LIMITED SCOPE REPRESENTATION: SOME CONSIDERATIONS

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"Limited Scope Representation" or "unbundled legal services" are phrases used to describe a situation in which a lawyer agrees with a client to provide some, but not all, of the legal work involved in a matter, with the understanding that the client would be responsible for the services the lawyer did not agree to provide. This article will discuss some ethical considerations for lawyers who choose to provide limited scope representation.

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SOME CONSIDERATIONS IN LIMITED SCOPE REPRESENTATION

1. Limited Scope Representation is permitted by the Rules of Professional Conduct: SCR 20:1.2(c) reads as follows:

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Thus the Rules explicitly allow limited scope representation under certain circumstances. Comment [6] to the Rule further elaborates:

A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitation may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

2. Limited scope representation must be reasonable under the circumstances: It is the lawyer's burden to determine whether the limitation is reasonable. Assisting a party with forms or providing a brief consultation may suffice for a simple uncontested

divorce, but may be unreasonable for a matter involving complicated marital property and tax issues.

3. Limited scope representation requires competence (SCR 20:1.1) and all the other ethical duties: Related to the requirement of reasonableness is the requirement that a lawyer providing limited scope representation be competent (although the limitations on the representation are a factor in determining what constitutes competent representation – *see* SCR 20:1.2, Comment [7]). Thus a lawyer should be experienced in the type of matter in which the lawyer seeks to provide limited services in order to be certain that discrete tasks are performed competently and do not negatively effect other aspects of the matter. All other Rules of Professional Conduct apply as well – limiting scope does not limit ethical responsibility for lawyers. Even in situation in which the services provided are very limited, the lawyer must, among other things, provide conflict free representation (SCR 20:1.7), communicate adequately with the client (SCR 20:1.4) and protect the client's interests upon termination of the representation (SCR 20:1.16).

4. A lawyer must conduct sufficient inquiry into the matter before undertaking a limited scope representation: A lawyer cannot determine whether a limitation is reasonable and whether the lawyer is able to provide competent representation without understanding the matter at hand. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and the use of methods and procedures meeting the standards of competent practitioners." SCR 20:1.1, Comment [5]. A lawyer should screen matters to identify pertinent facts and issues, even those issues that may fall outside the scope of the representation and advise the client that the client should consider seeking legal assistance with respect to those matters. See 5, *infra.*

5. A lawyer may have a duty to advise a client of readily apparent and relevant information, even if it falls outside the scope of a limited representation, and to advise the clients to seek independent advice if appropriate: In *Nichols v. Keller, 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601 (1993),* a California court found that a lawyer representing a client on a worker's compensation matter had a duty to advise the client of a possible third party claim even if the lawyer did not agree to represent the client with respect to such a claim. In so holding, the court noted:

"However, even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel."

Thus, while a lawyer need not provide services beyond the agreed upon scope of the representation, the lawyer should alert the client to relevant issues and matters. See also *Greenwich v. Markhoff, 234 A.D.2d. 112, 650 N.Y.S.2d 704 (1996).*

6. The scope of a limited representation should be defined carefully, in writing, and the client's informed consent should be confirmed, preferably in writing: SCR 20:1.2(c) requires the informed consent of the client before limiting the scope of a representation. SCR 20:1.0(f) defines informed consent:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Obtaining a persons informed consent, as defined by SCR 20:1.0(f) and its comments, has three essential elements:

A. Explanation of facts and circumstances. With a limited scope representation, this will obviously involve an explanation of what specific services the lawyer is agreeing to provide with respect to the matter. In many circumstances, it may be necessary to explicitly note what services the lawyer will not provide as well.

B. An explanation of the material advantages and disadvantages. Clients gain the advantage of decreased legal fees, and often some representation is better that none, and these advantages are often self-evident. More important here is providing an explanation of the risks of limited scope representation. In *Formal Opinion 101 (1998),* the ethics committee of the State Bar of Colorado discussed those risks:

A lawyer engaged in unbundled legal services must clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client's rights and interests. Where it is "foreseeable that more extensive services probably will be required" the lawyer may not accept the engagement unless "the situation is adequately explained to the client." Comment, Colo.RPC 1.5.

The lawyer's disclosure to the pro se litigant ought to include a warning that the litigant may be confronted with matters that he or she will not understand. That, however, is the trade-off which is inherent in unbundled legal services. As noted in Alaska Ethics Opinion 93-1, in providing unbundled legal services

. . . the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments . . . to which he is ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney and to pay less in fees. In exchange, he assumes the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance.

Examples of the "inevitable risks entailed in not being fully represented in court" include the pro se litigant's inability to introduce facts into evidence due to a lack of understanding of the requirements of the rules of evidence; the pro se litigant's failure to understand and present the elements of the substantive legal claims or defenses; and the pro se litigant's inability to appreciate the ramifications of court rulings entered or stipulations offered during the proceedings. Since many of these issues will not arise until the court proceeding begins, it will be impossible to advise the client of each and every problem which might later arise. However, the lawyer should counsel the client about those risks and problems which are typical in cases of the type presented by the client.

C. An explanation of available options and alternatives. Often, this should be self evident, as in most cases, the options will be some representation or none. However, some clients may seek limited scope representation for reasons other than financial and further explanation of options may be warranted.

SCR 20:1.2(c) does not require that a lawyer obtain a client's informed consent to limited scope representation in writing. SCR 20:1.5(b)(1), however, requires written fee agreements, which must include a description of the scope of the representation, if it is reasonably foreseeable that the total cost of the representation (fees and expenses) will be more than $1000. Thus some limited scope representations will require written confirmation.

While a client's written consent to limited scope representation is not required, there is much risk and little to be gained in failing to document the scope and the client's consent. Even in situations in which a lawyer provides limited representation to a high volume of clients, forms with fillable sections can easily be developed.

It is also worth noting that, in contrast to the *Nichols* case discussed *supra*, a New Jersey court rejected a malpractice claim against a lawyer who employed a carefully drafted limited scope retainer agreement, holding that the court saw "…no just reason in law or policy to deny attorneys practicing matrimonial law the right to assert as a defense to claims of malpractice that they were engaged under a precisely drafted consent limiting the scope of representation…if the service is limited by consent, then the degree of care is framed by the agreed service.." *Lerner v. Laufer, 359 N.J.Super. 201, 819 A.2d 471 (2003).* An Indiana court similarly held that a lawyer's engagement agreement that plainly limited the scope of a representation was factor in defeating a subsequent malpractice action premised upon the lawyer's failure to take action outside the stated scope of services. *Flatow v. Ingalls, 932 N.E.2d 726 (2010).*

7. A consent to a limited scope should consider the applicability of SCR 20:4.2 to the representation: SCR 20:4.2 prohibits a lawyer representing a person in a matter from communicating with another person who the lawyer knows to be

represented in the matter. How this Rule applies to a limited scope client is not always clear.[1] The lawyer should discuss with the client at the outset whether communication with opposing counsel (if one exists) should go through client or lawyer. When a lawyer providing limited scope representation is aware that another lawyer is involved in the matter, the lawyer should inform opposing counsel whether the client should be deemed unrepresented for purposes of 4.2.

8. Ghostwriting: Ghostwriting refers to the practice of a lawyer drafting pleadings, briefs or other documents filed with a court by a *pro se* litigant when the lawyer's role in drafting the documents is not disclosed. Several federal courts and ethics committees have looked with great disfavor on this practice. *See Johnson v. Bd. Of County Commissioners, 868 F. Supp 1226 (D. Colo. 1994), aff'd as modified 85 F.3d 489 (10th Cir. 1996); Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001); Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F.Supp. 1075 (E.D. Va. 1997); Ellis v. Maine, 448 F.2d 1325 (1st Cir. 1971); U.S. v. Eleven Vehicles, 966 F.Supp 361 (E.D. Pa. 1997); ABA Formal Opinion 1414 (1978); Iowa State Bar Ass'n Op. 94-35 (1995); Massachusetts Bar Ass'n Ethics Op. 98-1 (1998); Ass'n of the Bar of the City of New York Formal Op. 1987-2 (1987).* The federal courts reject ghostwriting on the grounds that it is unfair because pleadings of *pro se* litigants are construed with a latitude not afforded to represented parties, ghostwriting may constitute a deliberate evasion of a lawyer's responsibilities under Fed. R. Civ. P. 11 and that concealing the lawyer's role in drafting the pleadings is deceptive and violates the lawyer's duty of candor to the tribunal (SCR 20:3.3).

Not all courts and ethics committees agree that ghostwriting without disclosure is unethical. In *Formal Opinion 502 (1999)*, the Los Angeles County Bar Association opined as follows:

> *This Committee has concluded that there is no specific statute or rule which prohibits Attorney from assisting Client in the preparation of pleadings or other documents to be filed with the court, without disclosing to the court the attorney's role. (Ricotta v. State of California, 4 F. Supp.2d 961, 987-988 (S.D. Cal. 1998); L.A. County Bar Assn. Form. Op. 483, March 20, 1995. See also, Maine Ethics Commission No. 89, August 31, 1988; Alaska Bar Assn. No. 93-1, March 19, 1993.) Moreover, the Committee had found no published court decisions in California state or federal courts which have required an attorney's disclosure to the court regarding his or her involvement in preparing pleadings or documents to be filed by a litigant appearing in propria persona.[7] (Ricotta v. State of California, 4 F. Supp.2d 961, 987-988 (S.D. Cal. 1998).) The Committee has found no published California state case or ethics opinion holding that an attorney's preparation of a pleading or document for the signature of a party appearing in propria persona without disclosure to the court of the authorship of the pleading or document inherently involves deception or misleading of a court*

[1] Other states (e.g. Washington) have amended their versions of Rule 4.2 to specifically address limited scope representation and the State bar of Wisconsin proposed an amendment to SCR 20:1.2 which would require notice to courts and other counsel of limited scope representations. That proposed amendment, however, was not adopted by the Court as part of the Ethics 2000 revisions.

within the meaning Business and Professions Code section 6068(d) or rule 5-200, Rules of Professional Conduct….

The filing of "ghost drafted" pleadings or documents does not deprive a judge of the ability to control the proceedings before the court or to hold a party responsible for frivolous, misleading or deceit in those pleadings. The pro per litigant, not an attorney, makes representations to the court by filing a pleading or document. California Code of Civil Procedure, §128.7 requires that every pleading, petition, written notice of motion or other similar paper must be signed by one attorney of record or by the pro per party and that by presenting a document to the court, the attorney ***or the party*** *is certifying that conditions in subdivision (b) are met.*

In Formal Ethics Opinion 07-446, the ABA opined that the Rules of Professional Conduct do not require lawyers to reveal assistance provided to *pro se* litigants, opining as follows:

Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c). In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure. Some ethics committees have raised the concern 07-446 Formal Opinion 2 that pro se litigants "are the beneficiaries of special treatment," and that their pleadings are held to "less stringent standards than formal pleadings drafted by lawyers." We do not share that concern, and believe that permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage. As stated by one commentator:

Practically speaking … ghostwriting is obvious from the face of the legal papers, a fact that prompts objections to ghostwriting in the first place.… Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motion. A court that refuses to dismiss or enter summary judgment against a non-ghostwritten pro se pleading that lacks essential

facts or elements commits reversible error in the same manner as if it refuses to deny such dispositive motions against an attorney drafted complaint.

Because there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.

Similarly, we do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obliged under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleading and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

(footnotes omitted)

In some instances, a lawyer will ghostwrite documents primarily to conceal the lawyer's involvement in the matter rather than pursuant to a limited scope retention. For example, in *In re Brown, 354 B.R. 535 (Bankr. N.D. Okla. 2006)* a lawyer acted as a ghostwriter in a matter in which the lawyer had been forced to previously withdraw because of a conflict. In *Warner v. Reiter, 2010 WL 3987434 (N.D. Cal.)*, the lawyer ghostwrote pleadings in order to conceal the fact that the lawyer was not eligible to practice before the court. In these instances, the lawyers involved clearly intended to deceive the court and, as such, their behavior was in violation of rules prohibiting misrepresentation to courts (in Wisconsin, SCR 20:3.3). Such behavior is improper even in jurisdictions that explicitly permit ghostwriting.

It also must be remembered that not all assistance provided to clients in limited scope representations constitutes ghostwriting. Only when the lawyer provides substantial and undisclosed assistance in drafting pleadings or other filings do the concerns expressed by the federal courts arise. In *Ricotta v. State of California, 4 F.Supp.2d 961 (S.D. Cal. 1998)* a California court stated:

…it is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings. Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or

constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door. This conclusion is further supported by the ABA Informal Opinion of 1978 that "extensive undisclosed participation by a lawyer ··· that permits the litigant falsely to appear as being without substantial professional assistance is improper." ABA Informal Opinion (1978) (quoted in Elizabeth, J. Cohen, Afraid of Ghosts: Lawyers May Face Real Trouble When they 'Sort of' Represent Someone, 80 ABA JOURNAL (Dec.1997)).

Wisconsin has yet to address the issue of ghostwriting, in case law, court rule or ethics opinion. So how should a lawyer handle a request from a client for assistance in drafting pleadings? ABA Ethics Opinions typically carry considerable weight, so it is unlikely that a Wisconsin lawyer relying on ABA Formal Op. 07-446 would face professional discipline for ghostwriting. However, given the large weight of federal case law holding that a lawyer should disclose substantial assistance in the preparation of pleadings, etc., a lawyer wishing to avoid court imposed sanctions, particularly in federal court, may wish to obtain the client's consent to such a disclosure as a condition of accepting the engagement. Disclosure need not be extensive – the State Bar of Florida recommends that such pleadings state "Prepared with the Assistance of Counsel" See *Florida State Bar Ass'n Op. 79-7 (Reconsideration 2000).* Some lawyers, again particularly in federal court, may wish to use extra caution and disclose the lawyer's name and bar number. When disclosing assistance in drafting pleadings, the lawyer may wish to clarify to any other lawyers involved in the matter the client's status with respect to SCR 20:4.2.

While it is unlikely that a Wisconsin lawyer would face discipline simply for agreeing to provide limited assistance to a client, part or all of which consists of ghostwriting documents for the client, the lawyer must be cautious to avoid misrepresentation. If the primary purpose of the ghostwriting is to conceal the lawyer's otherwise improper involvement in the matter, or is otherwise primarily intended to mislead or deceive a court or another, the lawyer is highly likely to face professional discipline. Not for ghostwriting, but for engaging in fraud on the court (see SCR 20:3.3) or conduct involving dishonesty, deceit, fraud or misrepresentation [see SCR 230:8.4(c)].

9. Pro Bono: As part of the Ethics 2000 revisions, Wisconsin's Supreme Court adopted the following Rule:

SCR 20:6.5 Nonprofit and court-annexed limited legal services programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

This new Rule, which closely follows ABA Model Rule 6.5, allows lawyers to more freely participate in clinical or other programs which provide limited legal services by limiting conflicts and imputation of conflicts to matters in which the lawyer has knowledge of the conflict. This new Rule essentially exempts lawyers providing brief, one time only, limited scope legal services from the restrictions of SCR 20:1.7 (concurrent conflicts of interest), SCR 20:1.9(a) (former client conflicts) and SCR 20:1.10 (imputed conflicts), unless the lawyer is actually aware of the conflict. This means that lawyers can participate in most walk-in, advice-only clinics without worrying about screening for conflicts.

As a practical matter, this means that a lawyer may participate in a bar, non-profit, law school or court sponsored walk-in or hotline clinic that provides limited scope one-time legal services under the following conditions:

- The lawyer providing limited scope representation under this Rule must obtain the client's informed consent. See SCR 20:1.2(c) and SCR 20:6.5, Comment, paragraph [2].
- The lawyer need not screen for conflicts at the clinic, because the conflict Rules apply only if the lawyer is *actually* aware of the conflict, and it is recognized that conflict screening is not feasible under most "clinic" settings. See SCR 20:6.5, Comment, paragraph [1].
- The lawyer need not record the names of clinic clients to enter into the lawyer's firm's conflicts data base, because conflicts arising under this Rule are not imputed to the firm. See SCR 20:6.5, Comment, paragraph [4].
- If the lawyer providing services at such a clinic is *actually* aware of a conflict arising under SCR 20:1.7, SCR 20:1.9(a) or SCR 20:1.10 may not provide services.
- If a lawyer subsequently becomes aware of a conflict arising from the lawyer's provision of limited scope legal services under this Rule, the lawyer is personally disqualified but such disqualification is not imputed to other members of the lawyer's firm. See SCR 20:6.5, Comment, paragraph [4].

For a discussion of Rule 6.5, see *Louisiana State Bar Public Ethics Opinion 05-RPCC-005* and *Boston Bar Association Ethics Opinion 2008-01*. For a discussion of the ethical implications of participation in a pro-bono clinic in a jurisdiction which had not adopted a version of Rule 6.5, see *New York City Bar Association Ethics Opinion 2005-1*. This new Rule greatly affects, and to a certain extent renders outdated, *Wisconsin Ethics Opinion E-95-5*.

10. Lawyers who undertake to appear on behalf of a client for only part of a proceeding should clarify the scope of retention when entering an appearance: Some states, such as Washington, have amended their rules of civil procedure to specifically allow for limited appearances by lawyers. When the lawyer fulfills the extent of the representation, the lawyer is done and need not seek the court's permission to "withdraw."[2] Wisconsin's SCR 11.02 contains no similar provision, so lawyers who appear on behalf of a client for limited purposes should inform the court of the scope of the representation. Nonetheless, should a court refuse to permit a lawyer to withdraw upon completion of the limited services, SCR 20:1.16(c) requires the lawyer to continue the representation to the extent ordered by the court.

11. A lawyer should be cautious of attempting to prospectively limit liability: Given the fact that lawyers providing limited scope representation face certain risks arising from only seeing part of the picture, so to speak, some may wish to seek client's agreement to limit malpractice or disciplinary liability. SCR 20:1.8(h) provides:

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement,; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client without first advising unless that person is advised in writing that of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent representation is appropriate legal counsel in connection therewith; or

(3) make an agreement limiting the client's right to report the lawyer's conduct to disciplinary authorities.

Thus, an agreement limiting malpractice liability with a client seeking limited scope representation requires that the client have separate counsel with respect to the agreement. This is not a realistic possibility in most circumstances. Any agreement limiting the client's right to file a grievance is always forbidden and will not prevent a client from doing so.

[2] See Washington CR 70.1.