

An Ethics Primer on Limited Scope Representation

**By The State Bar of California
Committee on Professional Responsibility and Conduct**

Have you ever asked yourself this question: If I needed to hire a lawyer, could I afford to pay someone the fees I charge my clients? For many of us, the cost of legal services to handle even a routine legal matter is a “luxury” we simply cannot afford. For the indigent, getting the services of an attorney is often out of the question when, despite their eligibility for legal aid, they are unable to obtain representation due to the shortage of legal services attorneys. Thus, resorting to self-representation has become an economic necessity, not just for indigent individuals, but for large numbers of middle class litigants who find the cost of legal representation prohibitive. Moreover, while many litigants opt for partial self-representation because they have no financial alternative, others who have the resources to pay a lawyer to handle all aspects of their legal matter are choosing limited scope representation either to exert greater control and input, or to hold down the cost of legal services.

Therefore, it is not surprising that self-represented litigants (also called *pro per* or *pro se* litigants) are increasing in numbers and placing a strain on the limited resources of our judges and court system. Self-represented litigants are frequently unaware of the issues or procedures necessary to adequately represent their own interests, and repeatedly clog the courts with inaccurately prepared or inappropriately filed documents. As such, the courts and the legal profession have been challenged to find solutions to promote access to justice while at the same time limiting the burdens self-represented litigants place on the administration of justice.

One approach that has been increasingly utilized to bring down the costs of legal services is for lawyers and clients to allocate the duties and responsibilities for handling a legal matter between themselves, thereby limiting the scope of the lawyer’s representation to specific services or discrete tasks. Such “limited scope” or “discrete task” representation can provide the layperson with much-needed legal expertise and advice and limit the burdens placed on the courts by self-represented litigants, while keeping the cost of legal representation at an affordable level.¹

While limited scope representation promotes the core value of improving access to justice, attorneys who attempt to limit the scope of their representation must be mindful of their professional obligations, and must take care to communicate fully with the client and put appropriate procedures in place to ensure that the client receives competent representation and is not prejudiced. Thus, lawyers engaging in limited scope representation need to ask the right questions, identify the issues, make the necessary

¹ Throughout this article, the terms “limited scope representation” and “discrete task representation” are used interchangeably. Limiting the scope of legal representation is also sometimes referred to as “unbundling” a lawyer’s legal services.

disclosures, and develop the procedures that facilitate the proper handling of the client's legal matter.²

Some of the most important questions facing lawyers who provide limited scope or discrete task representation are:

(1) *Have I carefully evaluated whether limited scope representation is appropriate in my area of practice?*

We want to emphasize that not every type of practice is conducive to limited scope representation. Attorneys should carefully consider whether their practice lends itself to limited scope representation. For example, in family law limited scope representation has been successfully used for years. As a result, the Judicial Council has promulgated new forms to facilitate limited scope representation in family law cases. Others areas in which limited scope representation has proven effective include landlord-tenant disputes and consumer advocacy. Legal services providers have also utilized discrete task representation very effectively in a variety of matters in order to provide at least limited assistance to indigent clients who cannot afford the services of an attorney. Many of these efforts have been directed toward assisting self-represented litigants to navigate the legal system and conform to court practice and procedures. On the other hand, it is wise to avoid limited scope representation in very sophisticated and/or complicated litigation. In fact, attorneys practicing in some areas (e.g., immigration law) may not be allowed to limit their representation for a particular aspect of a judicial or quasi-judicial proceeding.

(2) *Have I adequately communicated the risks as well as the benefits of this type of legal service to the client?*

Attorneys engaging in limited scope representation should endeavor to fully advise their clients of the limitations on the representation, including the matters the attorneys are *not handling*. Clients also should be advised of the possible adverse implications of the limited scope representation, and to consult with other counsel about legal matters their attorney is not handling. It also may be advisable to recommend against a proposed allocation of responsibility or even to decline the representation if the attorney believes the client's proposed split of responsibility is a prescription for disaster.

(3) *Have I put procedures in place to ensure that in limiting the scope of representation I am still providing the client with competent representation?*

As noted, attorneys need to communicate with their clients regarding not only the limitations on the scope of the representation, but the risks and benefits arising from the arrangement. Amongst the most important procedures to ensure competent representation are written fee agreements and other written risk management tools

² In this article the authors do not intend to set or to define the standard of care or the duties of attorneys with respect to any of the issues discussed.

designed to ensure that clients understand the specific nature and ramifications of their specific arrangement. Some suggested materials have already been prepared for family law practitioners and can be adapted by attorneys in other practice areas as a checklist to ensure that all matters relating to the limited scope representation are covered either by the attorney or the client or both, and that both parties fully understand their respective assignments and responsibilities.

(4) If my scope of work does not include representing the client from start to finish, have I put procedures in place to avoid prejudice to my client upon my withdrawal?

In many limited scope or discrete task representations, the attorney and the client have an understanding from the outset that the lawyer is not going to see the matter through to its conclusion. However, in withdrawing from representation before the conclusion of a client's matter, an attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. (Cal. Rule of Prof. Conduct 3-700.) These obligations apply irrespective of whether the client and attorney agreed at the outset that the attorney's representation would not extend through the conclusion of the matter. Thus, from the beginning of the representation, the attorney should pay particular attention to the need to educate and inform the client in order to avoid reasonably foreseeable prejudice to the client's rights upon the completion of the attorney's services. In many situations this will include informing the client about matters pending at the time of the attorney's withdrawal, applicable deadlines, etc. The attorney should also check California Rule of Professional Conduct 3-700 as well as applicable statutes and rules of court to ensure compliance with the law in connection with the termination of the relationship.

(5) Have I put procedures in place to ensure that I am treating limited scope clients the same as all other clients for purposes of fulfilling my duties of undivided loyalty and confidentiality?

Attorneys who offer limited scope representation are required to comply with the same fiduciary duties of undivided loyalty and confidentiality as lawyers providing full service representation for a legal matter. Therefore, conducting conflicts checks and avoiding the disclosure of confidential client information remain the attorney's responsibility.

(6) Have I fulfilled my duties to the ethical administration of justice?

Each limited scope representation is different, and these questions should be answered in the context of each client matter. The following discussion highlights the issues which each attorney should carefully consider before undertaking a limited scope representation.

A. Agreements Defining the Limited Scope of Legal Representation

In California, most attorney-client arrangements involving payment for the attorney's services must be memorialized in writing. [See Bus. & Prof. Code §6147 (pertaining to contingency fee agreements) and §6148 (pertaining to non-contingency fee agreements)].³ These statutory mandates apply whether the attorney is providing full service representation for a particular matter, or has, instead, limited the scope of his or her representation. However, because of the nature of discrete task representation and the importance of educating the client concerning the scope, risks and benefits of that representation, it is of paramount importance that any fee agreement that purports to limit the scope of the attorney's representation be in writing, and be clear, unambiguous, and reasonable regarding the services to be performed by the attorney and client, respectively.

Thus, in limited scope representation, no part of the written fee agreement is more important than the provision defining the scope of the attorney's representation -- what the attorney will be doing -- and often, even more importantly, what the attorney will *not* be doing -- and what the client will be doing. It is easy enough for clients and attorneys to develop misunderstandings about their respective responsibilities when the attorney is providing full service representation for a transaction or litigated matter. In limited scope representation, the potential for misunderstandings, serious adverse consequences and malpractice exposure increases dramatically when the agreement is not memorialized in a writing signed by both the attorney and client. In addition, agreements regarding the scope of the representation may change over the course of the representation, and it is equally essential that these changes be memorialized in writing as well.

Because of the particular risks created when attorneys limit the scope of their representation in any specific matter, we recommend incorporating language in the agreement to the effect that the client has read the provisions of the agreement defining the limited scope of the engagement, that the scope of the attorney's services has been limited by express agreement (and at the client's request if that is the case), that the attorney has fully explained the nature and risks of the arrangement, and that the client understands the potential adverse consequences of limiting the scope of the attorney's representation.

While the definition of scope is generally included in the fee agreement, it can be set forth in a separate document. If a separate document is used, it should be prepared and signed by both the attorney and the client contemporaneously with the fee agreement as well as when changes in the scope of representation are agreed to by the attorney and client.

³ Failure to comply generally renders the agreement voidable at the option of the client and limits the attorney to recovery of the reasonable value of the services rendered.

B. The Duty of Competence

Once you have determined that limited scope representation is appropriate to handle your client matter, you must be prepared to comply with California Rule of Professional Conduct 3-110 by performing competently. The competency of an attorney's performance can become an issue in limited scope matters when the client and attorney disagree over whether the attorney has performed (a) as agreed or (b) as otherwise required. The latter issue is highlighted in the case of *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, in which an attorney desiring to limit the scope of his representation of an injured client to prosecuting a workers' compensation claim drafted an agreement so limiting the scope of representation. The agreement made no mention of a potential third party tort claim, and when the client learned that his tort case was time barred, he sued his attorney for negligently failing to put him on notice of that potential remedy.

In analyzing the malpractice claim, the court of appeal addressed an attorney's duty to advise clients, stating:

One of an attorney's basic functions is to advise. Liability can exist because the attorney failed to provide advice. ***Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered.***

Nichols v. Keller, supra, 15 Cal.App. 4th 1672, 1683-1684 (emphasis added).

In explaining the rationale for its decision, the court stated: "A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is the reason a party seeks out and retains an attorney to represent and advise him or her in legal matters." (*Nichols v. Keller, supra*, 15 Cal.App.4th 1672, 1686.)

In the specific context of a lawyer representing a client in a workers' compensation matter, the *Nichols* court held that the lawyer could limit the scope of services to the workers' compensation action, but to avoid exposure to the client for negligence, the attorney had to inform the client of: (1) the limitations on the scope of the attorney's services; and (2) the possible adverse implications of the limited scope representation.

As to explaining the possible adverse implications of the limited scope representation, the court noted that the attorney should disclose: (a) that there may be other remedies or issues pertaining to the client's legal matter that the attorney is not investigating (e.g., third party tort claims); (b) apparent legal problems pertaining to the limited scope of services (e.g., time deadlines would impact the client's ability to pursue

other claims); and (c) the advisability of consulting different counsel for other aspects of the client's legal matter. (*Nichols v. Keller, supra*, 15 Cal.App. 4th 1672, 1686-1687.)

Nichols teaches that because we, as attorneys, have greater knowledge than lay clients about the law and the potential pitfalls our clients may encounter, we have an obligation to alert our clients to matters that may result in adverse consequences if not considered. Although *Nichols* involved a situation where it was the attorney, rather than the client, who sought to limit the scope of the legal services being provided, the case provides a helpful roadmap for attorneys entering into limited scope or discrete task representation agreements with clients, particularly with respect to the fact that in defining a limited scope of representation it can be as important to *alert the client to what the attorney is not doing* as it is to identify the tasks the attorney is doing.

There are additional authorities to which attorneys may look for guidance in defining the limited scope of legal services. In the family law arena, Judicial Council Form FL-950 (July 1, 2003) entitled "Notice of Limited Scope Representation" specifies whether the attorney or the client will be "attorney of record" with respect to the following general issues and matters, each of which is then broken down in more detail: (a) Child Support; (b) Spousal Support; (c) Restraining Orders; (d) Child Custody and Visitation; (e) Division of Property; (f) Pension Issues; (g) Contempt; and (h) Other. The form also requires the attorney to verify the existence of a written fee agreement. As this Judicial Council form has been approved for use in family law cases, attorneys can consider the panoply of services provided in their own areas of practice and adapt forms that reference those specific services, leaving a place for "other" to cover matters that might be unique to a specific legal representation. The Limited Scope Representation Committee of the California Commission on Access to Justice also has created helpful and critical Risk Management Materials for attorneys to utilize in family law limited scope representation that may be adapted to your particular limited scope representation matters. These forms may be obtained by contacting the State Bar of California Office of Legal Services or online from a link to the Commission on Access to Justice, which can be reached through <http://www.calbar.ca.gov>.

It is also important to keep in mind that there are contexts in which the duty of competence prohibits limiting the scope of representation in a particular manner. [See, *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 521 ("there is no 'limited' appearance of counsel in immigration proceedings.") and *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930 (an attorney's obligations may extend beyond a document purporting to limit scope to include the duty to assert claims arising out of the same facts that the client would reasonably expect to be asserted to accomplish the objectives of the representation.)]

C. The Duty to Avoid Prejudice to the Client's Interests Upon Withdrawal

Before withdrawing from representation of a client in any matter, whether the representation is full or limited in scope, an attorney must comply with California Rule of Professional Conduct 3-700, and therefore must take:

reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with all applicable laws and rules.”⁴

[Cal. Rule of Prof. Conduct 3-700 (A)(2).]

In addition, if an attorney is of record in a litigated matter, permission of the client and/or tribunal is generally required. [Cal. Rule of Prof. Conduct 3-700(A)(1)].

In the context of a limited scope representation in which the attorney and client agree the representation will cease before the conclusion of the client’s matter, the obligations of the withdrawing attorney pursuant to subdivisions (A)(1) and (A)(2) of California Rule of Professional Conduct 3-700 should be addressed in the initial agreement between the attorney and client. In the context of limited scope representation, the avoidance of prejudice to the client is apt to depend upon the extent to which the attorney has disclosed: (1) the limitations on the scope of the attorney’s services; (2) apparent legal problems that are reasonably likely to exist at the projected time of withdrawal; and (3) the advisability of consulting different counsel for those aspects of the client’s legal matter the parties expect to be pending at the time of completion of the attorney’s services. Litigation attorneys, particularly those practicing in the tort arena, have included such limitations in their fee agreements for years by explaining that their scope of representation does not include an appeal or collection of a judgment.

If the circumstances pertaining to the conclusion of the attorney’s services have been adequately addressed at the outset of the attorney-client relationship, and there have been no unforeseen developments that have materially altered the situation, an advance agreement between the attorney and client setting forth the parameters for withdrawal may be sufficient to prevent reasonably foreseeable prejudice to the rights of the client. On the other hand, if these issues have not been adequately addressed in advance, the attorney will need to take precautions prior to the proposed withdrawal to ensure compliance with California Rule of Professional Conduct 3-700(A)(2).

Another related issue is whether a client can agree in advance to execute a substitution of attorney form upon the conclusion of a limited representation. There is no case law to suggest that it would be unethical for an attorney and client to agree at the outset to execute the documents necessary to formalize the conclusion of the relationship, such as a substitution of attorneys, when the terms of the engagement have been completed. The ability to enter into such an agreement also furthers the personal autonomy of a client to choose limited scope, rather than full service, legal representation for a particular matter.

⁴ Rule 3-700(D) pertains to the release of client papers and property, and to the return of unearned fees.

However, an attorney who obtains a pre-signed substitution *for filing in the attorney's sole discretion* will run afoul of California Rule of Professional Conduct 3-700. (See, Los Angeles County Bar Association Formal Opinion 371.) This is particularly true when the client disagrees that the services were completed and the timing of the withdrawal prejudices the client's rights. In Family Law matters, the Judicial Council has created a form that permits the attorney to request an order relieving him or her as counsel because the limited scope representation has been completed as agreed. This application is served on the client, and if the client disagrees, he or she has the right to file an objection with the court.

If an attorney providing limited scope representation in a litigated matter desires to withdraw and the client does not agree to sign a substitution of attorney, the attorney must seek permission from the tribunal to withdraw, and in so doing, should note completion of the limited scope representation. Because written fee agreements are confidential communications under California Business and Professions Code section 6149, there is a question as to whether it is permissible for an attorney to use a written fee agreement limiting the scope of services as a basis for a motion to withdraw. In order to assure that there is an understanding between the attorney and client as to the attorney's intention to place the agreement before the court, the attorney can obtain an advance waiver of California Business and Professions Code section 6149 from the client. (See, e.g., Cal. Rule of Prof. Conduct 3-310(C)(1) and (2); *Zador Corp. v. Kwan*, (1995) 31 Cal.App.4th 1285; California State Bar Formal Opn. No. 1989-115.) However, because submission to a court or other tribunal can result in dissemination of the agreement to the adversary and the public, an *in camera* production or protective order may be appropriate in certain circumstances.

Even if the attorney has not obtained the client's consent to disclose the agreement in advance, if the agreement defines the limitations on the scope of representation, and the client is nevertheless unwilling to sign a substitution when the scope has been completed, the attorney can use the limited scope agreement without violating California Business and Professions Code section 6068, subdivision (e) or the attorney-client privilege, on grounds that the issue for which it is offered is the client's breach of the agreement. (Cal. Evid. Code §958; *Fox Searchlight v. Paladino* (2001) 89 Cal.App.4th 294, 313.) However, to protect client confidentiality, *in camera* review or a protective order may be warranted.

D. The Duties of Loyalty and Confidentiality

The fiduciary duties of loyalty and confidentiality apply with equal force and effect whether an attorney is providing full service representation for a transactional or litigation matter, or representing the client only on a limited scope basis. The duty of confidentiality is "fundamental to our legal system" and attaches upon formation of the attorney-client relationship, or even in the absence of such a relationship where a person has consulted an attorney in confidence. (See, Cal. Bus. & Prof. Code, § 6068, subd. (e); Cal. Evid. Code, §§950 et seq., *People ex rel. Department of Corporations v. Speedee Oil*

Change Systems, Inc. (1999) 20 Cal. 4th 1135; California State Bar Formal Opn. No. 2003-161.)

For conflict of interest purposes, the duty of undivided loyalty attaches whenever “the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result.” (*People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.*, *supra*, 20 Cal. 4th 1135, 1148; *see also, Flatt v. Superior Court* (1995) 9 Cal. 4th 275, 284; Cal. Rule of Prof. Conduct 3-310.) Thus, this core value of the legal profession must be honored irrespective of the limited scope of the representation.

E. The Duty to the Administration of Justice

Pursuant to California Rule of Professional Conduct 5-200 (A) & (B), an attorney has a duty to be truthful and not to “mislead the judge, judicial officer, or jury by an artifice.” Self-represented litigants are often given more latitude by the court in the preparation of pleadings. Thus, federal courts have expressed concern that if an attorney has authored pleadings and guided the course of litigation for a self-represented litigant it may improperly disadvantage an adverse party. (*Ricotta v. State of California* (S.D. Cal. 1998) 4 F.Supp.2d 961.) Thus, if a “behind the scenes” attorney providing limited scope representation in the form of coaching or ghostwriting appears to be “guiding the course of the litigation with an unseen hand,” (*Id.* at 986) or preparing a brief “in any substantial part,” some courts have suggested that the attorney is obligated to advise the court of his or her role in the matter. (*Ellis v. State of Maine* (1st Cir. 1971) 448 F.2d 1325, 1328.) While indicating concern, the *Ricotta* court found no case law or local rules prohibiting ghostwriting in California.

Due to the overwhelming number of *pro per* litigants (approximately 80% in family law matters alone), the courts are finding new ways to encourage greater attorney participation to alleviate the strain on judicial resources caused by self-represented litigants. For example, in 2003, the California Judicial Council adopted Rule of Court 5.70 specifically providing that an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the document that he or she was involved in preparing the documents.

F. Conclusion

Most attorneys either have been, or soon will be, faced with client requests for limited scope legal representation. As our initial question suggested, it is not difficult to understand why consumers of legal services are increasingly seeking this flexible, economical and empowering option from attorneys.

All attorneys who are considering or engaging in limited scope representation should carefully consider the issues raised in this article (1) to determine whether their practice area can accommodate limited representation on particular matters, and if so (2)

to establish procedures that not only reduce the cost of legal representation through limiting the attorneys role, but also foster compliance with all of the duties attorneys owe their clients. Those attorneys who provide limited scope representation responsibly and ethically will not only increase the public's access to justice, but should also experience increased client satisfaction flowing from the collaborative effort of achieving the client's desired goals.