

# **HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE**

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**A Report of the Modest Means Task Force**

American Bar Association  
SECTION OF LITIGATION

Mark H. Tuohey III: Co-Chair  
Steven O. Rosen: Co-Chair  
Hon. Laurie D. Zelon: Co-Chair  
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Thomas A. Marrinson  
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\* Includes an Appendix of Practice Forms, Limited Scope Legal Assistance Rule Revisions, and Ethics Opinions.

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## FOREWARD

The Section of Litigation has long been committed to assuring access to justice for all people, including those who have moderate and low incomes, and to creating mechanisms to break down barriers between lawyers and clients in the provision of legal services. Last year, I appointed a Task Force to examine these issues and develop a practical approach for lawyers to serve those who have unmet legal needs in the American justice system. I also asked the TF to develop ways in which lawyers could help clients, who otherwise would proceed pro se, or not at all, to fairly resolve their disputes.

The Task Force devoted a year to examining the issues and fashioning a response. Co-Chairs Mark Tuohey, Steve Rosen, and Laurie Zelon together with Susan Hoffman, Tom Marrinson, Tina Tchen, David Van Susteren, and the Reporter, Professor Michael Millemann of the University of Maryland Law School, developed this *Handbook on Limited Scope Legal Assistance*. The *Handbook* is a practical guide to providing legal services in a way that permits clients, who otherwise could not afford or would not choose to hire a lawyer, to obtain critical legal representation for discrete and important tasks in the course of resolving disputes. The *Handbook* discusses all aspects of limited-scope representation, including the formation and termination of the relationship, the performance of discrete tasks, and the ethical issues and procedural rules involved in this service method. It also provides valuable anecdotal experiences of limited-services practitioners. An extensive Appendix contains sample forms, pleadings, and proposed court rules. It is a “soup-to-nuts” guide for the practitioner.

The Section is proud to provide this *Handbook* to lawyers, judges, court administrators, and bar associations. It will be an invaluable tool to bench and bar in our efforts to build a better justice system.

Scott J. Atlas  
Chair, Section of Litigation  
2002-2003

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## Chapter 1: Introduction<sup>1</sup>

In our democracy, we prize the rule of law, and the process that upholds it. Justice Harlan said: “It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.”<sup>2</sup> Unless the process is fair, however, “the State’s monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.”<sup>3</sup>

The process often is not fair for those who cannot afford to pay lawyers to represent them in litigation. They include *most* low and moderate-income families and individuals; that is, the *majority* of people in our nation!

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<sup>1</sup> The list of people to whom we are indebted in writing this handbook is too long to include here. We thank all, and mention a few. Without the leadership of Scott J. Atlas, Chair of the ABA’s Section of Litigation, and the Section’s support, this handbook would not have been written and published. William Hornsby, Staff Counsel, ABA Standing Committee on the Delivery of Legal Services, has provided many good editorial suggestions that we have happily incorporated into our final product. Many others have read drafts, made suggestions, and thereby improved the quality of this handbook. The Maryland Legal Assistance Network, led by its director, Ayn Crawley, provides a wealth of information on MLAN’s website, much of which we have used herein. *See generally* Changing the Face of Legal Practice: “Unbundled Legal Services,” at <http://www.unbundledlaw.org> (last updated Oct. 2002). We also have relied on the excellent work of the Limited Representation Committee of the California Commission on Access to Justice, including its research and recommendations. *See* the Committee’s REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 11 (Oct. 2001). M. Sue Talia and Forrest S. Mosten are national leaders in the limited-service field. We cite their publications throughout, including two that all interested lawyers should have: M. SUE TALIA, A CLIENT’S GUIDE TO LIMITED LEGAL SERVICES (1997), and FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000). We appreciate their generosity in allowing us to attach as appendices many of their helpful practice forms. Many lawyers, judges, and program and court administrators have shared their time, ideas and experiences with us over the phone and at meetings. We relate what they told us throughout this handbook, especially in Chapters 3 and 10. We deeply appreciate the important contributions of all of these people.

<sup>2</sup> *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971).

<sup>3</sup> *Id.*

We believe one way in which lawyers can make the process fairer is by providing “limited scope legal assistance” to people who cannot afford “full-service” representation.<sup>4</sup> This would help many moderate-income people to obtain the legal help they both need and can afford. By offering such assistance, private lawyers can make the legal services market work more efficiently, and, in the process, convert unmet legal needs into new practice opportunities.

We also believe that legal services, pro bono and public interest lawyers can use limited scope assistance to make more efficient use of their resources, and thereby provide legal services to more low-income people.<sup>5</sup>

#### **A. What we mean by “limited scope legal assistance”**

By “limited scope legal assistance”, we mean a designated service or services, rather than the full package of traditionally offered services.<sup>6</sup> The client and lawyer select the service the lawyer will provide.<sup>7</sup>

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<sup>4</sup> The Limited Representation Committee of the California Commission on Access to Justice uses this term, which we borrow, to describe several categories of limited representation. *See* the Committee’s REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 2 (Oct. 2001).

<sup>5</sup> Limited scope legal assistance is *not* a substitute for adequate funding for indigent legal services programs. For many years, the American Bar Association, through its Standing Committee on Legal Aid and Indigent Defendants, has urged Congress to substantially increase its annual appropriations for programs that provide legal services to the poor. *See generally* the website of the ABA Standing Committee on Legal Aid and Indigent Defendants at <http://abanet.org/legalservices/sclaid/home.html> (last visited June 12, 2003). We join the many national organizations and leaders who are asking Congress to do more.

<sup>6</sup> Forrest S. Mosten describes the full bundle of legal services as: “(1) gathering facts, (2) advising the client, (3) discovering facts of opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court.” Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L. Q. 421, 422-23 (1994). Appendix 2 contains Forrest Mosten’s self-assessment test for lawyers who might be interested in providing limited representation to clients.

<sup>7</sup> We do not mean to suggest that “limited” and “full” representation are qualitatively different. They are not. Most lawyers and clients regularly make service choices from the full array of *possible* services by selecting some services and rejecting others. In this sense, most lawyers provide limited services to most clients. Sometimes lawyers *must* limit their representation.

We alert readers that “limited scope legal assistance” has several other names, including “unbundled” or “discrete task” representation, “limited scope assistance”, or just “limited assistance” or “limited representation.” We use these labels interchangeably in this handbook.

Limited scope assistance is nothing new. In an ethics opinion, the Colorado State Bar Association Ethics Committee said that “unbundled legal services”, its name for limited scope assistance, “are both commonplace and traditional.” It offered several examples:

[C]lients often negotiate their own agreements, but before the negotiation ask a lawyer for advice on issues that are expected to arise. Sometimes, a lawyer's only role is to draft a document reflecting an arrangement reached entirely without the lawyer's involvement. Clients involved in administrative hearings (such as zoning or licensing matters) may ask their lawyer to help the client to prepare for the hearing, but not to appear at the hearing. In each of these situations, the lawyer is asked to provide discrete legal services, rather than handle all aspects of the total project.<sup>8</sup>

Corporate clients also commonly "segment" legal services by dividing legal representation into discrete tasks, and directing different lawyers to perform the different tasks. For example, different lawyers may conduct "due diligence", give a legal opinion, provide tax advice, and prepare legal documents in a single, major transaction. The corporate client may

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Barrie Althoff, former Chief Disciplinary Counsel for the Washington State Bar Association, said, speaking to Washington lawyers:

[Rule of Professional Conduct] 1.3 requires you to represent your client with ‘reasonable diligence and promptness;’ if your obligations to your existing clients are already very heavy, you may not be able to satisfy this requirement either for your existing clients or your new client unless you agree with your new client to a very limited representation. Similarly, since Rule 1.1 requires you to provide competent representation to your client, you may not be able to do so unless you limit the scope of your representation to the areas of your expertise....Likewise, you may find that the conflict-of-interest provisions may permit you to provide only a very limited representation for a particular client.

BARRIE ALTHOFF, CURRENT DEVELOPMENTS IN ETHICS AND PROFESSIONALISM: UNBUNDLING YOUR LAW PRACTICE-OPPORTUNITIES AND DANGERS (Oct. 25, 2002), *available at* <http://www.freecle.com/materials/current.html> (last visited June 9, 2003).

<sup>8</sup> Colo. Bar Ass’n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), *available at* [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003) (emphasis added) (Appendix 32).

reduce the overall legal costs by having in-house counsel oversee a project and perform many of the tasks, while retaining outside specialists, such as tax, real estate, or corporate finance lawyers, to provide specific advice on specific questions. This also occurs in litigation when in-house counsel work on a team with outside counsel, with discrete tasks assigned to each.

Through these limited-service relationships, the corporate client retains authority to make the major decisions in the matter, and limits the expenses of representation. Individuals often can retain the same authority and flexibility by using one of the types of limited scope legal assistance that we describe in this handbook.

Legal services and pro bono lawyers provide limited scope assistance to clients as well. The lawyer, for example, may advise a client about an uncontested divorce and draft the complaint, which the client then files *pro se*.<sup>9</sup>

Or, the lawyer may represent the client in a critical stage of a case, for example, at the creditors' meeting of a Chapter 7 bankruptcy case, with the client (the debtor in this example), representing him or herself thereafter.

Solo and small firm lawyers also regularly provide limited representation to clients. For example, the lawyer may "coach" a client through mediation, a hearing or a trial by advising the client throughout the process without entering an appearance in the case. Or, the lawyer may briefly consult with and advise a client without thereafter representing the person, provide a legal opinion to a client (an individual or organization), or prepare or review a legal document.

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<sup>9</sup> People who represent themselves are called "*pro se*" or "*pro per*" litigants, the latter being shorthand for *pro persona*. BLACK'S LAW DICTIONARY 1232, 1237 (7th ed. 1999). In this handbook, we call those who represent themselves in litigation "*pro se*" litigants.

Indeed, upon hearing a description of limited scope assistance, lawyers often respond by saying: “I did not know it is called that, but I do that, too.” They usually offer examples like those set forth above to make their point.

The limited scope legal assistance that we describe in this handbook involves the exercise of legal judgment and the application of law to facts to help clients to resolve legal problems. The lawyers who provide this assistance create attorney-client relationships with the people whom they help. We distinguish this assistance from “legal information”, which lawyers (and others) can provide without creating an attorney-client relationship.<sup>10</sup>

Much of what we say in this handbook assumes that a lawyer--usually a solo, small-firm, legal services or *pro bono* lawyer—is personally providing legal assistance to a client. (Most of the lawyers we describe also provide full representation to clients.)

We do not deal, other than briefly, with high-volume providers of limited legal assistance (including telephone “hotlines”), or major online service providers (through websites). Lawyers who provide legal services in these forms often face unique ethical and practice issues.

Forrest S. Mosten is a pioneer in providing what he calls “unbundled” legal services. Think about the full bundle of legal services, he says, and then imagine how it can be “unbundled”--how these services can be disaggregated--to help clients obtain the essential legal assistance they need.<sup>11</sup> In this legal relationship, “the client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package.”<sup>12</sup>

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<sup>10</sup> The distinction between “legal information” and “legal assistance” often is elusive. *See infra* note 39 and accompanying text (summarizing an ethics opinion that explains why lawyers who in fact are providing legal assistance can not and, should not, try to avoid the requirements and consequences of the attorney-client relationship by labeling the service they provide “legal information.”).

<sup>11</sup> MOSTEN, *supra* note 1, at 1-2.

<sup>12</sup> *Id.* at 1.

We emphasize throughout this handbook that lawyers owe the same duties of loyalty, confidentiality, diligence, and competence to limited-service clients that they do to full-service clients. The skills are the same. The craft is demanding. And, the client interests at stake are just as important.

### **B. Our focus on limited scope legal assistance in litigation: the *pro se* phenomenon**

We focus in this handbook on limited scope assistance in litigation. We do so in response to the national *pro se* litigation phenomenon. The figures, especially in domestic relations cases, are striking. Nationally, in three or four out of every five cases, one of the two parties is unrepresented. In Phoenix, Arizona and Washington, D.C., for example, the figure is nearly 90%.<sup>13</sup> In Florida, it is over 80%.<sup>14</sup> Nationally, both parties are unrepresented in two or three out of every five cases.<sup>15</sup>

In 2000, the Conference of State Court Administrators concluded that “the recent surge in self-represented litigation is unprecedented and shows no signs of abating.”<sup>16</sup>

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<sup>13</sup> ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS, EXECUTIVE SUMMARY 2 (2002), available at [http://www.ncsconline.org/WC/Publications/Res\\_ProSe\\_AccessJustMeetNeedsExecSumPub.pdf](http://www.ncsconline.org/WC/Publications/Res_ProSe_AccessJustMeetNeedsExecSumPub.pdf) (last visited June 10, 2003).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* The numbers of *pro se* litigants have grown considerably during the last 25 years. *See id.* at 2 (discussing the increase in *pro se* filings in the past decade); *see also* JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 3 (2002), available at [http://www.lri.lsc.gov/abstracts/020045/020045\\_selfrep\\_litigants&whatweknow.pdf](http://www.lri.lsc.gov/abstracts/020045/020045_selfrep_litigants&whatweknow.pdf) (last visited June 11, 2003) (considering the number of *pro se* filings from 1980-1991). In 1991, Bruce Sales, Connie Beck and Richard Han conducted “[t]he first comprehensive study of self-represented litigants” in Phoenix, Arizona. *Id.* Funded by the ABA, the “Sales study interviewed both represented and unrepresented litigants (by telephone interviews of persons completing their divorces and consenting to be interviewed) and concluded, in part, that the percentage of domestic relations cases involving self-represented litigants had increased from 24% in 1980 to 47% in 1985 to 88% in 1991....” *Id.*

<sup>16</sup> CONFERENCE OF STATE COURT ADMINISTRATORS, POSITION PAPER ON SELF-REPRESENTED LITIGATION 1 (Gov’t Rel. Office ed. 2000).

There are comparable problems in areas other than family law, including in bankruptcy, in housing, and especially in landlord-tenant matters.<sup>17</sup>

### **C. Some reasons for *pro se* litigation**

The Conference of State Court Administrators identified some reasons for this phenomenon: “The drastic reduction in funding for civil legal services has resulted in significantly fewer attorneys serving low-income individuals and is a significant contributing factor. For those with lower incomes, the impact of escalating costs of litigation can be presumed to encourage self-representation.”<sup>18</sup> The Conference added: “The proliferation of information available through self-help books and on the Internet has fostered the perception that the legal process can easily be navigated without a lawyer.”<sup>19</sup> The Conference concluded: “The impact of increasing self-representation on the courts--on court management and the administration of justice--cannot be overstated.”<sup>20</sup>

It is the cost of *full-service* representation in litigation that is prohibitive for many. Many *pro se* litigants have enough disposable income to pay for the *limited* representation they need. The market failure that we alluded to earlier is that the great majority of lawyers do not offer these potential clients the services they need *and* can afford. Instead, they present them with an all (full-service) or nothing (wholly self-represented) Hobson’s “choice.” The result is more *pro se* litigants.

Worse, some people pay lawyers an amount sufficient to buy the limited representation they need, but as a deposit for full-service representation. When the client cannot pay a later

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<sup>17</sup> GREACEN, *supra* note 15, at 2. Greacen claims that “[t]here is reason to believe that some of the more serious problems facing unrepresented persons arise in the limited jurisdiction courts, such as landlord/tenant matters, where persons have appeared without lawyers for years.” *Id.*

<sup>18</sup> CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 16, at 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

installment of the full-service fee, the lawyer discontinues the legal work. This leaves the client, lawyer, and court frustrated, and converts the former client into a *pro se* litigant.<sup>21</sup>

Other factors fueling demand for limited scope assistance include consumerism, the self-help ethic (reinforced by the Internet), and disaffection with the excesses of the adversary system.

A 1994 ABA Study provides evidence of all of these forces at work. The ABA surveyed the unmet legal needs of low and moderate-income persons, in the latter respect, households with incomes up to \$60,000.<sup>22</sup> It found that only 29% of “low-income households” and 39% of “moderate income households” that had legal problems used the “civil justice system” to resolve those problems.<sup>23</sup> That is, 7 out of 10 low-income households and 6 out of 10 moderate-income households that had legal problems did *not* use our legal system to resolve them.<sup>24</sup>

The majority of the those in low and moderate-income households that had legal problems “[h]andled” the problem “by [their] own initiative” (41% and 42%), “[t]ook no action at all” (38% and 26%), or “[c]onsulted [a] non-legal third party”, like a “non-legal professional,” “service providing agency,” or “community group”, to attempt to resolve the problem (13% and 22%).<sup>25</sup>

#### **D. The relationship between limited scope legal assistance and the *pro se* litigation problem**

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<sup>21</sup> See GREACEN, *supra* note 15, at 4, citing a 1999 Florida study of self-represented litigants. The study, conducted over an eight week period in 19 of Florida’s 67 counties, found that over 65% of domestic relations cases began with at least one self-represented person, and, in Miami at least 85% of the cases involved a self-represented litigant by the time the litigant’s case ended.

*Id.*

<sup>22</sup> ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, 11-17 (1994).

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.* at 12.

<sup>25</sup> *Id.* at 11.

Many of those who opt out, or who are forced out, of the legal system would use the legal system to resolve their disputes, and retain lawyers to represent them, if lawyers offered them reasonable limited-service options. Limited representation, therefore, is an important means to provide people with access to justice.

Limited representation can also help courts to manage their dockets more efficiently and fairly. It can increase the quality of pleadings, identify and focus the issues in cases, and lead to fairer outcomes, at least as measured by client satisfaction surveys.<sup>26</sup>

Some people worry that by providing more limited-assistance options, lawyers will encourage clients to choose partial representation over the full representation that they need. Experience to date, however, indicates that this has not happened. The significant majority of limited-service clients are not crossovers from full-service representation, but rather conversions from self-representation. Overall, expansion of limited representation should increase both the total number of represented parties, and the total amount of lawyer hours devoted to representation. There should be a considerable net “plus” in legal representation.

Most lawyers who provide limited scope services also provide full services to clients. By offering a limited-service option, a lawyer can add not only limited-service clients to his or her practice, but also full-service clients when, as frequently happens, partially-represented clients convert to full representation, or first-time limited-service clients come back as second-time full-service clients.<sup>27</sup>

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<sup>26</sup> See GREACEN, *supra* note 15, at 2 (explaining that “[c]ourt staff universally appreciate [*pro se* litigant-assistance] programs and believe that they save time and effort - both at the front counter and in the courtroom - and that they reduce the number of hearings that need to be reset because the paperwork is not adequate. Most judges agree.”).

<sup>27</sup> See discussion *infra* Chapter 3 (discussing lawyers’ limited-services practices).

The full-service lawyer's main competitors are not limited-service lawyers. Rather, they are on-line information services (in proliferating numbers), non-lawyer document-preparation services, financial institutions, real estate companies, tax preparation services, accounting firms, and others.

If lawyers are to retain their competitive advantage, they must be the leaders in developing representational options that most people can afford.

### **E. Some caveats about limited scope legal assistance**

Limited scope legal assistance is not for all lawyers, all clients, or all legal problems. In Chapter 5, we offer some guidelines to help lawyers determine whether limited scope assistance can work for a particular client in a particular matter.

The ultimate decision about whether and how to provide limited scope assistance to a client depends upon the capabilities of the client, the nature and importance of the legal problem, the degree of discretion decision-makers exercise in resolving the problem, the type of dispute-resolution mechanism, and the availability (or not) to the client of other self-help resources.

These are individualized decisions that lawyers and clients make jointly, and in many cases modify when a seemingly simple matter becomes complex, or the client discovers that he or she cannot, or no longer wants to, perform a task he or she had agreed to perform.

We also recognize that limited assistance is not a choice, but a necessity, for many people. Often, it is the legal equivalent of medical triage.

Some ask whether a little service is more harmful than none. We believe that in the great majority of situations some legal help is better than none. An informed *pro se* litigant is more capable than an uninformed one. A partially-represented litigant is more effective than a wholly unrepresented litigant.

The general test of whether limited scope assistance is appropriate that the ABA proposes is whether the legal assistance is “reasonable under the circumstances.”<sup>28</sup> Several states have recently adopted this test as part of their ethics rules, and we encourage other states to do the same.<sup>29</sup>

#### **F. The contents of the chapters to come**

In Chapter 2, we describe 13 differing types of limited scope assistance. They occur most often in family law, but also in bankruptcy, housing (transactions and landlord-tenant cases), and community representation.

In Chapter 3, we describe some of the many lawyers who provide limited representation to clients. We add descriptions from the practices of other lawyers throughout this book to give real-life examples of the points that we make.

The lawyers whom we describe market limited assistance to people who cannot afford, or do not want, full representation. Some of these lawyers are members of limited-service referral panels. Most charge clients on a “pay as you go” basis, and therefore, have few, if any, uncollectible accounts receivable.

These lawyers have developed limited-service retainer agreements, risk management forms (including checklists, interview guides, client-instruction hand-outs, and task-apportionment lists), and form pleadings. They have worked with their local judges, *pro se* assistance programs, and court administrators to develop supportive agreements, and have

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<sup>28</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 (c) (2003).

<sup>29</sup> See discussion *infra* Chapters 9-10.

developed practical solutions to common ethical problems. They describe their practices as fulfilling and report high levels of client satisfaction.<sup>30</sup>

In Chapters 4-8, we describe the nuts and bolts of successful limited-assistance practices: how to prepare to provide limited representation (Chapter 4); how to assess whether a client or matter is right for it (Chapter 5); how to fashion a good limited-service agreement (Chapter 6); how to carry it out (Chapter 7); and how to end it (Chapter 8).

Appendix 1 contains limited-service tips by M. Sue Talia. Appendices 3 and 4 are explanations of limited scope assistance for prospective clients. In Appendices 5-18, we provide a variety of practice forms, tools of the trade, that limited-service lawyers use in their practices. We believe interested attorneys can adapt them to create or expand their own limited-service practices.<sup>31</sup>

In Chapter 9, we present some of the common ethical problems that arise in limited-assistance practices, and we describe how ethics committees and courts have resolved these problems. We also describe some of the new ethics rules that the American Bar Association and

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<sup>30</sup> Surveys of *pro se* litigants who received limited assistance from courthouse or legal services programs find that a high percentage of the litigants were satisfied with the services. They also generally believed the outcomes in their cases were fairer as a result of the services. GREACEN, *supra* note 15, at 16-20. In a legal needs survey sponsored by the Oregon State Bar, the Oregon Judicial Department, and the Office of Governor John Kitzhaber, D. Michael Dale found that “[m]ost people who experience a legal need and don’t obtain representation feel very negatively about the legal system and about 75% are dissatisfied with the outcome of the case.” D. MICHAEL DALE, THE STATE OF ACCESS TO JUSTICE IN OREGON: PART I ASSESSMENT OF LEGAL NEEDS 18 (Mar. 31, 2000), *available at* <http://www.osbar.org/2practice/LegalNeedsreport.pdf> (last visited June 11, 2003).

<sup>31</sup> The lawyers who developed these forms did so for *their* specialized practices in *their* states. There are provisions in them, therefore, that may not be appropriate for all practices or in all states. *See e.g.*, Lerner v. Laufer, 819 A.2d 471, 484 (N.J. Super. Ct. Ch. Div. 2003) (discussing the invalidity of a provision that seeks to immunize the lawyer from civil liability) (Appendix 35).

several states have adopted to authorize and encourage lawyers to provide limited representation to clients.

Appendices 19-23 contain forms for entries of limited-service appearances, withdrawals, notice to clients of withdrawals, and client objections to withdrawals.

Appendices 24-28 contain revisions in ethical and procedural rules in California, Maine, Colorado, and Washington that affect limited scope assistance, and pending proposals in Florida.

Appendices 29-34 contain ABA, state and local ethics opinions on limited scope assistance, or substantial excerpts from those opinions.

Appendix 35 contains a recent limited-service malpractice decision.

Ethics committees uniformly have concluded that it is ethically permissible, without new or special authorizing rules, for lawyers to provide limited scope assistance to clients.<sup>32</sup>

In Chapter 10, we offer examples of limited-assistance programs in California, North Carolina, Oregon, and Washington. In these (and other) states, lawyers have successfully provided limited scope assistance to clients without special authorizing rules.<sup>33</sup>

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<sup>32</sup> See discussion *infra* Chapter 9(A). See also *infra* Appendices 29-34.

<sup>33</sup> In 2002, Washington adopted a comprehensive set of limited-representation rules. See discussion *infra* Chapter 10(A)(3). Prior to this, however, many Washington lawyers provided limited scope assistance to clients under the Rules of Professional Conduct that were then in effect in Washington, and are currently effective in most states. In its report, the Limited Representation Committee of the California Commission on Access to Justice concluded that “no changes are needed in the [California] Rules [of ethics] to permit limited scope representation.” LIMITED REPRESENTATION COMMITTEE OF THE CALIFORNIA COMMISSION ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 11 (Oct. 2001) [hereinafter CALIFORNIA REPORT ON LIMITED ASSISTANCE]. The Committee stated that these rules “provide the same guidelines for [limited scope legal assistance] that they do for any other form of representation, including maintaining confidences, avoiding conflicts, and assuring competence.” *Id.* California has developed its own ethical rules, without adopting either the Model Rules of Professional Conduct or the Model Code of Professional Responsibility. We summarize some of the experiences in Oregon and North Carolina, states without special authorizing rules for limited scope assistance, in Chapter 10(B)(1) and (C)(2).

Some lawyers believe that rule revisions are necessary. Among them are lawyers whom we spoke with in Florida.

Virtually everyone to whom we spoke agrees, however, that revisions in ethical rules, like those that we describe in Chapters 9 and 10, reduce uncertainties and provide ethical “safe harbors” for lawyers who have concerns. Rule revisions thereby encourage more lawyers to provide this essential form of legal help to clients.

In 2002, in the culmination of the ABA’s “Ethics 2000” project, the ABA’s House of Delegates adopted a number of revisions to the Model Rules of Professional Conduct in response to the Report of the Commission on the Evaluation of the Rules of Professional Responsibility.<sup>34</sup> The Model Rules are the bases for the ethical rules that are currently in existence in the substantial majority of states.<sup>35</sup> A number of the ABA revisions recognize and support limited representation. We believe a good starting point for states that have not done so would be to adopt the ABA revisions relevant to limited scope assistance.

In Chapter 10, we describe how broad-based coalitions of lawyers (public and private), judges, court administrators, justice advocates (including lay advocates, paralegals, facilitators and others), and organizations (including bar, public interest, legal services, and lawyer referral organizations) are creating comprehensive legal services delivery systems. As part of such

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<sup>34</sup> STEPHEN GILLERS AND ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xii (2003).

<sup>35</sup> *Id.* at 3. Forty-three states and the District of Columbia have adopted versions of the Model Rules of Professional Conduct, which the American Bar Association developed and approved. *Id.* “Most states have adopted most of the ABA Model Rules nearly verbatim with respect to many issues, but the states still differ sharply from the ABA - and from each other - with respect to [some issues].” *Id.* Of the remaining seven states that did not adopt some version of the Model Rules, “California and Maine...have adopted their own unique rules, and Iowa, Nebraska, New York, Ohio and Oregon have retained versions of the old ABA Model Code of Professional responsibility.” *Id.* In Chapter 9, we discuss the ABA revisions that apply to limited representation.

comprehensive systems, lawyers are providing limited scope assistance to clients through hotlines, information and advice centers, computerized research terminals, legal services programs, law school clinics, and referral panels.

We urge other state and local jurisdictions to use these models to develop their own limited-assistance programs as parts of their comprehensive legal-service delivery systems.

In Chapter 11, we make a series of recommendations. We believe these are some of the ways in which courts, bar associations, and others can help private and public lawyers to provide high quality limited scope assistance to more low and moderate-income clients.

## **Chapter 2: Types of Limited Scope Legal Assistance**

We use family law as the context for many of the examples of limited scope assistance that we present in this chapter. We also offer examples in the fields of bankruptcy, housing, and community law (the latter, a broad category of land-use, environmental, zoning and local law). We believe, however, that lawyers in virtually any field of practice can use the limited-service experiences we describe to craft representation like this for their clients when it is appropriate to do so.

We describe 13 types of limited scope legal assistance in this chapter. The first three, described in Parts A-C, are the most limited forms: self-help assistance and hotline and online information and advice. In cataloguing types of limited assistance, these are the first points on the legal services continuum. These also are among the most prevalent types of limited services. For these two reasons, we begin with these most limited types of assistance, although they are not the focus of this handbook.

We focus in this handbook on the types of limited services that we describe in Parts D-M. These are services that solo, small firm, legal services, and *pro bono* attorneys provide to their clients as regular parts of their private and public practices. Our major goal in writing this handbook is to encourage more lawyers to do the same, and thereby, to help more modest and low-income people obtain effective access to justice.

### **A. Centers that provide information, self-help resources and limited advice**

Nationwide, there are over 150 “local *pro se* assistance programs that run the gamut from informal, ad hoc operations, to statewide responses.”<sup>36</sup> These programs provide legal information

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<sup>36</sup> Beth Lynch Murphy, Results Of A National Survey Of Pro Se Assistance Programs: A Preliminary Report (2000), *available at* [http://www.ajs.org/prose/pro\\_murphy.asp](http://www.ajs.org/prose/pro_murphy.asp) (last visited June 10, 2003). One example of the “information” *pro se* assistance model is the recently

in brochures, videotapes, audiotapes, and sometimes interactive computer terminals or kiosks. In many states, they provide simplified pleading forms, with instructions about how and when to use them. They also have referral lists of lawyers, mediation services, social services and other sources of help.<sup>37</sup>

We include these centers in our description of limited scope legal assistance because some of them provide legal advice, as well as legal information. In such centers, lawyers and supervised paralegals conduct interviews, identify and analyze legal claims and defenses, advise clients, help them to select and fill out simplified pleading forms, and make referrals to other sources of assistance.

Some lawyers who work in these high-volume programs argue that they do not need to enter into written or oral retainer agreements because they provide only legal “information”

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inaugurated Family Court System Self-Help Center (“the Center”) in Washington, D.C. In contrast to the model in which *legal advice* is given to *pro se* litigants, the Center limits its services to providing information, forms and referrals to *pro se* litigants. The Center, located in the courthouse, is operated by several sponsor organizations along with the Family Court and is staffed entirely by volunteer attorneys, paralegals and law students. The Center provides five tiers of service: legal information in the form of materials, brochures and videos; access to court forms, *pro se* form pleadings and interactive computers; information about and referrals to legal and community service providers; access to free clinics, trainings, seminars and workshops; and individual assistance from a Family Law Facilitator. Visitors to the Center, referred to as “customers” by the Center, are given a disclaimer that cautions: “The Facilitator cannot represent any customers or provide legal advice. There is no attorney-client relationship between the customer and the Facilitator. Nothing a customer says to the Facilitator is protected by attorney-client confidentiality. The Facilitator may provide information and assistance to all parties in a case.” *Pro se* litigants are required to sign this disclaimer form acknowledging their agreement and understanding of the limited assistance given at the Center. *Id.*

<sup>37</sup> The “Self Service Centers” initiated in Maricopa County, Arizona, are good models. There are over 10 of them throughout the state. *Id.* The Arizona Supreme Court administers a website that provides information and forms through the centers. *See generally* the Self-Service Center’s website at <http://www.supreme.state.az.us/selfserv/> (last visited June 12, 2003). There are forms for divorce, child support, other family, landlord-tenant, name change, probate (guardianship), and small claims matters. *Id.* The forms can be filled out on-line, and then printed and filed. *Id.* The Maricopa County Self-Help website includes a directory of private lawyers who provide unbundled legal assistance. *See generally* the Maricopa County Self-Help website, at [http://www.superiorcourtmaricopa.gov/ssc/info/gen\\_info.asp](http://www.superiorcourtmaricopa.gov/ssc/info/gen_info.asp) (last visited June 12, 2003).

(which does not create an attorney-client relationship), rather than legal “advice” (which does).<sup>38</sup>

Without addressing the sometimes elusive distinctions between these two categories, we reiterate that the limited scope assistance we discuss in this handbook is within the second category. It creates, and is provided within an attorney-client relationship.<sup>39</sup>

## **B. Hotlines**

Several national organizations operate telephone-intake and limited-advice “hotlines.” Typically, an intake worker screens the caller for eligibility, conducts a conflicts check, and refers an eligible caller to an attorney. The attorney provides legal information, legal advice, and referrals to callers, either on the first phone call or on a “call-back.”

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<sup>38</sup> In such situations, a lawyer should inform those with whom the lawyer deals whether the services the lawyer is providing comprise legal information (and therefore in the lawyer’s view do not create an attorney-client relationship), or legal advice (which does create the relationship). In ambiguous situations, the potential client's understanding of the relationship will prevail.

<sup>39</sup> Lawyers who believe they can safely rely on a distinction between legal information and legal advice to avoid ethical and legal requirements that flow from an attorney-client relationship should carefully read Opinion No. 17 of the New Jersey Supreme Court Committee on Attorney Advertising. N.J. Sup. Ct. Comm. on Attorney Adver., Op. No. 17 (Apr. 25, 1994), 1994 WL 163257. The Committee found that lawyers may ethically operate hotlines. *Id.* at \*1. It rejected, however, the attempt by a hotline operator to avoid creating an attorney-client relationship with callers, and thus insulate itself from legal liability. *Id.* at \*2-3. The hotline service informed each caller that the hotline lawyer would provide only “broad answers to questions of a general nature”, that the caller “should consult with an attorney of your choice prior to taking any action based upon the answers or advice provided”, and that therefore, “the providers of this service cannot accept responsibility for the answers or advice provided.” *Id.* at \*1. The Committee found the disclaimer violated “established law and public policy.” *Id.* Further, it stated that “consumers will not call if they do not have specific problems for which they need advice—advice upon which they intend to rely.” *Id.* at \*2. By holding themselves out as a source of legal advice, no matter how qualified that advice might be, and by providing that advice, the hotline lawyers would create attorney-client relationships with callers whether or not they intended to. *Id.* at \*2-3. The “conduct of the parties” can create this relationship, the Committee said, and it is created when hotline lawyers provide even general answers to questions from callers about their individual problems. *Id.*

This roughly is the model of a hotline that the American Association of Retired Persons operates.<sup>40</sup> It provides free services to low-income members. It charges over-income members a fee that is billed to the caller's telephone bill through use of a 900 number. To assure quality control, their attorneys make written case notes, which a supervisor regularly reviews.<sup>41</sup>

There are private for-profit advice lines as well. One of the national leaders provides services in all 50 states.<sup>42</sup> Lawyers conduct telephone interviews, perform diagnostic assessments, and provide legal information, advice, discrete and continuing coaching and other assistance (including preparation of forms), to clients. The advice line offers over 1000 state-specific legal forms to consumers. It provides services in 1) domestic/family matters (more than 50%), followed by, in approximately equal numbers, 2) tenant/landlord, 3) debtor/creditor, and 4) commercial and consumer (especially credit-card defense) matters.<sup>43</sup>

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<sup>40</sup> See generally AARP Legal Hotline: Standards, Practices, and Reports at <http://www.legalhotlines.org/standards/index.cfm> (last visited June 12, 2003).

<sup>41</sup> *Id.*

<sup>42</sup> See generally My Professional Advice at <http://www.myprofessionaladvice.com> (last visited June 12, 2003).

<sup>43</sup> *Id.* State and local bar associations' ethics committees have found it ethically permissible for lawyers to provide telephone advice to callers for a fee. See, e.g., State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Interim Op. 95-0015 (1995), available at [http://www.calbar.ca.gov/calbar/html\\_unclassified/3cp9810a.htm](http://www.calbar.ca.gov/calbar/html_unclassified/3cp9810a.htm) (last visited June 10, 2003) (finding that attorney-administered telephone consultation service was ethically permissible, noting that attorney-client relationship was created with giving of advice, but observing that even if no such relationship were created, attorney would still owe duties of confidentiality, independence, and competence to caller); Kan. State Bar Assoc. Comm. on Ethics-Advisory Serv., Legal Ethics Op. No. 92-06 (Aug. 19, 1992) (reasoning that hotline service was ethical where lawyer created attorney-client relationship with caller, gave competent advice, advised caller of and obtained caller's consent to limited scope of service, screened matter without charge to make sure lawyer was competent to handle it, established conflicts system, maintained client confidentiality, used truthful and otherwise ethical advertisements, avoided improper fee-splitting practices, and did not solicit additional, non-telephonic legal work during the phone call); N.J. Sup. Ct. Comm. on Attorney Adver., Op. No. 17 (Apr. 25, 1994), 1994 WL 163257 (finding a 900 number pay-per-service practice ethically permissible where attorney complied with, among other requirements, federal telecommunications laws, state consumer and ethical disclosure requirements, and client confidentiality and conflicts rules); Pa. State Bar Assoc.

### C. On-line information, self-help resources and limited advice

William Hornsby, a national expert on the delivery of legal services, reports that lawyers increasingly are using the Internet to provide limited legal assistance to clients.<sup>44</sup> Some provide free advice, apparently as a public service or type of loss-leader. Others charge either nominal or substantial fees for advice. There are both free-standing (advice only) and integrated (part of a more comprehensive practice) services. Most of the advice sites are specialized, often sub-specialized.<sup>45</sup>

There are many on-line document-production services as well. Some generate documents that the consumer fills out and files. Others fill out the documents for the consumer based on information that the consumer provides. Some are operated by lawyers.<sup>46</sup> Others are not.

Pine Tree Legal Assistance in Maine developed, and now operates, one of the nation's best legal services websites, through which it provides users with comprehensive information, a

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Ethics Comm., Ethics Op. 90-156 (Feb. 12, 1991), 1991 WL 787518 (stating that a caller must be informed of cost of service before service is provided and lawyer should screen caller's matter without charge to make sure lawyer is competent to handle matter); Utah St. Bar Ethics Advisory Op. Comm., Op. 96-12 (Jan. 24, 1997), 1997 WL 45137 (finding that it was ethically permissible for a lawyer to give advice over the phone and charge for it); L.A. County Bar Assoc. Prof'l Responsibility and Ethics Comm., Ethics Op. 449 (March 1988) (stating that lawyer's fee should be based on actual time spent by lawyer on call and the lawyer should not be involved in the matter after the call); Phila. Bar Assoc. Ethics Comm., Op. 91-15 (June 1991), 1991 WL 642878 (opining that lawyers must maintain confidentiality of information, screen for conflicts, be competent to answer questions, must first tell caller the cost of service).

<sup>44</sup> WILLIAM HORNSBY, IMPROVING THE DELIVERY OF AFFORDABLE LEGAL SERVICES THROUGH THE INTERNET: A BLUEPRINT FOR THE SHIFT TO A DIGITAL PARADIGM 6 (Nov. 1999), in THE CHANGING FACE OF LEGAL PRACTICE: A NATIONAL CONFERENCE ON "UNBUNDLED" LEGAL SERVICES: WORKSHOP MATERIALS (Vol. 1, 2000).

<sup>45</sup> *Id.* at 12-13.

<sup>46</sup> A good example is The People's Law Library of Maryland, which offers legal information in several areas, as well as forms that can be downloaded, and links to related online services (including online mediation). See generally People'sLaw.Com at <http://www.peopleslaw.com> (last visited June 12, 2003). The American Pro Se Association also offers legal information, forms, and instructions on how to fill them out. See generally the American Pro Se Association's website at <http://www.legalhelp.org> (last visited June 12, 2003).

variety of legal forms (that one can fill out online and print), and an array of links to other websites.<sup>47</sup> The website contains consumer-friendly materials--brochures, answers to frequently-asked questions, and instructional manuals-- in eight specialty areas.<sup>48</sup> The many legal forms are accompanied by clear user instructions. The “HelpMeLaw” part of the website contains a law library, information about helpful organizations, and a description of Maine’s court system.<sup>49</sup>

Legal services programs and courts, with the support of the National Legal Services Corporation and other organizations, have developed, and are developing, some of the most innovative online and hotline legal services projects in the country.<sup>50</sup>

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<sup>47</sup> See generally the Pine Tree Legal Assistance website at <http://www.ptla.org/ptlasite/index.html> (last visited June 12, 2003).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* There are links to the websites of over 200 legal services programs, over 20 *pro se* assistance and self-help centers, over 20 *pro bono* programs, over 50 national resource, legal services and “back-up” centers, over 50 IOLTA programs and bar foundations, and over 50 federal, state and local sources of legal information. *Id.* The website also contains links to each of the offices and specialized units of the Pine Tree Legal Assistance program, as well as to a courthouse assistance project. *Id.* Pine Tree, like many legal services organizations, has an increasingly diverse client population. Pine Tree’s website now provides program and contact information in ten languages (Farsi, Somali, Chinese, Spanish, Vietnamese, Khmer, Russian, Croatian, French and Arabic). Many of their client education materials have been translated into Spanish. Fair Housing information has been translated into Somali, Spanish and Arabic. Taxpayer information exists in Spanish, Vietnamese and Russian. Dependent, for the most part, on volunteer translators, they are gradually expanding the reach of their materials for the immigrant communities.

<sup>50</sup> See generally the Legal Services Corporation, Legal Resource Library’s website at [http://www.lri.lsc.gov/sitepages/ps/ps\\_projects.htm](http://www.lri.lsc.gov/sitepages/ps/ps_projects.htm) (last visited June 12, 2003) (describing projects of the Legal Services Corporation, including: a website in Utah that allows volunteer attorneys to provide assistance online; an online project in Vermont administered by Legal Services Law Line of Vermont, which provides legal information and assistance in family, education, public benefits, individual rights, elder, housing, health care, disability, employment, and consumer law matters; a project to create a statewide hotline in Maryland (devised by the Legal Aid Bureau, the Maryland Legal Assistance Network and other Maryland legal service programs), which, when operative, will centralize intake, provide limited-advice and referral services, and connect callers to service providers statewide; a “Mobile Self-Help Center” in Ventura County, California, which uses a custom built 35 foot motor home, equipped with two internet-connected work stations, self-help videos and written materials, to provide legal information and assistance to people in their communities; a system of interconnected computer

#### **D. Stand alone interviews and advice**

Interview and advice services may be the *only* ones a limited-service lawyer provides to a client. The attorney-client relationship begins at the start of the interview and ends when it is over. That is, the interview and advice comprise a discrete unit of legal work.

Many full-service lawyers offer this initial interview and consultation for free because these services are the beginning, not the end, of the relationship. Lee Borden, an experienced limited-service lawyer, explains why he charges, on a pay-as-you-go basis, for this service:

A lawyer who spends 20 or more hours of professional time on an average case can justify an introductory consultation, because there's an expectation of a large retainer if the lawyer 'takes the case.' My whole business is set up to spend as little time as possible with (and charge as little money as possible to) each client. I'm totally comfortable spending 20 minutes with a client if that's all it takes to deliver the information the client needs, and I have no interest in trying to sell the client on using me more. This means that, among other things, I spend far less time with each individual client than the average divorce lawyer (on the order of 2.7 hours per client).<sup>51</sup>

The limited-service lawyer may give the client preventive advice, e.g., in a domestic case: how to prevent child-snatching (by instructing the client on how to obtain an emergency custody order); how to inadvertently avoid giving a spouse a fault ground for divorce (by counseling the client against moving out, for example, and thus “deserting”); how to protect a client’s financial resources (and credit rating) from a spouse on a spending spree; or how to avoid incurring child-support arrearages, and potential criminal liability (by counseling a non-custodial client not to stop making child-

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kiosks in the Navajo and Hopi Nations in Arizona, Utah and New Mexico, which will allow many *pro se* litigants to obtain legal information, advice, forms and assistance in completing the forms; and a videoconferencing project in Maine operated by Pine Tree Legal Assistance, through which people in rural areas can “meet with” lawyers in over 100 community videoconferencing sites around the state (community centers, hospitals, and state agencies, for example)).

<sup>51</sup>Divorceinfo.com, Alabama Family Law Center, at <http://www.divorceinfo.com/alafamlawcenter.htm> (last visited June 24, 2003).

support payments under the mistaken belief that the custodial parent's refusal to allow visitation suspends the client's support obligations).

Or, the limited-service lawyer may give a client litigation-focused advice in an uncontested divorce case in which there are no children or disputed property issues. This might include instructing the client how to select and complete the simplified complaint form, perfect service of process, request an order of default and/or an evidentiary hearing, prepare and present the required testimony (usually in response to a list of form questions), and obtain the final order and judgment.

Although representation may be limited to an interview and advice, the interview must be at least as thorough as in full-service representation. "Unlike a full representation case, if you," the limited-service lawyer, "miss a critical issue in the initial interview you will generally not get another chance to pick up the pieces later in the case."<sup>52</sup>

### **E. Coaching in mediation**

In the form of mediation coaching that we describe, the lawyer does not represent the client at the mediation session. (There are instances, of course, in which lawyers do represent clients before the mediator as well as before and after the mediation sessions.)

In some instances, the client retains the lawyer after the mediation has begun, or in some cases, after it is over, but before the parties have reached a final agreement. In these cases, the client often asks the lawyer to review a proposed, but not yet final agreement. The lawyer interviews the client, evaluates the proposed agreement, and advises the client whether to revise, accept, or reject it. If there is going to be another mediation session, the lawyer may also prepare

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<sup>52</sup> See Appendix 1, M. Sue Talia, "Advice on Limited Representation for Lawyers." We discuss the importance of the initial diagnostic interview in Chapter 6(D).

the client for that session, and then review or draft the final agreement and advise the client how to make it enforceable (for example, as a contract or consent agreement filed in court).

Most lawyers in this field, however, believe the lawyer should be involved before mediation begins. This is better for the process (which depends on equal bargaining power and fidelity to commitments), the client (who may not understand that the mediator, as a neutral, cannot require that the result be “fair”), and the lawyer.

Experienced lawyers warn that when the lawyer is retained mid-stream, or at the end of mediation, “the client expects that the consulting attorney will be able to master the details of the parties' situation, understand and evaluate the details of the tradeoffs made by the parties during the course of their negotiations, and confirm that the client has made a good settlement.”<sup>53</sup> Often, these expectations are unrealistic.

When the lawyer is involved from the outset, the lawyer can help the client to identify options, prepare for the mediation, understand the basic legal rules and process (before the client makes tentative concessions), perform as well as possible in the mediation, and reasonably evaluate offers from the opposing party. The lawyer also can “prepare successive drafts of ...agreements [that] are reached during the process.”<sup>54</sup>

Perhaps most important, given that mediation is a collaborative process, when lawyers are involved from the beginning they can help clients to realistically assess their interests, appreciate the interests of the opposing party, and prepare to propose and accept reasonable compromises.

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<sup>53</sup> Franklin R. Garfield & Frederick J. Glassman, *In The Beginning*, L. A. DAILY J., (Nov. 27, 1996.) See also *Lerner v. Laufer*, a recent malpractice decision that underscores the importance of a lawyer’s early involvement in mediation, if possible. 819 A.2d 471 (N.J. Super Ct. Ch. Div. 2003). See also discussion *infra* Chapter 4(B).

<sup>54</sup> Garfield & Glassman, *supra* note 53.

This interesting role allows lawyers to be teachers, coaches, and evaluators, as well as advocates.<sup>55</sup>

#### **F. “Collaborative lawyering”**

In this problem-solving method, the parties pledge to resolve their problems without litigation. The parties and lawyers agree that if either party pursues litigation, both lawyers will be disqualified.<sup>56</sup> This agreement is incorporated into the lawyers’ retainer agreements with their clients.<sup>57</sup>

The parties and lawyers pledge to use a cooperative style of negotiation through which they can arrive at “win-win” resolutions through “interest-based, rather than positional, bargaining,” and achieve the legitimate goals of both parties.<sup>58</sup> The lawyers must “manage conflict creatively,” using problem-solving, rather than purely adversarial skills.<sup>59</sup> The approach is particularly important in cases, including family disputes, in which the parties want, or need, to have a continuing relationship.<sup>60</sup>

Proponents claim this approach encourages parties to work together to resolve their problems. At a minimum, they say it accelerates the settlement process, which in litigation often

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<sup>55</sup> Because mediation is being used increasingly to resolve disputes in other areas, including employment, labor relations, and business, the need for limited-service representation in mediation should increase substantially.

<sup>56</sup> Pauline H. Tesler, *Collaborative Law: What It is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215, 219 (1999). See also Steven Keeva, *Working It Out Amicably: Collaborative Lawyers Agree Up Front To Settle Disputes Out Of Court*, A.B.A. J., June 2003, 66, at 66-67.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 220.

<sup>60</sup> *Id.* at 215.

does not really begin until trial is imminent.<sup>61</sup> This spares the parties the considerable expense of lengthy pretrial litigation.<sup>62</sup>

Stuart Webb, a Minneapolis lawyer, is a leading “collaborative lawyer.”<sup>63</sup> He “melds an unbundled approach with a mediative style of negotiation.”<sup>64</sup> He participates “in four-way meetings during which the clients are empowered (as in mediation) to play a major role.”<sup>65</sup> In this process, “Webb and his colleagues see themselves as coaches rather than advocates.”<sup>66</sup> Webb charges clients “\$150 per hour with a \$750 retainer in appropriate situations,” and he “indicates that this form of law, with low overhead,” is very profitable.<sup>67</sup> Moreover, “Webb says that ‘unbundling’ can mean doing those parts of law that you enjoy, not just those parts that a client might want you to do.”<sup>68</sup>

There are ground rules that seek to discourage dishonesty and bad faith. The parties can retain experts, but only jointly, with the experts acting as neutrals rather than partisans.<sup>69</sup> Like the lawyers, the experts are disqualified if the case goes to court.<sup>70</sup> The cost of retaining new lawyers and experts should the collaborative process fail, gives the parties an incentive to make the process work.<sup>71</sup>

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<sup>61</sup> Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 967, 968 n.8 (1999).

<sup>62</sup> *Id.*

<sup>63</sup> MOSTEN, *supra* note 1, at 113.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Tesler, *Family Law Attorneys*, *supra* note 56, at 219.

<sup>70</sup> *Id.*

<sup>71</sup> Tesler, *A New Paradigm*, *supra* note 61, at 968 n.8.

A leading collaborative practitioner reports that there were “[m]ore marital reconciliations” in her “6 years of collaborative practice than in her preceding 13 years in family law” as a litigator.<sup>72</sup>

### **G. Preparing or reviewing documents and pleadings**

In real estate transactions, lawyers often advise clients in advance of the purchase or sale and closing, but do not appear at the closing. They draft contracts, deeds and other transactional documents, or review a package of documents prepared by a lender or another party. For example, in Maryland, private lawyers working through an organization called Civil Justice, Inc., review the transactional documents of first-time homeowners with the goal of preventing legal problems, including predatory sales and lending practices, but do not appear at the closings.<sup>73</sup> This is, we believe, a type of limited-service that more lawyers can and should provide to clients.<sup>74</sup>

Many limited-service lawyers prepare, or help clients to prepare, pleadings in divorce, child-custody, child-support, guardianship, and other domestic relations cases.<sup>75</sup> In many of these cases, filing the complaint triggers a default process—in effect, it tips the first domino in a row of legal dominos. When the last domino falls, the default judgment is entered, and the case is over.

Here is one common “domino” process divorce case: The husband and wife have no substantial property (no stock options or pension plans), and no children. If they “own” a house,

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<sup>72</sup> Tesler, *Family Law Attorneys*, *supra* note 56, at 221.

<sup>73</sup> See the Civil Justice Network’s website soliciting volunteer lawyers for Civil Justice Inc. at [http://www.civiljusticenetwork.org/volunteer\\_lawyer.asp](http://www.civiljusticenetwork.org/volunteer_lawyer.asp) (last visited June 20, 2003).

<sup>74</sup> *Id.*

<sup>75</sup> See discussion *infra* Chapter 9(E) (providing answers to common ethics questions that arise when lawyers “ghost-write” pleadings for clients, for example: whether they must sign the pleadings, and whether, in making allegations, they can rely upon what the client tells them in the interview).

they have little equity in it. They are willing to work with each other to end their marriage as amicably as possible.

The limited-service lawyer, representing the plaintiff, drafts, or helps the client to draft, the complaint. The complaint requests relief that the parties have agreed is reasonable, and the client then files the complaint. The client's spouse, by pre-agreement, files a form answer consenting to judgment, or files no responsive pleading. In the latter case, the client, with the lawyer's advice, then files a motion for default judgment. The spouse does not contest the motion.

The lawyer advises the client to produce a witness at a default-judgment hearing to substantiate the ground for divorce (usually mutual separation without co-habitation for a fixed period of time). The client, acting *pro se*, does so.

The judge (or "master" or "commissioner") takes this testimony (by pre-agreement, the "opposing" spouse does not appear), and enters (or if a master or commissioner, recommends that a judge enter) a judgment of divorce. The defendant does not take exceptions, and a final divorce degree is issued.

In other cases, lawyers draft key motions or memoranda on contested issues. It may be a motion for, and/or memorandum in support of, summary judgment when the facts are not in dispute and the judge will decide the case based on the law.

One lawyer does this in consumer cases when the legal issues are "clear on the face of the paper," that is, there are legal violations in the text of the contract, loan documents, or promissory note.<sup>76</sup> This frames the legal issues for the judge, and marshals the strongest

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<sup>76</sup> See *infra* Chapter 1(L).

arguments for the client's position. (The lawyer reports that he has had good success in settling these cases before lawsuits are filed.)

In a variant of this approach, the lawyer can enter his or her appearance for the limited purpose of arguing the motion.<sup>77</sup>

#### **H. Coaching throughout litigation**

Some lawyers coach clients throughout a lawsuit without entering their appearances, most commonly in domestic relations cases.

There are examples in other practice areas, too. Often, lawyers who represent small businesses provide them with the information, legal forms, and coaching they need to collect overdue accounts.

A more complex example occurs in Chapter 13 bankruptcy reorganizations. Often, an individual who owns his or her home, has equity in it, and is behind on the mortgage payments can benefit from Chapter 13 reorganization. Lawyers often help such clients to prepare the bankruptcy pleadings, and represent the clients at the initial creditors' meetings. These often are the key events in the cases.

Sometimes, problems arise after the reorganization plan is developed. If a debtor fails to make payments required by the plan, a trustee may file a motion to dismiss the petition, or a mortgagee may move to lift the bankruptcy stay (which shields the debtor from lawsuits filed outside the bankruptcy proceeding). Sometimes, the initial lawyer will advise the client in a subsequent proceeding like this, usually pursuant to a second retainer agreement.

#### **I. Representation, including coaching, in litigation with limited disputes**

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<sup>77</sup> *Id.*

Some lawyers provide limited assistance to clients only in uncontested cases; others, in cases in which the disputes are limited.

For example, Sandra E. Purnell, an Oregon lawyer, practices “under the shingle ‘Transitions: A Non-Adversarial Divorce Service.’”<sup>78</sup> She “says she ‘kicked the habit’ about 1996.”<sup>79</sup> That means she handles only uncontested divorces and provides legal counseling and legal assistance, but does not [otherwise] represent the client.”<sup>80</sup> She is a problem-solver who found that adversarial litigation was “making difficult situations worse instead of better.”<sup>81</sup> For her, “unbundling [is] a way attorneys can provide services calibrated to what their clients need and what they can afford,” while “respecting the client’s autonomy” and “putting the attorney into the role of consultant.”<sup>82</sup> She points out that “[w]e used to be called ‘counselor at law.’”<sup>83</sup> She thinks unbundled representation, which she says business lawyers have done for years, is not “revolutionary, but going back to our roots.”<sup>84</sup>

Purnell “screens potential clients carefully,” refers out cases that later become “contentious,” and uses “a very straightforward, written agreement that specifies clearly what I am going to do and what [clients] are going to do. If they want my help, they have to pick out

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<sup>78</sup> Cliff Collins, *Different Paths: How Four Family Law Practitioners Balance Professional and Client Needs*, Oregon State Bar Bulletin (Dec. 2002), at: <http://www.osbar.org/2practice/bulletin/02dec/different.html> (last visited June 20, 2003). Collins says that “the unbundling of legal services” is a “key component of Oregon’s bold, internationally recognized experiment in reinventing family law.” *Id.* Unbundling responds to the fact “that domestic relations cases represent the largest, fastest-growing segment of civil court matters, and that in as many as 80 percent of family-law cases, at least one side has no legal representation.” *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

what they want, and it specifies what it will cost.”<sup>85</sup> Purnell “says the demand is high for the type services she offers.”<sup>86</sup>

A second Oregon lawyer, Steven Allen Smith, uses a “peaceful-resolution approach” to his family law practice.<sup>87</sup> He “accepts cases only if the parties are seeking a resolution rather than revenge.” He represents a variety of clients, from those “who need representation in a custody case, to those who cannot afford a lawyer and need coaching in order to self-represent, to those who want the option of having a lawyer step in later in the process if they need it.”<sup>88</sup>

Along with litigation services, Smith “offers a three-month course designed as ‘a pre-litigation service for anyone’s client,’ which he created for custody litigation for people who want to learn ‘how to convert to partner to raise [their] children.’”<sup>89</sup> Additionally, Smith “offers what he calls ‘self-help arbitration,’ and for clients who ‘think they have most of an agreement, [he] will mediate with them.’”<sup>90</sup> He employs “legal assistants to help clients fill out forms or to prepare the forms. Sometimes the practice charges a flat fee, other times it gives an estimate. Smith supervises but doesn’t get involved in coaching or filling out forms, saying his rate would prohibit that.”<sup>91</sup>

#### **J. Representation in an initial case or proceeding that helps the client in a subsequent case or proceeding in which the person appears *pro se***

Where one case or proceeding affects a second, representation in the first case or proceeding can help a person more effectively represent him or herself in the second. Domestic

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Another Oregon lawyer who is a mediator, Ingrid E. Slezak, reports that “[m]ore and more lawyers now are working with mediators ‘in an unbundled fashion,’ and ‘mediation has become a large part of the settlement process.’” *Id.*

<sup>91</sup> *Id.*

violence cases are good examples of this “ripple” effect of initial representation. In this instance, the second case is a divorce action.

Commonly, the victim of domestic violence (a spouse, parent, child, and, in some jurisdictions, co-habitant), files a petition alleging abuse. After an *ex parte* hearing, a judge can grant an emergency protection order. The limited-service lawyer, frequently aided by a paralegal, helps the client to fill out the petition, prepare the supporting affidavits, and prepare for the *ex parte* hearing. If the facts are in dispute, they usually are limited to an allegedly violent or threatening event or connected series of events. Sometimes, the lawyer represents the client at this initial hearing, but more often not.

There is a second, adversarial hearing, at which both parties can present evidence. Normally, the lawyer represents the client at this hearing. Afterwards, the judge can grant a longer-term order, often effective for six months or more, enjoining the abuser from having contact with the petitioner, ordering the abuser to leave the family home, awarding temporary custody of children, establishing a temporary visitation schedule for the non-custodial parent, and awarding emergency family maintenance to the petitioner.

Subsequently, domestic violence petitioners often file divorce actions against their abusers in which they represent themselves. The protective orders often resolve, at least initially, the same issues that will arise in the divorce case, for example, child custody, child support, and maintenance issues. The protective order can establish presumptions about how the similar divorce issues should be resolved. These “benchmarks” can substantially help the *pro se* party in the later divorce case.

The “ripple” effect of earlier representation can occur in a later proceeding in the same case. Presented are two good examples, one in bankruptcy and the second in family law.

When a debtor primarily has unsecured debt and does not own a house, the debtor can profit from Chapter 7, which authorizes the liquidation of unsecured assets. (Some debtors who own houses can benefit from Chapter 7 if they are current on their payments and do not have equity in the homes. Otherwise a trustee will likely force a sale to pay creditors.)

The process in these cases is often simple: the debtor prepares and files a “schedule” (listing assets and debts) and attends a creditors’ meeting. A lawyer can help the debtor to complete and file the schedule (and other forms), and to prepare for the creditor’s meeting. In addition, the lawyer can represent the client at the creditor’s meeting. In simple Chapter 7 cases, relief often is granted without any significant legal work after the creditors’ meeting. Customary fees for such Chapter 7 representation range from \$500 (or less) to \$1,500. The client in these cases represents himself after the creditor’s meeting, perhaps with some additional coaching by the lawyer.<sup>92</sup>

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<sup>92</sup> Bankruptcy lawyers often complain about the work of non-attorney form-preparers, who are authorized by federal law to assist bankruptcy petitioners in drafting petitions and filling out forms. They assert that the lay scribes provide inadequate services and charge unfair fees. If lawyers, rather than form-preparers, provided more limited legal assistance in bankruptcy matters, it might address some of these problems. In *Ellingson v. Ostrovsky*, the United States District Bankruptcy Court for the District of Montana enjoined an “independent paralegal” (a non-lawyer) from continuing to prepare bankruptcy petitions. 230 B.R. 426, 428 (Bankr. D. Mont. 1999). The defendant paralegal had failed to disclose fees paid by his clients. *Id.* at 432. In its opinion, the court acknowledged that federal law authorizes non-lawyers to prepare petitions in bankruptcy proceedings, but pointed out that the law “authorizing bankruptcy petition preparers to prepare for compensation a petition or other document for filing in a bankruptcy court, specifically provides that ‘nothing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law.’” *Id.* at 433. The court examined the problems that led Congress to enact this provision:

Bankruptcy petition preparers not employed or supervised by any attorney have proliferated across the country. While it is permissible for a petition preparer to provide services solely limited to typing, far too many of them also attempt to provide legal advice and legal services to debtors. These preparers often lack the necessary legal training and ethics regulation to provide such services in an adequate and appropriate

In domestic relations cases, lawyers often provide legal representation to clients at preliminary or emergency hearings, but not thereafter. Depending on the jurisdiction, at these hearings, judges or judicial officers make preliminary decisions on many of the issues in the case, including child custody, child support, and right of possession to the family home. Thereafter, the client represents him or herself.

Again, the preliminary decisions can easily evolve into permanent ones, absent significant changes in circumstances. The partial representation, therefore, has a continuing positive effect after the former client has become a *pro se* litigant.

### **K. Hybrids**

There are many types of working arrangements that lawyers can develop with clients; “[t]he permutations are endless and limited only by [the client’s] creativity and willingness and that of [the client’s ] attorney.”<sup>93</sup>

The lawyer may handle a *critical step* in a case, for example, a hearing on a motion to dismiss or for summary judgment, which either resolves the case, or resolves a key point in the case. Thereafter, the client will represent him or herself.

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manner. These services may take unfair advantage of persons who are ignorant of their rights both inside and outside the bankruptcy system. *Id.* at 432 (quoting from H.R. Rep. 103-384, 103rd Cong., 2nd Sess. at 40-41 (Oct. 4, 1994)). In deciding to issue the injunction, the court found that the defendant paralegal was guilty of unauthorized practice of law. *Id.* at 433. The court opined that, although “[t]here is a split of authority whether preparation of preprinted legal forms constitutes unauthorized practice of law,” “Montana follows the majority view that preparation or filling in of blanks on preprinted forms constitutes the practice of law.” *Id.* Further, the court found that the defendant had “advised [petitioners] of available exemptions, provided them with a comprehensive list of available exemptions, determined where property and debts were to be scheduled, summarized and reformulated information solicited from clients, and generated the completed bankruptcy forms for [them] on her computer.” *Id.* at 433-34. In the court’s opinion, “[t]hese tasks require the exercise of legal judgment beyond the capacity and knowledge of lay persons....” *Id.* Thus, the defendant “rendered legal advice and therefore engaged in the unauthorized practice of law.” *Id.* at 434.

<sup>93</sup> TALIA, *supra* note 1, at 30.

Or, the lawyer may handle a *critical issue*, for example, child custody in a divorce case, and appear in court several times on that single issue. When it is resolved, it may allow the parties to quickly resolve the remaining issues by consent with the client proceeding *pro se*.

In the pretrial phase of litigation, the lawyer and client may divide up case responsibilities in any one of a number of ways, for example, informal fact-finding (client), document-production (client), rough drafts of the substance of paper discovery (client), final discovery (lawyer), motions and legal research (lawyer), location of witnesses (client), and preparation of witnesses (lawyer).

#### **L. Lawyer of the day programs**

In some legal services, public interest, and *pro bono* programs a lawyer “covers” the cases in a particular courtroom on a specified day. The lawyer interviews and advises litigants and represents some of them in court.

There are at least two good examples of lawyer-of-the-day programs in the State of Washington. In 1997, Steve Fredrickson, an experienced staff attorney with Columbia Legal Services in Washington, was part of a group of lawyers who developed a “lawyer-of-the-day” pilot project in South King County that evolved into the two existing programs.<sup>94</sup> In the pilot project, Fredrickson and the other lawyers represented tenants in eviction proceedings in housing court.<sup>95</sup> With the cooperation of the judiciary, they established periodic “duty” days. During these days, the lawyers, with the help of law and paralegal students, interviewed and advised eligible tenants and represented some of them in court.<sup>96</sup> The legal assistance helped the tenants

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<sup>94</sup> In addition to Columbia Legal Services, the King County Bar Association, the Northwest Justice Project, the Legal Action Center, the Seattle University Law School, and a major tenants union were involved in creating this project.

<sup>95</sup> Interview with Steve Fredrickson.

<sup>96</sup> *Id.*

to recognize and assert valid defenses, and to avoid illegal and unwarranted evictions.<sup>97</sup> With the representation, many of the tenants were able to negotiate settlements with their landlords, and others were successful in the litigation.

In the two current programs, the staff recruits and trains volunteer lawyers who provide the “duty day” representation to tenants.<sup>98</sup> The King County Bar Association and the Northwest Justice Project operate these programs in South King County and Seattle.<sup>99</sup>

These programs are important national models. In many jurisdictions, there are large numbers of eviction cases, and in the great majority of them the tenants represent themselves. The interests at stake are very important, particularly when evictions lead to homelessness. Without court-day assistance, most of the tenants would not be able to recognize and assert their legal rights.<sup>100</sup>

There are at least several lawyer-of-the-day programs throughout the country.<sup>101</sup> Among other benefits, they give private law firms—small and large—good opportunities to do *pro bono*

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<sup>97</sup> In Washington, the volunteer lawyers can often develop defenses to eviction, which include: the tenant paid the rent; the conditions in the rental unit violate the common law warranty of habitability (entitling the tenant to partial or full rent abatements, including retroactive abatements); the eviction is in retaliation for lawful and protected conduct (for example, reporting housing code violations); the eviction is discriminatory (for example, because the landlord failed to make reasonable accommodations to the tenant’s disability); and the eviction breaches an employment contract (where the tenant is or was an employee of the landlord and free or reduced rent is part of the agreement).

<sup>98</sup> Interview with Steve Frederickson, *supra* note 95.

<sup>99</sup> *Id.*

<sup>100</sup> We do not mean to ignore the challenges that programs like these face. It may be necessary in some cases, for example, to continue them to properly investigate and prepare them for trial, and volunteer attorneys who are practicing outside of their areas of specialization will need to be trained.

<sup>101</sup> For example, in Chicago, the Lawyers Committee for Better Housing administers an “attorney-of-the-day” program. Interview with the Administrators of the Lawyers Committee for Better Housing. (The Committee was founded in 1980 by a group of tenant advocates and lawyers who were concerned about the deterioration of housing in Rogers Park, a Chicago neighborhood.) The Committee recruits and trains pro bono attorneys, each of whom spends one

work. Program staff can provide the essential training to the volunteer lawyers. The volunteer's time commitment can be both substantial and capped. In providing badly needed legal services to the poor, the volunteer lawyer can obtain important practice experiences that he or she would not otherwise be able to obtain.

### **M. Group representation**

Some lawyers provide limited legal assistance to community organizations (including unincorporated groups and not-for-profit corporations). The services include preventive advice, coaching, and representation in court or before an administrative agency. The key to these relationships is making maximum use of the expertise and resources of the members of the organization.

J. Carroll Holzer, a Maryland lawyer, is a former county solicitor and a long-time solo practitioner.<sup>102</sup> He provides limited legal assistance to community groups in land-use and environmental cases. He and his clients usually argue--often before several levels of administrative agencies--that government should not issue a permit to a builder or developer because they have not complied with a federal, state, or local environmental or land-use law.<sup>103</sup>

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morning a month in Cook County's eviction court. *Id.* The volunteers come from all segments of the bar, including large firms, government service, small firms, solo practices, and retirement. The attorneys appear in court regularly, and represent between 500 and 600 tenants a year. *Id.* The presence of the lawyers also encourages the judges and landlord representatives to pay greater respect to the rights of tenants who represent themselves. *Id.* Volunteer attorneys provide an array of services to clients, from assistance in settlement negotiations to representation in motions and litigation. *Id.* With the help of an attorney of the day, tenants often are often able to work out settlements that allow them to remain in their apartments or obtain time to locate appropriate substitute housing. (Approximately 40% of the program's eviction cases are resolved by settlements.) *Id.*

<sup>102</sup> Interview with J. Carrol Holzer.

<sup>103</sup> *Id.*

Holzer relies heavily on the client organization to do much of the work in these cases.<sup>104</sup> He conducts an initial planning session with group leaders in which he identifies the tasks that need to be done. He and the group leaders determine who within the group can competently perform the task, and who is willing to do it.<sup>105</sup>

The next step is to reduce these understandings to a written retainer agreement.<sup>106</sup> The organization usually assumes significant responsibility for gathering and analyzing documents (the county's land-use plan or the site permit-history, for example) and interviewing witnesses; obtaining experts (hydrogeologists, chemical engineers and toxic-waste experts, for example); preparing drafts of discovery requests; and doing administrative tasks (such as organizing and maintaining the case file).<sup>107</sup>

In these relationships, Holzer is a planner, manager/monitor, teacher/coach, and in-court (or in-agency) advocate. He makes sure the organizational volunteers perform their tasks, reviews their work, and uses it in the adjudicatory hearings.<sup>108</sup>

He has become the major land-use lawyer for community organizations in his area using this limited-service method. Other lawyers who represent organizations should be able to replicate this practice model.<sup>109</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> In its study, the ABA Consortium on Legal Needs and the Public found that the *third* most prevalent area of unmet legal needs was “community/regional” legal problems. ABA CONSORTIUM ON LEGAL SERVICES, *supra* note 22, at 5. These problems include many of the kinds of legal problems that Holzer’s clients bring to him.

### Chapter 3: Lawyers Who Provide Limited Scope Legal Assistance to Clients

Forrest Mosten says that lawyers who enjoy providing limited representation to clients want to “spend more time in direct contact with clients,” are “flexible with changing roles,” and can respond when “clients take [their] sound advice and make poor or self-destructive decisions.”<sup>110</sup> Further, lawyers providing limited representation like “to teach clients skills and concepts that will make their case go better—and maybe even improve their lives,” and “like to prevent problems from ever ripening into conflict.”<sup>111</sup> Here are some of these lawyers:

#### A. Forrest “Woody” Mosten

Mosten is frequently called the “father” of limited legal assistance.<sup>112</sup> He has practiced it, written and lectured about it, and successfully encouraged many lawyers to adopt it as part of their practices.

At his firm, the lawyers provide both limited and full assistance. “Clients get to choose the level of experience and cost.”<sup>113</sup> Cost varies based on the lawyer’s experience.<sup>114</sup> Mosten explains that the lawyers charge their “customary rates for coaching, but this is a major profit center since we have no uncollectible fees and the overhead burden is reduced because of the concentration of direct client-lawyer contact.”<sup>115</sup> Mosten adds that “[m]ost of our coaching takes place in the office, but occasionally we will coach by telephone or e-mail if the time is prepaid by credit card.”<sup>116</sup>

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<sup>110</sup> MOSTEN, *supra* note 1, at 6-7.

<sup>111</sup> *Id.* Mosten’s self-assessment test for limited representation is contained in Appendix 2.

<sup>112</sup> Continuing with the metaphor, M. Sue Talia certainly is the mother of limited representation. *See supra* note 1 and *infra* Chapters 4-9.

<sup>113</sup> MOSTEN, *supra* note 1, at 115.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Mosten's firm gives all clients "the choice between full-service and discrete-task coaching-even when they ask for full-scale representation."<sup>117</sup> He reports that "many of our biggest litigation cases are conversions from coaching. These clients selected our firm due to our unbundling approach but for various reasons decide[d] to convert to full-service representation."<sup>118</sup>

Mosten spends much of his unbundled practice time coaching, for example, advising clients about dispute-resolution options, family law (substance and procedure), and the skills of self-representation.<sup>119</sup> He teaches clients how to evaluate the strengths and weaknesses of their cases, prepare and file pleadings, represent themselves in mediation, negotiate effectively, and represent themselves at hearings and trials.<sup>120</sup> He also prepares pleadings and other legal documents for clients, among other limited services.<sup>121</sup>

### **B. Lee Borden**

Lee Borden is based in Birmingham, Alabama, and offers on-line information and services through <http://www.divorceinfo.com>. He explains: "My practice is limited to divorce. My revenue comes from uncontested divorce, coaching, and divorce mediation, in that order."<sup>122</sup> He adds: "I practice in a one-person shop. I have spent thousands of hours (and a great deal of money) developing systems that allow me to be thoroughly responsive to my clients' needs even though I do not have a staff. I also work some really crazy hours!"<sup>123</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 115-117.

<sup>121</sup> *Id.*

<sup>122</sup> Divorceinfo.com, *Who's in Charge Here?*, at [www.divorceinfo.com/whosincharge.htm](http://www.divorceinfo.com/whosincharge.htm) (last visited June 20, 2003).

<sup>123</sup> *Id.*

Borden operates the “Alabama Family Law Center,” which he describes as a “private law firm.”<sup>124</sup> He “works to keep people in control of their own divorce.”<sup>125</sup> He requires clients to “pay me for work done as that work is done.”<sup>126</sup> This allows him to dispense with retainers, which in turn attracts many clients who are put off by large retainers.

He operates in the forefront of technology, which allows him to maintain personal communication with a high volume of clients.<sup>127</sup> He also regularly measures the degree of client satisfaction with his services, and markets this to prospective clients.<sup>128</sup>

Borden reaches out to a niche clientele. He tells prospective clients that his practice “is narrowly focused on helping people to stay in control of their divorce,” and advises them not to use him “if you're working to save your marriage, if you and your spouse are at war, if you dislike using voicemail, if you need a payment plan or a free introductory consultation, or if you go for the ‘marble/mahogany’ look.”<sup>129</sup>

Borden charges \$200 an hour.<sup>130</sup> He tells clients: “I charge my time in tenths of an hour. So if you spend 33 minutes with me, that's 6/10 of an hour, and I'll ask you to pay me \$120.00 when we finish. I take cash, checks, Visa, and MasterCard.”<sup>131</sup> He asks clients “to pay the legal fee for the uncontested divorce when you come for the initial meeting. If you prefer, you may

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<sup>124</sup> Divorceinfo.com, Alabama Family Law Center, at <http://www.divorceinfo.com/alafamlaw center.htm> (last visited June 20, 2003).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

wait to pay the filing fee until you and your spouse have both signed the papers and they're ready to file with the court.”<sup>132</sup>

To be as efficient as possible, Borden provides clients with a comprehensive (15-part) “Divorce Information and Worksheet,” which, when completed by the client, provides the information Borden needs to prepare the divorce pleadings.<sup>133</sup> He has an extensive forms library,<sup>134</sup> and he uses a software package to evaluate and compute alimony.<sup>135</sup>

Borden offers clients several representational options, including: 1) “Do it yourself” (“[i]f the issues are simple and straightforward,” the couple has some sense of “the terms you can and should agree to,” and particularly “[i]f you and your spouse haven’t been married long, don’t have children, and don’t have much property or debt together”); 2) “collaborative law” (the attorney agrees to represent the client in problem-solving negotiations, but not at trial, an approach that “typically doesn’t work unless both spouses make this commitment”); 3) a “full-service attorney”; and 4) “coaching.”<sup>136</sup>

As a coach, Borden provides clients “good sound information that they can use to negotiate on their own,” helps them explore “the available alternatives,” including “when they're stuck on a particular point,” gives clients “a good solid understanding of the advantages and disadvantages of a proposal somebody is suggesting,” and offers them “suggestions for how they

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<sup>132</sup> *Id.*

<sup>133</sup> Divorceinfo.com, *WorkSheets*, at <http://www.divorceinfo.com/worksheets.htm> (last visited June 20, 2003).

<sup>134</sup> Divorceinfo.com, *Legal Forms*, at <http://www.divorceinfo.com/divorceforms/allforms.htm> (last visited June 20, 2003).

<sup>135</sup> Divorceinfo.com, *Alimony*, at <http://www.divorceinfo.com/alimony.htm#Software> (last visited June 20, 2003).

<sup>136</sup> Divorceinfo.com, *Affordable Legal Help for Your Divorce*, at <http://www.divorceinfo.com/legalhelp.htm> (last visited June 20, 2003).

might negotiate with their spouse or their spouse's lawyer to get what they want.”<sup>137</sup> He charges on a pay-as-you-go basis, explaining: “The next time you come back to see the coach, you'll pay again. Simple. Clean. You pay for what you need. And you stay in control. If you need your coach to go to court on your behalf later, you can always work that out with a separate agreement.”<sup>138</sup>

### **C. Suzanne Lieberman and Gary Smith**

Lieberman and Smith, LLP, is a Seattle law firm that Suzanne Lieberman (who graduated from law school in 1996) and Gary Smith (who graduated in 1999) established in October 2001.<sup>139</sup> The firm provides both full and limited services. Ms. Lieberman describes the limited services as “among the most rewarding that I provide.”<sup>140</sup>

The firm provides the majority of its limited services in family cases, including in uncontested divorce cases, domestic violence proceedings (the lawyer represents the client at these proceedings, but not necessarily in subsequent divorce cases), and preliminary hearings in contested cases.<sup>141</sup>

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<sup>137</sup> Divorceinfo.com, Coaching, at <http://www.divorceinfo.com/coaching.htm> (last visited June 20, 2003).

<sup>138</sup> *Id.* Appendix 13 contains Borden’s limited-service coaching agreement, which he offers on-line for others to use.

<sup>139</sup> *See generally* Lieberman & Smith, LLP’s website at <http://www.lsmithlaw.com> (last visited May 25, 2003). The home page contains a brief description of the firm, with links to “self-help resources” and the law firm’s office. *Id.* The resource link has secondary links to nine sets of information, eight of which are organized by specialty area: criminal law, domestic violence, employment law, family law, landlord and tenant, small business, small claims, and testamentary matters (wills, probate, estate planning and elder law). *Id.* The ninth link is to information on “researching statutes and case law,” including a very helpful on-line library of Washington State law, pamphlets, service programs, legal forms, and community resources. *Id.*

<sup>140</sup> Interview with Susan Lieberman.

<sup>141</sup> *Id.* The latter are good examples of the “ripple” effect of initial representation described in Chapter 2(J).

Washington’s ethics rules now authorize lawyers to provide limited scope assistance to clients if it is “reasonable under the circumstances”, and to enter limited-representation appearances in court and to strike those appearances when the representation has been completed.<sup>142</sup> Before the rules were adopted, judges in King County, the jurisdiction in which the firm primarily practices, generally allowed lawyers to do this.<sup>143</sup>

The revised rules also authorize lawyers to “ghost-write” legal pleadings in civil matters, which Lieberman and Smith do.<sup>144</sup> For example, they help clients to draft declarations, motions and answers to motions (including motions to dismiss and for summary judgment). They also help clients to prepare for and make arguments, and they enter limited appearances to make discrete arguments for clients. In these and other cases, the firm’s clients help to organize documents, compile information to be incorporated into documents, and fill out forms, including those provided online.

Many of the firm’s clients cannot afford to pay the standard \$5,000-\$10,000 retainer in domestic cases, but do have sufficient resources for the limited representation they need.<sup>145</sup>

The firm also provides limited services in unemployment insurance matters. It advises clients before they participate in important telephone interviews with agency representatives, and helps them prepare to represent themselves at hearings.<sup>146</sup>

The firm obtains its clients, including its limited-service clients, from a variety of sources, including the local bar association (it refers people whose incomes are just over legal services and bar-program eligibility guidelines), public interest organizations, and local social

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<sup>142</sup> WASH. SUPER. CT. CR 70.1; WASH. C.R.L.J. 70.1. In Chapter 10 (A) (3), we describe the Washington Rules and the history of their adoption.

<sup>143</sup> Interview with Susan Lieberman, *supra* note 140.

<sup>144</sup> *Id.* See also discussion *infra* Chapter 10(A)(3).

<sup>145</sup> Interview with Susan Lieberman, *supra* note 140.

<sup>146</sup> *Id.*

services agencies. It obtains referrals by word of mouth as well. By providing limited services, the firm can represent a higher volume of clients, which, in turn, produces more word-of-mouth referrals.<sup>147</sup>

#### **D. Mark Gardner**

Mark Gardner is a Minnesota lawyer who offers both full and limited scope representation.<sup>148</sup> He obtains some clients from an online advertisement, but more from referrals from other lawyers. His clients include those who “cannot afford the potential liability of an uncapped fee,” for example, clients who can pay \$350-\$500 (or more) for a service, but not a \$3,000 retainer. “Elite” lawyers refer many clients to him, sometimes because they do not realize that the client’s problem can be fairly resolved inexpensively, and other times because they do not want to be involved in the substance-abuse, domestic-violence and other issues that arise in these cases. He estimates that most of his limited-assistance clients make less than \$25,000 or so a year.<sup>149</sup>

He drafts documents and provides representation in discrete hearings, and customarily charges a flat fee of \$350-\$450 for these services.<sup>150</sup> Among the types of hearings that Gardner handles on this basis are “expedited child support” hearings that are mandated by federal law, and domestic violence hearings. He points out that these hearings have consequences that are not always apparent. For example, an immigrant can be deported for domestic violence, and decisions in these cases can affect those in subsequent divorce cases.<sup>151</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> Interview with Mark Gardner.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* See also discussion *infra* Chapter 2(J).

One reason Gardner is willing to provide limited representation is that Minnesota judges do not try to convert his limited-service contracts into full-service responsibilities. When he enters an appearance to provide a limited service, and he performs that service, judges allow him to withdraw from the representation.<sup>152</sup>

In preparing documents for an otherwise *pro se* litigant, Gardner often adds a signature line for the opposing party, who often is proceeding *pro se* as well, when he believes, or hopes, that the parties can reach agreement on the issues.<sup>153</sup>

There are secondary benefits to Gardner's practice. Although he charges a fee for his limited representation, it often has a public service dimension to it as well. Gardner may be the only lawyer in court when he appears before a judge who is handling an otherwise *pro se* docket. Accordingly, judges have come to trust and respect him. In addition, some clients who start out with him on an unbundled basis, evolve into, or return as, full-service clients.<sup>154</sup>

### **E. Richard Granat**

Richard Granat is one of the nation's leading experts on the uses of technology to provide low-cost legal services to modest and low-income people. He is based in Owings Mills, Maryland, where he maintains "a virtual law firm" called the Granat Self-Help Law Center, P.C.<sup>155</sup> He specializes in family law.

Unlike the other law firms in this chapter, Granat's law firm exists only on the Internet.<sup>156</sup> He primarily prepares documents for his clients, and gives them related legal advice. The parties then file the documents as *pro se* litigants. The documents include Maryland's simplified

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<sup>152</sup> Interview with Mark Gardner, *supra* note 148.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See generally the Granat Self-Help Law Center, P.C., at [www.mdfamilylawyer.com](http://www.mdfamilylawyer.com) (last visited July 10, 2003).

<sup>156</sup> *Id.*

Domestic Relations Forms, marital settlement agreements, pre-nuptial agreements, and “QDROs” (Qualified Domestic Relations Orders).<sup>157</sup>

Granat also provides general legal advice and court coaching services, but only by email and telephone. He usually charges a fixed fee, and occasionally an hourly rate (\$150), for these services.<sup>158</sup>

Granat says: “ I wanted to experiment with the idea of offering limited and unbundled legal services at the lowest possible cost to the broad middle class. I am testing the limits of ‘virtual law practice.’ My services are designed for those who will represent themselves, and usually are limited to document preparation and review, and legal advice on a per incident basis.”<sup>159</sup>

Granat’s website is the basis of his practice.<sup>160</sup> All clients and potential clients register for the web site and are assigned to a secure “client space.” There, they can purchase services with a credit card and obtain access to additional free, on-line information, including a “comprehensive on-line family law guide” and “basic tools like a child-support calculator.” Granat’s clients communicate directly with him on a secure (confidential) basis.<sup>161</sup>

Before Granat accepts a new client, he conducts a conflict of interest check. Granat will not represent or advise both spouses, even if they are in agreement and both intend to file *pro se*.

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<sup>157</sup> This is a term of art that has different meanings in different contexts. Initially, it meant a state court order in a domestic case that resulted in the payment of pension benefits by a federal agency to a former spouse. It also is a term in tax law and the Employee Retirement Income Security Act of 1974 (ERISA).

<sup>158</sup> Interview with Richard Granat.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

Instead, he refers the other spouse to Civil Justice, Inc., a network of lawyers in Maryland that offers clients modest fixed-fee services.<sup>162</sup>

Granat asks clients to complete on-line questionnaires that are customized for the various domestic and family law actions.<sup>163</sup> The documents in each case are automatically created by an innovative web-enabled document assembly process from the data that the client enters into the questionnaire. Granat then reviews, and if necessary modifies, the document. (Often, the process produces a final document.) After Granat reviews the document, he sends it to the client's secure web space, along with detailed filing instructions. The client then downloads, prints and files the document. Granat continues to coach some clients through litigation after they file their documents.

There are technological efficiencies in Granat's practice that allow him significantly to reduce the cost of the legal services he provides. These include the automatic document-assembly process, the provision of legal advice by email (which also allows him to provide advice during "off hours"), and on-line marketing. (Granat says that marketing his practice exclusively through the Internet lowers marketing costs dramatically and expands the geographic reach of his practice.)

Granat reports that his firm provides services to "*pro se* filers" in Maryland at "the lowest available cost", and that "volume has increased each month" since he "launched the site in December, 2002." He says that "while the revenue per transaction is lower than in a traditional practice, the revenue gap is closed by the much higher volume of cases."<sup>164</sup>

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<sup>162</sup> *Id.* See also the Civil Justice Network's website, at <http://www.civiljusticenetwork.org>. (last visited June 21, 2003).

<sup>163</sup> Interview with Richard Granat, *supra* note 158.

<sup>164</sup> *Id.*

## **Chapter 4: Preparing to Provide Limited Scope Legal Assistance**

### **A. Obtaining clients**

With at least one difference, lawyers obtain limited-service clients the same way in which they obtain full-service clients. The different referral source, as we explain below, is *pro se* assistance programs.

Limited-service lawyers, like others, market their limited services through brochures, websites, office signs, professional cards, yellow pages, and other multi-media materials (including videotapes and audiotapes).

The first place in which lawyers should look for limited-service clients is in their waiting rooms. Most lawyers now turn away many people who cannot afford to pay for full-service representation, but who could pay for limited services.

Another excellent referral source is other lawyers. Many are happy to refer people whom they cannot fully represent.

Lawyers interested in providing limited representation also have opportunities to make presentations to groups, write and distribute newsletters, and write articles in newspapers, journals, and other publications.

Administrators of courthouse information projects have been among the leaders in developing limited-assistance referral panels. They often recruit and train the lawyers who join these panels. Even if these projects have not developed limited-service panels, they should be willing, and probably are anxious, to refer project consumers who need additional assistance to limited-service lawyers.

Some of these programs invite people who have similar legal problems to attend group

educational sessions, at which a lawyer generally instructs the group about their shared legal problems (for example, uncontested divorces). The goal usually is to help the “students” represent themselves. These sessions, however, also serve to identify those who can not or do not wish to wholly represent themselves. By teaching such sessions, lawyers can perform a public service and establish contact with potential clients.

These forms of marketing will also produce full-service clients. After hearing a description of limited assistance, some people will conclude that they do not want or cannot manage limited representation, and will retain lawyers for full representation.

### **B. Malpractice insurance coverage**

Lawyers who provide limited assistance to clients do *not* report problems in obtaining malpractice insurance. This is not surprising. There is a high degree of client satisfaction with limited assistance.<sup>165</sup> This has led to an extremely low incidence of malpractice claims.

M. Sue Talia has had over 25 years of experience as a family lawyer. She remarked: “[E]xperience has demonstrated that as with mediation, there are *fewer* rather than more malpractice claims when lawyers unbundle services.”<sup>166</sup> Furthermore, she stated: “Years ago, when mediation was new and untried, some carriers denied coverage, or even raised rates, because they thought liability would increase. The reverse happened. People were so happy with the results they obtained themselves with the assistance of their mediator that claims *decreased*.”<sup>167</sup> She added: “Now, most malpractice insurance rates for mediators are lower than for traditional family law attorneys.”<sup>168</sup>

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<sup>165</sup> GREACEN, *supra* note 14, at 16-20.

<sup>166</sup> TALIA, *supra* note 1, at 35.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

In *Lawyers Weekly*, Leigh P. Perkins reported that “[t]he Oregon State Bar carrier has sent out a letter to its policy holders indicating that unbundling is the practice of law and that its policies cover discrete-task representation.”<sup>169</sup> She stated that there have been “no reports of any carrier turning down coverage for unbundling work....As with mediation, there are fewer rather than more malpractice claims when lawyers unbundled services. As of December 1995, none of the malpractice insurers with whom *Lawyers Weekly USA* spoke had seen a claim related to unbundling.”<sup>170</sup>

In Washington, a malpractice insurance carrier stated much the same thing in an open letter to Washington’s bar: “If Washington’s legal community chooses to adopt the concept of unbundling legal services, it should not raise any coverage questions at least under most current policy forms. Coverage is readily available at this point in time for such activity.”<sup>171</sup>

A national expert on hotline services, Michael A. Cane, explains why he believes the incidence of malpractice claims for limited representation may be so low. He calls this form of

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<sup>169</sup> Leigh P. Perkins, *Unbundling Your Services Makes Some Clients Happy*, LAW’S WKLY USA, Dec. 18, 1995.

<sup>170</sup> *Id.* Beverly Michaelis, a lawyer and practice management adviser with Oregon’s Professional Liability Fund, confirms this saying: “We don’t look at [unbundling] as any different from other limited-scope representation. There are some screening steps you need to take.... I don’t know that we see a lot of additional risks.” *Id.* She advises lawyers to “[s]tart with careful client and case screening, and prepare a carefully worded engagement letter outlining exactly what you will and will not do.” *Id.* Also, she adds, “be sure to specify what the responsibilities of the client entail.” *Id.*

<sup>171</sup> See Letter from John Chandler and Deborah Wade, Seabury and Smith, to the Washington State Bar Association (June 19, 1997) (on file with author). The letter continued:

Keep in mind, evolution in the standards and practices of a profession is often followed by changes in coverage provisions and/or pricing of professional liability policies. Should the unbundling concept gain momentum, we would suggest representatives from the insurance industry be included at some level in the process to insure any such changes are appropriate and beneficial to the legal community. From our perspective, obtaining professional liability insurance should not be an obstacle for attorneys who wish to pursue this particular area of practice or establish unbundled legal services as part of their private practice.

*Id.*

representation “client-centered”, and contrasts it with what he calls the “attorney-centered” model of full representation:

When an attorney says to a new client, put your money down and trust me to care for your legal problems, he takes away the client's control and thus takes on all the responsibility. So then why is it so surprising when the client later sues for malpractice, or files a bar complaint, simply because the case didn't go as he wanted?<sup>172</sup>

Cane contends that limited representation gives many clients what they want: “(1) control, (2) price, and (3) service.”<sup>173</sup>

A recent limited-service malpractice opinion by a New Jersey appellate court, which we attach as Appendix 35, reinforces our conclusion that by developing good limited-service practices, lawyers can avoid malpractice liability.<sup>174</sup> In that case, the plaintiff (“Client”) retained the defendant (“Lawyer”) in an uncontested divorce case after Client had completed mediation.<sup>175</sup> In the mediation, Client had reached a tentative agreement with her husband on how they would dispose of their property, which was worth millions of dollars.<sup>176</sup> At Lawyer’s suggestion, the parties made some changes in the mediated agreement before it became final.<sup>177</sup> The final judgment included the terms of the final property agreement.<sup>178</sup>

Client later alleged that before she executed the final property agreement, her husband did not adequately disclose information about his ownership interests in a business, including a decision to take the company public.<sup>179</sup> Further, Client alleged that Lawyer had breached the standard of care, both specifically for failing to discover this, and generally for failing to

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<sup>172</sup> MICHAEL A. CANE, WELCOME TO THE INFORMATION HIGHWAY 2, *in* THE CHANGING FACE OF LEGAL PRACTICE: A NATIONAL CONFERENCE ON “UNBUNDLED” LEGAL SERVICES (Vol. 4, 2000).

<sup>173</sup> *Id.* at 6.

<sup>174</sup> *Lerner v. Laufer*, 819 A.2d 471 (N.J. Super. Ct. Ch. Div. 2003).

<sup>175</sup> *Id.* at 474-76.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 475.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 476.

adequately protect Client’s interests.<sup>180</sup> As a result, Client claimed that she had accepted far less than she was entitled to in the property settlement.<sup>181</sup>

When Lawyer and Client first met in person, Lawyer presented Client with, and Client signed, a letter in which Lawyer explained the limited nature of the services he would provide to Client.<sup>182</sup> Subsequently, and apparently by mistake, Lawyer sent Client a standard full-service retainer agreement.<sup>183</sup> It was “undisputed,” however, that “the letter, not the standard retainer agreement, formed the basis of [Lawyer’s] representation.”<sup>184</sup>

In light of the limited scope of representation in the letter, the court affirmed the trial court’s summary judgment in favor of Lawyer, holding that Lawyer was not guilty of malpractice. The court rejected the opinion of Client’s expert that “the standard of care forbids an attorney to review a mediated agreement or to participate in the proceedings leading to its incorporation in a judgment of divorce without performing many of the usual services ordinarily expected of an attorney in a fully contested divorce.”<sup>185</sup> Rather, the court opined that “the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them.”<sup>186</sup> Furthermore, the court reasoned, “R[ule of] P[rofessional] C[onduct] 1.2(c) expressly permitted an attorney with the consent of the client after consultation

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<sup>180</sup> *Id.* at 477.

<sup>181</sup> *Id.* Client also sued to set aside the divorce and settlement agreement. *Id.* at 476. The trial court agreed to set aside the divorce, finding that both parties had lied about the ground for divorce, but refused to set aside the property settlement. *Id.* Client then retained a new lawyer to represent her in a second round of mediation before a new mediator, and the parties entered into a revised property agreement. *Id.* However, Client maintained her malpractice action against Lawyer (her first attorney) arguing that the execution of the first property agreement had forced her to accept less than she should have received in the second agreement. *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 482-83.

<sup>186</sup> *Id.* at 482.

to limit the scope of representation.”<sup>187</sup> Therefore, the court concluded that “[t]o us that means if the service is limited by consent, then the degree of care is framed by the agreed service.”<sup>188</sup>

Moreover, the court held that it was “not a breach of the standard of care for an attorney under a signed precisely drafted consent agreement to limit the scope of representation to not perform such services in the course of representing a matrimonial client that he or she might otherwise perform absent such a consent.”<sup>189</sup>

Considering the validity of the limited-service agreement, the court suggested that it would have been better if Lawyer’s limited services agreement had expressly referred to the ethics rule that authorized Lawyer to limit the scope of services (Rule of Professional Conduct 1.2 (c) in Lawyer’s case), but found that this was not essential to the validity of the agreement.<sup>190</sup>

The court also rejected Client’s argument that Lawyer, “by his conduct in suggesting modifications to the PSA, some of which were adopted, . . .stepped from under the protection of his limited scope of representation and became fully liable as if no such limitation existed.”

Rather, the court reasoned Lawyer’s role was limited: “to see to it that the agreement was ‘clear and concise,’ to resolve interpretation problems in the text, and to clarify the agreement.”<sup>191</sup>

Further, the court found “no evidence that in performing his role [Lawyer’s] conduct actually altered [Client’s] expectations of [Lawyer’s] duty or changed her demands for the kind of service she wished.”<sup>192</sup>

The court, however, expressed its disapproval of two aspects of the Lawyer’s limited-service representation.

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<sup>187</sup> *Id.* at 483.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 483-84.

<sup>192</sup> *Id.*

First, it stated that Lawyer “should not have included in his letter” the “undertaking” by client not to sue him.<sup>193</sup> Specifically, the court opined that “[s]uch a limitation violated the express terms of R[ule of] P[rofessional] C[onduct] 1.8(h). Such a provision should not be included in a consent to limit the scope of representation presented to a client for consideration or signature.”<sup>194</sup>

Second, the court stated that Lawyer “should not have presented [Client] with a separate, standard form of retainer agreement. Whether or not the retainer was ‘boilerplate’ . . . , the point is that it conflicted with the letter. . . .”<sup>195</sup> Emphasizing that Client did “not argue nor are there facts to support any contention that she reasonably believed the retainer supplanted the terms of the . . . letter or that she expected from [Lawyer] unlimited representation under the retainer,” the court reasoned that “[c]onsent to limit the scope of representation under RPC 1.2(c) should be included in a single, specifically tailored form of retainer agreement.”<sup>196</sup>

Finally, the *Lerner* court made a suggestion for the future:

Without intending to tread upon the jurisdiction of the Supreme Court in making and promulgating the Court Rules or in the governance of the practice of law, we would further suggest that for the protection of both attorneys and the public, when incorporation of a mediated [property settlement agreement] is sought, any party's consent to limit the attorney's scope of representation under RPC 1.2(c) should be fully disclosed to the court and, if the court requests it, the executed retainer agreement should be offered to the court for review.<sup>197</sup>

In Chapter 6, we identify, step by step, what a lawyer can do to avoid malpractice liability for limited representation. To summarize, based on the *Lerner* decision, the lawyer should: 1) clearly describe the limits of the scope of representation (both what the lawyer will,

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* The court noted that “in the course of these proceedings [Lawyer] did not rely on that part of his letter as a defense. He acknowledged that the limitation was unenforceable.” *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at n.2.

and will not, do); 2) obtain informed consent to those limits from the client; 3) embody all of the agreements, and the client's informed consent to them, in a written retainer agreement that the client and lawyer sign; and 4) repeat steps 1-3 if the lawyer and client subsequently decide to change the scope of representation.

In sum, all the available data indicate that the incidence of malpractice claims for limited representation is very low, and that carriers are covering limited representation under their standard policies. We believe that if lawyers follow the steps set forth in Chapter 6, or steps like these, and develop and use risk-management forms like those set forth in the appendices, they not only can successfully limit their exposure to malpractice claims; they also will be able to demonstrate to malpractice carriers that they have taken steps to alleviate any concerns that carriers might otherwise have about underwriting limited scope legal assistance.

## Chapter 5: Determining Whether Limited Scope Legal Assistance is Appropriate

Lawyers should consider several factors in determining whether limited representation is appropriate, including the capabilities of the client, the nature and importance of the legal problem, the degree of discretion that decision-makers exercise in resolving the problem, the type of dispute-resolution mechanism, and the availability (or not) to the client of other self-help resources.

We offer some general observations about the “best candidates” for limited representation, while acknowledging that the specific set of circumstances in each case will control.

### A. The client

M. Sue Talia warns clients who choose limited representation that you “must be prepared to live with the consequences of [your] decisions, even if they turn out differently than you hoped or expected.”<sup>198</sup>

Talia claims the best candidates for limited scope assistance have a degree of emotional detachment, the willingness and ability to handle some “legal paperwork”, some capacity to gather and analyze financial information, reasonable decisiveness, willingness and ability to handle details and follow through on obligations, and the necessary time to perform delegated tasks.<sup>199</sup>

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<sup>198</sup> TALIA, *supra* note 1, at xiii. *See also* Appendices 3-4 (providing explanations of limited representation that lawyers can provide to prospective clients).

<sup>199</sup> TALIA, *supra* note 1, at 13-19. Conversely, she says, people who consider themselves victims (without a factual basis), or are married to dishonest and larcenous spouses, are not good candidates for limited legal services. *Id.* Forrest S. Mosten offers an 18-factor test, which prospective clients can take, and which lawyers can use, to determine whether limited-service representation is appropriate. MOSTEN, *supra* note 1, at 6-7.

This is the profile of an *ideal* limited-service client. In many situations, people who are less than ideal have no choice other than to accept limited representation, and therefore, to partially represent themselves. We believe a number of these litigants can substantially help themselves, especially if the tasks they are asked to perform are relatively simple and there are self-help services (in addition to those the lawyer provides) available to the litigants.

Evaluations of *pro se* litigant-assistance programs have found that a substantial percentage of self-represented litigants are capable of helping themselves.<sup>200</sup> One survey in Maryland concluded:

What distinguished the capable from the incapable *pro se* litigant ... was not the difference between a high school or college education. Rather, it was more basic factors: the ability to speak and read English; a basic intelligence level; the absence of emotional and mental disorders; and some degree of self-motivation, among other qualities.<sup>201</sup>

We offer two cautions about these studies. They usually measure the ability of *pro se* litigants, *with assistance*, to perform relatively simple tasks, for example, to fill out simplified pleading forms. This is to say that self-help ability is relative to the complexity of the tasks a partially-represented litigant is asked to perform.

These studies also do not, and cannot be expected to, measure the fairness of the outcomes of the assisted *pro se* litigants' cases.

## **B. The matter**

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<sup>200</sup> See generally GREACEN, *supra* note 15.

<sup>201</sup> Michael Millemann, Nathalie Gilfrich, & Richard Granat, *Limited-Service Representation and Access to Justice: An Experiment*, 11 AM. J. FAM. L. 1, 5 (1997).

There are several considerations in evaluating whether a matter lends itself to limited scope assistance, including the importance of the interests at stake, the complexity of the matter, and the amount of discretion a judge or other decision-maker will exercise in resolving it.

In the last respect, one study of assisted *pro se* litigation divided legal problems into three categories: 1) “largely mechanical justice,” 2) “limited judgment and discretion,” and 3) “substantial legal judgment and discretion.”<sup>202</sup> As the degree of decisional discretion increased from the first through the third categories, the need for legal representation also increased.<sup>203</sup>

In the first category were “uncontested divorces involving neither children nor significant property”, “custody cases when the non-custodial parent had disappeared”, and “uncontested custody cases.”<sup>204</sup> The services that the project provided in this category were very limited, and the majority of otherwise *pro se* litigants adequately handled the remaining tasks themselves.<sup>205</sup>

In the second category were “divorces that were uncontested with the exception of child support” (child support awards were governed by “guidelines” that significantly limited judicial discretion, and after the resisting litigant learned this, the cases became uncontested), groundless disputes about visitation rights, and modifications of visitation schedules and child-support orders because of changes in circumstances.<sup>206</sup> The project provided more substantial advice and coaching to these litigants.<sup>207</sup>

In the third category were complicated matters, including “child-snatching” and real threats of physical abuse, to which we would add complex issues like the division of pension plans; the valuation of businesses, bonds and intangible property; and disputes over child

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 5.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 6.

<sup>207</sup> *Id.*

custody.<sup>208</sup> The study indicated that even with issues like these, the project staff (trained and supervised law students) often was able to give useful preventive advice to the litigants.<sup>209</sup> This suggests that the *role* of the lawyer is an important factor in assessing the effectiveness of limited services. When the limited-service lawyer is practicing “preventive law”, by providing the client with *forward-looking advice* that the client can use to avoid legal problems, limited representation is extremely valuable even if the issues are complex.<sup>210</sup>

### **C. Other supportive services**

Limited representation is more feasible and effective in jurisdictions that offer supportive services to partially-represented clients. The availability of such services can substantially reduce the time the lawyer needs to devote to the representation, and thereby reduce the cost to the client. This increases the number of people who can afford to pay for some representation.

In Chapter 2(A)-(C), we described the support services offered by many *pro se* assistance programs, hotlines, and websites across the country. Among the most important of these services are “packages” of simplified pleading forms (and directions on how to use them), flow charts that show the essential steps in the process and the locations (room numbers) of the principal actors, and simplified procedures in cases. These aids can save considerable amounts of lawyer time.

### **D. The dispute-resolution method**

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> To further identify matters in which limited scope legal assistance can be useful, we recommend that the reader return to the examples of limited representation in Chapter 2(D)-(M). These descriptions of categories of limited services contain examples of typical matters in which limited services are provided, including family, bankruptcy, simple consumer, housing, and community/environmental matters.

The dispute-resolution method is another relevant factor. It may be easier, for example, for some partially-represented clients to mediate, rather than litigate disputes. Others may find the small claims process to be simpler. Still others may respond better to arbitration or the structure of more formal litigation.

### **E. The Judge**

The additional assistance a judge provides to a partially-represented party can determine whether the limited legal assistance the lawyer has provided will be effective. The Pro Se Implementation Committee of the Minnesota Conference of Chief Judges developed a judicial protocol for *pro se* cases.<sup>211</sup> It advises judges, among other things, to “explain the process” (including the order in which testimony will be taken and how a party can question a witness); “explain the elements” (in simple terms); “explain that the party bringing the action has the burden to present evidence in support of the relief sought”; “explain the kind of evidence that may be presented” (testimony and exhibits); “explain the limits on the kind of evidence that can be considered” (including relevancy and hearsay limits); “ask both parties whether they understand the process and procedure”; allow “non-attorney advocates” to “sit at counsel table with either party and provide support” (without permitting them “to argue on behalf of a party or to question witnesses”); ask questions that elicit “general information”; “avoid the appearance of advocacy” (e.g., “Tell me why you believe you need an order for protection”); and, if possible, decide the matter and prepare the order “upon the conclusion of the hearing so that [the order] may be served on the parties.”<sup>212</sup>

Whether or not out-of-court assistance will materially help a party often may depend on the judge’s willingness and ability to take steps like those described above.

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<sup>211</sup> See The ABA’s Judge’s Journal 42, No. 1 (Winter 2003).

<sup>212</sup> *Id.*

## Chapter 6: Providing Limited Scope Legal Assistance to Clients

There is no single “right” approach to providing limited scope assistance to clients. There are, however, several common steps that experienced limited-service lawyers recommend, and follow in their practices.

### **A. Informational Materials: Consider providing self-help informational materials to prospective clients in your waiting room, through the mail, or on-line.**

Forrest Mosten provides an excellent description of the ways in which lawyers can adapt their offices, and the information they provide, to market limited representation and to begin to help litigants to help themselves.<sup>213</sup> The information includes explanations of limited representation, descriptions of ways in which lawyers and clients work together in limited-service partnerships, summaries of substantive and procedural law within the lawyer’s specialty areas, and interview questionnaires and forms with instructions on how to use them.<sup>214</sup> This helps prospective clients to understand limited representation, consider whether it is right for them, and, in some cases, to begin to help themselves to resolve their problems.<sup>215</sup>

### **B. Field of Practice: Stay within your field of practice.**

You must be competent in your field before you provide any type of legal service to a client. Limited services are no exception. The acceptable limitation is on the scope of the service, not on one’s competence to provide it. In Chapter 9(C), we discuss the ethics rules concerning competency. We also provide a hypothetical limited-service case example to describe how the competency requirements may change as the complexity and scope of services in a matter increase and expand.

### **C. Conflicts: Check for them.**

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<sup>213</sup> See generally, MOSTEN, *supra* note 1, at 57-71.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

You will be establishing attorney-client relationships with those to whom you provide legal services, even if the services are very limited. Lawyers owe the same duties of loyalty, confidentiality, diligence and competence to limited-service clients as they do to full-service clients. Avoiding conflicts of interest is a component of the duties of loyalty and confidentiality.

The traditional conflicts of interest rules apply to the types of limited representation that most lawyers provide, even though briefer client relationships usually mean more clients.

In Chapter 9(D), we discuss the ABA's new conflicts of interest rule for lawyers who provide limited representation as part of high-volume *pro bono* and legal services programs.

We provide a number of sample limited-service retainer agreements in Appendices 5-13. We recommend adding to them an additional conflicts of interest provision that: 1) states that the lawyer has conducted a conflicts of interest inquiry which has revealed no conflicts, and 2) describes what will happen if, subsequently, a conflict is discovered or arises.

#### **D. Initial Interview: Make it thorough and comprehensive.**

The Colorado State Bar Association Ethics Committee found that limited assistance includes “advice from lawyers who supplement case management without dominating it. In such circumstances, the lawyer is retained to *diagnose legal problems*, but not to appear as counsel of record.”<sup>216</sup>

The initial “diagnostic interview is critical” in limited representation, in part because, “[u]nlike a full representation case, if you miss a critical issue in the initial interview you will generally not get another chance to pick up the pieces later in the case.”<sup>217</sup> It also is “[p]erhaps the most fundamental legal skill” of a lawyer in that it “consists of determining what kind of

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<sup>216</sup> Colo. Bar Ass’n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), *available at* [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003) (emphasis added) (Appendix 32).

<sup>217</sup> M. Sue Talia, *Advice on Limited Representation for Lawyers*, *infra* Appendix 1.

legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.”<sup>218</sup>

You may have a standardized interview form or questionnaire. If not, we recommend that you develop one. In the appendices are several checklists.<sup>219</sup> Guides like these can improve the quality and efficiency of interviews and create records of lawyer-client agreements. They therefore are important risk-management tools.

**E. Problem Identification: Identify the problems that the client presents, and determine the client’s goals.**

The first interview steps are to identify the problems for which the client seeks assistance, and to work with the client to determine the client’s goals. We say no more, not because these steps are unimportant—on the contrary, they are the primary objectives of any good interview—but because they are the same steps that lawyers take in both full-service and limited-service interviews.

**F. Advice and Options: Advise the client about the available strategic and representational options, and help the client make selections.**

The client initially must select a strategy (or alternative strategies) for resolving the problems, for example, negotiation, mediation, or litigation. The lawyer then can present the client with representational options, i.e., the range of services that the lawyer can provide to effectuate the strategy.

The lawyer’s retainer agreement may set out the representational options, for example, in checklists that have 10, 15 or more categories of services.<sup>220</sup> Other agreements simply have blank spaces where the lawyer and client can write in the services they have decided that the lawyer

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<sup>218</sup> MODEL RULES OF PROF’L CONDUCT 1.1, cmt 2 (2003).

<sup>219</sup> See *infra* Appendices 14-18.

<sup>220</sup> See *infra* Appendices 5-8, 10.

will provide.<sup>221</sup> Still others have preprinted service provisions, when the lawyer provides the same limited services to all clients.<sup>222</sup>

M. Sue Talia advises clients that this planning phase “is not a time to get cheap about paying your lawyer. The savings occur because you will only be paying for the services that you want and need.”<sup>223</sup> She adds that the first rule of apportioning tasks is clarity:

[M]ake no assumptions. Take the time to spell out *exactly* what you want the attorney to do and what you intend to do yourself. Fully discuss all of the legal and factual issues in your case. You will, in fact, spend *more* time with your attorney discussing the facts and legalities if you unbundle, because it is so critical that you are clear on what each of you is doing and how your roles intermesh....The division of responsibility must be stated clearly and in writing.<sup>224</sup>

As part of this planning process, the client needs to identify how much he or she can spend on the litigation, and the client and lawyer then need to allocate the available funds to the tasks, services and costs of the litigation.

**G. The Lawyer’s Tasks: Identify what the lawyer will, and will not, do.**

There are at least three dimensions of the scope of representation: 1) the legal problem for which the lawyer will provide services; 2) the remedial measures the lawyer will take to resolve the problem; and 3) the services the lawyer will provide in the process. The lawyer and client should clearly provide for each in their retainer agreement, specifically identifying the legal problems, remedial measures, and services that are within the scope of the limited-service agreement.

The client and lawyer may agree that the lawyer will provide full representation—pretrial investigation through mediation and litigation—on one issue in a case, for example, a contested

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<sup>221</sup> See *infra* Appendix 9.

<sup>222</sup> See *infra* Appendix 11.

<sup>223</sup> TALIA, *supra* note 1, at 37.

<sup>224</sup> *Id.*

custody issue in a divorce case. The retainer agreement should clearly limit the representation to that problem, and describe the services the lawyer will provide, and the forums in which the lawyer will provide those services.

Or, the lawyer and client may agree that the lawyer will provide a limited service—drafting a complaint—in a case that has several legal problems, for example, a divorce case in which there are disputes about the grounds for divorce, the disposition of property, marital support, child custody, and child support. The retainer agreement should clearly limit the representation to that service, describe the problems for which the service is being provided, and explain that the lawyer is providing no service after drafting the complaint, i.e., that the lawyer will not file the complaint (the client must do this), or represent the client in any post-filing step in the process.

The lawyer must also alert the client to reasonably apparent related problems and remedies that are beyond the scope of the limited-service agreement. For example, in interviewing the client about one legal problem (the “first problem”), it may be reasonably apparent that the client has another related legal problem (the “second problem”). The lawyer should alert the client to the second problem even though the lawyer and client have limited the scope of representation to the first problem. The lawyer also should make it clear, including in the written retainer agreement, that the lawyer is not representing the client on the second problem, and that the lawyer has advised the client to seek separate representation for that problem if the client wishes to pursue it.

The lawyer should take the same approach when there are several possible remedies for the problem that is within the scope of the agreement (i.e., the first problem). For example, when a client has a right to pursue a claim before both an administrative agency and in a court, or to

sue more than one party, the lawyer needs to explain these options to the client. This assumes, of course, that these truly are options. In some cases, it will not be possible, without jeopardizing the client's claim, to bypass an administrative remedy (when "exhaustion" of that remedy is mandatory), or to refrain from suing a defendant (when that defendant is a "necessary" party).

In those cases in which there are such options, if the lawyer and client agree to limit the scope of the engagement to one forum or to one defendant, the lawyer should make it clear, including in the written retainer agreement, that the lawyer is not representing the client in the second forum and is not suing the second defendant. The lawyer should advise the client to consult with other counsel if the client decides to pursue the remedies that have been excluded from the scope of the limited-service agreement.<sup>225</sup>

In an ethics opinion about limited representation, the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee described this duty: "The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation." This duty applies, the Committee stated "whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis."<sup>226</sup>

We do not suggest that a lawyer has an affirmative duty to look for, and advise clients about collateral legal problems that are not reasonably apparent or related to the primary

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<sup>225</sup> In *Nichols v. Keller*, the Court of Appeals of California held that a lawyer who did not take these steps was guilty of malpractice. 19 Cal. Rptr. 2d 601, 610 (Cal. Ct. App. 1993). In *Nicolas*, the plaintiff, who was the employee of a subcontractor, was injured while on the work site of the general contractor. *Id.* at 604. The lawyers filed a worker's compensation claim against the subcontractor without advising the client that he also had a negligence action against the general contractor. *Id.* at 604-05. The court found this was malpractice. *Id.* at 610.

<sup>226</sup> L.A. County Bar Assoc. Prof'l Responsibility and Ethics Comm., Ethics Op. 449 (March 1988).

problem. Rather, the duty is limited to giving clients notice of reasonably apparent and related legal problems and remedies in the process of limiting the scope of the representation to *exclude* them. It is, therefore, part of the process of obtaining the client's informed consent to the limits of the representation.

#### **H. The Client's Tasks: Identify what the client can do.**

Some clients can effectively perform tasks that will reduce the amount of the fee the client will need to pay the lawyer, thereby making the representation affordable. For example, some clients have clerical and administrative skills. They can type pleadings, organize and maintain documents, and provide other support services to lawyers, particularly lawyers in solo practices who have limited support staff.

John H. Price, Jr., a Maryland lawyer who provides limited as well as full services to clients, offers another example of how a lawyer can use the time of a client to substantially reduce the costs of representation.<sup>227</sup> He asks his clients to be responsible for the "dead time" in his practice, for example, by filing papers in court, serving papers (when they can under the state rules), and attending conferences and hearings and calling him when their cases are called. (He has an office close to the courthouse in which he primarily practices). He argues that the billed hours that lawyers spend unproductively substantially inflate lawyers' fees, and preclude many people from retaining counsel.<sup>228</sup>

In each of the 13 types of limited representation that we described in Chapter 2, there are also tasks that some clients can perform to partially represent themselves. Before the client and lawyer can determine what tasks the lawyer will perform, they must assess whether, and to what extent, the client can perform some of the required tasks. Clients who can pay for full

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<sup>227</sup> Interview with John H. Price, Jr.

<sup>228</sup> *Id.*

representation may wish to perform some of the required tasks. Clients who cannot, may be required to do so.

In either case, the client and lawyer will need to go through the process of identifying and apportioning responsibility for tasks. Appendices 15-17 are very useful forms that M. Sue Talia has developed to guide the lawyer and client through this process. Appendix 15 is a “task” apportionment checklist, and Appendix 16 is an “issue” apportionment checklist. Appendix 17 is a summary sheet, to help the lawyer and client review and monitor the apportionment of tasks and issues.

These appendices not only help the lawyer and client make the apportionment decisions; they also memorialize these decisions, and are therefore important risk-management mechanisms.

### **I. Informed Consent: Obtain informed consent from the client for the representation.**

The lawyer must obtain the informed consent of the client for the representation and memorialize it in the retainer agreement. Although there is no one-size-fits-all explanation for clients, it might include a general description of limited representation, a specific description of the type of limited representation the lawyer will provide to the client, what the lawyer and client each will do, what the lawyer will *not* do under the agreement (a little redundancy here helps), whether the lawyer will enter an appearance and when and how the lawyer will withdraw or strike that appearance (making it clear the client will be required to support the withdrawal), whether and how the lawyer and client can modify the initial agreement if they need or want to do so, and identification of the risks of limited representation.<sup>229</sup>

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<sup>229</sup> In Formal Opinion 101, the Colorado Bar Association Ethics Committee said that a lawyer providing limited representation to an otherwise *pro se* litigant ought to explain that the “litigant

Although the ethics rules in most states do not require that a client's consent to limited representation be in writing, Barrie Althoff, former Chief Disciplinary Counsel of the Washington State Bar Association, advises lawyers that, "as a matter of good practice and self-protection it should be."<sup>230</sup> It could be a part of your written fee agreement, or in a memorandum attached to it, or a letter to your client confirming and describing your mutual decision to limit the scope of your representation."<sup>231</sup> He explains that "[i]f your client disputes the limitation, the written consent would be merely one part of the relevant evidence, which might also include other documentation, your billing statements, or your course of conduct."<sup>232</sup>

If there is informed consent for limited representation, and it is reasonable under the circumstances, the lawyer and client should have the right to adopt any variant of limited representation that they wish. This is a contractual right. It protects the client's right of access to justice. It also respects the lawyer's discretionary and contextual judgment about the potential usefulness of a particular service to a particular person in a particular case.

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may be confronted with matters that he or she will not understand. Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), *available at* [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003) (Appendix 32). That, however, is the trade-off which is inherent in unbundled legal services." The risks of partial representation, the Committee stated:

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.

*Id.* The Committee acknowledged that, "[s]ince 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." *Id.* It found that "the lawyer should counsel the client about those risks and problems which are typical in cases of the type presented by the client." *Id.*

<sup>230</sup> ALTHOFF, *supra* note 7.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* The ABA revised Rule 1.5 of the Model Rule of Professional Conduct to make it "preferable" that the "scope of the representation" to which a lawyer and client agree be in writing. GILLERS AND SIMON, *supra* note 34, at 53.

**J. Written Retainer Agreement: Embody all of the agreements and understandings, and the informed consent, in a written retainer agreement.**

Limited-service agreements, as well as client consent to them, should be in writing for the same reasons that full-service agreements should be.<sup>233</sup> There are additional reasons as well.

Because of the prevalence of full-service representation, clients may wrongly assume that lawyers will provide more than limited services to them. A written agreement, accompanied by a careful explanation, will help to dispel such an assumption.

There should be, in any event, a written description of how the lawyer and client have agreed to allocate the required work.

Moreover, the fee and scope-of-services agreements usually are linked, and if a lawyer needs to enforce a fee agreement, it will be very helpful if it *and* the related scope of services agreement are in writing.

A written limited-service agreement also will help to *prevent* disputes. It will refresh the recollections of clients who, in good faith, do not accurately recall the agreement, and discourage some clients from intentionally giving revisionist accounts of the agreement.

If there are later disagreements, a written agreement will help to resolve them more fairly and efficiently.

In addition, when a lawyer who enters into a limited-service agreement asks a court to enforce it, the court may require that the agreement be in writing and that the lawyer file a copy of it with the court. For example, when a lawyer, who has entered an appearance in court pursuant to a limited-service agreement completes the promised work and seeks to withdraw

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<sup>233</sup> Our caveat in Chapter 1 and Chapter 2 (B) and (C) about the special needs of hotline and online-service providers applies to signed retainer agreements. Although we believe all legal services agreements should be memorialized, it may not be possible to do this in a signed writing, as opposed to an unsigned writing, when the lawyer is providing the legal service by telephone or online.

from the representation, a judge is more likely to allow this if the agreement is in writing. Some states have revised their ethics rules to *require* a written retainer agreement under these circumstances.<sup>234</sup>

Appendices 5-13 provide nine examples of written retainer agreements. In Appendix 35, we note the suggestion in a recent New Jersey limited-service malpractice opinion that the retainer agreement explicitly refer to the ethics rule permitting limited representation. In most states, the applicable rule is based on Rule 1.2 (c) of the Model Rules of Professional Conduct.<sup>235</sup>

**K. Revision Provision: Anticipate the need to revise the agreement by adding a flexible revision provision to it.**

There is a frequent need to revise limited assistance agreements. To accommodate this need, M. Sue Talia recommends including the apportionment of tasks in an appendix to the retainer agreement, rather than in the agreement itself.<sup>236</sup> When the need to re-apportion tasks arises, the lawyer and client can do it by replacing the original appendix with a new one. The other terms of the retainer agreement do not change, at least when the lawyer is billing on an hourly rate. The lawyer and client need to re-execute the replacement appendix and memorialize the revisions.

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<sup>234</sup> Maine is one state that requires this. *See* ME. BAR R. 3.4(I). *See also infra* Chapter 10(A)(2) and Appendix 25 (containing and discussing Maine’s new ethics rules).

<sup>235</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2003).

<sup>236</sup> *See infra* Appendices 15-16 (providing “task” and “issue” apportionment checklists) and 17 (containing a checklist summary of apportionment decisions). These are examples of possible appendices to a limited-service retainer agreement.

## Chapter 7: Special Issues in Carrying Out the Limited Scope Representation Agreement

We organize this discussion around three major categories of limited scope assistance: document preparation; coaching; and limited court appearances.

### A. Document preparation

Lawyers who prepare pleadings for litigation, but do not enter their appearances, must decide whether to reveal their drafting roles in the documents they prepare.<sup>237</sup> A focus group of limited-service lawyers in California voiced the following concerns about requiring lawyers to disclose that they had prepared pleadings for otherwise *pro se* litigants: 1) “increased liability”; 2) “worry that a judicial officer might make them appear in court despite a contractual arrangement with the client limiting the scope of representation”; 3) “belief that they are helping the client tell his or her story - and that the client has a right to say things that attorneys would not include if they were directing the case”; 4) “fear that the client might change the pleading between leaving the attorney's office and filing the pleading in court”; 5) “apprehension that their reputation might be damaged by a client's inartful or inappropriate arguing of a motion”; 6) “concern that they would be violating the client's right to a confidential relationship with his or her attorney”; and 7) “worry that they may not be able to verify the accuracy of all the statements in the pleading given the short time available with the client.”<sup>238</sup>

We believe current rules provide reassuring answers to some of these concerns. We also recommend, however, that states modify their ethics and civil procedure rules to fully resolve these issues, and to encourage lawyers to provide document-preparation services to clients.

#### *1. No increased liability*

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<sup>237</sup> In Chapter 9(E), we pose and answer common ethical questions about document preparation.

<sup>238</sup> CALIFORNIA REPORT ON LIMITED ASSISTANCE, *supra* note 33, at 15.

Addressing the first concern of the California focus group, we note that here is no evidence of a greater incidence of malpractice claims against document-preparers than against lawyers generally. This holds whether or not the lawyers disclose their drafting roles. Instead, the recipients of drafting assistance express high levels of satisfaction with these services.<sup>239</sup>

*2. Precluding judicial conversion of partial representation into full representation*

In a growing number of jurisdictions, courts have adopted rules or practices that protect lawyers who prepare documents for otherwise *pro se* litigants from being “conscripted” into full-service representation by courts, the second concern of the California focus group. These jurisdictions resolve the disclosure issues in different ways.

In California, a new rule applicable to family law proceedings regulates lawyers who draft, or assist clients in drafting, legal documents, but do not make appearances in the cases. The rule provides that these lawyers are *not* required to disclose in the documents (or otherwise) that they were involved in preparing the documents. *See* Appendix 24.

Similarly, Washington’s new rules do *not* require a lawyer to disclose the drafting assistance the lawyer has provided to an otherwise *pro se* litigant.<sup>240</sup> By implication, they authorize “ghostwriting”, and preclude courts from requiring ghostwriters to provide full representation to clients.<sup>241</sup>

In Colorado, “[t]he attorney must advise the *pro se* party that a pleading or paper for which the attorney has provided drafting assistance must include the attorney's name, address,

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<sup>239</sup> GREACEN, *supra* note 15, at 16-20.

<sup>240</sup> WASH. SUPER. CT. R. 11(b).

<sup>241</sup> *See infra* Chapter 10(C) (discussing of Washington’s rules and their adoption) and Appendix 27 (providing the text of Washington’s rules and the drafters’ commentary).

telephone number and registration number.”<sup>242</sup> However, this disclosure requirement does “not apply to attorneys who assist *pro se* parties in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court.”<sup>243</sup> Most important, such disclosure “shall not constitute entry of appearance by the attorney” and “does not authorize or require the service of papers upon the attorney....”<sup>244</sup>

A middle ground is provided by rules that allow anonymous disclosures, for example, a statement that “an attorney helped to prepare this pleading”, without the requirement that the attorney identify him or herself by name.<sup>245</sup> Again, these rules implicitly preclude full-service conscription.

In Chapter 11, we recommend that jurisdictions that have not yet addressed this issue make it clear that courts should respect the limits of limited-representation agreements.

### 3. Satisfying Rule 11 requirements

This issue, which involves the third, sixth and seventh concerns of the California lawyers, arises under state rules that are the equivalents of Rule 11 of the Federal Rules of Civil Procedure.<sup>246</sup> Rule 11 requires a lawyer who drafts a pleading for an otherwise *pro se* litigant to certify, to the best of the lawyer’s information, knowledge, and belief, that there are meritorious grounds for the allegations in the pleading.<sup>247</sup>

The general consensus that emerges from ethics opinions and recent rule revisions is that a lawyer who prepares documents for an otherwise *pro se* litigant can not knowingly make frivolous allegations, but need not conduct an independent investigation of the facts beyond what

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<sup>242</sup> COLO. R. CIV. P. 11(b) (Appendix 26).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See e.g., WASH. SUPER. CT. R. 11. See also discussion, *infra* Chapter 10(A)(3).

<sup>246</sup> FED. R. CIV. P. 11. See note 303 for relevant text of Federal Rule 11.

<sup>247</sup> FED. R. CIV. P. 11.

the client tells the lawyer, unless the lawyer knows, or has good reason to know, that what the client is saying is false. In that case, the lawyer should conduct the additional investigation that the lawyer reasonably believes is warranted.<sup>248</sup>

#### *4. Preventing client's revision of pleadings*

M. Sue Talia recommends that when a lawyer fears that a client may revise a pleading after the lawyer has drafted it (the fourth concern of the California lawyers), the lawyer's office, and not the client, should file the pleading after the client has signed it. In any event, it is clear that, absent prior knowledge of the lawyer, the lawyer is not responsible for allegations that the client adds to a pleading.

#### *5. No loss of reputation*

The reputations of lawyers who provide limited scope assistance to clients are not undermined by the sometimes inartful or inappropriate advocacy of their partially-represented clients (the fifth concern of the California lawyers). The limited-service lawyers with whom we talked indicated that judges are able to distinguish the work products of lawyer and client, and do not visit the sins of the client on the lawyer. Indeed, many judges have expressed their special appreciation to the lawyers for providing limited scope assistance to parties who otherwise would have received no assistance.

### **B. Ongoing coaching**

Coaching may sometimes delay the dispute-resolution process. Obviously, a lawyer-coach should avoid unreasonably delaying the process. If the client cannot make decisions

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<sup>248</sup> See *infra* Chapter 9(E) (discussing this issue in more detail). Addressing the lawyer's related (sixth) concern—that disclosure of the lawyer's role would breach a confidence—we note that in most jurisdictions the fact that a lawyer represents a client is not privileged. Where special circumstances exist, under which disclosure of the fact of representation would disclose privileged information, we agree that disclosure should not be required.

without first consulting the lawyer, for example, during mediation or at a settlement conference, the coach should be readily available by phone (on “standby”), so that the client does not ask the mediator or judge to unreasonably delay the process. Judges should give the client a reasonable opportunity during the proceeding to communicate with the lawyer-coach.

Communications issues can arise when lawyers provide ongoing coaching to otherwise unrepresented clients. Can an opposing lawyer communicate directly with a partially represented client? The answer is “yes” when the existence of the coach has not been disclosed to opposing counsel. The answer is “no” if the coach or partially-represented client has notified the opposing lawyer of the coach’s role, the communication concerns a matter within the scope of the coach’s role, and the coach or client have asked opposing counsel to communicate with the coach about this matter. Some of the new state rules that we discuss in Chapters 9 contain such provisions.<sup>249</sup>

### **C. Litigation**

The communications issues that arise when an otherwise *pro se* party has a lawyer-coach also arise when a party and that party’s limited-service lawyer each are performing tasks in litigation. The lawyer may be providing representation on one issue or at one proceeding in the case, and the client is handling the remainder of the case. The lawyer and client should provide opposing counsel with the communication ground rules. If opposing counsel has doubts, he or she should seek clarification from the partially-represented client’s lawyer.

The ground rules should include directions about whom the opposing lawyer should contact and on what matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer is authorized to accept service for the client.

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<sup>249</sup> See *infra* Chapter 9(F) (discussing ethical opinions and recent rule revisions that deal with this and other communications issues).

A simple way of handling the paper flow would be to ask opposing counsel to send copies of all papers to both the lawyer and partially-represented client, in effect, treating them as co-counsel.

The partially-represented client and lawyer also need to provide communications ground rules to the court and clerk's office. The best possible approach, we believe, would be to request the clerk's office to send notices, orders, and other legal papers, to both the lawyer and partially-represented client. If the clerk's office cannot or will not send duplicates in this manner, then the lawyer and the partially-represented client should give the clerk's office one set of contacts--either those of the lawyer or of the client--for communications from the court. The lawyer and client can then agree on the process for sharing these communications with one another.

When the lawyer and client have divided litigation responsibilities between themselves "bifurcation" issues may arise, for example, whether the court will allow the lawyer an opportunity to brief and argue the issue the lawyer is handling before requiring the client to proceed on the issue for which the client is responsible. Lawyers should be reasonable in seeking to bifurcate proceedings to accommodate such limited-representation arrangements. If the issue for which the lawyer is representing the client is the major source of the dispute, bifurcation may make sense. Resolution of the dominant issue, with the help of the lawyer, may allow the parties to quickly reach agreement on the collateral issues.

Bifurcation also may be appropriate on the same grounds--convenience, efficiency and fairness--that justify a trial court generally in severing issues in a lawsuit. In weighing the sometimes competing interests at stake in a bifurcation decision, we believe courts should give great weight to the parties' interests in legal representation, especially when bifurcation is the only way in which one of the parties will be able to obtain representation.

## Chapter 8: Ending Limited Scope Representation

The good practices that generally apply in ending full-service representation apply to limited scope representation. The retainer agreement should specify how and when the representation will be completed. The lawyer should inform the client, usually in writing, when the lawyer has completed the legal work that the lawyer promised to do. If the lawyer has given the client regular status reports, this close-out letter should not surprise the client.

When the legal work is the preparation of documents for litigation, the retainer agreement should specify whether the lawyer or client will file the documents, and whether the lawyer has any post-filing responsibilities. If not, the professional relationship ends when the lawyer provides the documents to the client or files them, depending on the agreement.

When the lawyer agrees to provide coaching, there may be one retainer agreement for ongoing coaching until the matter is concluded. It should specify each of the events for which the lawyer will coach the client.

Or, the lawyer and client can take it a step at a time, entering into a succession of retainer agreements as the client adds events or functions for which the lawyer will provide coaching.<sup>250</sup>

Whichever coaching option the lawyer and client choose, the agreement should clearly state when it begins, what work it includes, how it can be revised, and when it will end.

Limited-service representation in litigation raises more complicated issues. The major issue is whether a lawyer who partially represents a client in court can do so by a “limited appearance,” and withdraw when the lawyer has provided the promised limited services. Here, we do not give the traditional meaning to “limited appearance,” which usually means an

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<sup>250</sup> See *infra* Appendices 12-13 (examples of coaching agreements).

appearance to challenge the court’s jurisdiction. Rather, our use of the term means that the lawyer appears only to provide those services set forth in a limited-service retainer agreement.

Some of the new state rules that govern limited representation, as well as some local rules and practices, provide that the attorney-client relationship ends, without the requirement of court approval, when the lawyer provides the promised in-court assistance.

For example, the Maine Supreme Court amended its rule governing withdrawal from representation to allow “the client and lawyer to agree to the parameters, including time limitations, on the scope of representation, and allow...the attorney to withdraw from pending litigation or otherwise terminate representation in accordance with the agreement with the client and [another rule governing withdrawals].”<sup>251</sup>

Similarly, Washington’s new rules authorize lawyers to enter limited appearances for particular proceedings, and provide that, “[a]t the conclusion of such proceedings the attorney’s role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance....”<sup>252</sup>

The Florida Supreme Court is considering revising its Rules of Procedure in Family Matters to allow an attorney to make an appearance limited to a “particular proceeding or matter.”<sup>253</sup> Under the proposed revisions, at the conclusion of that proceeding or matter, “the

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<sup>251</sup> ME. BAR R. 3.5(a)(4), advisory note. *See also infra* Chapter 10(B) (discussing Maine’s rule revisions) and Appendix 25 (providing the text of the Maine’s rule revisions and advisory comments).

<sup>252</sup> WASH SUPER. CT. R.; WASH. C.R.L.J. 70.1. *See also infra* Chapter 10 (discussing Washington’s rule revisions) and Appendix 27 (containing the full text of Rule 70.1).

<sup>253</sup> FLA. FAM. L. R. P. 12.040 (proposed rule 2003). *See also* discussion, *infra* Chapter 10 (D) and Appendix 28 (providing the full text of the proposed rule).

attorney's role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance.”<sup>254</sup>

California recently adopted limited representation forms that require lawyers to “apply” to be “relieved” as counsel upon completion of the limited representation, and that give clients notice and a chance to object. The client may object, however, solely on the ground that the lawyer has not completed the limited service the lawyer promised to provide. *See* Appendices 21-23. We believe this approach protects the reasonable expectations of both lawyers and clients.

In those jurisdictions that have not yet established special rules or practices for limited representation in litigation, lawyers can take several steps to enforce the limits of their representational agreements, including these:

1. Put the agreement in writing and have the client sign it. Then, you can file it with a withdrawal motion.

2. Have the client consent in the written retainer agreement to your withdrawal when you have performed the promised limited services, and call this consent to the attention of the court when you seek to withdraw.

3. Work with your local bar and bench, as others have (see Chapter 10), to make sure judges understand the benefits to the fair and efficient administration of justice of enforcing limited representation agreements.

We also recommend that when a lawyer completes the limited representation, the lawyer invite the former client to evaluate the experience. Several of the leading limited-service lawyers do this, and they report that it has helped them to improve the quality of the services they provide to clients.

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<sup>254</sup> FLA. FAM. L. R. P. 12.040 (proposed rule 2003).

## Chapter 9: Ethical Issues Posed by Limited Scope Legal Assistance

In earlier chapters, we have touched on some of the ethical issues posed by limited legal assistance. We now more carefully consider them.<sup>255</sup>

### A. Limited representation generally.

There is no doubt that limited representation is an ethically permissible form of legal assistance.

#### *1. State ethics opinions*

In a comprehensive opinion, the Colorado State Bar Association Ethics Committee emphasized the importance of “unbundled” representation to the “[m]any individuals who do not qualify for public or private legal assistance programs, but who cannot afford the full service of a lawyer.”<sup>256</sup> The Committee concluded that Colorado’s ethics rules, which are based on the Model Rules of Professional Conduct, “allow unbundled legal services in both litigation and non-litigation matters.”<sup>257</sup>

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<sup>255</sup> See generally Changing the Face of Legal Practice; “Unbundled” Legal Services, at <http://www.unbundledlaw.org> (last updated Oct. 2002) for an excellent general source of online information about ethical issues related to limited representation.

<sup>256</sup> Colo. Bar Ass’n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), available at [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003) (Appendix 32).

<sup>257</sup> *Id.* The New Hampshire Bar Association Ethics Committee agreed:

Many low and moderate income individuals may want limited assistance, because that is all they can afford. In addition, organizations who provide legal assistance to these individuals may want to try to stretch limited resources further by providing unbundled services to the many rather than full services to the few. Accordingly, the legal profession may well want to support and encourage these practices.

New Hampshire Bar Association Ethics Committee, Unbundled Services- Assisting the Pro Se Litigant 1 (May 12, 1999), available at <http://www.nhbar.org/pdfs/PEAS-99.pdf> (last visited June 24, 2003) (provided in edited form in Appendix 34).

In deciding that legal services lawyers “may properly limit [their] involvement to advice and preparation of documents,” the Delaware State Bar Association Committee on Professional Ethics provided an excellent summary of the various state ethics opinions on limited representation.<sup>258</sup> The Committee found that these “opinions generally agree that it is permissible

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<sup>258</sup> Del. St. Bar Assoc. Comm. on Prof'l Ethics, Op. 1994-2, 2 (May 6, 1994), *available at* <http://www.dsba.org/ethics94-2.pdf> (last visited June 24, 2003) (provided in edited form in Appendix 33). Among the opinions the Delaware Committee cited were Ky. Bar Assoc. Comm. of Ethics, Op. E-343 (January, 1991) (finding it permissible for a lawyer to limit representation of *pro se* litigant to preparation of initial pleadings), Me. Prof'l Ethics Comm. of the Bd. of Overseers of the Bar, Op. No. 89, *available at* <http://www.mebaroverseers.org/PDF/89.pdf> (last visited June 25, 2003) (stating that attorney who drafted a complaint that the claimant signed and filed herself acted ethically), Ut. St. Bar Ethics Advisory Op. Comm., Op. 74 (finding it ethical for an attorney to prepare a pleading for a *pro se* litigant, which the litigant files); Va. St. Bar Assoc. Legal Ethics Comm., Op. 1127 (claiming it ethically “permissible for an attorney to limit his representation of a *pro se* litigant to providing general legal advice, recommendations of courses of action to take in discovery, legal research, and redrafting of pleadings initially prepared by the litigant”); and N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. No. 613 (Sept. 24, 1990), 1990 WL 304220 (holding that it was ethically proper for lawyer to provide advice to *pro se* litigants and to prepare pleadings for them). *See also* Ala. Bar Assoc. Ethics Comm., Op. No. 93-1 (March 19, 1993), 1993 WL 849636 (finding that a lawyer may ethically limit the scope of representation to preparing pleadings if client provides informed consent); St. Bar of Ariz. Ethics Comm., Op. No. 91-03, 4 (Jan. 15 1991), *available at* <http://www.azbar.org/Ethics Opinions/Data/91-03.pdf> (last visited June 24, 2003) (“a lawyer may [ethically] agree to represent a client on a limited basis as long as: (1) the client consents after consultation,...(2) the scope of the representation is not so limited as to [cause the attorney to violate] the Rules of Professional Conduct or other law,” and (3) the attorney does not advise the client to do something that the attorney would be prohibited from doing personally); Fla. St. Bar Assoc. Comm. on Prof'l. Ethics, Op. 79-7 (Feb. 15, 2000), 2000 WL 706048 (lawyer may ethically limit representation to preparation of pleadings); Mass. Bar Assoc. Comm. on Prof'l Ethics, Op. 98-1 (May 27, 1998), *available at* [http://massbar.org/publications/ethics\\_opinions/article.php?c\\_id=611&vt=2](http://massbar.org/publications/ethics_opinions/article.php?c_id=611&vt=2) (last visited June 24, 2003) (attorney may provide “limited background advice and counseling to *pro se* litigants” without disclosing role, and more substantial assistance, including preparation of pleadings, with disclosure); New Hampshire Bar Association Ethics Committee, *supra* note 256 (lawyer may provide limited assistance to client, with disclosure required or not “depend[ing] on the particular facts involved” in the matter); N.C. St. Bar Assoc., Ethics Op. 114 (July 12, 1991), *available at* [http://www.ncbar.com/eth\\_op/ethics\\_sel.asp](http://www.ncbar.com/eth_op/ethics_sel.asp) (last visited June 24, 2003) (legal services lawyer ethically may prepare a pleading for, and advise, a *pro se* litigant without signing the pleading or entering an appearance). *See also supra* note 43 (discussing ethics opinions authorizing hotline services).

for an attorney to limit his or her representation of a litigant to advice and the preparation of documents.”<sup>259</sup>

In the substantial majority of states, the ethical rules are derived from the ABA Model Rules of Professional Conduct.<sup>260</sup> Most of the ethics opinions in these states identify Model Rule 1.2 as the source of authority for limited-service agreements.<sup>261</sup> Rule 1.2 provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>262</sup>

The ethics rules in some states continue to be based on the older ABA Model Code of Professional Responsibility.<sup>263</sup> The Illinois State Bar Association Professional Conduct Commission cited Disciplinary Rule 2-110 to support its conclusion that limited legal assistance is ethical.<sup>264</sup> First, the Committee found that there is “no Rule, Ethical Consideration or prior opinion directly in point on the question.”<sup>265</sup> The Committee then argued, by analogy, that DR 2-110, the rule allowing lawyers to withdraw from representation, authorized limited representation because, “if an attorney may under certain conditions withdraw from representation at a certain stage in the litigation, it would seem that he may in advance, and upon

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<sup>259</sup> Del. St. Bar Assoc. Comm. on Prof’l Ethics, Op. 1994-2, 3 (May 6, 1994), *available at* <http://www.dsba.org/ethics94-2.pdf> (last visited June 24, 2003) (provided in edited form in Appendix 33).

<sup>260</sup> GILLERS AND SIMON, *supra* note 34, at xix. *See supra* note 35 (listing states that have substantially adopted the ABA Model Rules of Professional Conduct (43 and the District of Columbia) or the older ABA Model Code of Professional Responsibility (five), or that have created their own rules (two)).

<sup>261</sup> *See, e.g.*, Colo. Bar Ass’n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), *available at* [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003) (Appendix 32).

<sup>262</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2003).

<sup>263</sup> *See supra* note 35 (stating that Nebraska, New York, Oregon, and Ohio maintain ethics rules based on the ABA Model of Professional Responsibility).

<sup>264</sup> Ill. St. Bar Assoc., Advisory Op. on Prof’l Conduct No. 849 (Dec. 9, 1983), 1983 WL 190426 at \*1.

<sup>265</sup> *Id.*

compliance with similar conditions, agree with his client that his representation will terminate at that stage.”<sup>266</sup> Therefore,

an attorney may agree in advance with his client to limit the attorney's employment to the drafting of pleadings, allowing the client to make other arrangements for the handling of the case through the pleading and trial stages, provided that the client gives his fully informed consent to such limitation of employment and the attorney takes whatever steps may be necessary...to avoid foreseeable prejudice to the client's rights.<sup>267</sup>

## 2. Local ethics opinions

The opinions of local bar ethics committees also support limited scope legal assistance.

For example, the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee concluded that “[a]n attorney may limit the attorney’s services by agreement with a *pro per* litigant to consultation on procedures and preparation of pleadings to be filed by the client in *pro per*.”<sup>268</sup> The attorney who had requested the opinion was a “law consultant” who advised the client on matters only when the client requested that the attorney do so, and who helped the client draft, or drafted, legal papers that the client then signed and filed.<sup>269</sup>

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<sup>266</sup> The Bar Association said that the lawyer, upon withdrawing from the representation, was obligated by DR 2-110 (A) (2) to protect the client’s interests by analyzing the claims of the client and opposing party, explaining the trial procedures, describing how the client might prove his case, and making sure the client understood the disadvantages of proceeding without counsel.

<sup>267</sup> *Id.* In a subsequent opinion, the Illinois Bar Association found that a lawyer who had prepared closing documents in a real estate transaction violated unauthorized practice of law requirements when he delegated legal questions about those documents to a non-lawyer, the seller’s broker, who attended the closing. Ill. St. Bar Assoc., Advisory Op. on Prof’l Conduct No. 94-1 (July, 1994), available at <http://www.isba.org/courtsbull/ethicsopinions/94-01.asp> (last visited June 24, 2003).

<sup>268</sup> L.A. County Bar Assoc. Prof’l Responsibility and Ethics Comm., Ethics Op. 483 (March 1988), available at <http://www.lacba.org/showpage.cfm?pageid=449> (last visited June 24, 2003) (provided in edited form in Appendix 30).

<sup>269</sup> *Id.* The Committee cited Formal Opinion No. 449, in which it had the Committee had reasoned that there was “no ethical proscription with respect to providing legal advice over the telephone in response to a stated set of facts, where charges would be based on the time spent on the telephone and where the attorney would not be otherwise involved in the case to which the alleged facts pertain.” *Id.* The Committee pointed out that “[a]s a matter of custom and practice

In a subsequent opinion, the Committee approved a coaching agreement between a lawyer and client, concluding: “An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in *pro per*, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it.”<sup>270</sup>

Similarly, the New York City Bar Association Committee on Professionalism and Judicial Ethics found that it was ethically permissible for a lawyer to provide limited assistance to a client who could not afford the lawyer’s full-service fee.<sup>271</sup> The Committee found “in doing so, the lawyer is taking action consistent with the duty of the legal profession to meet the needs of the public for legal services.”<sup>272</sup>

### 3. ABA ethics opinions

There is no ABA ethics opinion under the Model Rules of Professional Conduct that addresses limited scope legal assistance in the forms in which lawyers usually provide it today. There is an informal opinion, issued in 1978 under the former Code of Professional Responsibility.<sup>273</sup> In Informal Opinion Number 1414, the ABA indicated that under appropriate circumstances, lawyers could “give advice to a litigant who is otherwise proceeding *pro se*,” and “prepare or assist in the preparation of a pleading for a litigant who is otherwise acting *pro*

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many individuals use attorneys to assist them in representing themselves in litigation matters to save the costs and legal fees that would otherwise be involved.” *Id.*

<sup>270</sup> L.A. County Bar Assoc. Prof’l Responsibility and Ethics Comm., Ethics Op. 502 (Nov. 4, 1999), *available at* <http://www.lacba.org/showpage.cfm?pageid=431> (last visited June 24, 2003) (provided in edited form in Appendix 31).

<sup>271</sup> Assoc. of the Bar of the City of N.Y., Comm. on Prof’ism and Jud. Ethics, Formal Op. No. 1987-2 (March 23, 1987), 1987 WL 346192 at \*1.

<sup>272</sup> *Id.*

<sup>273</sup> ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1414 (1978) (provided in edited form in Appendix 29).

*se.*<sup>274</sup> The ABA concluded that the lawyer in the factual situation before it was ethically required to disclose his participation because the litigant “was receiving active and extensive assistance from the lawyer in preparation for the trial as well as during the trial itself.”<sup>275</sup>

#### *4. Unrevised Model Rules*

Despite the absence of a clear ABA ethics opinion, there now is no question about the ABA’s position on limited representation. It clearly supports limited representation through the ethics rules that it has developed and adopted.

There are two sets of relevant Model Rules of Professional Conduct: the Model Rules that the ABA originally adopted in 1983, which are the primary bases of the current ethical rules in a majority of the states today, and the revisions in the Model Rules that the ABA adopted in 2002 as part of the Ethics 2000 project, some of which a few states have adopted so far.

The unrevised Model Rules authorize a client and a lawyer to limit the scope of legal services. Unrevised Rule 1.2 (c) states: “A lawyer may limit the objectives of the representation if the client consents after consultation.”<sup>276</sup> According to Comment 4, it is not only the “objectives” that may be limited, but also the “scope of services provided by a lawyer” and “the terms under which a lawyer’s services are made available to the client.”<sup>277</sup> Many of the ethics opinions that we identify in this Chapter rely on Rule 1.2 (c), as adopted in that particular state, in concluding that limited representation is ethically permissible.

#### *5. 2002 Model Rule revisions*

The ABA’s revision of Model Rule 1.2(c) authorizes lawyers to “limit the scope of the

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.* In Part E of this Chapter, we describe the differing opinions of ethics committees about whether, when and how a lawyer should disclose the nature and extent of limited scope assistance that the lawyer provides to a client.

<sup>276</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2001).

<sup>277</sup> *Id.* at cmt. 4.

representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>278</sup> “Informed consent” is “the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”<sup>279</sup>

The ABA Ethics Commission explained that the recommended revisions to Rule 1.2 “more clearly permit, but also more specifically regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client.”<sup>280</sup> The ultimate purpose is to “expand access to legal services by providing limited but nonetheless valuable legal services to low or moderate income persons who otherwise would be unable to obtain counsel.”<sup>281</sup>

A revised Comment to Rule 1.2 explains that “limited representation may be appropriate because the client has limited objectives for the representation”, or because the client wishes to “exclude specific means that might otherwise be used to accomplish the client’s objectives.”<sup>282</sup> One reason the client might wish to do this is because “the client thinks [the means] are too costly.”<sup>283</sup>

## **B. Limitations on the scope of services**

Two standards govern limitations on the scope of services.

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<sup>278</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002). Several states have adopted this revision, either completely or in substantial part. *See e.g.*, discussion of the revised rules of Maine *infra* Chapter 10(A)(2) (Appendix 25) and discussion of the revised rules of Washington *infra* Chapter 10(A)(3) (Appendix 27). A proposed revision based on ABA Model Rule 1.2 (c) is pending before the Florida Supreme Court. *See* discussion *infra* in Chapter 10(A)(4) (Appendix 28).

<sup>279</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(n) (2003).

<sup>280</sup> ABA, REPORT OF THE COMMISSION ON THE EVALUATION OF THE RULES OF PROFESSIONAL RESPONSIBILITY 145 (Nov. 2000) [hereinafter, 2000 REPORT ON EVALUATION OF THE RULES].

<sup>281</sup> *Id.*

<sup>282</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 6 (2003).

<sup>283</sup> *Id.* The Reporter’s notes state: “Cost has been added as a factor that might justify limitation.” 2000 REPORT ON EVALUATION OF THE RULES, *supra* note 280, at 147.

First, as both the current and revised ethics rules provide, the client must give informed consent to the arrangement.

Second, as noted above, the service limitation should be “reasonable under the circumstances.”<sup>284</sup> Although the ABA’s revision of Model Rule 1.2 makes this requirement explicit, it is inherent in the attorney-client relationship as well. A lawyer is a fiduciary, who owes duties of candor, good faith, trust and care to a client. These duties include the requirement that a limited-service agreement be reasonable under the circumstances. (Most non-fiduciary contracts can be *unreasonable* without being unlawful as long as one party does not make misrepresentations that induce the other party to enter into the contract or otherwise violate the law.)

New Comment 7 to revised Rule 1.2 discusses the “reasonable under the circumstances” standard:

If, for example, a client’s objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated problem, the lawyer and client may agree that the lawyer’s services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.<sup>285</sup>

Whether a service limitation is reasonable under the circumstances is judged at the time the client and lawyer enter into the representational agreement, not retrospectively. The test is not whether, after the fact, the service proved to be of some use to the client, but rather whether, *at the time of the agreement*, a lawyer reasonably could have concluded that the service would be useful to the client.

In assessing whether a limited service is reasonable under the circumstances, the good

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<sup>284</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002).

<sup>285</sup> *Id.* at cmt. 7.

faith judgment of the lawyer and the informed consent of the client should be given considerable deference. As the Limited Representation Committee of the California Commission on Access to Justice observed, “[t]he attorney-client relationship, unless established by court appointment, is based on an agreement between the parties. That agreement defines the essential elements of the relationship, including the scope of services to be provided by the attorney.”<sup>286</sup>

Because the client-lawyer relationship is created by consent, “[t]he critical issue for the attorney in a limited scope representation is that the client fully understand and agree to what the attorney will do, and, more importantly, what the attorney will not do.”<sup>287</sup>

Contractual autonomy, even in a fiduciary relationship, entitles clients to make bad as well as good decisions, as long as they are informed decisions.

Moreover, lawyers’ judgments about legal services that might be useful to clients are predictive (for example, that a client will benefit from coaching), fact-bound (often based on information about the client, including confidential information), and discretionary (there is no objective formula for these decisions). Indeed, virtually all lawyers regularly make judgments about the potential value to clients of services they *could* provide to them, and their clients regularly make service choices in response to their advice.

In addition, lawyers and clients make legal service decisions in a real, not ideal, world. This is especially true of low and moderate-income clients. Limited representation may be the only representation they can obtain, and the only means by which they can vindicate rights to which they are legally entitled.

For all these reasons, we agree with The New York State Bar Association Committee on Professional Ethics when, in approving limited representation, it stated: “We firmly believe that

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<sup>286</sup> CALIFORNIA REPORT ON LIMITED ASSISTANCE, *supra* note 33, at 9.

<sup>287</sup> *Id.*

the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession."<sup>288</sup>

### **C. Competency requirements**

A lawyer's basic ethical responsibility is to "provide competent representation to a client."<sup>289</sup> This mandate applies to all forms of representation, including limited representation.

Although the duty is clear, it is impossible to provide a fixed description of "competent" representation because competency is relative to the client's legal needs and problem. Model Rule 1.1 states: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably *necessary for the representation*."<sup>290</sup>

There is a connection between competency and the scope of representation. One of the ABA's revisions of the Comments to the Model Rules states: "Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>291</sup>

In its opinion on unbundled representation, the Colorado State Bar Association Ethics Committee opined:

Generally, the duty of competence of Rule 1.1 is circumscribed by the scope of representation agreed to pursuant to Rule 1.2. However, a lawyer may not so limit the

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<sup>288</sup> N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. No. 613 (Sept. 24, 1990), 1990 WL 304220 at \*3.

<sup>289</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

<sup>290</sup> *Id.* (emphasis added).

<sup>291</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2002). The Ethics 2000 Commission stated: "Given the increase in the number of occasions in which lawyers and clients agree to a limited representation, the Commission thought it important to call attention to the relationship between Rules 1.1 [competency] and 1.2(c) [limiting the scope of representation]." 2000 REPORT ON EVALUATION OF THE RULES, *supra* note 280, at 139.

scope of the lawyer's representation as to avoid the obligation to provide meaningful legal advice, nor the responsibility for the consequences of negligent action.<sup>292</sup>

The Committee quoted from Comment 5 to Rule 1.1: “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem...”<sup>293</sup> Further, the Committee added: “Thoroughness and preparation requires the lawyer to make the factual inquiry necessary to understand the client's legal situation...”<sup>294</sup>

To think about how the required knowledge, thoroughness and preparation may differ depending upon the scope of the lawyer’s services, assume two clients ask a lawyer to provide them with different levels of limited assistance in similar divorce cases. In each case, the parties have been married for a substantial period of time, have agreed to the divorce, have agreed to waive alimony and marital support, have no children, and, with one exception, have agreed on the division of their personal property. (They do not own real estate.) The exception is this: In each case, the wife has a substantial pension plan that she is unwilling to share with the husband and about which the husband has little information.

In the first case, the client asks the lawyer only to help him to prepare the complaint. The client intends to file the complaint and thereafter to litigate the case himself.

In the second case, the client asks the lawyer to help him to prepare all of the necessary pleadings and to coach him through the litigation.

In each case, the lawyer should interview the client, make sure the client has given informed consent to the scope of the representation, determine that the client has a legal basis for divorce, rule out any complexities (other than the pension plan), give the client advice about the

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<sup>292</sup> Colo. Bar Ass’n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), *available at* [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003) (Appendix 32).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

terms of the parties' agreements, and help the client to prepare the complaint. In each case, the interview should be as thorough as an initial interview would be for full-service representation. Additionally, in each case, the lawyer should make sure the client adequately pleads the pension issue.

In the first case, the lawyer should also advise the client about the potential importance of having counsel on the pension issue.

In the second case, in order to coach the client competently, especially on the pension issue, the lawyer may have to have greater knowledge than he or she would need in the first case, and will have to make a substantially greater inquiry into the facts of the case and/or help the client to make that inquiry. The lawyer may need to coach the client in preparing discovery requests, evaluating the pension benefits, preparing a memorandum on the pension issue, and representing himself in mediation or at a hearing on the pension issue. Alternatively, depending on the scope of the coaching agreement, the lawyer may perform one or more of these tasks. (The lawyer also will need to help the client handle the uncontested aspects of the case.)

As the scope of the representation expands, and the matter becomes more complex, the lawyer's needs for greater legal knowledge and skill, and for greater thoroughness and preparation, will increase as well.

There is a second dimension of competency in limited representation. It often requires lawyers to be good coaches and teachers, as well as practitioners. These competencies include patience and the ability to communicate effectively and to work collaboratively.

#### **D. Conflicts of interest requirements**

The traditional conflicts of interest rules apply to the typical forms of limited scope legal assistance that solo and small firm practitioners provide.

The ABA has approved a new conflicts rule for lawyers who provide legal services for free as part of a nonprofit or court-administered program. New Model Rule 6.5 relaxes some of the existing conflicts of interest provisions for these providers. It applies to a lawyer who provides free and “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.”<sup>295</sup> Such a lawyer would be subject to the rules governing concurrent conflicts (Rule 1.7), and successive conflicts (Rule 1.9(a)) “only if the lawyer knows that the representation of the client involves a conflict of interest.”<sup>296</sup> The lawyer is subject to the vicarious disqualification rule (Rule 1.10) “only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified...with respect to the matter.”<sup>297</sup>

The 2000 Ethics Report explained that the Commission proposed the new rule “in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program.”<sup>298</sup> Further, the Rule “will eliminate an impediment to lawyer participation in such programs” by making “it unnecessary for the lawyer to do a comprehensive conflicts check in a practice setting in which it normally is not feasible to do so.”<sup>299</sup> Additionally, a new Comment explains that “the limited nature of the services significantly reduces the risk of conflicts of interest with other matters handled by the lawyer’s firm.”<sup>300</sup>

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<sup>295</sup> MODEL RULES OF PROF’L CONDUCT R. 6.5 (2002).

<sup>296</sup> *Id.* (a)(1).

<sup>297</sup> *Id.* (a)(2).

<sup>298</sup> 2000 REPORT ON EVALUATION OF THE RULES, *supra* note 280, at 360.

<sup>299</sup> *Id.*

<sup>300</sup> MODEL RULES OF PROF’L CONDUCT R. 6.5 cmt. 4 (2002).

The Rule will provide two-way protections—to both private law firms and the legal services or pro bono programs-- from unnecessary vicarious disqualifications based on existing conflicts rules. On the one hand, “a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices.”<sup>301</sup> “Nor”, on the other hand, “will a personal disqualification of a lawyer participating in the [legal services] program be imputed to other lawyers participating in the program.”<sup>302</sup>

Thus, a legal services program administrator will be able to recruit a *pro bono* lawyer to provide “short-term limited legal services” to a client with less fear that the representation of a private client by the lawyer’s firm will require the program lawyers to disqualify themselves from representing a party opposing that private client. And, the *pro bono* lawyer’s firm will be more willing to allow its lawyer to volunteer since it will be less likely that the representation of a client by the legal services program will require the law firm to disqualify itself from representing a party opposing the programs’ client.

Proposed Rule 6.5 is an important step in making limited legal assistance more available to low and moderate-income people.

#### **E. Certification and disclosure requirements for document preparation**

State rules, patterned after Rule 11 of the Federal Rules of Civil Procedure, generally require a lawyer who files a pleading to certify, to the best of the lawyer’s information, knowledge, and belief, that there are meritorious grounds to support the pleading.<sup>303</sup>

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Rule 11(b) of the Federal Rules of Civil Procedure provides:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying

There are different opinions about whether limited-service lawyers are subject to such a “certification” requirement, and whether they must disclose their drafting roles, if all they do is draft a pleading for an otherwise *pro se* litigant who then files it. (It is clear that, absent special circumstances, lawyers need not disclose their roles when they provide *non-litigation* services to clients.)<sup>304</sup>

Some argue that lawyers acting under these circumstances (“ghostwriters”), should not be subject to certification or disclosure requirements since it is the litigant who actually files the pleading, and who at that time is acting *pro se*.<sup>305</sup> The Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee offered these additional arguments for non-disclosure:

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that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as (to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b).

<sup>304</sup> The Delaware State Bar Association Committee on Professional Ethics stated:

While there is general agreement that there is no ethical reason precluding an attorney from providing limited representation to a client who agrees to accept services on that basis, the issue of disclosure of the representation to the courts or other tribunals and to opposing parties is more difficult and has produced a broader range of responses from ethics committees and courts.

Del. St. Bar Assoc. Comm. on Prof’l Ethics, Op. 1994-2, 6 (May 6, 1994), *available at* <http://www.dsba.org/ethics94-2.pdf> (last visited June 24, 2003) (provided in edited form in Appendix 33).

<sup>305</sup> A focus group of “private attorneys who currently draft pleadings on behalf of their clients” convened by the Limited Representation Committee of the California Commission on Access to Justice agreed that “they would be much less willing to provide this service if they had to put their names on the pleadings.” CALIFORNIA REPORT ON LIMITED ASSISTANCE, *supra* note 33, at 15.

First, the practice promotes access to the courts by *pro per* litigants, who often lack the necessary knowledge or skills to draft their own pleadings without assistance but may not have the resources for full representation in the litigation. Second, as a direct consequence, the practice generally is likely to improve the quality of the *pro per* pleadings and thus results in increased judicial efficiency and fairness to the parties. Third, the practice would support the client's right to control the extent of an attorney's involvement. Fourth, California statutes permit legal documents assistants and unlawful detainer assistants to assist in the preparation and filing of documents under certain circumstances, without making disclosure to courts. There may be an uneven application of law if similarly situated attorneys are required to make disclosures to courts.<sup>306</sup>

In addition, there are sanctions against *pro se* litigants who file frivolous lawsuits, as well as lawyers who knowingly assist them in doing so, as the Los Angeles County Ethics Committee pointed out:

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 [law] 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 [the law's] conditions...are met.

Even though Client may be responsible for certification that the conditions ...are met, Attorney may still be responsible for harm to Client or the administration of justice resulting from Attorney's preparation of pleadings. There are a number of statutes and rules that require fair and honest conduct from Attorney even if he or she is not the attorney of record for Client...The attorney also has a duty to the client to explain the importance of compliance with [the law] as well as consequences to the client for its violation.<sup>307</sup>

A rule mandating disclosure can be particularly troubling if judges treat disclosure as the entry of a full-service appearance in a case. Happily, we found this to be a rare practice. The conscription of limited-service lawyers to provide full services would violate the contract

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<sup>306</sup> L.A. County Bar Assoc. Prof'l Responsibility and Ethics Comm., Ethics Op. 502 (Nov. 4, 1999), available at <http://www.lacba.org/showpage.cfm?pageid=431> (last visited June 24, 2003) (provided in edited form in Appendix 31).

<sup>307</sup> *Id.*

between lawyer and client, and discourage lawyers from providing some legal services to people who otherwise would get none.<sup>308</sup>

A federal district judge in California listed the arguments in favor of disclosure while considering whether he should hold in contempt a *pro se* litigant and the ghostwriting lawyer who assisted him for failing to disclose the lawyer's assistance.<sup>309</sup>

The court reasoned that it would "disadvantage" the opposing party to give the pleadings of an apparently *pro se*, but actually partially-represented, litigant the "greater latitude" that courts afford to *pro se* parties.<sup>310</sup> Opining that a ghostwriting attorney misleads a court when the lawyer fails to reveal his or her role, the court held such conduct violated Rule 3.3 of the Model Rules of Professional Conduct.<sup>311</sup> Rule 3.3 provides, in part, that a "lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."<sup>312</sup>

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<sup>308</sup> The Kentucky Bar Association's Committee on Ethics found that although a lawyer who prepares a pleading for an otherwise *pro se* litigant ought to disclose this to the court, a judge should not consider the disclosure as an entry of a general appearance that would require the lawyer to do more than he or she had promised to do. *See* Ky. Bar Assoc. Comm. of Ethics, Op. E-343 (January, 1991). A recently adopted Colorado rule provides substantially the same thing. *See* COL. R. CIV. P. 11.

<sup>309</sup> *Ricotta v. State*, 4 F. Supp. 2d 961, 986-88 (S. D. Calif. 1998). The court found this was an issue of "first impression" in the Ninth Circuit, and reviewed the "only three reported cases in which courts have directly tackled this question." The court cited *Ellis v. State of Maine*, 448 F.2d 1325 (1st Cir. 1971); *Johnson v. Board of County Comm'rs for County of Freemont*, 868 F. Supp. 1226 (D. Colo. 1994); and *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997) as the only three cases previously addressing the issue. *Id.* at 986.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2003). Ethics committees and courts have cited other ethical rules in support of disclosure requirements, including Model Rule 4.1 (which requires truthfulness in statements to others), Model Rule 8.4 (c) (which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation"), and Model Rules 4.2 and 4.3, governing communications between lawyers and opposing parties and counsel. (The comparable

The pro-disclosure arguments assume two things: first, that courts do substantially forgive the pleading errors of *pro se* parties, and second, that courts can not tell from the face of ghost-written pleadings that an attorney has helped to prepare them.<sup>313</sup>

Although the federal district court in *Ricotta* found that the lawyer's failure to disclose her role was "improper," it refused to hold her in contempt because it could find no "local, state or national rule addressing ghost-writing."<sup>314</sup> Therefore, the court concluded that it would be unfair to punish the lawyer.<sup>315</sup> Moreover, the court explained that the case "illustrates the need for local courts and professional bar associations to directly address the issue of ghost-writing and delineate what behavior is and is not appropriate."<sup>316</sup>

Many ethics and judicial opinions distinguish permissible from impermissible forms of ghostwriting by the extent of assistance. Some unrevealed assistance is permissible. After surveying a number of ethics decisions, the Delaware State Bar Association's Committee on

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provisions of the old rules are MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4), DR 7-102 (A)(7), and DR 7-104).

<sup>313</sup> There are decisions in which courts have ignored technical defects in *pro se* pleadings because the litigant did not have the assistance of counsel. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Hughes v. Rowe*, 449 U.S. 5, 15 (1980); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Cir. 1984); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). There are other decisions, however, in which courts have held *pro se* litigants to the same legal requirements as fully-represented litigants. *See, e.g.*, *Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986) (only prisoner *pro se* litigants, because of their unique circumstances, are entitled to have pleadings construed liberally); *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981) ("right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law", but rather, *pro se* litigant "subjects himself to the established rules of practice and procedure"); *Newsome v. Farer*, 708 P.2d 327, 331 (N. Mex. S. Ct. 1985) ("a *pro se* litigant must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel").

<sup>314</sup> *Ricotta*, 4 F. Supp. 2d at 987-88.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* *See* *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 886 (D. Kan. 1997); *In re Ellingson*, 230 B.R. 426, 435 (Bankr. D. Mont. 1999); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 292 (E.D. Va. 2001); Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct, Op. No. 96-31 (June 5, 1997); Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct, Op. 94-35 (May 23, 1995).

Professional Ethics found that “there does not seem to be a bright-line rule regarding when disclosure is necessary.”<sup>317</sup> The Committee concluded that “substantial and extensive involvement by an attorney must be disclosed.”<sup>318</sup>

In *Ricotta*, the court agreed with this standard, citing a 1978 informal ABA ethics opinion in which the ABA said that “extensive undisclosed participation by a lawyer . . . that permit[ted] the litigant falsely to appear as being without *substantial* professional assistance [wa]s improper.”<sup>319</sup> In its opinion, the ABA Committee on Ethics and Professional Responsibility cautioned that it was not suggesting that a lawyer “may never give advice” to a *pro se* litigant, or that a lawyer could not prepare a pleading for such a litigant.<sup>320</sup>

The *Ricotta* court found that the lawyer’s work was improper ghostwriting because the lawyer drafted “seventy-five to one hundred percent of Plaintiff’s legal arguments in his oppositions to the Defendants’ motions to dismiss.”<sup>321</sup>

The Delaware Ethics Committee found that the disclosure duty attaches if the lawyer “prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding *pro se*, or . . . provides legal advice and assistance to the litigant on an on-going basis during the course of

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<sup>317</sup> Del. St. Bar Assoc. Comm. on Prof’l Ethics, Op. 1994-2, 2 (May 6, 1994), *available at* <http://www.dsba.org/ethics94-2.pdf> (last visited June 24, 2003) (provided in edited form in Appendix 33).

<sup>318</sup> *Id.*

<sup>319</sup> *Ricotta*, 4 F. Supp. 2d at 987 (citing ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1414 (1978)). Informal Opinion 1414 involved a lawyer, who not only drafted the client’s pleading, but also sat in on the trial and advised the client throughout the litigation. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1414 (1978) (provided in edited form in Appendix 29).

<sup>320</sup> ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1414 (1978). The Committee concluded that the lawyer was fostering a misrepresentation that the client was conducting the litigation *pro se*. *Id.* In that circumstance, the Committee concluded, the lawyer violated Disciplinary Rule 1-102(A)(4).

<sup>321</sup> *Ricotta*, 4 F. Supp. 2d at 987.

the litigation....”<sup>322</sup> The Committee defined significant representation to include “representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information.”<sup>323</sup> The Committee gave as an example of “significant assistance,” “an attorney [who] drafts court papers (other than an initial pleading) on the client's behalf.”<sup>324</sup>

Summarizing various ethics committee decisions, the Colorado State Bar Association Ethics Committee offered three possible resolutions of the disclosure issue.<sup>325</sup>

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<sup>322</sup> Del. St. Bar Assoc. Comm. on Prof'l Ethics, Op. 1994-2, 2 (May 6, 1994), *available at* <http://www.dsba.org/ethics94-2.pdf> (last visited June 24, 2003) (provided in edited form in Appendix 33). Summarizing the ethics opinions that we cite in Part A of this Chapter, note 258, the Delaware Committee stated:

The Virginia opinion states only that ‘under certain circumstances’ where the assistance is ‘active and substantial,’ disclosure is required. The Utah opinion is somewhat more specific, and seems to say that an attorney need not disclose that he or she gave initial advice and prepared or assisted in the preparation of initial pleadings, but that if the assistance continues and becomes more extensive, then disclosure to the court and opposing counsel is required. The Maine opinion states that the inquiring attorney, who had done no more than prepare the complaint, was not required to sign the complaint or enter his appearance in court as plaintiffs counsel. The New York City opinion is more restrictive, stating that drafting any pleading, except for assisting a litigant in filling out a form designed for use by *pro se* litigants or making available manuals and pleading forms, is ‘active and substantial legal assistance’ that requires disclosure to opposing counsel and the court....The New York State opinion is in basic agreement with the New York City opinion, although it requires, in addition, disclosure of the identity of the lawyer who is providing assistance to the *pro se* litigant....The Kentucky opinion concurs that where an attorney prepares a pleading for an otherwise *pro se* litigant, the attorney's name should be disclosed, although the attorney providing such limited assistance should not be compelled to enter an appearance on behalf of the litigant, since such a requirement ‘would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants.

*Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), *available at* [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003).

First, some committees “approve of a lawyer preparing the initial court pleading, so long as the lawyer's name (but not necessarily a signature) appears.”<sup>326</sup>

Second, other committees “do not require the lawyer's name to appear, but instead require only that the document bear the statement ‘Prepared by Counsel.’”<sup>327</sup>

Third, still other committees “find no reason whatsoever for disclosure of the lawyer's involvement.”<sup>328</sup>

The trend, evidenced in recent revisions and state rules, is either to permit ghostwriting (regardless of the extent of the lawyer's work), or to require anonymous disclosures, *i.e.*, only that the pleading was prepared by *a* lawyer, without actually requiring that the lawyer disclose his or her name.

According to a number of California judges, “it is usually very clear when a litigant has received some legal assistance, and they prefer litigants receive some help, rather than none.”<sup>329</sup> In these cases, “the party is the one signing the document, [and] certifying that the document is not fraudulent, misleading, or otherwise improper....”<sup>330</sup> It is, therefore, “important that the attorney advise the client” of his or her responsibilities.<sup>331</sup>

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<sup>326</sup> *Id.* (citing Ky. Bar Assoc. Comm. of Ethics, Op. E-343 (January, 1991)).

<sup>327</sup> *Id.* (citing Assoc. of the Bar of the City of N.Y., Comm. on Prof'lism and Jud. Ethics, Formal Op. No. 1987-2 (March 23, 1987), 1987 WL 346192).

<sup>328</sup> *Id.* (citing Ala. Bar Assoc. Ethics Comm., Op. No. 93-1 (March 19, 1993), 1993 WL 849636, Me. Prof'l Ethics Comm. of the Bd. of Overseers of the Bar, Op. No. 89, *available at* <http://www.mebaroverseers.org/PDF/89.pdf> (last visited June 25, 2003), and L.A. County Bar Assoc. Prof'l Responsibility and Ethics Comm., Ethics Op. 483 (March 1988), *available at* <http://www.lacba.org/showpage.cfm?pageid=449> (last visited June 24, 2003) (provided in edited form in Appendix 30).

<sup>329</sup> CALIFORNIA REPORT ON LIMITED ASSISTANCE, *supra* note 33, at 11.

<sup>330</sup> *Id.* at 10.

<sup>331</sup> *Id.* The Limited Representation Committee of the California Commission on Access to Justice said:

California's family law courts have been allowing (and encouraging) ghostwriting for many years. Family law facilitators, domestic violence advocates, family law clinics,

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee agreed, stating that “[g]enerally, where the client chooses to appear *in propria persona* and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending.” The Committee was addressing the lawyer’s role in “the preparation of pleadings or other documents to be filed with the court.”<sup>332</sup>

Washington, which recently revised its rules of civil procedure to expressly authorize limited legal assistance, does not require a lawyer who drafts a pleading for an otherwise *pro se* litigant, or the litigant, to disclose this assistance.<sup>333</sup> The proponents of this rule argued that

the benefits of having a pleading, motion or document prepared by a lawyer outweigh the need to know on the face of the document whether lawyer assistance was provided. Practical reasons also negate the need since a lawyer likely has no control over the pleading, motion or document once it is given to the client and nothing prevents a client from thereafter modifying the language of the pleading, motion or document.<sup>334</sup>

Moreover, “the perceived need for such a certification varies on whether the pleading, motion or document was a mandatory form or not, on whether the assistance was provided by a

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law school clinics and other programs and private attorneys serving low-income persons have often drafted pleadings on behalf of litigants. Judicial officers in the focus groups reported that it is generally possible to determine from the appearance of a pleading whether an attorney was involved in the drafting of the document. They also report that the benefits of having documents prepared by an attorney are substantial.

*Id.* at 15.

<sup>332</sup> L.A. County Bar Assoc. Prof’l Responsibility and Ethics Comm., Ethics Op. 483 (March 1988), *available at* <http://www.lacba.org/showpage.cfm?pageid=449> (last visited June 24, 2003) (provided in edited form in Appendix 30). The Committee cited *Ricotta*, indicating that it did not read this opinion to prohibit ghostwriting. *Id.*

<sup>333</sup> WASH. CR 11 (b) (2002) (Appendix 27).

<sup>334</sup> See GR 9 Cover Sheet to Suggested Amendments to Rules of Professional Conduct, 02-07-006 Wash. St. Reg. (Mar. 6, 2002) (Commentary of drafters of rules, Appendix 27).

lawyer or a non-lawyer, and on the extent of any assistance rendered, thus making any certification unduly complex.”<sup>335</sup>

Colorado took a hybrid approach. In 1999, it changed its rules of civil procedure to expressly authorize attorneys to provide limited representation to otherwise *pro se* litigants.<sup>336</sup> If the attorney helps the litigant to prepare “pleadings or papers” that the litigant files, the pleading or paper “shall include the attorney’s name, address, telephone number and registration number.”<sup>337</sup> The attorney in this situation “certifies that, to the best of the attorney’s knowledge, information and belief,” the “pleading or paper is (1) well-grounded in fact based upon a reasonable inquiry of the *pro se* party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose....”<sup>338</sup>

There are three important protections for attorneys in the amended rules. First, the Rules entitle the attorney to “rely on the *pro se* party’s representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.”<sup>339</sup>

Second, the “certification and attorney name disclosure requirements” do not apply to Colorado’s simplified *pro se* pleading forms that courts issue.<sup>340</sup>

Third, the attorney does not enter his or her appearance by providing the “limited representation” envisioned by the rule. If, however, the attorney appears before “a judge,

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<sup>335</sup> *Id.*

<sup>336</sup> See COLO. R. CIV. P. 11(b), 121(1-1) cmt. 311(b).

<sup>337</sup> COLO. R. CIV. P. 11(b); 311(b).

<sup>338</sup> COLO. R. CIV. P. 11(b); 311(b).

<sup>339</sup> COLO. R. CIV. P. 11(b); 311(b).

<sup>340</sup> COLO. R. CIV. P. 11(b); 311(b).

magistrate, or other judicial officer on behalf of the *pro se* party,” the attorney does enter an appearance.<sup>341</sup>

Florida, New York, and New Hampshire are among the states that only require anonymous disclosure, *i.e.*, that an unnamed attorney helped to prepare the pleadings.<sup>342</sup>

In Chapter 11, we recommend that other states that have not specifically addressed the issue of ghostwriting do so. We urge these states to devise rules that encourage and support lawyers who provide such drafting assistance to clients.

## **F. Communication ground rules**

Two sets of communications issues often arise when a lawyer partially represents a client in litigation.

### *1. Communications between a lawyer who represents a client and a partially-represented opposing party*

One issue is whether a lawyer who represents a client *against* a partially-represented party in litigation can communicate directly with the party, rather than through the limited-service lawyer, when the limited-service lawyer has not entered an appearance in the case.<sup>343</sup>

The answer of the Los Angeles County Bar Association Professional Responsibility and Ethics Committee to this question was “yes.”<sup>344</sup> In an ethics opinion about a limited-service

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<sup>341</sup> COLO. R. CIV. P. 11(b); 311(b).

<sup>342</sup> See Fla. St. Bar Assoc. Comm. on Prof'l. Ethics, Op. 79-7 (Feb. 15, 2000), 2000 WL 706048; N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. No. 613 (Sept. 24, 1990), 1990 WL 304220; New Hampshire State Bar Association, *supra* note 257.

<sup>343</sup> Model Rule 4.2, which assumes that clients are fully represented, states that “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” MODEL RULES OF PROF'L CONDUCT R. 4.2. Comment 8 to Rule 4.2 explains that the “knowledge” requirement “means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.” *Id.* cmt. 8.

attorney, the Committee stated that, “[s]ince Attorney [wa]s not counsel of record for Client in the litigation,” California’s ethical rules did “not preclude the opposing counsel from communicating directly with Client concerning all aspects of the litigation in the civil litigation context.”<sup>345</sup> Further, the Committee opined that where the “client is representing himself/herself in the representation and has undertaken the role of counsel for all aspects of the case, the opposing attorney is entitled to address Client directly concerning all matters relating to the litigation, including settlement of the matter.”<sup>346</sup>

The Committee warned, however, that “[i]f opposing counsel communicates directly with Client, the opposing counsel should not render legal advice to Client.”<sup>347</sup> Similarly, the ABA’s revision of Model Rule 4.3 provides:

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.<sup>348</sup>

States that have recently addressed this issue, however, require the opposing lawyer to communicate with the limited-service lawyer if opposing counsel *knows* that the party is partially represented. Although if the party *appears* to be a *pro se* litigant, the opposing counsel can assume the party is not partially represented.

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<sup>344</sup> L.A. County Bar Assoc. Prof’l Responsibility and Ethics Comm., Ethics Op. 502 (Nov. 4, 1999), *available at* <http://www.lacba.org/showpage.cfm?pageid=431> (last visited June 24, 2003) (provided in edited form in Appendix 31).

<sup>345</sup> *Id.* California has developed its own ethical rules for lawyers rather than adopting the Model Rules of Professional Conduct or the Model Code of Professional Responsibility. *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> MODEL RULES OF PROF’L CONDUCT R. 4.3 (2002).

For example, the Colorado Supreme Court declared that a litigant “is considered to be unrepresented for purposes of [the communication] rule *unless* the [opposing] lawyer has *knowledge to the contrary*.”<sup>349</sup>

Other states allow lawyer-to-party communications unless the limited-service lawyer gives opposing counsel notice of the representation. Maine’s rules, for example, provide that “an otherwise unrepresented party to whom limited representation is being provided or has been provided...is considered to be unrepresented...except to the extent the limited representation attorney provides other counsel *written* notice of a time period within which other counsel shall communicate only with the limited representation attorney.”<sup>350</sup>

The Washington Supreme Court’s revised rules, based largely on Maine’s, add that the written notice also must include a description of the “subject matter within the limited scope of the representation” for which the lawyer is responsible.<sup>351</sup> The drafters of the revisions explain that, as a practical matter, “this means the [limited-service] lawyer and client should decide whether the lawyer is, or is not, authorized to communicate on behalf of the client with the lawyer for the opposing party or” if the opposing party is unrepresented, “with the opposing party.” If the client does not give this authorization, “the client should so inform the opposing lawyer and, for purposes of [the ethics rules], the client should be deemed unrepresented as to the matter in question and the [limited-service] lawyer should be deemed to have consented to the

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<sup>349</sup> COLO. R.P.C. 4.2 cmt. (governing “Communication with [a] Person Represented by Counsel” (Appendix 26)). The Court revised the Comment to Colorado Rule of Professional Conduct 4.3 (“Dealing with Unrepresented Person”), to add that partially represented parties “are considered to be unrepresented for purposes of this rule.” *See* COLO. R.P.C. 4.3 cmt. But the comment makes a cross-reference to Rule. 4.2, indicating that if opposing counsel knows that the party is partially represented, counsel should deal with the opposing lawyer. *Id.* *See also infra* Appendix 26.

<sup>350</sup> ME. BAR R. 3.6(f) (Appendix 25) (emphasis added).

<sup>351</sup> WASH. R.P.C. 4.2 (b); 4.3 (b) (Appendix 27).

opposing lawyer communicating with the client.”<sup>352</sup> The limited-service lawyer should provide the ground rules for communication “as part of a notice of appearance, if litigation is pending concerning the subject of the representation.”<sup>353</sup> The “[r]eceipt or knowledge of a limited notice of appearance as to pending hearings or discovery”, the drafters said, “imposes a duty on the opposing lawyer to refrain from direct contact with the opposing person during the pendency of such hearings or discovery including the pendency of any time period for presentation of orders related to said hearings.”<sup>354</sup>

A proposal pending before the Florida Supreme Court would allow an opposing lawyer to communicate directly with “an otherwise unrepresented person to whom limited representation is being provided...unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer” about a matter “within the limited scope of the representation.”<sup>355</sup> (Lawyers who agree with clients “to limit the scope of the representation” would have to tell their clients about these communication ground rules).<sup>356</sup>

Rules like these place the burden on the limited-service lawyer and client to develop clear communication ground rules. They should put these understandings in their retainer agreement to first make sure that they understand them. Then, they should provide them in writing to the opposing lawyer.

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<sup>352</sup> See GR 9 Cover Sheet to Suggested Amendments to Rules of Professional Conduct, 02-07-006 Wash. St. Reg. (Mar. 6, 2002) (Commentary of drafters of rules Appendix 27). The drafters explained: “This paragraph, which has no counterpart in the ABA Ethics 2000 rules or commentary, is intended to clarify when an opposing lawyer may, without violating RPC 4.2, communicate with a person being represented on a limited basis by a lawyer.” *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> FLA. R.P.C. 4-4.2-4.4.3 (Proposed Revisions 2003) (Appendix 28).

<sup>356</sup> FLA. R.P.C. 4-1.2 (c) (Proposed Revisions 2003) (Appendix 28).

The ABA did not address these communications issues in its 2000 Ethics revisions. In Chapter 11, we recommend that those states that have not done so revise their ethics rules, as Colorado, Maine, and Washington have done, and as Florida is considering doing, to clarify the rules of communication for limited-service lawyers and clients and opposing counsel.

*2. Scripted communications between a partially-represented party and an opposing party who is represented*

The second communications issue involves a lawyer who partially *represents* a client in litigation, rather than a lawyer who opposes a partially-represented party. The issue is whether the limited-service lawyer can script a conversation between that lawyer’s client and a represented opposing party so that, in effect, the limited-service lawyer is communicating with the opposing party, not through counsel.

When parties are represented in litigation, the lawyers must communicate with one another, not directly with the opposing party. The parties may talk directly to one another, although most often their lawyers advise them not to do so.

It is unethical for a lawyer in litigation, whether providing partial or full representation, to script a conversation between his or her client and the opposing, represented party. This would be doing indirectly what the lawyer may not do directly.<sup>357</sup> Comment 4 to Model Rule 4.2 states that “[a] lawyer may not make a communication prohibited by this Rule through the acts of another.”<sup>358</sup> The Comment refers to Model Rule 8.4 (a), which makes it “professional misconduct” for a lawyer to “knowingly assist or induce another” to violate an ethics rule.<sup>359</sup>

On the other hand, Comment 4 to Model Rule 4.2 also provides that “[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from *advising* a client

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<sup>357</sup> See *Trumbull County Bar Association v. Makridis*, 671 N.E. 2d 31 (Ohio Sup. Ct. 1996).

<sup>358</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 4 (2002).

<sup>359</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4(a) (2002).

concerning a communication that the client is legally entitled to make.”<sup>360</sup> To reconcile the apparently conflicting provisions, such advice should be very limited. One ethics committee stated that this advice should not include the lawyer’s “active encouragement, client preparation, or personal participation” in the party-to-party communication.<sup>361</sup> Another found that such party-to-party communications are ethically permissible as long as the idea originates with the client and the lawyer does not help the client prepare what the client says during the communication.<sup>362</sup>

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<sup>360</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. (2002) (emphasis added).

<sup>361</sup> N.C. St. Bar Assoc., Ethics Op. 119 (Oct. 18, 1991), *available at* [http://www.ncbar.com/eth\\_op/ethics\\_o.asp](http://www.ncbar.com/eth_op/ethics_o.asp) (last visited June 24, 2003). The Committee found that it was not unethical for a lawyer to “allow” or to “permit” his client to directly negotiate a settlement with the opposing party without the knowledge of the opposing party’s lawyer. *Id.* The Committee stated that “[o]pposing parties themselves may communicate with each other with or without the consent of their lawyers about any matters they deem appropriate.” *Id.* The Committee applied North Carolina Rule 7.4(a) (which was based on DR 7-104 (a) of the Model Code of Professional responsibility). *Id.* North Carolina Rule 7.4(a) then provided:

During the course of his representation of a client, a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

*Id.* The Committee reasoned, however, that although, “client contact with the opposing represented party can be allowed or permitted by the attorney, the attorney cannot cause (by active encouragement, client preparation, or personal participation) such communication so as to accomplish indirectly what he or she could not do directly due to the prohibition of Rule 7.4(a).” *Id.* Moreover, the Committee cautioned that lawyers should “be careful to distinguish between active encouragement and participation on the one hand and passive acquiescence on the other.” *Id.* In the former respect, “[i]t is improper for the attorney to use his or her client as an agent, or to use any other actual agent of the attorney, to communicate with the opposing represented party in violation of Rule 7.4(a).” *Id.*

<sup>362</sup> Roy Simon, *Neil T. Shayne Memorial Lecture: The 1999 Amendments to The Ethical Considerations In New York's Code Of Professional Responsibility*, 29 HOFSTRA L. REV. 265, 273-274 (2000), describing an opinion of the Professional Responsibility Committee of the New York City Bar Association. Simon reported that the Committee held that if the communication is “the client’s idea, then the lawyer can tell the client that it is okay. The lawyer can also tell the client that he has the right to do this, but the lawyer could not tell the client what to say. That would be improper.” *Id.* Simon noted, however, that a more recent ethics provision in New York, DR 7-104(B), rejected the New York City Bar Approach:

It [DR7-104(B)] says that ‘a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the

As with many ethical issues, it is difficult to draw clear lines between impermissible “scripted,” and permissible “counseled” communications between parties in litigation. The touchstones are good faith and reasonableness.

Whatever approach a state takes to such party-to-party communications should apply to both full and limited representation.

### **G. Withdrawing from, and terminating, representation**

Rules of civil procedure and ethics rules both determine whether and when a lawyer can make a limited appearance in litigation and then withdraw. As we explained in Chapter 8, by “limited appearance” we mean the entry of appearance for one part of a case, for example, on a single issue or in a single hearing. In Chapter 8, we described some of the recent revisions in state rules of civil procedure that allow limited-service lawyers to withdraw from representation when they have completed their limited representation. Here, we discuss the related ethical issues.

The ABA’s revision of Model Rule 1.16(c) states: “A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.”<sup>363</sup> The assumption underlying Model Rule 1.16, and the other “applicable” rules to which it refers, is that the lawyer has agreed (or been appointed by a court) to represent a client on *all* of the issues in a lawsuit, in *all* of the proceedings in the case, and *before, during,* and immediately *after* the trial (in the latter respect, to file any necessary post-trial motions). The

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represented party's counsel that such communications will be taking place.’ Reasonable advance notice is notice that provides the opposing lawyer with enough time to advise his client.

*Id.*  
<sup>363</sup> MODEL RULES OF PROF’L CONDUCT R. 1.16(c) (2002).

assumption underlying Rule 1.16 is that the lawyer is seeking to withdraw *before* the lawyer has done what the lawyer promised (or was appointed) to do.

In our limited-service context, the lawyer has *fully* performed the tasks the lawyer undertook to perform. The attorney-client relationship has, or should have, terminated. The lawyer may be seeking to “withdraw” from the litigation, but not to prematurely end the representation.

The ABA revised Comment 1 to Rule 1.16 by adding the following language: “Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.”<sup>364</sup> The ABA Ethics Commission explained that this language “addresse[d] the question of when a representation is completed,” and applies to representations in which “services are limited in scope or intended to be short-term in nature.”<sup>365</sup>

Therefore, when a lawyer completes the limited service the lawyer has promised to provide, the court should allow the lawyer to withdraw.

The Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee reached this conclusion in applying California’s ethical rules to limited representation.<sup>366</sup> It concluded that there is “no ethical impropriety” in a lawyer making a special appearance to argue a motion “[a]s long as the limited nature of the representation is disclosed to the court and approved by the court.”<sup>367</sup> The Committee cautioned, however, that the lawyer and client would need court approval to divide the in-court representation.<sup>368</sup> Specifically, the

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<sup>364</sup> *Id.* cmt. 1.

<sup>365</sup> 2000 REPORT ON EVALUATION OF THE RULES, *supra* note 280, at 259.

<sup>366</sup> L.A. County Bar Assoc. Prof’l Responsibility and Ethics Comm., Ethics Op. 483 (March 1988), *available at* <http://www.lacba.org/showpage.cfm?pageid=449> (last visited June 24, 2003) (provided in edited form in Appendix 30).

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

Committee stated that “[a] party may appear in his own person or by an attorney, but cannot do both, unless approved by the court.”<sup>369</sup>

The Committee also opined that in order to avoid “abandoning” a client, upon withdrawal, the lawyer should take “[r]easonable steps to avoid reasonably foreseeable prejudice” to the client’s case, provide “due notice” of the withdrawal, provide “opportunity for replacement counsel’s engagement”, and provide replacement counsel or the client with a copy of the “client’s files.”<sup>370</sup>

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<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

## Chapter 10: Limited Scope Legal Assistance Programs and Initiatives

### A. States that have developed programs and supported limited-service practices, including by making rule changes

#### 1. Colorado

In 1999, the Colorado Supreme Court amended its rules of professional conduct and civil procedure to encourage lawyers to provide limited scope legal assistance to clients. Appendix 26 contains these revisions. Other states, including Washington (Appendix 27), have adopted some of the Colorado amendments in revising their rules.

Prior to the amendments, lawyers in Colorado were providing limited scope assistance to clients.<sup>371</sup> There was considerable uncertainty and differences of opinion about some aspects of limited representation, especially whether lawyers who prepared documents for otherwise *pro se* litigants were required to disclose their participation.

The Colorado revisions explicitly authorize lawyers to prepare “pleadings or papers” that litigants will file themselves, and provide that such assistance does not constitute an entry of appearance.<sup>372</sup> Under these circumstances: “A lawyer must provide meaningful legal advice consistent with the limited scope of the lawyer's representation, but a lawyer's advice may be

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<sup>371</sup> In 1998, the Colorado State Bar Association Ethics Committee reported that “[t]he Denver District Court has responded to the increasing number of pro se divorce litigants by establishing an ‘Information and Referral Office.’ The office is staffed, in part, by lawyers who provide limited legal assistance, but who do not enter their appearance for the client.” The Committee said that the lawyers “conduct self-help seminars to assist persons in representing themselves in eviction and divorce proceedings, as well as in criminal proceedings where incarceration is not threatened. These organizations then provide attorneys only for those aspects of the case in which the skilled help of a lawyer is required. Other tasks are left to the client.” Colo. Bar Ass’n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services), *available at* [http://www.cobar.org/static/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/static/comms/ethics/fo/fo_101.htm) (last visited June 11, 2003) (Appendix 32).

<sup>372</sup> COLO. R. CIV. P. 11(b); 311 (b) (Appendix 26).

based upon the *pro se* party's representation of the facts and the scope of representation agreed upon by the lawyer and the *pro se* party.”<sup>373</sup>

As we said in Chapter 9(E), the Colorado rules require the drafting lawyer to include the lawyer’s name and other contact information in the pleading unless the lawyer is completing or helping the client to complete one of Colorado’s court-approved simplified pleading forms.<sup>374</sup>

The Colorado rules also allow an opposing lawyer to deal directly with a partially-represented party unless the lawyer knows that the party has a limited-service lawyer.<sup>375</sup>

## 2. Maine

In 2001, Maine’s Supreme Judicial Court made a series of revisions in its rules to support limited scope legal assistance.

The court began by specifically authorizing lawyers to provide “limited representation” to clients.<sup>376</sup> Further, the court adopted the ABA’s revision of Model Rule 1.2 (c), which provides: “A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client provides informed consent after consultation.”<sup>377</sup>

The rules specifically authorize lawyers to make limited-service appearances in litigation as well: “If, after consultation, the client consents in writing...an attorney may enter a limited appearance on behalf of an otherwise unrepresented party involved in a court proceeding.”<sup>378</sup>

The rule adds, however, that “[a] lawyer who signs a complaint, counterclaim, cross-claim or any

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<sup>373</sup> COLO. R.P.C. cmt. 1.2 (Appendix 26).

<sup>374</sup> COLO. R. CIV. P. 11(b); 311 (b) (Appendix 26).

<sup>375</sup> COLO. R.P.C. 4.2-4.3 (Appendix 26).

<sup>376</sup> ME. BAR R. 3.4(i) (Appendix 25). The last two words, “after consultation”, are not in the ABA revision. *See* MODEL RULES PROF’L CONDUCT R. 1.2(C) (2002).

<sup>377</sup> ME. BAR R. 3.4(i) (Appendix 25).

<sup>378</sup> *Id.* advisory note.

amendment thereto which is filed with the court, may not thereafter limit representation as provided in this rule.”<sup>379</sup>

In the “Advisory Notes”, the court declared that “[i]n situations where the lawyer will not be providing limited representation in court, the limited representation agreement need not be in writing, but must be reasonable under the circumstances.”<sup>380</sup> Furthermore, the court stated that the “lawyer's advice may be based upon the scope of the representation agreed upon by the lawyer and client, and the client's representation of the facts.”<sup>381</sup>

Explaining why “a writing memorializing the agreement is not required in all contexts,” the court noted “(by way of example) the problem non-profit and court annexed legal services programs face in securing such a writing from their clients, and the time entering into the agreement takes in proportion to the time consumed by the limited representation itself.”<sup>382</sup> The court stated, however, “to the extent a writing may be obtained, it is a better practice to do so for both the lawyer and the client. In situations involving limited representation in court of an otherwise unrepresented party, a written memorandum of the scope of representation is required.”<sup>383</sup> The court also attached “[t]he general form of the agreement” to the rules embodying Maine’s “Code of Professional Responsibility.”<sup>384</sup>

Additionally, the court amended Maine Bar Rule 3.6(a)(2), which prohibits lawyers from handling legal matters “without preparation adequate in the circumstances” by adding: “with respect to the provision of limited representation, the lawyer may rely on the representations of

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<sup>379</sup> *Id.*

<sup>380</sup> *Id.* advisory note.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* The limited-service retainer agreement that the Court approved is provided in Appendix 8.

the client and the preparation shall be adequate within the scope of the limited representation.”<sup>385</sup>

Clarifying the amendment, the court declared that “[t]his rule does not reduce an attorney’s obligation to provide competent representation, but makes clear the preparation for the legal matter is limited along with the scope of the representation.”<sup>386</sup>

As we have discussed in earlier chapters, the Maine rules also authorize attorneys who provide limited representation to clients to withdraw from the representation when they have completed the limited representation (Chapter 8), and provide that an opposing lawyer may communicate directly with a limited-service client unless the limited-service lawyer has given opposing counsel “written notice of a time period within which other counsel shall communicate only with the limited representation attorney.” (Chapter 9(F)(1)).<sup>387</sup>

### 3. Washington

In 2002, Washington’s Supreme Court adopted the most comprehensive limited-representation rules in the country, which apply to all levels of Washington’s judiciary (its Superior, District and Municipal Courts).<sup>388</sup>

The new rules “explicitly allow attorneys and clients to agree to limit the scope of representation,” establish ground rules for communications between partially-represented litigants and opposing lawyers, revise conflicts rules by eliminating the need for conflicts checks when a lawyer provides “short-term limited legal services under the auspices of a court or nonprofit program,” allow lawyers to prepare pleadings for otherwise *pro se* litigants without

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<sup>385</sup> ME. BAR R. 3.6(a)(2) (Appendix 25).

<sup>386</sup> *Id.* advisory note.

<sup>387</sup> *Id.* (f) (Appendix 25).

<sup>388</sup> Kim Prochnau, *Slicing the Onion: Proposed Rules of Professional conduct and Court Rules make It Easier for Private and Nonprofit Legal Practitioners to Provide “Unbundled” Legal Services*, WASH. ST. BAR NEWS, April 2003, at 3, available at <http://www.wsba.org/media/publications/barnews/apr-03-prochnau.htm> (last visited April 2003).

disclosing their participation; apply most of the Rule 11 requirements to those lawyers' pleadings, but impose responsibility on the lawyer only for the lawyer's work ("not that of the litigant"), authorize those lawyer to "rely on the client's representations, unless the attorney has reason to believe the representations [are] false or materially insufficient," and allow lawyers to appear in court "for discrete proceedings" and then to "immediately withdraw at the conclusion of the hearing, provided that a notice of limited appearance is served and filed at or before the hearing."<sup>389</sup>

Because we believe the Washington experience is an important national model, we describe it in some detail.

In the early 1990s, the Washington State Bar Association appointed a Domestic Relations Task Force to examine the access-to-justice barriers that domestic litigants faced. With the leadership of Monty Gray, a private attorney, the task force recommended the development of a courthouse "facilitator" program based on the Maricopa County, Arizona model. It began as a pilot project. Now virtually every county court in the State has a facilitator to provide legal information and assistance to *pro se* litigants. There also is a full-service information center in Kings County, at the South County Courthouse.

The need for additional levels of legal assistance soon became apparent. The Honorable Anne Ellington, then Presiding Judge of the King County Superior Court, and now a judge on Washington's Court of Appeals (Division 1), and Kimberly Prochnau, a King County Superior Court Commissioner, co-chaired a *Pro Se* Workgroup. Among other things, it recommended the establishment of limited-service projects within the court itself. Bar members and the court were able to implement these recommendations, which included an attorney-of-the-day project that

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<sup>389</sup> *Id.*

provided on-the-spot assistance to litigants on *pro se* calendars. What made these initiatives successful was widespread cooperation between the bench and the bar and the leadership of the Court's presiding judge. The Family Law Section of the King County Bar Association played an important role as well.

By the mid-1990s, there were several *pro se* assistance and limited-service programs in existence.

The King County Bar's Young Lawyer Division had provided Neighborhood Legal Clinics in churches, service centers, and other community centers since 1974. In the clinics, which continue today, volunteer lawyers review documents, provide legal information and limited advice, and make referrals for people who are representing, or will represent themselves in litigation. The Bar also has offered a Self-Help Plus program since 1982, in which lawyers teach *pro se* litigants how to represent themselves in litigation. The Legal Clinics volunteers often provide additional assistance to Self-Help participants who are having problems representing themselves.

In 1991, a specialized Family Law Clinic was established as part of the Neighborhood Legal Clinics. Today there are two Family Law Clinics and one Domestic Violence Clinic. These programs have become important referral sources for limited-service lawyers. These lawyers, for example, handle pension issues in divorce cases for otherwise *pro se* litigants, and prepare clients for mediation.

In the mid-1990s, the Northwest Women's Law Center was operating a legal information and assistance hotline. Today, the hotline, which is staffed by paralegals and lawyers, offers legal information and limited advice to callers who have family law (the majority), employment,

landlord-tenant, consumer/debt (including bankruptcy), and other problems.<sup>390</sup> The Center also provides callers with packets of forms and instructions, and sometimes follow-up, written advice.<sup>391</sup> The Center refers callers who need additional legal help to private, legal service and volunteer attorneys.<sup>392</sup>

In 1996, June Krumpotick, the program coordinator, began asking attorneys on the referral panel to provide limited-service representation to clients. Today, approximately 125 of the 300 or so lawyers on the panel have agreed to provide limited representation to Center-referred clients. This includes advice, continued coaching, and help in preparing documents.<sup>393</sup> Some of the lawyers also make limited appearances in courts.

In the same year, the King County Bar Association's Lawyer Referral Service, with the encouragement of the judiciary, developed an unbundled services component of its referral panel. Today, there are approximately 50 lawyers on that panel. Joan Andersen, the bar's Lawyer Referral Service Director, says that these lawyers draft pleadings, provide "strategic advice," provide representation at hearings that result in temporary or interim orders (because they establish the status quo, they often become the final orders as well), and provide "rescue" representation—helping some *pro se* litigants to extricate themselves from "legal muddles" they have created. Lawyers also draft final orders after the parties, by themselves or through mediation, reach agreement on the terms of a settlement. Michael Fancher, an attorney who provides both limited and full representation in family cases, was instrumental in establishing

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<sup>390</sup> Unbundled Legal Services, Profile: "Unbundled" Legal Services Attorney Panel, Northwest Women's Law Center, Washington State, at [http://www.unbundledlaw.org/Program%20Profiles/NWWLC\\_profile.htm](http://www.unbundledlaw.org/Program%20Profiles/NWWLC_profile.htm) (last visited June 25, 2003).

<sup>391</sup> *Id.*

<sup>392</sup> The unbundled project is part of the Legal Information and Referral Service, which is part of the Law Center's Self Help Program. June Krumpotick, Lead Paralegal, coordinates the Self Help Program. *Id.*

<sup>393</sup> *Id.*

this referral panel, including by producing, with the bar, a CLE program for lawyers who are interested in providing unbundled representation in family cases.

Today, the Washington Coordinated Legal Education, Advice and Referral program (CLEAR) operates a statewide “telephone access system” that provides civil legal assistance to low-income persons. CLEAR is staffed by a collaborative team of 20 attorneys and paralegals. They screen clients, provide brief services and make targeted referrals to legal service and other providers throughout the State. The limited services include interviews, oral and written advice, assistance in negotiations, legal research, drafting of pleadings (which the litigants then file *pro se*), and the preparation and distribution of legal education materials. The CLEAR staff also identify systemic problems and work with other legal services providers to resolve them.

In 1997, Barrie Althoff, then Chief Disciplinary Counsel of the Washington State Bar Association, advised lawyers that they could provide limited advice to clients and limited representation in litigation, “although”, he said, “there does not appear to be a specific Washington Court rule” authorizing this.<sup>394</sup> The support that Althoff, as bar counsel, provided for limited representation was critically important.

In 2000, Washington’s Access to Justice Board, a standing commission of the Washington Supreme Court, appointed an Unbundled Legal Services Committee to develop rules on unbundled legal services for adoption by the Supreme Court. King County Superior Court Commissioners Kimberly Prochnau and Nancy Bradburn-Johnson were members of this committee, which Barrie Althoff chaired.

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<sup>394</sup> Barrie Althoff, *Limiting the Scope of Your Representation: When Your Client Wants, or Can Afford, Only a Part of You*, WASH. ST. BAR NEWS (July 1997), available at <http://www.wsba.org/media/publications/barnews/ethics/jul-97-ethics.htm> (last visited July 25, 2003).

Before making its final proposals to the Access to Justice Board, the Committee met and consulted with all of the interested constituents, including a committee of lawyers from the King County Bar Association's limited-service practice panel. The final proposals were as close to consensus recommendations as possible.

In 2002, the Access to Justice Board and the State Bar Association jointly proposed the rule amendments to the Washington Supreme Court. The Washington Superior and District Court Judges' Associations also endorsed the rules. The proponents claimed that the purpose of the suggested rules was "to clarify and facilitate the provision by lawyers of limited task representation/unbundled legal services, to clarify ethical issues for non-profit and court-annexed limited legal service programs, and to permit limited appearances by lawyers in civil matters in Superior Court and in courts of limited jurisdiction."<sup>395</sup>

The proposals were "closely modeled" on the ABA's Ethics 2000 proposals.<sup>396</sup> The new provisions were necessary, the proponents argued, because "Washington currently does not have a specific court rule expressly permitting a lawyer to represent a client on a limited basis and making it clear that the lawyer will not be obligated to continue the representation beyond the agreed scope of representation."<sup>397</sup>

In October 2002, the Supreme Court adopted these proposals as amendments to the State's Civil Rules and Rules of Professional Conduct. In sum:

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<sup>395</sup> See GR 9 Cover Sheet to Suggested Amendments to Rules of Professional Conduct, 02-07-006 Wash. St. Reg. (Mar. 6, 2002) (Commentary of drafters of rules, Appendix 27).

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

1. The court accepted the ABA’s revision of Rule of Professional Conduct 1.2 (c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation”).<sup>398</sup>

2. The court amended Rule 4.2, dealing with communication by an attorney with a represented person, and Rule 4.3, dealing with attorney communications with an apparently unrepresented person, by adding an identical subsection to each. It reads:

An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.<sup>399</sup>

3. The court adopted a considerably revised version of the ABA’s new Rule 6.5. It relaxes conflict of interest requirements when “[a] lawyer who, under the auspices of a program sponsored by a nonprofit organization or 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.”<sup>400</sup>

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<sup>398</sup> *Id.* The proponents of this revision argued that often “the client cannot afford to have the lawyer provide a full representation, or the lawyer cannot afford to provide that full representation for free, or the lawyer cannot provide the full representation because of preexisting commitments to other clients.” *Id.* Other times, “a client simply wants to remain in control of the client’s problem and merely wants the lawyer’s limited assistance.” *Id.* The proponents argued that “limiting the scope of the representation is often in the best interests of both the client and the lawyer and results in the client receiving legal assistance, albeit limited, where otherwise the client would not receive any legal assistance.” *Id.* They said that courts and opposing parties can benefit as well: “If the limited representation [involves] litigation, the opposing party and the court usually also benefit since otherwise each would be dealing with a person acting entirely pro se without the benefit of any legal assistance.” *Id.*

<sup>399</sup> WASH. R. P. C. 4.2-4.3 (Appendix 27).

<sup>400</sup> WASH. R. P. C. 6.5 (Appendix 27). *See* discussion *supra* Chapter 9(D).

4. The court revised its appearance rules to remove the full-service “conscripted” fear of some Washington lawyers about limited representation. The revision states: “If specifically so stated in a notice of limited appearance filed and served prior to or simultaneous with the proceeding, an attorney’s role may be limited to one or more individual proceedings in the action.”<sup>401</sup> Furthermore, “[a]t the conclusion of such proceedings, the attorney’s role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance,” in a form established by the new rule.<sup>402</sup> Superior Court Commissioner Kimberly Prochnau suggested that if a lawyer is appearing “for only one hearing and orders will be immediately entered”, the lawyer “may be able to combine the notice of appearance with a notice of completion of limited appearance, and serve and file it at the hearing.”<sup>403</sup> However, “[i]f it later develops that the hearing must be continued, or presentation of orders is set over for a later date, that attorney continues in his role until the conclusion of the hearing or presentation.”<sup>404</sup>

5. The court’s revisions allow lawyers who prepare pleadings for otherwise *pro se* litigants to do so without identifying themselves in the pleadings. Those who drafted the revisions decided against “an affirmative disclosure requirement after listening to a practitioner’s comments about the practical problems presented.”<sup>405</sup> Instead,

[a] litigant may visit several different lawyers for advice; he may hire a lawyer to prepare a pleading and then make his own changes to the pleading before filing it; or he may obtain a court form from the Internet and briefly speak to an attorney over the telephone before completing the pleading. None of these examples allows an attorney to maintain exclusive control over the content of a pleading or the court to reasonably infer what portions of the pleading the attorney is responsible for.<sup>406</sup>

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<sup>401</sup> WASH. SUPER. CT. R. 70.1 (Appendix 27). See discussion *supra* Chapter 8.

<sup>402</sup> *Id.*

<sup>403</sup> Prochnau, *supra* note 388.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* See discussion *supra* Chapters 7(A) and 9(E).

6. The court’s revisions allow an attorney who provides “drafting assistance” to “rely on the otherwise self-represented person’s representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.”<sup>407</sup>

#### 4. Florida

There are some Florida lawyers who currently offer limited legal assistance to clients. Peggy Schrieber is one. She teaches and practices in a *Pro Se* Advice Clinic at the University of Florida Frederick G. Levin College of Law.<sup>408</sup> Describing the clinic, she stated: “We are basically an ‘unbundling’ clinic. Our focus is on interviewing and counseling litigants who are representing themselves in the family Court.”<sup>409</sup> She and her students, who are qualified to practice law under her supervision, also “file limited notices of appearance to attend mediations, or to argue a particular motion.”<sup>410</sup> She believes, and we agree, that the important forms of limited representation that she and her students provide are permitted by Florida’s current ethics rules.<sup>411</sup>

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<sup>407</sup> WASH. SUPER. CT. R. 11(b) (Appendix 27). The proponents of this provision claimed that: one of the discrete parts of litigation most amenable to limited task representation is the preparation of pleadings, motions or other documents related to the litigation. Such assistance can benefit both parties to the litigation and the court itself by more precisely defining the legal issues and more clearly stating the facts. GR 9 Cover Sheet to Suggested Amendments to Rules of Professional Conduct, 02-07-006 Wash. St. Reg. (Mar. 6, 2002) (Commentary of drafters of rules Appendix 27). The new provisions chart a middle course that, on the one hand, recognizes “the lawyer’s limited role,” and, therefore, allows the lawyer “to rely on the client’s representations”, but on the other, “protect(s) against persons seeking to abuse the system.” *Id.* When “a lawyer has reason to believe the client’s representations are false,” the lawyer then must “make independent inquiry.” *Id.*

<sup>408</sup> Interview with Peggy Schrieber.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

Many other Florida lawyers, however, have questions about limited representation that have discouraged them from providing it. The Florida Supreme Court is now considering several important proposed rule changes in both its Rules Regulating the Florida Bar and its family law rules that will address these concerns. Appendix 28 contains these proposals.

The proposals substantially incorporate the ABA's revision of Model Rule 1.2(c). The Florida proposal states:

If otherwise permitted by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client consents, in writing, after consultation. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.<sup>412</sup>

The requirement that the client consent be in writing would be a change from the ABA's revision, which makes written consent the "preferred", but not required course.<sup>413</sup>

A proposed revision of the Comment to Florida Rule 4-1.2 provides that "a lawyer and client may agree that the representation will be limited to providing assistance out of court, including providing advice on the operation of the court system and drafting pleadings and responses."<sup>414</sup> If so, the lawyer must indicate on the document that it was "prepared with the assistance of counsel."<sup>415</sup>

In addition, the proposed revised Comment provides that

[i]f otherwise permitted by law or rule, a lawyer and client may agree that any representation in court be limited. For example, a lawyer and client may agree that the

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<sup>412</sup> FLA. BAR R. 4-1.2 (c) (proposed revision 2003) (Appendix 28).

<sup>413</sup> The ABA's revision to Model Rule 1.5 (b) adds the "scope of the representation" to the matters that a lawyer must communicate to a client, "preferably in writing." MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2003).

<sup>414</sup> *Id.*

<sup>415</sup> FLA. BAR R. 4-1.2 (c) cmt. (proposed revision 2003) (Appendix 28).

lawyer will represent the client at a hearing regarding child support and not at the final hearing or in any other hearings.<sup>416</sup>

The proposal reminds lawyers that, “[r]egardless of the circumstances, a lawyer providing limited representation forms an attorney-client relationship with the litigant, and owes the client all attendant ethical obligations and duties.”<sup>417</sup>

The proposed revisions in Florida’s Family Law Rules of Procedure would allow an attorney to make a “limited appearance” in a family law case, limited to a “particular proceeding or matter.”<sup>418</sup> At the conclusion of that proceeding or matter, “the attorney’s role” would “terminate...without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance.”<sup>419</sup>

As noted in Chapter 9(F), the Florida Supreme Court also is considering revising its rules to authorize an opposing lawyer to communicate directly with a partially-represented party “unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer” about a matter “within the limited scope of the representation.”<sup>420</sup>

The impetus for these proposals came from the Florida Supreme Court, especially former Chief Justice Major Harding. In February of 2000, the Supreme Court of Florida “ordered the

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<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> FLA. FAM. L. R. P. 12.040(a) (proposed rule 2003) (Appendix 28).

<sup>419</sup> *Id.* at 12.040(c) (proposed rule 2003) (Appendix 28).

<sup>420</sup> FLA. BAR R. 4-4.2-4.3 (proposed revision 2003). Proposed Rule 1.2(c) also requires lawyers who “limit the scope of the representation” to tell their clients about the communication ground rules contained in Rules 4-4.2 and 4-4.3. FLA. BAR R. 4-1.2 (c) (proposed revision 2003).

Florida Bar to study the possible need for unbundled legal services. The bar created the “Unbundled Legal Services Special Committee” to conduct this study.”<sup>421</sup>

With the assistance of the Family Law Section of the Florida Bar Association, the Committee completed its study and concluded that there was “a need for ‘limited representation’ in family law matters.”<sup>422</sup> It proposed changes in the Family Law Rules of Procedure to authorize lawyers to provide limited representation to clients in this area.<sup>423</sup> However, with opposition from some corners of the bar, and without support from the Board of Governors of the Bar Association, the bar did not recommend the proposed revisions to the Supreme Court.<sup>424</sup>

On March 13, 2002, the Supreme Court directly “requested that the Florida Bar *propose amendments* to the Rules of Professional Responsibility and the Family Law Rules of Procedure to address the issue of a lawyer engaging in limited representation.”<sup>425</sup> A second committee, called the Unbundled Legal Services Special Committee II, made the proposals in Appendix 28 largely based on the work of the first Committee. This time, the Board of Bar Governors approved the proposed revisions, and forwarded them to the Supreme Court.

Sharon Langer, Director of the Dade County Legal Aid Program, and a former member of the Florida Bar Board of Governors, Adel I. Stone, chair of the second unbundled committee,

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<sup>421</sup> THE FLORIDA UNBUNDLED LEGAL SERVICES SPECIAL COMMITTEE II, REPORT 2 (July 26, 2002), *available at* <http://www.flcourts.org/sct/sctdocs/probin/sc02-2035.pdf> (last visited June 25, 2003).

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 3.

<sup>424</sup> Lawyers in the Young Lawyers Division and Trial Lawyers Division of the Bar Association. Expressed opposition. *Id.* at 7. The former argued that unbundled legal services: 1) would cost more than full-service representation in the same way that a meal from an ala carte menu is more expensive than a “fixed price” meal (their analogy); 2) are less useful than full services; and 3) are inappropriate in family law matters because of the importance of the interests at stake, *e.g.*, custody of a child. The Trial Lawyers argued that full services are better than partial services, and partial services in litigation are unworkable.

<sup>425</sup> *Id.* at 1 (emphasis added).

Jeffery Wasserman, a member of the first and second committees, and Jeannie Etter, a leader in the family law section of the bar association, were leaders in these reform efforts.

The Florida experience, as well as the experiences in other states, demonstrates the need for strong leadership from both the judiciary and the bar to make changes that are necessary to support the expansion of limited legal assistance.

## **B. States that have developed programs and supported limited-service practices without making rule changes**

### *1. Oregon*

William J. Howe, III, an Oregon lawyer and chair of the Oregon Task Force on Family Law, claimed that “lawyers in Oregon have been providing unbundled representation to clients for years without calling it that.”<sup>426</sup> He reported that limited representation “has become part of the legal culture in Oregon.”<sup>427</sup>

“Task forces”, “commissions” and “committees” across the country, like the Oregon Task Force on Family Law, have played important roles in validating limited legal services and in initiating reforms. This is true in most of the states whose programs and practices we describe in this chapter.

In an article in the *Oregon State Bar Bulletin*, Howe described the work of the Oregon Task Force on Family Law.<sup>428</sup> It “was created by the 1993 Legislature with the charge to develop a ‘non-adversarial system for resolving family law disputes.’” Howe said that “any global family law procedural reform must meet the needs of the growing army of...*pro se* litigants.” (In 1997, in Oregon, neither side was represented in over 40% of the cases.)

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<sup>426</sup> Interview with William J. Howe, III. See discussion of practices of two Oregon limited-service lawyers, *infra* Chapter 2(I).

<sup>427</sup> Interview with William J. Howe, III.

<sup>428</sup> William J. Howe, III, *Unbundling Legal Services: A Part Of The Oregon Task Force On Family Law Reform Package*, OR. ST. BAR BULL., Jan. 1997.

The Oregon Task Force concluded that a number of *pro se* litigants can afford legal representation, but “choose not to hire lawyers because they do not wish to lose control of their cases.” Howe said this fear of lost control, as well as general distaste for lawyers and litigation, explained “the stampede away from utilizing lawyers and the enthusiasm of many litigants for various forms of alternative dispute resolution.”<sup>429</sup>

Howe noted a paradox. “At the same time” that many are choosing to represent themselves, “a growing number of lawyers are underemployed. In short, the market has not successfully matched up litigants, who in most cases need far more legal services than they recognize, with lawyers who are available to do the work.”<sup>430</sup>

Howe claimed that “the satisfaction rate of clients utilizing unbundled legal services is very high,” and that although “approximately 30 percent of family law generated accounts receivable go uncollected, 98 percent of unbundled legal services are paid in full.”<sup>431</sup>

At the recommendation of the Task Force, the Oregon legislature created the Oregon Family Legal Services Commission. The legislature asked the Commission to report on “how courthouse facilitation and unbundled legal services might enhance the delivery of family law legal services to low and middle-income Oregonians.”<sup>432</sup> During the next four years, the Commission held public monthly meetings and gathered information, including written comments from lawyers, litigants, experts in the field, court clerks and other interested parties.

In January 1999, the Commission made its recommendations to the Oregon legislature. It recommended that the legislature “authorize presiding judges to establish courthouse facilitation

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<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

programs” to provide the public with “educational material and information about court procedures” and “assistance in completing forms.”<sup>433</sup> It also said:

“The Oregon State Bar and local bar associations should promote practitioners’ efforts to provide unbundled legal services by: promoting the use of written retainer agreements particularized for discrete task representation; continuing to educate lawyers about the practical, ethical and economic issues of discrete task representation, and increasing efforts to publicize and promote the Modest Means program and other services designed for low and middle-income Oregonians.”<sup>434</sup>

## 2. California

In March, 2001, the California Commission on Access to Justice created the Limited Representation Committee to study “limited scope” or “unbundled” legal assistance.<sup>435</sup> The “ultimate goal” was to “increase the availability of legal assistance for persons of low and moderate means.”<sup>436</sup> The Committee made a series of recommendations, which the California Bar Association’s Board of Bar Governors later unanimously approved.

The Committee began by pointing out the many benefits of limited scope of practice. It provides essential legal help to people who otherwise would not receive it. By dividing legal work into smaller units, it encourages lawyers who have limited time to engage in *pro bono* work. It can help a court narrow and clarify issues and obtain necessary facts in *pro se* cases, decrease court congestion and reduce delay, and lighten the burdens on already overworked clerks and other personnel. Limited representation also increases the number of paying clients for lawyers (people who without limited assistance could not afford, or would choose not, to pay any fee to a lawyer).<sup>437</sup>

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<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> CALIFORNIA REPORT ON LIMITED ASSISTANCE, *supra* note 33, at 1.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 2-3.

The Committee found that “no modifications to the Rules of Professional Conduct [we]re necessary” to authorize limited representation.<sup>438</sup> It found that “the Rules provide no barrier to providing limited scope representation even though ethical questions or issues may arise as in any other representation.”<sup>439</sup>

Further, the Committee proposed “consumer education brochures describing the options, benefits and potential risks for consumers of limited scope legal assistance,” standardized retainer agreements and practice forms, “education and outreach” programs for attorneys, the development of “risk management tools,” education efforts with insurance carriers, and the expansion of limited scope lawyer-referral panels.<sup>440</sup>

On July 28 2001, the Board of Governors of the California Bar Association approved the Committee’s recommendations. Subsequently, the Family and Juvenile Law Advisory Committee proposed forms and a rule to help to implement the Committee’s recommendations. The forms, which have been approved and now are effective, are contained in Appendices 20-23. They regulate the entry and withdrawal of limited-representation appearances.<sup>441</sup>

The rule, which also has been approved and now is effective, allows an attorney to help an otherwise *pro se* litigant to prepare pleadings without disclosing that the attorney provided this assistance. *See* Appendix 24.

### **C. Local jurisdictions that have developed programs and supported limited-service practices**

#### *1. Contra Costa County, California*

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<sup>438</sup> *Id.* at 5.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 18-20, 24, 28.

<sup>441</sup> *See* California forms FL-950, FL-955, FL 956, and FL-958 in Appendices 20-23.

In the mid-1990s, the Contra Costa County bar, led by the family law section of the local bar association, offered to provide limited-service representation to otherwise *pro se* litigants in response to the increasing numbers of *pro se* litigants (called *pro per* litigants in California). The family court “facilitators”, who provide information and assistance to the *pro per* litigants, were overwhelmed by the glut of litigation.

The first step was a series of meetings with local judges. The lawyers agreed to provide a range of limited services to clients, including coaching, help in drafting and reviewing documents, and limited representation in court. In turn, the bench agreed to accept ghost-written pleadings and to allow lawyers to withdraw from representation when they completed the limited representation.

One of the leading national experts on limited-service representation, M. Sue Talia, developed a limited-service training program in 1997, and began offering it to interested lawyers. She has taught it regularly since then. The three-hour presentation has been videotaped and is available to any interested bar association, lawyer’s group, or individual lawyer. It is the best educational program of its type.

Ms. Talia’s presentation focuses on standard-of-care and risk-management issues. It, therefore, provides evidence of the standard of care for limited-service practice in Contra Costa County, as well as in other jurisdictions. By complying with the practical methodology that Ms. Talia clearly outlines, lawyers can create “safe harbors” for their limited-service practices.

To help lawyers develop competent limited-service practices, Ms. Talia has developed a very useful body of forms that accompany the videotape and can readily be tailored to practices in other jurisdictions. With her generous permission, we have included many of these forms in our Appendices.

The Contra Costa Bar Association is in the final stages of establishing a “Limited Representation Lawyer Referral Service Panel” (“LRS Panel”), through its regular lawyer referral program. The “family law coordinators” will refer unrepresented litigants to LRS Panel attorneys. Callers who are referred will pay a \$30 consultation fee. The participating lawyers will provide a range of limited legal services, including “1) advice and counsel, 2) limited court or administrative appearances, and 3) assistance with documents and pleadings or what is known as ‘ghostwriting.’”

This is not a pro bono or low bono referral service. The panel lawyer and client will negotiate the fee, and lawyers will be entitled to charge their full hourly rates. The lawyers will not require clients to pay retainers or deposits. Instead, the lawyers will provide services on a “pay as you go” basis, so there will be no uncollectible accounts.<sup>442</sup>

The project will work in coordination with pro bono programs, including “family law facilitators” (court-employed aides to *pro se* litigants), and self-help projects.

There will be eligibility “guidelines” for participating lawyers. Lawyers must have five years of practice experience, have represented at least three limited-service clients, successfully complete a three-hour training course, and have liability insurance that covers their limited service representation. Lawyers will then be assigned to clients on a “rotational” basis, to provide an equitable distribution of legal business.<sup>443</sup>

There now are many lawyers, not only in Contra Costa County, but throughout California, who are successfully providing limited representation to clients.

## 2. Mecklenburg County, North Carolina

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<sup>442</sup> Contra Costa County Bar Association, “Limited Representation”: LRS Panel Description, *at*: [http://www.unbundledlaw.org/program%20Profiles/CC\\_LRS.html](http://www.unbundledlaw.org/program%20Profiles/CC_LRS.html) (June 25, 2003).

<sup>443</sup> *Id.*

Mecklenburg County provides another example of how local bar, judicial, and administrative leaders can work together to support limited-service representation.<sup>444</sup> Among the results are a self-help center and interrelated limited-service lawyer referral panel, and a local rule that authorizes a lawyer to provide limited representation to clients in litigation, and to withdraw from the case when the lawyer has provided the promised service to the client.

In 1999, in response to a growing number of *pro se* litigants, the 26th Judicial District in Mecklenburg County established a “SelfServe Center”, modeled after Maricopa County’s pioneering program. The Honorable Jane V. Halper and the Trial Court Administrator of the 26th Judicial District, Todd Nuccio, were among leaders in this effort. The Trial Court Administrator's Office operates the program today, and the Administrative Office of the Courts primarily funds it. The State’s IOLTA program also has funded special projects, including the production of videotapes and establishment of a twice-monthly instructional “clinic” for groups of similarly-situated domestic litigants. A local public interest law firm, the McDowell Street Center for Family Law, teaches these clinics on a virtually pro bono basis.<sup>445</sup>

Currently, the Center provides litigants in domestic relations cases with simplified pleading forms, instructions on how to use them, a system flow chart, and an informational videotape. The Center recently added self-help materials in name-change, small claim, and limited driving privilege matters as well. Litigants learn of the Center through various means, including flyers, brochures, and referrals from family members or friends who have used its services.

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<sup>444</sup> See generally Unbundled Legal Services, Profile: “Unbundled” Legal Services Attorney Panel, Mecklenburg County, North Carolina, at: [www.unbundledlaw.org/states/nc\\_profile.html](http://www.unbundledlaw.org/states/nc_profile.html) (June 25, 2003).

<sup>445</sup> The firm receives \$25 total for each session.

The Center has developed a panel of lawyers who provide limited-service representation to clients. The attorneys who participate on the panel charge a variety of fees for the limited services they provide, including fees based on their regular hourly rates, reduced fees, and, occasionally, flat fees. In early 2003, there were about 10 panel attorneys and the number was growing. The Center plans to work with the Mecklenburg County Bar to develop a program that will help to recruit and train newly licensed attorneys to provide limited representation.

The panel attorneys offer three general types of limited services to clients: 1) legal advice, 2) assistance with document preparation, and 3) limited representation in court. Lawyers provide limited representation on disputed issues (often involving child custody and property disposition) that the clients do not resolve through mandatory mediation; help litigants to complete the pleading forms; prepare customized pleadings and memoranda when the forms are not sufficient; and consult with clients on a variety of case-related matters.

On May 24, 2002, the Mecklenburg Bar Association and the 26th Judicial District SelfServe Center conducted a three-hour, limited-service CLE course, and they are considering making this an annual event.<sup>446</sup>

To support limited representation, the 26th Judicial District adopted the following local rule:

Lawyers are permitted to provide limited scope “unbundled” services to pro se litigants. They may give legal advice and drafting assistance, including filling out legal forms and providing subpoenas, without appearing as counsel of record. They may advise regarding strategy, tactics and techniques of litigation.

Lawyers who undertake such a role should be aware that an attorney-client relationship would generally be formed under such circumstances, and the Rules of Professional Conduct, particularly those concerning confidentiality and conflict of interest, would apply. The lawyer must, of course, act competently in offering

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<sup>446</sup> Megan Anderson, “Unbundled- A New Way to Practice?” CLE Manuscript 2002 (May 24, 2002) at <http://www.unbundledlaw.org/States/Megans%20summary.htm> (June 25, 2003).

advice and assistance; for example, the lawyer should caution the client against undertaking a matter too difficult for the client to handle *pro se*.

Lawyers are encouraged to put each agreement for unbundled services in writing, obtain the client's signature, and include the signed agreement in the court file.

Should the lawyer enter a limited appearance, s/he should be careful to withdraw in a manner that makes it clear to the court, court personnel and other counsel that s/he is no longer in the case. Telephone calls inquiring about the lawyer's status in the case should be promptly returned, to avoid an unwelcome summons to court.<sup>447</sup>

In late 2002, the North Carolina State Bar Association created a *Pro Se* Task Force. It is co-chaired by Judge Anne Salisbury and Victor Boone, both of Raleigh, and is charged with studying "ways and means to assist *pro se* litigants," including through development of "[u]nbundled legal services," a "statewide system" of assistance, and other "[m]ethods of bringing prospective clients and lawyers together on an affordable basis."<sup>448</sup>

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<sup>447</sup> N.C. 26TH JUD. DIST., FAM. CT. DIV., LOC. DOM. CASE R. 23.

<sup>448</sup> See North Carolina Bar Association's Pro Bono Project, 16 PRO BONO CONNECTION 1 available at: [http://www.ncbar.org/legal\\_prof/probono/connection/16-1/connection.asp](http://www.ncbar.org/legal_prof/probono/connection/16-1/connection.asp) (last visited June 25, 2003). The State Bar Association also has appointed a "Committee to Review the ABA Ethics 2000 Commission's Report", which has recommended adoption of the ABA's proposed Rule 6.5 of the Model Rules of Professional Conduct, discussed *infra* Chapter 9(D). See Alice Neece Mine, Overview of the Proposed Revisions to the Rules of Professional Conduct (2001), at <http://www.ncbar.com/home/overview.asp> (last visited June 25, 2003).

## Chapter 11: Recommendations

We make the following recommendations understanding that there are many different ways to encourage lawyers to provide limited scope legal assistance to low and moderate-income clients, which is our goal. Some jurisdictions already have adopted the measures that we recommend, or measures like them. Others may wish to experiment with other approaches. Our recommendations are based on recent revisions in state ethics and procedural rules, the ABA's 2002 revisions of the Model Rules of Professional Conduct, and the trends in ethics opinions across the country. We believe they represent a developing consensus of professional opinion.

**A. In those jurisdictions that have not done so, the state's highest court should appoint a broad-based task force to study limited scope legal assistance and to make appropriate recommendations.**

Judicial leadership from appellate and trial judges has been a key factor in those jurisdictions that have developed programs, rules and practices that support limited scope legal assistance. Often it has been the recommendations of a task force appointed by the chief judge of the state's highest court that have produced reforms. State trial judges and judicial officers (commissioners and masters) have played important roles in constituting and leading these task forces.

Such a task force should have a broad-based membership. It should include the leaders of state and local bar associations (and family law sections within the associations); court administrators; the leaders of *pro se* assistance, legal services, lawyer-referral, IOLTA and public interest organizations; bar ethics committees and disciplinary counsel; state executives and legislatures; and client organizations.

We recommend in states that have not done so, that the state's highest court appoint a broad-based task force to study limited legal assistance and to make appropriate

recommendations. Such task forces should consider the great unmet need for *full-service* representation as well. We emphasize again that limited legal assistance is not a magic solution to the prevalent access-to-justice problems that low and moderate-income people face. Government, including Congress, must do more to fund and support full-service lawyers for the poor if we are to make equal justice a reality in our society.

**B. Those state courts that have not done so should review and make reasonable changes in their rules to accommodate and support limited scope legal assistance.**

Although we believe current ethics rules authorize lawyers to provide limited scope legal assistance to clients, it is clear that some lawyers have reservations about this. We believe revisions in rules like those that we recommend below will reassure these lawyers, and help to encourage more to provide limited representation to clients in the future.

We recommend that states that have not done so revise their ethics and procedural rules to:

1. *Expressly authorize lawyers to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent to it.*

This is the revision of Model Rule of Professional Conduct 1.2(c) that the ABA adopted in 2002. Several states already have adopted it.<sup>449</sup> We believe that it is both reasonable and a restatement of current law.

2. *Allow lawyers to make limited appearances in courts and administrative agencies when they provide limited representation to clients, and to withdraw from that representation when they have completed the promised representation, after giving the client notice and a chance to be heard if the client objects.*

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<sup>449</sup> We also recommend that all states adopt the ABA revisions of Comments 6-8 to Model Rule 1.2. Among them is a new comment indicating that the scope of service has an effect on competency requirements: “Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” See MODEL RULES OF PROF’L CONDUCT R. cmt. 1.2 (2002). See discussion *supra* Chapter 9(C).

The rule revisions in Maine (Appendix 25), Washington (Appendix 27), and the proposed revisions in Florida (Appendix 28) are, with one caveat, good models in our view. We discussed them in Chapters 8 and 10 (A)(2), (3), and (4).

The new rules in Washington, for example, authorize lawyers to enter limited appearances for particular proceedings, and provide that, “[a]t the conclusion of such proceedings the attorney’s role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance....”<sup>450</sup>

We believe rules like this are essential to encourage more lawyers to provide limited assistance to parties who now wholly represent themselves in litigation.

Our caveat is this: We believe rules like these should require the withdrawing lawyer to give the client notice of his or her intention to withdraw and a chance to object if the client believes withdrawal is inconsistent with the retainer agreement. Absent client objection, withdrawal would be accomplished without action by the court. If the client objects, the court would treat the withdrawal notice as a motion, and grant or deny it depending on whether the lawyer has complied with the limited-service retainer agreement. California’s new limited-representation forms, *see* Appendices 20-23, embody this approach.<sup>451</sup>

We also recommend that the federal judiciary revise the rules governing federal courts, and Congress do the same for federal administrative agencies, to accommodate limited representation.

These include ethics rules and rules of procedure, especially those that apply when lawyers seek to enter limited-service appearances and withdraw from that representation. We

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<sup>450</sup> WASH. CR 70.1. (Appendix 27). *See also generally* Chapter 10(C).

<sup>451</sup> When a lawyer strikes a limited-service appearance, there should be an administrative mechanism for assuring that the clerk’s office sends future court notices and other communications to the client (now a *pro se* party) rather than to the lawyer.

have been told that the strict enforcement of current federal appearance and withdrawal rules discourages lawyers from providing limited representation to otherwise unrepresented parties in bankruptcy proceedings, and in some federal administrative hearings, for example, immigration hearings.

*3. Clarify the rules governing communications between and among clients receiving limited representation, opposing parties who are represented, and limited and full-service lawyers, so that all of the affected parties understand when they can communicate directly with one another and when they can not.*

In Chapter 9(F), we described recent rule revisions in several states. In sum, they require opposing counsel to communicate with the limited-service lawyer if opposing counsel *knows* that the party is partially represented. If not, counsel may communicate directly with the party.

To provide clear guidelines to lawyers, at least two states require that the limited-service lawyer and client provide opposing counsel with *written* notice of the limited representation if they wish opposing counsel to communicate with the limited-service lawyer. Maine’s revised rules provide that “an otherwise unrepresented party to whom limited representation is being provided or has been provided...is considered to be unrepresented...except to the extent the limited representation attorney provides other counsel *written* notice of a time period within which other counsel shall communicate only with the limited representation attorney.”<sup>452</sup> Washington’s revised rules add that the written notice also must include a description of the “subject matter within the limited scope of the representation” for which the lawyer is responsible.<sup>453</sup>

Even without written notice, if a lawyer has good reason to believe an opposing party is partially represented, we believe the lawyer should contact the limited-service lawyer to establish

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<sup>452</sup> ME. BAR R. 3.6(f) (emphasis added) (Appendix 25).

<sup>453</sup> WASH. R. P. C. 4.2 (b), 4.3 (b) (Appendix 27).

the communication ground rules for that matter. We would add this caveat to a communications rule.

Revisions in communications rules also should include the ABA’s revision of Model Rule 4.3, which provides that a lawyer “shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”<sup>454</sup>

*4. Allow lawyers to help otherwise pro se litigants to prepare pleadings, or allow lawyers to prepare those pleadings themselves, without requiring disclosure that a lawyer provided this assistance. Alternatively, require that the pleading reflect that a lawyer helped the litigant to prepare it without personally identifying the lawyer. In any event, make it clear that, solely by providing such document-preparation assistance, a lawyer does not make an appearance in the case in which the pleading is filed.*

We analyzed this “ghostwriting” issue in Chapter 9(E). We agree with a number of judges who conclude that “it is usually very clear” to a trial judge “when a litigant has received some legal assistance”, and it is better that “litigants receive some help, rather than none.”<sup>455</sup> We therefore favor rules like those in California, *see* Appendix 24, and Washington, *see* Appendix 27, which require no disclosure under these circumstances. If disclosure is required, it ought to

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<sup>454</sup> MODEL RULES OF PROF’L CONDUCT R. 4.3 (2002).

<sup>455</sup> CALIFORNIA REPORT ON LIMITED ASSISTANCE, *supra* note 33, at 10-11. The Limited Representation Committee of the California Commission on Access to Justice proposed “a rule of court that would allow attorneys to assist in the preparation of pleadings without disclosing that they assisted the litigant if they are not appearing as attorney of record.” In support, the Committee noted: “Judicial officers in...focus groups reported that it is generally possible to determine from the appearance of a pleading whether an attorney was involved in the drafting of the document. They also report that the benefits of having documents prepared by an attorney are substantial.” *Id.* at 15. This led to the adoption of the rule in Appendix 24.

be an anonymous disclosure, for example, that “a lawyer helped in the preparation of this pleading.”<sup>456</sup>

*5. Allow an attorney who provides drafting assistance to an otherwise pro se litigant to rely on that person’s representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney should make an independent reasonable inquiry into the facts.*<sup>457</sup>

This substantially is the text of a new Washington rule, which we believe fairly responds to the Rule 11 issues that we discussed in Chapters 7(A)(3) and 9(E). The Washington approach, which embodies the consensus view of ethics opinions, recognizes the lawyer’s limited role, and at the same time prevents litigants from abusing the judicial system.

*6. Relax conflicts of interest requirements for a lawyer who, as part of a pro bono or legal services program, 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.*<sup>458</sup>

This is a summary of the ABA’s new Model Rule of Professional Conduct 6.5. In Chapter 9(D), we explained why we believe this rule will help administrators of *pro se* assistance programs to recruit volunteer lawyers. We believe this Rule is an important step in giving low and moderate-income people more effective access to justice.

### **C. Appellate and trial courts, with the help of the bar, should develop and/or approve limited-service practice forms.**

#### *1. Simplified pleading forms*

In many jurisdictions, there are court-approved, simplified pleading forms. These have helped *pro se* litigants to represent themselves more effectively. These forms also help lawyers provide limited legal assistance to clients. They reduce the time lawyers must devote to pleading,

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<sup>456</sup> This is the requirement in a number of states, including Florida, New York, and New Hampshire. *See* discussion *infra* Chapter 9(E).

<sup>457</sup> WASH. SUPER. CT. R. 11(b) (Appendix 27).

<sup>458</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 6.5 (2002).

and therefore, make limited representation more affordable. We recommend that jurisdictions that have not done so develop such forms and make them available in a broad variety of cases.

## *2. Limited-service retainers and appearance forms*

Court-developed and court-approved forms, like Maine's limited-service retainer agreement (Appendix 8), encourage lawyers to provide limited assistance to clients, standardize practices, and implement limited-assistance practice rules. We recommend that courts create or approve forms that lawyers can use with confidence to enter into limited-service agreements with clients, to enter limited appearances in court, and to withdraw from the limited representation. (See Appendices 19-23.)

We emphasize that court-approved and bar-approved forms are important risk-management tools. Lawyers who use them, in sensible ways adapted to the individual circumstances of clients, can improve the quality of the limited services they provide to clients, and substantially reduce the risks of malpractice.

### **D. Bar associations, continuing legal education programs, pro se assistance projects, lawyer-referral programs, and others should work together to develop limited-representation referral panels and training programs.**

In Chapter 10, we described limited-service referral panels in Washington, Contra Costa County, California, and Mecklenberg County, North Carolina. Through these panels, people who need limited representation can be matched with lawyers who are willing to provide it. We recommend that others replicate these programs or develop their own limited-service referral models.

Lawyers who join such panels should be trained and qualified to provide limited representation. We believe the Contra Costa educational program, which M. Sue Talia developed and teaches, is a model that other jurisdictions can and should replicate.

*Pro se* assistance projects are key participants in referral panels and educational programs. They have limited-service expertise and experience. They can help to identify those who need additional levels of legal assistance. They are essential partners in limited-representation referral systems.

We recommend that bar referral and CLE programs become involved as well. Referral programs have specialized panels of lawyers in many fields of practice. CLE programs offer educational programs across these fields of practice. People who have legal problems in a variety of areas, not just in family law, need limited representation. In the long term, these programs can help to institutionalize and increase limited representation.

**E. Bar associations and others should develop public educational materials and programs about limited legal assistance for the public.**

We agree with the Limited Representation Committee of the California Commission on Access to Justice that there should be “a consumer education brochure describing the options, benefits and potential risks for consumers of limited scope legal assistance.”<sup>459</sup> There should be other forms of consumer education and information as well. In today’s multi-media world, there are many effective ways—online, videos, public service announcements on television and radio—to help the public to understand limited representation, to evaluate it as an option for them, and to learn how and where to obtain it.

**F. Civil justice and judicial foundations should commission and conduct evaluations of the effectiveness of limited representation.**

There is some quantitative and qualitative research on *pro se* assistance programs, but very little on the types of more substantial limited representation that we describe in this book.<sup>460</sup>

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<sup>459</sup> CALIFORNIA REPORT ON LIMITED ASSISTANCE, *supra* note 33, at 6.

<sup>460</sup> See generally GREACEN, *supra* note 15.

We urge civil justice and judicial foundations to commission and conduct appropriate evaluations of limited representation.

Courts should take the first evaluative steps by identifying and tracking cases by level of service. Social scientists then might use this information, in addition to data they develop, to conduct evaluations.

In its Report and Recommendations, the *Pro Se* Litigation Committee of the Judicial Council of Georgia recommended that:

1. “[C]ourts should attempt to collect [*pro se* litigation] information on a local basis, and a statewide case reporting system should be mandated which tracks *pro se* filings. The Georgia Courts Automation Commission should consider this data for inclusion in any court database it develops.”<sup>461</sup>

2. “Courts should routinely ask *pro se* litigants to complete questionnaires to determine the reasons for self- representation and the litigant's experience with the courts. This should be a component of a court's customer service program....[P]rograms that are designed to assist *pro se* litigants should be encouraged to collect data on the number of *pro se* litigants served, the demographics of the litigants, the reasons for proceeding *pro se* and an evaluation of their treatment by the court.”<sup>462</sup>

We would expand the scope of such data collection efforts to include all litigants who receive limited representation. We acknowledge that this would pose definitional and administrative challenges. There are incremental and sometimes subtle differences among levels of services. Moreover, during the course of litigation, whether a party is fully or partially

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<sup>461</sup> Pro Se Litigation Committee of the Judicial Council of Georgia, Report and Recommendations (December 10, 1998).

<sup>462</sup> *Id.*

represented can change. In addition, measuring the “fairness” of outcomes is very difficult, especially by quantitative means.

We believe, however, that there are recurring forms of limited representation that can be identified and analyzed.<sup>463</sup> The objective of this analysis would be to identify the circumstances in which various forms of limited legal assistance are effective, and correspondingly, are not effective, in helping litigants to resolve their legal problems.

This objective is part of our overall goal in writing this handbook: to help low and moderate-income people obtain more effective access to justice. If this handbook helps in this respect, our project will have been successful.

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<sup>463</sup> See discussion *infra* Chapter 2.