Consent, Clarity, and Candor: The Ethics of Communication in Limited-Scope Representation

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Introduction

If there were a way to broaden your client base, focus your work on areas where you could be most effective, fulfill your clients' expectations, and reduce the time and energy you spend on collections, would you embrace the opportunity? Limited-scope representation[1] provides lawyers just such an opportunity. Imagine yourself a legal advisor on employment-law matters, earning fees for giving legal advice on client rights, responsibilities, and obligations in making or defending a discrimination claim, wage claim, or termination agreement, all without going to court or appearing before an agency. Alternatively, you could agree to make a single appearance on behalf of a client in a court or agency proceeding by entering a limited appearance, assuming ethical rules permit.[2] There, you could rely on the client paying you in full for your limited service. By offering limited services, you also promote access to justice by fulfilling the legal needs of clients who might otherwise go without help and who would not otherwise have engaged you.[3]

Increasing numbers of state court civil litigants proceed without benefit of counsel.[4] Self-representation often results from cost concerns,

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1. "'Limited Scope Representation' refers to the concept of a lawyer agreeing with a client to handle only some part(s) of the client's legal matter. The term 'unbundling' is sometimes used to refer to this method of client service." *Limited Scope Representation*, Am. Bar Ass'n, https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/limited_scope_unbundling.html (last visited Aug. 6, 2018).

2. *See* Model Rules of Prof'l Conduct rr. 1.2, 6.5 (Am. Bar Ass'n 2014).

3. *See Limited Scope Representation Helps Lawyers Expand Practice*, Am. Bar Ass'n (Apr. 2015), https://www.americanbar.org/publications/youraba/2015/april-2015/limited-scope-representation-helps-lawyers-expand-practice.html.

4. *See An Analysis of Rules That Enable Lawyers to Serve Self-Represented Litigants*, ABA Standing Comm. on the Delivery of Legal Servs. 1, 1 (Aug. 2014),

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but other factors also motivate litigants not to hire lawyers.[5] These factors include fear that engaging an attorney might affect both ongoing party relationships and a desire to have a greater voice.[6] Many prefer self-representation to retain a measure of control over the litigation process.[7]

Each year, the Legal Services Corporation highlights the difference between the civil legal needs of low-income Americans and the resources available to meet those needs in its annual *Justice Gap* report.[8] Its 2017 report notes that state courts continue to be overwhelmed with unrepresented litigants.[9] In 2015, in New York state courts alone, an estimated 1.8 million individuals appeared without counsel.[10] A 2011 Maryland Access to Justice Commission report estimated that over 340,000 Marylanders had unmet legal needs.[11]

Employment claims often arise under statutes with fee-shifting provisions,[12] suggesting that litigants with meritorious cases should be able to secure counsel. Yet low-wage workers are often unlikely to attract private counsel.[13] Some courts and agencies are hostile to attorney's fees claims or fail to recognize the public purpose of fee-shifting.[14] Unwilling to accept financial risk, private counsel may be more willing to accept cases involving large numbers of claimants than representing individual low-wage clients. Civil legal aid providers may assist in some types of cases, such as unemployment appeals, but lack the resources to meet all needs.[15] Employment disputes are among the civil

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https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf [hereinafter *An Analysis*].

5. *See* Natalie Knowlton et al., *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, Inst. for the Advancement of the Am. Legal Sys. 1–2 (2016), http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf. While most litigants would prefer to be represented, "it is not an option for them due to the cost and having other financial priorities. Attorney services are out of reach, while free and reduced-cost services are not readily available to many who need assistance." *Id.* at 2.

6. *Id.*

7. *Id.* at 18.

8. *See The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, Legal Servs. Corp. 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [hereinafter *Justice Gap*].

9. *Id.* at 9.

10. *Id.*

11. *Implementing a Civil Right to Counsel in Maryland*, Md. Access to Justice Comm'n 8 (2011), http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf.

12. *See, e.g.*, 29 U.S.C. § 216(b) (2012) (attorney's fees provision under the Fair Labor Standards Act); 42 U.S.C. § 2000e-5(k) (2012) (attorney's fees provision for claims brought under Title VII of the Civil Rights Act of 1964).

13. *See Justice Gap*, *supra* note 8, at 30.

14. Maryland Access to Justice Commission, *Fee-Shifting to Promote the Public Interest in Maryland*, 42 U. Balt. L.F. 38, 45 (2011) (public policy behind fee-shifting).

15. *Justice Gap*, *supra* note 8, at 30.

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legal aid problems most likely to affect substantially the lives of low-income Americans.[16]

This representation gap means large numbers of people lack effective access to justice.[17] One strategy the American Bar Association (ABA) has pursued to improve access to affordable legal services is to amend the Model Rules of Professional Conduct expressly to permit limited-scope representation, also referred to as "unbundling."[18] Many states have adopted rules allowing the practice to expand opportunities so that those with limited means can obtain some representation.[19]

Disciplined communication is key to assuring that limited representation does not violate professional responsibility rules. Section I of this Article explores the emerging practice of limited-scope representation, including benefits to lawyers and clients in employment matters. Section II explains how attorneys can communicate effectively with clients about limited services, with attention to rules and best practices for ensuring client informed consent. Section III describes attorneys' obligations when dealing with self-represented opposing parties and those who are, or may have engaged, limited counsel. Section IV examines communications with the court in the context of ghostwriting.

I. Limited-Scope Representation: Benefits to Counsel and Clients in Employment Matters

Limited-scope representation is an "attorney-client relationship in which the client is in charge of selecting one or several discrete lawyering tasks contained within the traditional, full-service legal-services package."[20] In a limited representation agreement, with appropriate guidance from the attorney, the client can select from a range of services. Discrete services might include drafting, filing and serving court documents, case analysis and advice, strategy formulation, obtaining documents, drafting correspondence, reviewing documents, conducting discovery, contacting witnesses, and, where permitted, limited court appearances.[21] The ABA Section of Litigation's Modest Means Task

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16. *Id.* at 25. The stress of dealing with civil legal problems can have cascading negative effects on physical and mental health and financial stability. *Id.*

17. *See id.* at 13.

18. The American Bar Association (ABA) Standing Committee on the Delivery of Legal Services provides an online Unbundling Resource Center. *See Unbundling Resource Center*, Am. Bar Ass'n, https://www.americanbar.org/groups/delivery_legal_services/resources.html (last visited Aug. 6, 2018).

19. *See, e.g.*, Minn. Rules of Prof'l Conduct r. 1.2(c) (2018); Md. Att'ys Rules of Prof'l Conduct r. 19-301.2(c) (2018).

20. Forrest S. Mosten & Elizabeth Potter Scully, Unbundled Legal Services: A Family Lawyer's Guide 1 (2017).

21. *See* M. Sue Talia, *Expanding Your Practice Using Limited Scope Representation*, ABA Standing Comm. on the Delivery of Legal Servs. 1, 15 (Mar. 24, 2009); *see also* Md. Att'ys Rules of Prof'l Conduct r. 19-301.2(c) cmt. 8 (2018) (illustrating range of activities that one state considers appropriate for limited representation).

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Force has promoted limited-scope representation to help moderate-income people obtain the legal help they need in a manner they can afford.[22] The Task Force also foresaw benefits for practitioners: "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."[23]

Limited-scope legal assistance is nothing new. Lawyers have long offered limited services.[24] Traditional full-service practitioners may complete discrete tasks on a fee-for-service basis, including initial consultation, drafting documents, second opinions, and offering strategic advice.[25] In 2002, the ABA modified Model Rule of Professional Conduct 1.2(c) to expand and promote limited-scope practice. The rule now provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[26] Many states have gone farther, adopting additional rules to permit specific forms of limited assistance, such as the preparation of court documents and limited court appearances.[27]

The civil legal-aid community and bar associations, including the ABA, have promoted these revised state supreme court rules to broaden access to justice for persons of low and moderate means.[28] Clients benefit when they can obtain attorneys for discrete tasks they cannot handle on their own.[29] A client unable to afford full representation might seek legal counsel if services are available on a task-by-task basis, allowing the client to determine, at each step, whether to engage the attorney for a particular service.[30] This pool of individuals in need of legal help, but unlikely to secure counsel in a traditional model, is the "latent" legal market identified by legal futurist Richard Susskind.[31]

Although rule changes encouraging limited-scope practice originated from a commitment to improve access to justice, lawyers also can personally benefit from limited-scope practice rules. These rules permit

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22. *Handbook on Limited Scope Legal Assistance*, ABA Section of Litig. 1, 1, (2003), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf. The idea of "unbundling" legal services to better serve lower-income clients was first articulated by Forrest Mosten. *See* Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 Fam. L.Q. 421, 425 (1994).

23. *Handbook on Limited Scope Legal Assistance*, *supra* note 22, at 4.

24. *See id.* at 3–5; *see also* Mosten & Scully, *supra* note 20, at 2.

25. *Handbook on Limited Scope Legal Assistance*, *supra* note 22, at 3–5.

26. Model Rules of Prof'l Conduct r. 1.2(c) (Am. Bar Ass'n 2014).

27. *See, e.g.*, Minn. Rules of Prof'l Conduct r. 1.2(c) (2018); Md. Att'ys Rules of Prof'l Conduct r. 19-301.2(c) (2018).

28. *Handbook on Limited Scope Legal Assistance*, *supra* note 22, at 3.

29. Mosten & Scully, *supra* note 20, at 8.

30. *Id.* at 8–11.

31. *See* Richard Susskind, The End of Lawyers? Rethinking the Nature of Legal Services 18 (2008); *see also Justice Gap*, *supra* note 8, at 8.

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attorneys to deliver a more efficient service to an increasingly knowledgeable and market-savvy client base.[32] Many employment matters lend themselves to "unbundling."[33] Many clients need critical, limited advice and would be willing to pay a flat fee for consultations on hiring, employment contracts, restrictive covenants, leave policies, sexual harassment policies, covenants not to compete, unemployment insurance, record retention policies, equal pay and other compliance issues, wrongful or abusive discharge claims, and Family and Medical Leave Act issues.[34] Other potential clients might be employers who could retain an attorney to prepare employee handbooks or draft policies and agreements. Still others may hire an attorney for negotiations related to harassment or discrimination claims, or for help before, during, or after mediation, litigation, or agency proceedings.[35] The attorney and client may select services from a broad range of activities: drafting agreements and court documents, conducting factual investigations, representing the client in particular matters or proceedings, evaluating and advising on settlement options, performing legal research, coaching and preparing for a hearing, or drafting position statements.[36]

Limited-scope practice expands the pool of potential clients. "There is a forty-five billion dollar latent market for legal services waiting to be served. This market represents the legal needs of low and moderate income individuals and families who cannot afford the existing high cost of legal fees."[37] In 2017, the Legal Services Corporation (LSC) estimated that seventy-one percent of low-income households experienced at least one civil legal problem.[38] This population sought help for 1.7 million legal problems from civil legal aid providers.[39] Low-income persons received help only about half the time, however, primarily because of legal aid funding limits.[40] Only about twenty percent of all low-income persons even sought help—some thought they could deal with legal problems on their own, but others did not know where to seek help, or were unsure whether their problems were legal ones.[41] LSC found that nineteen percent of the civil legal problems were related to employment matters, such as unfair terminations, workplace

32. Susskind, *supra* note 31, at 271.

33. *See Handbook on Limited Scope Legal Assistance*, *supra* note 22, at 23 n.50, 27 n.55, 38 n.97.

34. *See generally id*.

35. *Id.* at 23 n.50, 27 n.55, 38 n.97.

36. *See, e.g.*, *id.* at 37, 38, 68.

37. Frank Strong, *Slideshare Friday: The Latent Market for Legal Services*, Lexis Bus. L. Blog (Apr. 4, 2014), http://www.businessoflawblog.com/2014/04/latent-legal-services (quoting Richard Granat, *The Latent Market for Legal Services*, LinkedIn (Dec. 2, 2013), https://www.slideshare.net/rgranat/latent-market-for-legal-services).

38. *Justice Gap*, *supra* note 8, at 6.

39. *Id.*

40. *Id.*

41. *Id.* at 7.

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grievances, and unsafe or unhealthy working conditions.[42] These numbers and circumstances suggest marketing opportunities for offering discrete, task-specific legal services to employees and employers.

Those law firms moving from a traditional professional model toward a more business model are feeling pressure to deliver more effective, streamlined services.[43] Ultimately, limited-scope representation will allow solo practitioners and law firms alike to match particular legal services with the technology, cost, and staffing that meets client needs in the most efficient manner.[44] Technology can play a role in limited-scope practice by meeting client expectations and improving client communications.[45]

Limited-scope practice can work regardless of whether a firm primarily serves employers or employees. Littler Mendelson P.C., for example, developed Littler CaseSmart to provide low-cost services and increased efficiency for clients in Equal Employment Opportunity Commission (EEOC) and other agency proceedings, as well as in employment litigation.[46] The platform provides a dashboard for employer clients that consolidates information about all pending charges and cases.[47] The dashboard allows employers to identify areas of risk and improve compliance. The law firm couples this technology with an alternative staffing model, enabling employers to save money by engaging "Flex-Time Attorneys" for discrete tasks when needed.[48]

Limited-scope practice models allow firms to respond to the needs of in-house counsel and corporate leadership facing the "more for less" challenge.[49] Corporate consumers of legal services must demonstrate to shareholders that they secured necessary legal services at the best price.[50] This pressure drives demand for alternative billing structures.[51] Employers do not want to pay partners' rates for "repetitive and routine" legal tasks.[52] This, in turn, has led to innovative legal task sourcing.[53] Ultimately, firms that adopt these types of efficiency strat-

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42. *Id.* at 24.

43. Scott Forman, *Perspective: How Law Firms Can Embrace Unbundling*, BLOOMBERG BNA (May 4, 2016), https://biglawbusiness.com/perspective-how-law-firms-can-embrace-unbundling.

44. *Id.*; *see also* Chris DiMarco, *Littler's CaseSmart Platform Drives Efficiency, Work/Life Balance*, LEGALTECH NEWS (Mar. 13, 2015), https://www.law.com/legaltechnews/almID/1202720584777/Littlers-CaseSmart-Platform-Drives-Efficiency-WorkLife-Balance-.

45. *See CaseSmart*, LITTLER MENDELSON, https://www.littler.com/service-solutions/littler-casesmart (last visited Aug. 7, 2018).

46. *Id.*

47. *Id.*

48. *See* DiMarco, *supra* note 44.

49. *See* Richard Susskind, *Tomorrow's Lawyers*, 39 L. PRAC. 34, 36 (2013).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

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egies will earn a larger share of the employer market.[54] Limited-scope practice rules permit firms to rethink how they package and market services to employers.

Lawyers representing employees can also enhance the reach of their practice by offering discrete-task services.[55] If attorneys can identify the primary reasons employees seek their help, they can design a website that makes it easier for potential clients to understand the various services offered, and how those clients can engage an attorney in a way that works for them. Several areas may lend themselves to unbundling on the employee side, including separation agreement reviews, termination consultations, EEOC and state agency mediation, and unemployment appeals.[56]

One service that attorneys can provide is to help clients recognize when they can afford full representation and when limited services are a better fit. Attorneys need not take a case for limited representation if a prevailing employee would be entitled to an award of attorney's fees.[57] So, for example, on the one hand, if state wage-and-hour laws permit fee-shifting, and the client has a good case, the attorney can provide full representation while minimizing financial risk to both the attorney and the client.[58] If, on the other hand, the law limits attorney compensation or fee-shifting is not available, as may be the case in unemployment appeals, the attorney might focus the limited representation on helping the client be as successful as possible with a finite amount of support.[59]

Some areas of employment law may lend themselves to supported self-representation. Maryland law permits aggrieved workers to obtain a lien for unpaid wages on an employer's property without going to court.[60] The Maryland Public Justice Center developed a guide for litigants to enforce judgments using the wage-lien law.[61] Although helpful,

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54. *Id.*

55. Susskind, *supra* note 49, at 36.

56. Research shows that represented claimants in unemployment appeals are more likely to prevail. In these cases, experienced advocates (more so than general practitioners) make a difference. *See* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 Fordham Urb. L.J. 37, 60–61, 79–80 (2010).

57. *See* Thomas R. Newman, *Attorneys' Fees as Covered Costs, Damages, or Loss*, For Def. 8, 9 (Mar. 2014), https://www.duanemorris.com/articles/static/newman_for_the_defense_0314.pdf.

58. Md. Code Ann., Lab. & Empl. § 3-427 (West 2018).

59. In Maryland, there is no fee-shifting in unemployment appeals, and attorney's fees are limited to twice the weekly benefit amount without approval of the Chief Hearing Examiner. Md. Code Regs. 09.32.11.02 (2018).

60. Md. Code Ann., Lab. & Empl., § 3-1101 (2013).

61. *See generally* Jonathan Harris & Molly Theobald, *Collecting Unpaid Wages & Enforcing Judgments in Maryland*, Pub. Justice Ctr. (2012), http://www.publicjustice.org/uploads/file/pdf/MD_Wage_Collection_Judgment_Enforcement_Guide_PJC_FINAL.pdf.

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the guide is an eighty-three-page document.[62] It may be best for an aggrieved employee who obtained a judgment to pursue enforcement armed with both this guide and some assistance from a limited-scope attorney.

In other areas, where full representation is optimal but unrealistic, a litigant might find limited representation preferable to complete self-representation. Attorneys can make a difference, for example, by helping an otherwise self-represented employee draft the charge in a discrimination or workplace safety complaint. Similarly, an attorney may coach or counsel participants who are involved in EEOC and state agency mediation or who will represent themselves in unemployment appeals. In discrimination cases, a limited attorney can counsel the claimant, provide information on filing administrative complaints, support clients during the administrative process, and offer to expand the scope of the representation only if a lawsuit becomes advisable.[63] Aggrieved workers would benefit from an initial consultation or pre-litigation support in many other areas of employment law.[64] An employee seeking a disability accommodation from an employer may be more successful with limited attorney consultation.[65] Some employees may simply want an attorney to review an employment contract or separation agreement.[66]

Limited-scope practice disrupts traditional law firm marketing assumptions.[67] By embracing unbundling, law firms can change how potential clients—both corporate clients and in-house counsel—think about hiring lawyers.[68] The words "unbundling" or "limited scope" need not appear on law firm websites or in advertisements. Clients do not need to know what those terms mean or that they arise from a revision of long-standing ethical rules. Marketing plans should explain to potential clients that (1) a lawyer can make a difference at various stages of employment disputes; (2) it is easy to hire a lawyer; and (3) the client controls how much work the lawyer does and thus how much the representation costs. A well-designed communication allows potential clients to know what services are available on an unbundled basis for a limited or flat fee.

62. *See generally id.*
63. *See generally Handbook on Limited Scope Legal Assistance*, *supra* note 22.
64. *See, e.g.*, *id.* at 64–74 (providing steps for limited-scope representation).
65. Engler, *supra* note 56, at 60–61, 79–80.
66. *See Handbook on Limited Scope Legal Assistance*, *supra* note 22, at 25.
67. *See generally* Susskind, *supra* note 49.
68. *See id.* at 36.

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II. Communicating the Scope of Representation with the Client: Informed Consent

Model Rule 1.2(c) supports limitations on the scope of practice, conditioned upon the client's informed consent.[69] Most states have adopted a version of the rule that tracks its language.[70] Several states retain older rules, requiring "consent after consultation," rather than informed consent.[71]

The Model Rule does not require that the client's informed consent be reduced to writing.[72] Rather, the ABA states:

> While written consent to a limited scope representation is clearly a best practice that should be encouraged in many settings, the [Standing] Committee [on the Delivery of Legal Services] believed that such an ethical requirement would frustrate the ability of lawyers to provide services through telephone hotlines . . . or other electronic communications that do not lend themselves to an exchange of written or signed documents.[73]

Most states that adopted versions of the revised Model Rule 1.2(c) do not require that informed consent be in writing.[74] Several states,

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69. Model Rules of Prof'l Conduct r. 1.2(c) (Am. Bar Ass'n 2014).

70. *An Analysis*, *supra* note 4, at 5 n.21.

71. Alaska Rules of Prof'l Conduct r. 1.2(c) (2018); Haw. Rules of Prof'l Conduct r. 1.2(c) (2014); Me. Rules of Prof'l Conduct r. 1.2(c) (2017); Mass. Rules of Prof'l Conduct r. 1.2(c) (2015); Tex. Disciplinary Rules of Prof'l Conduct r. 1.02(b) (2016); Va. Rules of Prof'l Conduct r. 1.2(b) (2010); W. Va. Rules of Prof'l Conduct r. 1.2(c) (2015). North Dakota adopted a slight variation of the older rule: "A lawyer may limit the scope of the representation if the client consents in writing after consultation." N.D. Rules of Prof'l Conduct r. 1.2(c) (2017).

72. *An Analysis*, *supra* note 4, at 5.

73. *Id.*

74. Conn. Rules of Prof'l Conduct r 1.2(c) (2013); Del. Law.'s Rules of Prof'l Conduct r. 1.2(c) (2010); D.C. Rules of Prof'l Conduct r. 1.2(c); Ga. Rules of Prof'l Conduct r. 1.2(c) (2001); Ill. Rules of Prof'l Conduct r. 1.2(c) (2010); Ind. Rules of Prof'l Conduct r. 1.2(c) (2018); Ky. Rules of Prof'l Conduct r. 1.2(c) (2009); La. Rules of Prof'l Conduct r. 1.2(c) (2016); Minn. Rules of Prof'l Conduct r. 1.2(c) (2018); Miss. Rules of Prof'l Conduct r. 1.2(c) (2011); Neb. Rules of Prof'l Conduct § 3-501.2(b) (2016); Nev. Rules of Prof'l Conduct r. 1.2(c) (2016); N.J. Rules of Prof'l Conduct r. 1.2(c) (2016); N.M. Rules of Prof'l Conduct r. 16-102(c) (2008); Okla. Rules of Prof'l Conduct r. 1.2(c) (2008); Pa. Rules of Prof'l Conduct r. 1.2(c) (2017); S.C. Rules of Prof'l Conduct r. 1.2(c) (2005); S.D. Rules of Prof'l Conduct r. 1.2(c) (2017); Utah Rules of Prof'l Conduct r. 1.2(c) (2018); Vt. Rules of Prof'l Conduct r. 1.2(c) (2009); Wash. Rules of Prof'l Conduct r. 1.2(c) (2017).

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whether by rule, ethics opinion, or administrative order, express a preference for written consent,[75] while others expressly require it.[76]

Despite variations in rules and ethics opinions, certain practices can help attorneys avoid problems with limited-scope representation. The first precept is to know the rules of practice and the ethics opinions for the relevant local jurisdiction. Second, limited-scope representation is all about boundaries: "As in all professional relationships, limited scope representation works best when it is founded on clear and effective communication between the lawyer and the client."[77] Lawyers must carefully identify those clients for whom limited representation is appropriate. The practice model is best suited to clients capable of handling certain portions of the case on their own and able to distinguish between tasks they have agreed to undertake and those the attorney will handle. Client selection in this regard is paramount. A client who pushes the bounds of the agreement will be challenging to serve in a limited capacity. Even in states that do not require written informed consent, articulating the terms of the representation in writing is the safest practice. In a recent opinion, the ABA Standing Committee on Ethics and Professional Responsibility advised:

> Therefore, although not required by Rule 1.2(c), the Committee nevertheless recommends that when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation—including the tasks the lawyer will perform and not perform—in writing that the client can read, understand, and refer to later.[78]

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75. Ariz. Rules of Prof'l Conduct r. 1.2 cmt. 8 (2018) ("Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of the lawyer's written communication of the rate or basis of the lawyer's fee . . . ."); Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (2016); Idaho Rules of Prof'l Conduct r. 1.2(c) cmt. 8 (2004); Me. Rules of Prof'l Conduct r. 1.2(c) cmt. 6A (2017); Mich. Rules of Prof'l Conduct r. 1.2(b) (2018); N.C. Rules of Prof'l Conduct r. 1.2(c) cmt. 8 (2017); Ohio Rules of Prof'l Conduct r. 1.2(c) (2018); Or. State Bar Ass'n Formal Op. 2011-183 (2016); Tenn. Rules of Prof'l Conduct r. 1.2(c) (2017).

76. Alaska Rules of Prof'l Conduct r. 1.2(c)(3); Ark. Rules of Prof'l Conduct r. 1.2(c) (2017); Fla. Rules of Prof'l Conduct r. 4-4.2(b) (2017); Iowa Rules of Prof'l Conduct r. 4.2 cmt. 8 (2017); Kan. Sup. Ct. R. 115(a)(b)(3) (2017); Md. Att'ys Rules of Prof'l Conduct r. 19-301.2(c) (2018); Mo. Sup. Ct. Rules of Prof'l Conduct r. 4-1.2(c) (2017); Mont. Rules of Prof'l Conduct r. 1.2(b) (2017); N.H. Rules of Prof'l Conduct r. 1.2(c) (2017) (form required to confirm consent for limited appearances); N.Y. Admin. Order AO/285/16 (2016); N.D. Rule of Prof'l Conduct r. 1.2(c) (2017); R.I. Rules of Prof'l Conduct r. 1.2(d) (2017) (provisional); Wis. Sup. Ct. Rules of Prof'l Conduct for Att'ys r. 1.2(c) (2017).

77. *Limited Scope Representation in Maryland*, Md. Access to Just. Comm'n (Sept. 2009), http://mdcourts.gov/mdatjc/pdfs/08climitedscopewhitepaper.pdf; *see also* Model Rules of Prof'l Conduct r. 1.2(c) (Am. Bar Ass'n 2014) (representation boundaries must be delineated clearly).

78. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 472, at 3 (2015).

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Different procedures and rules may apply if a limited-scope attorney enters an appearance in court. Maryland's version of Model Rule 1.2(c), for example, requires written confirmation of informed consent for non-court activities beyond an initial consultation.[79] In Maryland, a written "Acknowledgment of Scope of Limited Representation" form must be completed and submitted if an attorney enters a limited appearance in court.[80] The form includes a statement by the client: "I understand that except for the legal services specified above, I am fully responsible for handling my case, including complying with court Rules and deadlines."[81] Attorneys must take care to identify and comply with whatever local rules and procedures govern limited representation in judicial proceedings.

One way to ensure informed consent is to use a retainer agreement that highlights the client's ongoing responsibility for the litigation, clearly delineating between services the attorney will provide and tasks the client will handle.[82] An effective agreement will include well-defined terms of service and detail the scope and pricing for each. This clarity will enable the client to make an informed choice about which tasks the attorney will perform.[83] If the client later requests additional services, the attorney and client should execute a revised agreement to memorialize changes.[84]

III. Communicating with Opposing Parties or Counsel

Lawyers can also find themselves interacting with unrepresented litigants or litigants with limited-scope assistance. This section discusses how lawyers should handle such situations.

A. What Is the Obligation of the Lawyer Who Encounters a Self-Represented Party or a Party Receiving Limited-Scope Assistance?

Whether providing limited or full representation to their own clients, attorneys are likely to encounter opposing parties who appear either unrepresented or who have obtained limited support from an attorney. What rules govern communication in these circumstances?[85] Model Rule 4.2 protects a person represented by counsel from receiving direct communication from opposing counsel.[86] Model Rule 4.3 prevents opposing counsel from taking advantage of an unrepresented opposing

79. Md. Att'ys Rules of Prof'l Conduct r. 19-301.2(c).

80. Form CC-DC-095, Md. Judiciary (July 2015), http://www.courts.state.md.us/courtforms/joint/ccdc095.pdf.

81. *Id.*

82. *See* Model Rules of Prof'l Conduct r. 1.2(c).

83. *See id.* r. 1.2(a) (attorneys to abide by clients' decisions).

84. *See id.* r. 1.2(c); *see also* Formal Op. 472, *supra* note 78, at 3.

85. *See* Model Rules of Prof'l Conduct r. 4.2; Formal Op. 472, *supra* note 78, at 4–5.

86. Model Rules of Prof'l Conduct r. 4.2.

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party.[87] "These rules . . . address the dichotomy of those who are fully represented and those who are self-represented."[88] However, "[t]hey do not effectively address the circumstance of when a self-represented litigant receives limited scope representation from a lawyer."[89]

A recent opinion from the ABA Standing Committee on Ethics and Professional Responsibility provides attorneys some guidance on communicating with opposing parties and counsel.[90] The opinion addresses how attorneys can comply with Model Rule 4.2 when it is not easy to tell if a party is indeed represented by counsel.[91] Rule 4.2 has been referred to as the "no contact" rule.[92] It provides:

> In representing a client, 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.[93]

The ABA Standing Committee explained: "A lawyer directly communicating with an individual . . . will only violate Rule 4.2 if the lawyer *knows* that the person is represented by another lawyer in the matter to be discussed."[94] When a party appears to be self-represented but may, nonetheless, be receiving some limited assistance from counsel, attorneys may have a duty not to assume the party is self-represented. The comment to Rule 4.2 states that "while the black letter of the Model Rule 4.2 does not include a duty to ask whether a person is represented by counsel, . . . a lawyer cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by 'closing eyes to the obvious.'"[95] A pleading or agreement might appear to have been prepared with an attorney's help, or other facts may cause a lawyer to infer that an otherwise unrepresented party has received attorney help. Under these circumstances, the Committee recommends that "the lawyer should begin the communication by asking whether the person is represented by counsel for any portion of the matter . . . ."[96] If the party is represented under a limited-scope agreement, the lawyer "should contact opposing counsel to determine the issues on which the

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87. *Id.* r. 4.3.
88. *An Analysis*, *supra* note 4, at 10.
89. *Id.*
90. *See* Formal Op. 472, *supra* note 78, at 4–7 (discussing attorney compliance with Model Rules 4.2 and 4.3).
91. *Id.*
92. *Id.* at 1.
93. MODEL RULES OF PROF'L CONDUCT r. 4.2.
94. Formal Op. 472, *supra* note 78, at 5.
95. *Id.* at 6 (citing MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. 8).
96. *Id*.

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inquiring lawyer may not communicate directly with the client receiving limited-scope services."[97]

The opinion suggests lawyers must be attentive and adaptive. Lawyers must recognize that representation is not a binary, all-or-nothing proposition, so communication with opposing parties requires more nuance as limited-scope representation becomes more common. Lawyers may communicate directly with opposing parties on aspects of litigation the opposing parties handle on their own, but must refrain from discussing parts of the case for which they are represented. Similarly, if at any point opposing parties or their attorneys notify the lawyer that the terms of the representation have expanded, the communicating lawyer must follow Rule 4.2 and avoid direct communication with parties on those aspects for which they are now represented.[98]

Several states and local bar associations have considered the ethics of communications between clients receiving limited representation, opposing parties who are represented, and their full- and limited-service counsel. The Los Angeles Bar Association, for example, concluded court rules do not prohibit communication with a partially represented party.[99] Several states have adopted versions of Model Rule 4.2 that do not impose an obligation to communicate through counsel unless the limited-scope attorney notifies opposing counsel of the representation.[100] As limited-scope practice expands, all attorneys, whether providing limited-scope services or only full representation, should know the limited-scope rules, their impact on practice, and their interplay with ethical rules.

B. What Is the Impact of the Rules on the Limited-Scope Lawyer?

These rules require nuance and flexibility by limited-scope attorneys, as well as opposing counsel. The ABA Standing Committee on Ethics and Responsibility has opined, "A lawyer providing limited-scope legal services to a client generally has no basis to object to communications between the opposing counsel and the client receiving those services on any matter outside the scope of the limited representation."[101] These matters can be best handled at the beginning of the

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97. *Id.* at 7.

98. Model Rules of Prof'l Conduct r. 4.2.

99. L.A. Cty. Bar Ass'n. Prof'l Responsibility and Ethics Comm., Formal Op. No. 502 (1999).

100. Alaska Rules of Prof'l Conduct r. 1.2(c)(3) (2018); Colo. Rules of Prof'l Conduct r. 4.2 (2008); Conn. Rules of Prof'l Conduct r. 4.2 (2013); D.C. Bar Op. 330 (2005); Fla. Rules of Prof'l Conduct r. 4-4.2(b) (2017); Iowa Rules of Prof'l Conduct r. 4.2 cmt. 8 (2017); Me. Rules of Prof'l Conduct r. 4.2(b) (2017); Mich. Rules of Prof'l Conduct r. 4.2(b) (2018); Mont. Rules of Prof'l Conduct r. 4.2(b) (2017); N.H. Rules of Prof'l Conduct r. 4.2 (2017); Utah Rules of Prof'l Conduct rr. 4.2(b), 4.3(b) (2018); Wash. Rules of Prof'l Conduct rr. 4.2, 4.3 (2017); Wis. Sup. Ct. Rules of Prof'l Conduct for Att'ys rr. 4.2(b), 4.3(b) (2017); Wyo. Rules of Prof'l Conduct r. 1.2(c) (2017).

101. Formal Op. 472, *supra* note 78, at 4.

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lawyer-client relationship.[102] The limited-scope attorney should obtain the client's consent to reveal to opposing counsel which issues can be discussed with the limited-scope attorney and which may be discussed directly with the client.[103]

IV. Communicating with the Court: Divergent Approaches to Ghostwriting

One area of caution concerns "ghostwriting"—a practice in which limited-scope attorneys draft, or provide substantial assistance in drafting, documents for self-represented parties to file with courts.[104] Several states have adopted rules specifically supporting ghostwriting, and the ABA has affirmatively supported and promoted it.[105] Federal courts, however, disfavor ghostwriting.[106] Attorneys who handle cases that may be removed to federal courts must pay particular attention to the interplay between state and federal rules on ghostwriting.[107]

While Model Rule 1.2(c) appears to permit lawyers to assist otherwise self-represented parties in drafting and document preparation, other ethical rules may be relevant.[108] For example, attorneys owe a duty of candor to the court.[109] By providing substantial (but undisclosed) help in drafting pleadings or other documents, attorneys may give the false impression that a party prepared the documents without assistance. This lack of candor may allow an otherwise self-represented person to benefit from procedural allowances or leniency some courts afford to pro se litigants.[110] Parties with the benefit of counsel, unbeknownst to the court, may have an unfair advantage in court.[111]

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102. *Id.*

103. *See id.*

104. *See* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1145 (2002); *see also Handbook on Limited Scope Legal Assistance*, *supra* note 22, at 101 (many courts and ethical commissions distinguishing permissible and impermissible ghostwriting).

105. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) (Undisclosed Legal Assistance to Pro Se Litigants). In 2013, the ABA adopted Resolution 108 in which it referenced Formal Opinion 07-446 favorably. ABA H.D. Res. 108 (2013).

106. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 285 (2010) ("The federal courts have almost universally condemned ghostwriting.").

107. *See infra* notes 112–40 and accompanying text.

108. *An Analysis*, *supra* note 4, at 12.

109. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2014); *see also* Tamara Kurtzman, *The Implications of Ghostwriting in State and Federal Courts*, L.A. LAW. 11 (Mar. 2016).

110. *See, e.g.*, Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaints held to less stringent standards than formal pleadings drafted by lawyers).

111. *In re* Merriam, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (when client signs pleading attorney prepares, attorney creates impression that client drafted the pleading, violating both Federal Rule of Civil Procedure (FRCP) 11 and duty of honesty and candor to the court, placing opposing party at unfair disadvantage and interfering with efficient administration of justice); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (ghostwriting legal documents filed by pro se litigants

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State courts have addressed this potential conflict between ghostwriting and the duty of candor in different ways. Several states created an exception to the duty of candor by adopting rules expressly permitting ghostwriting without disclosure.[112] Some state ethics commissions issued opinions to the same effect, concluding that ghostwriting is permissible without disclosing that the party received assistance or identifying the attorney in any way.[113] Other states have a partial disclosure rule, requiring pleadings prepared with counsel assistance include a statement disclosing the ghostwriting but without naming the attorney.[114] Still other states, by rule or opinion, require pleadings to include the name, and in some cases, address and signature, of the limited attorney.[115] The Colorado Bar Association Ethics Committee noted that an attorney's duty of candor

> would be triggered if a client who is receiving limited representation before a court, typically through filings, gives the court the misimpression that the client is proceeding pro se, without attorney assistance. In these and similar circumstances, the lawyer must correct any misapprehension that the court may have by disclosing the fact that he or she is providing limited representation.[116]

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unfairly exploits mandate that pro se pleadings be held to less stringent standard than pleadings drafted by lawyers, effectively nullifies certification requirement of FRCP 11, and circumvents withdrawal of appearance requirements of local court rules); Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) ("What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by [FRCP] 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made.").

112. Ariz. R. Civ. P. 11(d) (2018); Cal. R. Ct. Civ. R. 3.37 (2018); Ill. Sup. Ct. R. 137 (2018); Mo. Sup. Ct. R. 55.03 (2013); Mont. R. Civ. P. 11(e) (2017); N.D. R. Civ. P. 11(e) (2018).

113. Ala. St. B. Ass'n Off. Gen. Couns., Formal Op. 2010-01 (2010); N.Y. Cty. Law. Ass'n Comm. on Prof'l Ethics, Op. 742 (2010); N.C. St. B. Ass'n Formal Ethics Op. 3 (2008); Sup. Ct. of Tenn. Bd. of Prof'l Responsibility, Formal Op. 2007-F-153 (2007); Utah St. B. Ethics Advisory, Op. 08-01 (2008).

114. Ala. R. Civ. P. 11(b) (2012); Kan. Sup. Ct. R. 115A(c) (2007); Order Regarding Limited Assistance Representation, Mass. Sup. Jud. Ct. R. (2009); Mich. Rules of Prof'l Conduct r. 1.2(b) (2018); R. Super. Ct. St. N.H. R. 17(e) (2017); W. Va. Rules of Prof'l Conduct r. 1.2 cmt. 9 (2015); Wis. Rules of Prof'l Conduct r. 20:1.2 (cmt.) (2014). The Kansas rule, for example, requires parties to include this statement: "Prepared with the assistance of a Kansas licensed attorney." Kan. Sup. Ct. R. 115A(c).

115. Ark. R. Civ. P. 87(c) (2017); Colo. R. Civ. P. 11(b) (2009); Iowa R. Civ. P. 1.423 (2016); Neb. Sup. Ct. R. 3-501.2(c) (2008); St. B. of Nev. Comm. on Ethics & Prof'l Responsibility, Formal Ethics Op. No. 34 (revised 2009); Sup. Ct. of N.J. Advisory Comm'n on Prof'l Ethics, Op. 713 (2008); Or. Uniform Trial Ct. R. 2.010(7) (2018); Order Regarding Provisional R. for Limited Scope Representation in R.I. (2017); Wash. Civ. Rules for Cts. of Ltd. Juris. r. 11 (2005); Wash. Super. Ct. Civ. r. 11 (2005); Wyo. Rules of Prof'l Conduct r. 1.2 cmt. 7 (2014). In addition, a 1994 ethics opinion in Delaware provides that legal services organizations must disclose if "significant assistance" has been provided. Del. St. B. Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994).

116. Colo. B. Ass'n Ethics Comm., Formal Op. 101, at 11 (May 21, 2016). Despite this caveat, the opinion largely supports limited-scope representation and ghostwriting,

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Some courts now provide self-help centers for unrepresented persons.[117] These centers that routinely assist litigants in preparing pleadings and court documents would be significantly impacted if state court rules required disclosure. The ABA Model Rules include an exception to the conflict of interest rules for such high-volume centers in Rule 6.5.[118] Self-help centers might need a similar exception to rules mandating disclosure of all assistance.

Attorneys also have a duty to bring only meritorious claims.[119] When drafting pleadings for an otherwise self-represented party, what duty does an attorney have to verify the claims' merits? Unless ethical rules remove this requirement for limited attorneys, they might risk a violation of ethical rules or malicious prosecution lawsuits.[120] Several state courts have addressed this issue. For example, Montana not only permits ghostwriting but allows an attorney to "rely on the otherwise self-represented person's representation of the 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."[121]

Most federal circuits take a different approach. Federal courts have consistently determined that ghostwriting violates Rule 11 of the Federal Rules of Civil Procedure.[122] In *Duran v. Carris*,[123] the Tenth Circuit found that the "participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature."[124] The court expressed concern about attorneys who "author[ ] pleadings and necessarily guide[ ] the course of the litigation with an unseen hand,"[125] noting that, by providing substantial legal help to the litigant without entering an appearance, the attorney afforded that litigant "the benefit of this court's liberal construction of pro se pleadings."[126] The court also found that ghostwriting inappropriately shields

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in particular, noting: "Many private attorneys have found that providing limited scope representation is a useful means to provide some legal representation to modest means clients who could not otherwise afford to hire an attorney for full representation." *Id.* at 1.

117. *See, e.g.*, *Self-Help Centers*, Md. Cts., http://www.mdcourts.gov/selfhelp/ (last visited Aug. 7, 2018); *see also Self-Help Centers*, Self-Represented Litig. Network, https://www.srln.org/taxonomy/term/68 (last visited Aug. 7, 2018).

118. Model Rules of Prof'l Conduct r. 6.5 (Am. Bar Ass'n 2014).

119. *Id.* r. 3.1.

120. Kurtzman, *supra* note 109, at 11.

121. Mont. R. Civ. P. 11(e) (2017); *see also* Ark. R. Civ. P. 87(c) (2017); Colo. R. Civ. P. 11(b) (2009); Iowa R. Civ. P. 1.423(2) (2016); Mo. Sup. Ct. R. 55.03(c) (2013); Wash. Super. Ct. Civ. R. 11 (2005); Wis. Rules Prof'l Conduct r. 20:3.1 (2016).

122. Robbins, *supra* note 106, at 285 n.73.

123. Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001).

124. *Id.* at 1273.

125. *Id.* at 1271 (citing Johnson v. Bd. of Cty. Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994)).

126. *Id.* at 1272.

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attorneys from responsibility and accountability.[127] Other federal courts have taken issue with ghostwriting because it relieves attorneys from the obligation to certify that the pleadings have merit,[128] because it engages the attorney in a fraudulent misperception that the signer was the drafter of a paper,[129] and because the practice is unprofessional.[130]

In employment litigation, cases may be brought in or removed to federal court if the plaintiff raises federal questions[131] or on the basis of diversity jurisdiction.[132] Employers often find it advantageous to litigate in federal court and may use removal strategically because plaintiffs often fare better in state courts.[133] This jurisdictional difference raises two important issues for the limited attorney. First, attorneys ghostwriting complaints for filing in state courts need to counsel the client about the potential risks of removal of a case to federal court, and how the risk might affect how the complaint is drafted.[134] Second, and more important, if a defendant removes an action to federal court, a limited attorney for the plaintiff should notify the federal court of the attorney's limited role.[135]

Providing notice might be difficult if the attorney has not entered an appearance in the original case. The best practice may be for the attorney to file a disclosure of ghostwriting with the complaint in state court in the event that the matter is removed. Alternatively, to protect the plaintiff's interests, the attorney could include in the limited retainer agreement a provision that the plaintiff will notify the limited attorney if the matter is removed to federal court, so that the attorney can take steps to disclose the limited representation if necessary. One federal court has suggested limited attorneys sign and file pleadings and submit them with motions to withdraw, including appropriate

127. *Id.*; *see also* Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (ghostwriting impedes justice because it may result in "skewing the playing field"—a pro se litigant has the benefit of counsel while also being subjected to less stringent standards reserved for self-represented parties); United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (ghostwriting implicates attorney's duty of candor to court, interferes with the court's ability to supervise litigation, and misappropriates right to more liberal construction as a pro se litigant).

128. Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971).

129. *Johnson*, 868 F. Supp. at 1232.

130. Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998).

131. 28 U.S.C. § 1331 (2012).

132. *Id.* § 1332.

133. *State Court vs. Federal Court in Employment Litigation*, Rutten L. Firm: Wrongful Termination (Sept. 17, 2015), https://www.californialegaladvocates.com/blog/2015/09/state-court-vs-federal-court-in-employment-litigation.shtml.

134. *See* Davoodi v. Austin Indep. Sch. Dist., 755 F.3d 307, 311–12 (5th Cir. 2014) (federal question existed on face of former employee's discrimination complaint brought against employer in state court because it incorporated Equal Employment Opportunity Commission (EEOC) charge alleging Title VII violation).

135. *See supra* text accompanying note 106.

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explanation and briefing.[136] Given the federal courts' hostility to ghostwriting, it would be unwise to remain silent and risk prejudice to plaintiffs.

Note, however, that at least one circuit court has suggested that the federal courts' historically negative view of ghostwriting may be softening. In *In re Fengling Liu*,[137] the Second Circuit held that ghostwriting did not constitute sanctionable conduct in the circumstances presented there. Those circumstances permitted ghostwriting because:

- The court had no rule or precedent governing attorney ghostwriting;
- Some authorities permit ghostwriting;
- The attorney did not know (and should not have known) that the conduct constituted withholding material information from the court;
- The attorney had not otherwise acted in bad faith; and
- The attorney's motives demonstrated concern for the client, rather than a desire to mislead the court or opposing parties.[138]

The court acknowledged the divergent state and federal positions on ghostwriting, stating: "In light of the ABA's 2007 ethics opinion, and the other recent ethics opinions permitting various forms of ghostwriting, it is possible that the courts and bars that previously disapproved of attorney ghostwriting of pro se filings will modify their opinion of that practice."[139] Until more federal circuits follow the Second Circuit, however, practitioners should provide full disclosure of all representation when the matter is filed in, or likely to end up in, federal court.[140]

136. Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1077 n.2 (E.D. Va. 1997).

137. *In re* Fengling Liu, 664 F.3d 367 (2d Cir. 2011).

138. *Id.* at 372–73.

139. *Id*. at 371 (citing Robbins, *supra* note 106, at 290) ("Almost all of the federal cases and state ethics opinions opposing ghostwriting were issued before the May 2007 ABA opinion. Because most states look to the ABA *Model Rules* when adopting and amending their own rules of professional conduct, the coming years may see a number of courts and states take a more relaxed stance on ghostwriting.").

140. One author has recommended attorneys provide at least anonymous disclosure of assistance. *See* Salman Bhojani, *Attorney Ghostwriting for Pro Se Litigants—A Practical and Bright-Line Solution to Resolve the Split of Authority Among Federal Circuits and State Bar Associations*, 65 SMU L. REV. 653, 679 (2012). Others counter that anonymous disclosure is insufficient and suggest the solution would be to modify FRCP 11 to clarify when disclosure is and is not required. *See* Jeffrey P. Justman, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 MINN. L. REV. 1246, 1280–84 (2008). The statutory context may also be important. *See In re* Smith, Nos. 12-11603, 12- 11857, 2013 WL 1092059, at *21 (E.D. Tenn. 2013) ("The provisions of the Bankruptcy Code make disclosure of attorney participation material to a bankruptcy case."). In *Smith*, the applicable statute required attorneys to provide certain disclosures and notice from counsel; without disclosure of attorney participation, the court would not know whether those provisions were being violated. *Id.*

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Because employment lawyers navigate both state and federal law, practitioners must be aware of ethics rules and the varying interpretations of those rules among state and federal courts. This is especially true for cases filed in state court but potentially removable to federal court. Certain limited legal services, such as initial consultations or reviews of mediated agreements, may be appropriate in light of state ethics rules. Yet others, particularly the entry of a limited appearance or the preparation of pleadings and other documents to be filed in court, warrant more caution.

Conclusion

Across the United States, both employers and employees may benefit from legal representation in employment matters when they cannot afford comprehensive legal services. Limited-scope representation has the potential to improve access to justice for these employees and companies, while offering new income and clients for attorneys. In limited-scope representation, legal services are "unbundled," and clients contract with attorneys for one or more discrete lawyering tasks. This arrangement allows lawyers to gain efficiency by focusing on particular areas of law or specific tasks and by reducing time spent collecting fees. Limited representation also benefits clients by giving them clear expectations for legal work and enhanced control over their own cases. To be successful in offering limited representation, however, attorneys must be mindful of its ethical risks and appropriately structure and communicate to clients and others the limits of their representation. This requires explaining to clients the nature and scope of the representation and obtaining informed consent. Additional care is necessary in dealing with opposing parties proceeding with limited representation. Lawyers must also comply with both ethical obligations and court rules when considering ghostwriting pleadings or when encountering opposing parties using ghostwritten work product. Lawyers who follow recommended best practices can use limited representation to expand market reach while also satisfying currently unmet needs of employees and employers for critical legal services.

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