Unbundling Legal Services

EDUCATING THE CONSUMER:

What is my total litigation budget? (Be realistic)

What is the total monetary value of issues in dispute?[1]

What needs to be done? How do I find out?

Do your homework, going to the library if necessary

(If the problem involves court, sit in the back of the court and watch how other people do it before trying it yourself)

Which of these things can I do myself?

Which of these things can I do myself with coaching/assistance?

What kinds of resources are available to help me?

Self help books

workshops

library

online assistance

paralegal

other people who have handled similar problems for themselves

What do I need someone else to do for me?

List each task in order of priority

state the estimated cost against each task

compare this list to your total litigation budget

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[1]Lose 5 points if your answer is "It's not the money, it's the principle." There may be a principle involved, but this analysis is still about money. Quantify what the principle is worth to you in hard, after-tax dollars. It makes a big difference if the principle costs $5,000 rather than $500, and wouldn't you rather spend that money on a vacation or your kid's orthodontia?

spend your budget on the highest priority items which you can't do yourself

How do I find the right person to help me?

ISSUES PRESENTED BY MY CASE

Before you can decide whether you are a good candidate for limited legal services, you must understand the issues presented by your case. Only then can you properly evaluate the risks of limiting legal services and the possible consequences of taking on some of the responsibility for your own representation.

The following is a *partial* list. Divorces are as individual as the couples involved, and there are frequently hidden problems or complications which your consulting attorney will spot. Be sure you ask her to point them out to you so you can make informed decisions. Among the issues which you will need to consider are the following:

ISSUES INVOLVING CHILDREN:

Is there a dispute about custody of your children? Visitation or timeshare? Where they go to school? To church?
Is the disagreement likely to be resolved by mediation?
Is a formal evaluation likely to be required?
Is it likely that you will have a contested trial?
What kinds of witnesses or evidence are likely to be presented by your side? By your spouse's?
Does one of you want to take the kids and move away?
Are there contentions that one of you is an unfit parent?
Are there allegations of physical violence in the family?

ISSUES INVOLVING SUPPORT:

Is the income of both of you easily ascertained (as in a W-2, paystub or some other available document)?
How likely is it that there is additional income from other sources which must be discovered or evaluated?
How difficult is it going to be to get the information necessary to prove the additional income? Will you need to subpoena records or take depositions?
Is it likely that an outside party will have to go over records to find missing income? Does this need to be an attorney? A paralegal? An accountant?
Is alimony going to be in dispute? If you agree it will be paid, do you agree on the amount? Do you agree on the duration?
Is there a computer support guideline in effect in this state? Who is going to run it for you? Do you have all the information necessary to obtain a correct figure? If not, do you know how you are going to get it?
Are there subjective support issues which need to be addressed or developed, such as marital standard of living? What would be the best way to assemble the necessary information?

ISSUES INVOLVING PROPERTY:

Does your state make a distinction between separate and joint property? Is that likely to make a difference in the property division in your case? What kinds of evidence need to be developed to decide it?
What kinds of property do you have to divide:

- Real property (land and buildings)
- Personal property (furniture and appliances, etc.)
- Employee benefits (pensions, 401(k) plans, IRA accounts and the like)
- Stocks and bonds (including stock options)
- Business interests
- Other types of property recognized as divisible by my state law.

What special problems are presented by each type of property?
Was any of your property inherited? What complications does that present?
As to each of these kinds of property, what witnesses or documentary evidence will be required to present your case, and what is the best way to develop it?
Do you suspect your spouse of hiding assets? How do you propose to find them?

OTHER ISSUES:

Is there a history of domestic violence? What complications does that present to your representing yourself in part?
Does the date of separation make a difference in property division in your state, and is it in dispute?
Is there a premarital agreement which impacts the division of property? Support rights?
Is there inherited money which has been invested in any part of your marital estate?
What other complications are presented by the facts of your case? [*Always* ask this question of your consulting attorney or coach.]

CHECKLIST FOR LIMITED LEGAL SERVICES

The following is a partial list of duties and responsibilities which might be apportioned between you and your attorney. It is *not exhaustive*, for the simple reason that each state and each individual case is different, and if it were complete enough to cover all contingencies, it would be virtually meaningless to most of you. Therefore, it is intended to suggest areas which you should explore with your attorney.

When discussing your respective responsibilities with your attorney, it would be useful to make a notation as to who is going to take responsibility for each function. Don't forget, however, that your case may well require evidence and services which are not listed here. Discuss this with your attorney.

This list can then be used as *the basis for* a written retainer agreement. NOTE: IT IS NOT A SUBSTITUTE FOR A WRITTEN RETAINER AGREEMENT.

INFORMATION GATHERING:

Who will obtain the financial data (bank records, registers, pension statements, real estate documents)?

Who will obtain the information regarding custody and visitation disputes?

Income and expense data?

FORMAL DISCOVERY:

Do we need formal discovery?

Who will subpoena records?

Who will prepare requests for documents and evaluate the results?

Who will prepare and evaluate Interrogatories?

Take depositions?

DRAFT DOCUMENTS:

Who will prepare the court forms?

Motions and responses?

Affidavits and declarations?

Who will see that they are properly filed and served?

Analyze paperwork filed by the other side?

Who will prepare Orders?

Other court documents as may be necessary?

LEGAL RESEARCH:

Who will be responsible for researching the applicable law?

Will this include writing briefs and memoranda?

ADVISE CLIENTS:

Who will advise you on the relevant law?

Procedures?

Strategy and tactics?

NEGOTIATIONS:

Who is responsible for negotiating with the other side?

How will we be sure we exchange the information we have both obtained for maximum efficiency and effectiveness?

COURT APPEARANCES:

Who will appear at hearings?

Settlement conferences?

Trials?

Appeals?

If you are doing any of this yourself, will your attorney prep you?

Is there any ethical prohibition of scripting or ghostwriting in your state?

OTHER SERVICES:

What other services will attorney or coach provide?

Use of a client library?

Pointers as to resources to check at the law library?

Forms?

Other?

STRATEGY AND TACTICS:

Who is responsible for setting the strategy of the case?

If we are each doing part of it, how will we be sure we are coordinating sufficiently so that each of us is fully informed of everything we need to know to perform our part of the deal effectively?

QUESTIONS TO ASK YOUR LAWYER

What is your experience with limited legal services?

What are your requirements for apportioning our respective responsibilities regarding my case?

Will you work as my coach, advising me on law, procedure or tactics from time to time as I request it?

Will you perform designated services such as research, drafting or discovery, while I assume responsibilities for other areas of the case?

Are you willing to handle an entire issue such as custody or support from start to finish while I assume responsibility for the remaining issues?

What is your experience with cases such as mine? Have you handled similar cases in the traditional way? Unbundled?

If I want to represent myself in depositions or court appearances, will you coach me?

Will you outline questions for testimony if I request it?

If I want to negotiate my own settlement, will you coach me?

Will you draft declarations and affidavits for me? Orders?

Do you have a client library? Do you charge for its use?

What are the pitfalls I should be aware of if I decide to do part of the case myself? Will you coach me on how to avoid them?

Will you prepare a written retainer letter reflecting our agreements apportioning the responsibility of the case between us?

What are your billing rates and expectations of payment?

What issues do you see in my case which are particularly troublesome? What is your recommendation for the best way to approach them?

QUESTIONS TO ASK A PARALEGAL

There is a much greater variation in the depth and quality of the training and experience of family law paralegals than family law attorneys. This is because there is no standardized training system for paralegals. Some go through rigorous programs to obtain degrees; other programs do little more than teach them the basics of many different fields. This means that they may or may not have in depth family law training, even if they have a degree from a paralegal program.

Many paralegals who work in family law firms are not authorized to do more than fill out forms. Others have developed significant specialties in areas such as the division of pensions and complex family law discovery.

The best test of a paralegal's ability to help you effectively is long-term experience doing *exactly* what you need them to do for other clients. Many of them have spent years in family law firms before deciding to free lance, and these are likely to have the most thorough grounding in the areas you will need. The only way to find out is to *ask.* But don't assume that a paralegal degree alone qualifies them to do what you need. Also, remember that they are not qualified to give you legal advice because they are not trained to do so. The rules on this vary widely from state to state. Find out the rules in your state.

Among the questions you should ask are the following:

What is the nature of your paralegal training? Where did you obtain it? How long have you been doing this kind of work? Where?

What is your experience with cases such as mine?

Are you familiar with the court rules and procedures which apply to my case?

Are you experienced in drafting court forms similar to the ones I will need? Declarations? Orders?

What is your experience with discovery? Are you used to drafting interrogatories? Subpoenas? Deposition notices? [In big firms, paralegals may do virtually all of this; in small firms, they may or may not.]

What experience do you have in analyzing financial data? Tracing? Accounting? [I had a paralegal who was a whiz at this, but most aren't; ask the question if it is relevant to your case preparation.]

What experience do you have in preparing exhibits for trial? Are you familiar with the rules in my jurisdiction for the format and time deadlines for court exhibits? [If they worked in a big firm, they may have had primary responsibility for discovery and exhibits; find this out.]

What is your experience in preparing Qualified Domestic Relations Orders for pension benefits?

[Many paralegals have developed a specialty in this area, depending on where they worked before deciding to free lance.]

What are your billing requirements and rates?

SELF TEST

BE HONEST. Do the following self-test *in writing*. Don't just read it and answer it mentally. You won't be as thorough in your analysis if you don't force yourself to put pen to paper. You also won't be as effective in revising it as needed if you don't have a written record to refer to.

GOALS FOR LIMITING LEGAL SERVICES:

What are my goals in my divorce? [See Appendix ___ for more information on this.]

Why do I want to limit legal services?

Save money

Retain more control over the process?

Why?

Retain more control over my spouse?[Lose 5 points if your answer is yes]

Other reasons? List all perceived advantages.

What risks do I see if I represent myself in whole or in part? List all perceived disadvantages.

MY STRENGTHS AND WEAKNESSES

What am I good at? [Be brutally honest here.]

Paperwork

Writing

Public speaking

Computers

Investigation and information gathering

Research

Analysis of documents

Financial planning and analysis

Decision making

Other skills I have which will assist me:

Attention to detail
Persistence
Follow through
Can I consistently meet deadlines?

Can I understand and use support guidelines

Do computers intimidate me?

Which of the above do I really hate doing [Be *brutally* honest here; if you really hate doing something, you won't like it better if it is part of your divorce. Instead, you'll hate it more and will do a lousy job.]

If I'm not good at it, can I find someone else who is and hire them to do that part?

Which tasks would be better delegated to someone with greater expertise?

If I'm not good at it, can I find someone else to teach me how to do it, supervise or check my work?

Who?

Which specific tasks am I going to delegate or seek help with? Write them here, and write the name or designation of the person who will help you next to each one (i.e., paralegal, attorney, etc.)

TIME COMMITMENT:

Do I have the time to do it properly?

Will my other responsibilities suffer?

Is there a way to compensate for it by delegating some of my other responsibilities for work, etc.

EMOTIONAL CONSEQUENCES:

Can I handle it emotionally?

Am I motivated by a desire to keep up the fight?

Am I able to stand firm and not give up too much simply to have it over with?

Am I trying to get even for things my spouse did to me?

Can I separate my emotions from decisions involving money and property?

Can I separate money and property from decisions involving the kids?

Am I willing to find a trusted independent person (attorney, paralegal or friend) who is disinterested and who will be brutally frank with me if I allow one issue to spill over into another?

Will I commit to listen to them if they tell me I am off track? Even if they tell me what I *really* don't want to hear?

Am I willing to do a cost-benefit analysis at every stage to be sure I'm devoting my time, energy and money where they will do the most good?

Do I really want resolution, or am I trying to remain engaged with my spouse?

Am I afraid of confrontation with my spouse? With others?

Is there a history of physical or verbal abuse in my marriage?

Has my spouse threatened me if I seek legal help? [Many do.]

Is that impacting my decision to limit legal services?

Is it in my best interests to have a third person as a buffer between my spouse and myself?

THE KIDS:

Will my children suffer if I represent myself?

Will my attention be diverted from them?

Will it take time away from them?

If I am working on this at home, can I be sure they don't see or hear what is going on?

Can I keep them absolutely out of the case, as I recognize it is my obligation to do?

Will I commit to keep all written materials out of their reach and under lock and key?

Will I commit not to discuss the divorce in front of them, either on the phone or with others in their presence?

Will I commit to make arrangements for someone to care for them when I have to go to court (even just to file papers) so they will not be exposed to it?

RESPONSIBILITY:

How much responsibility am I willing to take?

Am I willing to take complete responsibility for the outcome?

If no, which areas am I willing to be responsible for?

Am I willing to take the time to educate myself fully on my rights and responsibilities?

Am I comfortable making decisions and sticking to them?

Am I willing to take the risk of being wrong?

Am I willing to accept the likelihood that I won't know things that the attorney on the other side does, and that lack of knowledge may place me at a disadvantage?

Do I believe the advantages of partial self-representation outweigh the disadvantages?

What are they? List them here:

If it turns out that I misjudged and don't get what I thought I should have, am I willing know that I made the best decision under the circumstances and to live with the consequences?

MY GOALS FOR THIS DIVORCE

Find at least one hour when you will be uninterrupted, and write out your goals for your divorce. Make sure to ask your consulting attorney or coach if your legal and financial goals are realistic, and if not, why not.

What kind of relationship do I want with my kids when this is over?

What kind of relationship do I want with my ex when this is over?

Where do I expect to live?

What kind of work will I do?

What kind of income do I expect to have? From what sources?

Will I be able to live comfortably on it?

What investments do I expect to have?

What kind of house do I expect to live in?

What property will I have after it is divided and the costs of the proceeding are paid?

How much responsibility am I willing to assume for all of this?

When I look in a mirror five years from now, what do I want to be able to say to myself about the way I handled my divorce?

The Changing Face of Legal Practice: "Unbundled" Legal Services

Informal National Survey of Ethical Opinions Related to "Discrete Task Lawyering"

Home

This is the result of an informal survey of ethical opinions on issues related to "unbundled" legal services a/k/a discrete task lawyering across the country. The survey was conducted by the Maryland Legal Assistance Network (MLAN), a project of the Maryland Legal Services Corporation. All 50 states were contacted and all states with bar association web pages have been reviewed on-line. The following states have issued at least one ethical opinion on a topic related to "unbundled" legal services a/k/a discrete task lawyering: AL, AK, AZ, CA, CO, CT, FL, GA, IL, IA, KS, ME, MD, MA, MI, MN, MS, NC, NH, NJ, NM, NY, PA, SC, SD, UT, VA, WA, and WI. The following states have indicted (either through direct contact or via web site lists of current ethical opinions) that no current opinions exist: AR, HI, ID, LA, MT, MO, NE, NV, ND, OH, OK, OR, TN, TX, VT, and WV.

As of early July, we have not heard from the following states (and websites do not contain ethical opinions): DE, D.C., IN, RI, and WY.

Facilitates Unbundling

Raises Concerns with Unbundling Issues

- **Arizona**: In a domestic relations matter an attorney can represent a client for the purposes of giving advice and preparing pleadings without appearing in court. Arizona Opinion No. 91-03, (January 15, 1991).
- **California**: It is not unethical for an attorney to limit his/her professional engagement to the consulting, counseling, and guiding of self-representing lay persons in litigation matters, provided that the client is fully informed and expressly consents to the limited scope of representation. Los Angeles County Bar Association Professional Responsibility And Ethics Committee, Opinion No. 483, Los Angeles Lawyer, (February 1996).
- **California**: If a client chooses to appear pro per (pro se) and there is not a court rule to the contrary, the attorney does not have to disclose the limited scope of representation to the court in which the matter is pending. An attorney may limit the scope of representation of a litigation client as long as the client consents to the limited representation. Los Angeles County Bar Association Professional Responsibility And Ethics Committee, Opinion No. 502, Los Angeles Lawyer.(November 4, 1999).
- **Colorado**: A lawyer must clearly explain limits of their representation and must not limit their duty to the client when providing unbundled legal services. Colorado Bar Association Ethics Committee Formal Opinion No. 101, "Unbundled Legal Services," (January 17, 1998).
- **Connecticut**: Legal Aid agencies in lieu of representation, may offer a class on pro se divorce to individuals seeking a simple uncontested divorce and for more complicated divorces, provided clients are fully advised of the risks of proceeding pro se. Connecticut Informal Opinion 90-18, Legal Assistance Organizations and Pro Se Divorce.
- **Florida**: A chief judge, by local rule, may establish a self-help program to facilitate access to family courts. The purpose of a self-help program is to assist self-represented litigants, within the bounds of this rule, to achieve fair and efficient resolution to their family law case. Florida Supreme Court, Appendix Family Self-Help Programs Opinion, www.law.ufl.edu/opinions/su...mily-self-help-programs.
- **Illinois**: Pursuant to prior agreement with client, it is not improper for an attorney to limit the scope of his/her representation. An attorney may prepare pleadings in a dissolution of marriage proceeding, without appearing or taking any part of the proceeding itself. The client must be fully informed of the consequences of the limited agreement, and the attorney must take any steps necessary to avoid foreseeable prejudice to the client's rights. This opinion was affirmed by the Board of Governors January 1991. Illinois State Bar Association, ISBA Advisory Opinion on Professional Conduct; "Limiting Scope of Representation", Opinion Number 849 (December 1983).
- **Kansas**: Law firms can provide services through a 900 telephone number as long as they follow all ethical rules. Kansas Bar Association 92-06 (1992).
- **Maine**: Since the lawyer's representation of the client was limited to preparation of the complaint, the lawyer was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff, and the plaintiff was entitled to sign the complaint and proceed pro se. Maine State Bar

Ethics Opinion No. 89, (August 31, 88).

- **Mississippi**: Where an attorney provides limited legal advice in a public service, multi-discipline counseling program, an attorney-client relationship is created for purposes of determining ethical obligations. Opinion No. 176 Of The Mississippi State Bar, (September 7, 1990).
- **New York State**: A lawyer who does not appear as counsel of record for a pro se litigant may prepare responsive pleadings and demands for financial disclosure, provided the lawyer investigates the matter adequately. New York Opinion 613, (September 24, 1990).
- **North Carolina**: The opinion rules that attorneys may give legal advice and assist persons wishing to proceed pro se with drafting documents without appearing as counsel of record. This opinion consists of seven specific inquiries relating to this topic and the ethics opinion provides seven specific opinions to each inquiry. North Carolina State Bar Association, RPC 114 (July 12, 1991).
- **Pennsylvania**: It is not the unauthorized practice of law when a non-lawyer "fills in the blanks" of a standard form prepared by an attorney. A supervising attorney is not in violation of the Rules of Professional Conduct, assuming the agent is doing nothing more than "filling in the blanks". Philadelphia Bar Association Opinion 94-29, (December 1994).
- **South Carolina**: A lawyer may draft and submit a responsive pleading and waiver of appearance on behalf of an opposing party in a divorce action while representing the interests of his own client when he/she determines that the preparation and submission of the pleadings does not constitute representation. South Carolina Bar: Ethics Advisory Opinion 90-18.
- **Washington**: This is an article from the Washington State Bar News (it is not an ethical opinion). This article discusses ethical considerations when limiting the scope of an attorney's representation. The author concludes the "unbundling" of legal services is ethically permissible. Althoff, Barrie, "Limiting the Scope of Your Representation: Questions of Cost, Candor, and Disclosure", Washington State Bar Association, Chief Disciplinary Counsel, Defined Task Reprentation workshop Access to Justice Conference, (June 1997).
- **Wisconsin**: A lawyer may prepare and disseminate an "Ask the Lawyer" column as long as they shun personal publicity and the lawyer is motivated by the desire to assist one who does not realize that he/she may have a particular legal problem or who does not know of his/her legal rights or obligations. Public dissemination by a lawyer does not prevent his accepting employment as a result of the advice given; so long as he/she does not emphasize his/her own professional experiences or reputation. State Bar of Wisconsin, Wisconsin Ethics Opinions, E-79-5, "Ask the Lawyer"Column, (July 1998).
- **Virginia**: It is ethically permissible for a lawyer to advise and assist the pro se litigant and provide: general legal advice, recommendations for courses of action to follow discovery, legal research, and redrafting of documents prepared by the litigant. Specifically, it is not unethical for an attorney to prepare discovery requests, pleadings, or briefs for signature by the pro se litigant. The opinion goes on to add that failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation. Virginia State Bar Association, Legal Ethics Opinion 1127, "Attorney-client Relationship-Pro Se Litigant: Rendering Legal Advice", Committee Opinion, (November 21, 1988).

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Raises Concerns with Unbundling Issues

Facilitates Unbundling

- **ABA**: The extent of assistance by counsel is an important issue and if it goes to a certain extent without counsel disclosing his/her assistance there may be a misrepresentation. American Bar Association Informal Ethics Opinion 1414, "Conduct of Lawyer Who Assists Litigant Appearing Pro Se," (June 6, 1978).
- **Alaska**: A lawyer may assist pro se litigants who are seeking modifications in child support to fill out forms and to prepare motions. A lawyer's assistance must be disclosed unless the lawyer merely helped the client fill out forms designed for pro se litigants. Alaska Bar Association Ethics Opinion 93-1, "Preparation of a Client's Legal Pleadings in a Civil Action Without Filing An entry of Appearance," (May 25, 1993).

- **Arizona**: No matter what limitations are placed on the assistance provided to the pro per litigants, the Rules of Professional Conduct still apply to the attorney. State Bar of Arizona, "Assisting Pro Per Litigants, Ethical Considerations".
- **California**: There are ethical issues arising from dispensing legal advice solely by telephone. Legal services provided solely over the telephone must use a format that enables the attorney to perform services in a competent and ethical manner and inform his or her client effectively of any limitations on the legal services being provided. Attorney-client relationships normally are formed between the callers and the attorneys. Even when attorney-client relationships are not formed, professional responsibilities can attach to the relationship. The State Bar of California Standing Committee on Professional Responsibility and Conduct, Interim Opinion No. 95-0015.
- **Florida**: Pleadings or other papers prepared by an attorney and filed with the court on behalf of a pro se litigant must indicate "Prepared with Assistance of Counsel". In addition, although a lawyer and client may agree to a limited scope relationship and purpose, the lawyer owes that client the same ethical obligations they would owe any other client. Florida Bar Association, Opinion 79-7 (Reconsideration), (February 15, 2000).
- **Illinois**: A lawyer aids in the unauthorized practice of law, and may violate rules pertaining to confidentiality, conflicts, and the duty to communicate with and explain matters to a client, by limiting his role in a real estate transaction to the drafting of documents and delegating to the real estate broker. Illinois State Bar Association Advisory Opinion on Professional Conduct, Opinion No. 94-1, (July, 1994).
- **Iowa**: "Ghostwriting" of pleadings is a deception on the court, where the pleading is represented as pro se, but the party has received counseling and advice from a lawyer. Iowa Board Opinion 94-35, (May 23, 1995).
- **Kentucky**: The Court and the opponent should not be misled as to the extent of counsel's role. Counsel should not aid a litigant in a deception that the litigant is not represented, when in fact the litigant is represented behind the scenes. Counsel may limit his or her undertaking and provide assistance in the preparation of initial pleadings. The overriding consideration should be the recognition and satisfaction of the legal needs of indigent persons.
- **Massachusetts**: Although an attorney may provide a pro se litigant with limited legal services, the situation raises multiple ethical concerns. Attorney ghostwriting has been viewed as an attempt to gain an unfair advantage. Liability for services rendered extends to all services actually rendered. Massachusetts Bar Association Committee on Professional Ethics, Confidential Opinion, January 9, 1998.
- **Massachusetts**: An attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting ("ghostwriting") litigation documents, especially pleadings, would usually be misleading to the court and other parties and therefore would be prohibited. Opinions of the Massachusetts Bar Association Committee on Professional Ethics, Opinion 98-1, (May 27, 1998).
- **New Hampshire**: A lawyer should not assist a client if the lawyer knows or suspects that the client will misuse the assistance. A lawyer may draft a complaint for a long-time client for a collection action in small claims court, based on the lawyer's familiarity with both the client and the client's business dealings, and the lawyer reasonably believes there is a substantial basis for the claim. New Hampshire Bar Association, Practical Ethics Article: Unbundled Services - Assisting the Pro Se Litigant, (May 12, 1999).
- **New Jersey**: The establishment of a 900 number pay-per-call service is not per se unethical. However, there are several problem areas which if not addressed, could result in malpractice liability and/or ethical exposure. New Jersey State Bar Opinions on Advertising, 26 CAA Opinions, Professional Responsibility in New Jersey, Opinion No. 17, (April 25, 1994).
- **New Mexico**: A lawyer may participate in pro bono clinics that provide educational programs to individuals interested in pro se representation, provided the programs do not provide specific legal advice to the individual. State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1987-6.
- **New York**: Undisclosed participation by a lawyer in drafting pleadings or in rendering other active and substantial assistance to a litigant who thereafter represents himself/herself as being without

professional assistance is improper and prohibited. The Association of the Bar of the City of New York, No. 1987-2, Committee on Professional and Judicial Ethics, Formal Opinion, (March 23, 1987).

- **South Dakota**: South Dakota lawyer may not participate in an Internet Referral Service taking an advertising fee and a share of legal fees to refer cases to South Dakota lawyers and provide no legal services. State Bar of South Dakota Ethics Opinion 98-10, (January 12, 1999).
- **Utah**: A disclaimer stating that no attorney/client relationship existed for advice given over a 900 # is ineffective to negate such a relationship. Utah State Bar Ethics Opinion 96-12, January 24, 1997.

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The survey was conducted by Marla Zide, MLAN research assistant. (June-July 2000)

BA Ethics Opinions

LOS ANGELES COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

Ethics Opinion No. 483

SUMMARY

Limited Representation of In Pro Per Litigants An 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. A litigant may be either self-represented or represented by counsel, but not both at once, unless approved by the court; therefore, in order for the attorney to specially appear on behalf of the litigant before the court for a limited purpose, the attorney should comply with all applicable court rules and procedures of the particular tribunal.

Authorities Cited

Business and Professions Code §6105; Business and Professions Code §6068(d); Business and Professions Code §6068(e); Anderson v. City R. Co., 9 Cal. App. 2d 205, 206-07 (1935); Epley v. Califro, 49 Cal. 2d 849 (1958); Grudger v. Manton, 21 Cal. 2d 537, 549-50 (1943); Himmel v. City of Burlingame, 169 Cal. App. 2d 97, 100 (1959); Kelly v. Ning Yng Venev. Asso., 2 Cal. App. 460, 466 (1905); Nicol v. Davis, 90 Cal. App. 337, 342 (1928); People v. Bloom, 48 Cal. 3d 1194, 1218-19 (1989); Rules of Professional Conduct, Rule 1-300(A); Rules of Professional Conduct, Rule 1-400; Rules of Professional Conduct, Rule 3-110; Rules of Professional Conduct, Rule 3-310(C); Rules of Professional Conduct, Rule 3-700(A)(2); Los Angeles County Bar Association, Formal Opinion No. 432, dated December 17, 1984; Los Angeles County Bar Association, Formal Opinion No. 449, dated March 1988; Cal. State Bar Formal Opinion No. 1984-83; American Bar Association, Model Rules of Professional Conduct, Rule 1.2(c).

FACTS AND ISSUES PRESENTED

An attorney is engaged by individuals representing themselves in litigation in propria persona to give legal advice about various steps in the case. The attorney's written engagement agreement with the in pro per client provides that the attorney will not be the attorney of record in the case, that court appearances, calendaring, filing of papers, meeting of deadlines, and all other responsibilities that counsel of record normally would do, are the client's responsibility. The attorney's engagement is limited to that of a law consultant who will advise the client on matters only as the client requests and to assist in or draft papers that the client will sign and file. The attorney also may keep track of the case and its deadlines. All documents are prepared with the client appearing as a party in pro per. Is the providing of the foregoing limited legal services to the in pro per client improper or unethical, assuming that the client requests it, the limited scope of the attorney's representation is fully explained in writing, and the client agrees thereto?

The attorney additionally desires to make special appearances on motions the in pro per client has filed or responded to, which may or may not have been drafted in whole or in part by the attorney. May the attorney ethically do this?

May the attorney, at the request of the client (i) appear at the status conference as "associate counsel" at which the attorney who will actually try the case must appear, and then (ii) actually try the case, again on an "associated in" basis?

DISCUSSION

I. Provision of consulting advice and preparation of pleadings.

Except where an attorney is assigned by the court, the attorney-client relationship is created by a contract, express or implied, between the attorney and the person who engages him or her. Kelly v. Ning Yng Venev. Asso., 2 Cal. App. 460, 466 (1905). An attorney's authority is limited to the subject matter for which the attorney is retained by the client. Grudger v. Manton, 21 Cal. 2d 537, 549-50 (1943); Nicol v. Davis, 90 Cal. App. 337, 342 (1928).

There is nothing per se unethical in an attorney limiting the professional engagement to the consulting, counseling, and guiding of self-representing lay persons in litigation matters, provided that the client is fully informed and expressly consents to the limited scope of the representation. In Los Angeles County Bar Association Formal Opinion No. 432, this committee opined that the preparation of an answer for an in pro per litigant constituted the providing of professional services and the attendant creation of an attorney-client relationship. The American Bar Association, Model Rules of Professional Conduct, which are not binding on California lawyers but which sometimes provide useful guidance on matters not specifically addressed by the California Rules of Professional Responsibility (cf. Cal. State Bar Formal Opinion 1984-83), provide at Rule 1.2(c) that "[a] lawyer may limit the objectives of the representation if the client consents after consultation."

In Los Angeles County Bar Association Formal Opinion No. 449, this committee opined that there is 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. The committee is of the opinion that, assuming the attorney's engagement agreement with the client clearly delineates the limited scope of the attorney's services, the attorney may provide consultation and prepare pleadings for filing on behalf of the client.

The performance of such legal services does create an attorney-client relationship and, as the committee pointed out in Los Angeles County Bar Association Formal Opinion No. 449, the attorney would have a duty of confidentiality toward each person using the attorney's services under Business and Professions Code §6068(e). The attorney would also be under a duty to avoid the representation of adverse and conflicting interests prohibited by Rules of Professional Conduct, Rule 3-310, and that this might well involve extensive record keeping. To meet the competency requirements of Rules of Professional Conduct, Rule 3-110, the attorney should take care to elicit sufficient information from the client to enable the attorney to render appropriate advice. Any advertisement of the attorney's services must conform to the requirements of Rules of Professional Conduct, Rule 1-400.

As a matter of custom and practice 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.[1] An attorney may not assist the unauthorized practice of law by preparing papers for a client other than the party directly involved in the litigation. Rules of Professional Conduct, Rule 1-300(A).

The provision of limited services to a client from time to time raises potential issues of client abandonment under Rules of Professional Conduct, Rule 3-700(A)(2), prohibiting abandonment of clients. Reasonable steps to avoid reasonably foreseeable prejudice, due notice, and opportunity for replacement counsel's engagement and providing client's files are still required.

II. Special appearances on behalf of the client.

A party may appear in his own person or by an attorney, but cannot do both, unless approved by the court. Epley v. Califro, 49 Cal. 2d 849, 854 (1958); People v. Bloom, 48 Cal. 3d 1194 (1989); and Nicol v. Davis, 90 Cal. App. 337, 342 (1928). The attorney in the circumstance proposed in the inquiry of limited representation to argue motions, whether or not prepared by the attorney, should comply with all applicable court rules and procedures of the particular tribunal. As long as the limited nature of the representation is disclosed to the court and approved by the court, the committee is of the opinion that there is no ethical impropriety.

The appearance at the status conference, where trial counsel must appear, where counsel did not intend to become counsel of record, may constitute a violation of Business and Professions Code §6068(d), as misleading the court as to the true status of the attorney and that the attorney is not controlling the case. Appearance at the status conference requiring trial lawyers may be a tacit representation to the court and opposing counsel that prior to the time of trial there will be an appropriate substitution of the attorney for the in pro per client and the attorney is ready, willing, and able to proceed to trial. In such circumstances it is most likely that the court would find that the client has ratified the attorney becoming counsel of record and fully responsible for the case. Anderson v. City R. Co., 9 Cal. App. 2d 205, 206-07 (1935). Thus, it would be advisable for the attorney to make clear to the court the scope of the attorney's representation.

This opinion is advisory only. The committee acts on specific questions submitted ex parte and its opinions are based only on such facts as are set forth in the questions submitted.

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1 Since a corporation can appear only through an attorney, an attorney may not represent a corporation in this manner. Himmel v. City of Burlingame, 169 Cal. App. 2d 97, 100 (1959).

BA
Ethics Opinions

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE
FORMAL OPINION NO. 502

NOVEMBER 4, 1999

LAWYERS' DUTIES WHEN PREPARING PLEADINGS OR NEGOTIATING SETTLEMENT FOR IN PRO PER LITIGANT

SUMMARY OF OPINION

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. 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. These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis.

Generally, 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.

If an attorney, who is not "of record" in litigation, is authorized by his client to participate in settlement negotiations, opposing counsel may reasonably request confirmation of the attorney's authority before negotiating with the attorney.

Normally, an attorney has authority to determine procedural and tactical matters while the client alone has authority to decide matters that affect the client's substantive rights. An attorney does not, without specific authorization, possess the authority to bind his client to a compromise or settlement of a claim.

AUTHORITIES CITED

Cases:

Abeles v. State Bar (1973) 9 Cal.3d 603, 108 Cal.Rptr. 359.
Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 212 Cal.Rptr.151
Butler v. State Bar (1986) 42 Cal.3d 323, 228 Cal. Rptr. 499
Flatt v. Superior Court (1995) 9 Cal.4th 275
Joseph E. DiLoreto, Inc. v. O'Neill (1991) 1 Cal.App. 4th 149, 1 Cal. Rptr. 2d 636
Houston General Insurance Co. v. Superior Court (1980) 108 Cal.App.3d 958, 964, 166 Cal.Rptr. 904
Laremont-Lopez v. Southeastern Tidewater Opportunity Center, et al. (1997 E.D, Va.) 968 F.Supp. 1075
Lucas v. Hamm (1961) 56 Cal.2d 583, 591
Lysick v. Walcom (1968) 258 Cal.App.2d 136, 147, 65 Cal.Rptr. 406
Miller v. Metzinger (1979) 91 Cal.App.3d 31, 39-40, 154 Cal.Rptr. 22
Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6

Cal.3d 176, 181, 98 Cal.Rptr. 837
Nichols v. Keller (1993) 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601
Ricotta v. State of California (S.D. Cal. 1998) 4 F.Supp.2d 961, 987-988
Sampson v. State Bar (1974) 12 Cal.3d 70, 115 Cal.Rptr. 43

Statutes:

Bus. & Prof. Code §6068(a)-(e)
Bus. & Prof. Code §6090.5
Bus. & Prof. Code §6104
Bus. & Prof. Code §6106
Bus. & Prof. Code §6147
Bus. & Prof. Code §6147.5
Bus. & Prof. Code §6148(a)(2)(3)
Bus. & Prof. Code §6149
Bus. & Prof. Code §§6400 et seq.
Code Civ. Proc. §128.7
Code Civ. Proc. §283(1)
Evid. Code Section 952

Other:

Fed. Rls. Civ. Proc. 11
Rules of Professional Conduct 2-100
Rules of Professional Conduct 3-110
Rules of Professional Conduct 3-210
Rules of Professional Conduct 3-310
Rules of Professional Conduct 3-310(E)
Rules of Professional Conduct 3-400
Rules of Professional Conduct 3-700(A)(2)
Rules of Professional Conduct 5-200
L.A. Co. Bar Assn. Form. Op. 334
L.A. Co. Bar Assn. Form. Op. 350
L.A. Co. Bar Assn. Form. Op. 449 (1988)
L.A. Co. Bar Assn. Form. Op. 476 (1995)
L.A. Co. Bar Assn. Form. Op. 483 (1995)
ABA Inf. Op. 1414
Alaska Bar Assn. No. 93-1, March 19, 1993
Iowa Op. 94-35, May 23, 1995
Iowa St. Bar Assn. Op. 91-31 (1997)
Kentucky Bar Assoc. Op. E-353, January 1991
Maine Ethics Commission No. 89, August 31, 1988
N.Y. State Bar Assn. Op. 613

FACTS AND ISSUES PRESENTED

Client has appeared *in propria persona* in litigation and has engaged Attorney to give legal advice about the litigation and to participate in settlement negotiations. Client has filed a Superior Court complaint which attorney drafted for her on an hourly fee basis. Attorney's written engagement agreement with Client provides that Attorney will not be the attorney of record in the case and that court appearances, calendaring, filing of papers, meeting of deadlines in the case and all other usual responsibilities of counsel of record are Client's responsibility. Attorney's engagement is limited to that of a law consultant who advises Client on matters only as Client requests, assists in or drafts papers that Client will sign and file and attempts to negotiate a settlement with defendants' counsel.

This inquiry raises the following questions:

1. Is this limited legal representation unethical?
2. May opposing counsel properly refuse to negotiate with Attorney on the grounds that he is not the attorney of record in the pending case and, therefore has no authority to bind his client regarding settlement negotiations pursuant to Code of Civ. Proc. §283?
3. If Client has retained Attorney for purposes of settlement negotiations, is Client bound by any agreement Attorney makes on her behalf?
4. Does Attorney have any obligation to disclose to the court in which the matter is pending the limited scope of Attorney's representation of Client?

DISCUSSION

A. Limited Scope of Representation

Attorney-client relationships can be created by the parties' express or implied oral or written agreement or by assignment of an attorney by the court. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 181, 98 Cal.Rptr. 837; Houston General Insurance Co. v. Superior Court (1980) 108 Cal.App.3d 958, 964, 166 Cal.Rptr. 904; Miller v. Metzinger (1979) 91 Cal.App.3d 31, 39-40. 154 Cal.Rptr. 22.)

We previously opined in Formal Opinion 483: "There is nothing per se unethical in an attorney limiting the professional engagement to the consulting, counseling, and guiding self-representing lay persons in litigation matters, providing that the client is fully informed and expressly consents to the limited scope of the representation." (L.A. Co. Bar Assn. Form. Op. 483 (1995); see also Joseph E. DiLoreto, Inc. v. O'Neill (1991) 1 Cal.App. 4th 149, 158, 1 Cal. Rptr. 2d 636, 641.) Any limitations on work to be performed should be stated explicitly and completely.[1]

Limiting the scope of legal services is not an impermissible prospective limitation on an attorneys' liabilities. (See Rule of Professional Conduct 3-400, Discussion.[2])

If the fee agreement is required to be in writing pursuant to Business and Professions Code section 6148, the scope of the legal services as well as the clients' responsibilities should be in writing. (Bus. & Prof. Code, §6148(a)(2)-(3).) Prof. Code §§6147, 6147.5.)

B. Ethical Obligations Resulting from Limiting the Scope of Representation

An attorney who is requested to significantly limit the scope of representation of a client must make the limitations clear. Some of the ethical constraints limiting representation include an attorney's duty of care to advise a client about his or her rights, the alternatives available under the circumstances, the consequences of each, their cost and the likelihood of their success. (Nichols v. Keller (1993) 15 Cal.App.4th 1672, 1684-1687, 19 Cal.Rptr.2d 601.) Thus an attorney should advise the prospective client of the consequences of the attorney providing only "behind the scenes" legal counsel and advice and "ghostwriting" of pleading services to the client including the difficulties which the client may encounter in appearing in court on his or her own behalf or at depositions.

As was held in the Nichols opinion:

> "... if counsel elects to limit or proscribe his representation of the client, i.e., to a workers' compensation claim only without reference or regard to any third party or collateral claims which the client might pursue if adequately advised, then counsel must make such limitations in representation very clear to his client."
>
> "However, even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel." 15 Cal.App.4th at 1684.

Failure to advise the client about relevant issues collateral to the subject of representation may constitute a breach of the standard of care. See also rule 3-110(A), Rules of Professional Conduct (Failure to perform competently).

Although an attorney may provide limited services, the legal services nonetheless must be competently provided (see, rule 3-110(A), Rules of Professional Conduct) and the attorney would have the duty to exercise such skill, prudence and diligence as attorneys of ordinary skill and capacity commonly possess respecting the limited scope of services. (Lucas v. Hamm (1961) 56 Cal.2d 583, 591.)

C. Professional Responsibilities Regarding the Limited Scope of Representation

Even though an attorney may limit the scope of legal services, the attorney is required to discharge professional responsibilities relating to legal services within the scope of representation. For example, Attorney would owe Client a duty of undivided loyalty and would therefore be unable to accept employment adverse to Client from other prospective clients even in unrelated matters. (Flatt v. Superior Court (1995) 9 Cal.4th 275.)

Where it is contemplated that the attorney will have ongoing responsibilities throughout the case, abandonment or improper withdrawal from even limited representation may constitute a violation of rule 3-700(A)(2), Rules of Professional Conduct. The attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the limited-representation client. Thus there may be a need to explain the consequences of the attorney's withdrawal in terms of the limited representation, for example where there is pending discovery which will require greater client effort to follow-up without the attorneys' assistance. The attorney must also give notice to the client, time for employment of other counsel and returning of client files, property and unearned fees, as applicable. (L.A. Co. Bar Assn. Form. Ops. 476 and 483 (1995).)

The provision of limited legal services to Client does not eliminate the potential for conflicts of interests, whether the limited representation is concurrent with or sequential to an attorney's

possible conflicting representation or relationships. Attorney should carefully comply with the requirements of Rule of Professional Conduct 3-310 and should be cognizant particularly of maintaining client confidentiality. (Bus. & Prof. Code §6068(e); Rule of Professional Conduct 3-310(E).)

Moreover, an attorney is prohibited from making an agreement with the client to prospectively limit his or her professional liability to the client. (Rule 3-400(A), Rules of Professional Conduct.) Even if the scope of legal representation is limited to specific tasks, that limitation does not, standing alone, violate the rule against an attorney's obtaining prospective limitation on liability for malpractice. Similarly, any limitation upon the scope of representation does not constitute a limitation on the right of the client to file a disciplinary complaint or cooperate with the investigation or prosecution of a disciplinary complaint. (Bus. & Prof. Code §6090.5.)

These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis

D. May Opposing Counsel Refuse to Negotiate with Attorney on the Grounds That Attorney Is Not Counsel of Record in the Pending Case?

Subdivision 1 of section 283 of the Code of Civil Procedure provides that an attorney has the authority to bind the client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered in the minutes of the Court and not otherwise.

The authority conferred by section 283 does not include the authority to agree to a settlement of the case or to dismiss the action. Generally, the attorney has apparent authority as to procedural or tactical matters but it is the client who decides matters that affect her substantive rights, including the settlement of her claim. (Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 404-405, 212 Cal.Rptr. 151, 155-156, 696 P.2d 645.)[3] Outside the scope of section 283, an attorney, like any other agent, can be given authority by his principal. If granted by Client, Attorney has the authority to act for Client in conducting settlement negotiations.

While opposing counsel may refuse to engage in any settlement discussions whatsoever, the fact that Attorney is not counsel of record and does not possess the authority conferred by section 283, is irrelevant to opposing counsel's decision whether or not to engage in settlement negotiations. Opposing counsel might well request a confirmation of Attorney's authority to act for Client in the absence of the authority that is apparent from being attorney of record in the pending litigation.[4] However, we have found no authority requiring Attorney, when **not** the "attorney of record" to have the specific authority conferred by section 283 in order to participate in out of court settlement negotiations.

If Attorney desires to appear at a court sponsored settlement conference, Attorney must obtain the permission of the court. As the Committee opined in Formal Opinion No. 483:

"A party may appear in his own person or by an attorney, but cannot do both, unless approved by the court. [Citations omitted.] The attorney in the circumstance proposed in the inquiry of limited representation to argue motions, whether or not prepared by the attorney, should comply with all applicable court rules and

procedures of the particular tribunal. As long as the limited nature of the representation is disclosed to the court and approved by the court, the Committee is of the opinion that there is no ethical impropriety."

E. Can Ex Parte Communications Between Client and Opposing Counsel Continue During Attorney's Representation of Client Respecting Settlement and If So, What Is the Scope of Such Communications? Yes.

Rule 2-100(A) provides:

"While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

Since Attorney is not counsel of record for Client in the litigation, rule 2-100(A) does not preclude the opposing counsel from communicating directly with Client concerning all aspects of the litigation in the civil litigation context.[5] Because 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.[6] The protections afforded by rule 2-100 extend only to clients who are not representing themselves in a case or matter. If and when Client formally substitutes Attorney as counsel of record, rule 2-100 (A) will then attach. (Abeles v. State Bar (1973) 9 Cal.3d 603, 108 Cal.Rptr. 359.)

If opposing counsel communicates directly with Client, the opposing counsel should not render legal advice to Client. (L.A. Formal Opinions 334 and 350.)

If Client and Attorney nevertheless assert that some or all communications must go through Attorney based upon Attorney's representation of Client respecting settlement negotiations, based upon rule 2-100, the opposing counsel may properly communicate with Client or may seek court clarification of a process for communication with Client based upon Attorney's assertions.

F. Disclosure to the Court of the Attorney's Role in Preparation of Pleadings for the Client's Filing in Court

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

to the court of the authorship of the pleading or document inherently involves deception or misleading of a court within the meaning Business and Professions Code section 6068(d) or rule 5-200, Rules of Professional Conduct.

There is a nationwide debate concerning the ethical propriety of attorney's "ghostwriting" pleadings and documents for a *pro per* litigant to file with a court [8], including whether an attorney has a duty to disclose to the court the identity and extent of an attorney's involvement in the preparation thereof.

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

Even though Client may be responsible for certification that the conditions of CCP §128.7(b) 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. These include at least the following: Business and Professions Code section 6068(a) requires an attorney to support the laws of the State of California, including section128.7. Business and Professions Code section 6068(c) provides that it is the duty of an attorney to counsel such actions, proceedings or defenses only as appear legal or just, except the defense of a person charged with a public offense. Rule 3-200 prohibits an attorney from accepting or continuing employment, if the member knows that the objective employment is to bring an action or assert a position in litigating without probable cause and for the purpose of harassing or maliciously injuring any person or to present a claim or defense in litigation that is not warranted under existing law unless supported by a good faith argument for extension, modification or reversal of such law. Rule 3-210 prohibits an attorney from advising the violation of any law rule or ruling of a tribunal unless the member believes in good faith that the law, rule or ruling is invalid. Business and Professions Codes section 6106 prohibits an attorney from engaging in any act of dishonesty, corruption or moral turpitude. The attorney who prepares pleadings to be signed and filed by a *pro per* litigant still must comply with the professional obligations of 5-200; Business and Professions Code sections 6068(b)-(d) and 6106; and other applicable court rules as to the documents' content and form. (Bus. & Prof. Code § 6068(a).)

An attorney who prepares documents to be filed by a pro per litigant which do not comply with section128.7(b) may violate one or more of the ethical duties set forth above. The attorney also has a duty to the client to explain the importance of compliance with section128.7 as well as the consequences to the client for its violation. (See e.g., Lysick v. Walcom (1968) 258 Cal.App.2d 136, 147, 65 Cal.Rptr. 406.)

In the event of a court determination of a violation of section

128.7(b), the court may sanction the *pro per* litigant for its presentation[9] and may lodge a complaint with the State Bar about the attorney's participation in the preparation of the document.

Some non-California federal court decisions have held that by providing anonymous assistance with *pro per* pleadings, the attorney wrongly avoids the ethical and substantive purposes underlying Rule 11 of the Federal Rules of Civil Procedure or state policies that may be analogous to Rule 11. (Laremont-Lopez v. Southeastern Tidewater Opportunity Center, et al. (1997 E.D.Va.) 968 F.Supp. 1075, 1078-79. But see Ricotta v. State of California (S.D. Cal. 1998) 4 F.Supp.2d 961, 987-988, wherein the court held that "ghost writing" 75-100% of a *pro per* litigant's pleadings was "unprofessional" conduct but would not subject the attorney to contempt because the conduct was not a violation of any rule or law.) The purpose of Rule 11 is to promote fairness and efficiency, by obliging the signer to conduct reasonable inquiry to determine that the pleading is well grounded in fact; is not presented for an improper purpose; and takes a non-frivolous legal position. (Ibid.) Rule 11 also has remedial and deterrent purposes, as it authorizes sanctions against a signer who violates those obligations. (Fed. R. Civ. Proc. 11.)

California practitioners who desire to prepare pleadings or documents for presentation in a California federal court by a *pro per* litigant must comply with that court's rulings on "ghostwriting" and if disclosure is required, comply with such rulings. (Bus. & Prof.§6068(a).)

This opinion is advisory only. The Committee acts on specific questions and its opinions are based on such facts as are set forth in the inquiry submitted to it.

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1. A written fee contract, including any written limitations upon the scope of services and representation, is deemed to be a confidential communication protected by Business & Professions Code section 6068(e) and Evidence Code Section 952. (Bus. & Prof. Code §6149.)

2. All further references to "rules" are to the Rules of Professional Conduct of the State Bar of California unless otherwise noted.

3. There may be disciplinary consequences for an attorney who settles his client's case without authority. (Sampson v. State Bar (1974) 12 Cal.3d 70, 83, 115 Cal.Rptr. 43, 51; Bus. & Prof. Code §6104.)

4. As noted above, the authority conferred by section 283 does not include the authority to bind the client to a settlement of the case or matter without the client's express consent.

5. This opinion does not address limited representation in a criminal matter which may involve countervailing constitutional considerations, including constitutional guarantees of effective assistance of counsel.

6. Settlement of the case is an inherent part of the litigation process for which Client is representing himself or herself in *pro per* because the termination of the case, through settlement, is a formal event which occurs within the litigation process. Thus, settlement of the

case is an inherent part of the litigation process upon which Client is representing himself or herself in *pro per.*

Nor can Attorney and Client be co-counsel with respect to settlement of the matter. In L.A. Formal Op. No. 483, the Committee opined that a client cannot become co-counsel with an attorney without engaging in the unauthorized practice of law. However, even if a client could become a co-counsel, the opposing counsel would still be authorized to communicate directly with the client-co-counsel on all matters regarding the case pursuant to rule 2-100, since the rule does not apply to parties who are themselves represented by counsel. 7. If a court rule or regulation requires disclosure to the court by an attorney assisting a pro se client in the preparation of pleadings and other court documents, the lawyer must comply with any applicable rule or regulation. (Bus. & Prof. Code §6068(a).)

8. Views expressing that an attorney may ethically assist a litigant appearing *in propria persona* with pleadings, free from any special duties to identify the attorney's role to the court in which the litigant's pleading or papers are filed appear to be based upon the following policy arguments: 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. (Bus. & Prof. Code, § 6400 et seq..) There may be an uneven application of law if similarly situated attorneys are required to make disclosures to courts.

The contrary view, that anonymous assistance to a *pro per* litigant with drafting pleadings is unethical, is based on arguments that the practice is dishonest to the court, and permits the attorney to evade the court's authority. Some opinions observe that the attorney deceives, defrauds, misrepresents to, or lacks candor with the court by anonymously assisting the *pro per* litigant. (Laremont-Lopez v. Southeastern Tidewater Opportunity Center, et al. (1997 E.D.Va.) 968 F.Supp. 1075, 1078-79 and authorities cited therein; Iowa Op. 94-35, May 23, 1995.) Other opinions approve of assistance in the preparation of a *pro per's* pleadings, provided the attorney discloses his identity to the court. (ABA Inf. Op. 1414; Iowa St. Bar Assn. Op. 91-31 (1997); N.Y. State Bar Assn. Op. 613, Kentucky Bar Assoc. Op. E-353, January 1991.))

9. The sanctioned client may argue advice of counsel to a sanctioning court and disclose the identity of the attorney who prepared the objectionable pleading. The court's potential authority to sanction the preparer of the pleading is beyond the purview of this Committee.

Colorado Bar Association

Formal Opinions Number Index || Formal Opinions Subject Index

The following Formal Opinion was written by the Ethics Committee of the Colorado Bar Association

[*Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions.*]

101 Unbundled Legal Services
Adopted January 17, 1998.

Introduction and Scope

For many years, courts have experienced increasing numbers of *pro se* litigants. While by definition attorneys do not enter appearances for *pro se* litigants, attorneys are often asked by *pro se* litigants to explain legal procedures, principles, and strategies. A lawyer who provides a client with some, but not all, of the work normally involved in litigation is said to be providing "unbundled" legal services.[1] By this unbundling, a person who cannot afford full representation can receive at least some legal assistance. In certain circumstances, it may be preferable for a lay person to have limited legal services rather than no services at all.

The Need for Unbundled Legal Services

Recent years have witnessed greater numbers of *pro se* litigants. A seminal American Bar Association study in Maricopa County (Phoenix), Arizona found that in 1980, at least one lawyer appeared in 76 percent of all divorce filings. By 1990, that number had dropped to 48 percent. In only 12 percent of the 1990 filings were both parties represented by counsel.[2] It has been estimated that in California, between 45 percent and 55 percent of the divorces are entirely *pro se*.[3]

The 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 office also maintains a referral list of attorneys who provide unbundled legal services.[4]

The need for unbundled assistance is not limited to divorce cases. The U.S. District Court for the District of Colorado reported that 36 percent of the civil filings between January and May 1995, were filed *pro se*.[5] While many of these were filed by incarcerated persons, non-prisoner filings involved such disparate topics as

copyright infringement, trademark disputes, product liability, bankruptcy appeals, and "torts to land." A recent newsletter from the Boulder County (Colorado) Bar Association reported that 37 percent of all cases filed in the Colorado state judicial system involve at least one *pro se* party.

Outside the courtroom, unbundled legal services are both commonplace and traditional. For example, clients 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.

Although unbundling is commonplace in many areas of the law, the concept is receiving the most attention in connection with *pro se* litigation. As a way of coping with the enormous number of *pro se* litigants, legal services organizations such as the Colorado State Public Defender and the Metro Volunteer Lawyers Program (formerly known as the "Thursday Night Bar") 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.

Many individuals who do not qualify for public or private legal assistance programs, but who cannot afford the full service of a lawyer, recognize that their chances of success in the legal arena can be enhanced by 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.

New York State has approved of the unbundling of legal services, noting: "We firmly believe that 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." New York State Opinion 613 (9/24/90).

Different circumstances may create the need for unbundled legal services. Perhaps the most common is when a client cannot afford full representation. Others include where time constraints prevent fullÊrepresentation from being provided or the client requests only limited representation.

Ethical Issues

Rule 1.2 of the Colorado Rules of Professional Conduct allows a lawyer and client to limit the scope of the lawyer's representation. Rule 1.2(a) considers the issue from the client's perspective in providing that "[a] lawyer shall abide by a client's decisions concerning the objectives of the representation. . . ."

Rule 1.2(c) addresses the lawyer's point of view in providing that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." The Comment to Rule 1.2 further emphasizes that a lawyer's representation need not include the full bundle of services in every instance:

> The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.

The unbundling of legal services is not limited to situations where an attorney is entirely absent from the courtroom. The Comment to Rule 1.2 suggests that an appearance in court for only some of a client's claims is not unethical. For example, where an insurance contract provides a defense for certain lawsuit claims, but not others, the Comment states that, "the representation may be limited to matters related to the insurance coverage."[6]

The ABA Ethics Committee concluded under the prior Code of Professional Responsibility that there was no *per se* prohibition against unbundled legal services:

> We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding *pro se,* or that a lawyer could not, for example, prepare or assist in the preparation of a pleading for a litigant who is otherwise acting *pro se.*

ABA Informal Ethics Opinion 1414, *Conduct of Lawyer Who Assists Litigant Appearing* Pro Se (1978).

However, in the unusual situation where the lawyer provided every legal service except sitting at counsel table during trial and examining witnesses, ABA Opinion 1414 concluded that the lawyer was participating in a misrepresentation that the client was conducting the litigation *pro se.* In that circumstance, ABA Opinion 1414 concluded that the lawyer's conduct constituted fraud, deceit or misrepresentation in violation of Disciplinary Rule 1-102(A)(4).[7]

A lawyer who limits the scope of the representation must consult with the client about the limited representation and obtain the client's consent to the limitation. Colo.RPC 1.2(c). As noted in the Terminology section of the Colorado Rules of Professional Conduct, "consult or consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." A lawyer engaged in unbundled legal services must clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client's rights and interests. Where it is "foreseeable that more extensive services probably will be required" the lawyer may not accept the engagement unless "the situation is adequately explained to the client." Comment, Colo.RPC 1.5.

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

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

Examples of the "inevitable risks entailed in not being fully represented in court" include the *pro se* litigant's inability to introduce facts into evidence due to a lack

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

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 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. As noted in the Comment to Rule 1.1, "competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." Thoroughness and preparation requires the lawyer to make the factual inquiry necessary to understand the client's legal situation and provide competent advice.

The nature of the required "thoroughness and preparation" is not the same in every matter. As noted in the Comment to Rule 1.1, "the required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence."

Conclusion

The Colorado Rules of Professional Conduct, and especially Rule 1.2, allow unbundled legal services in both litigation and non-litigation matters. A lawyer who provides limited representation must nonetheless make a sufficient "inquiry into and analysis of the factual and legal elements of the problem" to provide the competent representation required by Rule 1.1.

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1. The "full bundle" of representation in litigation has been described as: "(1) gathering facts, (2)Êadvising 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." Mosten, "Unbundling Legal Services and the Family Lawyer," *Family Law Quarterly* at 423 (Fall 1995).

2. ABA Standing Committee on the Delivery of Legal Services, *Self-Representation in Divorce Cases* (1993) at 6-7.

3. California State Bar Legal Services Section, Standing Committee on Legal Services to Middle Income Persons, *The Pro Per Counseling Handbook* (1994) at 4.

4. "Unbundled Services,"18 *The Docket* 5 (Denver Bar Assoc., Sept., 1996).

5. 417 of 1,162 civil cases were filed *pro se*. *Pro Se Litigation Summary* prepared by the Civil Justice Reform Act Advisory Group for the U.S. District Court, D. Colorado (1996).

6. This Committee previously approved multiple lawyers appearing in insurance defense cases, with each lawyer's appearance limited to specific issues in the litigation. Our Ethics Opinion 91, *Ethical Duties of Attorney Selected by Insurer to Represent Its Insured* (Jan. 16, 1993) [22 *The Colorado Lawyer* 497 (March 1993)], suggests that "[w]hen there are significant issues of uninsured exposure (such as damages sought in excess of policy limits or uncovered claims), the defense counsel should so advise the insured and inform the insured that he or she has the right to retain independent counsel."

Opinion 91 also approves the use of separate counsel to pursue any counterclaims an insured

defendant might have against the plaintiff: "Insurance defense counsel should, in most cases, recommend that another attorney pursue the counterclaim on the insured's behalf because of the potential for conflict between the insured and the insurance company." *Id.* at § II(C)(2).

In *Johnson v. Board of County Commissioners*, 868 F.Supp. 1226 (D.Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996), the federal district court concluded that a lawyer who wished to defend only the "official capacity" claims against a former county employee violated Rule 1.1 of the Colorado Rules of Professional Conduct. The Tenth Circuit Court of Appeals disapproved that conclusion and held that a limited appearance is not only ethically permissible, but is sometimes ethically *required:*

> . . . when a potential conflict exists because of the different defenses available to a government official sued in his official and individual capacities, it is permissible, but not required for the official to have separate counsel for his two capacities. . . . Obviously, if the potential conflict matures into an actual material conflict, separate representation would be required.

85 F.3d at 493 (10th Cir. 1996), *cert denied*, S.Ct. 611, 136 L.Ed 2d 536.

7. The related issue of a lawyer "ghostwriting" court papers for a *pro se* litigant is beyond the scope of this opinion. Ghostwriting has been the subject of numerous and contradictory ethics opinions. Some opinions hold that "ghostwriting of pleadings . . . is a deception on the court" and constitutes "conduct involving dishonesty, fraud, deceit and misrepresentation." (Iowa Opinion 94-35, May 23, 1995). Others approve of a lawyer preparing the initial court pleading, so long as the lawyer's name (but not necessarily a signature) appears. (Kentucky Bar Association Opinion E-353, Jan. 1991). Others do not require the lawyer's name to appear, but instead require only that the document bear the statement "Prepared by Counsel." (N.Y. City Bar Association. Opinion 1987-2). Still others find no reason whatsoever for disclosure of the lawyer's involvement. (Maine Ethics Commission No. 89, August 31, 1988) (Alaska Bar Association No. 93-1, March 19, 1993) (Los Angeles County Bar Association No. 483, March 20, 1995).

Colorado lawyers should consider *Johnson, supra*, note 6 (ghostwriting violates the duty of candor to the tribunal, and therefore violates the Rules of Professional Conduct); *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996) (*see* n. 3: "The [trial] court was also critical of the practice of attorneys ghostwriting for *pro se* litigants. . . . This aspect of the court's ruling is not at issue in this appeal."); *cert. denied*, 117 S.Ct. 611, 136 L.Ed.2d 536.

See also Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F.Supp.1075, 1080 (E.D.Va. 1997) (while there is no specific ethical, procedural or substantive rule against ghostwriting, attorneys "should have known that this practice was improper. . . .").

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