Ethical and Malpractice Minefields of Unbundling: How to Deliver Limited Scope Services without Being Sued or Disciplined

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"Don't Forget the Four No-Brainers!
1) Limitations must be informed and in writing
2) Limitations must be reasonable under the circumstances (ABA Model Rules)
3) Changes in scope must be documented
4) Clients must be advised on related issues even if they don't ask*"*

—Texas Legal Access to Justice Commission (2016)

It seems that wherever we travel around the country to talk about unbundling, before our first PowerPoint slide comes up on the screen, several hands go up throughout the room with questions such as:

- "Should I call my malpractice carrier to find out about my new higher rates before or after my first unbundling client appears in my office?"
- "I went to law school for three years and have been in practice for ten. How can you expect clients to learn how to handle their own case after one hour with me—even if they spend three days sitting in one of those client libraries that you are always talking about?"
- "How can I take on a case if the client won't authorize me to do sufficient legal research?"
- "Won't I expose myself to ethical complaints if I advise a client how to negotiate directly with the other side who is represented by a lawyer?"
- "What will my liability be if the client screws up the proper advice that I have given?"
- "Most experienced family lawyers have trouble properly drafting a subpoena. How can you expect a client to do that type of technical legal work with a little coaching from me?"
- "I am having a rough time covering my overhead nut as it is. Won't unbundling just take away full-paying clients?"

- "I have spent my entire career building a professional practice. Aren't you really trying to turn me into a document paralegal technician?"
- "In our state, if I ghostwrite a court document and don't disclose that I did it, I could be brought up on disciplinary charges with the state bar. Aren't you advocating that I defraud the court and give a pro se litigant unfair advantage due to the deference that our judges give litigants without lawyers?"
- "How in the world can I comply with conflict of interest checks and statute of limitations when I only see a client once, and for 30 minutes? Won't it cost me more just to protect myself than the fee I could earn—assuming the client check doesn't bounce?"
- "If all I am going to do with this unbundling is sit on the sidelines, I'm going to think about going into another line of work."

These are the voices of lawyers. As you saw in Chapter 1, the first reaction of many lawyers may be hostile toward unbundling—but lawyers are not the only ones who have trouble with unbundling. Discomfort, questions, excuses, hesitation, they exist everywhere—with the public, with judges, with the organized bar, with the legislature, and in the law schools. There are real fears and concerns about unbundling that need to be addressed. Some fears, such as the fear of malpractice, are legitimate. Other concerns are not grounded in reality, and these need to be allayed. These fears and concerns represent barriers to the widespread acceptance of unbundling in the legal world today. There are true benefits to unbundling, just as there are true barriers. Yet, for every barrier, solutions exist that can make it easier for unbundling to grow in use and acceptance.

> Overall, states have addressed four primary areas in order to mainstream unbundling: the attorney-client relationship, the duty of candor to the court, the relationship with opposing counsel, and judicial conduct.
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> Molly M. Jennings and D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 Denv. U. L. Rev. 825 (2011).

WIDESPREAD ACCEPTANCE OF UNBUNDLING BY THE ORGANIZED BAR, COURTS, AND LEGISLATURES

Would you believe it if we told you that unbundling has been actively promoted by the American Bar Association (ABA)? By most state bar associations? By unbundling-friendly statutes and court rules? By court decisions in favor of unbundling attorneys who were sued by their clients? By major lawyer malpractice insurance companies? Don't take our word for it. Throughout

this book and beyond, you will see a treasure trove of legal authority that should help you to relax about the risks and focus on the opportunities.

The Denver-based public interest organization Institute for the Advancement of the American Legal System (IAALS) highlights three resources as points of departure to help you get comfortable with unbundling, specifically:

1. ABA Unbundling Resource Center, Court Rules. This ABA compilation of state court rules pertaining to limited scope representation details relevant professional conduct, ethics, and civil procedure rules across the country.
2. National Center for State Courts, Self-Representation State Links: Unbundling Rules. This National Center for State Courts resource page contains links to state unbundling rules.
3. ABA Standing Committee on the Delivery of Legal Services, *An Analysis of Rules That Enable Lawyers to Serve Self-Represented Litigants* (August 2014). This white paper by the ABA Standing Committee on the Delivery of Legal Services provides a detailed look at the ways in which states around the country are drafting or amending rules of conduct and procedures that allow attorneys to provide limited scope representation.

Exploration of these compendia quickly reveals the scope and breadth of national rules and policies on unbundling. Unbundling is being researched, actively examined, addressed, and implemented at the highest levels. You will not be going out too far on a limb by trying it—you will have plenty of company.

IDENTIFYING AND AVOIDING COMMON UNBUNDLING PITFALLS

In its *Unbundling Legal Services: A Guide for Lawyers* (2015), IAALS identifies some common but avoidable missteps relating to limited scope representation, including the following:

- Failing to obtain informed consent from the client.
- Failing to file the appropriate entry of appearance form, if necessary.
- Failing to precisely define or document the scope of engagement, spelling out what you will and will not do for the client.
- Failing to keep your services within the scope of your agreement.
- Failing to communicate with the client to ensure understanding of your partial involvement and the tasks for which the client remains responsible.
- Failing to properly manage the client's expectations, including what to expect if the limited representation does not extend to court appearances.
- Failing to advise your client on related matters, even if not asked.

- Failing to provide proper documentation, such as memos to the file and confirming e-mails.
- Failing to document changes in the scope of representation.
- Failing to detect conflicts of interest.
- Failing to ask the right questions or verify the client's facts.
- Failing to effectively/properly disengage and withdraw as attorney of record.
- Failing to read the rules and sign the proper forms.
- Failing to obtain initial and ongoing training about unbundling rules, ethics opinions, laws, and best practices.

While common, these missteps are avoidable. You just need to be familiar with and utilize appropriate practices and procedures described in this chapter and throughout this book.

Fear of Malpractice and Professional Discipline

Even the lawyers who support unbundling are often afraid to try it. They are afraid that their clients will get hurt. And they are afraid that, as lawyers who unbundle, they will be the logical targets for unhappy clients. Many of these fears are legitimate. The specter of a malpractice claim, whether well founded or not, haunts every practicing lawyer in the United States today. Family lawyers are even more wary about malpractice claims than lawyers in other fields. Malpractice, originally intended as a protection for consumers, has unfortunately become more a sword than a shield, often wielded against caring and hardworking lawyers as a tactic to avoid payment, and only occasionally weeding out the negligent. Yet malpractice laws and disciplinary rules are based, for the most part, on the traditional adversarial full service delivery model and are only recently focusing on limited scope services.

> All of the duties that exist during a "full scope" representation still exist in a limited scope representation. In other words, "the scope of the services may be limited but their quality may not." The duties of competence, diligence, loyalty, conflicts, confidentiality, truthfulness, and the rest apply in full force because attorneys are engaged in the practice of law even if the practice of law is limited. Thus, the representation that the clients receive is fully ethical even if the attorney only assists the clients in discrete tasks. Limited scope representation is now endorsed by the American Bar Association and many other bar associations as a way of providing some legal services to those who otherwise would not be able to afford a "full service" attorney.
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> Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Service*s, 28 Ohio State Journal on Dispute Resolution 3 (2013).

This is reality. Negligence for legal work authorized by the client and performed by the attorney will be actionable. And it should be. You remain liable for your professional negligence, regardless of how brief the engagement. It is also reality, however, that most people do not sue, and satisfied clients sue less and are more appreciative of your advice. There are few claims for limited scope representation. This may be the result of several factors, including client satisfaction with getting limited help plus appreciation for their lawyer being willing to provide this limited assistance. Research has shown that clients who like their lawyer are less likely to sue, just like patients who like and appreciate their doctor are less likely to start litigation, despite suffering damages.[1] In her book *The Client's Guide to Limited Legal Services*, M. Sue Talia indicates that the solution rests in the self-interests of the insurance companies:

> Attorneys who have been routinely offering limited legal services find the client satisfaction quotient jumps substantially. They do not get sued because the clients are happy . . .
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> > You would think that malpractice carriers would have learned from the mediation experience. Years ago when mediation was new and untried, some carriers denied coverage or even raised rates because they thought liability would increase. The reverse happened. People were so happy with the results they obtained themselves with the assistance of their mediator that claims decreased. What a surprise. People are happier when they are treated as grown-ups and given the tools to craft their own solutions. Now most malpractice rates for mediators are lower than for traditional family law attorneys.
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> As with mediation, there are fewer rather than more malpractice claims when lawyers unbundle services.

There is case law authority protecting the unbundling attorney where the limited scope is in writing and the attorney acted responsibly. The most important court decision for you to know about (and study) is *Lerner v. Laufer* (819 A2d.484, New Jersey, 2003) in which the court absolved from malpractice a family lawyer who had reviewed a mediated settlement and had limited his scope to the review of the agreement, specifically excluding any investigation or discovery. When the client (the wife) discovered later that the husband's company was more valuable than she thought, she successfully vacated the decree and negotiated a better deal. The client then sued the lawyer for $10 million, contending that the stock had been more valuable at the time of the original agreement. The court held that the client's expectations were for limited representation, the client was informed about the nature of limited scope

services and signed a limited scope engagement letter, she received limited representation, and the lawyer had no duty to perform outside the agreed limited scope of representation.

Another source of comfort is the legal malpractice industry's support of unbundling. Perhaps the most progressive view comes from Lawyers' Mutual in California. In 2014, this company launched a full campaign to educate its policyholders about the opportunities and pitfalls of unbundling. Lawyers' Mutual put out a video entitled *Limited Scope Representation: Debunking the Myths* that featured a member of the Lawyers' Mutual Board of Directors, a legal malpractice defense attorney, a family court judge, and a lawyer who unbundles. The video was supported by written materials that provided the Lawyers' Mutual policyholders with CLE credit. You can access the materials through the company's website at www.lmic.com or contact Kim Spirito (spiritok@lawyersmutual.com), vice president of loss prevention and claims, to discuss access to the video and supporting materials. Spirito and other Lawyers' Mutual representatives lecture widely on unbundling and encourage policyholders to consider using it in their practices.

Fear That Brief Meetings Will Invoke an Attorney-Client Relationship and Hurried or Incomplete Advice May Give Rise to Malpractice Liability

It is true that attorneys are liable for any professional negligence that they may commit, regardless of whether they are paid or not or whether the consultation in question lasted 15 minutes or two hours. Model Rule 1.1 requires lawyers to provide competent representation, period. There is no "pass" on this for unbundling. Many argue the standard of care depends on whether there is an attorney-client relationship with respect to the particular matter at hand.[2] Even if you meet with clients in a pro bono capacity, in your office or as part of a court or community program, you have formed an attorney-client relationship, no matter how short the meeting or how little you are paid.

The primary response to these fears is found in ABA Model Rule of Professional Conduct 1.2(c), a crucial rule that is the key to ethical unbundling. It provides that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." IAALS touts the ABA's updated Model Rule 1.2(c):

> Although Rule 1.2(c) was adopted in 2002 and has been broadly embraced by the states since then, public opinion research demonstrates that a substantial portion of the public is unaware of the option to limit the scope of representation.
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> Access to competent legal services for those with personal, civil legal problems can be advanced through the ABA's support of limited

scope representation, advancement of the professional obligations of lawyers that provide limited scope representation and encouragement of justice system stakeholders to inform the public about opportunities for limited scope representation.

Rule 1.2(c) is so important that we have included the ABA update (through 2014) of its state by state ratification (sometimes in amended form) for easy reference below.[3]

STATE	RULE	ABA MODEL RULE 1.2(c)	COMMENTS
Alabama	RPC 1.2 (c)	Similar	Additional language regarding when informed consent must be confirmed in writing
Alaska	RPC 1.2 (c)	Similar	Additional language and requirements (written fee agreements for representation over $500 and also addresses communication between opposing attorney and otherwise unrepresented client)
Arizona	Ethics Rule 1.2	Yes	
Arkansas	RPC 1.2 (c)	Yes	
California	n/a	No	Proposed adoption of Model Rule—see proposal (Currently no counterpart in California Rules—See Civil Rules 3.35-3.37 and Family & Juvenile Rules 5.70-5.71 for rules that permit limited scope representation)
Colorado	RPC 1.2 (c)	Similar	Additional language referring to rules of civil procedure—explicitly permits limited representation
Connecticut	RPC 1.2 (c)	Similar	Additional language referring to consent when attorney retained by third party; comment addresses limited appearances
Delaware	RPC 1.2 (c)	Yes	
District of Columbia	RPC 1.2 (c)	Similar	Omits "reasonable under the circumstances"; encourages consent in writing
Florida	RPC 4-1.2 (c)	Similar	Additional language and requirements referring to written consent (required) and communication; comment addresses document preparation
Georgia	RPC 1.2 (c)	Yes	
Hawaii	RPC 1.2 (c)	Similar	Omits "reasonable under the circumstances"; adds consultation

STATE	RULE	ABA MODEL RULE 1.2(c)	COMMENTS
Idaho	RPC 1.2 (c)	Yes	Comment [8] encourages consent in writing
Illinois	RPC 1.2 (c)	Yes	
Indiana	RPC 1.2 (c)	Yes	
Iowa	RPC 32:1.2	Similar	Additional language and requirements—outlines requirements for consent and clarifies limitation of lawyer's service
Kansas	RPC 1.2 (c)	Yes	
Kentucky	RPC 1.2 (c)	Yes	
Louisiana	RPC 1.2 (c)	Yes	
Maine	RPC 1.2(c)	Similar	Additional language and requirements referring to limited appearances; also includes sample consent form—Change from Bar Rules to RPC 08/09
Maryland	RPC 1.2 (c)	Yes	
Massachusetts	RPC 1.2 (c)	Similar	Omits "reasonable under the circumstances"; adds consultation
Michigan	RPC 1.2(c)	Similar	Omits "reasonable under the circumstances"; adds consultation
Minnesota	RPC 1.2 (c)	Yes	
Mississippi	RPC 1.2 (c)	Yes	Adds "objectives or"
Missouri	RPC 4-1.2	Similar	Additional language and requirements (consent must be in writing); also includes sample agreement form—omits "reasonable under the circumstances"
Montana	RPC 1.2 (c)	Similar	Requires that the informed consent be in writing except for specific situations, as indicated in the rule
Nebraska	RPC 501.2(b)	Similar	Additional language referring to lawyer's judgment; additional requirements in 1.2(c) -(e) related to document prep, limited appearances
Nevada	RPC 1.2 (c)	Yes	
New Hampshire	RPC 1.2 (c)	Similar	Additional language and requirements referring to lawyer's responsibility to client, court, etc.
New Jersey	RPC 1.2 (c)	Yes	
New Mexico	RPC 16-102(C)	Yes	

STATE	RULE	ABA MODEL RULE 1.2(c)	COMMENTS
New York	RPC 1.2 (c)	Similar	Additional language and requirements (notification of tribunal and opposing counsel when required)
North Carolina	RPC 1.2 (c)	Similar	Omits "and the client gives informed consent"; comment [8] encourages written consent
North Dakota	RPC 1.2 (c)	Similar	Omits "reasonable under the circumstances"; adds consultation
Ohio	RPC 1.2 (c)	Similar	Additional language (preference for written consent); see comment [7a]—omits "and the client gives informed consent"
Oklahoma	RPC 1.2 (c)	Yes	
Oregon	RPC 1.2 (b)	Yes	
Pennsylvania	RPC 1.2 (c)	Yes	
Rhode Island	RPC 1.2 (c)	Yes	
South Carolina	RPC 1.2 (c)	Yes	
South Dakota	RPC 1.2 (c)	Yes	
Tennessee	RPC 1.2 (c)	Yes	Adds "preferably in writing"
Texas	RPC 1.02 (b)	Similar	Omits "reasonable under the circumstances"; adds consultation
Utah	RPC 1.2 (c)	Yes	
Vermont	RPC 1.2 (c)	Yes	
Virginia	RPC 1.2 (b)	Similar	Omits "reasonable under the circumstances"; adds consultation
Washington	RPC 1.2 (c)	Yes	
West Virginia	RPC 1.2 (c)	Yes	Omits "reasonable under the circumstances"; adds consultation
Wisconsin	RPC 1.2 (c)	Yes	
Wyoming	RPC 1.2 (c)	Similar	Additional language and requirements (written consent unless solely represented through phone communication); also includes sample consent form

The comments to Model Rule 1.2(c) (2004) provide guidance for our unbundling work, in particular with regard to the concepts of "reasonableness" and "informed consent," which are the foundation for ethical unbundling. Comments 1.1 and 1.3 state,

> Competence is an important part of defining if a lawyer's work is reasonable under the circumstances. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. It compels the attorney to make sufficient inquiry of the client and to obtain all the facts necessary to give good legal advice. Diligent representation, which is also a component of reasonableness, means that a lawyer must not neglect a legal matter entrusted to the lawyer.

In its *Unbundling Legal Services: A Guide for Lawyers* (2015), IAALS provides the following example: If a client wants general information concerning an uncomplicated legal problem, lawyer and client can agree that the lawyer's services will be limited to a brief telephone consultation. However, to be reasonable under those circumstances, the amount of time allocated must be sufficient to yield advice on which the client could rely.

Informed consent requires that each client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege, and the advantages and risks involved.

Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

> "Unbundling highlights the need to be heads-up about your own responsibility. We want lawyers to do that anyway for risk management purposes. I have no problem with the client saying, 'I want you to do only these three things out of the eleven that need to be done.' But I do think it remains the lawyer's obligation to point out that there are eleven things to be done. The client isn't going to know that."
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> Katja Kunzke, cited in Dianne Molvig, *Unbundling Legal Service*s, Wisconsin Lawyer (September 1997).

The lawyer is to obtain the informed consent of the client, confirmed in writing. Such writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of writing. You have the responsibility, in other words, to be sure the client is fully informed with respect to the choices available, but the client must take responsibility to specify the objectives of the relationship with your help.

Specific Issues Raised by "Brief Consultations"

Are you considering modifying your practice to offer advice through a website, e-mail, or brief isolated consultations? In these and other models of brief advice, you are still bound to professional responsibility in respect to competence, confidentiality, and the duty to avoid conflicts of interest.

The 1999 Fordham Conference on Limited Services provided several recommended solutions for brief advice lawyering, including:

1. If you provide brief advice, you should develop systems to prevent disclosure of client confidences;
2. You must avoid the risk of divided loyalty by terminating communication as soon as it appears there may be a conflict with a previous recipient of either brief advice or full service;
3. If your discrete services go beyond just brief advice, you should conduct a diagnostic interview to enable the client to make informed consent on which limited services should be appropriately undertaken;
4. When limited services are identified to the client through a competent diagnostic interview, the lawyer should have no further obligation with respect to the client;
5. A competent diagnostic interview would determine which choices are appropriate for the client and which ones are not. For example, some clients can read and work with pro se materials or websites, as determined in the interview. If a client is determined to be illiterate, those options

should be eliminated and a limited court appearance and/or full service may be the only option available;
6. Courts and the legal profession should be encouraged to explore efforts to assist pro se litigants;
7. Existing rules regarding the administration of justice, practice of law, and prohibition of the unlicensed practice of law should not be created, advanced, interpreted, or applied as to obstruct efforts to increase legal access; and
8. The following unbundled methodologies should be studied:
   a. Hotlines;
   b. Websites—filling in intake form; and
   c. E-mail with attorney and online video conferences.[4]

Ways to Avoid Malpractice at the Inception of the Unbundling Relationship

1. Have thorough diagnostic interview to identify pertinent factual, legal and personal issues which might influence the legal services the client may need or desire.
2. Conduct factual investigation sufficient to identify relevant legal issues. At minimum, advise the client of related tasks that the client may want to consider performing or hiring lawyer to perform.
3. Determine that the client sufficiently understands the consequences of "going unbundled," i.e., the limited nature of lawyer's role and specific limitations of unbundled services. This may take multiple meetings that diminish economic benefit of unbundling.
4. Ensure that clients have "convenient, ready, and inexpensive access to the necessary information to proceed pro se."
5. Determine the client's capacity to handle her own work.
6. Advise the client of limitations of discrete service and potential obstacles.

Fear That Limitations on Liability Are Illusory Despite Client Consent

Limitations on the scope of legal representation are permitted in virtually every state. The issue is whether such limitations are agreed to by the client after full explanation of the consequences and with the advice to consult independent counsel before signing such a limitation. You must take steps to document that the client understands and agrees to the limitation of service. In so doing, you should set forth the client's understanding of the downsides of limited service, how limited service will work, and the client's motivations in choosing limited over full service representation.

Fear That Malpractice Insurance Carriers May Not Cover Lawyers Who Unbundle Due to the Risks and Ethical Uncertainty

Some attorneys are fearful that an unbundled practice might have adverse implications for their malpractice insurance in terms of cost or level of coverage. This concern is belied by the leading role professional liability insurance companies have taken in promoting unbundling. We have already discussed the groundbreaking work of Lawyers' Mutual, and there are plenty of other examples. For over 20 years, the self-funded Oregon State Bar Legal Malpractice insurance program has sent out a letter to its policyholders indicating that unbundling is the practice of law and that its policies cover discrete task representation. Given the increased pro-unbundling reforms signed by the Chief Justice of the Oregon Supreme Court in 2015,[5] Oregon is an example of a state whose insurers are quite happy with the expanded use of unbundling.

If you have any doubt about whether your own malpractice policy will cover limited scope representation, make a full disclosure of your current unbundling practice by letter to your carrier. We are not aware of reports of any carrier turning down coverage for unbundling work.

Fear That Unbundled Coaching Runs Afoul of Prohibition against Communicating Directly with a Represented Party

ABA Model Rule 4.2 prevents a lawyer from communicating directly or indirectly with a represented party. Some State Bar Ethics Opinions, e.g., California Formal Opinion 1993-131, specifically prohibit lawyers from scripting their clients to negotiate directly with a represented party. Prohibitions against scripting communications with represented parties indeed constitute a barrier to unbundling and could frighten lawyers from acting as negotiation coaches when the other side is represented. Ethical opinions are not binding, but they are taken seriously by courts, disciplinary bodies, and consumer groups. It may give you some comfort that we are not aware of any efforts by the organized bar to enforce this ethical rule in the unbundling context.

Besides, what constitutes "scripting"? Drafting documents or correspondence to be delivered to an opposing party represented by counsel likely does. Is it still scripting, however, if a client meets with the opposing party at Burger King, remembers the key strategic goals of the interaction developed with counsel, and communicates in her own words? Apparently not. The California Ethics Opinion referenced above states,

> When the content of the communication to be had with the opposing party originates with and is directed by the client, it is permitted by rule 2-100. Thus, an attorney may confer with the client as to the strategy to be pursued in, the goals to be achieved by, and the general

> nature of the communication the client intends to initiate with the opposing party as long as the communication itself originates with and is directed by the client and not the attorney.

One key distinction, therefore, is whether or not the communication to be had originates with and is directed by the client. Properly done, unbundled communication coaching is client directed. Actively involving clients and ensuring that ultimate decision making rests with them is not only consistent with the philosophy of unbundling, it is a way to ensure compliance with the attorney's own ethical responsibilities.

Another lodestar should be the overriding purpose of the rule, namely "to prohibit one side to a dispute from obtaining an unfair advantage over the other side as a result of having ex-parte access to a represented party." When lawyers coach clients (especially co-parents) on how to communicate respectfully and constructively with the other side, how to present the client's concerns and interests in a manner most likely to be heard by the other side, how to point out common interests and concerns, and how to acknowledge the other side's concerns and interests, it is hard to see how any of this implicates "unfair advantage" concerns.

In the real world, lawyers help their clients communicate with one another every day, and bar associations have much more important things to do than narrowly enforce this line of ethical opinion, especially when the same bar associations are clear in their policies supporting increased legal access. Judges are continually urging parties to settle lawsuits themselves, and legislators seem to favor policies that promote resolution and settlement. Given the benefit to the public of having lawyer coaches urging settlement from the sidelines and providing information to unrepresented parties that could maximize the constructiveness of their discourse, perhaps a consortium of the bench, organized bar, and judiciary could unite to promulgate legislation or rules that would affirm negotiation coaching—or at least clarify the definition of "scripting" so that unbundled coaches need not be in fear of doing what is recommended in this book!

As an interim matter, if you are coaching your clients with regard to planning and conducting their negotiations with parties who are represented by counsel, you may consider seeking authorization from clients to contact the other lawyer and request permission to coach from the sidelines, including scripting the client for negotiation sessions with either the other party or the other lawyer. This may protect you from committing an ethical violation, but it treads on other areas sacred to unbundling. The client might not want either the other party or opposing counsel to know about your involvement. Your client might treasure both the privacy and negotiating advantage that non-disclosure brings. Also, if you step into the limelight, the opposing lawyer may refuse to deal directly with your client or may instruct the other

represented party not to negotiate directly with your client. Either result could cost your client money and/or opportunities to resolve the matter.

The 1999 Colorado Supreme Court Comments to CPR 1.2 give added protection to the counsel of record by permitting a lawyer to communicate directly with a party who has limited representation, so this might motivate a counsel of record to agree that the limited representing lawyer can coach negotiations from the sidelines.[6]

Fear That Ghostwritten Pleadings Must Disclose the Name of the Lawyer Who Prepared or Assisted the Pro Se Litigant

Within the unbundling community, there are two schools regarding disclosure of unbundled ghostwriting services. In some states, such as Colorado, Iowa, and Florida, disclosure is required. Other states permit silent ghostwriting. Before spelling out the differences, it is worth noting that both schools seem to agree that lawyer ghostwriters do not need to disclose their existence when they draft non-court documents such as letters, deeds, corporate documents, insurance forms, or the like.

With regard to ghostwriting court documents, support for the Colorado scheme is as follows. First, Rule 3.11(b) specifically endorses limited representation and indicates that preparation of documents does not constitute an entry of an appearance by the ghostwriter. This gives ghostwriters some comfort (especially in Colorado) given the outrage toward a ghostwriting lawyer shown by Colorado Federal Judge John Kane in *Johnson v. Bd. County Com'rs County of Fremont* (868 F. Supp. 1226 [1994]), in which Judge Kane ordered the ghostwriter to respond to contempt for "defrauding the court."

The second reason to support disclosure is that many unbundlers believe, as does the Colorado Supreme Court, that "although limited scope may be solely between lawyer and client in non-court matters, when court pleadings are filed, the matter now involves the court" (Comments to Colorado Rule of Professional Conduct 1.2, 1999). *Wesley v. Dan Stein Buick* (987 F. Supp. 884 [1997]), a Kansas federal case, also required a litigant to identify whether she had legal assistance in drafting court documents and requiring the lawyer to be identified, enter an appearance, and accept accountability.

The other unbundling school favoring non-disclosure contends that courts benefit greatly from ghostwritten documents and that research shows that not only do judges not grant pro se litigants deference, but the truth is that unrepresented litigants do far worse with judges than parties with counsel.[7] The findings of the 2016 *Cases Without Counsel* study support this idea, and also found that judges themselves believe that self-representation impacts outcomes. One representative sticking point is how frequently self-represented parties have forms and paperwork returned by court staff, and the mutual frustration and paper churning this engenders. The following two

examples from *Cases Without Counsel* illustrate just how fraught and prohibitive the interactions between self-represented litigants and the courts can be:

> Whether because they made mistakes, omitted necessary information, or submitted the wrong form altogether, several self-represented litigant interviewees reported having their paperwork returned, sometimes cycling through several iterations before the court accepted the forms. One participant remembered: "[T]he mistakes I made partway through the process made me have to resubmit and re-document, and delay things." Understanding the reasons for the rejection and/or how to cure errors was not always apparent.
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> Judge and court staff participants similarly suggested that forms, paperwork, and other court documents were a substantial source of frustration for self-represented litigants, largely mirroring the themes litigant interviewees reported. Said one court staff participant, "The forms are too technical; the instructions . . . [are] as clear as they can be, but they're legal forms. Attorneys go to school and learn all of this legal stuff, and you have a party that's coming in with maybe a high school education at best trying to do these forms." "They do get a little frustrated," said a court clerk, "because they may have to come several times or redo a document." As would be expected, this individual noted, this situation happens for self-represented litigants "more than if someone's represented by counsel—they're not going to have to go through that." With respect to the frequency with which some self-represented litigants' paperwork is returned, one court clerk explained: "It's rare that they get the forms correct on the first go around, and often they're still not correct on the fourth or fifth go around—and that becomes very frustrating for them." Another described sitting with self-represented litigants in the hall and going through forms to identify errors. "Many times," said this individual, "they have to go right back down to the clerk's office and start fresh." The overlap between the litigant and court participant comments on this subject paint a picture of inefficiencies in rounds of filing, review, rejection, and return.

This school contends further that legal representation is not a prerequisite for access to the courts, and litigants have a right to get confidential help from any source, lawyers or non-lawyers. This view contends that such disclosures violate the litigant's right to confidential and privileged communications with their attorney. California has taken the lead in the second school. California Rule of Court 4.425 states:

> In a family law proceeding, an attorney who contracts with a client to draft or assist in drafting legal documents, but does not make an appearance in the case, is not required to disclose within the text of the document that he or she was involved in preparing the documents.

The issue of ghostwriter disclosure to the court may need clarification from the nation's highest court, or else we will have to tolerate (celebrate?) the existence of different standards in different states. The safest route is to disclose, and the Colorado Rule mandates that the ghostwriting lawyer must disclose her role to the court. This presents parties with the Faustian choice of either doing without the help to prevent the disclosure or getting the help and having the lawyer disclose against the client's wishes.

AVOID DUAL LEGAL REPRESENTATION IN ALL SITUATIONS

If the two parties come to you for one-stop shopping and you do not offer mediation services, be very careful about representing them both, even with clear waivers of conflict of interest.

ABA Model Rule 1.7 reads:

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

The Comments to Rule 1.7 are also instructive as to why you should be very careful before providing dual representation in family law matters:

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rules 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the

circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of

> subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

A long-standing California case, *Klemm v. Superior Court* (75 Cal.App.3d 893 [1977]), gives important guidance to this issue. In *Klemm*, both husband and wife had previously used the services of the same attorney for different purposes (one for child support defense, one for a probate matter), and both had confidence in his abilities. They sought his assistance in completing the dissolution of their marriage. The attorney made a full disclosure of the potential conflicts, but the trial court still refused to recognize his representation. The Court of Appeal reversed on a writ, holding that as long as the attorney's conflict remained only potential and not actual, and as long as there was a valid informed disclosure and consent, that dual representation was permissible at a hearing or trial. *Klemm* contained important cautionary language as well, indicating that if any conflict were to arise, such as wife seeking child support from husband, that the attorney would be precluded from such representation:

> As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.[8]

A subsequent California case, *Marriage of Egedi* (88 Cal.App.4th 17 [2001]), permitted dual representation in the drafting of a settlement agreement in which the conflict waiver was informed and there was no actual conflict, just a potential one. It is our view that, unlike a settlement agreement that resolves all issues, if you agree to represent one party against the other, the conflict is actual and such waiver would violate public policy. Do not do it.

EXAMPLES FROM TEXAS AND MASSACHUSETTS

Materials from two sample states, Texas and Massachusetts, may be of assistance and interest as you formulate your ethical obligations.

Texas

- Remember the four no-brainers from the beginning of this chapter.
- Document your file.
- Know that checklists are your best friend.
- Use good judgment in defining the scope, keeping the particular client and particular judge in mind.
- *Never* step outside the bright line box without drawing a new bright line box.
- Tailor and use risk management materials.
- Remember that most issues are practical rather than ethical.
- When in doubt, don't do it.
- Remember, it's not for everyone, but great for many.

Massachusetts

1. Attorney Duties and Liability in General: Limited assistance representation (LAR) does not mean limited liability. The attorney remains responsible for the conduct of all the tasks which he or she undertakes, whether in the context of full service or limited scope.
2. Specialized Attorney Duties for LAR—Scope of Representation and Informed Consent: While most of the rules that apply to full service representation are equally applicable to limited assistance, there are a few specialized rules you must keep in mind. They are:

    a. Limitations in scope require the client's informed consent.
    b. Limitations in scope must be reasonable.
    c. An attorney has a duty to advise clients fully about the issues, even if not asked.
    d. Any change in scope must be documented.

These duties are non-delegable and must be governed by the professional judgment of the attorney. As an attorney, it is your responsibility to ensure that the client understands the consequences and trade-offs inherent in limited assistance representation. Your responsibility includes advising the client about the options available for limited assistance and ascertaining not only that the limitation is reasonable under the circumstances but also that the client has given informed consent to the limitation. For example, it would generally not be reasonable to assign a particularly technical or complex issue to a self-represented litigant.

PRACTICE TIPS

1. Have your client sign the Limited Scope Client-Lawyer Agreement (see Chapter 2) before you render any legal services beyond the initial conference.
2. Be crystal clear about what the client needs to do so that you are not blamed later for dropping the ball.
3. If you are serving as a negotiation coach and the opposing party is represented, do not draft documents for the client to give to the other party. Make sure all communications originate with the client. Consider getting permission from your client to contact the other lawyer to announce that you are coaching from the sidelines.
4. Make sure you know your jurisdiction's rule on disclosing the existence of an attorney ghostwriter for court pleadings. When in doubt, disclose.
5. Make sure you know your jurisdiction's rule on limited court appearances (see Chapter 9), especially as to whether court permission is required before you can withdraw.
6. If you actually go down to court to coach a limited services client, do not interfere with the court proceedings in any way.
7. Encourage your bar association to put on an unbundling training program for lawyers in your community.
8. Work with your state legislature in promoting legislation that will protect lawyers who wish to unbundle.

ENDNOTES

1. *See e.g.*, Aaron E. Carroll, *To Be Sued Less, Doctors Should Consider Talking to Patients More*, The New York Times (June 1, 2015), http://www.nytimes.com/2015/06/02/upshot/to-be-sued-less-doctors-should-talk-to-patients-more.html, noting the inverse relationship between malpractice suits and good doctor-patient relationships.
2. *See e.g.*, Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, Wake Forest Law Review (Summer 1997), at 18.
3. *Adoption of ABA Model Rule of Professional Conduct 1.2(c)*, available from http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_delivery_adoption_aba_model_rule_1_2.authcheckdam.pdf.
4. *See Recommendations of the Fordham Conference on Delivery of Legal Services to Low Income Persons: Professional and Ethical Issues*, 67 Fordham L.R. 1776 (1999). See also the reflections of Mary Helen McNeal on these recommendations at 67 Fordham L.R. 2617 (1999).

5. *See* William Howe III and Elizabeth Potter Scully, *Redesigning the Family Law System to Promote Healthy Families*, Family Court Review (July 2015).
6. See Colorado Legal Services, *Practical and Ethical Considerations to Integrating Unbundled Legal Services*, 3rd Edition (2016), http://www.cobar.org/Portals/COBAR/Repository/modernlaw/Practical_and_Ethical_2d_Ed%20Updated%2008_2016.pdf.
7. *See* Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?* Judicature (July–August 1998).
8. Klemm v. Superior Court (75 Cal.App.3d 893 [1977]) at 898.