
Limited Scope Representation:

ETHICAL CONSIDERATIONS FOR THE CHRISTIAN LEGAL AID CLINIC

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Agenda:

- Types of limited scope legal representation (hereinafter “LSR”) – 3-3:10
- Overview of applicable ethical rules in the provision of LSR – 3:10-3:35
- Ethics in action -- analysis of ethical issues in client meetings – 3:35-4:00
- Ethics in action -- client considerations in the provision of LSR – 4:00-4:15

Definition of Limited Scope Representation

- LSR is also known as “unbundled legal services” or “discrete task representation.”
- It is a multifaceted form of advocacy which “involves an attorney-client relationship for less than a full case,” and can range from limited scope advice to limited scope advocacy. (Mandilk, James G. “Attorney for the Day: Measuring the Efficacy of In-Court Limited Scope Representation,” *Yale Law Journal*, vol. 127, no. 7, May 2018, pp. 1828-1889).
- It can also be considered “the practice of breaking legal representation into distinct tasks as opposed to representing a client” from start to finish. (Buiteweg, Lori A. “Limited Scope Representation: A Possible Pancea for Reducing Pro Per Court Congestion, Attorney Underemployment, and a Frustrated Public,” *Michigan Law Journal*, no. 8, August 2016, pp. 10-14).

Examples of LSR Services

- Legal advice: office visits, telephone calls, fax, mail, e-mail;
- Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;
- Evaluation of client self-diagnosis of the case and advising client about legal rights and responsibilities;
- Guidance and procedural information for filing or serving documents;
- Review pleadings and other documents prepared by client;
- Suggest documents to be prepared;
- Draft pleadings, motions, and other documents;
- Factual investigation: contacting witnesses, public record searches, indepth interview of client;
- Assistance with computer support programs;
- Legal research and analysis;
- Evaluate settlement options;

Examples of LSR Services

- Discovery: interrogatories, depositions, requests for document production;
- Planning for negotiations;
- Planning for court appearances;
- Standby telephone assistance during negotiations or settlement conferences;
- Referring client to expert witnesses, special masters, or other counsel;
- Counseling client about an appeal;
- Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;
- Provide preventive planning and/or schedule legal check-ups:
- **Other: -- This could include other non-litigation services, such as helping a client to achieve an objective like obtaining a government-issued identity card after losing all of their identity documentation or negotiating a lease.**
- Source: Maine Board of Overseers of the Bar, comment to Maine Prof. Resp. Rule 1.2 contains court-approved LSR agreement, available at https://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_bar_rules&id=87817&v=article

Ethical Rules Pertaining to LSR

SOURCES:

- State Professional Rules
- ABA Model Rules*
- ABA and State Ethics Opinions
- Court and Local Rules

*Note: Every state has its own ethical rules so, by necessity, this presentation is focusing on ABA and NY Rules. Although most states tend to follow the ABA, states have full discretion whether/when to actually adopt ABA rules because the ABA is only suggesting templates in its Model Rules. Furthermore, states often put their own spin when adopting the model rules so they may have Rules which read differently in part or in whole.

Ethical Considerations at the Clinic and Beyond

- Conflicts of Interest
- Scope of Representation
- Duties of Privilege and Confidentiality
- Duty of Communication
- Duty of Competency
- Duty of Candor
- Limited Scope Agreements
- Record-Keeping

CONFLICTS OF INTEREST

BOTTOM LINE

- In short, the rules regarding conflicts are more lenient at the legal aid desk. If a conflict between clients or attorney and client is known, then it must be dealt with according to the normal rules. If it is unknown, there is more leniency in the rules.
- **Caution:** If you continue to provide ongoing advocacy or services, this would trigger the normal rules.

*Please note that not all 50 states may have adopted a version of ABA Rule 6.5, so one should confirm that their state has it.

Rule 6.5 of the 2020 ABA Model Rules of Professional Conduct provides the following:

- a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
 - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
 - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

CONFLICTS OF INTEREST CONT.

Rule 1.7 of the 2020 ABA Model Rules of Professional Conduct provides the following:

- (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.

Rule 1.10 provides the following, in relevant part:

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
- (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm [...]

CONFLICTS CONT.

Comments to the rules provide the necessary guidance:

- Comment 1 to Rule 6.5 provides that nonprofit organizations which “have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms” does not require “systematically screen[ing] for conflicts of interest as is generally required before undertaking a representation.”

Qualifications:

- **Qualification 1:** Types of programs covered are legal advice hotlines, advice-only clinics, or *pro se* counseling programs
- **Qualification 2:** A client-lawyer relationship is established, “but there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation.”
- **Qualification 3:** Lawyer must secure the client’s informed consent to the limited scope of the representation (Comment 2 to Rule 6.5)
- **Qualification 4:** Short-term limited representation would not be unreasonable under the circumstances, and if so, the “lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel.”: Rules of confidentiality apply (i.e. referrals) (Comment 2 to Rule 6.5)
- **Qualification 5:** “If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) [Duties to Former Clients], and 1.10 become applicable.” (Comment 5 to Rule 6.5)

SCOPE OF REPRESENTATION

Bottom lines:

- Most jurisdictions have accepted the “unbundling” of legal services in order to serve the greater good.
- The scope of legal services provided must be reasonable under the circumstances.
- It is best practice (and may be required) to have the client sign a written Limited Scope Agreement (LSA).

Rule 1.2 of the ABA Model Rules of Professional Conduct provides the following, in relevant part:

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

SCOPE OF REPRESENTATION CONT.

Comments to the Rule:

- Comment 7 to Rule 1.2: “Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.”

Qualification #1:

- Unbundled legal services must be competent.
 - All agreements concerning a lawyer's representation of a client, including limited scope agreement, must accord with the Rules, including Rule 1.1 – Duty of Competence.
 - “Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” See Rule 1.1.

SCOPE OF REPRESENTATION CONT.

Qualification #2:

- Limited scope legal services require informed consent of the client.
 - According to ABA Formal Opinion 472, “informed consent is defined as: ‘the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.’”
 - Thus, one should “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.” *Id.* at pg. 3 (citing Colorado Bar Ass’n. Formal Ethics Op. 1010).
 - “The client’s understanding of the scope of the services is fundamental to a limited scope representation.” *Id.* at pg. 3 (citing D.C. Bar Legal Ethics Committee Op. 330 (2005)).

Limited Scope Agreement should be in writing.

- Therefore, the ABA recommends that “when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation – including the tasks the lawyer will perform and not perform – in writing that the client can read, understand, and refer to later.” ABA Formal Op. 472, at pg. 3.
- It is noted in this Formal Opinion that several states require such agreements to be in writing, and many states recommend the same.

DUTIES OF CONFIDENTIALITY & PRIVILEGE

Bottom lines:

- All privilege and confidentiality rules apply in the context of the legal aid clinic and any unbundled legal service provided.
- If direct referrals are made on client's behalf, client must give informed consent. (See Rule 6.5, Comment 2).
- Efforts should be made to provide as much privacy during clinic consultations as possible.

Rule 1.6 of the ABA Model Rules of Professional Conduct provides the following, in relevant part:

a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [to prevent certain financial or physical injuries to others, or to defend one's self against certain allegations of professional misconduct]. (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

DUTIES OF CONFIDENTIALITY & PRIVILEGE CONT.

Guidance:

- Comment 2 to Rule 1.6: “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”
 - Informed consent: “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” ABA Model Rule. 1.o(e).
- Comment 3 to Rule 1.6: Confidentiality is given effect by: the attorney-client privilege, work product doctrine, and the rule of confidentiality established in professional ethics.
 - Attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or produce evidence
 - Rule of confidentiality applies in all other situations, and “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”
- Comment 18 to Rule 1.6: Explains paragraph (c) of the rule – “requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”
 - Qualification: It is not a violation of the rule “if the lawyer has made reasonable efforts to prevent the access or disclosure.”
 - Factors to consider: sensitivity of information, likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients.

Duty of Communication

Bottom lines:

- Scope of representation must be clearly explained to clients (LSA).
- Clear communication to the client is extremely important as it pertains to the provision of certain unbundled legal services. (Consider Engagement Agreements).
- Interpreters are sometimes needed to fulfill the duty of communication, including within limited scope advice sessions.

Rule 1.4 of the ABA Model Rules of Professional Responsibility provides the following, in relevant part:

a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter; [. . .]

(4) promptly comply with reasonable requests for information;

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

DUTY OF COMMUNICATION CONT.

- **Guidance and Qualification:**

- The Duty of Communication is triggered when limiting the scope of legal services or providing unbundled legal services, since limiting the scope requires informed consent. See Rule 1.2 and see ABA Formal Opinion 472 (above) with regard to limited scope agreements.
- Qualification: Comment 5 to Rule 1.4 -- “Adequacy of communication depends in part on the kind of advice or assistance that is involved. . . The guiding principle is that the lawyer should fulfill reasonable client expectations consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of the representation.”
 - In certain situations, this would require informed consent of a conflict of interest.
- Interpreters: consider providing a training for interpreter volunteers.

COMMUNICATION – FOR INTERPRETERS

DO:

- Interpret everything as completely and accurately as possible just as it was said.
- Be impartial and unbiased in your interpretation.
- Speak up if you don't hear something, don't understand something, or if you need a break.
- Continue to improve your vocabulary, especially related to the field that you are in.
- Bring a notebook, pen and water bottle to interpretation sessions. Take notes during the session!!

DON'T:

- Give legal advice even if you know the legal answer (I.e. paralegal). When you are interpreting, that is all you are doing.
- Add, omit, change, summarize or explain anything that was said.
- Give your own opinion in your interpretation.
- Source: Catholic Migration Services: A Guide to Working with Each Other for Lawyers and Interpreters

COMMUNICATION – FOR ATTORNEYS WORKING WITH INTERPRETERS

DO:

- Explain to the client that you have an interpreter for this meeting and that they will be interpreting everything.
- Speak to the client during the meeting and not to the interpreter. The meeting is still between the lawyer and the client.
- Give the interpreter advance notice of the meeting if possible
- Provide the interpreter with material prior to the appointment if possible

DON'T:

- Ask the interpreter to “sum up” or “give the basics” of what they said to the client.
- Talk for long stretches of time during CI without pausing for interpretation.
- Tell the interpreter to not interpret something during the meeting.
- Ask the interpreter to explain what was just said. If the client has a question, they must ask the lawyer.
- Source: Catholic Migration Services: A Guide to Working with Each Other for Lawyers and Interpreters

DUTY OF COMPETENCY

Bottom lines:

- Limited scope and unbundled legal services are subject to the duty of competency.
- Volunteer attorneys may be competent to advise on a client's matter, even if it is outside their practice area, under the supervision of a Christian legal aid program.
- Attorneys, including volunteer and pro bono, may become competent to advise clients through reasonable preparation.
- Legal aid organizations who depend upon volunteer law staff should have a robust volunteer training and supervision program.

Rule 1.1 of the Model Rules of Professional Responsibility provides the following:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

DUTY OF COMPETENCY CONT.

Guidance – Comment 1:

- Comment 1 to Rule 1.1 provides that the determination of whether a lawyer is competent in a particular matter depends upon the weighing of several factors:
 - Relative complexity and specialized nature of the matter;
 - Lawyer’s general experience;
 - Lawyer’s training and experience in the field in questions;
 - Preparation and study the lawyer is able to give the matter; and
 - *Whether it is feasible to refer or consult with a lawyer of established competence in the field.
- “In many instances, the required proficiency is that of a general practitioner.” Comment 1 to Rule 1.1.

By: Open Hands Legal Services, 175 E. 125th Street, NY, NY

Guidance: Comment 2

- Comment 2 to Rule 1.2: “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar...Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problem a situation may involve, a skill that necessarily transcends any particular specialized knowledge.” (Emphasis added).

DUTY OF COMPETENCY CONT.

□ Qualifications:

- The lawyer can provide adequate representation in a novel field through necessary study. Comment 2 to Rule 1.1.
- “Competent representation can be provided through the association of a lawyer of established competence in the field in question.” Comment 2 to Rule 1.1.
 - Comment 4 to Rule 1.1.: A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.
- “Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” See Rule 1.2, Comment 7.
 - Important consideration: The demand for civil legal services far outweighs the supply of attorneys. Weigh important competency concerns with the fact that your client may have no other legal source from which to obtain information. See New York County Lawyers Association (NYCLA), Opinion 742 (April 16, 2010).

DUTY OF COMPETENCY CONT.

NOTE ON REFERRALS:

Before a lawyer “retains or contracts” with lawyers from other organizations to provide or assist with provision of legal services to the client, the lawyer should ordinarily obtain informed consent from the client and must also believe the other organization’s services will contribute to the client’s representation. Rule 1.1, Comment 6.

NOTE ON VOLUNTEER TRAININGS:

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including [. . .] engag[ing] in continuing study and education [. . .] Rule 1.1, Comment 8; and see Rule 1.1., Comment 2; and see Rule 1.1, Comment 4.

DUTY OF CANDOR

Bottom lines:

- Disclosure of the provision of limited scope or unbundled legal services for a client to others, including the court and an opposing attorney or party, is sometimes required.
- When preparing court documents/pleadings for a *pro se* client, it is generally best practice to note that such documents have been “prepared with assistance of counsel [by one’s agency].”
- The lawyer for your client’s opponent may be required to communicate with you, rather than the client, on an unbundled legal service.

ABA Model Rule 3.3 provides the following, in relevant part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or [. . .]

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

DUTY OF CANDOR CONT.

ABA Model Rule 8.4 provides the following, in relevant part:

It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation [. . .]

Ghostwriting:

- “Litigants appearing before a tribunal *pro se* (representing themselves, without counsel) sometimes engage lawyers to assist them in drafting or reviewing documents to be submitted in the proceeding.” ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-446 (May 5, 2007), at pg. 1.

DUTY OF CANDOR CONT.

GUIDANCE:

- ABA Formal Op. 07-446: “We conclude that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to *pro se* litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer’s conduct.” Id. at pg. 4.
- Factors considered by the ABA in its decision:
 - Whether a lawyer or lawyer’s *pro se* client makes disclosure to a tribunal or adversary depends on whether the fact of assistance is material to the matter, i.e. whether the failure to disclose limited scope representation would constitute fraudulent or dishonest conduct on the part of the client
 - ABA determined that the fact that a litigant submits papers to a tribunal on a *pro se* basis that have been prepared by a lawyer “behind the scenes” is not material to the merits of the litigation. Id. at pg. 2.
 - Whether *pro se* litigants are the beneficiaries of special treatment in court and whether their pleadings are held to less stringent standards
 - ABA determined that it will be evident from the papers whether an attorney helped to prepare them and therefore court will not use a more liberal standard with such pleadings, and if it is not apparent from the pleadings, there will be no unfair advantage to the *pro se* litigant. Id. at pg. 3.
 - “While judges may provide greater latitude to a *pro se* litigant as far as some procedural rules are concerned, a *pro se* litigant should not enjoy the same extended latitude on the merits of his or her claim.” NYCLA, Opinion 742, at pg. 4 (citations omitted).
 - **“Treating pleadings more leniently does not make it more likely that a *pro se* litigant will win. It simply makes it more likely that the *pro se* litigant’s cause will be heard on the merits, as opposed to being dismissed at the pleading stage.”** Id. at pg. 5.

DUTY OF CANDOR CONT.

Qualification and Caution

- A lawyer must check the rules in his/her jurisdiction, as they differ in the requirement to disclose assistance of counsel on *pro se* pleadings.
- New York's rule: Rule. 1.2 of New York's Code of Professional Responsibility provides that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." (Emphasis added).
- In New York – NYCLA has concluded that disclosure is necessary where mandated by a 1) a procedural rule; 2) a court rule; 3) a particular judge's rule; 4) a judge's order in a specific case; or 5) "in any other situation in which an attorney's ghostwriting would constitute a misrepresentation or otherwise violate a law or rule of professional conduct." NYCLA Op. 742 at pg. 6.
- In New York – "Given the lack of clarification from the Appellate Divisions, and New York's prior opinions disfavoring ghostwriting, best practices dictate that until there is such clarification, where the attorney's participation on behalf of a *pro se* litigant has been substantial and the circumstances so warrant, practitioners should give notice to the tribunal and/or to opposing counsel." Id. at pg. 8.

DUTY OF CANDOR CONT.

➤ ABA Formal Opinion 472 (November 30, 2015): Communication with Person Receiving Limited-Scope Legal Services

- Provides guidance to opposing counsel on matters involving a person who is the recipient of unbundled legal services
- Provides that if a lawyer has reason to believe that an unrepresented person on the opposing side has received limited scope legal services, “the Committee recommends that the lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 (no contact rule) or 4.3 (dealing with an unrepresented person).” Id. at pg. 1.
- “The opposing lawyer must comply with Rule 4.2 and communicate with the person’s counsel when the communication concerns an issue, decision, or action for which the person is represented.” Id.
- “Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.” Id.

HYPOTHETICALS!

Jim is an attorney meeting with client Jan at your local CLA desk. Jan is a tenant embroiled in a long-running dispute with her landlord about her housing seven dogs of various breeds and sizes while often paying her rent late. Jan asks Jim to write a “back off” letter for her signature so that the landlord doesn’t think a lawyer is involved. Jan explains that she wants the landlord to think that she has training as a lawyer.

A. How should Jim respond?

B. Could Jim propose to write half of the letter for her to complete later?

C. If Jim assists with the full letter in some fashion, may he inform Jan that he is limiting the representation to that letter, and will not be able to assist with subsequent correspondence, such as the landlord’s response?

HYPOTHETICAL NO. 2

Jan's dispute becomes litigation when the landlord brings an eviction proceeding. Jan calls the staff of your local CLA to request assistance, noting volunteer attorney Jim's help with the earlier letter. The CLA staff does not have the bandwidth to appear for Jan in the litigation, and so reaches out to Jim to ask if he would be able to step in. Jim says that he would be willing to draft pleadings for Jan's use in the litigation and also to "coach" her along the way, but he would prefer for the name of his law firm and himself to "stay out of it."

A. Assume the reason Jim wants to stay anonymous is that the landlord is an important client of his firm. How should you respond?

B. Assume the reason Jim wants to stay anonymous is that he doesn't know whether he will be able to make all of the court dates in light of his workload and he is also hesitant to be "first chair" having never actually appeared in court before. How should you respond?

C. Assume this is a federal - rather than state - court matter. Would that change your analysis?

D. Assume this is an immigration matter. Would that affect your analysis? See *In re Valinoti*, 4 Cal. State Bar Ct. Rptr. 498 (Cal. Bar Ct. 2002).

HYPOTHETICAL NO. 2 THOUGHTS

From ABA/BLOOMBERG LAW LAWYERS' MANUAL ON PROFESSIONAL CONDUCT

- ❑ Federal courts, however, express “nearly universal disdain” for undisclosed ghostwriting, sometimes incorporating Fed. R. Civ. P. 11 into their analysis. Ira P. Robbins, Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts, 23 Geo. J. Legal Ethics 271 (2010).
- See, e.g., Chung v. El Paso Sch. Dist. #11, No. 14-CV-01520-KLM, 2015 BL 9948 (D. Colo. Jan. 15, 2015) (lawyer may provide advice, may help locate sample documents and may attend hearings as a member of the public, but may not ghostwrite documents, assist in drafting documents or speak with opposing counsel on behalf of pro se litigant); Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001) (ghostwriting of ostensibly pro se appellate brief must be acknowledged by signature); Ricotta v. California, 4 F. Supp. 2d 961 (S.D. Cal. 1998) (lawyer's involvement in drafting pro se plaintiff's court documents “cross[ed] the line” into unprofessional conduct), aff'd, 173 F.3d 861 (9th Cir. 1999). But see In re Liu, 664 F.3d 367, 27 Law. Man. Prof. Conduct 746 (2d Cir. 2011) (disagreeing with its grievance committee, court held that undisclosed ghostwriting is not sanctionable; as no rule or precedent governs, lawyer not required to disclose his participation).
- See generally Lynn A. Epstein, With a Little Help From My Friends: The Attorney's Role in Assisting Pro Se Litigants in Negotiations, 13 T.M. Cooley J. Prac. & Clinical L. 11 (2010); Michael W. Loudenslager, Giving Up the Ghost: A Proposal for Dealing With Attorney “Ghostwriting” of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearances for Such Attorneys, 92 Marq. L. Rev. 103 (2008); Daniel J. O'Brien, Ghostwriting and Its Constitutional Support, 28 Geo. J. Legal Ethics 771 (2015); Laurel A. Rigertas, Stratification of the Legal Profession: A Debate in Need of a Public Forum, 2012 Prof. Law. 79 (2012); Louis S. Rulli, Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients, 17 U. Pa. J.L. & Soc. Change 347 (2014).
- ❑ **.20.80.60 Immigration —**
- Federal regulations prohibit limited appearances in immigration proceedings. In re Valinoti, 4 Cal. State Bar Ct. Rptr. 498 (Cal. Bar Ct. 2002) (duty to represent client fully and competently cannot be modified by agreement).

HYPOTHETICAL NO. 3

X calls your local CLA staff for help. X believes that he was wrongfully terminated from his job yesterday and that the reason is that he has the same name as someone who has recently appeared on the “OFAC list.” You learn that by “OFAC list” X means a list maintained by the US Treasury of persons or entities whom US persons may not do business with absent special permission from US Treasury (e.g., the list includes alleged terrorists and narcotics traffickers). You do a Google search and are fairly confident from news reports that the X on the OFAC list is the name of a ship used in human trafficking (not a human being), so that this is a simple mix-up.

A. Could you agree to help X with just the employment aspect and not the OFAC aspect?

B. Assume that no one on your staff or in your network of volunteers is familiar with the OFAC rules and process, can you still have one of them represent X in finding a way to avoid this kind of mix-up in the future (in addition to the employment aspect)?

HYPOTHETICAL NO. 3 CONT.

C. Assume that you have a volunteer who actually specializes in OFAC work for large corporations. She is willing to help X but she represents the parent company of the entity which fired X, so she proposes that she do this on a “no names basis” to avoid making her own law firm skittish. Ok?

i. Now assume the volunteer is willing to be named as X’s counsel but only to write an initial letter to OFAC requesting redress. Ok?

ii. Assume that you have agreed to represent X fully in the OFAC process but not with the employment aspect because of conflict issues. Ok?

iii. Now X is arrested by federal agents because X’s former employer reported X for being on the OFAC list. X calls you from the holding facility to ask if you can help. Can you?

iv. While in the holding facility, X (who has been living and working in the US on a “green card”) receives notice that, as a result of his arrest, he is being deported in accordance with immigration law. X desperately asks if you can help with this?

HYPOTHETICAL NO. 4

Hypo #4: Claire is a volunteer at your local CLA desk. She went to law school and passed the bar exam but never bothered to get licensed because she was so disillusioned by the whole process that she decided to go to medical school instead. At your desk, you have a common practice of having a volunteer attorney joined by a volunteer non-attorney to meet with clients, so Claire joins an attorney at the desk to meet with a client today. The client has a legal problem that the attorney knows nothing about but Claire, as it happens, wrote a published, award-winning law review article about exactly how to address this problem.

A. May Claire advise the client so long as she states that she is not “yet licensed to practice law”?

B. Does the analysis change if Claire is licensed to practice law in another state but not in this state?

C. Does the analysis change if Claire is admitted in this state but has her license on “inactive” status?

HYPOTHETICAL NO. 4 CONT.

D. Assume that the problem involves an intricate immigration issue which would require months of consultation and advocacy to resolve. May Claire or the attorney say, “Of course, we will help you through this”?

E. Mid-way through the consultation, the client asks to stop to pray out loud and begins, “Dear Lord, please help these lawyers to keep me and my two sisters, who are in this country without papers, from being deported.” After she says, “Amen” should Claire and/or the attorney say anything other than “Amen”?

F. It becomes clear, after the client continues to explain, that if the CLA helps Claire solve her immediate immigration problem, it will increase the likelihood of her two sisters being deported. How should you proceed? What if the only way you can identify to help Claire without deporting the sisters would involve making active misrepresentations to the applicable immigration agency?

LIMITED SCOPE AGREEMENTS

Statement of Understanding and Agreement

Relating to the Limited Scope of Assistance

We are glad you are here, and it is our pleasure to serve you. Open Hands Legal Services, Inc. (Open Hands) is a nonprofit, Christian organization. Our volunteers may offer to pray with you during your interview. You are not required to pray with us, and you do not have to be a Christian to receive our help.

This a one-time, limited interview with Open Hands at no charge to you. You will be provided with limited information and assistance with the legal issues you share. We do not have an obligation to follow up with you or to represent you legally after your interview ends. If we provide any follow-up services, we will discuss that with you separately. The organization where this interview is taking place is merely providing us with the needed physical space for the Legal Aid Desk and is not otherwise involved in, or responsible for, this interview.

We will use our best judgment to give you good advice. Our advice, however, is limited by our knowledge and the information you provide at the time of this interview. Any volunteers who are not licensed attorneys will be working under the supervision of a licensed attorney.

We will treat the information you share with us as confidential. You will have the full protection of confidentiality as required by the applicable rules of professional conduct.

Please sign this sheet to indicate that you have read the above statement and that you understand, accept and agree to the limited scope of assistance offered at the Legal Aid Desk.

Check here if you do not consent to being photographed or videographed and do not consent to Open Hands using your likeness in photographs and/or videos. All photographs and videography shall be the exclusive property of Open Hands and you will not receive compensation for their use.

ENGAGEMENT AGREEMENT

LIMITED SCOPE OF LEGAL SERVICES ENGAGEMENT AGREEMENT

1. **AGREEMENT:** This is an agreement to provide limited scope legal services between **(Client) and (Attorney) of Open Hands Legal Services.** The Attorney is being engaged to act as legal counsel solely for the Client and not for any other person or entity.]
2. **LEGAL NEED:** The nature of the services to be provided is limited to assisting the Client by providing legal services in the following manner: **Assist Client with making electronic FOIL request to FAA. Open Hands is not entering its appearance as Client's attorney of record in the submission of the form.** Once the Attorney's assistance to the Client in this matter has been concluded, the attorney-client relationship between the Attorney and the Client will cease. The Attorney may, but will not be required to, so notify the Client of such cessation.
3. **COSTS:** The Attorney agrees to provide legal services to the Client for no charge, although sometimes there are fees and other costs that the Client may be asked to pay.
4. **APPEALS:** This engagement agreement does not cover an appeal of this matter, to the extent the Attorney's representation involves appearing before a court or other tribunal on behalf of the Client. The Attorney does not agree at this time to represent the Client in connection with an appeal. The parties may agree at a later time to extend representation to an appeal. If they do so, they will sign a separate agreement to that effect.
5. **HONESTY:** The Client agrees to make a full and honest disclosure to the Attorney of all facts relevant to the matter, including new facts that may arise during the course of the matter. The Client also agrees to let the Attorney know right away if the Client receives any letters or other papers related to the matter.
6. **COMMUNICATION:** The Client agrees to promptly notify the Attorney of any changes in address, telephone number, or contact information. The Client and Attorney agree to respond reasonably promptly to telephone calls and correspondence received from each other.
7. **CONFIDENTIALITY:** The Attorney will keep all information provided by the Client confidential unless authorized by the Client to disclose it (except that information may be shared with other Open Hands staff) to the extent necessary to assist with the provision of legal services.
8. **CONSULTATION:** The Attorney will keep the Client informed about the status of the matter. The Attorney will consult with the Client before making any significant decisions about the matter. The Attorney will not settle any matter without the Client's consent.
9. **TERMINATION OF REPRESENTATION:** The Client may terminate this agreement at any time for any reason. The Attorney may terminate this agreement if there are not enough legal reasons to continue the matter or the Client does not cooperate with the responsibilities outlined in this agreement or requests made by the Attorney. The Attorney will provide written notice of his or her intention to terminate assistance.

LSAs v. ENGAGEMENT AGREEMENT

➤ Outcome-driven

➤ Possible Outcomes

(1) Point of Contact Advice

a. Client's legal issue can be resolved during the intake: Volunteers provide necessary information and advice. If need be, refer to outside legal organization. Advises the client that no more assistance will be given but they can contact one's organization if they have further questions.

b. No legal issue: Volunteers provide client with relevant resources; informs client that because there is no legal issue, organization cannot assist client further.

c. **LSA required**

d. **If completing discrete task during the consultation, like preparing court papers, sign Engagement Agreement specifying exact nature of service provided.**

LSAs v. ENGAGEMENT AGREEMENT

(2) Research and Follow Up

- a. Client's issue requires additional research after the LAD: Volunteers provide limited advice and information. Advises the client that further research will be done and organizational staff will follow up with the client as soon as possible.
- b. Organization determines client's matter requires ongoing follow-up and assistance.
- c. **LSA required.**
- d. **Engagement agreement may be required, but likely organizational staff will make the determination if and when it is required.**

LSAs v. ENGAGEMENT AGREEMENT

(3) Referral

- a. Client's issue cannot be resolved by organization: Another legal services organization may be able to assist the client.
- b. Organization will assess the case further and reach out to its network of attorneys, with client's informed consent, to see if it can make a possible referral.
- c. Client is advised that there is no guarantee organizational staff can make the referral, and if a referral is made, there is no guarantee there will be representation.
- d. **LSA required**
- e. Consider obtaining client's written consent and/or **Release of Information form to share their contact information and details of case with another organization.**

RECORD-KEEPING

- Client information and files should be retained and discarded in a manner consistent with your organization's recordkeeping policy. Pro Bono Basics 2022: Best Practices and Ethics: Chapter 7 of Written Materials.
- Contemporaneous notes should be taken with each action on behalf of or communication with the client or anyone else connected with the matter.
- Maintain original LSAs and Engagement Agreements.
- Full and complete advice should be recorded in each advice-only consultation.
- Consider allowing volunteers to access data system for note-keeping in longer-term unbundled legal services

LSR SPECIAL CLIENT CONSIDERATIONS

Pros of LSR:

- o Equity — addressing the nation’s “justice gap”
- o Improving client outcomes
- o Preserving client/litigant autonomy
- o Incentivizing attorneys

LSR SPECIAL CLIENT CONSIDERATIONS

➤ Client counseling considerations

- Manage expectations
- Enforce boundaries
- Build self-empowerment

MANAGE CLIENT'S EXPECTATIONS

- Written LSA “sets the stage” for LSR
- Engagement agreements should be specific and written in plain language
 - Include language that clearly defines the scope as well as the “end” of the representation – whether it be an event or a time
- If LSR extends to more than one discussion, continue to verbally make clear the scope of the representation, and keep contemporaneous notes of these discussions.
 - Check in frequently with client to make sure they understand.
 - Consider formalizing ongoing LSR into an Engagement Agreement

MANAGE CLIENT EXPECTATIONS -- BUT GIVE WHAT YOU CAN

Do not withhold good from those who deserve it, when it is in your power to act.
Do not say to your neighbor, "Come back later; I'll give it tomorrow"-- when you now have it with you.
-Proverbs 3:27-28

What good is it, my brothers, if a man claims to have faith but has no deeds? Can such faith save him?
Suppose a brother or sister is without clothes and daily food.
If one of you says to him, "Go, I wish you well; keep warm and well fed," but does nothing about his physical needs, what good is it?
In the same way, faith by itself, if it is not accompanied by action, is dead.
-James 2:14-17

ENFORCE BOUNDARIES

- Written LSAs and Engagement Agreement
- Gentle but firm discussions
- Allow LSR clients ample time to speak, but do not allow them to monopolize hours of time that are needed to serve others
 - Consider effects of mental health conditions on enforcement of boundaries
- Determine whether it is a legal issue that you are able to meaningfully assist with – if it is not a legal issue, is not a legal issue that will likely be resolved, or requires more practice area expertise, consider delegating these intakes to volunteer staff

ENFORCE BOUNDARIES

A Canaanite woman from that vicinity came to him, crying out, "Lord, Son of David, have mercy on me! My daughter is suffering terribly from demon-possession."

Jesus did not answer a word. So his disciples came to him and urged him, "Send her away, for she keeps crying out after us."

He answered, "I was sent only to the lost sheep of Israel."

The woman came and knelt before him. "Lord, help me!" she said.

He replied, "It is not right to take the children's bread and toss it to their dogs."

"Yes, Lord," she said, "but even the dogs eat the crumbs that fall from their masters' table."

Then Jesus answered, "Woman, you have great faith! Your request is granted." -Matthew 15:23-28

ENFORCE BOUNDARIES

One who was there had been an invalid for thirty-eight years.

When Jesus saw him lying there and learned that he had been in this condition for a long time, he asked him, "Do you want to get well?"

"Sir," the invalid replied, "I have no one to help me into the pool when the water is stirred. While I am trying to get in, someone else goes down ahead of me."

Then Jesus said to him, "Get up! Pick up your mat and walk."

At once the man was cured; he picked up his mat and walked. –John 5:5-9

BUILD SELF-EMPOWERMENT

- A big part of LSR is empowering the client, in appropriate cases, to take the next steps to solve their legal problem.
 - Different clients have different needs --Not all clients can do the steps on their own, but many can.
 - Determine what role you should and are able to play, based upon the client's individual needs and your own capacity.
 - If you provide Next Steps only, consider extending your advice sessions, or provide an opening for them to ask follow-up questions. This may require an Engagement Agreement. This may allow the client to feel that they will have someone to “check in” with along the way, and build their confidence.
 - If you do a discrete task, empower the client to follow up with the opposing party or entity to check on the status of the request, if appropriate. Also, make sure they know what their legal options are if the outcome of the task you did does not resolve the issue.
 - If you provide advocacy, be on the client's “team” and assure them that you understand what they are fighting against, which is often systemic oppression.

BUILD SELF-EMPOWERMENT

"I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me."

–Matthew 25:40

RESOURCES, BIBLIOGRAPHY, FURTHER READING

- https://www.americanbar.org/groups/delivery_legal_services/resources/prose_unbundling_resource_center/court_rules/ -- ABA website which provides state-by-state rules as it pertains to limited scope representation
- https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf --AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED LITIGANTS A White Paper by the ABA Standing Committee on the Delivery of Legal Services
- Spiro, Edward, Harwood, Christopher (2021). Limited-Scope Representation in Civil Cases. New York Law Journal. Retrieved from <https://www.law.com/newyorklawjournal/2021/06/14/limited-scope-representations-in-civil-cases/>

RESOURCES, BIBLIOGRAPHY, FURTHER READING

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1) *Altboff, Barrie. "Ethical Issues Posed by Limited-Scope Representation - The Washington Experience." Professional Lawyer Symposium Issues, 2004, 2004, pp. 67-106. HeinOnline, <https://heinonline.org.ezp-prod1.hul.harvard.edu/HOL/P?h=hein.journals/profeslwr12&i=69>.

2) Buiteweg, Lori A. "Limited Scope Representation: A Possible Panacea for Reducing Pro Per Court Congestion, Attorney Underemployment, and a Frustrated Public" Michigan Law Journal, no. 8, August 2016, pp. 10-14. HeinOnline, <https://heinonline.org/HOL/P?h=hein.barjournals/micbj0095&i=1276>

3) Eckley, Tim. "Unbundling Limited Scope Representation." Iowa Lawyer, vol. 78, no. 5, June 2018, pp. 9-10. HeinOnline, <https://heinonline.org/HOL/P?h=hein.barjournals/ialaw0078&i=137>

4) Fagg, Russell C. & Johnson, Clifton R. "Reactions to Limited-Scope Representation." Montana Lawyer, vol. 36, no. 3, December/January 2011, pp. 18-20. HeinOnline, <https://heinonline.org/HOL/P?h=hein.barjournals/mtlaw0036&i=82>

- *Asterisks mark the more comprehensive and useful studies in the case of further reading

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5) Fennell, Monica A. "Consider Limited Scope Representation." *Res Gestae*, vol. 55, no. 3, October 2011, pp. 46. HeinOnline, <https://heinonline.org/HOL/P?h=hein.barjournals/resgestae0055&i=166>

6) *Mandilk, James G. "Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation." *Yale Law Journal*, vol. 127, no. 7, May 2018, pp. 1828-1889. HeinOnline, <https://heinonline-org.ezp-prod1.hul.harvard.edu/HOL/P?h=hein.journals/ylr127&i=1905>.

7) Lerner, Jonathan J. & Sushon, William J. "Limiting the Scope of an Attorney's Representation to Avoid Client Conflicts." *Record of the Association of the Bar of the City of New York*, vol. 56, no. 3, Summer 2001, pp. 412-422. HeinOnline, <https://heinonline.org/HOL/P?h=hein.barjournals/rabbny0056&i=422>

8) *Ortiz, Pamela Cardullo. "Consent, Clarity, and Candor: The Ethics of Communication in Limited-Scope Representation." *ABA Journal of Labor and Employment Law*, vol. 33, no. 3, Fall 2018, pp. 247-266. HeinOnline, <https://heinonline-org.ezp-prod1.hul.harvard.edu/HOL/P?h=hein.journals/lablaw33&i=266>.

9) Williams, John Morris. "Consider Limited Scope Representation to Expand Your Practice." *Oklahoma Bar Journal*, vol. 89, no. 7, March 2018, pp. 50-51. HeinOnline, <https://heinonline.org/HOL/P?h=hein.barjournals/oklbaj02018&i=508>

FURTHER READING -- GHOSTWRITING

- Ghostwriting is undisclosed assistance by a lawyer to an ostensibly pro se litigant. Ethics opinions in most jurisdictions agree with the conclusion in ABA Formal Ethics Op. 07-446 (2007), that ghostwriting is a permissible form of limited-scope representation in most situations. This is “unsurprising,” notes one expert, given that state bars “have generally encouraged attorneys to provide unbundled legal services.” See Peter M. Cummins, *The Cat-O'Ten Tails: Pro Se Litigants Assisted by Ghostwriting Counsel*, 53 (No. 4) *DRI For Def.* 40 (April 2011).
- However, because the lawyer's participation in the matter is not disclosed to others—including the court, opposing parties, and opposing counsel—ghostwriting implicates other ethics rules, most obviously Model Rule 3.3 (candor toward tribunal), Model Rule 4.1 (truthfulness in statements to others), and Model Rule 8.4(c) (misrepresentation), and may also implicate local court rules.
- See also the discussion of lawyer ghostwriting in *Misconduct and Discipline—Misconduct—Dishonesty, Fraud, Deceit, Misrepresentation*.
- Model Rule 6.5 makes special accommodations for lawyers who provide short-term limited services under the auspices of a program sponsored by a nonprofit organization or court. See *Types of Practice—Public Interest—Nonprofit Limited-Services Programs*.

FURTHER READING -- GHOSTWRITING

- Jurisdictions disagree about how much help is permissible before the lawyer's participation—and, in some jurisdictions, identity—must be disclosed. See, e.g., *Persels & Assocs., LLC v. Capital One Bank*, 481 S.W.3d 501 (Ky. 2016) (lawyer involved in preparation of initial pleadings must include “Prepared By or With Assistance of Counsel” on the document; any later assistance must be disclosed by providing the lawyer's contact information and describing the nature of the limited representation agreement); *FIA Card Servs., N.A. v. Pichette*, 116 A.3d 770 (R.I. 2015) (lawyer may help pro se litigant if scope of representation is reasonable and litigant gives informed written consent, but lawyer assisting with a document must sign it, state that signature is not entry of appearance and disclose lawyer's identity); Alabama Ethics Op. 2010-01, 26 Law. Man. Prof. Conduct 673 (2010) (participation need not be disclosed if “limited in nature and quantity”); Arizona Ethics Op. 06-03, 22 Law. Man. Prof. Conduct 405 (2006) (if limited representation does not involve interaction with court or opposing counsel, lawyer must not disclose role without client's permission unless disclosure is required by Rule 3.3 or Rule 4.1); Kansas Ethics Op. 09-01 (2009) (if lawyer helps prepare document for pro se litigant to file in court, document must say “Prepared with Assistance of Counsel” but need not identify lawyer); Michigan Informal Ethics Op. RI-347, 26 Law. Man. Prof. Conduct 383 (2010) (undisclosed ghostwriting is not dishonest); New Jersey Ethics Op. 713, 24 Law. Man. Prof. Conduct 85 (2008) (nondisclosure of limited drafting assistance does not violate duty of candor to tribunal); New York County Ethics Op. 742, 26 Law. Man. Prof. Conduct 290 (2010) (pro se litigant must disclose lawyer's assistance in preparing pleading but need not identify lawyer); North Carolina Ethics Op. 2008-3 (2009) (undisclosed drafting and advice permissible unless court order or law provides otherwise); Tennessee Formal Ethics Op. 2007-F-153, 23 Law. Man. Prof. Conduct 196 (2007) (undisclosed help preparing “leading pleading” is permissible but “extensive” undisclosed participation is dishonest); Utah Ethics Op. 08-01, 24 Law. Man. Prof. Conduct 265 (2008) (unless court rule expressly provides otherwise, lawyers may help pro se litigants prepare written submissions to tribunals without disclosing their role); West Virginia Ethics Op. 2010-01 (2010) (ghostwriting creates lawyer-client relationship and must be disclosed pursuant to obligations of Rules 3.3 and 3.4 on candor to tribunals and fairness to opponents, and pursuant to Rule 8.4(c)'s prohibition of misrepresentation).

OPEN HANDS LEGAL SERVICES

openhandslegalservices.org



We set up mobile legal aid desks at soup kitchens and shelters across the city, bringing volunteer attorneys directly to low-income and homeless New Yorkers. We provide legal assistance and advocacy in civil legal matters such as family, housing, and immigration law. We also offer phone consultations for income-eligible people who lives in NYC.