Ethical Issues in Pro Bono Representation 2014

Co-Chairs
Bruce A. Green
Louis S. Sartori

Practising Law Institute
1177 Avenue of the Americas
New York, New York 10036
Hypothetical 2: Limited Scope Representation

Louis S. Sartori
*The Legal Aid Society*

Attachment b: Reprinted with permission from Professor Philip M. Genty.

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.
HYPOTHETICAL:

Compassion Pride & Responsibility LLP (CPR), a law firm with an extensive history of pro bono work on a variety of matters, has decided that they would like to take on a “Signature Project” and has reached out to the Director of Pro Bono at Hudson Essex Legal Providers (HELP) about establishing a monthly clinic focusing on providing advice and assistance to clients seeking to apply for a new county program called FRIE (Fugazy Rent Increase Exemption), designed to offset rent increases to eligible tenants by providing a dollar for dollar tax credit to private landlords. Flyers are distributed in HELP’s catchment area through community partners and clients are instructed to call and RSVP for one of the monthly clinics. Normally about half of the callers show up for the clinic and from time to time clients who have not called show up without an appointment. Sammie is one of those clients.

Since Sammie was not screened, the CPR associate Annie goes over the qualifications, including income, and explains how FRIE works. Sammie assures Annie that his income qualifies, although he has not brought any documentation to prove that fact. Annie helps Sammie complete the FRIE application form, highlights on the instructions the documentation Sammie needs to attach prior to submitting the application, and provides Sammie with an envelope that includes the address where the application needs to be filed.

Several months later Annie receives a call from the HELP Pro Bono Director. Sammie’s FRIE application was approved based on his stated income. However, Sammie neglected to tell Annie that he is the Super in his building and that part of his compensation is reduced rent. When the landlord received the notice from the county about the tax credit, he becomes irate with Sammie and fires him on the spot and commences an eviction proceeding. HELP and Sammie want Annie and CPR to defend Sammie at the eviction proceeding and bring an action for wrongful termination.

Have Annie and CPR entered into an attorney-client relationship with Sammie? Are Annie and CPR obligated to represent Sammie on the eviction proceeding that resulted from the FRIE application? Do they need to commence an action for wrongful termination? Was Annie’s representation “competent”? 


LIMITED SCOPE LEGAL SERVICES
DECLARATION OF UNDERSTANDING
OF SERVICES RENDERED

I understand that Hudson Essex Legal Providers has agreed to represent me for the limited purpose of assisting me with an application for the Fugazy Rent Increase Exemption Program, and that volunteers from Commitment Pride & Responsibility LLP will be assisting HELP today.

I understand that this is the only assistance HELP is providing to me and that HELP’s assistance will not continue in time after today’s clinic.

I understand that the information I provide to HELP must be complete and truthful. I also understand that HELP’s legal advice and assistance will be based solely on the information I have provided at this time.

I understand that the information I provide is confidential and will not be disclosed without my consent.

I have read the statement or the statement has been read/translated to me in ________________________ by ___________________, who is fluent in English and _______________, and I understand and agree to the terms of the above Declaration of Understanding written above.

______________________________       ______________________
Applicant                                                Date

______________________________       ______________________
Hudson Essex Legal Providers Representative/Volunteer      Date
Limited scope representation is part of the larger topic of “unbundled legal services,” which has been defined as “the division of legal assistance into discrete tasks, with an understanding between the lawyer and client that the lawyer will provide only selected legal services that may not address the client’s entire legal problem.”1 One might think about legal services as falling on a continuum:

1. attorney-client relationship with full representation
2. attorney-client relationship with limited representation
3. some direct attorney involvement with the client, but no representation in court proceedings or ongoing attorney-client relationship (e.g. providing legal advice or “ghostwriting” pleadings)
4. pro se materials with no direct attorney involvement with the client (e.g. handbooks, general information websites, sample forms)

In discussing “limited scope representation” or “unbundled legal services,” this essay will focus on the second and third categories, although the fourth category is also a form of “unbundled legal services.” Although the second and third categories may both be thought of as forms of “limited scope representation,” there are important differences between them. In the second category, a full attorney-client relationship is established, and the attorney provides actual representation to the client, although the representation is limited in scope. In the third category, something less than actual representation is being provided, and an attorney-client relationship may not even be formed.

As discussed more fully below, unbundling of legal services has important potential advantages for both attorneys and clients.

1. Mary Helen McNeal, Unbundling and Law School Clinics: Where’s the Pedagogy? 7 CLINICAL L. REV. 341, 349 (Spring 2001). The terms “limited scope representation,” “unbundled legal services,” and variations of both will be used more or less interchangeably throughout this essay.
Unbundling is also explicitly permitted by the relevant ethical code provisions. At the same time, however, it involves significant risks of failing to satisfy the duties that attorneys owe to clients, particularly the duty of competence. In addition, there is a risk that an attorney who engages in some form of limited scope representation will inadvertently enter into a full attorney-client relationship, with all of the duties that the relationship entails.

II. POTENTIAL BENEFITS AND ETHICAL PERMISSIBILITY OF LIMITING THE SCOPE OF REPRESENTATION AND “UNBUNDLING” LEGAL SERVICES

There are obvious potential benefits to all types of limited scope or unbundled legal services. For the client, they cost less than full representation. For the attorney, limited time and resources can be stretched to provide some assistance to a larger number of clients. Unbundled legal services are of particular importance in the public interest context, where the demand for legal services greatly outstrips supply and where the goal may be to meet at least some of the legal needs of as many people as possible.

Limiting legal services is also explicitly endorsed by the ethical rules. Rule 1.2(c) of the Model Rules of Professional Conduct provides: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Furthermore, Rule 6.5 – Nonprofit and Court-Annexed Limited Legal Services Programs – provides for the provision of “short-term limited legal services” to clients in programs sponsored by nonprofit organizations or the courts. Such “short-term services” are defined as:

services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no

2. See Mary Helen McNeal, supra note 1, at 350-51.
3. ABA Model Rules of Prof’l Conduct R. 1.2(c) (2013). “Informed consent” is defined as follows: “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 Rules of Prof’l Conduct R. 1.0(e) (2013).
expectation that the lawyer’s representation of the client will continue beyond the limited consultation.\(^5\)

Rule 6.5 further relaxes the rules relating to conflicts of interest to make it easier for private attorneys to take on such limited representation.\(^6\)

Recently, the Committee on Professional Ethics of the New York County Lawyers’ Association endorsed the use of one type of unbundled legal service – “ghostwriting” of pleadings – in a thoughtful ethics opinion.\(^7\) The Committee was asked whether it was permissible for lawyers to draft pleadings for individuals for use in court proceedings in which the lawyers would not be providing representation to, or appearing in court on behalf of, the individuals. Such “ghostwriting” is routinely provided by legal services programs to individuals whom the programs are unable to represent. For example, individuals who are facing eviction may need assistance in drafting a motion for a stay of the eviction.

The Committee concluded that this was a permissible form of limited scope representation under Rule 1.2(c) of the New York Rules of Professional Conduct. The Committee began by discussing the possible benefits of providing limited scope legal assistance to pro se litigants. The Committee stated that unbundled legal services are one way to address the needs of people who are unable to afford legal assistance. With respect to “ghost-writing” specifically, the Committee concluded: “[G]hostwriting allows attorneys to fulfill their professional obligation to make the system of justice available to all.”\(^8\)

In addressing the possibility that a pro se individual might receive an unfair advantage from such assistance, the Committee distinguished between substantive considerations, relating to the merits of the proceeding, and procedural considerations, relating to the ability of the individual to get access to the courts. The Committee noted: “Treating [pro se] pleadings more leniently does not make it more likely that a pro se litigant will win. It simply makes it more likely that a pro se litigant’s cause will be heard on the merits, as opposed to being dismissed at the pleading stage.”\(^9\) The Committee found that any possible concerns about misleading the court by suggesting that the pro se individual had prepared the pleadings without any assistance could be addressed by indicating on the pleadings that they had been prepared with the assistance of an attorney. The Committee left to the courts the question

---

7. N.Y. County Lawyers Ass’n Comm. on Prof’l Ethics, Opinion 742 (April 16, 2010).
8. Id. at 2.
9. Id. at 5.
of whether, in cases where some disclosure of attorney assistance was found to be required, the pleadings could be submitted anonymously or should include the name of the attorney who had provided the assistance.¹⁰

Other forms of unbundled legal services have been evaluated by ethics committees. One example is the courthouse based “pro se clinic”¹¹. Thus, the ability to “unbundle” legal services is an ethically permissible tool of significant importance to both attorneys and clients. Unbundling has the potential to address the problems of rising legal costs and unmet legal needs. However, because unbundling involves a departure from optimal, full-service, “first-class” legal representation,¹² it also implicates fundamental ethical concerns.¹³ Two of these – the danger of violating duties to the client, including the duty of competence, and the potential for inadvertent formation of a full attorney-client relationship – are discussed below.

III. DANGER OF VIOLATING ETHICAL DUTY OF COMPETENCE

It is important for every attorney to realize that any interaction with a client, even for limited purposes, triggers important duties.¹⁴ Chief among these is the duty of competence. Rule 1.1 of the Model Rules of Professional Conduct states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁵ The mere fact that an attorney is not providing full legal representation to a client does not relieve the attorney from the

¹⁰. Id. at 6-8.
¹¹. See Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Opinion 2005-F-151 (June 17, 2005) (finding most components of pro se divorce clinic permissible).
¹². See Stephen Pepper, The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, AMERICAN BAR FOUNDATION RESEARCH JOURNAL 613, 617 (1986) (arguing that the access to law and autonomy that lawyers provide to clients is the means to “first-class citizenship” for the client).
¹⁴. Professor W. Bradley Wendel has described the principal duties owed to clients in a formal or quasi-client relationship as the “Four-Cs”: competence, communication, confidentiality, and (avoidance of) conflicts. See W. Bradley Wendel, PROFESSIONAL RESPONSIBILITY: EXAMPLES & EXPLANATIONS 22 (2d ed. 2007).
responsibility of acting competently. Indeed, competence is arguably even more important in situations where an attorney will only be seeing an individual for a brief period of time and may not have the opportunity to follow-up with the individual after this meeting and correct any errors or miscommunications.

The Comments to Rule 1.2, which as noted above permits an attorney to limit the scope of services, explicitly links the duty of competence under Rule 1.1 to the requirement that the limitation on the scope of services be “reasonable”:

[7] 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. 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 [relating to competence of representation].

Thus, the duty of competence includes a responsibility to determine whether a contemplated limitation or unbundling of legal services is reasonable under the circumstances. Some limitations on the scope of representation are routine and would not generally involve any ethical concerns. For example, an attorney may agree to handle a case at the trial stage but not on appeal. Or an attorney might agree to handle a client’s will but not the client’s lawsuit for breach of contract. The Comments to the Model Rules of Professional Conduct provide additional examples.

But there are other situations where the reasonableness of a proposed limitation may be less clear. An attorney’s duty of competence involves determining whether the individual will be better off with the limited assistance than without it, i.e. whether something is necessarily better

16. ABA MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 7 (2013).
17. Comment 6 to Rule 1.2 states: “When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. ABA MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 6 (2013).
than nothing. While it may seem obvious that an individual will always benefit from even limited legal assistance, this is not necessarily true. There may be cases where an attorney risks putting an individual in a worse situation than if the attorney had not become involved in the first place.

One such case provides a cautionary tale for any attorney contemplating limited scope representation. In *MC v. GC*, a law firm attorney had become involved with a *pro bono* divorce program run by a not-for-profit organization. The attorney, who had no experience handling divorces, was apparently told by the organization overseeing the *pro bono* program that the assistance she would be providing would be limited to uncontested divorces. The attorney agreed to represent a wife who was referred to her by the organization. When the wife asked the attorney about the possibility of obtaining a custody order that would allow her to relocate with her child, the attorney told her that she would not be able to help with this issue. The attorney explained what she saw as the limited scope of her representation as follows:

Please be advised that I was not retained for a contested divorce, nor was I retained to advise you regarding relocation. Rather, you originally retained me as *pro bono* counsel for an *uncontested* divorce, based on the facts that you presented to [the not-for-profit organization]. As such, if settlement negotiations break down over an unreasonable disagreement as to visitation rights, I will withdraw my representation. Furthermore, *I will not negotiate the relocation issue under any circumstances.* While I am . . . well aware of your desire to move to Florida in the near future, I do *not have the experience or the time to handle a lengthy relocation trial.* However, once you obtain this divorce, if you do obtain it, you are free to hire whomever you wish, maybe even court appointed counsel, to litigate the relocation issue.

The wife subsequently signed a stipulation of settlement prepared by the attorney. Despite the wife’s desire to relocate and the attorney’s knowledge of that fact, the stipulation provided that she would not be permitted to do so. In addition, even though the attorney had not discussed equitable distribution of assets with the wife, the stipulation stated that the parties were waiving any right to equitable distribution. The attorney was apparently under the impression that the wife could modify the terms of the stipulation at a later date, but this was not correct.

---

18. 25 Misc.3d 217 (Sup..Ct., Bronx Co. 2009).
19. Id. at 220-22.
20. Id. at 223 (emphasis in original).
21. Id. at 223-24.
22. Id.
The wife subsequently retained new counsel and moved to vacate the stipulation and litigate the relocation and equitable distribution issues. In granting the wife’s application, the court was highly critical of the pro bono attorney, as well as her law firm and the not-for-profit organization. The court found that the attorney lacked appropriate training, supervision, and oversight, and that, as a result, she made material misstatements to the wife and put improper pressure on her to settle.23

This case teaches a powerful lesson: An attorney must provide competent representation at all times and may not limit the scope of representation in a way that will unreasonably undermine the effectiveness of the representation. In MC v. GC, while it may have been reasonable in the abstract to limit representation to uncontested divorces, the attorney could not permissibly impose that limitation in the face of the client’s desire to litigate other issues, including the possibility of relocation. Once the wife was accepted as a client, competent representation required the attorney – or someone else in her firm or in the not-for-profit organization – to provide full representation of the client on all issues necessary to the effective handling of her divorce, or to secure for the client another attorney who would be able to do this.

It is important to stress that the problems of the lawyer in MC v. GC were caused, in part, by her desire to “do good” by participating in a pro bono program for women who could not afford representation. Despite these honorable intentions, this is an example of a situation where some representation might actually have been worse than no representation: The court might well have concluded that since the wife had the benefit of counsel when she signed the stipulation, there was no basis for vacating it. In such circumstances, the wife might actually have done better proceeding pro se and raising the relocation and financial issues directly with the court.24

Another situation involving issues of competence in the context of limited scope legal services arose in Louisiana after Hurricane Katrina. The Louisiana Bar Ethics Committee saw the need to discourage the stampede of well-meaning, but unqualified, lawyers seeking to come to

23. Id. at 226-29.
24. An even more frightening example of the risks of incompetent pro bono representation is Maples v. Thomas, 131 S. Ct. 1718 (2012). There two law firm associates had undertaken representation of a prisoner on death row. The lawyers left the firm, apparently without making any provisions for the continued representation of the client. When the state court sent a notice to them at their former firm, the firm simply returned the notice to the court. The prisoner’s time to appeal expired. Happily, the Supreme Court reinstated the prisoner’s right to appeal.
the state to volunteer their services. In the context of a proposed “hot-line” or advice booth for Katrina victims, the Ethics Committee sounded a cautionary note:

As callers to such a “hotline” and visitors to such a booth will likely be desperate for help, eager for assistance and, therefore, most vulnerable, a lawyer who is not competent in the areas of law at issue (and unwilling/unable to attain competence through seminars, training and other learning aids) should refrain from volunteering to provide this type of assistance as that lawyer’s participation would have a high potential for causing more harm than good.

. . . [T]he lawyer confronted with a disaster victim who is seeking advice on matters beyond the lawyer’s competence should refer that person to another lawyer who would be capable of providing competent advice or – despite the overwhelming desire to help – compassionately but firmly remind the disaster victim of the limitations of the service and decline to offer advice on those matters which exceed the lawyer’s competence.25

In short, there are risks involved in trying to do too much even in, or perhaps especially in, the context of limited scope, unbundled legal services that may require a level of competence that the lawyer does not possess. Sometimes it is better for both the client and the lawyer if the lawyer simply says “No.” This theme is discussed further in the following section.

IV. DANGER OF INADVERTENT FORMATION OF FULL ATTORNEY-CLIENT RELATIONSHIP

As discussed above in the context of the *MC v. GC* case, a lawyer who has initially agreed to take on only a limited scope of representation may find that principles of competence require her or him to take on responsibility for full representation, because circumstances have caused the limitation to become unreasonable. Another possible concern that arises in limited scope representation or unbundling of legal services is that a lawyer will inadvertently create a full attorney-client relationship involving additional ethical duties to the client.

While state laws and court rules may require lawyers to provide clients with retainer agreements or other formal documents concerning the representation, an attorney-client relationship may be entered into without such formalities and may even occur inadvertently through the

actions – or inaction – of the lawyer.\textsuperscript{26} Section 14 of the Restatement of the Law Governing Lawyers sets out the requirements for formation of an attorney-client relationship:

§14. Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.\textsuperscript{27}

Thus, the burden is on the lawyer, as the person possessing superior relevant knowledge and information, to make sure that the client understands whether an attorney-client relationship has been entered into. Ambiguities and misunderstandings will be construed against the attorney and may result in the inadvertent formation of an attorney-client relationship.

This risk is especially acute in situations involving unbundled, limited scope legal services. Many of these arise in the context of pro bono programs for individuals who will be handling their own legal proceedings without any legal representation. There is a thin line between assistance to such pro se individuals and inadvertent formation of an attorney-client relationship. A lawyer, faced with an individual in need, will naturally want to act out of compassion and do as much as possible for the individual. For example, a lawyer who is participating in a pro bono project ghostwriting pleadings to prevent an eviction may feel the urge to do more to address the individual’s problem. The lawyer may, e.g., offer to let the individual call and have a follow-up conversation about her/his case, or ask the individual to send legal papers to the lawyer for review. Or if an individual learns in, say, an advice-only domestic violence clinic that the pro bono lawyer works for a law firm

\textsuperscript{26} The classic case illustrating this principle is \textit{Togstad v. Vesely, Otto, Miller & Keefe}, 291 N.W.2d 686 (Minn. 1980) (finding attorney liable for malpractice based on a finding that he had inadvertently entered into an attorney-client relationship when the client consulted him and had failed to advise the client competently.).

\textsuperscript{27} Restatement (Third) of the Law Governing Lawyers§14 (2000).
and handles tort actions for money damages, the individual may ask the
lawyer for advice about a potential lawsuit arising from an accident.

However, if the lawyer succumbs to these pressures and agrees to
take on tasks that are beyond the limited scope of the pro bono program,
the lawyer may cause an individual to believe that an attorney-client
relationship has been formed. If so, the lawyer will inadvertently take on
full representational duties, including the duties of competence and
confidentiality. This may then create a conflict of interest for the lawyer
and require him or her to withdraw from representation of an existing
client.28 Even if a full attorney-client relationship is not formed, an
attorney may create a prospective client relationship, which involves
similar concerns about competence, confidentiality and conflicts of
interest.29

V. CONCLUSION

Limiting the scope of representation and unbundling legal services are
potentially valuable tools for lowering the cost and expanding the
availability of legal services. They are a way to allocate scarce legal
resources to address the significant problem of unmet legal needs.
However, they come with a potential cost. By definition, limited scope,
unbundled services cannot be as effective as full, “1st class” representa-
tion, and at some point limiting the scope of services becomes unreason-
able and fails to meet the standard of competence required of lawyers.

A different concern about limited scope/unbundled legal services is
that the individuals served may be confused about whether the lawyer
has agreed to represent them. In failing to resolve this ambiguity, a
lawyer may inadvertently create a full attorney-client relationship.

Thus for limited scope representation and unbundled legal services,
the flip side of the concerns about effectiveness and competency that are
discussed in Section III, supra, are the concerns about inadvertent
formation of an attorney-client relationship discussed in Section IV,
supra: An attorney may feel that the limited scope, unbundled services,
are insufficient to meet all of the individual’s legal needs competently.
The lawyer may therefore feel compelled to offer to do more for the
individual. But this act of compassion may inadvertently create an
attorney-client relationship with all of its attendant ethical duties. This

“do too little” or “do too much” dilemma makes it difficult for an attorney to find the right balance in carrying out limited scope legal services.

Attorneys therefore need to proceed with caution and be mindful of the risks, as well as the advantages, of limiting the scope of legal services. As in so many other areas of life, personal and professional, it is important to act with both a “head” and a “heart.”