

**REPORT ON  
LIMITED SCOPE LEGAL ASSISTANCE  
WITH INITIAL RECOMMENDATIONS**

**REPORT PREPARED BY THE  
LIMITED REPRESENTATION COMMITTEE  
OF THE  
CALIFORNIA COMMISSION ON ACCESS TO JUSTICE**

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**INITIAL RECOMMENDATIONS APPROVED BY THE BOARD OF GOVERNORS  
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# **REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS**

## **PART I. INTRODUCTION**

The California Commission on Access to Justice established the Limited Representation Committee to study the practice of delivering legal services known as limited scope legal assistance, or “unbundling.” The Committee was directed to analyze current practices and to provide recommendations to the bar, the courts and other involved institutions and individuals to assist them as they address the issues raised by limited scope legal assistance in the civil law context – with the ultimate goal of helping increase the availability of legal assistance for persons of low and moderate means.

The Committee began its work in March of 2001. This report contains the Committee’s initial recommendations, which received unanimous support from the State Bar’s Board of Governors, following a presentation on July 28, 2001. The Committee intends to continue to develop the concepts described here, and to coordinate with other groups considering related issues. The Committee will then present additional recommendations to be pursued by appropriate institutions including the State Bar and Judicial Council.

This report is intended to help clarify the roles and duties of all those involved with limited scope legal assistance: the consumer; the “unbundling” attorney; and the court -- as well as opposing parties and their attorneys.

### **Statement of Principle**

After analyzing many of the issues raised and receiving input from different perspectives, the Committee adopted the following statement of principle:

The Committee finds that consumers of legal services need and are seeking a continuum of legal services that includes both full service representation and limited scope legal assistance. The State Bar should support the expansion of such limited scope legal assistance as part of its ongoing effort to increase access to legal services.

To be effective in this effort, it is necessary to educate attorneys, judges, insurers, and the public about the benefits, risks, obligations, and structure of these arrangements. The committee therefore recommends a collaborative program with the State Bar, Judicial Council, and other interested parties to design and implement that outreach effort and to develop policies and procedures for the appropriate use of limited scope legal assistance.

## What is “Limited Scope Legal Assistance”?

The definition of limited scope legal assistance adopted by the Committee is:

A relationship between an attorney and a person seeking legal services in which it is agreed that the scope of the legal services will be limited to the defined tasks that the person asks the attorney to perform<sup>1</sup>.

There are three general categories of services involved:

1. Advice and counsel
2. Limited court or administrative appearances
3. Assistance with documents and pleadings

Some limited scope legal assistance is provided in such a way that there is no court appearance and no contact with opposing counsel. This may include legal research or advice and counsel. Other services involve one or more court appearances or contact with opposing counsel.<sup>2</sup>

Limited scope legal assistance does not involve limiting the liability of attorneys, or the duties attorneys owe their clients with regard to competence, confidentiality, or avoidance of conflicts.

Limited scope legal assistance has been an accepted practice for many years, particularly in certain areas of the law such as bankruptcy, and corporate law – and has recently expanded substantially in the area of family law. Insurance companies have long followed the practice of paying for counsel for specific issues that are covered by their policy. Courts promote limited representation when they appoint an attorney for part of a case, such as to represent a party for one issue in a case, for example child custody. The issues raised by this type of legal assistance are complex and go to the heart of what it means to practice law, and the essence of the attorney-client relationship – as well as the authority of judicial officers to control the cases before them.

## The Benefits of “Limited Scope Legal Assistance”

From an **access to justice or consumer perspective**, limited scope legal assistance will increase access to the courts and legal assistance because more individuals will get some legal assistance in situations where, because of a lack of resources, they would receive no legal help if only full service were available. This practice is also partially consumer driven, as consumers of legal services insist on, and receive, greater control over their legal matters and representation.

It also may **encourage more *pro bono* assistance**, because attorneys may be more likely to provide limited assistance *pro bono* if they are assured that they will be allowed to help someone on part of a case without the threat of being forced to commit to a long, costly proceeding.

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<sup>1</sup> Also called “unbundling”, “discrete task representation”, “limited representation”, and “partial representation.” These terms are used interchangeably in this report.

<sup>2</sup> This service involves some level of expectation on the part of opposing parties or attorneys, and questions may arise about who should be served with documents and how to identify the portions of the case in which the attorney is not involved.

From a **court's perspective**, limited assistance will clarify the presentation of issues and help reduce errors and continuances, demand on court personnel, and court congestion. New procedures can provide clarity about when a party is or is not represented, helping the court and opposing parties address such issues as knowing who needs to be served, and with whom they can negotiate.

From an **attorney's perspective**, limited assistance can provide access to many more potential clients, who can afford some, but not the entire, traditional model of legal representation. Attorneys may be able to attract other potential clients who can afford full service, but who want to participate in their own representation. In addition, developing solutions and providing guidance for attorneys who offer limited scope assistance will be a great service, assisting them to avoid malpractice exposure where they perform ethically and competently; ensuring that their involvement in a case is limited to what they contract for; and allowing attorneys to recover court-sanctioned attorney's fees in limited appearances when fees would be awardable for the same tasks if performed in a full service context.

### **Related Developments**

A collaborative approach is the best way to develop the policies and procedures necessary to implement the findings and recommendations of this report. Some of the efforts currently in progress relating to limited scope legal assistance include:

- The Judicial Council's Family and Juvenile Law Advisory Committee is also analyzing issues involving limited scope legal assistance, including proposed Judicial Council forms and policies discussed in this report, and will continue to address these proposals throughout the balance of this calendar year and beyond.
- The Judicial Council has just established its Task Force on Self-Represented Litigants, which will consider this issue of limited scope legal assistance as part of a strategic plan to improve services for self-represented litigants.
- Other states and national organizations, such as the ABA, the American Judicature Society and others are addressing similar issues; this Committee will continue to coordinate with these entities to take advantage of their input as our initial recommendations are finalized and implementation moves forward.
- Several local courts and local bar associations are analyzing limited scope legal services and considering alternative solutions for their local needs. Again, this Committee will coordinate with these entities, to the extent feasible.
- Finally, the State Bar has reinstated its Commission on the Revision of the Rules of Professional Conduct, which will review the Rules, in light of the ethics changes considered by the ABA and changes in the practice of law. This Committee will coordinate with that Commission to ensure that any changes they consider do not inadvertently create barriers for limited scope legal assistance, and to determine whether any minor changes might facilitate limited legal services and make it more available to the public.





## **PART II. SUMMARY OF INITIAL RECOMMENDATIONS**

(See Part IV, pages 9 through 29, for a discussion of these initial recommendations.)

### **Ethics Recommendation**

1. The Committee believes that no modifications to the Rules of Professional Conduct are necessary at this time to implement the recommendations of this report.

### **Court-Related Recommendations**

2. **Limited Representation Form:** Work with the Judicial Council to develop forms to be filed with the court clarifying the scope of representation when the attorney and client have contracted for limited scope legal assistance.
3. **Notice of Withdrawal:** Work with the Judicial Council to develop a standard form of Notice of Withdrawal to formalize attorney withdrawal and notice at the conclusion of limited scope legal assistance.
4. **Ghostwriting:** Work with the Judicial Council to develop a rule of court that would allow attorneys to assist in the preparation of pleadings without disclosing that they assisted the litigant if they are not appearing as attorney of record.

### **Disclosure & Agreement Recommendations**

5. **Consumer Education Brochure:** Work with the State Bar to develop a consumer education brochure describing the options, benefits and potential risks for consumers of limited scope legal assistance.
6. **Sample Agreements and Forms:** Work with the State Bar to develop standards for limited scope retainer agreements and sample practice forms.
7. **Education and Outreach:** Work with the State Bar to develop programs to educate attorneys about the limits of limited scope legal assistance and the requirement of competency; to educate consumers on their rights; and to educate all participants on the importance of disclosures and communication.

### **Insurance Recommendations**

8. **Education to Reduce Exposure:** Work with the State Bar to develop plans to educate insurance carriers about limited scope legal assistance and the ways attorneys can reduce their claims exposure when providing such services, and to develop plans to educate attorneys and judges about criteria, procedures, and forms for providing limited scope legal services.
9. **Develop Risk Management Tools:** Work with the State Bar to develop risk management tools for attorneys and clients.

### **Lawyer Referral & Information Services (LRIS) Recommendations**

10. **Consider Modifications to LRIS Regulations:** Request that the State Bar Office of Certification work with appropriate entities to complete a review of present LRIS regulations to determine if any changes or rule explanations would be necessary to encourage LRIS organizations to offer effective limited scope panels.
11. **Training:** Request that the Program Development Unit of the Office of Legal Services, Access & Fairness include training about limited scope services as part of its curriculum for future LRIS trainings.

### **PART III. CHARGE OF THE COMMITTEE AND SCOPE OF WORK COMPLETED**

The Limited Representation Committee of the Access to Justice Commission was asked to evaluate the current state of the field with respect to the availability of limited scope legal services for civil legal matters, and the issues raised by this delivery mechanism. This report is based on a first look at the area, and contains initial recommendations intended to form the basis for further work by the Committee, often in conjunction with other entities. The Committee recognizes that there are other groups and individuals with relevant knowledge and experience in this area; many assisted the Committee in this preliminary phase, and many will be consulted as the work continues.

To begin the analysis, five study groups were formed to examine issues relating to:

- Ethics
- Courts
- Disclosures and Agreements
- Insurance
- Lawyer Referral & Information Services (LRIS)

The Committee and its study groups conducted several focus groups, distributed questionnaires, and conducted one-on-one interviews. Among the persons consulted through these methods were attorneys who do and attorneys who do not offer limited scope services, judges, LRIS representatives, ethics and insurance experts, legal services advocates, family law facilitators, and users of limited scope legal services. Information was also received from the State Bar-sponsored LRIS roundtable conducted on August 14<sup>th</sup>, 2001.

The Committee focused its attention on limited scope services in the context of private attorneys, and does not address some of the different, but related issues involved with self-help assistance offered at court-based self-help projects. These will be addressed by the new Judicial Council Task Force on Self-Represented Litigants. The recommendations and conclusions of this report are limited to civil matters, where there is currently no right to appointed counsel; however, there are models that may provide helpful information in the criminal justice representation context.

Going forward, the Committee plans to:

- develop the concepts outlined in this report and coordinate with other groups;
- draft specific recommendations for implementation by appropriate institutions including the State Bar and Judicial Council;
- work with the reactivated Commission on the Revision of the Rules of Professional Conduct to provide input to their process; and
- continue analysis of issues, including concepts raised during the input phase, such as how prepaid plans could or should be involved.





## **PART IV. ANALYSIS AND INITIAL RECOMMENDATIONS FOR ACTION**

### **A. ETHICS ISSUES**

#### **Initial Recommendation 1: Ethics**

The Committee believes that no modifications to the Rules of Professional Conduct are necessary at this time to implement the recommendations of this report.

The Committee adopted this initial recommendation based on the input it received at focus groups and on its own analysis of the rules and relevant ethics opinions. The Committee believes that the Rules provide no barrier to providing limited scope representation even though ethical questions or issues may arise as in any other representation.

The attorney-client relationship, unless established by court appointment, is based on an agreement between the parties. That agreement defines the essential elements of the relationship, including the scope of services to be provided by the attorney. There is nothing in California law that circumscribes the ability of the attorney and client to reasonably limit the scope of services in any way acceptable to them.<sup>3</sup> In fact, it has long been the practice for clients, both corporate and individual, to retain attorneys to assist with some portion of the representation needed in a transaction or case. [For an analysis of the authority to limit legal assistance, see L. A. County Bar Association Opinions 483 (1995) and 502 (1999).]<sup>4</sup> The critical issue for the attorney in a limited scope representation is that the client fully understand and agree to what the attorney will do, and, more importantly, what the attorney will not do. (See Disclosures and Agreements section of this report.)

It is important to note that limits on the scope of legal assistance do not limit the ethical obligations of the attorney to the client, including the duty to maintain confidentiality [Business & Professions Code §6068] and to act competently [California Rules of Professional Conduct 3-110]. An attorney-client relationship is established, involving all duties owed to clients in any other form of representation. In addition, such a limited representation does not limit the obligations of counsel to other parties or to the court. Finally, it should be noted that limiting the scope of representation does not limit the attorney's exposure to liability for the work he or she agreed to perform, nor is such a limitation permissible.

<sup>3</sup> See Comment to California Rules of Professional Conduct, Rule 3-400: "Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation. (Amended by order of Supreme Court, operative September 14, 1992.)"

<sup>4</sup> Los Angeles County Bar Association Ethics Opinion 502 is reprinted as part of the Appendix, p. 49.

## **Conflict of Interest**

The issue of conflicts of interest presents a more complex question. In general, the rules that apply to any attorney-client relationship regarding conflicts apply as well to the provision of limited legal services. In some situations, however, the circumstances of the assistance preclude a full search for potential conflicts. Where a *pro bono* attorney is working in a clinic providing advice and counsel to clients of a legal services program, for example, the attorney may not have access to the conflict checking system of his or her firm. If the attorney is aware of a conflict, such as a personal representation of the opposing party, he or she must refuse to provide the services; but difficult choices may arise where the lawyer does not know that an actual conflict exists.<sup>5</sup>

## **Communication with Opposing Party**

Among other issues frequently raised in discussions of limited scope representation is the question of communication between an attorney and an unrepresented but assisted opposing party. The issues raised by this concern seem to be practical rather than ethical in nature.

A self-represented party may be contacted by opposing counsel. Rule 2-100 (A) only restricts contact when the person is "represented by another lawyer." For this rule to be applicable, it would appear that opposing counsel must be aware that the party is represented. Where there is not an attorney of record and the attorney is not aware of any representation of the opposing party, there does not appear to be any restriction on such contact.

Even when opposing party has an attorney for part of a case, there is no restriction on contact by the opposing attorney on other parts of the case. Further, a member may contact the opposing party when the attorney has consented to that contact. [Rule 2-100 (A).] Of more practical importance is an attorney's concern about knowing who has authority to negotiate on a given issue, or having to negotiate different issues with different individuals. The limited representation form recommended by this Committee, and discussed in the "Courts" section below, may at least help clarify when opposing party is or is not represented by counsel, and thus when direct communication is appropriate.

## **Assistance with Documents**

The preparation of pleadings or other court documents by an attorney for a self-represented litigant also presents some potential ethical concerns. There is no California statute, rule, or case that requires the attorney to disclose his or her participation to either the court or the opposing party. Since the party is the one signing the document, it is the party who is certifying that the document is not fraudulent, misleading, or otherwise improper under Code of Civil Procedure §128.7. Because the party is therefore subject to sanctions for an improper pleading, it is important that the attorney advise the client of §128.7, and of the consequences of its violation.

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<sup>5</sup> The Commission on Evaluation of the Rules of Professional Conduct of the American Bar Association, in its Ethics 2000 Report, has recommended an amendment to the ABA Model Rules to account for the situation where the attorney in a clinical situation has no knowledge of a potential imputed conflict based on representation of the opposing party by someone else in the firm. Proposed Model Rule 6.5 provides that a lawyer may provide limited legal services to a client in a court-annexed or non-profit program where the attorney is not aware of any potential conflict of interest. The Supreme Judicial Court of Maine recently adopted a new rule 3.4 (j) of the Maine Bar Rules that includes a similar provision. While it is not necessary to proceed with the preliminary recommendations of this report to adopt such a rule, the special committee established by the State Bar to review the ethics rules should consider this rule closely.

While some outside of California have opined that failure to disclose ghostwriting is a fraud on the court, there is no such California authority. California courts seem to be more aware of the value of having attorneys provide this assistance. Judges have provided feedback to this Committee indicating that it is usually very clear when a litigant has received some legal assistance, and they prefer litigants receive some help, rather than none. (Please see the “Pleading and Document Preparation” discussion in the “Courts” section below.)

### **Termination of Representation**

The termination of the limited scope representation presents additional ethical issues. Where the assistance provided to the client is intended to be more than a brief, one-time event, the attorney must take care to properly terminate the representation. If no court appearance is involved, the client must be clearly advised that the agreed-upon representation has been completed, and that the attorney is no longer assisting the client. The client must also be advised of any impending deadlines or other tasks pending, and any other consequences of the attorney’s withdrawal. Where the limited representation has included court appearances, the attorney must also take whatever steps are legally required to assure that he or she is no longer attorney of record. (California Code of Civil Procedure Section 284.2, Rule 3-700) Again, development of Judicial Council forms to specify the extent of the limited scope relationship and show when such a relationship terminates will be helpful in this connection.<sup>6</sup>

### **Conclusion on Ethics Issues**

The current Rules of Professional Conduct do not preclude the ability of attorneys and clients to limit the scope of the representation provided. They do, however, provide the same guidelines for that representation that they do for any other form of representation, including maintaining confidences, avoiding conflicts, and assuring competence. The State Bar has established a commission to review the Rules in light of changes in the delivery of legal assistance and of the ABA Ethics 2000 report. While no changes are needed in the Rules to permit limited scope representation, it is important that this Committee offer to work with that commission to assure that there are no changes that would restrict—and that there is consideration of changes that might enhance—the ability of clients to obtain the services they need.



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<sup>6</sup> This matter is discussed further in the Courts and Disclosures sections of this report.



## **B. COURTS ISSUES**

California's courts are encountering an increasing number of self-represented litigants in civil cases throughout the state. Currently, over one half of the parents seeking custody and visitation orders from the courts act as their own attorneys, and over seventy-five percent of parents with child support problems proceed on their own. Many large courts report that self-represented litigants filed more than eighty percent of new divorces. Self-represented litigants require more time from both judicial officers and clerical staff than represented litigants, as they are unfamiliar with court processes and the law.

Limited scope representation helps these self-represented litigants:

- to prepare their documents legibly, completely and with greater accuracy;
- to prepare their cases based upon an improved understanding of the law and court procedures;
- to have representation for a portion of their case, such as for one court hearing, even if they are unable to afford full representation;
- to obtain assistance in preparing, understanding and enforcing court orders.

This increased assistance can reduce the number of errors in documents; limit wasted court, litigant and opposing attorney time due to procedural difficulties and mistakes by self-represented litigants; and decrease demands on court personnel and docket congestion. Judicial officers indicate a strong interest in assisting self-represented litigants obtain as much information and assistance from attorneys as possible. They point to the California courts' positive experience with self-help programs such as the Family Law Facilitator program, which provides assistance to self-represented litigants with paperwork and education. These programs, however, cannot meet the needs of all self-represented litigants and must, by nature of existing regulation of their operation, have limitations on the scope of services that can be provided.

### **Advice and Counsel**

The courts are generally not directly confronted with "advice and counsel" cases as attorneys are consulting with clients in their offices and there is little cause for the court to be informed of their involvement. In general, any advice and counsel that a litigant can receive from an attorney will be helpful to them in determining whether to bring a matter to court, and in identifying the legal issues involved.

## Limited Court Appearances

### **Initial Recommendation 2: Limited Representation Form**

Work with the Judicial Council to develop forms to be filed with the court clarifying the scope of representation when the attorney and client have contracted for limited scope legal assistance.

### **Initial Recommendation 3: Notice of Withdrawal**

Work with the Judicial Council to develop a standard form of Notice of Withdrawal to formalize attorney withdrawal and notice at the conclusion of limited scope legal assistance.

One of the key services that self-represented litigants in focus groups reported they would like to receive is an attorney to argue a motion, evidentiary hearing or trial in court. This is generally in the best interests of the judiciary, as attorneys are aware of local rules and procedures, rules of evidence, and the scope of legally relevant issues. Judicial officers can direct counsel to prepare orders after hearing, and otherwise receive counsel's assistance through a clear presentation of the case, saving significant court resources.

However, this is an area in which attorneys are often cautious about providing limited scope services. Lawyers need certainty that courts will abide by the limitations contained in the retainer agreement. In general, while a court may have a preference for an attorney to represent a litigant for the entire case, the court's desire for more litigants to be represented in court proceedings can effectively be met by allowing limited scope services.

The Committee recommends that the Judicial Council adopt a form clarifying that an attorney is making an appearance for a limited issue or for only one hearing. This would provide notice to the court and the other party, and ensure a clear understanding between the client and lawyer regarding the scope of the service. It would also allow clerks and opposing counsel to know who was attorney of record and to whom notice should be sent for various stages of a case. The Committee will investigate the utility of asking the Judicial Council to consider adopting procedures for ex parte applications to be relieved as counsel in the event that a client fails to comply with an agreement to execute a substitution of attorney form upon termination of the limited scope of representation.

The Committee plans to investigate the design of materials that the Judicial Council could use to include discussion of limited scope services in training for judicial officers, to consider case management issues and techniques to encourage use of attorneys who are willing to assist litigants with a portion of their case even if they cannot afford full representation.

## **Pleading and Document Preparation**

### **Initial Recommendation 4: Ghostwriting**

Work with the Judicial Council to develop a rule of court that would allow attorneys to assist in the preparation of pleadings without disclosing that they assisted the litigant if they are not appearing as attorney of record.

Limiting the scope of representation to the preparation of pleadings is a widespread practice in California. The primary issue of concern during the Committee's discussions was whether attorneys should be required to disclose that they assisted a litigant in drafting the documents.

There is no specific statute or rule that prohibits an attorney from assisting a client in the preparation of pleadings or other documents to be filed with the court, without disclosing the attorney's role to the court. Further, there appear to be no published court decisions in California state or federal courts which have required an attorney's disclosure to the court regarding his or her involvement in preparing pleadings or documents to be filed by a self-represented litigant [LACBA Ethics Opinion 502 (1999) and LACBA Ethics Opinion 483 (1995)]. The issue appears to be a policy decision for the courts.

Some courts in other jurisdictions have expressed concern that providing anonymous assistance to a self-represented litigant is defrauding the court by misrepresenting that the litigant has had no assistance. There is a concern that this might lead to special treatment for the litigant, or allow the attorney to evade the court's authority. However, California's family law courts have been allowing (and encouraging) ghostwriting for many years. Family law facilitators, domestic violence advocates, family law clinics, law school clinics and other programs and private attorneys serving low-income persons have often drafted pleadings on behalf of litigants. Judicial officers in the focus groups reported that it is generally possible to determine from the appearance of a pleading whether an attorney was involved in the drafting of the document. They also report that the benefits of having documents prepared by an attorney are substantial.

Focus groups with private attorneys who currently draft pleadings on behalf of their clients revealed that they would be much less willing to provide this service if they had to put their names on the pleadings. Issues raised included:

- increased liability;
- worry that a judicial officer might make them appear in court despite a contractual arrangement with the client limiting the scope of representation;
- belief that they are helping the client tell his or her story – and that the client has a right to say things that attorneys would not include if they were directing the case;
- fear that the client might change the pleading between leaving the attorney's office and filing the pleading in court;
- apprehension that their reputation might be damaged by a client's inartful or inappropriate arguing of a motion;
- concern that they would be violating the client's right to a confidential relationship with his or her attorney;
- worry that they may not be able to verify the accuracy of all the statements in the pleading given the short time available with the client.

It does not appear that the filing of “ghostwritten” documents deprives the court of the ability to hold a party responsible for filing frivolous, misleading or deceitful pleadings. A self-represented litigant makes representations to the court by filing a pleading or document about the accuracy and appropriateness of those pleadings. In the event that a court finds that CCP Section 128.7(b) has been violated, the court may sanction the self-represented litigant and also may lodge a complaint with the State Bar about the attorney’s participation in the preparation of a frivolous or misleading document, whether his or her name is on the pleading or not. Given that the current practice is not to require ghostwriters to disclose their participation in a case, there seems to be no reason to require such a rule.<sup>7</sup> Adoption of a rule requiring disclosure is likely to discourage access to the courts, leave more litigants without attorney assistance in the drafting of pleadings, require more courts to decipher pleadings by unassisted self-represented litigants and cause continuances to allow time for filing and service of correct and complete pleadings.<sup>8</sup>

### **Attorneys Fees**

Awarding attorneys fees in cases where a litigant receives assistance with completing paperwork or preparing for a hearing may also help to encourage attorneys to provide this service. Family Code Section 2032 states that the court “. . . shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party’s case adequately.” For many litigants, the only counsel they would be able to afford, even with attorney’s fees awards, is counsel willing to provide limited scope legal services. If through coaching or assistance with preparation of a pleading, a litigant were able to present their case “adequately,” an award of fees might also be appropriate. When the proposed rule on ghostwriting is considered by the Judicial Council, it would be helpful to also consider how to address the issue of attorneys fees for limited representation. One possibility is to require that attorneys providing limited task representation disclose their involvement only if the litigant is requesting attorneys fees to pay for their services.

### **Conclusion on Courts Issues**

The role of the courts in addressing limited scope legal assistance is extremely valuable. The recommendations contained in this report would go a long way to clarify the practice of limited scope legal assistance for the courts, for litigants, and for their attorneys.



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<sup>7</sup> Disclosure of ghostwriting is an area of considerable confusion. Legal document assistants are required to disclose. Other non-lawyers are not. Disclosure of ghostwriting appears to be more important when the person preparing the paperwork is not an attorney and is not governed by professional standards or subject to disciplinary proceedings or malpractice actions. Attorneys who ghostwrite, like attorneys who offer any form of limited scope representation, are, by contrast, still held to their professional standard.

<sup>8</sup> For further discussion of this issue, please see the Disclosures and Agreements section below.

## **C. DISCLOSURE AND AGREEMENT ISSUES**

The nature and scope of disclosures can make the difference between a successful and an unsuccessful representation in this area. Disclosures fall into two categories: those made to the potential client and those made to the court. The Committee considered the following issues:

- What disclosures should an attorney make to ensure that a potential client understands the options available for limited scope representation and gives informed consent to the limitations?
- What should be included in retainer agreements to clearly delineate the limitations on scope and apportionment of responsibility?
- What is an attorney's obligation to disclose to the court that he or she provided assistance with document preparation when the attorney is not of record?
- Where an attorney appears, what obligations arise to disclose the limited scope of representation to the court and opposing party?
- What forms or materials could be developed to assist attorneys in meeting their obligations for disclosures and agreements?

The Committee's research, along with information received from focus groups and questionnaires, indicated helpful findings in several areas.<sup>9</sup>

### **1. DISCLOSURES TO THE CLIENT**

#### **Informed Consent**

As is discussed above under the "ethics" section, there is no inherent breach of ethics in limiting the scope of legal representation, so long as "the client is fully informed and expressly consents to the limited scope of the representation." [LACBA Ethics Opinion 483 (1995).] LACBA Ethics Opinion 502 (1999) further provides that the attorney should advise the potential client of the consequences of choosing limited scope "including the difficulties which the client may encounter in appearing in court on his or her own behalf." (LACBA 502, p.4)

Initial briefing of the potential client is essential. Where limitations on scope are being considered, the attorney has an obligation to advise the potential client of the options for limited or full representation and the consequences of electing one or the other. The attorney has the further obligation to determine whether the client is capable of undertaking self-representation, given the facts, law, and other circumstances.

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<sup>9</sup> There is much that has been written over the years, many sample forms and practices developed, and dozens of workshops offered on how to competently and efficiently offer limited scope legal assistance. This pioneering work by such experts as Forrest (Woody) Mosten, Sue Talia, and others has helped lay the foundation for the expansion of limited scope legal assistance and clarify the types of disclosures and agreements that are most appropriate.

The competing needs of full disclosure and informed consent on the one hand, and the client's desire to reduce costs on the other, raise practical issues regarding the effective use of time with the potential client. Many of these contacts are one-time only, and the client's primary motivation for seeking limited scope assistance is to reduce cost. It potentially defeats the goal if the available time is consumed by lengthy explanations. Furthermore, since so many of the contacts are single events, it could be impractical to require lengthy engagement or retainer agreements in all cases. Therefore, when the attorney's involvement is a single contact, a "non-retainer" letter, which documents the fact that the client is not retaining the attorney to perform further services, would be advisable.

At the conclusion of the limited scope representation, the attorney should disclose what lies ahead, including procedures the client should be aware of, or pitfalls to avoid.

#### **Initial Recommendation 5: Consumer Education Brochure**

Work with the State Bar to develop a consumer education brochure describing the options, benefits and potential risks for consumers of limited scope legal assistance.

Some preliminary disclosures concerning limited scope legal assistance could be made through printed materials. This could include such documents as a consumer-oriented brochure issued by the State Bar that would describe the options available for limited services and explain the differences between limited and full service in understandable language. The brochure would be designed to outline the various forms that limited scope legal services could take and outline questions that potential clients should ask their attorney. It would serve as a basis for the discussion of the type of representation that would be appropriate for their specific case. The brochure could be displayed in the attorney's waiting room and reviewed by the client before meeting with the attorney. While no brochure is a substitute for the attorney's professional judgment and that attorney's explanation to the potential client, it would be a useful introduction to the options available and a basis for discussion.

## Documentation of the Specific Limitations on Scope between the Attorney and Client

### **Initial Recommendation 6: Sample Agreements and Forms**

Work with the State Bar to develop standards for limited scope retainer agreements and sample practice forms.

Once the attorney and client have decided that a limited scope engagement is appropriate, the decision to enter into a limited representation arrangement should be made. (This decision to enter into a limited representation arrangement should be reached only after the attorney has used his or her professional judgment, considering the issues, law, ability of the client to self-represent, and all other relevant factors.) The results should be delineated clearly and in writing, and the limitations should be expressly stated and not implied. An agreement that requires the client to affirmatively indicate which tasks the attorney is requested to perform is preferable to one that excludes certain areas and includes everything else. The latter is likely to create ambiguity and confusion.

### **Retainer Agreements**

A good agreement clearly demonstrates the client's consent to restrict the scope of the attorney's representation. It should require the client to affirmatively specify the services requested, such as checking boxes on a form to indicate services they want, rather than leaving services implied. It must demonstrate the clear allocation of tasks. Because each case is different, the agreement should be flexible enough to be tailored to a specific situation. It should also be revised every time the scope changes, as it frequently does.

The agreement should be simple enough for the client to understand, and detailed enough so that the limited scope is clearly delineated. The State Bar can assist in training attorneys on the types of retainer agreements they should consider, including "non-retainer" agreements. Standards for limited scope agreements would assist attorneys to fully satisfy their obligations for disclosure of limited scope representation.

### **Agreements must be clear and modifiable**

An attorney-client relationship that requires a written agreement,<sup>10</sup> should also disclose the limitations on scope and the client's responsibilities in writing. These agreements must be clear and modifiable. The need for clarity is obvious as it is an agreement between the attorney and client under which the client will perform certain tasks traditionally reserved to the attorney.

The need for ease of revision or modification is inherent in the nature of limited scope arrangements, as the scope may change over time as the case develops. As some clients find self-representation more difficult than originally expected, limited representation frequently evolves into full representation, which must be documented in a new agreement in compliance with §6148. Further, as new issues arise the scope may change, and the new limitations or boundaries must be delineated in a clear writing.

<sup>10</sup> See Business and Professions Code §6148.

Limited scope arrangements fall into several different categories, most requiring a written agreement tailored to the specific limitations on which the attorney and client agree. (An exception is a single consultation, discussed elsewhere.) An essential part of the service offered is the attorney's analysis of the law and the facts as well as an analysis of the client's capacity for self-representation as a prerequisite for entering into such an agreement. For that reason, "boilerplate" agreements that provide no opportunity for modification are not suitable to limited scope representation. Checklists delineating the tasks to be performed by the attorney and those to be performed by the client, and which can be incorporated in or attached to the written agreement, are of great practical benefit. These checklists clearly set forth the apportionment of tasks, set the boundaries, reinforce the client's responsibilities, and protect the attorney. They can also be easily supplemented as the scope of limitation changes.

## **Education and Outreach**

### **Initial Recommendation 7: Education and Outreach**

Work with the State Bar to develop programs to educate attorneys about the limits of limited scope legal assistance and the requirement of competency; to educate consumers on their rights and obligations; and to educate all participants on the importance of disclosures and communication.

While many attorneys currently offer limited scope representation, more would be likely to do so if they understood the risks and benefits, and had a better understanding of the issues raised and possible solutions. The State Bar could greatly assist by offering training to attorneys and information to consumers of legal services on their options for limited representation.

Limited scope assistance is well established in a number of areas of current practice. The attorneys who engage in limited representation seek to offer a public service, improve access, and serve a population that would otherwise lack professional assistance. They perceive that they are operating with little guidance and assistance and would like to see more consumer and attorney education. The Committee and the State Bar should develop and disseminate standards for limited scope retainer agreements and sample forms for use which can be helpful to attorneys wishing to offer limited scope legal assistance.

## **2. DISCLOSURES TO THE COURT**

### **Scope of representation**

There is a fear among attorneys that judicial officers will not honor limited scope agreements and will require them to remain in the case for services outside the negotiated scope. Judicial officers generally welcome the assistance of counsel, which results in better educated self-represented litigants and clearer pleadings. However, there is a concern that the limited scope of the representation by attorneys who appear of record should be disclosed to facilitate service of process, calendar management and notice to opposing counsel. The Committee believes that appropriate court forms and rules can address this concern. Suggestions for possible court rules and/or court forms are discussed above under "Courts."

## **Next Steps on Disclosure and Agreement Issues**

The Committee will take some additional steps, as its work continues:

- Collect retainer agreements and other forms of agreement for study and evaluation, and identify standards for limited representation agreements.
- Review disclosure statutes for non-attorney document preparers.
- Work with the State Bar to prepare lawyer education materials to assist in the training of attorneys.
- Identify standards for disclosure to clients of options available for limited scope representation.
- Work with attorneys who currently offer, or would like to offer, limited representation, so as to help them keep abreast of ongoing concerns and practical problems regarding disclosures and agreements.
- Work with judicial officers to determine what disclosure issues impact their courts and identify steps to address the issues raised.





## D. INSURANCE ISSUES

As set forth in previous sections, limited scope legal assistance currently exists as a mechanism for providing civil legal services. The absence of any systematic treatment by the insurance industry of the issue of limited representation tends to underscore the lack of controversy in this area. In other words, it does not appear that the insurance industry has made any substantive distinction between limited and full-service representation. Thus far, it appears that few malpractice judgments have been entered related to limited scope legal assistance.

The Committee made two general inquiries concerning how insurance issues might impact on limited scope legal services. First, the Committee sought to identify the malpractice insurance concerns that could deter attorneys from providing limited scope legal services. Second, the Committee attempted to make a preliminary determination of the insurance industry's perspective on coverage for limited scope legal services.

### **Comments from Attorneys and Insurance Industry Representatives**

Participants in focus group discussions concerning limited scope legal services, as well as those who responded to our questionnaires, included both practitioners and insurance industry representatives. Their concerns reflect some uncertainty about potential liability, and a desire for clearer definitions and practices.

Attorneys expressed concern about the effect of established case law on malpractice liability when they offer such representation.<sup>11</sup> They would like to see case law qualified in some manner to

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<sup>11</sup> California courts have acknowledged limited scope legal assistance, but few cases have addressed its contours. See, e.g., *Buehler v. Sbardellati* (1995) 34 Cal. App. 4th 1527; *Nichols v. Keller* (1993) 15 Cal. App. 4th 1672; and *Piscitelli v. Friedenberg* (2001) 87 Cal. App. 4th 953.

In *Buehler*, two existing clients of a law firm joined to form a limited partnership. Defendant attorney agreed to represent the partnership only and warned the parties that in the event an adversarial relationship developed he would be unable to represent either client individually. When that in fact did happen, plaintiff client sued for malpractice alleging that defendant attorney failed to give "undivided loyalty and commitment to the client." The Court of Appeal disagreed and upheld the jury verdict for defendant attorney, finding that the representation had been limited by the parties to the representation of the partnership only and that plaintiff client was fully informed of that fact. The Court also distinguished *Nichols, infra*, stating that in *Nichols*, the parties did not carefully limit the representation, and they failed to exclude the third party claims, whereas the parties in *Buehler* had made the proper limitations in the representation.

In contrast, the *Nichols* court sided with the plaintiff. There, plaintiff client did not pursue a possible third party claim because, he alleged, his workers' compensation attorney failed to advise him of its existence. The trial court granted defendant attorneys' summary judgment motion holding that the representation was limited to workers' compensation matters only. The Court of Appeals reversed that ruling, however, finding that a duty existed to warn plaintiff of the potential claims. The Court held that even if defendants' representation was limited in scope, the foreseeability of harm to plaintiff resulting from the failure to warn plaintiff of a potential third party claim compelled finding a duty on the part of defendants.

Finally, in *Piscitelli*, defendant attorneys argued that, despite broad language in the retainer agreement, there was a limited scope representation and, consequently, they did not have a duty to protect their client's interests from being co-opted by a related class action settlement. The Court of Appeals disagreed. The Court distinguished *Nichols, supra*, stating that in *Nichols* the issue was one of scope of representation. On the other hand, in *Piscitelli* the Court held that the scope of the representation was determined by the retainer agreement, and it clearly covered the representation at issue. Thus, the real issue was one of a breach of the duty to exercise ordinary skill and care in the handling of plaintiff's matters, not one of limited scope legal assistance.

account for limited scope legal services, perhaps through court rules. In this context, the responding attorneys made clear that they did not want to be the guarantors of those aspects of a client's matter in which they were not involved.

Insurers are aware that limited scope representation is becoming more and more common, but some have expressed concern that attorneys who provide such services may be liable for acts and omissions which lie outside the agreed upon scope of representation.

## **Developing Risk Management Tools and Conducting Educational Outreach**

### **Initial Recommendation 8: Education to Reduce Exposure**

Work with the State Bar to develop plans to educate insurance carriers about limited scope legal assistance and the ways attorneys can reduce their claims exposure when providing such services, and to develop plans to educate attorneys and judges about criteria, procedures, and forms for providing limited scope legal services.

### **Initial Recommendation 9: Develop Risk Management Tools**

Work with the State Bar to develop risk management tools for attorneys and clients.

Both attorneys and insurance industry representatives would like to have a system in place that limits attorneys' liability to the limited scope representation that they and their clients have agreed upon, so long as those services are competently provided. Without these clear limits, some attorneys avoid limited scope representation for fear of either having to pay higher insurance premiums or incurring liability for aspects of the case on which they did not work or which they did not control.

Attorneys have also asked that the insurance industry and the State Bar give their "seals of approval" to the practice, insuring that limited scope representation will not create additional liabilities. The Committee has made initial recommendations supporting the development of Judicial Council forms that clarify the limited nature of an appearance, and clarify that disclosure of "ghostwriting" is not required. The Committee believes that the adoption of a limited representation form and a clear policy on disclosure respond to these concerns because they will promote the understanding that limited scope legal assistance is an accepted practice. These recommendations are discussed above in the "Courts issues" section of this Report.

Insurance experts have noted that the industry would be more supportive if a clear, formal definition of the common term “unbundling” were developed. This Committee has developed a clear, formal definition of “limited scope legal assistance” that should help to address both consumer and attorney confusion and the insurance industry’s concerns expressed above (see page 3 above). In addition, insurance industry representatives would like to see case management procedures that document advice given to clients, provide clear notice to the client of the scope of the representation and the potential pitfalls, and involve an ongoing assessment of whether the client can proceed on his/her own for other aspects of the case. Recommendations concerning sample practice forms, disclosures and agreements are discussed above in the “Disclosures and Agreements” section of this Report.

### **Conclusion on Insurance Issues**

Ultimately, the Committee will need to clearly ascertain whether actions will have to be undertaken, whether through the courts, Legislature, State Bar, the insurance industry and/or others, so that attorneys’ malpractice exposure will not increase if they competently provide limited scope legal assistance.

The Committee will develop plans to educate insurance carriers about limited scope legal assistance and the means for attorneys to reduce their claims exposure when providing limited scope legal services. The development of risk management tools should further this process and provide additional guidance for attorneys seeking to offer such services. The Committee will also cooperate with others in developing plans for educating attorneys and judges about limited scope legal assistance and developing criteria, procedures, and forms for providing these services.





## **E. LAWYER REFERRAL AND INFORMATION SERVICES ISSUES**

During its investigation, the Committee reviewed a variety of ways in which consumers of legal services access both full representation and limited scope legal assistance. The state's Lawyer Referral and Information Services, or LRISs, are traditionally one of the prime access points for the public to contact lawyers, and the Committee analyzed the level of limited scope legal services presently being offered through this important system.

Regulated by the State Bar of California, under authority granted by the California Supreme Court and by legislation, LRISs operate to match consumers in search of legal services with attorneys experienced in the relevant area of legal need. The present regulatory scheme and most operational models are based on the assumption that panel attorneys will provide full representational services. LRISs are funded through referral usage fees and through the return of a percentage of legal service fees collected by panel attorneys in successful referral matches. Although the Committee did not address other emerging systems of matching consumers to attorney services in detail, it does believe that as new technologies lead to new access routes each should be developed to encourage the broadest access to limited scope legal assistance possible.

### **Concerns and Barriers to Expansion of Limited Scope Legal Services Via LRISs**

While a number of the state's LRIS organizations have experimented with limited scope legal referral panels, especially in the areas of bankruptcy services, will drafting, and family law, few have reported operating successful panels that effectively serve large numbers of clients. LRIS organizations face economic pressures resulting from the changing ways consumers obtain information about legal services, including internet-based search tools, commercially-produced legal advice systems, and non-attorney service organizations.

During a recent LRIS round-table event in August 2001, the prime barrier cited by many services to adding limited scope legal services was the fear that such referrals would supplant the existing full representation referrals that provide much higher economic returns to LRISs. After discussion at the roundtable about the ways in which limited scope services represent an important service to consumers, possibly resulting in increased numbers of satisfied customers, concerns decreased dramatically. This was particularly true because, in fact, consumers are now using the LRIS system to obtain limited scope legal services. If the LRIS system does not account for these kinds of requests, consumers will probably continue to call LRISs when they need help on a discrete task, and then be referred to a series of attorneys, in a very inefficient manner. The consumers do not get what they want, and the LRIS system does not achieve its goals either.

## **Analysis of LRIS Regulations and Training on Limited Representation**

### **Initial Recommendation 10: Consider Modifications to LRIS Regulations**

Request that the State Bar Office of Certification work with appropriate entities to complete a review of present LRIS regulations to determine if any changes or rule explanations would be necessary to encourage LRIS organizations to offer effective limited scope panels.

### **Initial Recommendation 11: Training on Limited Scope Legal Assistance for LRISs**

Request that the Program Development Unit of the Office of Legal Services, Access & Fairness include training about limited scope services as part of its curriculum for future LRIS trainings.

Recognizing the economic realities and changing environment facing LRIS organizations, it is important for the State Bar of California to work with services to develop successful systems and models for limited scope panel administration. It may be that the best methods will vary from county to county; some services may decide to have one “coaching” panel, whereas others may incorporate coaching options within their existing subject matter panels. This information should be shared widely to ensure that services can take advantage of successful models developed throughout the state and can remain financially viable by taking advantage of increased numbers of consumers who would otherwise forego legal assistance. LRIS Regulations should also be reviewed to determine if any changes would be necessary or desirable to facilitate the expansion of LRIS involvement with effective limited scope legal assistance.

The Committee believes that the addition of effective limited scope panels will increase the number of consumers willing to access services through LRIS organizations. Further, many services, especially those in larger metropolitan areas, should be encouraged to coordinate limited scope service panels with the expanding number of court-based self-help centers which already serve this client base. Many of these self-help centers want to have the ability to refer individuals needing representation for a single court hearing or for other discrete tasks; thus, the collaborative effort would further the objectives of both LRISs and court-based self-help centers.

## **Conclusion on LRIS Issues**

Despite the administrative and economic barriers facing LRIS organizations, most have expressed a desire to expand their limited scope legal services. During a recent LRIS roundtable event, providers indicated they believed it was an area where they expected significant growth, and believed it was important for LRIS groups to be in the forefront. Assuming that appropriate technical assistance can be provided through the State Bar, the Committee anticipates that LRIS organizations will expand their limited scope legal services.

Resolution of the malpractice insurance issues discussed earlier will also address concerns raised by LRIS representatives, who seek to ensure that lawyers will join new panels. Establishing such panels, especially to provide limited "coaching" services, will not only serve consumers, but will allow programs to ensure that people calling for brief advice can receive consistent services from a single attorney.





## **PART V. CONCLUSION**

Now is the time to address the issues of limited scope representation in a coordinated way, because there are so many developments, so many different groups – both bench and bar – considering related issues, and the lack of available funding for full representation is creating a larger gap between the need and the availability of legal assistance.

Limited scope representation is already a reality in the legal marketplace. It is driven by consumer demand, court overcrowding, and the increasing cost of full service representation. It is growing in every area of the law in which the consumer of legal services interacts directly with the legal system. Within the realities of the current legal system, it is a critical means of increasing legal access and serving a population which is currently unserved or underserved.

There is a population of attorneys who are already offering these services, and an even larger one that would do so if it felt the State Bar supported their efforts. The issues raised are real, compelling and go to the very heart of an attorney's role. We hope the State Bar and the Judicial Council will take advantage of this unique opportunity to increase access to justice by assisting in the development of forms, standards and guidelines to encourage the availability of limited scope legal services, and to use their position to work with the other groups whose interests are affected.





**REPORT ON  
LIMITED SCOPE LEGAL ASSISTANCE  
WITH INITIAL RECOMMENDATIONS**

**APPENDIX**



## A. LIST OF MEMBERS

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## **B. INFORMATION ON THE ACCESS TO JUSTICE COMMISSION**

### **CALIFORNIA COMMISSION ON ACCESS TO JUSTICE**

The broad-based California Commission on Access to Justice is dedicated to finding long-term solutions to the chronic lack of representation available for poor and moderate income Californians. The Access Commission's composition is one of its key strengths. Because improving the justice system and working to achieve equal access to that system is a societal responsibility and not an obligation of the legal profession alone, the Commission includes members of the civic, business, labor, education and religious communities.

The Commission is pursuing long-term strategies designed to make significant progress toward the goal of improving access to justice, including developing cooperative efforts among judiciary, local bar associations, legal services providers and the broader community. The Commission is seeking both new financial resources to expand the availability of legal services advocates and pro bono attorneys as well as systemic improvements that will make the law more accessible to the poor, the near-poor and those of moderate means.

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### California League of Women Voters

Vacant

### California Chamber of Commerce

Fred L. Main  
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### California Labor Federation

Marshall Walker, III  
President, Local 790 SEIU  
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### Consumer Attorneys of California

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## **C. SUMMARY OF INPUT RECEIVED BY LIMITED REPRESENTATION COMMITTEE FROM FOCUS GROUPS, INTERVIEWS, AND OTHER PROCESSES**

The following is a summary of input received by the Limited Representation Committee from three different focus groups held in Los Angeles, San Francisco, and Contra Costa County, a Lawyer Referral Service Roundtable, held jointly in Los Angeles and San Francisco, discussions with judges and lawyers from rural settings, and one-on-one interviews with consumers of "limited scope" or "unbundled" legal services.

Input was obtained from ethics experts, insurance experts, judges, court commissioners, family law facilitators, attorneys from legal services programs, bar leaders, LRS staff, and private attorneys specializing in family law, some of whom favored unbundling, and some who did not.

### **Introductory Comments**

**Public service:** All participants at one focus group felt that offering limited or unbundled legal services was a public service which increased the availability of legal representation to a population which is otherwise unserved or underserved. They perceived that their efforts to offer these services are hindered or restricted by policies, practices and case law which evolved under a full service representation model and which do not readily translate to an unbundled model. Case law was viewed as particularly troublesome.

Some attorneys indicated that they do a lot of this and feel quite comfortable with it. They believe the system should acknowledge its existence and set guidelines for getting in and out of a case, and allow adults freedom to contract.

Attorneys have been unbundling for years, particularly in the areas of bankruptcy and family law. Even providing a second opinion is unbundling. In criminal law, there are stand-by attorneys and advisory counsel, appointed to assist a party who chooses self-representation.

Courts promote unbundling by appointing counsel for limited purposes, e.g., paternity, contempt.

People want and need unbundled services.

There was strong support for a Court Rule or Court Form allowing notice of limited appearance and service on all parties.

Problems arise when organizations can't find attorneys who will unbundle, so they can refer people to them. If the local nonprofit agency conflicts out opposing parties, there is no one available to help those conflicted out. There are many defaults because people can't afford an attorney; and people indicated they believed it is terrible to have a custody order by default. If you don't have representation, things go wrong.

Regarding insurance, there is actually a long claims history for unbundling, since it has been done in bankruptcy, corporate, etc., for a long time.

Lawyer referral services have been connecting consumers with unbundling attorneys, but on an informal basis. Consumers have been using LRS's as a way to get unbundled services, but often come into conflict with an LRS which uses the 1-2 hour consultation as a marketing tool. Formalizing unbundled services can therefore be of great value to the consumer, the LRS, and the attorney.

The need for and prevalence of unbundling seems to be more of an urban phenomenon. Attorneys in rural areas tend to charge less, and individuals may therefore be able to afford full representation. Also, attorneys in rural areas seemed more reluctant to unbundle, partly because of concern about reputation with the judges and with the public.

### **Perceived Barriers to "Unbundling" or "Limited Scope Legal Services"**

The practice of some judicial officers to expand the scope of the representation beyond that contracted between the client and attorney is perceived as a serious barrier. When the scope is expanded, attorneys are required to represent the client on issues for which they may not be prepared. Expectations of judicial officers can drag things beyond formal hearing, require an attorney to pursue next steps, prepare order after hearing, or similar work that the attorney may or may not be paid for.

Lack of specific carrier approval for the practice: While many reported that their carriers have indicated they will cover these practices, they would prefer to see a more institutionalized approval from the carriers.

Most of these contacts are one-time only, and the client's motivation is to reduce cost. It defeats the purpose of offering these services if the time is spent going over lengthy explanations or if lengthy engagement or retainer agreements are required.

Serious objections were raised to requiring attorneys to put their names on pleadings if they are not the attorney of record.

- There is concern that a rule requiring disclosure of anyone assisting in drafting court forms might make them liable for the content or be brought into the case, thus reducing the likelihood that attorneys would volunteer to perform this valuable service.
- "When I draft a pleading for a client it is his declaration, not mine, and I do it differently. My name means something at court, and I don't want it to appear on documents for which someone else is responsible."
- "If I put my name on a pleading that someone else files, I don't know whether it will be altered before it hits the court file."
- "I have an obligation to independently investigate the factual basis for documents I prepare on behalf of a client. If a client drafts a declaration and I suggest changes to make it more effective, it defeats the purpose if I have to conduct an independent investigation or risk violating my obligation. Putting my name on the document implies that I must do so."
- Some commented that disclosure of involvement if they do not become attorney of record is an absolute breach of confidentiality and they wouldn't consider it.
- "Disclosure requirements will make attorneys reluctant to participate in pro per clinics assisting litigants in preparing their paperwork."

Different judges treat unbundling differently, sometimes even on the same case; one judge will allow it, but a different judge won't.

Client confusion regarding scope: The attorney has to constantly remind the client of limited representation.

Attorneys resist doing unbundling because they don't feel they can competently do one issue without being involved with the entire case.

Biggest challenge is having opposing counsel understand it. They, like the clients, want more information. Often, attorneys must provide opposing counsel with copies of 502. Must educate the courts, clients, and other counsel.

### **Concerns about the Practice of "Unbundling" or Limited Scope Legal Services"**

There should be a level playing field for opposing party in an unbundled situation. If one side had known the other side had an attorney, instead of learning of it when, all of a sudden, an attorney appeared at a court hearing, they might have brought one too.

Confusion. If opposing counsel has negotiated with an attorney who is all of a sudden out of a case, it is a waste of their time, confusing, etc.

Attorneys may use unbundling as a ploy to avoid service. One pending case, where judge will soon rule, involved opposing counsel who didn't announce at the outset that they were doing unbundling. Then the opposing counsel stopped accepting service in a way that prejudiced the other party.

Chain of Unbundled attorneys: Problems arise when one attorney has handled part of a case, then a client calls LRS to get a second unbundled attorney; issue of sharing fees with prior attorney or issue of conflict.

Attorneys are asked to come in part-way through a case. Legal services programs often get pulled into the middle of a case – would love some procedure where they can show that they had limited engagement, and therefore help avoid malpractice exposure for the earlier part of a case, and keep them from having to avoid taking a case at all.

Some believed that unbundling is impossible, since issues are so intertwined. It may be impossible to separate the issues, such as trying to do custody and visitation only, but not property or support. It can't be done because visitation impacts support, since the amount of time spent with a child will impact the amount of support required. Even though a hearing or motion may be discrete, many implications are raised. For example, a domestic violence temporary restraining order raises custody presumptions that must be dealt with at further hearings. There are no discrete issues, but rather discrete tasks.

An oral hearing may not be of value if a pro per is unable to explain it in court, which leads to confusion, delay and judicial frustration.

A concern was raised about the duties of attorneys to the court. If the attorney ghostwrites and knows the litigant is lying, is there a duty to tell the court?

## **Suggested Ways to Address Limited Representation Issues**

Encourage bifurcation of limited issues where an attorney is of record for part of the case.

Insurance: Insurance representatives said there had not yet been a claim concerning unbundling. The insurance industry would be more supportive if there were 1) a definition of unbundling and clarity about what needs to be done; and 2) attorneys who follow routine procedures.

Set up systems for inexperienced attorneys to be mentored by more experienced attorneys.

Consider advisory counsel in criminal law as a model.

Initial briefing of the client is critical. Good briefing of the client at the outset, as well as ongoing disclosure is very important. Attorneys must also brief clients as the attorney finishes his or her work, so that the client knows what to expect. The court's perception is that it is better than litigants who are completely self-represented.

Good retainer agreement: Have a well-designed contract, requiring that the client must check a box for each service they WANT, rather than leaving services to be "implied."

Protection from judges: Since there is uncertainty about whether judges will allow an attorney off the case, some policy should be pursued that would clarify the procedures for judges in unbundled cases. One way to address this concern is to educate the bench on the benefits and practice of limited scope representation.

Help with individual appearances:

- Self-help centers would like to be able to refer customers to attorneys offering low-income services such as court appearances for those whose papers are prepared by free services.
- Consumers also want help with individual appearances, especially in family law where the emotion that is involved can harm their ability to explain themselves in a calm, rational manner.

Legal Services could increase the recruitment of *pro bono* attorneys if they could offer clear unbundling opportunities.

Law schools should incorporate unbundling in their courses.

An educational component is needed for lawyers regarding their duties, because there is a gap in understanding amongst lawyers; many local bar leaders don't know what unbundling is.

Prepare an educational brochure for consumers.

Leveling the playing field: Australia federalized the family law system. When first papers are filed, each party must do an orientation program which includes issues, the law and assistance options.

Address prepaid plans, including ways to address the issue of master contracts with the insured,

giving attorneys less lee-way in the relationship with the client.

Educating attorneys about ways to offer unbundled services in a competent, ethical manner can also be valuable for all attorneys. There is much concern about what attorneys charge and what consumers get for those fees, and using the models for clear communication developed for unbundling can improve all attorney-client relationships.

### **Miscellaneous Comments**

Litigation has changed over the years. The ideal situation would be one in which lawyers fully represent each side, but that is just not the case. Courts are now doing administrative work rather than judicial, it seems, when acting as a moderator. The reality is that courts should be helping people through the process, and so should encourage unbundling to the extent that it gets people help they wouldn't otherwise have.

Judges take a more active role because of the lack of attorneys; judges ask more questions.

Pension plans are often joined in family law cases, where the plan attorneys become of record, but no one ever sees/hears from them, requires their attendance, etc.

If the party signs and files something, the party has to stand behind the document, regardless of who prepared it.

Often, a case will start out unbundled and end up full service.

The federal court has lawyers volunteer to be early neutral evaluators, a type of unbundled services.

If attorneys are not willing to offer unbundled legal services, unscrupulous paralegals and document assistants abound, doing bad work and overcharging consumers.

Requiring attorneys to take the risk that the judge won't let them off the case is similar to the risk they take with any case. If a client stops paying, or cannot be reached, the court will still not let the attorney withdraw if it is close to trial or might otherwise prejudice the client. This should not be a deterrent to people willing to take on cases, particularly if the sample steps and materials, as well as a proposed new limited appearance form is adopted.



## D. REFERENCES ON LIMITED SCOPE LEGAL ASSISTANCE

This brief list of resources is designed to provide the reader with easy reference to some of the primary sources of information relied only the committee in preparing this preliminary report. More complete information is available at the following websites:

- <http://www.unbundledlaw.org>, containing information for a unbundling conference in Maryland in 2000, "The changing face of legal practice: Unbundled legal services". The website includes a comprehensive bibliography by Forrest "Woody" Mosten located under "Thinking about Unbundling".
- <http://www.abanet.org/legalservices/delivery.html>, containing a wealth of references to resources on pro se and unbundling.

### BOOKS

Talia, M. Sue (1997). *A Client's Guide to Limited Legal Services*. San Ramon: Nexus Publishing

Mosten, Forrest S. (2000). *Unbundling Legal Services: How to Deliver Legal Services a la Carte for Improved Service and Profits*. Chicago: ABA Publishing  
[To order, go to [www.MostenMediation.com](http://www.MostenMediation.com).]

### ARTICLES

Biro, Nancy & Hill, Kerry (2000). "Supplement to Meeting the Challenge of Pro Se Litigation." Retrieved October 2001 from the American Judicature Society website: <http://www.ajs.org/prose/Kerry%20Update.htm>

McNeal, Mary Helen (1999). "Having One Oar or Being Without A Boat: Reflections on Fordham Recommendations on Limited Legal Assistance." *Fordham Law Review* 67:2168

## **ETHICS OPINIONS AND RELATED DEVELOPMENTS**

Los Angeles County Bar Association, Professional Responsibility and Ethics Committee (1999). *Formal Opinion No. 502: Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for In Pro Per Litigant.*

<http://www.lacba.org/showpage.cfm?pageid=431>

Los Angeles County Bar Association, Professional Responsibility and Ethics Committee (1995). *Formal Opinion No. 483: Limited Representation of In Pro Per Litigants.*

<http://www.lacba.org/showpage.cfm?pageid=449>

Colorado Bar Association, Ethics Committee (1998). *Ethics Opinion No. 101: Unbundled Legal Services.* [http://www.cobar.org/comms/ethics/fo/fo\\_101.htm](http://www.cobar.org/comms/ethics/fo/fo_101.htm)

State of Maine, Supreme Judicial Court Amendments to the Maine Bar Rules (July, 2001)

## **REPORTS**

National Sources of Findings and Recommendations: (available at <http://www.unbundledlaw.org>)

Goldschmidt, Jona (1998). *Meeting the Challenge of Pro Se Litigation: A Report and Guide Book for Judges and Court Managers.* Chicago: American Judicature Society Publications

Special Issue: Conference on Delivery of Legal Services to Low Income Persons (April 1999) *Fordham Law Review* 67

ABA Tech2000 Task Force (2000). "Lawyer's Serving Society through Technology."

American Bar Association Comprehensive Legal Needs Study (1994) and Recommendations (1996).

## **VIDEOTAPES**

Talia, M. Sue, Family Law Unbundling Training (1998). Produced by Contra Costa County Bar Association.

**E. LOS ANGELES COUNTY BAR ASSOCIATION  
ETHICS OPINION 502  
(NOVEMBER 4, 1999)**

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

**SUMMARY**

An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation. These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis.

Generally, where the client chooses to appear in propria persona and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending.

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

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

**AUTHORITIES CITED**

**Cases**

- Abeles v. State Bar (1973) 9 Cal.3d 603, 108 Cal.Rptr. 359.  
Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 212 Cal.Rptr.151  
Butler v. State Bar (1986) 42 Cal.3d 323, 228 Cal. Rptr. 499  
Flatt v. Superior Court (1995) 9 Cal.4th 275  
Joseph E. DiLoreto, Inc. v. O'Neill (1991) 1 Cal.App. 4th 149, 1 Cal. Rptr. 2d 636  
Houston General Insurance Co. v. Superior Court (1980) 108 Cal.App.3d 958, 964, 166 Cal.Rptr. 904  
Laremont-Lopez v. Southeastern Tidewater Opportunity Center, et al. (1997 E.D. Va.) 968 F.Supp. 1075  
Lucas v. Hamm (1961) 56 Cal.2d 583, 591  
Lysick v. Walcom (1968) 258 Cal.App.2d 136, 147, 65 Cal.Rptr. 406  
Miller v. Metzinger (1979) 91 Cal.App.3d 31, 39-40, 154 Cal.Rptr. 22  
Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 181, 98 Cal.Rptr. 837  
Nichols v. Keller (1993) 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601  
Ricotta v. State of California (S.D. Cal. 1998) 4 F.Supp.2d 961, 987-988  
Sampson v. State Bar (1974) 12 Cal.3d 70, 115 Cal.Rptr. 43

**Statutes**

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

Other

Fed. Rls. Civ. Proc. 11  
Rules of Professional Conduct 2100  
Rules of Professional Conduct 3-110  
Rules of Professional Conduct 3-210  
Rules of Professional Conduct 3-310  
Rules of Professional Conduct 3-310(E)  
Rules of Professional Conduct 3-400  
Rules of Professional Conduct 3-700(A)(2)  
Rules of Professional Conduct 5200  
L.A. Co. Bar Assn. Form. Op. 334  
L.A. Co. Bar Assn. Form. Op. 350  
L.A. Co. Bar Assn. Form. Op. 449 (1988)  
L.A. Co. Bar Assn. Form. Op. 476 (1995)  
L.A. Co. Bar Assn. Form. Op. 483 (1995)  
ABA Inf. Op. 1414  
Alaska Bar Assn. No. 93-1, March 19, 1993  
Iowa Op. 94-35, May 23, 1995  
Iowa St. Bar Assn. Op. 91-31 (1997)  
Kentucky Bar Assoc. Op. E-353, January 1991  
Maine Ethics Commission No. 89, August 31, 1988  
N.Y. State Bar Assn. Op. 613

**FACTS AND ISSUES PRESENTED**

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

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

**DISCUSSION**

**A. Limited Scope of Representation**

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

We previously opined in Formal Opinion 483: "There is nothing per se unethical in an attorney limiting the professional engagement to the consulting, counseling, and guiding self-representing lay persons in litigation matters, providing that the client is fully informed and expressly consents to the limited scope of the representation." (L.A. Co. Bar Assn. Form. Op. 483 (1995); see also Joseph E.

DiLoreto, Inc. v. O'Neill (1991) 1 Cal.App. 4th 149, 158, 1 Cal. Rptr. 2d 636, 641.) Any limitations on work to be performed should be stated explicitly and completely.<sup>17</sup>

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

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

#### **B. Ethical Obligations Resulting from Limiting the Scope of Representation**

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

As was held in the Nichols opinion:

"... if counsel elects to limit or proscribe his representation of the client, i.e., to a workers' compensation claim only without reference or regard to any third party or collateral claims which the client might pursue if adequately advised, then counsel must make such limitations in representation very clear to his client."

"However, even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel." 15 Cal.App.4th at 1684.

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

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

#### **C. Professional Responsibilities Regarding the Limited Scope of Representation**

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

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

<sup>17</sup> A written fee contract, including any written limitations upon the scope of services and representation, is deemed to be a confidential communication protected by Business & Professions Code section 6068(e) and Evidence Code Section 952. (Bus. & Prof. Code §6149.)

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

The provision of limited legal services to Client does not eliminate the potential for conflicts of interests, whether the limited representation is concurrent with or sequential to an attorney's possible conflicting representation or relationships. Attorney should carefully comply with the requirements of Rule of Professional Conduct 3-310 and should be cognizant particularly of maintaining client confidentiality. (Bus. & Prof. Code §6068(e); Rule of Professional Conduct 3-310(E).

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

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

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

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

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

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

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

"A party may appear in his own person or by an attorney, but cannot do both, unless approved by the court. [Citations omitted.] The attorney in the circumstance proposed in the inquiry of limited representation to argue motions, whether or not prepared by the attorney, should comply with all applicable court rules and procedures of the particular tribunal. As long as the limited nature of the representation is disclosed to the court and approved by the court, the Committee is of the opinion that there is no ethical impropriety."

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

Rule 2-100(A) provides:

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

Since Attorney is not counsel of record for Client in the litigation, rule 2-100(A) does not preclude the opposing counsel from communicating directly with Client concerning all aspects of the litigation in the civil litigation context.<sup>5</sup> Because Client is representing himself/herself in the representation and has undertaken the role of counsel for all aspects of the case, the opposing attorney is

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

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

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

entitled to address Client directly concerning all matters relating to the litigation, including settlement of the matter.<sup>6v</sup> The protections afforded by rule 2-100 extend only to clients who are not representing themselves in a case or matter. If and when Client formally substitutes Attorney as counsel of record, rule 2-100 (A) will then attach. (Abeles v. State Bar (1973) 9 Cal.3d 603, 108 Cal.Rptr. 359.)

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

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

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

This Committee has concluded that there is no specific statute or rule which prohibits Attorney from assisting Client in the preparation of pleadings or other documents to be filed with the court, without disclosing to the court the attorney's role. (Ricotta v. State of California, 4 F. Supp.2d 961, 987-988 (S.D. Cal. 1998); L.A. County Bar Assn. Form. Op. 483, March 20, 1995. See also, Maine Ethics Commission No. 89, August 31, 1988; Alaska Bar Assn. No. 93-1, March 19, 1993.) Moreover, the Committee had found no published court decisions in California state or federal courts which have required an attorney's disclosure to the court regarding his or her involvement in preparing pleadings or documents to be filed by a litigant appearing *in propria persona*.<sup>7i</sup> (Ricotta v. State of California, 4 F. Supp.2d 961, 987-988 (S.D. Cal. 1998).) The Committee has found no published California state case or ethics opinion holding that an attorney's preparation of a pleading or document for the signature of a party appearing *in propria persona* without disclosure to the court of the authorship of the pleading or document inherently involves deception or misleading of a court within the meaning Business and Professions Code section 6068(d) or rule 5-200, Rules of Professional Conduct.

There is a nationwide debate concerning the ethical propriety of attorney's "ghostwriting" pleadings and documents for a *pro per* litigant to file with a court<sup>6v</sup>, including whether an attorney has a duty to disclose to the court the identity and extent of an attorney's involvement in the preparation thereof.

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

Nor can Attorney and Client be co-counsel with respect to settlement of the matter. In L.A. Formal Op. No. 483, the Committee opined that a client cannot become co-counsel with an attorney without engaging in the unauthorized practice of law. However, even if a client could become a co-counsel, the opposing counsel would still be authorized to communicate directly with the client-co-counsel on all matters regarding the case pursuant to rule 2-100, since the rule does not apply to parties who are themselves represented by counsel.

<sup>7i</sup> If a court rule or regulation requires disclosure to the court by an attorney assisting a *pro se* client in the preparation of pleadings and other court documents, the lawyer must comply with any applicable rule or regulation. (Bus. & Prof. Code §6068(a).

<sup>8</sup> Views expressing that an attorney may ethically assist a litigant appearing *in propria persona* with pleadings, free from any special duties to identify the attorney's role to the court in which the litigant's pleading or papers are filed appear to be based upon the following policy arguments: First, the practice promotes access to the courts by *pro per* litigants, who often lack the necessary knowledge or skills to draft their own pleadings without assistance but may not have the resources for full representation in the litigation. Second, as a direct consequence, the practice generally is likely to improve the quality of the *pro per* pleadings and thus results in increased judicial efficiency and fairness to the parties. Third, the practice would support the client's right to control the extent of an attorney's involvement. Fourth, California statutes permit legal documents assistants and unlawful detainer assistants to assist in the preparation and filing of documents under certain circumstances, without making disclosure to courts. (Bus. & Prof. Code, § 6400 et seq.) There may be an uneven application of law if similarly situated attorneys are required to make disclosures to courts.

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

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

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

An attorney who prepares documents to be filed by a *pro per* litigant which do not comply with section 128.7(b) may violate one or more of the ethical duties set forth above. The attorney also has a duty to the client to explain the importance of compliance with section 128.7 as well as the consequences to the client for its violation. (See e.g., Lysick v. Walcom (1968) 258 Cal.App.2d 136, 147, 65 Cal.Rptr. 406.)

In the event of a court determination of a violation of section 128.7(b), the court may sanction the *pro per* litigant for its presentation<sup>9</sup> and may lodge a complaint with the State Bar about the attorney's participation in the preparation of the document.

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

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

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

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