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Comments

Give Up the Ghost Hunt: A Defense of Limited Scope Representation and Ghostwriting in Rhode Island

Judah H. Rome*

I. INTRODUCTION

The Rhode Island Rules of Professional Conduct provide that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹ Despite the express language in the

* Candidate for Juris Doctor, Roger Williams University School of Law, 2016; B.A., Wesleyan University, 1999. I would like to thank Professor Niki Kuckes for turning me on to the topic of limited scope representation and Professor Peter Margulies for speaking with me about the topic and providing background information and feedback. And, I thank Mr. Lauren Jones for taking the time to read and comment on drafts of this Comment. I would also like to thank my Notes and Comments editor, Todd Rose, who provided excellent feedback and guidance throughout, and thanks to Thomas Pagliarini for his help with title of this Comment. Additionally, I am grateful to my Law Review cube-mate, Rita Nerney. She is as good a colleague as I could ask for and an even better babysitter. I am especially grateful to Rita for the work that we did together researching limited scope representation for the Pro Bono Collaborative amicus brief that was filed with the Rhode Island Supreme Court in association with the three pending ghostwriting cases. Finally, and most importantly, I want to thank my wife, Jess, for her unyielding support (and occasional prodding), and my two boys, Eli and Jonathan, for reminding me every day that they do not care about limited scope representation or law school at all.

1. R.I. SUP. CT. R. PROF'L CONDUCT 1.2(c).

rule, as well as the endorsement of the Rhode Island Bar Association (“RIBA”)² and the American Bar Association (“ABA”),³ access to limited scope representation in Rhode Island remains, shall we say, limited, and poses risks for practitioners.⁴ Given that the Rhode Island rules already allow limited scope representation, and that many other jurisdictions now allow limited scope representation, the question is not whether Rhode Island will or should have limited scope representation, but how best to implement limited scope representation across the state. It is time for the Rhode Island legal community to embrace limited scope representation. To best effectuate this, the state should look to the best practices established by our neighboring states to implement a comprehensive and codified set of rules that govern limited scope representation.

This Comment will first provide background information on limited scope representation. Next, it will describe how it is currently being implemented in other jurisdictions. Finally, this Comment will lay out a proposal for how Rhode Island should implement limited scope representation.

Currently, there are three cases pending before the Rhode Island Supreme Court, all of which take on the issue of ghostwriting,⁵ a component of limited scope representation: *FIA*

2. See Amicus Brief of the Rhode Island Bar Association for the Appellants at 4, *FIA Card Servs. v. Pichette*, No. 2012-272A (May 14, 2014) [hereinafter *RIBA Amicus*] (“[Limited] assistance is permissible under Rule 1.2(c).”); *id.* at 6 (“The position taken by RIBA . . . is that the provision of assistance with pleadings to *pro se* litigants is permitted under Rule 1.2(c).”); Michael R. McElroy, *Dangers of the Pro Se Explosion*, R.I. B.J., Jan.–Feb. 2013, at 3, 3 (identifying a need for “effectively implementing the unbundling of legal services (limited scope representation)”).

3. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) (“A lawyer may provide legal assistance to litigants appearing before tribunals ‘pro se’ and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.”).

4. It is of note that many other jurisdictions, including all of the other New England states, already permit limited scope representation. See *infra* Part III.

5. Ghostwriting, at its most basic level, is when an attorney prepares a document for a *pro se* litigant, and then the *pro se* litigant subsequently files that document with the court. Ghostwriting means different things in different jurisdictions. Some jurisdictions do not require any indication that the document was prepared with the assistance of an attorney. Others require notification that the document was prepared with the assistance of an

Card Services v. Pichette,⁶ *Discover Bank v. O'Brien-Auty*,⁷ and *HSBC Bank Nevada, N.A. v. Cournoyer*.⁸ All three cases have remarkably similar facts, and although they have not been consolidated, they can be treated together. Each case involves a debt collection action where the defendant proceeded pro se, but prepared responsive pleadings with the assistance of a Rhode Island attorney pursuant to a limited scope representation agreement.⁹ In each case, the Rhode Island attorney was not identified, and the attorney did not enter an appearance.¹⁰ In *O'Brien-Auty*, the signature line did disclose that the document had been prepared with the assistance of a Rhode Island attorney.¹¹ Meanwhile, the other two cases did not contain a disclosure that the pro se litigant had the assistance of an attorney.¹² In each case, the attorney who assisted the pro se litigant was ultimately sanctioned by the superior court under Rule 11 of Rhode Island's Superior Court Rules of Civil Procedure.¹³ Those sanctions are currently being appealed to the Rhode Island Supreme Court.¹⁴ One of the main reasons that the issue is before the court is that Rhode Island, despite allowing for

attorney, but do not require the pro se litigant to disclose the attorney's name. And still, other jurisdictions require that the attorney who helped draft the document identify themselves and sign the document, but do not have to enter an appearance. *See infra* Part III.

6. C.A. No. PC 2011-2911, 2012 WL 3113460 (R.I. Super. Ct. July 26, 2012).

7. C.A. No. PC-11-0449, 2013 WL 300888 (R.I. Super. Ct. Jan. 17, 2013).

8. C.A. No. PC 11-0194, 2013 WL 300887 (R.I. Super. Ct. Jan. 17, 2013).

9. *See* RIBA Amicus, *supra* note 2, at 4–5.

10. *See id.* at 5.

11. 2013 WL 300888, at *2.

12. *See* RIBA Amicus, *supra* note 2, at 5.

13. *See id.* at 5–6. R.I. SUPER. CT. R. CIV. P. 11 states the following:

Every pleading, written motion, and other paper of a party represented by an attorney shall be personally signed by at least one (1) attorney of record in the attorney's individual name and shall state the attorney's address, email address, bar number, and telephone number. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed the pleading, motion, or other paper, a represented party, or both, any appropriate sanction.

14. *See* RIBA Amicus, *supra* note 2, at 6.

limited scope representation in its rules, currently has no codified rules or procedures on how to deal with limited scope representation.¹⁵

As part of the appeal, the Supreme Court of Rhode Island invited RIBA to submit an amicus brief.¹⁶ Although the cases pending before the court only deal with ghostwriting in the context of debt collection, RIBA took the opportunity to ask the court to provide Rhode Island attorneys with guidance, not just on how attorneys should handle assisting pro se litigants with preparing documents,¹⁷ but also “on the general procedure of limited-scope representation.”¹⁸ It is unlikely that the court will lay out an entire set of procedures and protocols on limited scope representation in its opinion. If the court does choose to take on the issue broadly, it is more likely to form some sort of task force that will make recommendations that can be adopted by the court at some later point. This Comment, in addition to advocating for the adoption of limited scope representation, attempts to answer RIBA’s call for guidelines for limited scope representation and also provide guidance for any subsequent task force.

II. WHAT IS “LIMITED SCOPE REPRESENTATION,” AND WHAT ARE ITS BENEFITS?

A. *What is Limited Scope Representation?*

Limited scope representation is a relatively new concept in the legal world, and therefore, there is not a fully developed lexicon to go along with it.¹⁹ Limited scope representation goes by

15. The cases pending before the Rhode Island Supreme Court are truly matters of first impression for the state. There currently is no existing case law out of Rhode Island on the issue.

16. RIBA Amicus, *supra* note 2, at 1.

17. *Id.* at 19–20.

18. *Id.* at 20.

19. Forrest S. Mosten is widely recognized as the father of limited scope representation. He coined the term “unbundling.” See Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *GEO. J. ON POVERTY L. & POL’Y* 453, 454 n.4 (2011). Mosten began writing about limited scope representation in 1994, when he published *Unbundling of Legal Services and the Family Lawyer* in the *Family Law Quarterly*, in which Mosten recognized that limited scope representation programs existed in the 1970s. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 *FAM. L.Q.* 421, 425 (1994).

many names, including, but not limited to: “unbundling,”²⁰ “limited legal assistance,”²¹ “discrete task representation,”²² and “limited assistance representation.”²³ All of these terms have been used interchangeably and represent the same concept.²⁴ The term “limited scope representation” closely mirrors the language used in the ABA’s Model Rules of Professional Conduct Rule 1.2(c), which was adopted by Rhode Island (and nearly every other state); therefore, it will be used throughout this Comment to describe the concept.²⁵ The rule reads: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”²⁶

But what is limited scope representation? The best way to think about it is to identify what it is not: the traditional soup-to-nuts representation that clients would normally receive when they engage the services of an attorney. Included in the full suite of services that a client might receive are: legal advice, legal research, gathering of facts, discovery and the accompanying motion practice, negotiation and mediation, drafting of documents, and finally, court representation.²⁷ In limited scope representation, the client chooses any combination of the above-mentioned services. Limited scope representation happens all the time in transactional law, even if neither the lawyer nor the client

20. See, e.g., FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000).

21. See, e.g., Steinberg, *supra* note 19, at 454 n.5.

22. See, e.g., *id.*

23. See, e.g., Order on Limited Assistance Representation, at 1 (Mass. 2009), available at <http://www.mass.gov/courts/docs/sjc/docs/rules/limited-assistance-representation-order1-04-09.pdf>.

24. See, e.g., Steinberg, *supra* note 19, at 454 n.5.

25. See *State Adoption of the ABA Model Rules of Professional Conduct*, ABA CTR. FOR PROF'L RESP., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 17, 2015). Every state except California has adopted the rules in whole or in part. See *id.* Cf. Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1183 n.192 (2002) (stating that at a national conference on “‘Unbundled’ Legal Services” one of the recommendations was that “[t]he bar should encourage the adoption of a word or phrase to better describe this set of services, instead of ‘unbundling’”).

26. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2014).

27. See MOSTEN, *supra* note 20, at 1.

realizes it.²⁸ For example, a client may ask a lawyer to review an employment contract, but will not engage the lawyer's help in the accompanying negotiations. There is nothing controversial about that type of representation because it is done commonly, presumably pursuant to an engagement letter, and the lawyer never needs to enter an appearance in court.

However, the situation gets more complicated in a litigation setting. Traditionally, once a lawyer enters an appearance, he is attached to that case and client until the issue is fully resolved. This normally means a multiyear obligation and, therefore, a significant financial commitment on both the part of the lawyer and the client. Frequently, clients do not have the means or desire to pay for full representation. Even more troubling, lawyers who want to assist clients in a pro bono setting are dissuaded from doing so unless they are assured that they can withdraw from the case once the discrete task is completed.²⁹

Limited scope representation can be thought of as taking one of two distinct tracks.³⁰ It can either be "quick advice" or "pro se assistance."³¹ Quick advice, which is sometimes thought of as advice and counsel, comes *via* hotline or some other type of "lawyer on call" service.³² Quick advice "is the most basic form of [limited scope representation], and by far the most common."³³ Clients utilize it to learn about what is usually publicly available

28. See Hon. Michael B. Hyman, *Why judges should embrace limited scope representation*, ILL. ST. B. ASSOC. BENCH & BAR, Apr. 2014, at 1, 2, available at <http://www.isba.org/sections/bench/newsletter/2014/04/whyjudgesshouldembracelimitedscoper> ("For years, transactional lawyers, among others, have provided services limited to discrete tasks.").

29. See *id.* (discouraging limited scope representation on the grounds that it will "foster suspicion that a lawyer will be held in a case despite a carefully constructed agreement with the litigant"). This problem is particularly pronounced in the family court setting where cases can remain open for years, if not decades, and many litigants do not have the means to hire a lawyer.

30. See Steinberg, *supra* note 19, at 463.

31. *Id.* Steinberg calls quick advice "brief advice," but I choose not use this term because I find it confusing, in that some people might think it means to help write a brief, rather than give quick advice, as the author intended. See also, Goldschmidt, *supra* note 25, at 1179 (recognizing the same categories, calling them "brief, specific advice," and "assistance requiring a diagnostic interview").

32. Steinberg, *supra* note 19, at 463.

33. *Id.*

legal information, such as questions about housing or employment issues. The information provided by the lawyers is general and not necessarily tailored to the individual facts surrounding that client's situation.³⁴

Pro se assistance, on the other hand, is more involved and complex because it deals with a client's unique situation, as opposed to simply providing generally applicable legal advice.³⁵ Pro se assistance "varies in nature, but in all cases its key characteristic is a diagnostic interview," which allows the lawyer to assess the client's facts and meet the client's individual needs.³⁶ It is within the pro se assistance model that a lawyer might ghostwrite a pleading or brief or enter a limited appearance on behalf of a client.³⁷

B. *What are the Benefits of Limited Scope Representation?*

Limited scope representation can be beneficial to the bench, bar, and clients because it expands access to legal counsel at a free or reduced price, which in turn assists the court in alleviating the slower pace at which it must move when dealing with pro se litigants.³⁸ According to the Probate and Family Courts of Massachusetts:

Courts will benefit by having documents prepared properly and issues presented to the court more clearly, thereby saving court time. Attorneys will benefit by being able to help a party for a short time, without being required to remain in a case until completion and will be able to be paid in a timely fashion as part of the specific agreement between the party and attorney.³⁹

34. *See id.*

35. *See id.* at 463–64.

36. *Id.* at 464.

37. *See id.*

38. *See generally* Order on Limited Assistance Representation, at 1 (Mass. 2009).

39. *Limited Assistance Representation Probate and Family Court: Frequently Asked Questions For Judges, Court Personnel and Attorneys*, MASS. PROB. & FAM. CT. DEP'T (last visited Mar. 18, 2015) [hereinafter *Mass. FAQ on Limited Assistance Representation*], available at <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/faqsforcourtandlawyerstatewide.pdf>.

Clients also benefit because they receive some counsel where they otherwise might not have received any.⁴⁰

One of the chief benefits of limited scope representation is that it mitigates the various issues that courts face when dealing with the massive number of pro se litigants recently percolating through the courts. Although the exact number of pro se litigants may not be known, figures range anywhere from sixty-seven to ninety-two percent of cases having at least one unrepresented party.⁴¹ Rhode Island Supreme Court Chief Justice Suttell called this phenomenon a “*pro se* explosion.”⁴²

In recent years, the pro se explosion has become particularly pronounced for at least two reasons. First, the downturn in the economy has meant that fewer people are able to afford lawyers themselves, and simultaneously, the legal services organizations that have traditionally provided counsel to indigent clients in civil cases have seen their funding slashed.⁴³ Legal aid organizations are turning away roughly fifty percent of those seeking help,⁴⁴ and approximately eighty percent of the legal needs of the poor are going unmet.⁴⁵ Second, the explosion of legal information, forms, and services available on the internet—whether that information is accurate is debatable and the accuracy is part of the problem—lead people of all socioeconomic groups to believe that they can go at it alone with legal matters.⁴⁶ Even educated people who choose to proceed pro se after consulting the internet need “legal assistance to make sure their . . . papers are in order and to

40. *See id.* (“Parties will benefit by having some legal assistance in prosecuting or defending a case.”).

41. *See* McElroy, *supra* note 2, at 3 (stating that approximately “70% of civil cases in [New England] currently involve *pro se* litigants”); Steinberg, *supra* note 19, at 459 (“States report that in matters that typically affect the poor—divorce, landlord/tenant, and bankruptcy—at least one party appears unrepresented in 67% to 92% of cases.”).

42. McElroy, *supra* note 2, at 3 (quoting Hon. Paul Suttell, Chief Justice, R.I. Supreme Court).

43. *See* Helen W. Gunnarsson, *Practice of Law: Unbundling Explained*, 98 ILL. B.J. 512, 513 (2010), available at www.isba.org/ibj/2010/10/unbundlingexplained.

44. *About LSC*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Mar. 18, 2015).

45. Steinberg, *supra* note 19, at 453.

46. *See* Goldschmidt, *supra* note 25, at 1145; Gunnarsson, *supra* note 43, at 513.

navigate the litigation process.”⁴⁷ Ultimately, these litigants need more help than court staff or pro bono clinics can offer, and as such, they turn to attorneys for limited scope representation because it costs less and allows them to remain in control of their cases.⁴⁸

Additionally, pro se litigants present a problem to judges because, according to Justice Michael B. Hyman of the First Appellate District Court of Illinois, they often have “little or no understanding of courtroom procedure and decorum, with pleadings that are nearly impossible to decipher, and with no clue how to articulate a coherent argument.”⁴⁹ Justice Hyman argues that limited scope representation presents a solution to the traditional “system based solely on the paradigm of full representation” where a litigant either:

has the resources or luck to obtain beginning-to-end assistance from a lawyer, or is left alone to languish in the inexorable demands of the legal system. . . . For instance, a litigant unable to front a \$5,000 retainer required for traditional representation can pay, say, \$750, for a lawyer to argue just a complex motion.⁵⁰

Limited scope representation is a model of lawyering that would allow attorneys to provide “assistance with a discrete legal task *only*.”⁵¹ Justice Hyman sees the benefits of limited scope representation on multiple levels: first, “[t]he litigant gets the benefit of legal assistance”; second, “the lawyer gets some paid work”; and third, “the judge hears a presentation that serves the ends of justice.”⁵²

Limited scope representation is particularly attractive to both middle class and poor clients.⁵³ For the middle class, limited scope representation provides access to the assistance of a lawyer only when the client determines that he is in need of one.⁵⁴ Middle class clients would likely decide to engage the pro se

47. Goldschmidt, *supra* note 25, at 1145.

48. *See id.* at 1145–46.

49. Hyman, *supra* note 28, at 1.

50. *Id.*

51. Steinberg, *supra* note 19, at 454.

52. Hyman, *supra* note 28, at 2.

53. *See* Steinberg, *supra* note 19, at 463.

54. *See id.*

assistance model when deciding that they need help preparing a pleading, filing a motion, or restructuring child support, amongst many other possibilities.⁵⁵ Likewise, poorer clients may access pro se assistance through legal aid clinics or pro bono attorneys.⁵⁶

C. *The Arguments Against Limited Scope Representation, and Why Those Arguments Fail*

Because limited scope representation represents an affront to traditional legal practice, critics argue that implementation of limited scope lawyering will lead to “a parade of horrors: confused clients abandoned in front of the bench, complex issues left dangling, [and] less than scrupulous lawyers exploiting new procedures for dubious ends.”⁵⁷ However, these concerns can be overcome by rules and guidelines. Lawyers who make limited scope appearances can be required to provide the court with a written statement that fully explains the scope of representation that they will provide the client before entering an appearance. Similarly, there can be a compulsory and formal withdrawal process that requires notice to both the client and the court. Furthermore, in the rare circumstances when there has been either a violation of procedure or the client objects to the withdrawal, the attorney’s withdrawal can be regulated by special hearings.⁵⁸

One issue often cited by critics of limited scope representation is that it presents ethical problems for lawyers who are providing only discrete services because, the critics argue, limited scope representation violates rules of professional conduct.⁵⁹ Fundamental to a lawyer’s ethical duties is to provide the client

55. *See id.* at 462.

56. *See id.* at 463. And, the poor client is also likely to seek out legal advice through quick assistance. *See id.*

57. Hyman, *supra* note 28, at 3.

58. *See id.*; *see also* ILL. SUP. CT. R. 13.

59. *See, e.g.,* Steinberg, *supra* note 19, at 455. *See also* FIA Card v. Pichette, No. PC 2011-2911, 2012 WL 3113460 (R.I. Super. Ct. July 26, 2012); Discover Bank v. O’Brien-Auty, No. PC-11-0449, 2013 WL 300888 (R.I. Super. Ct. Jan. 17, 2013); HSBC Bank Nevada, N.A v. Cournoyer, No. PC 11-0194, 2013 WL 300887 (R.I. Super. Ct. Jan. 17, 2013). These are the three cases pending before the Rhode Island Supreme Court in which the lawyers are appealing sanctions for violations associated with ghostwriting, which is a component of limited scope representation.

with competent representation.⁶⁰ Competent representation, according to the commentary of the Rhode Island Rules of Profession Conduct—and the ABA Model Rules—includes “analysis of the factual and legal elements of the problem, and . . . adequate preparation.”⁶¹ Similarly, a lawyer must “act with reasonable diligence,” which is understood to mean that a lawyer must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”⁶² Therefore, critics argue that “[t]he ethical duties of competence, diligence, and zeal pose challenging issues for a lawyer providing” limited scope representation.⁶³ Additionally, practitioners are worried about running afoul of existing conflict of interest rules because they may not be able (or the cost may be prohibitive) to do a full check in the limited scope setting.⁶⁴

When looked at narrowly, Rules 1.1 and 1.3, which require a lawyer to act competently and diligently,⁶⁵ would seem to be real ethical obstacles to providing limited scope representation. However, the commentary to both rules provides explicit exceptions for a lawyer to limit his or her representation in accordance with Rule 1.2. The commentary to Rule 1.1 provides that “[a]n agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.”⁶⁶ Meanwhile, the commentary to Rule

60. See R.I. SUP. CT. R. PROF'L CONDUCT 1.1; MODEL RULES OF PROF'L CONDUCT R. 1.1 (2014) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

61. R.I. SUP. CT. R. PROF'L CONDUCT 1.1 cmt. 5; MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5.

62. R.I. SUP. CT. R. PROF'L CONDUCT 1.3 cmt. 1. Rule 1.3 reads, “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” *Id.* R. 1.3.

63. Steinberg, *supra* note 19, at 466.

64. See, e.g., Rachel Brill & Rochelle Sparko, Note, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 554, 563–66, 568 (2003).

65. R.I. SUP. CT. R. PROF'L CONDUCT 1.1 states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Meanwhile, R.I. SUP. CT. R. PROF'L CONDUCT 1.3 requires a lawyer to “act with reasonable diligence and promptness in representing a client.”

66. R.I. SUP. CT. R. PROF'L CONDUCT 1.1 cmt. 5.

1.3 tells us that “a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.”⁶⁷ Therefore, with appropriate rules and regulations these ethical issues can be overcome.⁶⁸

A classic example of a supposed ethical violation is ghostwriting—ghostwriting is one component of limited scope representation in which a lawyer prepares a document for a pro se client and the client then files the document with the court⁶⁹—in which critics argue that attorneys are misleading the court and opposing parties.⁷⁰ There is a legitimate concern about making sure that the court knows when a pro se client has been helped by an attorney for at least two reasons: first, courts often times will hold a pro se litigant to a more liberal standard than a represented litigant, especially when it comes to pleadings;⁷¹ and second, opposing parties need to know who and where to serve the pro se litigant because communicating directly with a represented party is an ethical violation.⁷² These are real problems if limited scope representation is left completely unregulated.

III. WHAT OTHER STATES ARE DOING

Limited scope representation already exists in some form or another all across the country. As previously discussed, it is

67. R.I. SUP. CT. R. PROF'L CONDUCT 1.3 cmt. 1.

68. See *infra* Part III. See also Steinberg, *supra* note 19, at 456 (“The literature on [limited scope representation] abounds with proposals for crafting new ethical norms.”).

69. See Sean T. Carnathan, *The Ghostwriting Debate Continues*, 40 LITIG. NEWS 8, 8–11 (2014). Different jurisdictions have different definitions of what constitutes ghostwriting, ranging from the pro se litigant giving the court no notice that he had the help of an attorney, all the way up to having the attorney sign the document without entering an appearance. For a full discussion, see below Part III.

70. See, e.g., Goldschmidt, *supra* note 25, at 1149; Steinberg, *supra* note 19, at 455. See also, *FIA Card v. Pichette*, No. PC 2011-2911, 2012 WL 3113460 (R.I. Super. Ct. July 26, 2012); *Discover Bank v. O'Brien-Auty*, No. PC-11-0449, 2013 WL 300888 (R.I. Super. Ct. Jan. 17, 2013); *HSBC Bank Nevada, N.A v. Cournoyer*, No. PC 11-0194, 2013 WL 300887 (R.I. Super. Ct. Jan. 17, 2013).

71. Interview with the Hon. Judith Savage (Ret.), Associate Justice, R.I. Super. Ct. & Distinguished Jurist in Residence, Roger Williams U. Sch. of Law, in Bristol, R.I. (Sept. 16, 2014).

72. This is a concern addressed in the rule changes by many of the states that have codified rules about limited scope representation.

common practice in the transactional world, and limited scope representation is the “dominant mode of practice in many legal aid offices throughout the country.”⁷³ Rhode Island’s neighbors have embraced limited scope representation and have provided many high-quality, working examples for how Rhode Island can move forward.

A. *Massachusetts*

Massachusetts has a comprehensive program with rules promulgated by the Supreme Judicial Court.⁷⁴ As an initial step, Massachusetts requires attorneys who wish to participate in limited scope representation to complete an educational session to become a “qualified attorney.”⁷⁵

An attorney who makes a limited appearance on behalf of a pro se litigant is required to notify the court through a standardized form.⁷⁶ The form must state:

precisely the court event to which the limited appearance pertains, and, if the appearance does not extend to all issues to be considered at the event, the Notice shall identify the discrete issues within the event covered by the appearance. An attorney may not enter a limited appearance for the sole purpose of making evidentiary objections. Nor shall a limited appearance allow both an attorney and a litigant to argue on the same legal issue during the period of the limited appearance. An attorney may file a Notice of Limited Appearance for more than one court event in a case. At any time, including during an event, an attorney may file a new Notice of Limited Appearance with the agreement of the client.⁷⁷

Similarly, to withdraw from representation at the conclusion of the attorney’s limited scope responsibilities, the attorney need only file “a Notice of Withdrawal of Limited Appearance” with the

73. Steinberg, *supra* note 19, at 462.

74. See Order on Limited Assistance Representation (Mass. 2009).

75. *Id.* For a copy of the training manual, see LIMITED ASSISTANCE REPRESENTATION TRAINING MANUAL, MASS. TRIAL CT. (last visited Mar. 17, 2015), available at <http://www.mass.gov/courts/docs/lar-training-manual.pdf>.

76. Order on Limited Assistance Representation, at 4–5.

77. *Id.*

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court.⁷⁸ The notice must “include the client’s name, address and telephone number, unless otherwise provided by law.”⁷⁹ If the attorney fails to follow the established protocol, “[t]he court may impose sanctions.”⁸⁰ The forms that Massachusetts employs are very straightforward and apply a tick-the-box approach for the attorney to indicate what aspects of the litigation he will be involved with. For example, the form for entering a limited appearance in the Housing Court lists categories to choose from, including motion to dismiss, motion for summary judgment, and motion to compel discovery, amongst others.⁸¹

Regarding ghostwriting, Massachusetts takes the middle ground and requires that the attorney “insert the notation ‘prepared with assistance of counsel’ on any pleading, motion or other document prepared by the attorney. The attorney is not required to sign the pleading, motion or document, and the filing of such pleading, motion or document shall not constitute an appearance by the attorney.”⁸² Furthermore, concerning the confusing matter of service in limited scope representation, “[w]henver service is required or permitted to be made upon a

78. *Id.*

79. *Id.*

80. *Id.*

81. Standing Order 1-10 on Limited Assistance Representation (Mass. Housing Ct. 2010), *available at* <http://www.mass.gov/courts/docs/courts-and-judges/courts/housing-court/housing-standing-order1-10.pdf>. The complete list of categories on the housing court form is: Motion to dismiss, Motion for summary judgment, Motion to vacate default judgment, Motion to issue execution, Motion to file late answer and discovery, Motion for stay or continuance, Motion for stay or continuance in proceedings in connection with referral of litigant to the Tenancy Preservation Project, Motion to compel discovery, Motion for new trial, Motion to waive appeal bond, Motion for injunction or order to repair, Motion for injunction or order to enjoin interference with quiet enjoyment, Mediation, Trial, and Other. *Id.* For other Massachusetts forms, see, for example, *Notice of Limited Appearance*, MASS. PROB. & FAM. CT. DEPT (last visited Mar. 17, 2015), *available at* <http://www.mass.gov/courts/docs/forms/probate-and-family/noticEOFlimitedappearance.pdf>; *Notice of Withdrawal of Limited Appearance*, MASS. PROB. & FAM. CT. DEPT (last visited Mar. 17, 2015), *available at* <http://www.mass.gov/courts/docs/forms/probate-and-family/noticEOFwithdrawaloflimitedappearance.pdf>; *Limited Assistance Representation Attorney Statement of Qualification to appear as an LAR Attorney in all Divisions of the Probate and Family Court Department*, MASS. PROB. & FAM. CT. DEPT (last visited Mar. 17, 2015), *available at* <http://www.mass.gov/courts/docs/forms/probate-and-family/pfc-lar-statement.pdf>.

82. Order on Limited Assistance Representation, at 3.

party represented by an attorney making a limited appearance, for all matters within the scope of the limited appearance, the service shall be made upon *both* the attorney and the party.”⁸³ For matters outside the scope of representation, opposing parties’ counsel need not provide service to the limited scope attorney.⁸⁴

In addition to providing limited services within the courtroom, the Massachusetts rules also allow “coaching.”⁸⁵ Coaching, in Massachusetts, means helping the client understand “what the law is and what the rules of procedure are without ever filing an appearance or appearing in court to represent the litigant.”⁸⁶

B. *Connecticut*

Connecticut’s limited scope representation program is newer than Massachusetts’, but shares many of the same features.⁸⁷ Although Connecticut does not require an attorney to become certified before practicing limited scope law, it does offer training courses for attorneys.⁸⁸ And, like Massachusetts, Connecticut utilizes standardized forms for attorneys practicing limited scope representation.⁸⁹ Connecticut requires that “[t]he attorney and party enter into a detailed written agreement defining the scope of the legal assistance including which tasks the attorney will be

83. *Id.* (emphasis added).

84. *Id.*

85. *See Mass. FAQ on Limited Assistance Representation*, *supra* note 39.

86. *Id.*

87. *See Limited Scope Representation: Pilot Program for Family Matters and Family Support Magistrate Matters Frequently Asked Questions*, CONN. JUD. BRANCH, http://www.jud.ct.gov/faq/limited_scope_rep.htm (last visited Mar. 16, 2015) [hereinafter *Conn. FAQ on Limited Scope Representation*]; *see also* Minutes, Civ. Comm’n, Conn. Jud. Branch (June 6, 2011), *available at* http://jud.ct.gov/Committees/civil/civil_minutes_060611.pdf (indicating that discussions about implementing limited scope representation were ongoing as of at least June 6, 2011, whereas Massachusetts began its pilot program in 2006 and was implementing limited scope representation statewide by 2009).

88. *See Connecticut Legal Research and Courthouse Resources: Training Sessions Flyer*, CONN. JUD. BRANCH (2014), *available at* http://jud.ct.gov/lawlib/Training_Brochure_2014.pdf.

89. For the forms, *see Limited Appearance*, CONN. SUPER. CT. (last visited Mar. 17, 2015), *available at* <http://www.jud.ct.gov/WebForms/forms/CL121.pdf>; *Certificate of Completion of Limited Appearance*, CONN. SUPER. CT. (last visited Mar. 17, 2015), *available at* <http://www.jud.ct.gov/WebForms/forms/CL122.pdf>.

responsible for and which tasks the party will be responsible for.”⁹⁰ Connecticut allows limited scope representation to range from “providing legal advice to an individual about a case or a legal problem he or she is involved in[, to] drafting documents or pleadings for the individual . . . [to] filing a limited appearance where the attorney represents the party in court for a part of his or her case.”⁹¹

When an attorney is going to enter a limited appearance, he must file a form that specifies “the event or proceeding for which the attorney is providing representation.”⁹² Then, upon completion of the limited appearance, the attorney must file another form to withdraw, called “The Certificate of Completion of Limited Appearance.”⁹³ The “form must be filed with the court and copies must be provided to the client and opposing counsel or opposing party if unrepresented. After the Certificate of Completion of Limited Appearance form is filed, the attorney’s obligation to continue to represent the client is terminated.”⁹⁴ Assuming the attorney has completed and filed all the forms properly, “[t]he client will have no right to object” to the attorney’s withdrawal from the case.⁹⁵ Finally, “[i]f the client and the attorney agree that the attorney will provide additional legal help, the attorney and the client will enter into a new agreement and the attorney must file another Limited Appearance form identifying the additional events or proceedings.”⁹⁶

Connecticut treats ghostwriting in much the same way as Massachusetts, in that attorneys are “required to disclose on the pleading or document that it was ‘prepared with assistance of counsel,’ but [attorneys are] not required to disclose their name or juris number.”⁹⁷ Regarding service, “for all matters within the scope of the limited appearance, the service shall be made upon the attorney *and* on the party for whom the limited appearance was filed.”⁹⁸ However, service upon the limited scope attorney is

90. *Conn. FAQ on Limited Scope Representation*, *supra* note 87.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* See also *supra* note 89.

96. *Conn. FAQ on Limited Scope Representation*, *supra* note 87.

97. *Id.*

98. *Id.* (emphasis added).

not “required for matters outside the scope of the limited appearance.”⁹⁹ This is a practical solution, because once the attorney has filed all of the appropriate forms, it is clear to both the court and opposing counsel exactly which aspects of the litigation the attorney is involved in.

Also, like Massachusetts, Connecticut allows “coaching.”¹⁰⁰ In Connecticut, coaching can consist of “providing legal guidance about the legal or court process such as how to introduce evidence, how to cross examine a witness, general courtroom decorum and procedure.”¹⁰¹

In sum, although Connecticut has begun to embrace limited scope representation, they do note that “[n]ot every type of practice is conducive to limited scope representation. It is wise to avoid Limited Scope Representation in very sophisticated and/or complicated litigation.”¹⁰² And, regardless of whether an attorney is providing full or limited representation, he “must follow all ethical rules and standards of professional responsibility . . . Limited scope does not mean limited liability or limited responsibility.”¹⁰³

C. *New Hampshire*

New Hampshire has amended its superior, district, and probate court rules to allow for limited scope representation.¹⁰⁴ New Hampshire does not have a compulsory educational requirement for lawyers to participate in limited scope representation. The state does, however, provide a two-credit Continued Legal Education (“CLE”) course on limited scope representation and recommends that any lawyer who will engage in limited scope representation complete the CLE.¹⁰⁵

Like Massachusetts and Connecticut, New Hampshire’s limited scope representation system is grounded in detailed forms

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See Order 0009 on Limited Scope of Legal Assistance Rules (N.H. 2006), available at <http://www.courts.state.nh.us/supreme/orders/20060321.pdf>.

105. See *Unbundled Legal Services*, N.H. BAR ASSOC., <http://www.nhbar.org/legal-links/unbundle.asp> (last visited Mar. 17, 2015).

that lay out exactly what the lawyer's responsibilities are and alert the client, opposing party, and court to the extent that the lawyer will be involved.¹⁰⁶ New Hampshire's rules make clear that "an attorney providing limited representation to an otherwise unrepresented litigant may file a limited appearance in a *non-criminal* case on behalf of such unrepresented party."¹⁰⁷ To file a limited appearance, an attorney must use a form that "state[s] precisely the scope of the limited representation, and the attorney's involvement in the matter shall be limited only to what is specifically stated."¹⁰⁸ And, an attorney's limited representation "automatically terminate[s] upon completion of the agreed representation, without the necessity of leave of Court," so long as the attorney "provide[s] the Court [with] a 'withdrawal of limited appearance' form giving notice to the Court and all parties of the completion of the limited representation and termination of the limited appearance."¹⁰⁹ That is, once a lawyer has detailed the scope of their representation through the "Consent to Limited Representation" form "the lawyer does not have to give more help

106. See *Limited Appearance or Withdrawal by Attorney*, N.H. JUD. BRANCH (last visited Mar. 17, 2015), available at <http://www.courts.state.nh.us/forms/nhjb-2294-dfps.pdf>; *Appendix I to Rule 1.2: Consent to Limited Representation*, N.H. BAR ASSOC. (last visited Mar. 17, 2015) [hereinafter *N.H. Consent to Limited Representation*], available at <http://www.nhbar.org/uploads/pdf/ClientConsentFormLimitedRep.pdf>.

107. N.H. SUPER. CT. R. 14(d) (emphasis added). The types of limited scope representation allowed in New Hampshire are extensive and include: (1) general advice about legal rights and responsibilities in connection with potential litigation concerning a specific issue identified by the client, including consultation at a one-time meeting or consultation at an initial meeting and further meetings and telephone calls or correspondence as needed or as requested by client; (2) assistance with the preparation of the client's court or mediation matter regarding an issue specified by the client, including explaining court procedures, reviewing court papers and other documents prepared by or for client, suggesting court papers for client to prepare, drafting specified court papers for client's use, legal research and analysis regarding client specified issue, preparation for court hearing regarding client specified issue, preparation for mediation, and other items specified by client; and (3) representing client in court, but only for matter(s) specified by client, including motion, temporary hearing, final hearing, trial, or other item specified by the client. See *N.H. Consent to Limited Representation*, *supra* note 106.

108. N.H. SUPER. CT. R. 14(d).

109. *Id.* R. 15(e).

than the lawyer and [the client] agreed” to.¹¹⁰ Likewise, “the lawyer does not have to help with any other part of [the client’s] case.”¹¹¹

Regarding ghostwriting, New Hampshire has a rule similar to those of Massachusetts and Connecticut. In New Hampshire, an attorney may draft a document for a pro se litigant. “[T]he attorney is not required to disclose the attorney’s name on [the document] to be used by [the pro se litigant]; any pleading drafted by [a] limited representation attorney, however, must conspicuously contain the statement ‘This pleading was prepared with the assistance of a New Hampshire attorney.’”¹¹²

D. *Highlights From Other Jurisdictions*

The Illinois Supreme Court Rules, in addition to adopting the standard ABA language regarding limited scope representation in its rules of professional conduct,¹¹³ codify limited scope representation as an acceptable and encouraged form of legal practice.¹¹⁴ Illinois firmly believes that limited scope

110. *N.H. Consent to Limited Representation*, *supra* note 106.

111. *Id.*

112. N.H. SUPER. CT. R. 15(f).

113. ILL. SUP. CT. RULES OF PROF’L CONDUCT 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”).

114. ILL. SUP. CT. R. 13(c), reads in pertinent part:

(6) *Limited Scope Appearance*. An attorney may make a limited scope appearance on behalf of a party in a civil proceeding pursuant to Rule of Professional Conduct 1.2(c) when the attorney has entered into a written agreement with that party to provide limited scope representation. The attorney shall file a Notice of Limited Scope Appearance in the form attached to this rule, identifying each aspect of the proceeding to which the limited scope appearance pertains.

...

(7) *Withdrawal Following Completion of Limited Scope Representation*. Upon completing the representation specified in the Notice of Limited Scope Appearance filed pursuant to paragraph (6), the attorney shall withdraw by oral motion or written notice.

See also ILL. SUP. CT. R. 137(e) (“An attorney may assist a self-represented person in drafting or reviewing a pleading, motion, or other paper without making a general or limited scope appearance. Such assistance does not constitute either a general or limited scope appearance by the attorney. The self-represented person shall sign the pleading, motion, or other paper. An attorney providing drafting or reviewing assistance may rely on the self-represented person’s representation of facts without further investigation by

representation can increase access to justice, and it takes on critics of limited scope representation in the commentary to Illinois Supreme Court Rule 13:

A court's refusal to permit withdrawal of a completed limited scope representation, or even its encouragement of the attorney to extend the representation, would disserve the interests of justice by discouraging attorneys from undertaking limited scope representations out of concern that agreements with clients for such representations would not be enforced.¹¹⁵

The Minnesota Supreme Court recently (October 8, 2014) vacated sanctions against a lawyer who had been admonished by the lower court for failing to appear in court after he had helped a couple prepare documents pursuant to a limited scope agreement in a cooperative divorce.¹¹⁶ In analyzing if the lawyer acted ethically and whether limited scope representation should be allowed, the court framed the central question as “whether [the lawyer] ‘engage[d] in conduct that [was] prejudicial to the administration of justice.’”¹¹⁷ By using this standard, the court signaled that limited scope representation is generally acceptable, but left room to sanction lawyers if they obstructed the administration of justice.

Regarding ghostwriting, perhaps the most controversial element of limited scope representation, “28 states [already] permit ghostwriting, and . . . ghostwriting has been approved in opinions by state advisory or ethics opinions in an additional 10 states.”¹¹⁸ The thirty-eight jurisdictions around the nation that have adopted ghostwriting generally have taken one of three approaches in implementing it. The first approach is to expressly allow anonymous ghostwriting, in which there is no indication that the pro se litigant received any help from an attorney.¹¹⁹ The

the attorney, unless the attorney knows that such representations are false.”).

115. ILL. SUP. CT. R. 13 cmt.

116. *In re Disciplinary Action Against A.B.*, 854 N.W.2d 769, 773 (Minn. 2014).

117. *Id.* at 771 (quoting MINN. R. PROF'L CONDUCT 8.4(d)).

118. Reply Brief of Appellant at 18, *FIA Card Servs. v. Pichette*, C.A. No. PC2011-2911 (R.I. Jan. 12, 2015).

119. *See Steinberg, supra* note 19, at 470.

states that have adopted this approach include Arizona, California, and Missouri.¹²⁰ Other states, such as New York, Colorado, Iowa, and Nebraska, have opted for a second kind of approach that allows ghostwriting, but require full disclosure of the assisting attorney's name and address.¹²¹ And, a third approach—adopted by Massachusetts, Connecticut, New Hampshire, and Florida, amongst others—takes a middle ground that allows attorneys to ghostwrite without revealing their identity so long as the document indicates that it was prepared with the assistance of an attorney.¹²²

In addition to what other states are doing and the ABA model rules, the Restatement (Third) of Law Governing Lawyers provides for limited scope representation. Namely, “a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances.”¹²³ The Restatement, in the commentary to section 19, goes on to provide five safeguards for limited scope representation:

First, a client must be informed of any significant problems a limitation might entail, and the client must consent. For example, if the lawyer is to provide only tax advice, the client must be aware that the transaction may pose non-tax issues as well as being informed of any disadvantages involved in dividing the representation among several lawyers.

Second, any contract limiting the representation is construed from the standpoint of a reasonable client.

Third, the fee charged by the lawyer must remain reasonable in view of the limited representation.

Fourth, any change made an unreasonably long time after the representation begins must meet the more stringent tests of § 18(1) for postinception contracts or modifications.

120. *See id.*

121. *See id.*

122. *See id.*

123. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19 (2000).

Fifth, the terms of the limitation must in all events be reasonable in the circumstances.¹²⁴

IV. A PLAN FOR RHODE ISLAND

At an October 2000 conference focused on limited scope representation, “[t]he conferees, recommended, inter alia, that the court and bar should adopt rules, regulations, and procedures to permit [limited scope representation] services under appropriate circumstances.”¹²⁵ Some fifteen years later, it is now time for Rhode Island to act.

Before proposing new rules and protocol for Rhode Island, it is worth noting that Rhode Island already has the skeletal framework in place to begin comprehensive limited scope representation. As noted in the first lines of this Comment, Rule 1.2(c) allows “[a] lawyer [to] limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹²⁶ The commentary to Rule 1.2 informs us that “[t]he scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client,” and “the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.”¹²⁷ Finally, “[a]lthough an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹²⁸

In addition to the limited scope representation that is already allowed under Rule 1.2, Rhode Island has also carved out some leeway for pro bono attorneys in Rule 6.5.¹²⁹ In the pro bono settings “such as legal-advice hotlines, advice-only clinics or pro se

124. *Id.* § 19 cmt. c (citations omitted).

125. Goldschmidt, *supra* note 25, at 1183.

126. R.I. R. SUP. CT. R. PROF’L CONDUCT 1.2(c).

127. *Id.* R. 1.2 cmt. (“Agreements Limiting Scope of Representation”).

128. *Id.*

129. *See id.* R. 6.5.

counseling programs[,] . . . there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation."¹³⁰ The commentary goes on to add that "[a] lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation."¹³¹

The language in Rules 1.2 and 6.5 seem to make it clear that some form of limited scope representation is acceptable. However, the language is ambiguous and leaves a lot of uncertain ground for Rhode Island attorneys to fear that they may be running afoul of their obligations. Although lawyers are used to arguing about "reasonableness" standards, no practitioner wants to take on such a fight voluntarily when his personal reputation and career will be on the line. Therefore, I propose the following guidelines for limited scope representation. These guidelines fit within the current rules and provide lawyers with the guidance they need to provide a high quality service to clients without fear that they may breaching a duty to that client.

A plan for Rhode Island should begin by embracing the broad principle that the Minnesota Supreme Court laid out when it measured a lawyer's conduct, not by the scope of representation, but instead by whether the lawyer's actions aided the administration of justice.¹³² With that general principle in mind, Rhode Island must address: when it is appropriate to limit the scope of representation; how to apply the ethical standard of competence to limited scope representation; how the court and opposing parties should communicate with a party who is engaged in limited scope representation; how an attorney can enter a limited appearance and then withdraw; and whether the rules surrounding conflicts of interest should be relaxed for limited scope representation.¹³³

130. *Id.* R. 6.5 cmt.

131. *Id.*

132. See *In re Disciplinary Action Against A.B.*, 854 N.W.2d 769, 771 (Minn. 2014).

133. For a similar framework for analyzing limited scope representation, see Alicia M. Farley, Comment, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 573–78 (2007).

A. When to Allow Limited Scope of Representation

First, a lawyer should only be allowed to practice limited scope representation after becoming certified through a training program, much like the one implemented by Massachusetts.¹³⁴ The training need not be lengthy or cumbersome. Instead, it can take the form of a CLE class, which lawyers should be attending regardless. The purpose of the training would be to standardize limited scope representation and highlight all of the issues that follow. In particular, it would highlight how to handle any ethical concerns raised by limited scope representation and how to manage client expectations during limited scope representation.

Rule 1.2(c) clearly articulates that limited scope representation is only acceptable with the client's informed consent.¹³⁵ The practitioner should be responsible for securing a written consent form from the client that clearly articulates, in easy to understand language, the specific responsibilities of the lawyer and those of the client. Furthermore, any changes in scope must be documented in writing.¹³⁶

In addition to making clear the lawyer's responsibility to get client consent for limited scope representation, the procedures should require that the representation be "reasonable." This standard is much trickier to define. There appears to be two key areas where the reasonableness standard comes into play. First, is the lawyer's limited representation more beneficial to the client than no representation; and second, is the lawyer's representation reasonable when viewed within the context of the existing Rules of Professional Conduct?

Although it may be impracticable to create regulations that define when a client is actually disserved by limited representation, this area can be covered by allowing judges to hold special hearings that would prohibit a lawyer from withdrawing in accordance with the forms discussed below. That is, the presumption should be that the limited representation offered by

134. See generally LIMITED ASSISTANCE REPRESENTATION TRAINING MANUAL, *supra* note 75.

135. R.I. SUP. CT. R. PROF'L CONDUCT 1.2(c).

136. See LIMITED ASSISTANCE REPRESENTATION TRAINING MANUAL, *supra* note 75, at 9. This segment of recommendations is largely based on Massachusetts's plan.

the lawyer is reasonable, and ordinarily a lawyer can rely on the ability to withdraw from a case in accordance with forms filed with the court. However, in a situation involving complex litigation where it is clear that the party is completely confused by the proceedings, a judge may intervene and force a lawyer to remain in the case, because it would be unreasonable for the lawyer to believe that the client could proceed without representation.

Still, this would have to be relative to the type of limited assistance the lawyer agreed to provide. For example, a pro se litigant may have a firm grasp of the legal arguments he seeks to make but is faced with the threat of contempt charges because he does not fully understand the procedural requirements of the court. In that instance, a pro se litigant could hire an attorney simply to aid him in avoiding any contempt charges.¹³⁷ Under a limited scope agreement where the attorney was hired solely for the purpose of avoiding contempt charges, the attorney would not be responsible for knowing any of the facts or law that pertain to the issues of the case, but only responsible for the procedural rules. In such a situation, the judge could not force the attorney to remain in the case because the client was struggling with a legal issue in the case. But, had the attorney been employed to argue a motion for summary judgment, then in particularly extreme circumstances the attorney could be forced to remain in the case. Clearly, there would have to be an avenue for the attorney to appeal a judge's decision holding him in a case. I would suggest a standard appeals process, in which the attorney would first appeal to the superior court (if the action in question began in either the family court, district court, workers' compensation court, or traffic tribunal), and then to the supreme court. And, if the action in question originated in the superior court, then the appeal would go directly to the supreme court.

One of the main arguments against limited scope representation is that it is unethical. I suggest that when governed by existing ethical rules, lawyers engaged in limited scope representation can be held to the same ethical standards as lawyers providing full representation. Simply requiring lawyers

137. Interview with the Hon. Gilbert V. Indeglia, Associate Justice, R.I. Supreme Ct., in Providence, R.I (Jan. 8, 2015).

who assist pro se litigants to disclose their identity and the fact that they helped draft a document can alleviate most ethical concerns.

B. *How to Apply Ethical Standards to Limited Scope Representation*

1. *Competence*

Critics of limited scope representation argue that limited scope lawyering amounts to partial and, therefore, incompetent representation.¹³⁸ Certainly, Rule 1.1 still applies to limited scope lawyering, but I contend that the competence standard referenced in Rule 1.1 is akin to the “reasonableness” standard in Rule 1.2(c). That is, full representation is not required for competent representation, and full representation does not automatically mean that the representation was competent. Instead, whether the representation provided is full or limited, the representation must be “reasonable.” Therefore, much like the above discussion about reasonableness, for a limited scope lawyer to provide competent representation, the practitioner must take into account the complexity of the legal issue at hand, as well as the sophistication of the litigant, and balance that with an appropriate amount of research and involvement in the client’s case. Ultimately, representation is not competent if the client is better off with no representation instead of limited representation. Finally, even when competent representation is provided in a limited scope setting, it is incumbent upon the practitioner to inform the client of the risks associated with limited scope representation, including:

it is impossible to predict every evidentiary objection which might be made in court; [t]he litigant may be confronted with issues and objections which were not anticipated; and [o]f course, an otherwise reasonable limitation on scope which the client is unable to understand, for one reason or another, may not be effective.¹³⁹

138. See, e.g., Steinberg, *supra* note 19, at 466; Farley, *supra* note 133, at 574–75.

139. See LIMITED ASSISTANCE REPRESENTATION TRAINING MANUAL, *supra*

These tradeoffs are reasonable when they have been disclosed to the client, the client has given written consent for limited representation, and the client is aware of the costs of the services that he is choosing from.

2. *Ghostwriting*

Of all the criticisms of limited scope representation, ghostwriting has drawn the most forceful critiques. True ghostwriting, when there is absolutely no disclosure that a document was created with the assistance of an attorney, does raise some real concerns about fairness, candor to the court, unearthing incompetent representation, and also how an opposing party should communicate with an apparently pro se litigant. However, these concerns can be overcome simply by requiring attorneys to disclose their identity and the fact that they assisted in drafting the document. I propose that the document that is filed with the court contain a standard disclosure immediately below the pro se litigant's signature at the end of the document. The disclosure should note that the document was created with the assistance of an attorney and provide the attorney's name, contact information, and bar number.¹⁴⁰ The attorney, although

note 75, at 8.

140. For example, Colorado codifies this type of rule in its version of Rule 11 of Civil Procedure. Colorado has added a second section to the rule that deals specifically with ghostwriting documents. The rule states:

An attorney may undertake to provide limited representation in accordance with Colo.RPC 1.2 to a pro se party involved in a court proceeding. Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number. The attorney shall advise the pro se party that such pleading or other paper must contain this statement. In helping to draft the pleading or paper filed by the pro se party, the attorney certifies that, to the best of the attorney's knowledge, information and belief, this pleading or paper is (1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient,

he would not have entered an appearance, would then become subject to all of the conditions, as well as the sanctions available under Rule 11.

With full disclosure, not only will the court know when to apply the more liberal pro se standard, but opposing counsel will be alerted as to which issues he may contact the litigant directly with, and which ones he must contact opposing counsel. Disclosure, therefore, addresses two of the major concerns surrounding ghostwriting, as it eliminates not only the limited scope attorney's ethical issues, but also any potential ethical issues for the opposing counsel regarding improper contact with a party. Additionally, it also allows the court to hold the attorney accountable under Rule 11, which states that documents must be:

well grounded in fact and [are] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that [they are] not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.¹⁴¹

However, for a policy of full disclosure to be effective, the court must refrain from making attorneys enter an appearance just because they disclosed their involvement in drafting a document. Assuming that attorneys can ghostwrite without fear of being drawn into a case,¹⁴² all parties involved benefit; the court and opposing party get the disclosure and fairness that they seek, and meanwhile, the client gets the benefit of limited scope representation. Of course, the practitioner would still be

in which instance the attorney shall make an independent reasonable inquiry into the facts. Assistance by an attorney to a pro se party in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court are not subject to the certification and attorney name disclosure requirements of this Rule 11(b).

Limited representation of a pro se party under this Rule 11(b) shall not constitute an entry of appearance by the attorney . . . The attorney's violation of this Rule 11(b) may subject the attorney to the sanctions provided in C.R.C.P. 11(a).

COLO. R. CIV. P. 11(b).

141. R.I. SUPER. CT. R. CIV. P. 11.

142. Unless, of course, there is reason to believe that the lawyer is not acting reasonably or that there has not been informed consent.

accountable and could be called into court if their drafting was bad or if a limitation of their representation was unreasonable, amongst other things.

C. How to Enter a Limited Appearance and How to Withdraw

Most other jurisdictions that allow attorneys to enter limited appearances utilize standardized forms that alert the court and the opposing party to the limited appearance and its scope. Some of the best examples of these forms come from Massachusetts, where the forms employ a simple tick-the-box approach, and each court has its own form with categories specific to that type of law. For example, in Rhode Island the workers' compensation court could have its own form that includes check boxes for things like "Employee's Petition for Compensation Benefits," while the family court could have a box for "Motion to Amend Child Support." In this manner, each court could customize its forms to include the most common types of services provided by limited scope attorneys. The form would act as notice to the court and opposing party of exactly which area(s) will be covered by the attorney and which will be covered by the litigant in a pro se manner.

This type of notice has several benefits. First, it gives the court a clear understanding of what to expect during hearings and whether to apply a more liberal standard to any accompanying pleadings or briefs. Second, it makes it clear to opposing parties which areas of litigation they should not speak to the litigant about and where to provide service. That is, for any matter that a litigant is engaged in limited representation, the normal rules of service and communication would apply, but in areas where the litigant is proceeding pro se, the opposing party would not be responsible for providing copies of documents to the limited scope attorney and could communicate directly with the litigant.

For limited scope representation to be successful, the most important step that Rhode Island can take is to have clear and predictable standards for withdrawing. In his article in support of limited scope representation, Justice Hyman recognized:

Without a doubt, the ability to automatically withdraw from a limited scope appearance is the question of singular importance to lawyers who might offer limited scope services. Judges who want to see the litigants in

their courtrooms benefit from limited assistance need to understand and respect the boundaries established by the rules and limited scope representation agreements.¹⁴³

Thus, in much the same way that a lawyer would complete a form to enter a limited appearance, he would file another form to withdraw. This form would be filed with the court and served on the opposing party so that there is complete transparency regarding the limited scope lawyer's role. And, as discussed above, by serving the withdrawal form on opposing counsel it makes clear when opposing counsel may again have direct contact with the litigant.

D. *Conflicts of Interest*

For limited scope representation to be successful, the rules surrounding conflicts of interest might need to be relaxed. Fortunately, the standards for this already exist under Rule 6.5, which allows a lawyer to have a lower threshold for a conflict of interest check when engaging in limited scope representation in the pro bono setting.¹⁴⁴ The same standards that apply to pro bono limited scope representation under Rule 6.5 can also apply to the paid form of limited scope representation.¹⁴⁵ That is, the same ethical standards should apply to a lawyer whether he is engaging in pro bono or paid work because the court's interest in lawyers acting ethically should be constant, unwavering, and not dependent on the client's ability to pay. Therefore, if Rule 6.5 is already an acceptable standard for pro bono work, it ought to apply equally to paid work.

V. CONCLUSION

The current state of Rhode Island law on limited scope representation is murky at best. While Rule 1.2(c) permits, with client consent, a lawyer to limit the scope of representation, the delineation of what is permissible in limiting said representation remains unclear. At the moment, there are simply no rules governing limited entries of appearances with provisions for automatic withdrawal and ghostwriting and no guidelines on what

143. Hyman, *supra* note 28, at 3; *see also* ILL. SUP. CT. R. 13.

144. R.I. SUP. CT. R. PROF'L CONDUCT 6.5.

145. *See* Farley, *supra* note 133, at 578.

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is “reasonable” under Rule 1.2(c). Although there may not be a perfect implementation of limited scope representation, the suggestions laid out above represent a coherent plan that would provide Rhode Island’s bench and bar with clear guidelines, which is certainly better than having no system at all.