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Limited Scope Representation When an Appearance Is Made and the Ethics of Lawyering

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LIMITED SCOPE REPRESENTATION WHEN AN APPEARANCE IS MADE AND THE ETHICS OF LAWYERING

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INTRODUCTION

Consider the following: you are a legal aid lawyer working in housing court. Faced with an overwhelming number of cases,[1] you are further burdened with the difficult task of triaging your workload.[2] But for your representation, your clients facing eviction would represent themselves in court and defend their cases as pro se litigants.[3] This is not ideal; pro se

1. *See* Mihir Zaveri et al., *How the Pandemic Worsened a Housing Crisis in the Bronx*, N.Y. TIMES (Nov. 18, 2021), https://www.nytimes.com/2021/11/16/nyregion/bronx–evictions–housing–coronavirus–pandemic.html [https://perma.cc/NUR6-5X56].

2. *See* Ericka Rickard, *Triage and Justice for All*, A2J LAB (Sept. 23, 2016), https://a2jlab.org/triage-and-justice-for-all/ [https://perma.cc/W4SM-HG6L].

3. Pro se means "[f]or oneself; on one's own behalf; without a lawyer." *Pro Se*, BLACK'S LAW DICTIONARY (11th ed. 2019). The vast majority of tenants facing eviction do not have counsel. *See* Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction,*

litigants have a significantly lower chance of receiving favorable rulings in housing court,[4] or for that matter, in any other kind of case they litigate.[5]

Knowing that you do not have capacity to fully represent each client through trial, you consider offering some clients limited scope representation.[6] The terms of the limited scope representation would be simple: rather than represent a client for the entire case, you propose to make an appearance for them and represent them through settlement. If the client receives and rejects a settlement offer that you determine to be reasonable given the facts of the case and your experience, you have the option of withdrawing from the case.

This arrangement can be advantageous for both a limited scope lawyer and her client. Withdrawing would allow a former client to continue litigating the case pro se to pursue their desired outcome, separate from the deal that has been offered. Withdrawing would also spare the limited scope lawyer from taking time to prepare for a trial where the outcome will likely be less favorable than the offer, or even if it were more favorable than the offer, it may not be worth all the extra effort. This allows the limited scope lawyer to work for clients who are ready and willing to accept reasonable settlements. In review, this model of representation allows lawyers to take

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FAST FOCUS: INST. RSCH. POVERTY, Mar. 2015 at 5, https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf [https://perma.cc/W2EH-63RM] (citing Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 38–92 (2010)). Even in cities like New York that have laws guaranteeing counsel for those facing eviction, not all tenants are represented in their proceedings. *See* OFFICE OF CIV. JUST., N.Y.C. HUM. RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR FOUR OF IMPLEMENTATION IN NEW YORK CITY 5 (2021), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2021.pdf [https://perma.cc/TG9P-X2AR] (noting that only 71% of tenants who appear in Housing Court have attorneys despite universal representation).

4. James G. Mandilk, *Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation*, 127 YALE L.J. 1742, 1864–65 (2018); *see also* Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 208–10 (2020) (finding that lack of tenant representation in housing courts keeps tenants from having access to legal recourse provided by the warrant of habitability).

5. *See* Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1837–44 (2018) (describing the limited success of pro se litigants in federal court).

6. SARAH SMITH & WILL HORNSBY, ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, UNBUNDLED LEGAL SERVICES: AT THE TIPPING-POINT? 1 (2018), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_tipping_point_article.pdf [https://perma.cc/4P35-JDSR] (describing limited scope representation).

on more cases,[7] reach more favorable outcomes,[8] and increase access to justice.[9]

This hypothetical raises several questions regarding a limited scope lawyer's obligation to her client, the court, and herself as an advocate. First, do rules of professional conduct allow this kind of limited scope representation?[10] In particular, when would the lawyer have to tell her client, the court, or opposing counsel of her intention to limit the scope of your representation, if she must at all? Second, is conditioning a lawyer's representation on the client's acceptance of an attorney-recommended settlement ethical under rules of professional conduct, given that the threat of withdrawal will pressure clients to accept settlements that they would otherwise reject, arguably encroaching on their right to make key decisions regarding the representation?[11] Lastly, is this arrangement desirable for the limited scope lawyer or the client? Just because a lawyer can offer limited scope representation, should she? Is having "half a lawyer better than no lawyer?"[12]

This Note addresses ethical issues posed by one possible way of serving the unmet needs of civil litigants.[13] To this end, this Note draws on Model Rules of Professional Conduct ("Model Rules"), versions of which have

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7. *See* Justice Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1111–12 (2002) (noting that limited scope lawyers can represent more clients than lawyers providing full scope representation).

8. *See* Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J. L. & GENDER 55, 83–86 (2018) (describing how the right to counsel in housing court yields positive substantive outcomes).

9. *See* Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1251 (2014); *see also* Tina L. Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 FORDHAM URB. L.J. 1281, 1295–96 (2002) (describing how limited scope representation increases access to justice for indigent litigants unable to afford a lawyer).

10. *See generally* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145 (2002) (defending the practice of ghostwriting); John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice,* 67 FORDHAM L. REV. 2687 (1999) (challenging critiques of ghostwriting and ultimately endorsing the practice).

11. *See infra* Part III.

12. Mary Helen McNeal, *Having One Oar or Being without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617, 2618 (1999).

13. *See generally* AM. ACAD. OF ARTS & SCI., CIVIL JUSTICE FOR ALL: A REPORT AND RECOMMENDATION FROM THE MAKING JUSTICE ACCESSIBLE INITIATIVE 1–5 (2020), https://www.amacad.org/sites/default/files/publication/downloads/2020–Civil–Justice–for–All_0.pdf [https://perma.cc/5EU7-8NYL]. This Note does not discuss other important questions such as the additional emotional labor limited scope representation might impose on lawyers. *See, e.g.*, Sofia Yakren, *Lawyer as Emotional Laborer*, 42 U. MICH. J.L. REFORM 141 (2008).

been adopted in all 50 states and a number of U.S. territories.[14] This Note also utilizes various other sources, such as court opinions, ethics committee opinions, whitepapers, comments to the Model Rules, and law review articles, all of which influence courts.[15] Ultimately, this Note concludes that the form of limited scope representation it addresses can be undertaken consistently with the professional conduct rules.

This Note aims to advance discussion of an underexplored aspect[16] of limited scope representation in the legal services context.[17] Others have examined limited scope practices such as ghostwriting[18] and pro se clinics,[19] and have discussed other ways that overburdened public defenders can meet their ethical obligations.[20] However, limited scope representation where a lawyer makes an appearance in court on behalf of an indigent litigant poses unique ethical challenges that have not been fully examined.[21] The question is important now given the increased access to justice gap in the wake of the COVID-19 pandemic.[22] Furthermore, though limited scope representation

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14. *See Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ alpha_list_state_adopting_model_rules/ [https://perma.cc/BNF7-K4SY]. As a result, this Note refers to the Model Rules and state Rules of Professional Conduct as they exist in the United States interchangeably, unless otherwise noted.

15. Comments to professional rules have been persuasive for courts adjudicating ethics cases. *See, e.g.*, In re Egwim, 291 B.R. 559, 570 (2003). Though ethics opinions from bar associations are not binding on courts, they have been persuasive for courts facing issues surrounding limited scope representation. *See, e.g.*, In re Fengling Liu, 664 F.3d 367, 370–72 (2d Cir. 2011). They have also proven to be valuable resources in scholarship exploring limited scope representation. *See, e.g.*, Rothermich, *supra* note 10, at 2694.

16. *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, 465 (2011) (noting that "[e]thical critiques have plagued unbundling from the outset").

17. A notable exception is Lianne Pinchuk's article, which examines the issue of an attorney's withdrawal from limited scope representation when the lawyer makes an appearance on the record for a client under Model Rule 1.16. *See* Lianne S. Pinchuk, *Limited Scope Lottery: Playing the Odds on Your Ability to Withdraw*, 85 BROOK. L. REV. 699, 701 (2020).

18. *See generally* Rothermich, *supra* note 10; *see also infra* Part II.B.i.

19. *See, e.g.*, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 66–72 (2010).

20. *See* A.B.A. Comm. On Ethics and Pro. Resp., Formal Op. 06–441 (2006) (discussing the ethical obligations of lawyers who represent indigent criminal defendants).

21. *See* Pinchuk, *supra* note 17, at 706–14.

22. *See* Dalton Courson, *Limited-Scope Representation: Preparing for the COVID-19 Influx of Cases*, AM. BAR ASS'N (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/access-justice/articles/2021/winter2021-limited-scope-representation-preparing-for-the-covid-19-influx-of-cases/ [https://perma.cc/C55P-UZ6Z] (encouraging lawyers to offer limited scope representation in light of the pending influx of eviction cases given the effects of COVID–

is used to assist indigent litigants facing housing cases,[23] consumer debt actions,[24] federal civil litigation,[25] and family court matters,[26] many courts and attorneys remain ambivalent about the practice.[27] In fact, a 2017 survey identified lack of clarity around ethics obligations as the principal reason why some attorneys do not unbundle their services.[28]

This Note is structured in five parts. Part I provides background on limited scope representation.[29] Part II examines whether the limited scope attorney would have to disclose the terms of the representation — that is, that the representation is conditioned on acceptance of a reasonable settlement — to the client, court, and opposing counsel.[30] Part III addresses whether a limited scope representation structured around an agreed upon

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19); *see also* Mihir Zaveri, *After a Two-Year Dip, Evictions Accelerate in New York*, N.Y. TIMES (May 2, 2022, 1:44 PM), https://www.nytimes.com/2022/05/02/nyregion/new-york-evictions-cases.html [https://perma.cc/KG3C-4SML] (describing how housing lawyers in New York City are overburdened with eviction cases, which has caused some organizations to stop taking cases altogether).

23. *See, e.g.*, *Volunteer Lawyer for the Day Program – Housing*, N.Y.C. HOUSING CT. (June 8, 2018), https://www.nycourts.gov/courts/nyc/housing/vlfd_hsg_prospectiveattys.shtml [https://perma.cc/F4G6-QZ5K] (describing New York City's volunteer lawyer-for-a-day program).

24. *See, e.g.*, *About Claro*, CLARO: CIV. LEGAL ADVICE AND RES. OFF., http://www.claronyc.org/claronyc/default.html [https://perma.cc/7YNL-GX5S] (last visited Sept. 16, 2022).

25. *See, e.g.*, *Legal Assistance Clinic*, U.S. DIST. CT.: S. DIST. OF N.Y., https://www.nysd.uscourts.gov/attorney/legal-assistance [https://perma.cc/YUX2-498H] (last visited Aug. 23, 2022); *Pro Bono Limited–Scope Representation Pilot Program*, U.S. DIST. CT.: CENT. DIST. OF CAL., https://www.cacd.uscourts.gov/attorneys/pro-bono/pro-bono-limited-scope-representation-pilot-program [https://perma.cc/6JY4-B5BY] (last visited Sept. 16, 2022).

26. *See, e.g.*, Joel R. Brandes & Chris McDonough, *Limiting the Scope of Representation in Family Court Proceedings*, N.Y.L.J. (July 1, 2020, 10:30 AM), https://www.law.com/newyorklawjournal/2020/07/01/limiting-the-scope-of-representation-family-court-proceedings/?slreturn=20211130212909 [https://perma.cc/2EQP-RY2C].

27. *See, e.g.,* Villar v. City of New York, 540 F. Supp. 3d 437, 441 (S.D.N.Y. 2021) (denying pro se plaintiff limited scope counsel from legal aid organization founded to provide assistance to pro se litigants); Hammett v. Sherman, No. 19–CV–605, 2020 U.S. Dist. LEXIS 146155 (S.D. Cal. Aug. 13, 2020) (denying pro se plaintiff leave to hire a limited scope attorney to assist with collecting fees, despite a rule in the district explicitly allowing for limited scope representation); O.L. v. City of El Monte, No. 20–cv–00797, 2020 U.S. Dist. LEXIS 203489 (C.D. Cal. Oct. 26, 2020) (denying pro se plaintiff leave to hire a limited scope attorney to assist with taking two depositions for failure to comply with local "meet–and–confer" rule when pro se plaintiff merely emailed opposing counsel, but giving the plaintiff the ability to cure this violation).

28. AM. BAR ASS'N LEGAL SERVS. DIV., LAWYERS' USE OF AND ATTITUDES TOWARD UNBUNDLING (2017) https://create.piktochart.com/output/28644162-multi-state-survey-on-unbundled-legal-services [https://perma.cc/8D5Y-33CN].

29. *See infra* Part I.

30. *See infra* Part II.

outcome violates the client's right to settle.[31] Part IV assesses when an attorney could withdraw from the representation. Part V explores whether the structure of the limited scope representation is reasonable, and the value of limited scope representation as a whole.[32]

I. UNDERSTANDING LIMITED SCOPE REPRESENTATION

Before examining the ethics of the limited scope arrangement, it is important to explore how limited scope representation works on a day-to-day basis. This Part provides a brief introduction to the practice of limited scope representation. Section I.A defines limited scope representation. Section I.B notes the unique ethical challenges associated with limited scope representation where an appearance is made.

A. Defining Limited Scope Representation

Limited scope representation is a broad term that refers to various discrete services that lawyers provide clients.[33] Forrest Mosten, who has written extensively on the topic of limited scope representation and is one of its leading proponents,[34] described limited scope representation as providing at least one of a panoply of services: "(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court."[35] Limited scope representation can also involve limiting the time period of the representation to a specific portion of a given matter or a certain number of hours.[36] As a result, limited scope representation is also referred to as "unbundled legal services"[37] or "law à la carte."[38]

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31. *See infra* Part III.

32. *See infra* Part IV.

33. *See* Forrest S. Mosten, *Unbundling Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994).

34. *See id.*

35. *Id.* at 423.

36. *See id.*

37. *Id.* at 426.

38. *See, e.g.*, *"Law à la Carte" Conference Home – Conference Materials*, N. Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/ip/nya2j/LawALaCarte/materials.shtml [https://perma.cc/WP74-Q3KF] (last visited Sept. 16, 2022).

Lawyers in private practice and legal services[39] offer different kinds of limited scope representation.[40] Specifically, limited scope representation encompasses everything from lawyer for a day programs,[41] legal hotlines,[42] lawyers advising clients in courthouse hallways,[43] prefiling counseling,[44] and other kinds of representation.[45] One of the most discussed forms of limited scope representation is called "ghostwriting."[46] Ghostwriting is the practice of an attorney drafting pleadings or other documents for a client and providing legal advice without ever appearing on record or formally introducing herself as representing the client.[47] Not all states allow attorneys to provide ghostwriting services to clients, as doing so can insulate the ghostwriting attorney from discipline for ethics violations.[48]

In general, Model Rule (MR) 1.2(c) explicitly allows for lawyers to limit the scope of their representation.[49] However, many other rules of

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39. Legal services organizations provide limited scope representation across a wide variety of practice areas to provide access to counsel to the 90% of litigants who proceed in court without an attorney. *See* Lauren Sudeall & Darcy Meals, *Every year, millions try to navigate US courts without a lawyer*, CONVERSATION (Sept. 21, 2017, 8:36 PM), https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159#:~:text=Unrepresented,their%20opponent%20has%20a%20lawyer [https://perma.cc/2ENT-SAX8]. For example, legal services organizations provide limited scope representation in federal civil matters. *See, e.g.*, *Legal Clinic for Pro Se Litigants in S.D.N.Y.*, N. Y. LEGAL ASSISTANCE GRP., https://nylag.org/pro–se–clinic/ [https://perma.cc/UBV8-RJAF] (last visited Apr. 13, 2022). Others support litigants seeking assistance with consumer debt cases. *See, e.g.*, *About Claro*, *supra* note 24.

40. *See, e.g.*, The 1958 Lawyer, *Mellisa Grisel: Unbundled Legal Services Provide a Bright Future for Law*, AMATA (Nov. 17, 2020, 1:03 PM), https://podcastaddict.com/episode/https%3A%2F%2Fcdn.simplecast.com%2Faudio%2F8c51679e-a70c-4c82-a6e0-b1119ed0f694%2Fepisodes%2F56c7cb5e-e18e-4dde-a6d5-03f75b7d3f96%2Faudio%2F5f0c4d86-df52-4d02-b53b-7cd88f93db14%2Fdefault_tc.mp3%3Faid%3Drss_feed%26feed%3DLBoIdpBA&podcastId=2978771 [https://perma.cc/9EYK-C6EE]; Margaret Martin Berry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1883–88 (1999) (describing pro se clinics).

41. *See generally* Mandilk, *supra* note 4.

42. *See Legal Hotline*, CITY BAR JUST. CTR., https://www.citybarjusticecenter.org/legal–hotline/ [https://perma.cc/P6CF-VN4F] (last visited Sept. 28, 2022).

43. *See* Erica L. Fox, Note, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 85 (1996).

44. *See Legal Clinic for Pro Se Litigants in S.D.N.Y.*, *supra* note 39.

45. *See generally* AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 18–40 (2014) [hereinafter HANDBOOK ON LIMITED SCOPE ASSISTANCE].

46. *See* Jona Goldschmidt, *Ghosting: It's Time To Find Uniformity on Ghostwriting*, 102 JUDICATURE 37, 37 (2018).

47. *See id.* at 37.

48. *See id.* at 40 (noting that federal courts in Colorado prohibit ghostwriting).

49. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

professional conduct do not reflect how a limited representation might change a lawyer's ethical obligations under those rules.[50] For example, limited scope representation implicates MR 1.1's competence requirement;[51] MR 1.3's diligence requirement;[52] MR 1.6's confidentiality requirements;[53] MR 1.16's guidance on withdrawal;[54] MR 3.3's candor concerns;[55] MR 6.5's provisions regarding limited scope representation provided by legal aid organizations;[56] and MR 8.4's rules regarding misconduct.[57] Because each of these rules was written on the assumption that a lawyer would provide full scope representation, it is unclear how or whether a lawyer's obligations under these rules changes in the context of limited scope representation.[58]

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50. *See* Rothermich, *supra* note 10, at 2695. One exception is MR 6.5, which explicitly allows for lawyers to provide "short-term limited legal services" to clients in the context of nonprofit and court-sponsored legal services programs. *See* MODEL RULES OF PRO. CONDUCT r. 6.5 (AM. BAR ASS'N 2020).

51. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020). MR 1.1 requires that an attorney provide "competent representation" to the client. *See id.* It is not clear whether the competence requirements apply only to the discrete service that the lawyer provides, or if the competence requirements should account for other portions of a client's case that the attorney has not agreed to work on. *See id.*

52. *See id.* r. 1.3. MR 1.3 requires that an attorney "act with reasonable diligence . . . in representing a client." *See id.* Much like the competence requirement, it is unclear whether an attorney's diligence obligations require her to research other areas of the law that are outside of the limited representation, in order to clearly draw a line between what matters the lawyer is working on and those outside the scope of representation. *See id.*

53. *See id.* r. 1.6. MR 1.6 states that a lawyer must not disclose information "relating to the representation of a client unless the client gives informed consent." *See id.* It is not clear whether the terms of the limited scope representation would fall under the kind of information that the lawyer should not reveal. *See id.*

54. *See id*. r. 1.16. MR 1.16 defines when a lawyer may withdraw from the representation of a client. *See id.* It is not clear whether a prior agreement to limit the scope of representation would fall under one of the acceptable reasons for attorney withdrawal. *See id.* One scholar examining this problem has termed this the "limited scope lottery." *See* Pinchuk, *supra* note 17.

55. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2020). MR 3.3(a)(1) states that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." *Id.* It is not clear whether failing to disclose the terms of a representation would violate this rule.

56. *See id.* r. 6.5.

57. *See id.* r. 8.4. MR 8.4 states that a lawyer must not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or] engage in conduct that is prejudicial to the administration of justice." *Id.* It is not clear if a court would find that the hypothetical limited scope representation violates this Rule.

58. *See* Pinchuk, *supra* note 17, at 710.

B. What is Unique about Limited Scope Representation Where an Appearance is Made?

A key distinction within limited scope representation is whether the attorney makes a notice of appearance for the client on the record.[59] When the attorney makes a notice of appearance for a pro se litigant, the litigant's chances of obtaining a favorable outcome in a case greatly increase.[60] At the same time, the responsibilities of both the client and attorney also increase. For example, a client with a limited scope attorney needs to be aware of what matters are outside the scope of the representation, as the client is responsible for litigating those matters.[61] Additionally, a client needs to be aware of what she is giving up by not receiving full scope representation, if it was ever a possibility that she might be fully represented.[62] Furthermore, when an attorney makes a notice of appearance for a limited scope client, there are new potential violations of rules of professional conduct to be resolved. [63] Finally, relative to offering limited scope representation via practices like ghostwriting where the attorney does not necessarily make a notice of appearance, sanctioning an attorney for ethics violations may be easier when a notice of appearance is made.[64]

Concerns about the ethics of limited scope representation when an appearance is made can be so substantial that some courts have cited them to deny indigent individuals legal representation.[65] In *Villar v. City of New York*, Judge Rakoff ruled that a limited scope attorney who had been assisting the client in an employment discrimination case through a pro se clinic could not make a notice of appearance and represent that client for the purposes of settlement.[66] The court used a balancing test to find that the risks of a limited scope attorney who made a notice of appearance representing a

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59. *See id.* at 719–23. Examples of instances where attorneys make a notice of appearance that discloses the fact of limited scope representation include lawyer-for-a-day programs. *See also supra* notes 41–45, and accompanying text.

60. *See* Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 337 (2002).

61. *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998).

62. *See* Dora Galactos, *Letter to the Editor: Do Debtors Really Need a Lawyer When Sued?*, https://news.law.fordham.edu/blog/2022/02/01/do-debtors-really-need-a-lawyer-when-sued/ [https://perma.cc/YV5T-C2MG] (last visited Aug. 5, 2022) (advocating that indigent debtors litigating their debts should have full legal representation, as opposed to receiving advice from individuals who have not been credentialled).

63. *See* Villar v. City of New York, 540 F. Supp. 3d 437, 440 (S.D.N.Y. 2021) (discussing novel ethical issues raised in limited scope representation where an appearance is made).

64. *See id.*

65. *See id.*

66. *See id.* at 440–41.

client in that case outweighed the benefits of the representation.[67] Judge Rakoff held that traditional, full scope representation "sets clear expectations for all involved regarding the durability of the attorney-client relationship" that limited scope representation as described in the limited scope lawyer's notice of appearance in *Villar* did not.[68] Instead, Judge Rakoff wrote that "one of the greatest risks of [limited scope representation] is confusion."[69] To resolve this uncertainty, the court found that describing the relationship "with the utmost clarity" in a limited scope notice of appearance was required.[70] This includes specific disclosures about the timeline of the representation and the kinds of services the limited scope attorney would provide, as opposed to simply disclosing that the representation was limited in scope.[71]

Judge Rakoff's opinion exemplifies the different concerns that arise from limited scope assistance where an appearance is made as compared to other kinds of limited scope assistance. First, courts can cite lack of clarity around this practice to deny an individual an attorney.[72] As a result, an indigent plaintiff who needed legal representation was precluded from receiving services. Second, the exact nature of what a limited scope attorney must disclose to the court is unclear.[73] Therefore, even though the kind of limited scope representation contemplated in *Villar* is different from that proposed for the limited scope lawyer described in the hypothetical, *Villar* raises the question of the extent to which a court needs to know the terms of a limited scope relationship. As a result, *Villar* also exemplifies that clarity around the nature, scope, and ethics of limited scope representation is needed.

II. WHEN DOES AN ATTORNEY HAVE TO DISCLOSE THE LIMITATION ON REPRESENTATION?

This Part asks whether an attorney would need to disclose the terms of the limited scope nature of her representation to different parties, and if so, when this disclosure should happen. The Model Rules do not directly answer this question, and so this Part examines how different obligations under the Model Rules inform this responsibility. Section II.A examines when the attorney would need to tell her client. Section II.B examines when the attorney would need to tell the court.

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67. *See id.*
68. *See Villar*, 540 F. Supp. 3d at 440.
69. *Id.*
70. *See id.*
71. *See id.* at 441.
72. *See id.* at 440–41.
73. *See Villar*, 540 F. Supp. 3d at 440–41.

A. To A Client?

In practice, a lawyer looking to offer limited scope representation has two options regarding when to disclose the limitation to the client. The first is to disclose the limitation to the client at the outset of the representation.[74] The second is to disclose the limitation during the representation.[75] This could happen at any point during the representation, including before or after the client receives a reasonable settlement offer. Though the latter option may provide the lawyer with more discretion to determine whether to offer the client limited or full representation, attorneys acting with this discretion are also bound by the rules of professional conduct. However, none of these rules explicitly answer the question of whether an attorney making an appearance for the client would need to disclose the fact that she is providing limited scope representation.

i. Model Rule 1.2(c)'s Informed Consent Requirement

MR 1.2(c), which addresses when a lawyer may limit the scope of representation, favors early disclosure. The text of that rule states that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[76] The comments to MR 1.2(c) indicate that a limited scope representation "does not exempt a lawyer from the duty to provide competent representation" as defined in MR 1.1.[77] As a result, MR 1.2(c) places three constraints on limited scope representation: the limited services must be competent;[78] that limit must be reasonable;[79] and the client must give informed consent to those limitations.[80]

The requirement that a client give informed consent to the limitation on representation implicates the attorney's disclosure requirements.[81] MR

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74. *See* Ariz. Jud. Adv. Op. 05-06, Limited Scope Representation; Candor To Tribunal; Fees, 2005 WL 6715943, at *3 (2005) (noting that that limiting the scope of representation at the beginning of the representation is permissible).

75. *See id.* at *3–*4.

76. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2020).

77. *See id.* r. 1.2 cmt. 7.

78. *See id.*

79. *See id.*

80. *See id.* The Model Rules for Lawyer Disciplinary Enforcement suggest that violations of the Model Rules be proven using a clear and convincing evidence standard, which this Note adopts. *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T R. 18(C) (AM. BAR ASS'N 2020).

81. At its best, the informed consent standard provides clients more information before giving consent by requiring that lawyers disclose more information to clients. *See* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PENN. L. REV. 41, 50 (1979). At its worst, the informed consent model still fails to consider the particularities of a client's circumstances and serves as an ineffective measure of

1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[82] In order to meet the informed consent requirement the lawyer must therefore explain to the client what the proposed course of conduct is, which in this case would mean explaining the limited-scope nature of the representation. As a result, MR 1.2(c)'s informed consent requirement obligates the attorney to disclose to the client the limitation on representation.[83]

Nothing in the MR explicitly precludes the lawyer from obtaining informed consent from the client either at the outset of the representation or immediately before withdrawing from the representation. In fact, ethics committees have written that limiting the scope of representation after beginning the representation is permissible so long as doing so does not violate any other ethical rules or laws.[84]

To resolve the question of when a disclosure must happen, a court could look to the validity of the client's informed consent to the limitation. In *In re Seare*, the Bankruptcy Court of Nevada used a two-part test to find that a fee-paying client who had declared bankruptcy had given informed consent to limited scope representation.[85] First, the court examined whether the lawyer disclosed the required information to the client.[86] The necessary disclosures included the adequate and material risks of limited scope representation in general, and those particularly relevant to the case at hand.[87] The court also found that the lawyer needed to disclose the reasonably available alternatives to the limited scope representation to the

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addressing the power disparity between lawyer and client. *See* Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346, 386–93 (1999). Despite the limitations of seeking informed consent, the Model Rules situate informed consent at the center of limited scope representation.

82. *See* MODEL RULES OF PRO. CONDUCT r. 1.0 (AM. BAR ASS'N 2020).

83. *See id.*; *id.* r. 1.2(c).

84. *See* Ariz. Jud. Adv. Op. 05-06, *supra* note 74.

85. *See* In re Seare, 493 B.R. 158, 197 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff'd,* 515 B.R. 599 (B.A.P. 9th Cir. 2014) (citing Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 166, 225 (2012)).

86. *See id.* at 203.

87. *See id.* Some of the risks of limited scope representation include the fact that the litigant may be confused about what issues are outside of the limited scope representation, may not fully understand the impact of how matters handled by the limited scope lawyer can affect issues the litigant is responsible for, and relatedly, the litigant's ability to prepare for matters he is responsible for that are outside the scope of the limited scope lawyer's representation during the representation. *See* Colo. Bar Ass'n Ethics Comm., *supra* note 61.

client.[88] Key to the court's holding was that the client understand that she was giving up alternative options — including the use of self-help resources — when accepting a limitation on representation.[89]

Second, the court held that the consent needed to be "valid."[90] At the center of this inquiry was whether the consent reflected a client's understanding of the disclosures and the nature of the agreement.[91] The court held that if there were "sufficient indicia of understanding," then the consent would be valid.[92] This was not a black and white inquiry.[93] Instead, the court found that consent was presumed to be valid in the "absence of any red flags," such as client incompetence.[94] The court also held that for complicated matters such as bankruptcy, a signed retainer agreement would not suffice to show valid consent.[95] This is because a retainer does not show a "link between the excluded services and the client's understanding of the import of excluding those particular services in relation to the client's particular circumstance."[96] However, other courts disagree and have found that a signed retainer that details the limitations on representation is sufficient.[97]

Limited scope lawyers may struggle to meet *Seare's* two-part test if the lawyer attempts to obtain informed consent to limit the representation when the representation is already ongoing. In that context, limiting the scope of representation could be seen simply as squeezing an indigent client who has no alternative but to likely lose the case as a pro se litigant. Put differently, it could be a "red flag" that precludes a finding of valid informed consent.[98] In this setting, the work that limited scope representation would do to increase access to justice could be limited.[99] Alternatively, the client could simply refuse to consent to the limitation, which may lead to the attorney moving to withdraw.[100]

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88. In re Seare, 493 B.R. at 197.
89. *See id.*at 186 n.20.
90. *See id.* at 203.
91. *See id.* at 202.
92. *See id.*
93. In re Seare, 493 B.R. at 203.
94. *Id.* at 202.
95. *Id.*
96. *Id.*
97. FIA Card Servs., N.A. v. Pichette, 116 A.3d 770, 784 (R.I. 2015).
98. *See* In re Seare, 493 B.R. at 202.
99. *See* Rhode, *supra* note 9, at 1251 (discussing the access to justice benefits of limited scope representation).
100. *See infra* Section II.C.

ii. Model Rule 8.4(c)'s Prohibition on Dishonest, Fraudulent, or Deceitful Conduct

Other rules also favor disclosing to a client early in the representation. For example, MR 8.4 prohibits conduct that is damaging to the integrity of the legal profession.[101] This includes lying to a client.[102] MR 8.4(c) also prohibits an attorney from engaging in "dishonesty, fraud, deceit or misrepresentation."[103] The Model Rules define fraud as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[104] Otherwise, the kinds of conduct MR 8.4 prohibits are not defined in the Model Rules.[105] Nonetheless, ethics committees have noted that entering into a limited scope representation on its face is not dishonest, fraudulent, or deceitful behavior.[106]

Courts have interpreted the conduct MR 8.4 prohibits broadly. For example, the Maryland Court of Appeals has held that dishonesty refers to "conduct evincing a lack of honesty, probity or integrity of principle; [a] lack of fairness and straightforwardness."[107] Under this broad definition, limiting the scope of the representation during the course of the representation and specifically immediately before or after receiving a reasonable settlement could be construed as unfair to the client.[108] This is because the client proceeded on the assumption that the lawyer would provide full representation for the duration of the case.

A key question for courts determining if a lawyer has violated MR 8.4(c) is the lawyer's intent.[109] Some courts have found that understanding a lawyer's intent is either a relevant or required inquiry,[110] while others have found that a lawyer's intent does not need to be considered when adjudicating a violation of the state equivalent of MR 8.4(c).[111] In cases where intent is not considered, courts examine the effect of the lawyer's

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101. *See, e.g.*, RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4 (2021–22 ed.).

102. *See 8.4 Misconduct*, ANN. MOD. RULES PROF. COND. § 8.4.

103. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR. ASS'N 2020).

104. *Id.* r. 1.0(d).

105. *See 8.4 Misconduct*, *supra* note 102.

106. Pa. Eth. Op. 2011-100, Representing Clients in Limited Scope Engagements, 2011 WL 7574467, at *8 (2011).

107. Att'y Grievance Comm'n of Md. v. Thomas, 440 Md. 523, 555 (2014) (citations omitted).

108. *See supra* Section II.A.

109. *See 8.4 Misconduct*, *supra* note 102.

110. *See, e.g.*, Attorney Grievance Comm'n of Md. v. Moore, 451 Md. 55, 86 (2017).

111. *See 8.4 Misconduct*, *supra* note 102.

conduct on the client.[112] In these jurisdictions, if a lawyer does not intend to limit the scope of their representation at the outset of representation but does so midway through the representation, the lawyer may be found to have violated MR 8.4(c) if their conduct is considered unfair or deceitful.

When interpreting conduct prohibited under MR 8.4(c), courts have held that a lawyer may not mislead or lie to a client about a particular aspect of the representation.[113] Therefore, if a lawyer were to deliberately withhold her intent to limit the scope of the representation partway through, or lie to her client about the intent or possibility of limiting the scope of representation, the lawyer could violate MR 8.4(c). To this end, there may be issues of proof, which may be addressed by a recommendation from the American Bar Association (ABA) to include the terms of representation in a written retainer in advance of beginning the representation.[114]

Nonetheless, as an independent basis for attorney discipline, MR 8.4(c) applies in few circumstances. This is because courts generally consider violations of 8.4(c) in scenarios where there has been "particularly egregious conduct."[115] For example, the Supreme Court of Missouri found that a lawyer's omissions that prolonged an investigation into police misconduct have been found to violate MR 8.4(c).[116] Conversely, being convicted of certain crimes — such as a DUI,[117] or the conviction of certain misdemeanors[118] — does not in itself constitute a violation of state analogues of MR 8.4.

iii. Model Rule 8.4(d)'s Prohibition on Conduct Prejudicial to the Administration of Justice

MR 8.4(d)'s prohibition on allowing lawyers to engage in "conduct that is prejudicial to the administration of justice" weighs in favor of early disclosure.[119] Though the Model Rules do not define what kind of conduct

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112. *See, e.g.,* State ex rel. Couns. for Discipline of Neb. Sup. Ct. v. Hanson, 305 Neb. 566, 577 (2020).

113. *See 8.4 Misconduct*, *supra* note 102.

114. *See* AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF–REPRESENTED LITIGANTS 5 (2014) [hereinafter AN ANALYSIS OF RULES].

115. Matter of Robertelli, 248 N.J. 293, 317 (2021) (citations omitted).

116. *See* In re Schuessler, 578 S.W.3d 762, 775 (Mo. 2019).

117. *See* Iowa Supreme Ct. Att'y Disciplinary Bd. v. Templeton, 784 N.W.2d 761, 768 (Iowa 2010) ("[T]he mere act of committing a crime does not constitute a violation of this rule because the rule does not simply prohibit the doing of an act.").

118. *See* In re Michaels, 2013 WL 3017362, at *2 (Del. 2013) (finding that lawyer's misdemeanor conviction for offensive touching, which involved him grabbing his minor daughter's ponytail and refusing to let her go to keep her from running away from home had "no relationship to [his] fitness to practice law").

119. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR. ASS'N 2021).

is covered under this prohibition, courts have offered definitions rooted in understandings of justice held by those outside of the profession.[120] Specifically, the Maryland Court of Appeals has held that conduct banned under the state's equivalent of MR 8.4(d) "is that which reflects negatively on the legal profession and sets a bad example for the public at large."[121] For example, making repeated misrepresentation to the court or opposing counsel violates the rule.[122]

MR 8.4(d) does not have a materiality requirement, meaning that the conduct does not have to reach a certain threshold or affect a client's representation in anyway to violate the Rule.[123] Furthermore, violations of MR 8.4 are determined on a case-by-case inquiry. Nonetheless, courts use an objective standard to determine if a lawyer's conduct would "negatively impact a reasonable member of the public's perception of the legal profession" and therefore violate MR 8.4(d).[124]

A court may find that limiting the scope of representation shortly before or after giving a reasonable settlement offer may violate MR 8.4. Doing so could be seen as squeezing or abandoning the client during a key moment of the representation, which could be seen as prejudicial to the administration of justice.

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Beyond disclosing at the outset of the representation, one viable interpretation of the informed consent requirement would be to have clients give informed consent to the limited representation throughout the duration of the representation.[125] Specifically, by requiring a lawyer to repeatedly explain the circumstances of the representation to the client, the concern that the consent would not be "valid" may be mollified, as the consent would be refreshed at the beginning of every meeting or encounter. If the client no longer consents to the representation, the lawyer may be able to withdraw from the case with the client's consent.[126] Furthermore, lawyers could memorialize the terms of the limited scope representation in a written

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120. *See* Att'y Grievance Comm'n of Md. V. Trye, 444 Md. 201, 223 (Md. 2015).

121. *See id.*

122. *Id.*

123. *See* Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 311 (2004).

124. Att'y Grievance Comm'n of Md. V. Maldonado, 203 A.3d 841, 862 (Md. 2019) (quoting Att'y Grievance Comm'n v. Basinger, 109 A.3d 1165, 1176 (Md. 2015)).

125. *See generally* Rashmi Ashish Kadam, *Informed Consent Process: A Step Further Towards Making It Meaningful!*, 8 PERSPECT. CLIN. RES. 107, 107–12, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5543760/ [https ://perma.cc/G3EP-W4GN].

126. *See infra* Section II.C.

retainer agreement to ensure clarity and a historical record of the agreement.[127]

B. To the Court?

Separate from obligations to the client, the lawyer must also determine when to disclose the terms of limitation to the court. Like in the context of disclosing the limitation to the client, the lawyer could tell the court at the outset, or immediately prior to withdrawing from the case. The same authorities that shape the client disclosure analysis also inform, but do not explicitly answer, whether or when a lawyer must disclose the nature of a limitation to the court. As a result, some rules which apply in the context of attorney-client disclosure also apply to attorney-court disclosure obligations are not discussed again by this Note.[128]

i. Comparison to Disclosure in the Context of Ghostwriting

The question of whether and when a lawyer must disclose the terms of the representation is comparable to the inquiry required in the context of ghostwriting.[129] Ghostwriting is a kind of limited scope representation where an attorney drafts pleadings or other court documents for a pro se litigant.[130] This kind of representation is limited scope because, in the context of ghostwriting, an attorney does not necessarily make a notice of appearance on the record and does not provide the full slate of services.[131]

Courts disagree about whether an attorney who is ghostwriting court documents for a client must disclose the fact of her representation. Some courts do not require any disclosure.[132] Other courts require full disclosure, effectively banning the practice of ghostwriting.[133] Finally, some courts require disclosure if material assistance has been provided.[134]

There is debate about who benefits from the practice of ghostwriting.[135] Clients may have a higher likelihood of success with the assistance of an attorney writing the pleadings. Courts may benefit as it allows them to adjudicate cases on the merits.[136] Opposing counsel may also benefit for

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127. *See* AN ANALYSIS OF RULES, *supra* note 114.
128. *See supra* Subsection II.A.i.
129. *See* Rothermich, *supra* note 10, at 2689.
130. *See id.* at 2692.
131. *See id.*
132. *See* Pa. Eth. Op. 2011-100, *supra* note 106, at *10.
133. *See id.*
134. *See id.*
135. *See* Rothermich, *supra* note 10, at 2696–97.
136. *See id.* at 2697.

comparable reasons.[137] At the same time, there are concerns about who is protecting a pro se litigant from getting taken advantage of in a ghostwriting relationship.[138]

Many of ghostwriting's critics cite the lack of disclosure of legal advice as a central reason for banning the practice.[139] These concerns do not apply in the case of the limited scope lawyer in the hypothetical representation. For example, some are still concerned that clients whose complaints are ghostwritten will have complaints construed under the more liberal pro se pleading standards, resulting in unequal outcomes.[140] In order to remedy any potential inequities that may come from not having an attorney, courts view pro se pleadings with greater deference to the litigant, who presumably is not proceeding with legal assistance.[141] Relaxing the procedural rules for pro se litigants reaffirms the view that the presence or absence of a lawyer in a given case should not influence the legitimacy of a claim.[142] However the claim that ghostwriting is more favorable to pro se litigants under these more liberal pleading standards is unfounded because it is usually easy to distinguish ghostwritten pleadings from pro se authored complaints[143] Thus, the already low risk that courts would apply the liberal pleading standard is further reduced.[144] This concern regarding application of the liberal standard does not carry to the context where the attorney makes a notice of appearance, because the attorney's presence is already known.

Second, critics are concerned about ghostwriting because an undisclosed attorney who provides assistance may avoid sanctions. [145] This concerns is also unfounded, as the attorney or the pro se litigant would still be subject to sanctions under Federal Rules of Civil Procedure Rule 11.[146] Regardless, this concern again is not shared in the context where a notice of appearance is made, as the court would know the identity of the limited scope attorney in question.[147]

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137. *See id.* at 2701.

138. *See* Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970)

139. *See, e.g.*, Goldschmidt, *supra* note 10, at 1162–65.

140. *See* Goldschmidt, *supra* note 10, at 1155–66; Rothermich, *supra* note 10, at 2704–05; *see also* Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159. U. PENN. L. REV. 585, 604–07 (2011).

141. *See* Schneider, *supra* note 140, at 604–07.

142. *See* Rothermich, *supra* note 10, at 2711.

143. *See* Goldschmidt, *supra* note 10, at 1157.

144. *See id.* at 1178.

145. *See* Rothermich*, supra* note 10, at 2716–20.

146. *See* Goldschmidt, *supra* note 10, at 1169–76. Rule 11 allows the court to sanction an attorney or firm who has made a misrepresentation to the court, in addition to other conduct. *See* FED. R. CIV. P. 11.

147. *See, e.g.*, Villar v. City of New York, 540 F. Supp. 3d 437 (S.D.N.Y. 2021).

A third and similarly moot concern involves clarifying for opposing counsel who to contact or serve papers on – the attorney or the litigant – in the course of litigation.[148] Concerns surrounding communication may be warranted if the limited scope attorney withdraws from the representation. Confusion around who to contact while an attorney is in the process of withdrawal, however, likely will be mediated by a jurisdiction's rules governing the circumstances of withdrawal.[149]

In conclusion, because the concerns motivating the need to disclose in the context of ghostwriting do not apply to the limited scope lawyer in the hypothetical, citing disclosure requirements in the context of ghostwriting should not be persuasive.

ii. Obligations Under the Model Rules

The Model Rules also inform an attorney's obligation to disclose the limited scope representation to the court. Model Rule 3.3 prohibits an attorney from knowingly making a "false statement of fact or law to a tribunal," and imposes a requirement of candor to the court. [150] The comments to MR 3.3 note that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."[151] Nonetheless, neither MR 3.3 nor the comments to the rule provide any guidance specifically about limited scope representation, or obligations to disclose the terms of representation.[152] Courts have found that omitting material information that could impact a court's decision in a case is a violation of MR 3.3.[153] As a result, it is unclear whether the attorney making the limited scope representation would violate MR 3.3 if she did not tell the court about the limited scope nature of the representation.

In most states, violating the state's analogue of MR 3.3 requires that the false statement or omission be material.[154] A material fact is one that would affect the judicial process, or is "significant" or "essential."[155] In a related ethics opinion, the ABA has also noted that a material statement is one that "that the lawyer knows is misleading, whether or not it is intended to

148. *See, e.g.*, A.B.A. Comm. On Ethics & Pro. Resp., Formal Op. 15-472 (2015) (describing the challenges inherent in communication with a client receiving limited scope representation).

149. *See infra* Part III.

150. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2020).

151. *3.3 Candor Toward the Tribunal*, ANN. MOD. RULES PROF. COND. § 3.3 cmt. 3.

152. *See* Goldschmidt, *supra* note 10, at 1161–62.

153. *See* Domain Prot., L.L.C. v. Sea Wasp, L.L.C., 23 F.4th 529, 543 (5th Cir. 2022).

154. *See* Richmond, *supra* note 123, at 310.

155. *See id.*

mislead."[156] That opinion, which examines obligations under MR 3.3 in the context of whether a lawyer must disclose adverse information to a regulatory agency, also finds that the candor obligations supersede any other ethical obligations the lawyer has.[157] In the context of limited scope lawyer in the hypothetical, however, the limited-scope nature of the representation would likely not rise to the level of materiality, as it would not have any impact on the substance or procedures of the court prior to the limit being reached and the lawyer withdrawing from the case.

MR 1.6 tempers MR 3.3's candor requirement. MR 1.6 states that an attorney should not disclose "information relating to the representation of a client" without the client's informed consent. [158] In the context of limited scope representation, it is possible that the client may not want the court to be aware of the limited scope nature of the representation for strategic reasons, such as to .[159] MR 1.6 also states that an attorney may disclose information regarding their representation of a client if the attorney is "impliedly authorized in order to carry out the representation" or is otherwise required by MR 1.6.[160]

Commentators disagree about how to weigh competing obligations of confidentiality under MR 1.6 and candor under MR 3.3. The ABA has indicated that MR 3.3's candor requirement would win out over any conflicting obligations under MR 1.6. This is because MR 3.3's obligation

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156. *See* A.B.A. Comm. On Ethics & Pro. Resp., Formal Op. 93-375 (1993).

157. *See id.*

158. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).

159. *See* Pa. Eth. Op. 2011-100, *supra* note 106 ("Entering into a limited representation is decidedly not dishonest, fraudulent or deceitful and so long as one does not represent to anyone affirmatively that a lawyer is not assisting the client, there is no reason why a failure to disclose such assistance is inherently problematic. Indeed, quite the opposite might be true. The client may not wish that the court, or, for that matter, anyone else know of the relationship . . . ."). Another reason why the client may not want to disclose the limited scope nature of the relationship is because a client may want to settle the case while the litigant is still represented. *See* Jona Goldschmidt, *Judicial Ethics and Assistance to Self-Represented Litigants*, 28 JUST. SYS. J. 324, 325–26 (2007). Furthermore, the settlement value of a given case is at least in part determined on the amount of money that the opposing party determines they will have to spend in litigation. *See* Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 4 (1991). Therefore, if the opposing counsel knows that costs will decrease after a settlement offer is made that the limited scope attorney recommends, then the attorney may low-ball the client on the initial settlement. At the very least, any settlement offer made after the litigant was no longer represented would not be likely to include the calculation of attorney's fees, because pro se litigants do not receive fees for their work. *See* Kay v. Ehrler, 499 U.S. 432, 437–38 (1991) (finding pro se litigants should not be awarded attorney's fees); *but see* Jeremy D. Spector, *Awarding Attorney's Fees to Pro Se Litigants Under Rule 11*, 95 MICH. L. REV. 2308, 2310–30 (1997) (suggesting that pro se litigants should receive attorney's fees in the Rule 11 context).

160. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020).

to candor is unqualified in the rules.[161] To that end, state bar ethics committees haven taken both positions when answering this question.[162]

Legal ethicist Geoffrey Hazard resolves this tension by reading MR 3.3's candor requirement as the superior obligation, and that others – like those to a client – must be forsaken in favor of a lawyer's obligation to tell the truth to the court.[163] This is because not elevating this requirement damages the process of the court, which relies on truth telling.[164] Furthermore, Hazard notes that the alternative approach – which finds the obligation to client confidentiality superior – does not have a limiting principle.[165] On Hazard's reading, making the client's concerns paramount would effectively give a lawyer the license to "become a 'hired gun' and simply assassinate inconvenient opposing witnesses or bribe everyone in sight."[166]

An alternative approach places the obligation to the client above all other competing duties. This view, argued by legal ethicist Monroe Freedman, reads MR 1.6 as a rule that preserves the autonomy and dignity of a client which should not be sacrificed at any cost.[167] In Freedman's view, disclosing confidential information to the court preempts the client's judgement by assuming that the client wants the lawyer to maximize the client's legal position apart from non-legal considerations.[168] Similarly, if the lawyer no longer protects her client, this too may damage the court's legitimacy because clients seeking dispute resolution may no longer turn to the courts for advice.

Courts have generally followed Hazard's position and found that obligations of candor under MR 3.3 outweigh confidentiality protections of MR 1.6.[169] Importantly, however, courts have only given out limited punishment in cases where attorneys have protected their client's

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161. *See id.* r. 3.3. An A.B.A. ethics opinion makes a comparable distinction in the context of comparing Model Rule 3.3 and Model Rule 4.1(b), which discusses truthfulness in statements to others. *See* A.B.A. Comm. On Ethics & Pro. Resp., Formal Op. 07-446 (2007).

162. *See* Los Angeles Cnty. Bar Ass'n Pro. Resp. and Ethics Comm. Formal Op. 502 (1999); Ariz. Jud. Adv. Op. 05-06, *supra* note 74, at *8–9.

163. *See* GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING §32.02 32–4 (4th ed., Supp. 2019).

164. *See id.* at 32–6.

165. *Id.* at 32–5.

166. *Id.*

167. Monroe H. Freedman, *Client–Centered Lawyering–What it Isn't*, 40 HOFSTRA L. REV. 349, 353–54 (2011).

168. *Id.* at 350–51.

169. *See* In re Scahill, 767 N.E.2d 976, 981 (Ind. 2002) (finding that an attorney's obligation under MR 3.3 overrode the attorney's confidentiality obligations under MR 1.6, but merely admonishing the attorney for protecting the client's confidentiality in violation of MR 3.3); *see also* People v. Casey, 948 P.2d 1014, 1016 (Colo. 1997) (finding that obligations under MR 3.3 superseded obligations under MR 1.6).

confidentiality.[170] As a result, even a court-centered view can be read as not necessarily encouraging the lawyer to reveal this information, as doing so would not yield severe punishment.

However, MR 4.1(a) states that a lawyer shall not "make a false statement of material fact or law to a third person."[171] Comments to MR 4.1 state that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts."[172] However, statements that are "partially true but misleading" can be the equivalent of false statements that are violations of the MR 4.1.[173] Therefore, if a lawyer were to be asked point blank by a court if her representation was limited in scope, the lawyer might be able to claim this information as privileged and refuse to disclose. Failure to make this disclosure, however, might have other ramifications for the lawyer in question, specifically by limiting the lawyer's ability to withdraw from the case.[174]

iii. The Court's Inherent Authority to Require Disclosure

Aside from the Model Rules' obligations regarding truthfulness and disclosure, other authorities exist that could require a limited scope attorney to disclose the terms of her representation.[175] Courts possess the equitable power over their own procedures to generally prevent abuses, misuse, and injustice.[176] A court might also draw upon this inherent authority and require an attorney to disclose the nature of the limited scope representation. The Supreme Court has commented that these powers are essential and inherent to the organization of courts.[177]

The court's inherent power over its own cases may have been at work in Judge Rakoff's ruling in *Villar*. In that case, Judge Rakoff denied an indigent litigant limited scope counsel because it was not clear how long the limited scope counsel would represent the client.[178] Though the opinion did not mention the court's inherent power to deny this representation or mandate disclosure of the terms of representation, the court did note that this kind of

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170. *See* In re Scahill, 767 N.E.2d at 981.

171. *See* MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR. ASS'N 2020).

172. *See id.* at r. 4.1 cmt. 1.

173. *See id.*

174. *See infra* Part III.

175. *See* Richmond, *supra* note 123, at 305.

176. *See, e.g.*, Gumbel v. Pitkin, 124 U.S. 131 (1888); Covell v. Heyman, 111 U.S. 176 (1884); Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866).

177. *See* Eberly v. Moore, 65 U.S. (24 How.) 147, 158 (1861).

178. *See* Villar v. City of New York, 540 F. Supp. 3d 437, 441–41 (S.D.N.Y. 2021).

representation differed from what lawyers traditionally offered.[179] In the context of the limited scope lawyer in the hypothetical, therefore, if a court required the lawyer to disclose this information, she would have to make this disclosure. Such a disclosure, however, might be able to be made ex parte.

iv. Could Disclosure to a Court be Done Ex Parte?

In the case of the attorney needing to disclose the terms of the limited scope representation to the court, the attorney may be able to make the necessary disclosure ex parte to the judge. Ex parte proceedings are communications where the other party in a pending matter is not present.[180] MR 3.5(b) states that lawyers are only allowed to communicate ex parte with a judge when authorized by law or court order.[181] While ex parte communications are often thought of as a tool in the context of criminal proceedings to oversee the disclosure of evidence, to file temporary restraining orders, or for scheduling reasons, there is relatively little guidance from the Model Rules on what matters can and cannot be discussed in an ex parte proceeding.[182] As a result, they provide a potential option for courts to be more accommodating for limited scope representation.

The key question is whether the limited scope nature of the representation is the kind of information that could be disclosed in an ex parte proceeding.[183] Separate from the Model Rules, Rule 2.9 of the Model Rules of Judicial Conduct lays out a number of circumstances where ex parte communications are appropriate.[184] These include when these discussions

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179. *See id.* at 439 ("Traditionally, federal courts have required that when an attorney appears on behalf of a client, that attorney must represent the client in all respects until judgment, unless relieved by the Court.").

180. *See Ex parte* BLACK'S LAW DICTIONARY (11th ed. 2019).

181. *See* MODEL RULES OF PRO. CONDUCT r. 3.5(b) (AM. BAR ASS'N 2020) ("A lawyer shall not . . . communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.").

182. The only example of an ex parte proceeding given in the Comment is an application for a temporary restraining order. *See, e.g.*, In re Malmin, 895 P.2d 1217 (Idaho 1995) (attorney disciplined for failure to inform magistrate of settlement reached in allied proceeding); Comm. on Pro. Ethics & Conduct v. Postma, 430 N.W.2d 387, 391 (Iowa 1988) (attorney disciplined for presenting ex parte application for order transferring funds without disclosure of ongoing controversy over entitlement). Comments on the draft rules of professional conduct that govern ex parte proceedings in the early in 1980s indicate that the primary focus of the rule was on applications for temporary emergency relief, such as a temporary restraining order. *See* N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2019–1 (2019).

183. *See* State v. Schlienz, 774 N.W.2d 361, 367 (Minn. 2009) (evaluating the nature of ex parte discussions by determining whether the substance of the discussion was appropriate for ex parte discussion).

184. MODEL RULES OF JUDICIAL CONDUCT r. 2.9(A) (AM. BAR ASS'N 2020).

are authorized by law,[185] to assist with settlement as agreed upon by the parties,[186] or to obtain the advice of a disinterested expert in the hearings.[187] Ex parte communication is also authorized "for scheduling, administrative, or emergency purposes, which do[] not address substantive matters."[188] Prior to allowing ex parte communication, the judge must have reason to find "that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication"[189] and must "promptly . . . notify all other parties of the substance of the ex parte communication, and give[] the parties an opportunity to respond."[190] When to make this notification is in the discretion of the judge, as guided by the Model Code of Judicial Conduct, which states that a " judge shall perform the duties of judicial office impartially, competently, and diligently."[191]

In some cases, courts have found that matters regarding the nature of the representation can be scheduling or administrative, and therefore can be discussed ex parte.[192] When reviewing the appropriateness of an ex parte communication, courts look to whether information in the ex parte communication went to the merits of each case,[193] or if the information in the ex parte communication influenced the judge's decision in a case.[194] Notably, the fact of the limited scope representation would not go to the merits of the case; a key tenet of limited scope representation is that it should not be determinative of the validity of a claim.[195] Furthermore, the limited scope nature of the representation would not likely factor into a court's

185. *Id.* at r. 2.9(A)(5).
186. *Id.* at r. 2.9(A)(4).
187. *Id.* at r. 2.9(A)(2).
188. *Id.* at r. 2.9(A)(1).
189. *Id.* at r. 2.9(A)(1)(a).
190. *Id.* at r. 2.9(A)(1)(b).
191. *Id.* at r. 2.
192. *See* ISC Holding AG v. Nobel Biocare Fin. AG, 688 F.3d 98, 107 (2d Cir. 2012) (finding that a ten minute conversation between judge and counsel about the attorney's potential withdrawal was not an improper ex parte discussion); State v. Ergonis, No. 2 CA–CR 2012–0327, 2014 WL 3756248, at *3 (Ariz. Ct. App. July 30, 2014) (finding that a prosecutor's communication with the judge about the preferred counsel for the defendant was not an improper ex parte discussion).
193. *Compare* Kaufman v. Am. Fam. Mut. Ins. Co., No. CIVA05CV02311–WDMMEH, 2008 WL 4980360, at *3 (D. Colo. Nov. 19, 2008), *aff'd*, 601 F.3d 1088 (10th Cir. 2010) (finding that communication with judge's clerk about substantive and procedural matter was improper ex parte discussion by looking at the content of the discussion), *with* Dragash v. Saucier, No. 17–12031–JJ, 2017 WL 5202252, at *2 (11th Cir. Sept. 26, 2017) (finding that a letter from a courtroom deputy was not an improper ex parte communication because it did not address substantive matters of the case).
194. *See* Wilson v. Armstrong, 686 So. 2d 647, 649 (Fla. Dist. Ct. App. 1996) (remanding a case because information from ex parte discussion could have informed judge's ruling).
195. *See supra* Section I.A.

decision about how to proceed with a case.[196] Therefore, it seems likely that a limited scope representation is a scheduling or administrative matter that is not substantive.

Disclosing the fact of limited scope representation would also not likely give the party a procedural, substantive, or tactical advantage. When evaluating whether a communication does provide such an advantage, courts again look to the substantive of a given communication relative to the case.[197] Courts have found that calls — even when a judge picks up the phone — involving non-substantive scheduling matters do not give an unfair advantage.[198] Further, first mover advantage is not an issue here.[199] The first mover problem refers to the idea that if a party tells the judge information first, they might receive favorable treatment.[200] Here, because the limited scope nature of the representation is only known by one party, the first mover problem does not exist.[201] As a result, information about whether the representation is limited would not likely provide an advantage for the limited scope attorney while litigating the case, though it may impact the settlement value of the case.[202]

To review, ex parte proceedings may solve the problem of disclosures so long as proper measures are taken to control for the substance and truthfulness of the disclosures.

III. WHEN CAN AN ATTORNEY WITHDRAW FROM THE LIMITED SCOPE REPRESENTATION?

Limited scope representation is premised on the idea that the lawyer can withdraw from the representation while the case is ongoing.[203] If the attorney cannot withdraw from a case, then the lawyer can no longer offer limited scope representation. Instead, she must offer full representation to each client, which eliminates any advantages from the limited scope representation. Doing so would reduce any increased access to justice that limited scope representation has the potential to offer. The ethics of limited scope limitation are not worth exploring if a court does not allow a limited scope attorney to withdraw from the representation.

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196. *See Wilson*, 686 So. 2d at 649.

197. *See* Eleanora J. Dietlein Tr. v. Am. Home Mortg. Inv. Corp., No. 3:11–CV–0719–LRH VPC, 2014 WL 911121, at *2 (D. Nev. Mar. 7, 2014).

198. *See* BB Online UK Ltd. v. 101domain, Inc., No. 14–CV–885–WQH JLB, 2014 WL 6980566, at *3 (S.D. Cal. Dec. 9, 2014).

199. *See* N. C. Bar Eth. Formal Op. 5 (1997).

200. *See id.*

201. *See id.*

202. *See* Hoffman, *supra* note 159, at 4.

203. *See* AN ANALYSIS OF RULES, *supra* note 114, at 23.

As Professor Rachel Pinchuk has noted, while limited scope representation is a "contractual right," some jurisdictions require that the court approve an attorney's withdrawal from representation, even when the attorney and client have agreed on limited scope representation at the outset of a matter.[204] As a result, the "deep dark secret of limited scope representation" is that, despite whatever the attorney and client agreed at the outset of the representation, the representation could become full service "at the whim of a court."[205] Therefore, limited scope representation in the context of pro bono assistance has been compared to playing the "lottery."[206] That an attorney's right to withdraw from the limited scope representation is not guaranteed may keep attorneys from entering limited scope agreements,[207] and courts from allowing them.[208]

MR 1.16 governs a limited scope attorney's withdrawal from representation.[209] As an initial matter, MR 1.16(a) states that a lawyer should not represent, or should withdrawal from representation, if the work violates the professional rules, impairs the lawyer's physical or mental condition so that they cannot represent the client, or the client discharged the lawyer.[210] MR 1.16(b) states that an attorney may withdraw from representation if doing so does not have a materially adverse effect on the client's interest, the client fails to fulfill a previously agreed upon obligation, or for good cause, among other reasons.[211] In fact, the comments to MR 1.16 indicate that an

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204. *See* Pinchuk, *supra* note 17, at 701 (quoting HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 45, at 72–74).

205. *See generally id.* (writing about the challenges of withdrawal from limited scope representation in the context of pro bono work); *see also* N.Y. St. Bar. Assn. Comm. Prof. Eth. Op. 856 (2011).

206. *See* Pinchuk, *supra* note 17, at 701.

207. *See id.* The NY State Bar Ethics Committee has written on how an attorney, who has had their limited scope representation extended at the court's discretion, can continue to ethically represent a client who is bringing seemingly frivolous claims. *See* N.Y. Bar. Ass'n. Comm. Prof'l. Eth., Op. 1214 (2021).

208. *See, e.g.*, Villar v. City of New York, 540 F. Supp. 3d 437, 440 (S.D.N.Y. 2021).

209. *See* MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2020).

210. *See id.* r. 1.16(a); Mark Fucile, *Model Rule 1.16(A)(2): Where Wellness Meets Withdrawal*, 27 PRO. LAW. 13, 13–15 (2020).

211. The full list for permissible withdrawal: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists. *See* MODEL RULES OF PRO. CONDUCT r. 1.16(b) (AM. BAR ASS'N 2020).

agreement limiting the scope of representation is one viable reason for withdrawing from representation.[212] MR 1.16(d) notes that an attorney who does withdraw should give the client reasonable notice, allow time for the client to seek alternative representation, provide any relevant papers or documents to the client, and refund any advanced payments made for services.[213] Furthermore, state ethics rules may also contain provisions governing an attorney's withdrawal from limited scope representation.[214]

Other authorities govern the withdrawal process as well. For example, states have adopted their own rules governing the withdrawal.[215] These rules can be categorized into three categories: *de facto* withdrawal, administrative withdrawal, or mixed *de facto* and administrative withdrawal.[216] *De facto* withdrawal refers to the practice that when a lawyer has completed the obligations set out in the limited scope retainer, she may withdraw from the case without filing any notice with or requesting permission from the court.[217] Other states have administrative withdrawal, which requires an attorney to file a notice of completion or request the court's permission to withdraw.[218] Other states have a mix of *de facto* and administrative withdrawal procedures, where attorneys must file notice with the court if they wish to end the limited scope representation prior to the time previously agreed upon.[219]

In the absence of rules governing withdrawal or procedural rules that empower courts to resolve these disputes, courts are faced with the fact-intensive inquiry of deciding on motions to withdraw.[220] Three relevant circumstances where courts have permitted withdrawal are identified below.

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212. *See id.* r. 1.16 cmt. 8.

213. *See id.* r. 1.16(d).

214. *See, e.g.*, Davis v. Kaiser Found. Hosps., No. 19–CV–05866–HSG, 2020 WL 5653152, at *1 (N.D. Cal. Sept. 23, 2020).

215. *See* AN ANALYSIS OF RULES, *supra* note 114, at 23–27.

216. *Id.* at 23.

217. *Id.*

218. *Id.* at 24.

219. *Id.*

220. *See* N.Y. State Bar Ass'n Comm. Pro. Ethics Op. 856 at *5 (2011):

> Thus, even if the original limitation on the representation was ethical, and even if the lawyer has good cause for terminating the representation because the client knowingly and freely assented, in advance, to the lawyer's withdrawal after arraignment, Rule 1.16(d) requires the lawyer to continue the representation if ordered to do so by the court.

A. When the Agreed-Upon Limited Services Have Been Provided

In *Davis v. Kaiser Foundation Hospitals*, the district court of Northern California granted an attorney's motion to withdraw from a limited scope representation because the lawyer had completed the terms of the representation.[221] In that case, the attorney and client had agreed to limit the lawyer's representation to the Initial Case Management Conference on a particular date, and to a review of the client's case file.[222] After reviewing the client's file, the lawyer determined that further investigation and filing an amended complaint was required.[223] As the fees would be too much for the plaintiff, she consented to her limited scope attorney's withdrawal and planned to proceed pro se.[224] In addition to the fact that the initial retainer agreement was limited in scope, and that the plaintiff had consented to the withdrawal, the court also noted that attorney was in compliance with the district's local rules, which required that the attorney give the client reasonably advanced notice prior to requesting withdrawal, and the rules of professional conduct.[225]

In the context of limited scope lawyer in the hypothetical arrangement, a key question would be whether the agreed-upon services — that is, representation prior to receiving a reasonable settlement offer — have been provided. This inquiry would require courts to determine if the settlement offer was in fact reasonable, which is comparable to settlement analyses that judges are already responsible for performing.[226] As a result, so long as the settlement offer was indeed reasonable, it is likely that a lawyer may be able to withdraw. Notably, however, a retainer agreement does not bind the court, and so other elements addressed below must also be present to allow for withdrawal.[227]

B. When Equitable Factors Do Not Preclude Withdrawal

Courts with established procedures may also factor in equitable considerations when determining whether the attorney has the right to withdraw. In *Davis*, the District Court of Northern California found that equitable considerations could override an agreement to limit the scope of representation, and preclude the attorney from withdrawing.[228] For example,

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221. No. 19–CV–05866–HSG, 2020 WL 5653152, at *1 (N.D. Cal. Sept. 23, 2020).
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *See* Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 55 (1999).
227. *See* Pinchuk, *supra* note 17, at 701.
228. 2020 WL 5653152, at *2.

withdrawal that would prejudice other litigants involved in the case, delay the resolution of the case, or was contrary to the interests of justice, precluded the attorney from withdrawing from the case.[229] To assist the litigant, the court also issued a stay on the case to give the litigant more time to find representation.[230]

Equitable factors that might preclude the limited scope lawyer's withdrawal in the context of the hypothetical might be late disclosure of the attorney's limitation on representation, or a failure to disclose the nature of the limitation on representation to the court.[231] Further equitable factors may include the vulnerability of a particular client.[232] For example, at least one court has found that when withdrawal is not "abandoning" a client at a critical juncture of a case, then it should be allowed.[233] One factor that may weigh in favor of withdraw is if the lawyer has repeatedly received consent from the client to limit the scope of the representation.[234] As a result, so long as equitable factors favor withdrawal, it would likely be allowed.

C. When the Attorney Does not Go Beyond the Agreed-Upon Limited Services

If a lawyer goes beyond the agreed upon limits of the representation, then courts will deny an attorney's motion to withdraw.[235] In *Finazzo v. Hawaiian Airlines*, a plaintiff's attorney, allegedly hired only for settlement purposes, was prohibited from withdrawing when the attorney began assisting the client with discovery disputes.[236] The discovery dispute work was outside the scope of the agreed upon work.[237] In particular, the court found that the completion of the limited scope representation was no longer "good cause" to permit the counsel to withdraw, as the attorney's work had gone "well past" the agreed-upon work.[238]

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229. *Id.* at *1.

230. *Id.* at *2.

231. *See supra* Part II.

232. *See* Michell Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. TEX. L. REV. 159, 173 (2014).

233. *See* Ramirez v. Sturdevant, 21 Cal. App. 4th 904, 915 (1994) (reversed on other grounds).

234. *See* Part II.A.

235. *See* Finazzo v. Hawaiian Airlines, No. CV 05–00524 JMS–LEK, 2007 WL 9711011, at *1 (D. Haw. May 15, 2007).

236. *See id.*

237. *See id.* at *2.

238. *See id.* The court did not detail exactly how long the attorney had been working beyond the scope of the representation.

In the context of the limited scope lawyer in the hypothetical representation, this issue might come up if the attorney decides to extend the scope of the representation beyond the agreed-upon limitation, and then attempted to re-limit the representation. A lawyer who did so would probably face significant obstacles to withdrawing, as the original agreement has already been overwritten. Furthermore, equitable factors at that point may also be considered, as the attorney has already offered above and beyond what they had agreed to do. This may weigh in favor of or against withdrawal, depending on the facts and circumstances.

Perhaps one of the more important equitable factors would be the reasonableness of the settlement that the client has rejected, leading to the limited scope lawyer's withdrawal. An examination of the reasonableness of this settlement raises a host of questions, such as whose perspective should be used to evaluate whether the offer is reasonable? Though the limited scope lawyer has to have good reason to find the settlement offer reasonable in order to request withdrawal, unanswered questions remain about how a court would evaluate the reasonableness of any offer, and whether doing so violates the client's right to settle.[239] Some of these questions are taken up in the next Part.

IV. DOES WITHDRAWING FROM REPRESENTATION IF A CLIENT REJECTS A REASONABLE SETTLEMENT OFFER VIOLATE A CLIENT'S RIGHT TO SETTLE?

The limited scope lawyer in the hypothetical arrangement conditioned her representation on the client's acceptance of an attorney recommended settlement. In addition to determining if this limitation is reasonable under MR 1.2(c),[240] this condition of the representation raises questions similar to those raised by MR 1.2(a)'s requirement that lawyers are required to abide by a client's decision regarding settlement.[241] It is unclear if the hypothetical's conditioning of the client's representation on the acceptance of a reasonable settlement offer violates the text or purpose of MR 1.2(a).[242]

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239. *See infra* Part IV.

240. See *infra* Part V.

241. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020):

> [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

242. *See* Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority*, 78 OR. L. REV. 1061, 1065, 1086 (1999) (noting that

This Part examines under what conditions an attorney could proceed with the proposed limited scope representation and comply with MR 1.2(a). Section IV.A examines competing interpretations of MR 1.2(a). Section IV.B examines when courts and ethics committees have found MR 1.2(a) has been violated. This Part concludes by finding that the hypothetical can comply with MR 1.2(a).

A. Understanding the Right to Settle

MR 1.2(a) states that a lawyer must adhere to the client's objectives for the representation, and must consult with the client about how to achieve those objectives.[243] The comments to the rule clarify that an intended purpose of this rule is to give a client the "ultimate authority to determine the purposes to be served by legal representation," while at the same time, allowing the lawyer to use her expertise to determine how to achieve these goals.[244] This rule is implicated by the hypothetical client's decision whether or not to accept settlement.[245] The condition of the limited representation — that the client accept a settlement that the attorney recommends — puts pressure on the client's right to settle under MR 1.2(a).

Courts and commentators have struggled to understand the obligations MR 1.2(a) places on lawyers.[246] This is because a key distinction in the rule — the means vs. objectives of a representation — is not always clear.[247] Scholars have read the tension between means and objectives as a kind of deliberate ambiguity that causes the lawyer and client to communicate about the case.[248] In practice, this results in clients having complete control over the objectives of the representation, but having "somewhat less" control over the means.[249] Commenting on this inherent tension, the Annotated Model Rules of Professional Conduct indicate that the objectives vs. means distinction can be better understood as the tension between decisions that "directly affect the ultimate resolution of the case or the substantive rights of

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competing interpretations of Model Rule 1.2(a) make questions about settlement authority challenging).

243. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

244. *See id.* cmt. 1.

245. *See 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer*, ANN. MOD. RULES PROF. COND. § 1.2.

246. *See id.* (noting that the means vs. objectives distinction in Model Rule 1.2(a) is "not entirely clear").

247. *See id.*

248. Jonathan Barker & Matthew Cosentino, *Who's in Charge Here? The Ethics 2000 Approach to Resolving Lawyer-Client Conflicts*, 16 GEO. J. LEGAL ETHICS 505, 511–12 (2003).

249. *See 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer*, *supra* note 245.

the client," (objectives) and those choices "that are procedural or tactical in nature" (means).[250]

To help alleviate this friction, MR 1.2(a)'s requirement that a lawyer consult with the client about the means of a representation is governed by MR 1.4's rules regarding communication.[251] MR 1.4 requires that a lawyer "promptly" update the client with information that requires a client's informed consent;[252] "reasonably consult" with the client about how to achieve a client's objectives;[253] keep her client "reasonably informed" about the status of the case;[254] promptly respond to reasonable requests for information about the case;[255] and consult with the client about any "relevant limitation on the lawyer's conduct."[256]

B. Violations of a Client's Right to Settle

Courts have held that MR 1.2(a) is violated when a lawyer fails to pursue the objectives of the representation.[257] These cases often arise out of disputes relating to the lawyer's retainer agreement.[258] While no court has directly addressed the issue of whether withdrawal after a client does not accept the settlement violates 1.2(a), courts have analyzed a few analogous cases that are instructive.[259]

i. When the retainer agreement "impermissibly burden[s]" the client's right to settle

Courts and commentators have agreed that a retainer agreement that "impermissibly burdens" a client's right to settle violates MR 1.2(a).[260] The Annotated Model Rules of Professional Conduct indicate that retainers that burden the client's right are void as to public policy.[261] Relatively few cases,

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250. *See id.*

251. MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020).

252. *See id.* r. 1.4(a)(1).

253. *See id.* r. 1.4(a)(2).

254. *See id.* r. 1.4(a)(3).

255. *See id.* r. 1.4(a)(4).

256. *See id.* r. 1.4(a)(5). For examples of potential limitations on a lawyer's representation, see *supra* note 33–46 and accompanying text.

257. *See 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer*, *supra* note 245.

258. *See id.* (citing Covington v. Cont'l Gen. Tire, Inc., 381 F.3d 216 (3d Cir. 2004) (examining a retainer agreement to determine whether to enforce a settlement that the lawyer agreed to without the client's prior approval).

259. *See id.*

260. *See* Compton v. Kittleson, 171 P.3d 172, 180 (Alaska 2007).

261. *See 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer*, *supra* note 245.

however, have interpreted this standard to determine the outer bounds of when a retainer burdens the client's right to settle.[262]

The Alaska Supreme Court found that a retainer agreement that creates a financial disincentive for the client to settle impermissibly burdens a client's right to settle and thus violated Rule 1.2(a).[263] In *Compton v. Kittleson*, the retainer for the plaintiff's lawyer stated that the clients would be billed on a contingent fee unless they settled "for an amount that will pay less than $175.00 per hour for the time [Kittleson] invest[ed]."[264] The court held the agreement "impermissibly burden[ed] the client's exclusive right to settle a case."[265] Two components of the agreement were objectionable. First, the use of the client's decision to settle as the trigger for the conversion was problematic as it burdened the right to settle.[266] Second, the fact that the subsequent fee arrangement incorporated all of the work done prior to the deal was problematic as it was the equivalent of "'springing' [an] obligation to pay for work already performed but never before chargeable to the client[s]."[267] In the court's view, the convertible retainer agreement surpassed the lawyer's "duty to encourage a client to settle" and encroached on the decision whether to settle.[268]

The court analogized the contingent retainer in *Kittleson* to the Alaska Rule of Professional Conduct's prohibition on restricting a client's ability to terminate the attorney-client relationship.[269] Specifically, the court noted that just like in cases finding that nonrefundable retainer agreements "alter[ ] and economically chill[ ] the client's unbridled prerogative to walk away from the lawyer" in violation of the Rules of Professional Conduct, so too did Kittleson's contingent retainer agreement.[270] The court also cited professors Geoffrey C. Hazard, Jr. and W. William Hodes' noted legal treatise *The Law of Lawyering*, which stated that an attorney "cannot use . . . economic coercion" to force a client to take a settlement.[271] Ethics opinions concur with its finding of a 1.2(a) violation.[272]

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262. *See id.*
263. *Compton*, 171 P.3d at 179.
264. *Id.* at 173.
265. *Id.*
266. *Id.* at 173, 176.
267. *Id.* at 179.
268. *Compton*, 171 P.3d at 177.
269. *Id.* at 176–77.
270. *Id.* at 178 (quoting In re Matter of Cooperman, 83 N.Y.2d 465, 473 (1994)).
271. *Id.* at 178 (quoting HAZARD ET AL., *supra* note 163).
272. *See 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer*, *supra* note 245 (citing Conn. Informal Ethics Op. 99-18 (1999)) (contingent-fee agreement that includes clause that requires a client to pay lawyer at hourly rate if client rejects

The court rejected Kittleson's argument that the agreement complied with the state's rule codifying MR 1.2(a).[273] Specifically, Kittleson argued that his agreement did not take away the decision regarding settlement from the client, following the plain language of the rule.[274] The court agreed, also noting that nothing in the Alaskan Rules of Professional Conduct precluded the kind of hybrid fee arrangement at issue in the case.[275]

Contrary to the Alaska Supreme Court, the First District, Division 1 of the California Court of Appeals has found that a comparable retainer that made the payment of fees contingent on accepting settlement does not violate relevant Rules of Professional Conduct.[276] In *Ramirez v. Sturdevant*, Sturdevant agreed to represent the plaintiff on a contingent fee basis.[277] This retainer agreement also contained a provision that allowed Sturdevant to give notice to the court and withdraw "at any time."[278] The court found this provision in the retainer valid.[279]

Remarking on the provision allowing Sturdevant to withdraw, the Court of Appeals expounded on the differences between an attorney's right to withdraw for just cause, the ethical violation of "*abandoning*" a client, and the dubious decision to withdraw at a critical moment in the client's case which results in the client's rights being prejudiced.[280] The court explicitly noted that "[w]e see no basis in the law, or in logic, for a conclusion that an attorney never may withdraw from a case except for cause."[281] Therefore, the financial pressures associated with the contingent retainer did not amount to a violation of 1.2(a).

ii. Loss of Control over the Decision to Settle

The Colorado Court of Appeals found that a provision in a retainer in a fee-paying case requiring that the client not unreasonably refuse to settle his claims violated MR 1.2(a).[282] In *Jones v. Feiger, Collison & Killmer*, the defendant firm included a provision in the retainer that stated: "The client

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settlement offer recommended by lawyer and defendant prevails violates 1.2(a) because economic pressure on that decision violates rule).

273. *See Compton,* 171 P.3d at 175–76.

274. *Id.*

275. *Id.* at 176.

276. *See* Ramirez v. Sturdevant, 26 Cal. Rptr. 2d 554, 558 (Cal. Ct. App. 1994) (reversed on other grounds).

277. *See id.*

278. *Id.* at 559.

279. *See id.* at 557.

280. *See id.* at 559 (emphasis in the original).

281. *Ramirez*, 26 Cal. Rptr. 2d at 559.

282. *See* Jones v. Feiger, Collison & Killmer, 903 P.2d 27, 29 (Colo. App. 1994), *as modified on denial of reh'g* (Feb. 2, 1995), *rev'd*, 926 P.2d 1244 (Colo. 1996).

agrees to consider seriously any recommendation of settlement that the law firm makes. The client agrees not to refuse unreasonably to settle his claims should such an opportunity arise."[283] The firm also included a provision in the retainer that allowed them to withdraw at any time.[284] The client initially refused to settle the case for an amount that the firm considered reasonable.[285] The firm then reminded the client of the retainer agreement.[286] The client then sought additional legal advice regarding the legality of the retainer.[287] The client ultimately accepted the offer, but refused to pay the firm any fees.[288] The law firm sued and won at trial, and the client appealed.[289]

The Colorado Court of Appeals found that the provision requiring the client to accept a reasonable settlement offer was void for public policy purposes.[290] Specifically, the court held that there was a public policy interest in ensuring that the client did not lose control of the case.[291] Because the provision in the agreement made "the client vulnerable to pressure from the law firm to accept a settlement the law firm deems 'reasonable,'" the agreement was void.[292] The court also noted that while firms working on a contingency fee basis do take on the risk of investing time and financials on behalf of the client, these concerns do not outweigh the client's right to control settlement.[293]

iii. When a lawyer deprives the client of information necessary to make a reasonably informed decision about the objective of the case

Courts have found that a lawyer has violated the state equivalent of MR 1.2(a) when they fail to provide a client with information necessary to make a reasonably informed decision about whether to settle a case.[294] This violation of MR 1.2(a) happens by way of MR 1.4(a)'s obligation that a lawyer keep the client reasonably informed about the status of the matter.[295] Specifically, if a lawyer fails to provide a client with the information

283. *Id.*
284. *See id.*
285. *See id.*
286. *See id.*
287. *See Jones,* 903 P.2d at 29.
288. *See id*.
289. *See id.* at 30.
290. *See id.* at 34.
291. *See id.* at 35.
292. *See Jones,* 903 P.2d at 34.
293. *See id.* at 34–35.
294. *See* Att'y Grievance Comm'n of Md. v. Shapiro, 108 A.3d 394, 403 (Md. 2015).
295. MODEL RULES OF PRO. CONDUCT r. 1.4(a)(3) (AM. BAR ASS'N 2020).

necessary to determine the objectives of the representation, the lawyer has not complied with MR 1.2(a)'s requirement that the client be in charge of the representation.[296]

The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline found that a lawyer violated the state's equivalent of MR1.2(a) and MR 1.4(a) when the client gave the lawyer power of attorney to sign any documents, including settlement agreement.[297] In that case, the lawyer was hired on a contingent-fee basis.[298] In finding that the arrangement violated 1.2(a), the commissioners wrote that because "no crystal ball" exists at the outset of the representation, a client would not be able to adequately consider all of the facts and circumstances surrounding the decision to settle.[299] As a result, the lawyer would be "highly unlikely" to fulfill the requirements of 1.2(a) and 1.4(a) that would allow the client to make an informed decision regarding the settlement.[300] Therefore, agreeing to accept the settlement the attorney thought was best was a violation of the rules of professional conduct, as the lawyer never could properly advise his client about decision as required under 1.4(a).[301]

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Important factors distinguish the above two cases from the limited scope lawyer's work in the hypothetical representation in ways that mean the requirements of MR 1.2(a) might be met. First, because the hypothetical representation involves a legal aid attorney, the client is not paying for representation. As a result, the issue of surprise fees being placed on the client does not apply. Secondly, the client has not lost the right to choose to settle the case under the proposed limitation. Additionally, the attorney is still able to meet any obligations under MR 1.4(a) that require her to explain the necessary information to the client prior to settlement. Specifically, though the initial limitation on representation is made at the outset of the case, the lawyer would still be able to meet the requirements of 1.2(a) and 1.4(a) when a settlement was recommended. This is because the attorney would be able to advise her client about the facts and details of the settlement as required by 1.4(a). Additionally, the hypothetical representation does not

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296. *See Att'y Grievance Comm'n of Md.*, 108 A.3d at 403.

297. *See* Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-6, 2010 WL 4038613, at *3 (2010).

298. *See id.*

299. *See id.*

300. *See id.* The opinion notes that there might be an "extraordinary circumstance where the details of a particular settlement might be available at the signing of the contingent fee agreement so that the client could make an informed decision as to specific settlement terms and conditions based upon fully developed facts and circumstances," which would allow for duties under MR 1.2(a) and 1.4(a) to be fulfilled. *See id.*

301. *See id.*

require the client to accept the recommended settlement. Therefore, the fact that the limitation on representation was made at the outset of representation, and the fact that the client still has discretion to reject the offer, means that obligations under MR 1.2(a) can still be met.

Furthermore, in the hypothetical representation, the lawyer does not require the client to accept the "reasonable" settlement, but merely conditions withdrawal on rejection of a reasonable settlement offer. If a court were to follow the Colorado Court of Appeals, it would seem that the hypothetical representation does impermissibly interfere with the client's right to settle. The Colorado court, however, did not consider the possibility that the client might reject the settlement and hire new counsel, or proceed pro se. The court is silent as to whether these viable alternatives would change its analysis. As a result, the opinion could be read as not considering proceeding pro se as a viable option. Another plausible reading is that the court did not analyze this particular question. This is because the court was aware that the client in *Jones* did consult outside counsel, but refused to examine the possibility that the client would discharge the defendant and hire new counsel, which seems to have been a viable option.

The hypothetical representation can be carried out so that the legal aid attorney complies with obligations under MR 1.2(a).[302] In this case, the proposed limitation does not impermissibly burden the client's right to settle, as there is no financial disincentive to not settle the case.[303] The limitation does place certain strategic pressures on the client's decision-making, mainly weighing the risk to proceed pro se or to end the case with an attorney. Nonetheless, these strategic considerations are not unlike those faced by a client in every settlement conference, as they mirror questions about whether a client wants to proceed with litigation. Therefore, the limitation does not impermissibly burden the client's right to settle.

V. IS IT REASONABLE TO LIMIT THE SCOPE OF REPRESENTATION BASED ON REJECTION OF AN ATTORNEY-RECOMMENDED SETTLEMENT OFFER?

This Part explores the hypothetical representation in the context of MR 1.2(c), which lays out the ethical requirements regarding limited scope representation.[304] In particular, MR 1.2(c) places the following constraints on limited scope representation: that the limitations on the services are

302. *See supra* Section III.B.
303. *See supra* Subsection IV.B.i.
304. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

reasonable,[305] that the limited services are competent,[306] and that the client gave informed consent to those limitations.[307] This Part focuses on how to achieve the reasonableness and competence requirements of MR 1.2(c) under the proposed representation.[308] Additionally, as courts and commentators have noted that a limited scope representation that violates terms of Professional Conduct is not reasonable, this part examines reasonableness of the practice.

A. Limitation(s) on Representation Under the Model Rules

Two rules govern the nature of an attorney's limitation on representation. The first is MR 1.2(c), which reads that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[309] The comments to MR 1.2(c) indicate that a limited scope representation "does not exempt a lawyer from the duty to provide competent representation" as defined in MR 1.1.[310] Nonetheless, the comments also indicate that MR 1.2(c) grants a lawyer and client "substantial latitude" to limit the scope of the representation.[311] As a result, limited scope representation is both bolstered and restrained by MR 1.2(c).

There are different views about the perspective that should be used to define the term reasonable in MR 1.2(c). MR 1.0(h) defines reasonable as "the conduct of a reasonably prudent and competent lawyer."[312] Courts have endorsed the view that limited scope representation that violates the rules of ethics is unreasonable.[313] The ABA has stated that the question of reasonableness should be evaluated according to whether a lawyer, "at the time of the agreement" reasonably could have found that the services would have helped the client..[314] Noted legal ethics scholar Geoffrey Hazard has argued that reasonableness should be understood in light of whether the representation is harmful to the client.[315] The Restatement (Third) of Law Governing Lawyers ("Restatement") puts forward a balancing test for determining whether a service is reasonable, weighing the benefits of the

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305. *See id.*

306. *See id.* r. 1.2 cmt. 7.

307. *See id.*

308. *See id.*; *see also supra* Subsection II.A.i for a discussion of the informed consent requirement.

309. MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2020).

310. *See id.* r. 1.2 cmt. 7.

311. *See id.*

312. *See id.* r. 1.0(h).

313. *See, e.g.,* In re Seare, 493 B.R. 158, 193 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff'd,* 515 B.R. 599 (B.A.P. 9th Cir. 2014).

314. *See* HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 45, at 91.

315. *See* HAZARD ET AL., *supra* note 163, at 6-38.

service against the potential risks.[316] Regardless of how reasonableness is to be assessed, the courts, the ABA, and the Restatement all indicate that the reasonableness inquiry should take place at the time the representation begins.[317]

Courts have also put forward their own definition of the reasonableness requirement.[318] In *In re Egwim*, a bankruptcy court in the Northern District of Georgia ruled that an attorney's unbundling of representation to certain services violated Georgia Rule of Professional Conduct 1.2.[319] Key to the court's holding was that the limited representation left out assisting the client with the "essential purpose" of the lawsuit.[320] The court also found that given the complicated nature of the case, the client would not have realized that the attorney carved out such an important part of the lawsuit from the representation, which also contributed to the unreasonableness of the unbundling.[321] Nonetheless, because the attorney's limited scope representation was done in good faith and did not cause the client to incur any "adverse consequences," the court found that sanctions were not appropriate.[322]

Similarly, in *In re Seare*, the Bankruptcy Court in the District of Nevada used an expansive definition of reasonableness and yet still found that a limited scope attorney had violated the Nevada Rule of Professional Conduct

316. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (AM. L. INST. 2000). This approach does not specify what kinds of harms, risks, or benefits should be balanced.

317. *See, e.g., In re Seare*, 493 B.R. at 192 (finding that "[r]easonableness is assessed at the time the client agreed to unbundled services; neither party has the benefit of hindsight."); *see also* HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 45, at 91; RESTATEMENT (THIRD), *supra* note 316 (noting that reasonableness is understood "in advance" of carrying out the duties of a lawyer or client).

318. *See* In re Collmar, 417 B.R. 920, 923 (Bankr. N.D. Ind. 2009) (finding limitation of services to particular tasks improper because the excluded services were "an integral part of reordering affairs and making the peace with creditors that is the debtor's ultimate bankruptcy goal; it is a critical part of the bankruptcy process"); In re Johnson, 291 B.R. 462, 466 (Bankr. D. Minn. 2003). *But see* N.Y. Bar. Ass'n. Comm. Prof'l. Eth., Op. 604 (1989) (finding that limited criminal defense work to pre-indictment representation was reasonable).

319. *See* In re Egwim, 291 B.R. 559, 581 (2003). Though at that time Georgia Rules of Professional Conduct did not include a "reasonableness" requirement, the court read into the rule a "reasonableness" requirement that followed the Restatement. *See id.* at 571. Other courts have cited *Egwim* for a judicial interpretation of a "reasonable limitation" on representation. *See, e.g.*, *In re Seare*, 493 B.R. at 192–93.

320. *See In re Egwim*, 291 B.R. at 581 (noting that the attorney's decision to exclude "representation in connection with discharge and dischargeability litigation and efforts to retain a residence encumbered by a mortgage," which was an essential purpose of the debtor filing for bankruptcy in the first place, violated the state analogue of 1.2(c)).

321. *See id.* at 572.

322. *See id.*

1.2's reasonableness requirement.[323] In that case, the court held that a limitation was not reasonable "if, in light of the relevant information that the lawyer knew or should have known at the time the retainer agreement was formed, the unbundled service was reasonably necessary to achieve the client's reasonably anticipated result."[324] As a result, when the attorney excluded certain core adversarial representation from the services, he had violated the rules of ethics.[325]

The court in *In re Seare* also provided parameters for determining the breadth of a "reasonable circumstances" analysis.[326] First the court held that attorneys limiting services should consider "whether the client has the ability to handle the unbundled matter without legal assistance."[327] Second, courts should also consider the "complexity of the legal matter at issue."[328] Put differently, the circumstances of the limited scope representation — understood not just as the kind of case, but also with respect to the client — are considered when determining whether representation is reasonable.

The second rule governing the nature of an attorney's limitation on representation is MR 1.1. According to comment 7 on Model Rule 1.2(c), reasonable services must also be competent services.[329] Specifically, MR 1.2(c), states that a limitation on representation "does not exempt a lawyer from the duty to provide competent representation" as defined in MR 1.1.[330] As a result, whether the proposed limited services can be offered competently is a factor for determining whether or not the services are reasonable.

MR 1.1 requires that an attorney possess and provide "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[331] Notably, the comments also indicate that the lawyer need not have practiced in the area previously in order to provide competent representation.[332] As a result, lawyers who have never limited the scope of

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323. *See In re Seare*, 493 B.R. at 192, 219.

324. *Id.* at 193.

325. *See id.* at 192.

326. *See id.* at 193–94.

327. *Id.* at 194.

328. *In re Seare*, 493 B.R. at 194.

329. MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 7 (AM. BAR ASS'N 2020).

330. *Id.*

331. *See id.* r. 1.1. To determine whether a lawyer is competent, the comments to Model Rule 1.1 suggests consideration of "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." *See id.* cmt. 1.

332. *See id.* r. 1.1 cmt. 2.

representation previously are not precluded from doing so. Other Model Rules provide color as to the competence requirement.[333] In particular, Comment 2 to MR 1.3 states that "[a] lawyer's work load must be controlled so that each matter can be handled competently."[334] In this way, competence is invoked as a consideration when managing the workloads of clients.

Courts are divided about whether limited scope representation can ever meet MR 1.1's competence requirement in the context of limited scope representation where an appearance is made.[335] For example, the Tenth Circuit has found that a lawyer's decision to represent a client only for claims brought against him in his official capacity, as opposed to those in his personal capacity, would not be competent representation.[336] Therefore, the lawyer's conduct did not meet the state's equivalent of MR 1.1.[337] Of particular concern for the court was that this kind of limited representation did not follow the spirit of MR 1.1, and also led to a waste of judicial resources, as multiple parties would be involved in representing the same client.[338] Conversely, the Second Circuit has found that limited scope representation can meet the competence requirement in the context of ghostwriting.[339] Key for the Second Circuit was that this case resolved a question of first impression for the court, and therefore the lawyer could not have known the extent of her obligations to the court.[340] Additionally, the fact that the limited scope representation offered was aimed at preserving the client's rights, and was not deployed to gain an unfair advantage weighed in the attorney's favor.[341]

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In the context of the limited scope lawyer's representation in the hypothetical, the proposed representation can provide reasonable services and is done under reasonable circumstances. The kinds of services that an attorney would provide before receiving a settlement are comparable to those suggested by Mosten. Furthermore, there is nothing inherently violative of MR 1.2 with limiting representation to a particular time period. Whether the limitation is reasonable given the circumstances, however, is more

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333. *See, e.g.*, *id.* r. 3.8 cmt. 1 (discussing the obligations of a prosecutor for "[c]ompetent representation").

334. *Id.* r. 1.3 cmt. 2.

335. *See, e.g.*, In re Seare, 493 B.R. 158, 194 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff'd,* 515 B.R. 599 (B.A.P. 9th Cir. 2014).

336. *See* Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231 (D.Colo.1994), *aff'd in part and disapproved in part on other grounds*, 85 F.3d 489, 492 n.3 (10th Cir. 1996).

337. *See id*.

338. *See id.*

339. *See* In re Fengling Liu, 664 F.3d 367, 371–73 (2d Cir. 2011).

340. *See id.* at 372.

341. *See id.* at 373.

questionable. Beyond a fact intensive inquiry, a court might wish to look further at the practices the limited scope attorney used throughout the representation — such as requiring repeated consent to the limited scope nature of the representation — to determine if the circumstances warrant limited representation. Other values of limited scope representation, such as those suggested below, may also factor into a court's analysis.

B. Additional Justifications for the Reasonableness of Limited Scope Representation

At its broadest, the reasonableness standard in MR 1.2(c) has been interpreted to call for courts to evaluate the potential the limitation has to harm to clients,[342] and also weigh the risks and benefits to the client.[343] In this way, reasonableness can be understood to involve an analysis of the effectiveness of the practice of limited scope representation generally.[344] Courts have adopted this approach when adjudicating questions involving limited scope representation.[345] Nonetheless, despite the prevalence of limited scope representation, the fact that the American Bar Association (ABA) has endorsed the practice, and the documented positive effects of limited scope representation on client outcomes in certain cases,[346] skepticism about the efficacy of the practice remains.[347] This skepticism is somewhat warranted; limited scope representation often supports litigants who lack resources, and so evaluating a practice that affects a particular vulnerable group should be done with diligence and care.[348]

At its best, limited scope representation increases access to justice[349] for pro se litigants, many of whom are Black, Hispanic, or Asian.[350] As an attempted remedy to this problem, programs have started to provide free and

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342. *See* HAZARD ET AL., *supra* note 163, at 6-38.

343. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS., § 19 cmt. c. (AM. L. INST. 2000).

344. *See id.*

345. *See* Villar v. City of New York, 540 F. Supp. 3d 437, 440 (S.D.N.Y. 2021).

346. *See* Mandilk, *supra* note 4.

347. *Compare* Steinberg, *supra* note 16, at 457 (finding the substantive impacts of limited scope representation in the context of housing court to be limited), *with* Mandilk, *supra* note 4, at 1833 n.14 (finding the substantive impacts of limited scope representation in the context of housing court to be "statistically significant"). *See also* D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future* 126 HARV. L. REV. 901, 903–04 (2013) (finding full representation offered by a legal aid attorney to be more effective than limited scope representation).

348. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

349. *See* FIA Card Servs., N.A. v. Pichette, 116 A.3d 770, 783 (R.I. 2015).

350. *See* Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 713 (2012) (detailing racial disparities among represented and unrepresented plaintiffs).

low-cost limited representation to clients in need.[351] For example, clients and courts have cited the benefits of having limited scope representation in the context of lawyer-for-a-day programs in housing court.[352] Limited scope lawyers who make a notice of appearance have similarly benefitted their clients in the context of S.D.N.Y.'s pro se litigation program.[353] To this end, some state legislatures have moved to formalize limited scope representation as a matter of law.[354] Therefore, limited scope assistance can be said to be reasonable in that its benefits outweigh its harms, because it helps individual clients with viable cases find justice.[355]

Limited scope representation may also serve the client in ways outside of the immediate outcome of their case. Empowering a client in a lawyer-client relationship may have spillover effects in a client's interactions with other institutional actors.[356] Client-centered lawyering values the client's individual experience by providing an outlet for its expression within the lawyer-client relationship. This validation of the client's experience can empower clients to authentically assert themselves within whatever system they are challenging or being challenged by. With the aid of their lawyer, clients would be better suited to insist that their voice be hear, regardless of the context they are in.[357] As a result, aspects of limited scope representation, such as a commitment to client dialogue, non-routine handling of client problems, and the client's significant role in contributing solutions to his legal problem could bear fruits for clients in other aspects of their lives.[358]

Limited scope representation may benefit other parties aside from the client. Attorneys looking to volunteer their time may be provided with more opportunities through limited scope representation.[359] Courts and opposing

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351. *See e.g.*, D. James Greiner et al., *The Limits of Unbundled Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 903, 912 (2013).

352. *See* Mandilk, *supra* note 4, at 1881.

353. *See* Rebecca Price, *From the Southern District of New York, a Success Story: Limited-Scope Pro Se Program Provides Access and Justice*, DISP. RESOL. MAG., Spring 2016, at 14.

354. *See* Pinchuk, *supra* note 17, at 724 (citing ME. R. CIV. P 89(a); REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NY 44 (Jan. 2018)).

355. *See* STANDARDS FOR THE PROVISION OF CIV. LEGAL AID 129–35 (AM. BAR ASS'N 2006).

356. *See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, *in* LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE 154 (Susan D. Carle ed., 2005).

357. *See id.*

358. *See id.* at 155.

359. *See* FIA Card Servs., N.A. v. Pichette, 116 A.3d 770, 783 (R.I. 2015).

counsel may find it easier to manage a case that has limited scope representation as opposed to no representation at all..[360]

Limited scope representation does not seem to be a tactic for achieving systemic change.[361] Specifically, a focus on litigation as a method for achieving change may keep individuals from joining movements focused at systematic, as opposed to individual, reform.[362] Individual limited scope representation may also be of limited effectiveness in addressing the broad economic and political inequities that provide the conditions for a legal dispute.[363] Some scholars, however, have challenged this view. [364] Writing on the decision in New York City to provide a right to counsel in housing court, City University of New York Law professor John Whitlow has noted that legal representation can serve as a piece in a larger tenants' rights movement in the City.[365] Similarly, receiving significant limited scope representation — if it achieves successful outcomes — could also be viewed as supporting a movement for indigent litigants.[366]

The relationship between limited scope representation and other civil legal reforms is yet to be fully explored. Some scholars and practitioners argue that establishing the practice of limited scope representation may preclude more radical reforms, such as a legal right to counsel in the civil setting, commonly referred to as civil *Gideon*.[367] Separately, efforts to reform civil procedure in favor of indigent litigants may also benefit from limited scope representation, as doing so would only serve to highlight how civil procedure has made litigation more difficult for the less resourced.[368]

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360. *See, e.g.*, Goldschmidt, *supra* note 10, at 1159–65; Steinberg, *supra* note 16 at 465–68; Halley Acklie Ostergard, *Unmasking the Ghost: Rectifying Ghostwriting and Limited-Scope Representation with the Ethical and Procedural Rules*, 92 NEB. L. REV. 655, 660 (2014).

361. *See* STANDARDS FOR THE PROVISION OF CIV. LEGAL AID, *supra* note 360, at 129–35.

362. *See* Dinerstein, *supra* note 356, at 154.

363. *See id.* at 154–55.

364. *See, e.g.*, John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1116–23 (2019).

365. *See id.*

366. *See id.*

367. *Compare* Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (arguing that other pro se reforms are more ameliorative to the issue of indigent representation than civil *Gideon*), *with* Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y. REV. 503 (1998) (arguing that the implementation of Civil *Gideon* is "essential to the functioning of an effective justice system" and "maintain[ing] the confidence of the society").

368. *See generally* Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471 (2022) (arguing that current era of U.S. civil procedure is defined by neoliberalism, making it more difficult for citizens to bring and maintain civil claims).

At the same time, the presence of counsel may only mask how the judicial system marginalized indigent, pro se litigants.[369]

In sum, though limited scope representation may achieve favorable outcomes for individual litigants, it is still unclear whether the practice would be beneficial on a collective basis. Nonetheless, limited scope representation has significant upsides, and its prevalence in courtrooms across the U.S. favors a finding of reasonableness under the Model Rules.

CONCLUSION

Time to return to the hypothetical arrangement offered at the outset of the Note. The limited scope lawyer has the option to tell her client of her intentions to limit the scope at either the outset of the representation, or during the representation. MR 1.2(c), MR 8.4(c), and MR 8.4(d) all favor early disclosure if the lawyer's intent is to limit the representation at the outset of the case. If the court asked the lawyer directly if she was only offering limited scope representation, the lawyer would have to answer, though this disclosure may happen ex parte. Further down the line, if the client receives and rejects a reasonable settlement offer, the attorney may withdraw, so long as she has not gone beyond the scope of her representation and no equitable factors preclude her exit. A limited scope agreement like that would not violate the client's right to settle, as it is not an impermissible burden on the client's right to settle, nor does it remove this right from the client. A court reviewing this arrangement under MR 1.2(c) would likely find it competent and reasonable, both in the narrow and broad senses of the rule's requirement.

This Note offers an introduction to key ethical questions facing scholars and practitioners looking to engage in limited scope representation when a notice of appearance is made. This Note's examination of ethical obligations under the Model Rules takes place against the backdrop of a broader debate about how best to provide access to justice for people who cannot afford lawyers. While scholars, judges, and practitioners have argued that it is better for an individual to always be fully represented in a civil action, others have highlighted the pragmatic reality that this may not be possible, and even suggested that non-lawyers should get involved.[370] This Note engages in a small portion of this debate by endorsing the kind of limited scope representation proposed in the hypothetical arrangement, and exploring how

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369. *See id.*

370. *See* Andy Newman, *They Need Legal Advice on Debts. Should It Have to Come From Lawyers?*, N.Y. TIMES (Jan. 25, 2022), https://www.nytimes.com/2022/01/25/nyregion/consumer-debt-legal-advice.html [https://perma.cc/2G83-C3J8].

the practice is ethical under rules of professional conduct. Though further work is still needed to fully understand effectiveness of this practice, this kind of limited scope representation has the potential to bring more justice to the people who need it most.