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Cover Page Footnote

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HAVING ONE OAR OR BEING WITHOUT A BOAT:* REFLECTIONS ON THE FORDHAM RECOMMENDATIONS ON LIMITED LEGAL ASSISTANCE

*Mary Helen McNeal***

INTRODUCTION

WHEN legal advocates for the poor gathered at Fordham Law School in late 1998 to discuss ethical and professionalism issues in the delivery of legal services to low-income clients, one of our tasks was to make recommendations regarding the delivery of limited legal assistance.[1] Participants in the Working Group on Limited Legal Assistance included legal services program directors, Legal Services Corporation staff, clinical law teachers (who were legal services lawyers), representatives of the American Bar Association ("ABA"), the National Legal Aid and Defender Association ("NLADA"), funding organizations, and others involved in the delivery of legal services.

We came together with certain predispositions on this issue, although they were not always explicit. Some acknowledged that they had been providing limited legal assistance for years but had never confronted the ethical issues raised by the practice. Others are strong proponents of limited legal assistance as a means to provide increased access to legal services for both low-income and moderate-income clients. At least one, myself, came with a predisposition against limited legal assistance, fearing that it results in poor quality legal services for

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* Thanks to Group member John Asher for suggesting this analogy.

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1. To the extent the positions adopted here vary from those in a previous analysis of ethical issues in the context of unbundling, Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 Wake Forest L. Rev. 295 (1997), these ideas represent a recognition of the very limited resources for low-income clients and an acknowledgment that limited legal assistance models are increasingly the predominant method of delivering legal services to the poor. In light of these facts, it seems prudent to contribute to the debate about how these services are delivered.

Although the Working Group on Limited Legal Assistance did not define "limited legal assistance," also called unbundling or discrete task assistance, it is generally understood to be legal assistance that includes only selected tasks from the full range of lawyering provided in the traditional attorney-client relationship. *See, e.g.*, Forrest S. Mosten, *Unbundling of Legal Services & the Family Lawyer*, 28 Fam. L.Q. 421, 423 (1994) ("Unbundling these various services means that the client can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly.").

low-income people, is potentially detrimental to clients, and perpetuates dual systems of justice.[2]

Despite these varying perspectives, the group was committed to grappling with the unfortunate reality of legal services to the poor: a tremendous scarcity of resources.[3] We struggled to define mechanisms to increase legal access for low-income people without so diluting legal services as to render them meaningless, and simultaneously to respect client autonomy. As suggested by one Group member, although limited legal assistance may be sending clients out in a boat with only one oar, isn't that better than leaving them without a boat? Or, isn't half a lawyer better than no lawyer?

The Group ultimately concluded that half was better than none, and sought to devise a system for providing these services that offered sufficient client protections. The centerpiece of the resulting recommendations is the division of limited legal assistance services into two categories, "brief, specific advice" and those services requiring a diagnostic interview, and a reinterpretation of select ethical principles in the brief advice setting.[4]

The Fordham recommendations on limited legal assistance[5] undoubtedly are, and will be, controversial. Hopefully, they also are a concrete step in identifying client-centered mechanisms for increasing access to justice in a world of limited resources.

This Essay seeks to do what the Group wanted, but had insufficient time, to do: to apply the recommendations to a variety of delivery models and evaluate the consequences of these suggestions. This initial effort to apply the recommendations is a critical step in evaluating their merits. It is not intended to be a thorough analysis of the ethical issues implicated by the recommendations, which would be valuable, nor is it a critique of the value of limited legal assistance—an important and healthy debate. Rather, my purpose is narrow. I ask two simple questions: (1) If a lawyer or legal services provider implemented these recommendations, what would it mean for her practice? (2) In light of this application of the recommendations, what are their strengths and weaknesses?[6] Following this analysis, I suggest an alter-

2. This position was explicit. *See* McNeal, *supra* note 1, at 296 (defining discrete task representation, or unbundling, as "the process of breaking down legal problems or issues into their components, enabling clients to choose selected aspects of the problem for a lawyer's representation, assistance, or advice" (citation omitted)).

3. *See, e.g.*, Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 Fordham L. Rev. 2475, 2479-84 (1999) (outlining the history of funding for legal services for the poor and the chronic problem of scarcity).

4. *See Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 Fordham L. Rev. 1751, Recommendation 60(a), at 1776 (1999) [hereinafter *Recommendations*].

5. *Id.* Recommendations 47–64, at 1774-78.

6. My thinking about limited legal assistance was enhanced dramatically by the discussions in this Group while at the Fordham conference, and I am grateful to the conference sponsors for bringing together such a knowledgeable and dedicated group

native way to think about limited legal assistance and to evaluate its role in the delivery of legal services.

Part I of this Essay outlines the Fordham recommendations regarding limited legal assistance. Part II applies the recommendations to various delivery models, including pro se clinics, hotlines, form pleadings, and ghostwriting, noting that the recommendations turn on the distinction between "brief, specific advice" and services requiring a diagnostic interview, not the particular delivery model. This application illustrates the strengths of the recommendations, which include the dual categories of limited legal assistance, the critical role of the diagnostic interview, and the flexibility of the contextual interpretation of the ethical rules. It also highlights a weakness, i.e., the difficulty in determining into which category of limited legal assistance a particular inquiry falls. Part III proposes a different conceptual model for evaluating the role of limited legal assistance in the delivery of legal services. Part IV outlines a research agenda. These reflections conclude in part IV by arguing for a tentative application of the recommendations coupled with extensive assessment of their effects on clients' efforts to obtain justice.

I. SUMMARY OF RECOMMENDATIONS ON LIMITED LEGAL ASSISTANCE

The Group outlined a series of principles applicable to limited legal assistance. They include the following: (1) There should be ongoing analysis of the purpose of law and legal proceedings to simplify the administration of justice and to serve the interests of the public;[7] (2) Rules governing the practice of law should not be interpreted to narrow the delivery of services;[8] and (3) The Model Rules should be interpreted to encourage the use and expansion of delivery modes that increase access.[9]

Relying on these and other principles, the Group adopted specific recommendations for limited legal assistance. Defining legal assistance as existing on a continuum, with "general advice" on one end, and traditional, full-service representation on the other, the Group sought to define those categories of legal assistance in the middle. In Recommendation Sixty, the Group divided limited legal assistance into two categories: (1) "brief, specific advice"; and (2) assistance re-

of advocates. The positions articulated here represent my interpretation of the Recommendations, and not necessarily those of the Group, unless otherwise stated. At the request of our facilitator, Lynn Kelly, I prepared the summary of our Group discussions and revisions to the recommendations in light of the final conference session. Throughout the process of preparing these documents, I was cognizant of my multiple roles and hope I fairly differentiated the ideas of the Group from my own when they differed.

7. *See Recommendations*, *supra* note 4, Recommendation 47, at 1774.

8. *See id.* Recommendation 48, at 1774.

9. *See id.* Recommendation 51, at 1775.

quiring a diagnostic interview.[10] "Brief, specific advice" is defined as "answering a specific question or limited set of related questions without follow up or exploration by the legal services provider."[11] In all other circumstances, a diagnostic interview is required to determine which limited legal assistance methodologies are appropriate for this particular consumer.

The recommendations further provide that systems of limited legal assistance must be evaluated.[12] The recommendations also emphasize the court's role in increasing access to justice and that the courts and the legal profession should "explore innovative efforts to assist pro se

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10. Recommendation 60 states as follows:

> Within the Limited Legal Assistance category, there are two subdivisions: (a) brief, specific advice, and (b) assistance requiring a diagnostic interview.
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> (a) *Brief, Specific Advice*: An individual may interact with a lawyer or legal services organization for the limited purpose of obtaining brief, specific advice. "Brief, specific advice" shall be defined as answering a specific question or limited set of related questions without follow up or exploration by the legal services provider. In such circumstances, the client must be advised that the service is limited to brief advice only.
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> The lawyer or legal services provider offering brief advice is bound by obligations of confidentiality, competence, and the duty to avoid conflicts of interest appropriate to the context. The lawyer or legal services program has no duty to provide complete assistance with respect to the individual's legal problem. Under the ethical rules governing conflicts of interest which apply to potential as well as actual conflicts, the lawyer or legal services program should not be restricted to the same degree as the lawyer who renders more extensive representation. A lawyer or legal services organization that provides brief advice must develop systems that prevent disclosure of client confidences and must avoid the risk of divided loyalty by terminating the communication as soon as it appears that there may be a conflict with a previous recipient of brief advice services. A provider of a brief service that also operates a full service or diagnostic system must have in place a mechanism to avoid actual conflicts of interest between recipients of brief advice and those who receive assistance under the full services or diagnostic models.
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> . . . .
>
> (b) *Assistance Requiring a Diagnostic Interview*: In all other circumstances, the lawyer or legal services provider shall conduct a diagnostic interview before providing legal assistance. That diagnostic process shall elicit sufficient facts to enable an appropriate decision as to the limited service(s) to offer the client and for the client to make an informed decision about how to proceed. An informed decision includes knowledge of the circumstances under which the recommended course of action might change and when additional services might be necessary. Information obtained in this process is protected as confidential regardless of whether an attorney-client relationship results from the process. When the limited services identified through an appropriate diagnostic process have been competently provided, the lawyer or legal services program has no further obligation with respect to this client.

Id. Recommendation 60, at 1776-77.

11. *Id.* Recommendation 60(a), at 1776.

12. *See id.* Recommendations 57, 61, at 1775, 1777.

litigants."[13] Finally, the recommendations address the application of selected ethical principles to these two settings.[14]

II. Application of Recommendation Sixty to Delivery Models

A. *Introduction*

This part applies Recommendation Sixty to various delivery models. Since the recommendation's analysis hinges on whether or not the service is "brief, specific advice," clarifying what services fall into this category is helpful. Two examples of "brief, specific advice" are provided in the recommendations themselves, and both present discrete legal questions. The first is as follows: "[A] [p]otential client calls [a] legal services office and states, 'My boyfriend registered his car in my name because he had so many parking tickets. Now, he has more parking tickets under my name. Do I have to pay them?'"[15] Her responsibility to pay tickets for a car registered in her name is indisputable.[16] The second example is as follows:

> [A] [c]onsumer calls a legal services office and states that she was turned down for credit and that her credit report is incorrect, and asks what she should do. [A] [l]egal worker advises her how to get a copy of her credit report, that the report is free, and the steps she should take to get the credit reporting agency to revise the information.[17]

These examples are best understood in contrast to a question not fitting the "brief, specific advice" category. A legal consumer may raise the following question: "My boss was harassing me, so I quit my job. Can I collect unemployment?" To give accurate advice in re-

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13. *Id.* Recommendation 62, at 1777.

14. The Group's recommendations on limited legal assistance are consistent with four major trends that emerged from the conference recommendations as a whole. The first is an emphasis on innovation, especially technology, and modifying, or at least reinterpreting, existing ethical norms, professional standards, and court practices to encourage expanded use of technology. *See id.* Recommendations 47–51, 89–90, at 1774-75, 1786-87. Second, the role of courts and judges in expanding access to the legal system is emphasized. *See id.* Recommendations 25–33, 62, at 1759-65, 1777-78. Third, an expanded role for nonlawyer professionals is advocated to increase access to the legal system. *See id.* Recommendations 25–33, at 1759-65. Fourth, many recommendations emphasize the need for ongoing assessment and evaluation of delivery models. *See id.* Recommendations 57, 119–40 at 1775, 1796-1800.

15. *Id.* Recommendation 60(a)(i), at 1776.

16. One could argue that there are follow-up questions, the answers to which are more complicated. For example, the legal consumer could then ask what she can do to get her boyfriend to reimburse her for the costs of the tickets. Answering this question is more involved and could take this problem out of the "brief, specific advice" category.

17. *Id.* Recommendation 60(a)(ii), at 1776.

sponse to this question, the legal professional[18] would need to engage the caller in a fairly lengthy discussion about the surrounding facts, including the nature of the harassment, what motivated it, how the consumer responded, and whether she complained to her supervisor. Consequently, this service would not be characterized as "brief, specific advice."

The determining factor in distinguishing between the two categories is whether the legal professional can provide accurate, helpful assistance based only upon minimal facts offered by the client. Although this distinction is the crux of the recommendations, it does not lend itself to easy definition.[19]

B. *Taxonomy of Limited Legal Assistance Delivery Models*

Before applying the recommendations, it is helpful to identify a taxonomy of selected limited legal assistance delivery models. Returning to the continuum and eliminating the extreme forms of "general advice" and "traditional, full service representation," delivery models in the middle include "advice only,"[20] pro se classes, form pleadings, "ghostwriting," hotlines, and discrete-task representation.[21]

"Advice only" may be provided in several contexts. The most common model is a legal consumer who contacts a legal services office and asks a very discrete question. Typically, the consumer is not seeking representation, but minimal assistance to help with a distinct legal issue. The same type of inquiry might arise in the context of a pro bono clinic being held at a local homeless shelter.

Pro se clinics, a second delivery model, vary considerably in format and scope.[22] Some clinics offer statements indicating the general nature of the information provided, that legal advice will not be provided, or that participants will need to adapt information to their own

18. I use the term "legal professional" to include an attorney, paralegal, intake worker, or other staff.

19. The difficulty in defining this distinction presents one of the weaknesses in the approach adopted in the recommendations. *See infra* Part V.

20. In these comments, I use the term "advice only" to describe a delivery model. This is to be distinguished from "brief, specific advice," one of the two categories of limited legal assistance described in the Conference's recommendations. *See Recommendations*, *supra* note 4, Recommendation 60, at 1776-77.

21. For a definition of discrete task assistance, see *supra* note 1.

22. For a definition of pro se clinics, see Margaret Martin Barry, *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 (1999) (describing pro se clinics as "provid[ing] general information about the law, procedure, and practice to a group of litigants or prospective litigants who share a common category of legal issues"). *See also* Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. Pub. L. 123, 139-40 (1993) (finding a broad array of approaches to pro se clinics from sample forms and cursory explanations to assistance and follow-up through the hearing stage).

situations and perhaps seek further help.[23] Many clinics provide no case-specific advice. In others, the degree of case-specific advice offered is minimal, and usually provided only with the proviso that it is "based solely on the limited information provided and might be significantly different after an in-depth interview."[24] In addition to legal information[25] provided orally or in writing, some clinics may also provide forms, which consumers may complete with the general assistance of clinic staff or independently at a later date. Once the consumer has finished the class, she is typically on her own to complete the remaining tasks and hopefully to resolve her legal problems.

Another form of limited legal assistance is "form pleadings," where documents are provided to the consumer to complete and file on her own.[26] Examples of these documents include petitions for divorce, counterclaims in eviction matters, and bankruptcy forms. Such pleadings or forms might be provided in the context of a pro se clinic or independently distributed through the mail, a community education program, or on-line.[27]

Ghostwriting is the process of preparing pleadings for a client, who then files them pro se and represents herself.[28] In a series of recent decisions, courts have frowned upon this process.[29] At least one court

23. *See, e.g.*, Barry, *supra* note 22, at 1891-94 (discussing efforts by the Maricopa County Superior Court to assist pro se litigants).

24. *Id.* at 1889 (citation omitted).

25. For a discussion of the dubious distinctions between providing legal information and legal advice, see, for example, 80 Op. Md Att'y Gen. No. 95-056 (1995) (outlining what services lay advocates may and may not provide to domestic violence victims), *available in* 1995 WL 783587; Barry *supra* note 22, at 1892 (discussing the appropriate function of a paralegal in the providing of legal services); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 1992-98 (1999) (exploring the difficulties encountered by court clerks when asked for legal advice); Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 Clearinghouse Rev. 1178, 1186-89 (1997) (arguing that trained nonlawyers should be permitted to provide simple legal advice given the practical difficulties of distinguishing between legal information and legal advice).

26. Form documents may also be provided by court personnel and other non-lawyer professionals. *See generally* Jona Goldschmidt et al., Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers 34-45 (1997) (discussing the use of forms in these contexts).

27. *See id.* at 69.

28. For a more detailed discussion of ghostwriting, see generally John C. Rothermich, Note, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 Fordham L. Rev. 2687 (1999).

29. *See, e.g.*, Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079-80 (E.D. Va. 1997) (disapproving of ghostwriting as disrupting the efficient administration of justice); Johnson v. Board of County Comm'r, 868 F. Supp. 1226 (D. Colo. 1994) (finding ghostwriting a violation of Fed R. Civ. P. 11), *aff'd*, 85 F.3d 489 (10th Cir. 1996); *see also* Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 887 (D. Kan. 1997) (requiring plaintiff to identify if she had legal assistance in drafting court documents, and noting that such attorney should be identified, enter an appearance, and "accept accountability" for her work).

has stated that the pro se litigant "cannot have it both ways," i.e., have the added protection afforded pro se litigants and the advice and assistance of counsel.[30] A secondary concern is that such pleadings are not signed by counsel, certifying that the claim is meritorious, and therefore, the attorney is not subject to Rule 11 or other sanctions.[31]

The hotline is one of the most prevalent limited legal assistance methodologies.[32] Although various hotline systems exist, hotlines usually include a central number, phones staffed by lawyers or paralegals, and a complex computer database. Following an initial telephone interview, hotline staff provide information and/or advice to the caller. Some programs provide additional services such as referrals, letters or phone calls, document review, and written legal opinions.[33]

In applying the recommendations to hotlines, the first inquiry is whether or not this is a "brief, specific advice" service or a diagnostic interview service, which will depend on the circumstances. The caller is receiving "brief, specific advice" if she asks a single, or small number, of well-defined questions that the hotline staff believes does not require further exploration or follow-up questions. In that context, the staff person need not conduct the diagnostic interview. The staff person would, however, be required to advise the caller that this is "brief, specific advice" service. If the caller asks multiple additional questions or it becomes apparent to the staff person that the caller's request is more complex than what can be accommodated by brief advice, a diagnostic interview is required by Recommendation 60(b).[34]

Each of the delivery models outlined above is a form of discrete task assistance.[35] Discrete task assistance also includes any limited assistance that a lawyer and client agree shall be provided. For example, a lawyer may assist a client in determining the tax consequences of a property settlement in a divorce, or may help a client identify zoning issues relevant to a proposed land purchase. This concept has become increasingly common in the realm of personal service lawyer-

30. *See Laremont-Lopez*, 968 F. Supp. at 1078.

31. *See id.* at 1078-79. Although devising a solution to this dilemma is beyond the scope of this Essay, a potential compromise would be for the lawyer assisting pro se litigants to identify herself for the court and to certify that these pleadings are accurate based upon the information provided.

32. *See generally* Legal Counsel for the Elderly, Inc., American Ass'n of Retired Persons, Legal Hotlines: A How To Manual (n.d.) [hereinafter Hotlines] (outlining procedures for establishing various legal hotlines); *see also* Wayne Moore & Monica Kolasa, *AARP's Legal Services Network: Expanding Legal Services to the Middle Class*, 32 Wake Forest L. Rev. 503, 526 (1997) (describing a legal hotline program pioneered by the American Association of Retired Persons in 1985).

33. *See* Hotlines, *supra* note 31, at 3-5.

34. *See Recommendations*, *supra* note 4, Recommendation 60(b), at 1777.

35. For a definition of discrete task assistance, see *supra* note 1.

ing, although some argue such discrete services have been provided in the business context for many years.[36]

C. *"Brief, Specific Advice": Services Not Requiring a Diagnostic Interview*

Under the Group's recommendations, only services categorized as "brief, specific advice" do not require a diagnostic interview.[37] This analysis begins by applying the recommendations to "brief, specific advice" services[38] and evaluating the implications for confidentiality, conflicts of interest, and competence.[39]

1. Confidentiality

No one disputes that a legal professional providing "brief, specific advice" should maintain the confidences of the consumer.[40] One objective of the confidentiality provisions is to "facilitate[ ] the full development of facts essential to proper representation of the client

36. *See, e.g.*, Dianne Molvig, *Unbundling Legal Services*, Wis. Law., Sept. 1997, at 10, 12 ("If you mention unbundling to transactional business lawyers, they scratch their heads and say, 'What's new?'" (quoting William Hornsby, Staff Counsel to ABA's Standing Committee on the Delivery of Legal Services)); *see also* Mosten, *supra* note 1, at 422-26 (discussing the origins and models of unbundling).

37. *See Recommendations*, *supra* note 4, Recommendation 60(a), at 1776.

38. The Group assumed that general advice can be given without any interview because the content of the advice is not linked to an individual's specific circumstances or to a specific set of facts.

39. An alternative approach would evaluate the nature of the relationship between the legal professional and consumer, and apply the ethical principles based on the characterization of the consumer as a prospective client, client, or non-client. Because the recommendations define how the ethical principles apply, this analysis is unnecessary. If one chose to engage in this analysis, however, one would likely conclude that the legal consumer in the brief advice setting is most like a prospective client. This characterization permits the application of those ethical rules that are appropriate and avoids over-inclusion of unnecessary, prophylactic provisions. The lawyer or legal professional's conduct can be monitored under the ethical provisions and should a serious ethical breach occur, the attorney is subject to the disciplinary process. Similarly, the lawyer is held to the appropriate standard of care, as defined by legal malpractice law, providing potential redress for the client. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 27(1)(b)(3) (Proposed Final Draft No. 1, 1996) (defining the lawyer's duty to a prospective client as the duty to "use reasonable care to the extent the lawyer gives the person legal advice or provides other legal services"). The only substantial argument against considering the recipient of brief advice a prospective client is that this is a fiction, given the small likelihood the prospective client will ever become a client. *See, e.g.*, Tremblay, *supra* note 3, at 2484-99 (identifying intractable problems of scarce resources and advocating a weighted triage process).

40. Model Rule 1.6(a) provides that: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." Model Rules of Professional Conduct Rule 1.6(a) (1998); *see also Recommendations*, *supra* note 4, Recommendation 60(a), at 1776 (noting the ethical rules regarding confidentiality in "brief, specific advice" situations).

. . . ."[41] Despite the limited contact between lawyer and consumer, such candor is no less critical here, and may be even more critical, given that the consumer will act upon the limited advice provided, often without further legal assistance. Whether "brief, specific advice" is provided during a routine intake call to a legal services office, at an in-person pro bono clinic, or via a hotline, the consumer's confidentiality should be maintained.

The only potential difficulty with this stricture is an advice-only pro bono clinic, outside of a law office setting where there are many potential consumers and little privacy. One example is a pro bono clinic conducted at a homeless shelter on a weekly basis. Despite the inconvenience of maintaining consumer confidences in this and similar settings, the legal professional should be no less, and possibly more, diligent in protecting the consumer's privacy and confidences.[42]

2. Conflicts of Interest

Recommendation 60(a) provides that: "[t]he lawyer or legal services provider offering brief advice is bound by . . . the duty to avoid conflicts of interest appropriate to the context."[43] It further provides that: "[u]nder the ethical rules governing conflicts of interest which apply to potential as well as actual conflicts, the lawyer or legal services program should not be restricted to the same degree as the lawyer who renders more extensive representation."[44] In adopting this recommendation, the Group determined that the conflicts of interest rules were designed to prevent disclosure of client confidences and to avoid the risk of divided loyalty.[45] The Group sought a method for satisfying these objectives without unduly restricting providers of limited legal assistance. Acknowledging the prophylactic nature of conflicts of interest provisions, these recommendations apply a less strict standard to the provider of "brief, specific advice."

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41. Model Rules of Professional Conduct Rule 1.6 cmt. 2.; *see also* Ethics 2000 Comm'n, American Bar Ass'n, Proposed Rule 1.6 (7th working draft, Jan. 11, 1999) (on file with the author) (proposing an addition to Comment 4, which adds the following sentence: "This [confidentiality] contributes to the trust that is the hallmark of the client-lawyer relationship.").

42. A member of the Group suggested that the consumer participating in this clinic arguably had waived any right to confidentiality, given the setting. This conclusion is problematic. For most homeless people, their only hope of obtaining legal assistance is in a setting such as this. Encouraging client candor is equally as important here as in other contexts.

43. *Recommendations*, *supra* note 4, Recommendation 60(a), at 1776.

44. *Id.*

45. *See Report of the Working Group on Limited Legal Assistance*, 67 Fordham L. Rev. 1819, 1838 [hereinafter *Working Group Report*]; *see also* Restatement (Third) of the Law Governing Lawyers § 201 cmt. b (Proposed Final Draft No. 1, 1996) (stating that the rationale for conflicts of interest provisions includes assuring clients of undivided loyalty, enhancing effectiveness of representation, safeguarding confidential client information, ensuring that lawyers will not exploit clients, and promoting adequate presentations to tribunals).

What does this mean in practice? A consumer calls a local legal services office and asks a basic question about her personal situation, such as in the two examples outlined above. What duty does the lawyer or provider of legal services have with respect to avoiding conflicts of interest prior to answering these questions? Model Rule 1.7, designed to avoid all potential conflicts, would require the legal services provider to make numerous assessments before assisting this caller.[46] First, the provider would need to determine if the assistance to this client is directly adverse to that of another client.[47] Because the legal services office will not have represented or advised the city or municipality that issued the tickets, no conflict of interest exists within the meaning of Model Rule 1.7(a) with respect to them.[48]

A second inquiry is whether any conflict arises with respect to the boyfriend. The provider would need to ascertain if the boyfriend is a program client and, if so, whether advising this caller would be directly adverse to his interests.[49] Following this inquiry, if the boyfriend is a program client, the provider must determine whether that relationship is adversely affected by advising this caller and whether the boyfriend could consent to providing assistance to the caller.[50] The provider must also assess whether the program's advice to this caller would be materially limited by the program's responsibilities to the boyfriend.[51] A thorough conflicts check under a Model Rules analysis would also determine whether or not this caller's interests are materially adverse to those of any other ongoing program clients.[52]

The Group's recommendations eliminate many of these inquiries. Given the recommendation that the provider of "brief, specific advice" need not, with respect to conflicts of interest, be restricted to the same degree as the lawyer who renders more extensive representa-

46. *See* Model Rules of Professional Conduct Rule 1.7.

47. Model Rule 1.7(a) provides: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." *Id.* Rule 1.7(a).

48. *See id.*

49. *See id.*

50. *See id.* Rule 1.7.

51. Model Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

Id. Rule 1.7(b).

52. Potentially, an inquiry with respect to former clients could also be required under Model Rule 1.9(a), which provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." *Id.* Rule 1.9(a).

tion, what is the extent of the conflicts check that providers of such advice ought to conduct? Focusing on the objectives of maintaining client confidences and assuring client loyalty, the program should terminate the communication "as soon as it appears that there may be a conflict with a previous recipient of brief advice services."[53] These recommendations impose no formal obligation on the provider to engage in a full, program-wide conflicts check. If, however, the caller provides any information even suggesting a conflict, the provider must immediately conduct the conflicts check and analyze whether the clients could consent to the conflict under the Model Rules.[54] Absent the suggestion of conflict, the program can provide the brief, specific advice even if it might actually be adverse to another client.

Assume a different set of facts. The resident of a homeless shelter attends a legal clinic at the shelter and seeks advice about the following problem: He and another shelter resident are former roommates. They each contributed $250 toward a security deposit. When they left their apartment, the landlord returned the full security deposit to the other tenant. Can he get his money back from the co-tenant? The question seems appropriate for the "brief, specific advice" category. However, one must resolve the extent of the necessary conflicts inquiry. Under a Model Rules analysis, a conflicts check would identify whether or not the lawyer or legal services provider had ever assisted this landlord or the co-tenant. If the answer was "yes," the program would then determine whether providing assistance to this prospective client would be directly adverse to the interests of the landlord or the other shelter resident, or if representation of this client would be materially limited by the lawyer's responsibilities to another client.[55] Assuming a "yes" answer to either of those questions, the legal professional would then need to determine if the client and prospective client could consent to the conflict.[56] Even if this prospective client eventually obtains assistance, this conflicts-checking process is resource intensive and time consuming.

It is certainly possible that the co-tenant, also a shelter resident, is also a recipient of services from this provider. Must the legal professional do a conflicts check before providing the advice? Such a check is not required unless "it appears that there may be a conflict."[57] Thus, the legal professional could provide the advice without taking any specific precautions to avoid a conflict. However, if during the course of answering the question it appears there may be a conflict,

53. *Recommendations*, *supra* note 4, Recommendation 60(a), at 1776.

54. Model Rule 1.7(b)(1) provides that the client can, after consultation, consent to a conflict if "the lawyer reasonably believes the representation will not be adversely affected." Model Rules of Professional Conduct Rule 1.7(b)(1).

55. *See id.* Rule 1.7.

56. *See id.*

57. *Recommendations*, *supra* note 4, Recommendation 60(a), at 1776.

the legal professional should determine if a conflict exists, and if so, should terminate the communication absent appropriate consent.

A related issue concerns who is the "provider" of legal services. The provider could be a legal services program, a pro bono lawyer participating in a legal services program, or an "independent" pro bono lawyer. If the provider is a local legal services office, whatever conflicts check is conducted shall include at least that particular office. If the legal professional is a pro bono lawyer participating in a legal-services-sponsored program, particularly one providing training and backup support, the conflicts screening process should include that legal services office.

Assume the shelter's legal professional is a pro bono lawyer either participating in a pro bono program or working independently who represents many of the city's rental management companies as a partner in a large firm. Must a conflicts check be conducted to avoid conflicts with the lawyer's paying clients? Under these recommendations, in the scenario outlined above, the lawyer can provide advice to this consumer without a conflicts check. However, if at any point "it appears there may be a conflict," she should terminate the communication.[58] If the pro bono attorney provides traditional representation to the management company, then an actual conflict of interest exists, and she should terminate the communication with the shelter resident.[59]

A related issue concerns imputed disqualification due to conflicts of interest. Under a Model Rules analysis, if any member of the firm represented the management company that had rented to the shelter resident, the pro bono lawyer would need to cease communication with the shelter resident, absent consent to the conflict.[60] Although the limited legal assistance recommendations do not specifically address this issue, they do suggest that the standards regarding imputed disqualification should not be applied rigidly. The recommendations provide that "the lawyer or legal services program should not be re-

58. *See id.* Although the pro bono lawyer is participating in an organized pro bono clinic, she remains a member of her own firm. Depending on the structure of the pro bono clinic, the lawyer may be assisting under the auspices, and malpractice coverage, of a legal services program. This fact should not, however, alter her obligation to avoid actual conflicts of interest with her firm's clients.

59. *See id.*

60. *See* Model Rules of Professional Conduct Rule 1.10(a). A comment to this rule states:

> The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Id. Rule 1.10(a) cmt. 6.

stricted to the same degree as the lawyer who renders more extensive representation"[61] and also distinguish between actual and other conflicts. If the pro bono lawyer has no confidential information or knowledge about this particular firm client, and there is no risk of divided loyalty, the assistance to the shelter resident would be permissible under the recommendations.[62]

In the hotline setting, the relaxed standards in the recommendations suggest that a program need not perform a complete conflicts check for every caller seeking brief advice.[63] Requiring a thorough conflicts check would create a logistical nightmare, particularly for programs operating central intake numbers, handling a high volume of calls, and using substantial numbers of staff and pro bono attorneys. These recommendations require the organization providing the hotline to "develop systems that prevent disclosure of client confidences" and to "avoid the risk of divided loyalty by terminating the communication as soon as it appears that there may be a conflict with a previous recipient of brief advice services."[64] The contextual interpretation of the conflicts of interest provisions imposes a duty to avoid actual

61. *Recommendations*, *supra* note 4, Recommendation 60(a), at 1776.

62. Even under a Model Rules analysis, courts are increasingly evaluating whether the presumption of shared confidences within a law firm can be rebutted. In the Annotated Model Rules, the legal background section states:

> Relevant factors used in rebutting the presumption of shared confidences include the nature of the former representation, the time lapse between representations, the nature of the current association between the tainted lawyer and the firm sought to be disqualified, the likelihood of contact between the tainted lawyer and the lawyers responsible for the current matter and the presence and efficiency of specific institutional mechanisms to prevent the passage of information.

Center for Prof'l Responsibility, American Bar Ass'n, Annotated Model Rules of Professional Conduct 172 (1996) (discussing the legal background surrounding Rule 1.10); *see also* United States for the Use and Benefit of Lord Elec. Co. v. Titan Pac. Constr. Corp., 637 F. Supp. 1556, 1566-67 (W.D. Wash. 1986) (determining that confidences had not been shared within a law firm). The *Titan* court analyzed the lawyers' of counsel relationship and looked to other evidence in the absence of a screening device. *See id.*

63. Because the current literature on hotlines applies the Model Rules, it typically requires a conflicts check similar to that which would be conducted in a traditional, full service representation setting. *See, e.g.*, Hotlines, *supra* note 32, at 8 ("The Hotline attorneys, at their orientation, should be instructed to consistently check any possible conflict of interest before advising a caller."); *see also* Ethics Advisory Opinion Comm., Utah State Bar, Opinion 96-12 (1997) (finding that when an attorney provides general advice over a 900 number, an attorney-client relationship is created, and all ethical rules apply to that relationship), *available in* 1997 WL 45137; Standing Comm. on Prof'l Responsibility and Conduct, State Bar of Cal., Interim Op. 95-0015 (noting that, normally, an attorney-client relationship is formed between callers to a telephone consultation service and the attorney; even if there is not an attorney client-relationship, professional responsibilities attach to the relationship).

64. *Recommendations*, *supra* note 4, Recommendation 60(a), at 1776.

conflicts,[65] but only after the potential conflict is brought to the legal professional's attention.

The extent of the necessary conflicts check in the hotline setting depends on the nature of the program. One component of this analysis is whether or not the program is one "firm" within the meaning of the Model Rules.[66] Relevant factors include the size of the organization,[67] the structure of the organization,[68] the degree of communication between the offices,[69] and the administrative and supervisory connections between the offices.[70] A conflict does not automatically arise simply because the callers to different but affiliated legal services offices advise prospective clients on opposite sides of a case.

If a program provides diagnostic services or traditional representation in addition to brief advice service, the program must "have in place a mechanism to avoid actual conflicts of interest . . . ."[71] However, given that providers of brief advice services "should not be restricted to the same degree as the lawyer who renders more extensive representation" in the context of conflicts of interest,[72] the program

65. *See id.* In an effort to satisfy the purposes of the conflicts provisions without unduly restricting client access to legal professionals, the Group's recommendations refer to "actual" conflicts as distinguished from all potential conflicts. This distinction is in contrast to the current Model Rules and the Restatement of the Law Governing Lawyers. *See also* Ethics 2000 Comm'n, American Bar Ass'n, Proposed Rule 1.7 cmt. 1 (7th working draft, Jan. 11, 1999) (on file with author) (indicating that proposed language regarding actual and potential conflicts was deleted from Comment 1, and deemed "meaningless when conflict is defined to mean the presence of *risk* that harm will occur").

66. *See, e.g.*, Model Rules of Professional Conduct Rule 1.10 cmt. 3 (1998) (noting what constitutes a firm).

> Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Id.; *see also* Restatement (Third) of the Law Governing Lawyers § 203 cmt. d(v) (Proposed Final Draft No. 1, 1996) (noting that lawyers in same legal services agency may represent conflicting interests if adequate measures are taken to protect confidential client information so it will not be available to other lawyers).

67. *See, e.g.*, English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498, 1507 (D. Colo. 1993) (finding the presumption of imputed confidences was rebutted in light of the firm's size). *But see* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir. 1978) ("[T]here is no basis for creating separate disqualification rules for large firms.").

68. *See* People v. Wilkins, 268 N.E.2d 756, 757 (N.Y. 1971) (finding that the rule of imputed disqualification does not apply to a large public defense organization such as the Legal Aid Society).

69. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1975) (stating that the relationship between two organizations did not prevent lawyers in those offices from accepting employment on different sides of a controversy where there was "no exchange of personnel, no exchange of information and no controlling or supervisory relationship").

70. *See id.*

71. *Recommendations*, *supra* note 4, Recommendation 60(a), at 1776.

72. *Id.*

need not avoid all potential conflicts. Similarly, it need not screen initially to avoid imputed conflicts or the appearance of conflicts.[73]

3. Competency

Indisputably, the advice provided in the "brief, specific advice" setting must be competently given.[74] Applying the competency standard to this setting raises two additional questions: (1) To what should the competency requirement apply; (2) What redress exists for the consumer if the limited service, i.e., the "brief, specific advice," is not competently provided.

Assessing whether the advice given was competent is fairly straightforward. One need only examine the question asked of the legal services program, and the answer given. Returning to one of the fact scenarios presented above, if the legal professional's answer to the question regarding the parking tickets is accurate, the advice is competent.[75]

The more complicated question concerns the professional judgment with respect to *defining* the legal question. Circumstances will undoubtedly arise in which it would be incompetent to answer one or two questions only, without knowing more.[76] The critical question is was it incumbent upon the legal professional to ask a series of additional questions, thereby converting this "advice only" service into one requiring a diagnostic interview. The competency requirement must apply to the initial screening decision that this question is appropriate for brief advice only.

In the hotline context, it may be possible to answer a discrete question or set of questions and provide limited advice.[77] However, the legal professional, relying on her experience and judgment, will need to determine what is an appropriate question for "brief, specific ad-

73. Even under a Model Rules analysis, a lawyer or legal services entity need not screen to prevent the appearance of impropriety with respect to potential conflicts between former clients and current clients. *See, e.g.*, Waters v. Kemp, 845 F.2d 260, 265 (11th Cir. 1988) (denying a motion to disqualify court-appointed counsel based on Canon 9 of the Model Code, which states "[a] lawyer should avoid even the appearance of professional impropriety," because under the governing Model Rules, "the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit").

74. Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Professional Conduct Rule 1.1 (1998).

75. This suggests the need to keep records of all advice given to determine in the future that the services were competently provided. *See, e.g.*, Hotlines, *supra* note 32, at 41 (requiring hotline attorneys to take detailed notes of the facts of a case and the advice given to a client).

76. *See, e.g.*, McNeal, *supra* note 1, at 318-30 (exploring the ethical implications of providing unbundled services to elderly clients).

77. *See* Hotlines, *supra* note 32, at 2.

vice."[78] If she exercises this judgment competently and provides competent advice, she has met this ethical standard.

A major concern is the redress available for the consumer if the "brief, specific advice" is not competently provided. The hotline caller has the traditional protections afforded by the legal malpractice standards. Realistically, however, pursuing a claim is expensive, time consuming, and inefficient.[79] Seeking redress is further complicated by the nature of the service provided, i.e., brief advice, and proof may be a problem.[80]

If the hotline advice is provided by an attorney, or other legal professional assisting under the supervision of an attorney,[81] the attorney is subject to the bar's disciplinary process. The purpose of this process is to discipline the attorney and protect the public, especially future clients. Because the consumer is not a party to the disciplinary proceeding and it rarely provides her with compensation or relief, its value to this consumer is limited.[82]

D. *Services Requiring a Diagnostic Interview*

Under the recommendations, all services other than "brief, specific advice" require a diagnostic interview.[83] Because the diagnostic interview plays a critical role in this analysis, it is worthy of brief discussion. One purpose of the diagnostic interview is to elicit facts. Elicited facts might include information about the legal problem, the opposing party, and the forum or context in which the legal problem arises. The diagnostic interview also involves "probing for hidden is-

78. *See id.* at 19. "The concept behind the Hotline is that very experienced people should be used to handle the calls. This insures that advice is based on a practical knowledge of the law and that all issues are identified and addressed." *Id.*

79. *See* Paul Rheingold, *Legal Malpractice: Plaintiffs' Strategies*, Litigation, Winter 1989, at 13, 13 (noting the need to carefully value legal malpractice cases because they are expensive and time consuming).

80. At least one hotline manual recommends that hotline attorneys "make detailed notes in the computer on the facts of the case and the advice given to the client." Hotlines, *supra* note 32, at 41. This manual also recommends a sophisticated computer system to record all telephone contacts, conduct efficient conflict checks, and assemble forms and documents. *See id.* at 32.

81. Model Rule 5.3(b) provides that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Model Rules of Professional Conduct Rule 5.3(b) (1998). The comment further provides that lawyers should be responsible for the work product of assistants in their employ. *See id.* Rule 5.3(b) cmt.

82. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 1.9, at 41 (4th ed. 1996) (distinguishing between ethical rules and civil liability, the authors note the "prophylactic purpose" of the ethical provisions and that the injured client who initiates a disciplinary action is not a party to that proceeding).

83. *See Recommendations*, *supra* note 4, Recommendation 60(b), at 1777. For a discussion of diagnostic interviews in the context of a pro se family law clinic, see Michael Millemann et al., *supra* note 25, at 1182.

sues."[84] The interviewer seeks to learn enough about the consumer to make a determination about the range of services appropriate for this particular person.[85] Factors that the legal professional might assess include the potential client's emotional stability as well as her ability to understand the limited nature of the services to be provided, to read pro se materials, to write, and to proceed without traditional representation.[86]

Evaluating specific facts provided by a consumer during a diagnostic interview is relatively easy. The legal professional can assess the complexity of the legal problem, the nature of the forum in which the consumer will be proceeding and its receptiveness to pro se litigants, and the potential consequences of a bad result. Assessments about this particular consumer, however, and her ability to proceed in a specific setting, are more problematic. They are not formulaic, and are necessarily subjective. They require good judgment[87] and experience in working with people from diverse backgrounds with a myriad of social problems. Diagnostic interviewers should also be knowledgeable about the law and the legal system. Based on the information obtained during the interview, the legal professional will provide the consumer with a range of appropriate, limited legal assistance choices.[88]

A second goal of the diagnostic process is to provide the consumer with sufficient information "to make an informed decision about how to proceed."[89] This disclosure should include a description of the op-

84. Milleman, et al., *supra* note 25, at 1182.

85. *See id.* In the context of a family law pro se clinic:

> [To determine the type and level of legal services clients may require,] the diagnostic interviewer must understand the whole body of family law and be good at eliciting facts, evaluating people, and probing for hidden issues. . . .
>
> . . . .
>
> The client may also be less able than she appears to perform an essential task, or to understand, accept or act on legal advice.

Id.

86. Critics of this process will likely assert that it is paternalistic for the legal professional to make such assessments about the client during this initial diagnostic interview, *see generally* Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method, 411-24 (1994) (discussing paternalism in various attorney-client relationships), and that it is time-consuming. Although I do not underestimate the challenge of making such assessments in a brief interview and simultaneously respecting clients' autonomy, I believe that lawyers and other legal professionals regularly make such assessments about clients, although our conclusions are rarely articulated.

87. For a discussion on the role of judgment in lawyering, see, e.g., David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31 (1995).

88. The Group spent substantial time discussing the role of client choice and consent in this context. Recognizing the limitations of informed consent where the options are narrow, the Group determined that the provider should offer as wide a range of choices to the client as is appropriate under the circumstances. *See Working Group Report*, *supra* note 45, at 1821-22.

89. *Recommendations*, *supra* note 4, Recommendation 60(b), at 1777.

tions, information about what is required of the consumer, and an outline of the pros and cons of each option.[90] Recommendation Sixty requires a statement as to the limited nature of the services to be provided, information about when the recommended course of action might change, and information about "when additional services might be necessary."[91] The goal is to prevent a legal consumer from relying on a small modicum of advice and inappropriately applying it to an array of circumstances.

Effective diagnostic interviewing is critical for the success of limited legal assistance.[92] Weaknesses in a provider's diagnostic process could severely injure the legal consumer and have a more profound effect than they would in the traditional, full service context. Critics of the diagnostic interview will likely assert that this requirement diminishes the value of limited legal assistance, given the time involved. However, this assessment is the primary mechanism to assure that clients obtain services that are valuable to them. It also prevents limited legal assistance from becoming a routine mechanism for delivering legal services that has no relationship to client need, problem type, and resolution context.

Under the recommendations, a diagnostic interview is required for all services except "brief, specific advice." Diagnostic interviews will most often be required in the following contexts: pro se clinics, form pleadings, ghostwriting, hotlines (in all circumstances other than those described above), and other forms of discrete task assistance.[93] These services may be offered individually or in combination with each other. As in the "brief, specific advice" context, critical issues arise regarding confidentiality, conflicts of interest, and competence.[94]

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90. This is similar to a mini-counseling session. *See generally* David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (1991) (discussing models of client counseling).

91. *Recommendations*, *supra* note 4, Recommendation 60(b), at 1777.

92. *See* Millemann et al., *supra* note 25, at 1182.

93. Technically, one might include "general advice" among the categories of pro se assistance. However, I have eliminated "general advice" from this list because this discussion is narrowly focused on the limited legal assistance services in the middle of the continuum of legal services. *See supra* notes 10-14 and accompanying text. For definition of discrete task assistance, see *supra* note 1.

94. Again, an alternative approach would be to define the nature of the relationship in the diagnostic interview setting. The most practical way to characterize this relationship is as an attorney-client relationship. The reasons for this are numerous. First, the legal professional will be providing extensive services for the client, including as part of the diagnostic interview, the exchange of confidential information, an analysis of the client's situation and what limited services are most appropriate, and, potentially, the collection of additional information when providing the actual, limited service. Second, the Model Rules permit the attorney and client to limit the scope of the representation. Model Rule 1.2(c) provides: "A lawyer may limit the objectives of the representation if the client consents after consultation." Model Rules of Professional Conduct Rule 1.2(c) (1998); *see also* Restatement (Third) of the Law Governing Lawyers § 30 (Proposed Final Draft No. 1, 1996) (stating that a lawyer and client can agree to limit a duty a lawyer would otherwise owe, provided the client

1. Confidentiality

Given that the diagnostic interview will generate detailed information about the consumer, maintaining confidentiality is even more imperative in this context than in the "brief, specific advice" setting. Additionally, candor is particularly important given that a full and honest depiction of the facts is essential in determining the appropriate range of services.

In the pro se clinic setting, confidentiality issues may arise occasionally. If a consumer asks a question revealing specific information about her case in the classroom setting, the consumer has waived her right to confidentiality with respect to those in the class, but not to others. The legal services provider remains bound by obligations of confidentiality.[95] With respect to form pleadings, hotlines, ghostwriting, and other forms of discrete task representation, information obtained during the diagnostic interview and pursuant to providing the service must be kept confidential.

2. Conflicts of Interest

Because the diagnostic interview creates an attorney-client relationship, under a Model Rules conflicts of interest analysis, the lawyer or legal services program would be required to screen for representation that would be directly adverse to that of another client.[96] The client could consent to the conflict, but only if the "lawyer reasonably believes the representation will not adversely affect the relationship with the other client."[97] The program should also screen to determine if the lawyer's responsibilities to another client would materially limit the representation.[98] In determining whether the conflict precludes representation, "[t]he critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclos[ing] courses of action that reasonably should be pursued on behalf of the client."[99] Ideally, this screening should occur before the diagnostic interview.

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agrees and the limitations are reasonable). Characterizing the consumer as a client provides additional protections in the area of conflicts of interest and redress from attorney error or negligence. This characterization implicates the ethical rules regarding conflicts of interest, and, under the recommendations, requires a screening in all situations except when the other party is the recipient of brief advice. *See infra* Part II.D.2. If the legal professional does not perform competently or violates an ethical provision, the client has a means of redress through a malpractice action and potentially via the attorney discipline process.

95. The application of the attorney-client privilege is a different issue, which I will not address.

96. *See* Model Rules of Professional Conduct Rule 1.7(a).

97. *Id.* Rule 1.7(a)(1).

98. *See id.* Rule 1.7(b).

99. *Id.* Rule 1.7 cmt. 4.

The recommendations are silent as to how the conflicts provisions should apply to limited legal services requiring a diagnostic interview. Many clients in need of limited legal assistance would be screened out under a strict Model Rules analysis, given that the rules are prophylactic and designed to identify "the presence of risk that harm will occur."[100] A potential consequence of strictly interpreting the Model Rules in the diagnostic interview setting is the risk that providers would define services that *should* require a diagnostic interview as "brief, specific advice" in an attempt to avoid the strict conflicts requirements.

A contextual application of the conflicts of interest provisions is more workable. Conflicts of interest provisions are designed to protect clients from divided attorney loyalties, and to prevent confidential information from being shared to the client's detriment.[101] A primary objective of the contextual approach is to satisfy these goals without hindering access to legal assistance.

In evaluating the contextual approach, it is helpful to apply it to the limited legal assistance settings. Beginning with pro se classes, programs should at minimum screen to avoid placing together in a pro se class individuals for whom an actual conflict exists, such as spouses seeking a divorce. Although many pro se classes do not address individual client issues, there is always the risk that case-specific questions will arise.[102] If clients with actual conflicts are not screened out, the legal professional will be forced to choose among clients and would by definition have divided loyalties, the very things the conflicts provisions are designed to avoid.

The next concern in the pro se clinic context is clients whose interests may be adverse in another matter, but not in this particular matter. For example, clients attending a pro se family law class together may be on opposing sides of a landlord-tenant dispute. Whether that is permissible depends on whether the program can serve both consumers and satisfy the purposes of the conflict provisions, i.e., maintaining loyalty and confidentiality. If not, a strict interpretation of the Rules should be applied prohibiting assistance absent appropriate client and consumer consent.[103]

The greater challenge is defining a contextual interpretation of the conflicts principles in a program providing a range of services, includ-

100. Ethics 2000 Comm'n, American Bar Ass'n, Proposed Rule 1.7 (6th working draft, Nov. 16, 1998) (on file with author).

101. *See, e.g.*, Restatement (Third) of Law Governing Lawyers, § 201 (Proposed Final Draft No. 1, 1996) (noting that the two purposes of the conflicts of interest provisions are assuring clients of undivided loyalty and safeguarding confidential client information).

102. *See* Barry, *supra* note 22, at 1210-13.

103. In contrast, comment three to Model Rule 1.7 provides that when client interests are only generally adverse client consent is not required. Model Rules of Professional Responsiblity Rule 1.7 cmt. 3.

ing pro se classes. For example, can a program represent one client with traditional, full-service representation and another client in the pro se class if they have an actual conflict of interest? Or, can a program assist clients on opposite sides of a family law matter with two different forms of limited legal assistance? For example, one client might attend the pro se classes and another may receive form pleadings or ghostwriting assistance. Under current interpretations of the Model Rules, each of these scenarios would create an impermissible conflict, although potentially one that could be waived.

Applying a contextual analysis, a variety of factors determine the best approach. Factors to be considered include the size of the program, the number of personnel involved, the likelihood that the same personnel could be involved in providing limited legal services to both clients, the degree to which the program is integrated, the location of the various services, the size of the geographic area served, the population of the community, and whether or not consumer information is catalogued in a unitary database. A principle consideration is to what extent it is likely that confidential information regarding a particular client will be shared with someone having knowledge of specific information about an opposing client, to the detriment of either or both clients. If examination of the above factors demonstrates that client confidentiality can be maintained and divided loyalties avoided, the program may provide services to both clients.

This problem becomes more complex if one of the recipients of limited services seeks additional assistance. Assume the same example, where one spouse is receiving form pleadings and another is participating in the pro se family law class. The client in the class may seek additional assistance, and even full-service representation, if the family law case unexpectedly becomes contested. Can the program provide that representation? The conclusion may depend on what that additional assistance would be. For example, if the case has become exceedingly complicated, such as a custody dispute with conflicting professional evaluations of the parents, a second diagnostic interview may indicate the need for traditional representation. However, confidential information will have been obtained as a result of the diagnostic interview and potentially additional information obtained while providing the limited legal assistance. Because these two consumers have an actual conflict and given the risk that confidential information obtained from one party could be used to the detriment of the other, the Model Rules should be applied to prohibit representation of both parties.[104]

Similarly, the lawyer who is "ghostwriting" pleadings on behalf of a client will have conducted a diagnostic interview. The lawyer will also need additional information in order to competently complete the

104. *See id.* Rule 1.7.

pleadings on behalf of the client, potentially as much information as one would need to engage in full service representation. Therefore, the lawyer would need to screen for conflicts with other clients the lawyer represents in the traditional fashion. In this situation, the lawyer should be bound by the current interpretations of the Model Rules to avoid all potential conflicts of interest.

The contextual conflicts interpretation has two primary advantages. First, the fluidity of the rule's interpretation enables more clients to be served. Second, it eliminates the arbitrary principle of avoiding conflicts of interest, which often functions to screen out applicants for assistance who do not have any *real* conflict. Potential disadvantages of this approach are the risk of inappropriate application of the contextual standard, the potential reorganization of programs to permit looser application of conflicts principles, and the unknowing creation of actual conflicts.

The contextual application provides that only those clients or consumers whose cases present actual conflicts shall be deemed "conflicted out." If a program offers different forms of limited legal assistance through separate and distinct units, the delivery of legal assistance to consumers with actual conflicts may be permitted.

3. Competence

How should one measure competence in the context of limited legal assistance requiring a diagnostic interview? Because Model Rule 1.1 envisions only traditional, full service representation,[105] it is of little assistance in determining how this standard might be applied throughout the diagnostic process.

Obviously, the provider must competently provide whatever service she chooses to provide. Preliminarily, this includes the diagnostic interview. A competent diagnosis does the following: (1) defines the nature of the legal problem; (2) determines the relevant facts to gather; (3) identifies the client's goals; (4) determines the range of services likely to accomplish the client's goals; and (5) determines the range of assistance appropriate for the client in light of the above inquiries. The most challenging aspect of this process is the last component, determining the range of appropriate services.[106] This requires sophisticated judgment applied to a limited set of facts and to a person with whom one has had limited contact. This is also where the standard is most likely to be breached.

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105. *See id.* Rule 1.1.

106. *See, e.g.*, Lonnie A. Powers, *Pro Bono and Pro Se: Letting Clients Order Off the Menu Without Giving Yourself Indigestion*, B. Bar J., May/June 1998, at 10, 10-11 ("[T]he major ethical issues in discrete task representation are being sure that you give complete, competent legal advice and that you assess the ability of the client to act on the advice.").

Recommendation 60(b) states that the provider of the diagnostic service must also provide the client with sufficient information for the client to have "knowledge of the circumstances under which the recommended course of action might change and when additional services might be necessary."[107] This critical part of the diagnostic assessment is designed to protect the client from oversimplifying the process and to encourage the client to seek additional assistance should the facts change. It also must be performed competently.

The competency standard applies to other components of limited legal assistance beyond the diagnostic interview. In the pro se clinic setting, the pro se class must be conducted competently.[108] The provider must exercise due diligence to assure that information is provided in a manner easily understood, and must be both a competent practitioner and a competent teacher.[109]

In the form pleadings context, the competency standard first arises, again, with the diagnostic interview. The second application is to the pleadings or forms themselves. The forms should take into account all applicable law and procedures, and should define when they apply. They must be "user friendly" and constructed with sufficient care to inform clients of potential problems, as well as when clients should abandon this methodology and seek additional assistance. The forms should be accompanied by a set of instructions for appropriate filing, information about any required fees, and information regarding when clients can expect a response from the opposing party or the court.[110] This information should be accurate, based on experience in that substantive area and in that forum, and designed to assist the client in achieving the results she seeks. Once the initial "diagnosis" has been completed, the legal professional must make a competent assessment as to the appropriate forms for this particular consumer.

A lawyer choosing to engage in ghostwriting must competently assess this client's ability to accomplish her goals with ghostwritten pleadings.[111] This requires an assessment of the client's ability to ad-

107. *Recommendations*, *supra* note 4, Recommendation 60(b), at 1777.

108. *See, e.g.*, Barry, *supra* note 22, at 1883. (reviewing the use of pro se clinics as a means of providing successful legal services for pro se litigants).

109. *See, e.g.*, Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 Clinical L. Rev. 359, 361-71 (1998) (expounding upon the numerous tasks lawyers perform in their role as teachers and outlining models for preparing lawyers to be good teachers). For an extensive discussion of the role of community education among lawyers for poor people, see Ingrid Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 Clinical L. Rev. 433 (1998).

110. One mechanism to assure that the forms "work" is to develop them in collaboration with the courts, service providers, client groups, community advocates, and others who have experience within this system. In the Maryland family law experiment, the forms were developed by the Family and Juvenile Law Subcommittee of the Maryland Rules Committee. *See* Millemann et al., *supra* note 25, at 1182 n.15.

111. Attorneys ghostwriting pleadings for clients should remain cognizant that courts have condemned this procedure. *See supra* note 28 and accompanying text.

vocate effectively for herself and the receptiveness of the applicable setting to pro se litigants. If the lawyer concludes that this particular client is not likely to succeed proceeding pro se with the ghostwritten pleadings, the lawyer should not prepare them for the client.[112]

Once the client chooses ghostwriting from the range of limited legal assistance options, the lawyer must elicit additional facts to assist her in drafting the pleadings. The lawyer must utilize at least the same degree of care she would in the traditional full service model. Arguably, a higher degree of care is required here since it will be more difficult for the client proceeding pro se to rectify any errors or omissions.

Once the pleadings have been filed, should the lawyer have any obligation to assist, particularly if a problem arises due to the lawyer's failure to adequately investigate? If the client's difficulty is due to an omission by the lawyer, the lawyer should provide, and should be obligated to provide, additional assistance. If the difficulty is not the lawyer's "fault," the result should depend on the seriousness of the problem, and whether or not the client can successfully accomplish her goals without further legal assistance. A balance should be struck between a standard so strict that it will discourage lawyers from providing ghostwriting assistance and one so lenient that it will potentially harm clients.

In other discrete-task-assistance contexts, the competency standard imposes on the lawyer a burden to assure that this assistance will help the client achieve her goals. It requires an analysis of other issues that might arise as a result of providing this service, issues for which the client may need, or at least should be offered, assistance.[113]

III. THE "LIKELIHOOD OF SUCCESS" STANDARD: AN ALTERNATIVE APPROACH TO LIMITED LEGAL ASSISTANCE

The Working Group on Limited Legal Assistance examined the interrelationship between limited legal assistance and existing ethical norms, and determined what changes should be made to encourage innovation in the delivery of legal services. However, this approach may have been premature.

Presumably, the primary goal is to assist legal consumers in obtaining just resolutions of their legal problems. An alternative approach to that goal is to focus on the client's "likelihood of success" with the limited legal assistance obtained. One should ask what impediments hinder the client in translating the limited legal assistance into a successful resolution of the problem. The nature and extent of these impediments then determine the viability of appropriate limited legal assistance.

112. For further discussion of this issue, see McNeal, *supra* note 1, at 331-33.
113. *See id.* at 303-11.

An empirical investigation of the use of the implied warranty of habitability in the Municipal Court of the Los Angeles Judicial District illustrates this point dramatically.[114] This study by UCLA law students and faculty concluded that despite established law on the implied warranty of habitability, "[a]n owner of a substandard building faces essentially *zero* risk that a tenant will succeed in defending an eviction based on those substandard housing conditions."[115] More specifically, of fifty-one tenants receiving paralegal assistance in drafting habitability defenses and then proceeding unrepresented in court, none were successful in raising their defenses.[116] This study determined that major causes for the tenants' lack of success were gross misapplication of the law and the court's imposition of additional proof requirements on tenants.[117] Other factors include the court's failure to provide interpreters for tenants who do not speak English, the tenants' lack of sophistication, and the complexity of the law.[118]

As this study demonstrates, a critical component of a "likelihood of success" analysis is the receptivity of the forum to pro se litigants.[119] Aspects of this assessment include the willingness of the court to apply the law and procedure accurately, to permit unrepresented litigants to raise their claims,[120] and to expend the necessary resources to resolve issues fairly.

Another component of this analysis is the capacity of the client to proceed after obtaining the limited legal assistance.[121] Aspects of this inquiry include the client's literacy, intellectual ability, vulnerability (emotional, financial, and physical), emotional fortitude, and determination.[122] These factors should be analyzed in conjunction with those

114. *See* Telephone Interview with Gary Blasi, Professor at UCLA School of Law (Jan. 25, 1999) (referencing the Executive Summary of the Report of the Blue-Ribbon Citizens' Committee on Slum Housing (n.d.) (unpublished manuscript, on file with the author) [hereinafter Executive Summary], a summary of a study conducted by UCLA law students regarding the success rate of pro se litigants raising habitability defenses).

115. Executive Summary, *supra* note 114, at 2.

116. *See* Telephone Interview with Gary Blasi, *supra* note 114. In this study of fifty-five cases that went to trial, landlords were successful in eight-four percent of the cases. Only those tenants with lawyers won at trial. *See* Executive Summary, *supra* note 114, at 3.

117. *See* Executive Summary, *supra* note 114, at 3.

118. *See id.*

119. *See generally id.* at 1-4 (discussing the Blue-Ribbon Citizen's Committee's findings on the civil justice system's role in regulating substandard housing conditions).

120. For an interesting analysis of the inability of tenants to raise claims in eviction matters, see generally Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533, 538-39 (1992).

121. *See, e.g.*, McNeal, *supra* note 1, at 336-38 (advocating that a lawyer providing unbundled services to the elderly must determine the client's ability to complete remaining legal tasks).

122. In the Maryland family law experiment, a project analysis determined that

defined above, cognizant of the obvious tension between determining a prospective client's ability to proceed on her own and paternalism.

A third factor in this assessment is the complexity of the problem or issue the consumer seeks to resolve.[123] For example, litigants without children, resources, and property can end their marriages relatively easily, and those litigants may be successful with pro se assistance.[124] In contrast, legal consumers with complex custody disputes are less likely to be successful if their only legal assistance is a pro se class or form pleadings.[125] The diagnostic interview process should assist in determining who needs what level of assistance.[126]

A fourth factor concerns the seriousness of the particular problem and the ramifications for this particular client. Some legal issues have more dramatic consequences than others. Ramifications may be legal, financial, social, moral, emotional, and physical.[127] In the landlord-tenant context, for example, exploring the ramifications would include an analysis of the housing the client stands to lose (including whether or not it is subsidized) her capacity to locate alternative housing at a reasonable cost, and her willingness to engage in a protracted dispute with her landlord. Evaluating these factors requires an extensive discussion with the client about her goals and objectives.[128]

A final factor of this "likelihood of success" analysis is the power dynamic between the parties. Common disputes with classic power imbalances that may influence the results in litigation, negotiation, or

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> what distinguished the capable from the incapable pro se litigant in these cases was not the difference between a high school or college education. Rather, it was more basic factors: the ability to speak and read English; a basic intelligence level; the absence of emotional and mental disabilities; and some degree of self-motivation, among other qualities.

Millemann et al., *supra* note 25, at 1183 (citing Nathalie Gilfrich et al., The Family Law Assisted Pro Se Project, University of Md. Sch. of Law, Report on the University of Maryland School of Law's Pro Se Project in Anne Arundel and Montgomery Counties, and Recommendations 7-8 (1996)).

123. *See* McNeal, *supra* note 1, at 299-303.

124. *See* Millemann et al., *supra* note 25, at 1183-84.

125. *See id.* at 1184.

126. In his analysis of the Maryland pro se family law experiment, Millemann defines three categories of legal problems that the project addressed: (1) those that could be resolved with "mechanical justice" (including uncontested divorces, obtaining default custody orders, and obtaining consent custody orders); (2) those that required limited judgment and discretion (often cases labeled as contested but only because one of the parties did not know the law); and (3) those requiring "substantial legal judgment and discretion" (such as advice to help avoid physical abuse, child abductions, and child support arrearages). *See id.* at 1183-85. This analysis concluded that project participants were most satisfied when the issue required only "mechanical justice" and increasingly less satisfied as the degree of complex judgment required increased. *Id.* at 1185.

127. *See* Binder et al., *supra* note 90, at 295-96.

128. *See, e.g., id.* at 272-73 (eliciting client objectives plays an important role in a lawyer's counseling with the client).

mediation settings are landlord-tenant disputes[129] and domestic violence situations. The extent of this imbalance, particularly when combined with an analysis of the forum, will affect the viability of pro se classes, form pleadings, hotlines, ghostwriting, and brief advice for a given client.

Analyzing these factors in any given setting is quite challenging. As addressed below, a future research agenda should include a study of the critical factors in various kinds of cases. Because we know little about the ramifications of limited legal assistance, this results-oriented perspective is essential.

IV. Research Agenda

An underlying assumption of this discussion is that potential low-income clients would prefer to have limited legal assistance rather than no legal assistance. While this is probably accurate, we do not know what prospective clients or low-income people in need of legal services want but are not getting from lawyers.[130] Assuming individuals will want different things, a delivery system should make a variety of approaches available.[131]

In light of the above discussion, including the "likelihood of success" approach to assessing limited legal assistance, a research agenda should include five components. The first component is information on what types of services prospective consumers want. This data will be helpful as the profession continues to fashion alternative delivery models, particularly in light of evolving technologies.

The second component of a research agenda is determining whether the recipient of limited legal assistance was aided in obtaining the results she wanted.[132] This raises two issues: (1) whether the client got

129. *See generally* Bezdek, *supra* note 120, at 536-41 (examining the social relations and power imbalances in the landlord-tenant context).

130. Many who promote limited legal assistance models do so in the vein of client empowerment and client interest in self-help, *see, e.g.*, Mosten, *supra*, note 1, at 427-30 (discussing three models for providing unbundled legal services), but little data exists about who in the client community wants what.

131. *See Recommendations*, *supra* note 4, Recommendation 65, at 1778. Recommendation Sixty-five provides:

> A delivery system of legal services for low-income persons . . . should ensure delivery of a full range of services including the following: class, group, and individual representation; legislative and administrative advocacy at the state and local level; and counseling, advice, and community education. A delivery system that only provides advice and brief legal services cannot meet this goal.

Id. For further discussion of assessment issues, see Gregg G. Van Ryzin & Marianne Engelman Lado, *Evaluating Systems for Delivering Legal Services to the Poor: Conceptual and Methodological Considerations*, 67 Fordham L. Rev. 2553 (1999).

132. Outcome is, of course, only one measure of client satisfaction. Other measures might include whether the client was able to tell her story, if she felt empowered by the experience and whether she focused the court's attention on systematic problems.

the information she wanted at the time she asked the question; and (2) whether that information helped her resolve her legal problem or legal issue. Measuring the first inquiry is relatively simple. Recipients of limited legal assistance can be surveyed to determine if they received responsive information or assistance.

Determining whether the assistance obtained was helpful is much more difficult to measure and involves an assessment of whether the consumer resolved the problem with the limited assistance she obtained.[133] For example, it might include asking what happened when she proceeded pro se in housing court, armed with the information she received from the hotline. Or an assessment of whether a tenant equipped with the form pleadings successfully raised code violations as a defense to a rent action.[134] Questions that might be asked include: Was she able to state her claim?[135] Was she permitted to put forth her evidence? Was she able to successfully convey the points that she wanted to with the evidence she presented? What was the outcome? Finally, would additional legal assistance have resulted in a different outcome?

The research agenda should also include an assessment organized by substantive areas of law. For example, a common method of providing limited legal assistance is through pro se family law clinics. Additional research should measure whether these clinics and clinics in other substantive areas enable consumers to obtain the results they seek.[136] The results of such surveys would determine settings in which additional limited legal assistance models should be developed, settings in which they are less effective, and the critical aspects of effective delivery in each substantive area.

A fourth component of measuring the effectiveness of limited legal assistance is to analyze who uses these services. Comprehensively studying a variety of delivery methods will provide data about which prospective clients are accessing the various methodologies. Demographic data should include gender, age, education level, race, geographical location, family profile, and disabilities. Cross-referencing this data with the substantive area information will help determine

133. Obviously, an assessment must take into account that, even with traditional full service representation, not all claims are successful nor are all legal problems happily resolved.

134. *See, e.g.*, Executive Summary, *supra* note 114, at 3 (discussing tenants' inability to raise habitability claims in the municipal court of Los Angeles).

135. *See, e.g.*, Bezdek, *supra* note 120, at 558-66 (documenting the inability of tenants to successfully raise claims in rent court).

136. For one such study, see *id.* at 1183-86. *See also* Van Ryzin & Engelman Lado, *supra* note 131, at 2558-61 (suggesting that an effective evaluation of the delivery of legal services requires a clear articulation of the goals and objectives of the activities provided).

which methodologies work for which consumers to address which problems.[137]

An assessment of limited legal assistance should compare outcomes in these settings to those in the traditional, full service settings.[138] Despite thirty years of organized legal services for the poor, poverty lawyers have not adequately measured the effectiveness of our work.[139] Data should be collected to determine the impact of providing legal services to low-income people, and to compare the relative merits of limited and traditional delivery models.

Finally, a theoretical issue worthy of scrutiny involves the continuation of one uniform body of ethical provisions. After discussing the merits and detriments of specific ethical provisions applying only to advocates for low-income clients, the Working Group on Limited Legal Assistance determined that it was preferable to have one set of ethical provisions applicable to the profession as a whole.[140] I suspect most advocates for the poor would support this position. However, one wonders whether separate ethical provisions are a logical development from the expanding notion of contextual rule interpretations. Is it logical to assert that the contextual application is permissible but dual sets of ethical provisions are not? More study, analysis, and discussion of this issue will assist the profession in resolving this difficult question.

V. Assessment of the Recommendations and Conclusion

The Fordham Conference's recommendations on limited legal assistance[141] are a critical first step in analyzing the ethical and professional issues implicated by limited legal assistance delivery models. They are an important development in what must be ongoing analysis and discussion, as well as research on mechanisms for increasing access to justice for low-income people.

Applying selected limited legal assistance recommendations to delivery models provides insight on how these concepts work in practice. It also highlights both the strengths and weaknesses of the recommendations. A significant strength of the recommendations is the creation of two categories of limited legal assistance: "brief, specific advice"

137. For factors influencing litigants' ability to proceed pro se in the family law area, see *supra* notes 122, 126.

138. *See Recommendations*, *supra* note 4, Recommendation 121, at 1796-97 (one goal of assessment is to "compare the effectiveness of traditional and innovative delivery systems/strategies").

139. *See generally* Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 Geo. L.J. 1529, 1542-58 (1995) (arguing that legal services lawyers have failed to adequately identify legal problems of the poor, to be knowledgeable of the economic, political and social contexts in which these problems arise, and to evaluate potential strategies).

140. *See Recommendations*, *supra* note 4, Recommendation 52, at 1775.

141. *See id.* Recommendations 47–64, at 1774-78.

and "services requiring a diagnostic interview."[142] Examining delivery methods from this perspective permits varying interpretations of the applicable ethical rules and provides guidelines for providers of limited legal assistance.

A second strength of the recommendations is the use of the "diagnostic interview." Perhaps *the* critical component of providing limited legal assistance, it enables the legal services provider to avoid many of the pitfalls of offering limited legal assistance and offers assurance to the client that an appropriate range of services will be offered.

The contextual interpretation of selected ethical provisions is also a strength of the recommendations' approach. While attorneys and clients alike appreciate the need for ethical standards, such provisions should be sufficiently fluid to accommodate the evolving economies and realities of law practice. The recommendations' approach is to identify the purpose behind the applicable provisions, and then to seek a less rigid mechanism to achieve those goals. As is demonstrated in the analysis of "brief, specific advice" and of conflicts of interest, this approach appears to work.

Although the recommendations help conceptualize how the ethical provisions apply in the limited legal assistance context, distinguishing between those services that qualify as "brief, specific advice" and those requiring a diagnostic interview remains difficult. In the Group discussions, we readily agreed that some services could be categorized as "general advice," while others required the application of law to client-specific scenarios, and still others required a more in-depth factual analysis.[143] Agreeing upon what fact scenarios fit in which category was more challenging. Through ongoing evaluation and experimentation, these two categories of assistance can be more carefully defined.

A second notable weakness in the recommendations is a failure to consider a "likelihood of success" standard in evaluating limited legal assistance delivery methods.[144] Although the Group acknowledged the absence of data on the success of limited legal assistance delivery models, we eagerly sought an analysis that would permit the use of such methodologies, allow adequate protection for clients, and be workable for the profession. While this approach has merit, more data is needed.[145] It is imperative that assessment begin immediately,

142. *Id.* Recommendation 60, at 1776-77.

143. *See Working Group Report*, *supra* note 45, at 1823. Actually, the term "brief, specific advice" was not used during our discussions. In carefully reviewing the recommendations following the conference, however, it became apparent that we needed a term to describe those limited, but case-specific, advice settings.

144. For further discussion of the factors involved in a "likelihood of success" analysis, see *supra* Part III.

145. While acknowledging the need for thorough assessment of delivery models, the Group did not suggest that assessment be a prerequisite for ongoing experimentation or funding.

be implemented in ongoing programs, and be carefully conducted to generate concrete data on a range of issues.

The Fordham Conference's recommendations on limited legal assistance represent a dramatic effort to address the needs of low-income clients through evolving delivery mechanisms while maintaining high ethical and professional standards. These preliminary comments evaluate how these recommendations work in practice, highlighting their strengths and weaknesses. They also demonstrate the critical need to assess the effectiveness of limited legal assistance. If these recommendations are adopted by the profession, their impact in assisting clients in obtaining greater access to justice, and on the judicial system and the profession, is uncertain. The potential is profound.

APPENDIX

Although the Working Group on Limited Legal Assistance generally believes that amendments to the Model Rules are unnecessary and that a new "gloss" on the Rules is sufficient to accommodate these recommendations, the participants did not have sufficient time to actually engage in a thoughtful analysis of how each recommendation dovetails with the Model Rules. In light of this brief analysis of the limited legal assistance recommendations, the following tentative revisions to the Model Rules are proposed for study and consideration:

A. *Preamble*

The following provisions from the recommendations on Limited Legal Assistance should be added to the Preamble:

a. Access to justice must be maximized by an ongoing analysis of the purpose of law and legal proceedings and the implementation of modifications that simplify the administration of justice and serve the interests of the public without undue intervention.

b. The legal profession has a responsibility to facilitate access to justice; therefore, the Model Rules of Professional Conduct should be interpreted to encourage use and expansion of responsible modes of representation that increase such access.

c. Rules regarding the administration of justice, rules governing the practice of law, and rules prohibiting the unauthorized practice of law should not be created, advanced, interpreted, or applied so as to obstruct efforts to increase access.

d. The courts and the legal profession should be encouraged to explore innovative efforts and to assist pro se litigants.

B. *Model Rule 1.1.*

This rule provides that "a lawyer shall provide competent representation to a client." However, "representation" is not defined. The comments and other authority assume traditional, full service representation. A comment should be added to Model Rule 1.1 specifying that "representation" may include "advice only" and other forms of discrete task representation.

C. *Model Rule 1.3.*

This rule provides that "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 3 further provides that "[u]nless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been re-

solved." This comment should be modified to permit the situation addressed in the recommendations in the "brief, specific advice category," providing that in certain circumstances, "the lawyer or legal services program has no duty to provide complete assistance with respect to the individual's legal problem."

D. *Model Rule 1.7.*

The conflicts of interest provisions should be modified to permit a looser interpretation in the "brief, specific advice" context. The comments should provide that the primary concerns are protecting client confidences and avoiding divided loyalties; if those two concerns are addressed, a more lenient application of the conflicts of interest principles should be permitted in limited legal assistance settings.

E. *New Rule on Prospective Clients.*

A new rule should be drafted on prospective clients, as has been proposed by ABA Ethics 2000. It should address issues such as confidentiality, conflicts of interest, and the competence standard in the context of prospective clients.