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Limited Scope Lottery: Playing the Odds on Your Ability to Withdraw

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PLAYING THE ODDS ON YOUR ABILITY TO WITHDRAW

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INTRODUCTION

Pro bono work is integral to the practice of law.[1] Its importance to attorneys is evidenced by its inclusion in the American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC).[2] Much has been written about its significance to the client recipients of free legal work.[3] But private practice attorneys, especially those without the support of large firms behind them, may find themselves mired in a pro bono conundrum: How to volunteer their time without getting involved in an all-consuming case? There may be a constant nagging fear that agreeing to help a pro bono client may result in the attorney taking on far more work than was intended. What can an attorney do if they want to volunteer their time with an assurance that a single pro bono matter won't eclipse all other matters? Or that the pro bono matter won't take so much time away from paying clients as to prevent the attorney from making a living?

Limited scope representation is one possible solution to this constant dilemma. Practice and ethical rules have evolved over the past twenty-five years to reveal the potential of limited

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1 Pro bono or "pro bono publico" means "for the public good." *See, e.g.*, Jeremy R. Feinberg, *Undeniably Important – Pro Bono Work Made Easier by Recent Ethics Developments*, N.Y. PROF. Resp. REP., Sept. 2008, at 1.

2 Pro bono work is written into the Model Rules of Professional Conduct in aspirational terms. The American Bar Association Model Rule 6.1 states that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year." MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 2018).

3 According to former Chief Judge Judith Kaye, "Access to the legal system is an inherent right of citizenship, yet far too many New Yorkers are currently denied this right because they lack economic resources." OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, EXPANDING ACCESS TO JUSTICE IN NEW YORK STATE 1 n.3 (2009) (quoting from address given by Chief Judge Kaye to announce the creation of the office of Deputy Chief Administrative Judge for Justice Initiatives in 1999).

scope representation to provide opportunities for attorneys concerned about the potentially unlimited amount of work that may be required to fully represent a pro bono client. This seemingly magical solution provides pro bono opportunities for attorneys seeking limited work, allows more individuals to obtain some representation, and provides some access to justice to those who may have been otherwise deprived of any access to justice.[4] But it is not as magical as it seems and is not without risk.[5]

Limited scope representation seems to provide the easy answer—and some legal service providers, in search of more volunteer attorneys to assist with their client loads, have jumped on the limited scope bandwagon.[6] Almost every state has a public legal service provider offering limited scope assistance and many states have amended their practical and ethical rules to allow such assistance.[7] But what happens when the limited scope of representation ends and the case has not yet been resolved? Or the representation is set to end, but the case has moved to a phase where the administration of justice is furthered by the presence of the attorney? Can the attorney extricate themself, using a limited scope retainer for support?

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[4] The premise of limited scope representation is generally thought of as some assistance is better than no assistance. *See* Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 454–55 (2011) (concluding that "half a lawyer is better than none" (citing Mary Helen McNeal, *Having One Oar or Being Without a Boat*, 67 FORDHAM L. REV. 2617, 2618 (1999))); *see also* Michael K. Davis et al., *Limited Scope Representation: A Variety of Perspectives*, WYO. LAW., Dec. 2013, at 24, 26 ("Most would agree that full representation is ideal, but the reality is most individuals that seek [limited scope representation] are not choosing between full representation and limited representation, but rather their choice is between limited assistance and no assistance at all."). In this feature article, Judge Michael K. Davis of Laramie County describes how a couple engaged in an uncontested divorce would benefit from (paid) limited scope services. *Id.* at 25–26. Angie Dorsch of the Wyoming Center for Legal Aid also emphasizes using clear agreements at the outset and "clearly defining the scope of representation in writing, and maintaining appropriate documentation." *Id.* at 26.

[5] *See* Colleen F. Shanahan et al., *Can a Little Representation Be a Dangerous Thing*?, 67 HASTINGS L.J. 1367, 1368 (2016) ("Disparate voices in research and theory suggest that access to justice interventions that are less than full representation may be helpful, but can also be harmful.").

[6] In 1999, almost seventy-five percent of Legal Services Corporation cases "were resolved through advice, referral, or some other brief service." Robert Bickel, Note, *Limited Legal Services: Is It Worth It?*, 39 COLUM. J.L. & SOC. PROBS. 331, 338 (2006). Bickel argues that "due to the characteristics of the indigent community, the provision of limited legal services to this community is not only inefficient, but fails to achieve its own goal of providing real help to more clients." *Id.* at 331. Financial constraints cause legal service providers to either limit the number of people served "and provide them with full representation, or . . . continue to serve a wider population, but offer only limited representation to many or all of those served. The current trend has been to adopt the latter option." *Id.* at 332 (citations omitted).

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

The deep dark secret of limited scope representation is that, at the whim of a court, a limited scope representation may turn into an undesired—and unplanned for—full-scale representation. A limited scope retainer is simply a private agreement between a lawyer and client "to limit the objectives of the representation in certain circumstances."[8] Limited scope representation is a "contractual right," but, unlike other contracts, limited scope agreements may require specific court approval before termination.[9] These retainers do not bind a court nor do they prevent a court from denying a motion to withdraw.[10]

While much has been written about the ethics of limited scope representation and its many clear benefits,[11] as it approaches its twenty-year anniversary, it is time to examine some cracks in the façade.[12] Little, if anything, has been written about issues surrounding withdrawal from, or termination of, limited scope representation.[13] Of the few articles that have raised the issue, many have simply determined, without support, that complications are unlikely to arise.[14] Some practical publications have described the potential withdrawal issues and recognized the need for guidance,

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[8] Sharp v. Sharp, No. 02-74, 2006 WL 3088067, at *9 (Va. Cir. Ct. Oct. 26, 2006).

[9] A.B.A. SECTION ON LITIGATION, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 72–74 (2003).

[10] *See id.*; Michele N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. TEX. L. REV. 159, 162–83 (2014).

[11] "[U]nbundling . . . enjoys strong, if not near-universal support, as a valuable access to justice tool." Steinberg, *supra* note 4, at 474. The efficacy of unbundled services is often applauded, with no support. "As a policy, it is clear that allowing attorneys to provide limited-scope representation yields greater access to justice for pro se litigants who are choosing between either no contact with an attorney or some degree of a limited attorney-client relationship." FIA Card Servs. N.A. v. Pichette, 116 A.3d 770, 783 (R.I. 2015) (emphasis omitted).

[12] While Steinberg examined the efficacy of limited scope services, *see* Steingberg, *supra* note 4, at 454–45, few legal scholars have provided any criticism of it. *But see* Shanahan et al., *supra* note 5, at 1368 ("Disparate voices in research and theory suggest that access to justice interventions that are less than full representation may be helpful, but can also be harmful.").

[13] The ABA Standing Committee on the Delivery of Legal Services White Paper *An Analysis Of Rules That Enable Lawyers to Serve Self-Represented Litigants* devotes several of its two hundred thirty pages to a discussion of existing state rules regarding appearances and withdrawals in limited scope matters. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED CLIENTS 17–27 (2014) [hereinafter A.B.A. WHITE PAPER].

[14] *See* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1108 (2002); *see also* Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 663–65 (2006). Klempner explicitly raises this issue but then determines, with no support, that it is a non-issue. *See* Klempner, *supra*, at 664 ("[L]awyers fear that the court will not abide by the limitations contained in the retainer agreement. In general, while the court may prefer that an attorney represent a litigant for the entire case, the court's desire for more litigants to be represented in court proceedings can effectively be fulfilled by allowing unbundled legal services." (internal quotation marks omitted)).

but have not provided it.[15] In the scholarly literature, the key issue rarely mentioned, and never resolved, is that limited scope representations are sometimes not limited.[16] As described by one Virginia court, under current ethical rules, a judge can easily prevent an attorney's withdrawal from a case, even after the limited scope of the attorney's work has been completed.[17]

Some states have been more proactive than others in confronting the potential withdrawal issues in limited scope representation of litigated matters.[18] Those states that have attempted to remedy the withdrawal and termination issues have created specific rules governing limited scope engagements and allowed for easier withdrawal by attorneys in such matters.[19] Neither New York nor the ABA have promulgated rules (or model rules) specifying a different standard for the withdrawal from representation by limited scope attorneys.[20] This essay proposes a solution in the form of an amended ABA model rule, which could be adopted by New York and other states, to provide clear, balanced guidelines for withdrawal from limited scope representation, particularly in pro bono engagement.[21]

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[15] *See, e.g.*, Melissa E. Darigan, *Changes in How We Practice: Limited Scope Representation Is Here*, 64 R.I. B.J., Nov.-Dec. 2015, at 3, 3 (asking "how do lawyers enter and, more importantly, exit a case"). The Rhode Island Bar Journal describes limited scope representation in the courtroom as "where the playing field is not well defined and the potential for controversy is greatest." *Id.*; *see also* Diane S. Diel & Thomas J. Watson, *Limiting Representation May Attract Clients, But Beware Gray Areas*, WIS. LAW., Oct. 2013, at 43, 45 ("Sometimes, because we want to help our clients, we may do more than we originally signed up for. That can be risky.").

[16] *See* Diel & Watson, *supra* note 15, at 45.

[17] *See* Sharp v. Sharp, No. 02-74, 2006 WL 3088067, at *9 (Va. Cir. Ct. Oct. 26, 2006).

> [W]hile an attorney and client may reach an agreement to limit the objectives of the representation to an extent that it limits the attorneys [sic] role in the litigation, once the matter comes before the court in a litigation posture and withdrawal is sought, the Court must consider the position of the client regarding such withdrawal motion, how any such agreement will affect its docket, the public perception of the litigation, and the other parties to the litigation, before it decides whether to permit withdrawal by "counsel of record."

Id.

[18] *See, e.g.*, WASH. CIV. R. 70.1.

[19] *See, e.g.*, *id.*

[20] In 2018, the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York proposed an amendment to the state's Civil Practice Laws and Rules (CPLR). *See* REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 38–44 (2018).

[21] This essay focuses on pro bono unbundling, and more specifically, on those issues that arise in litigated matters. This focus limits the ethical implications because there is no discussion of fees, withdrawal for non-payment of fees, or fee dispute arbitrations, each of which is governed by its own ethical rules. *See* Darigan, *supra* note 15, at 3 ("Limited scope representation is expanding into the courtroom where arguably affordable and competent representation is most needed, but where the playing field is

This essay begins with a brief description of limited scope representation and how it has been deployed over the past twenty years to increase access to justice. Part I describes some of the myriad ethical rules implicated in limited scope representation. Part II then discusses the specific ethical and procedural rules governing withdrawal from representation, focusing on New York as an example. It also analyzes case law that has demonstrated the existence of some of the potential problems with limited scope representations in many jurisdictions. Finally, Part III concludes by offering potential solutions for New York and other states that have not yet changed their rules to specifically make it easier for attorneys to withdraw from limited scope representation, without tilting the balance of risk to the client.

I. LIMITED SCOPE REPRESENTATION: A PRIMER

Limited Scope representation—also commonly called discrete task representation, unbundled legal services, or even, by a trendy few, "law à la carte"[22]—refers to a relatively newly defined form of legal practice[23] wherein a client and attorney agree that the attorney will provide something less than the "full package"[24] of legal services.[25] The terms "limited scope" or "unbundled legal services" are generally attributed to Professor Forrest S. Mosten of UCLA, who expressed grave concerns about increased impediments to access to justice.[26] Mosten practiced family law, an area where supporters of limited scope services

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not well defined and the potential for controversy is greatest."); MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2018); N.Y. R. CHIEF ADMIN. JUDGE 137 (Fee Dispute Resolution Program).

[22] *See, e.g.*, Stephanie L. Kimbro, *Law a la Carte: The Case for Unbundling*, GPSOLO, Sept.-Oct. 2012, at 30, 32; *"Law à la Carte Conference,"* N.Y. ST. CTS. ACCESS TO JUST. PROGRAM, http://www.nycourts.gov/ip/nya2j/LawALaCarte/index.shtml [https://perma.cc/VGD9-F2D8]; Fisher-Brandveen & Klempner, *supra* note 14, at 1108 ("Unbundling has been described as ordering 'a la carte,' rather than from the 'full-service menu.'" (quoting Dianne Molvig, *Unbundling Legal Services Similar to Ordering a la Carte, Unbundling Allows Clients to Choose from a Menu the Services Attorneys Provide*, WIS. LAW., Sept. 1997, at 10)).

[23] *See, e.g.*, Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825, 825–26 (2012).

[24] Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994).

[25] *See, e.g.*, Davis et al., *supra* note 4, at 24 ("Limited scope representation includes a range of attorney-client relationships where the attorney handles part, but not all, of a legal matter.").

[26] Mosten mentioned the idea during his time on the ABA committee discussing unrepresented litigants. *See #143: The Past, Present, and Future of Unbundled Legal Services, with Forrest Mosten*, LEGAL TALK NETWORK: LAWYERIST (Oct. 25, 2017), https://legaltalknetwork.com/podcasts/lawyerist-podcast/2017/10/143-the-past-present-and-future-of-unbundled-legal-services-with-forrest-mosten/ [https://perma.cc/A7U8-Q7M7].

posit that there are extensive client needs, and such needs may lend themselves to being unbundled or divided into discrete tasks.[27] Unbundled legal services are often viewed as one possible solution as they allow increased access to justice for those who cannot afford traditional full representation.[28]

To determine what unbundled service, or limited scope representation, is, it is necessary to understand what is being limited or unbundled. Mosten characterized the full bundle of services in litigation as follows: "(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court."[29] While this may be a simplified version of the entire array of services a lawyer may offer a litigant, it does provide a framework in which to discuss limited scope legal service. Limited scope representation is anything less than this full bundle of services.[30]

While examples of limited scope representation occur in a multitude of attorney-client interactions, there are some that are more often discussed. For example, an attorney volunteering to answer a legal hotline is providing the limited service of advising the client;[31] an attorney working in a court-sanctioned help center, providing assistance and direction with completion of court forms on site, is likewise providing the limited service of advising the client;[32] an attorney providing single day-of representation through an "attorney-for-the day" program is providing the limited service of representing the client in court.[33] These are among the common scenarios in pro bono limited scope

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[27] *See, e.g.*, Forrest S. Mosten, *Unbundled Legal Services Today—and Predictions for the Future*, 35 A.B.A. SEC. FAM. L.: FAM. ADVOC., Fall 2012, at 14, 15 ("In just under a quarter of a century, unbundling has blossomed into a powerful force in the delivery of accessible family legal services."); Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166, 196–97 (2012) (discussing the ABA's encouragement of limited scope practices in family law matters).

[28] *See, e.g.*, Krista A. Hess, *The Broad Reach of Limited Scope Representation: A Pathway to Access to Justice*, 39 W. NEW ENG. L. REV. 263, 269 (2017); Alicia M. Farley, Current Development, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 565 (2007); 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, 2691 (1999); Steinberg, *supra* note 4, at 453–54.

[29] Mosten, *supra* note 24, at 423.

[30] *Id.*

[31] Steven A. Nigh, Current Development, *Legal Hotlines: Ethical Concerns and Proposals for Regulation*, 22 GEO. J. LEGAL ETHICS 1053, 1065 (2009).

[32] *See* Stacy L. Brustin, *Making* Turner *A Reality—Improving Access to Justice Through Court-Annexed Resource Centers and Same Day Representation*, 20 TEX. J. C.L. & C.R. 17, 29 (2014).

[33] *See, e.g.*, Hess, s*upra* note 28, at 274 (describing limited representation on the day of motion hearings for foreclosures).

representation through not-for-profit legal service providers.[34] Such limited scope services have "flourished" in recent years in order to provide assistance to clients.[35]

Limited scope representation exists both in the pro bono context and in paid legal representation.[36] In the paid model of limited scope representation, clients and lawyers may agree to unbundle services to create a fee-for-service model,[37] traditionally seen in personal transactional legal representation (e.g., residential real estate closings and will preparation)[38] and not usually used in litigation. This unbundling allows a client to use a lawyer only for those tasks the client is unable to complete themselves.[39] It does not amount to full representation and allows the client to budget the costs for legal services more accurately than by the traditional hourly rate of billing used by many attorneys.[40]

In the pro bono context, limited scope representation has been used to attempt to address the access to justice gap.[41] While

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[34] *See* Steinberg, *supra* note 4, at 462; *see also* Klempner, *supra* note 14, at 655 ("[U]nbundled legal services [exist] through vehicles such as pro se clinics, community education programs, telephone advice and referral services, Internet education and self-help materials, and pro se assistance at courthouses." (emphasis omitted)).

[35] Klempner, *supra* note 14, at 655.

[36] *See, e.g.*, Colo. Bar Ass'n, Unbundling/Limited Scope Representation, Formal Op. 101 (2016) ("[L]imited scope representation is now used as a means of providing legal representation in both pro bono cases and cases in which private attorneys charge a fee."); Mary C. Ashcroft, *Unbundling Legal Services: Delivering What Your Client Wants at a Price She Can Afford*, VT. B.J., Winter 2010, 34, 34; Steinberg, *supra* note 4, at 461 ("Unbundling first came into vogue formally as a way of providing affordable legal services to the middle class—those that might need assistance with one particular aspect of their legal case, but could competently handle the rest of their matter pro se."); Lazar Emanuel, *Unbundling of Services & Practice of Law*, N.Y. LEGAL ETHICS REP. (May 2003), www.newyorklegalethics.com/unbundling-of-services-practice-of-law [https://perma.cc/B7TP-SQBB].

[37] Emanuel, *supra* note 36 (noting a trend "to promote segmented or 'unbundled' legal services to clients who cannot afford to pay for all the legal services required in a particular litigation or matter").

[38] *See* Fisher-Brandveen & Klempner, *supra* note 14, at 1108 (noting that unbundled legal services have been provided for years in estate planning and mediation matters); Diel & Watson, *supra* note 15, at 43. Diel and Watson describe the benefits of limiting representation in the paid context, including that it "may help lawyers get business they may not otherwise get." Diel & Watson, *supra* note 15, at 44.

[39] *See, e.g.*, Pa. Bar Ass'n & Phila. Bar Ass'n, Representing Clients in Limited Scope Engagements, Joint Form. Op. 2011-100 (2011) ("[I]t may simply be the client's preference unrelated to financial concerns to act as his or her own representative, seeking legal advice only on an as needed basis.").

[40] *See, e.g.*, Barrie Althoff, *Ethical Issues Posed by Limited Scope Representation—The Washington Experience*, PROF. LAW., 2004 Symposium Issue, at 67, 68; David Holterman, *Rule Changes Permit Limited Representation in Litigation: Increasing Access and Opportunity*, CHI. B. FOUND., Sept. 2013, at 30, 31–32, http://chicagobarfoundation.org/pdf/resources/limited-scope-representation/rule-changes-permitting-limited-scope-litigation.pdf [https://perma.cc/W4HZ-5P2M] (clients retain lawyers for a specific task for a fixed fee and "can be assured that they won't rack up unaffordable fees"); Halley Acklie Ostergard, Note, *Unmasking the Ghost: Rectifying Ghostwriting and Limited-Scope Representation*, 92 NEB. L. REV. 655, 657 (2013).

[41] *See, e.g.*, Nigh, *supra* note 31, at 1057; *see also* A.B.A. Res. No. 108, at 44 (2013) ("RESOLVED, That the American Bar Association encourages practitioners, when

there is no civil *Gideon,*[42] and there are certainly not enough pro bono attorneys to provide full representation to every civil litigant,[43] the provision of limited scope services is seen as a partial solution, providing at least some representation for those who would otherwise have none. The basic assumption underlying limited scope representation, then, is that some representation is better than none.[44] The intent of unbundled legal services can perhaps be described as "doing the most good with the fewest resources."[45] It has grown exponentially over the years as it is deemed an effective and efficient way to provide at least a little assistance to a large number of individuals.[46]

II. THE ETHICAL FRAMEWORK FOR LIMITED SCOPE REPRESENTATION

Since its inception, limited scope representation has faced an evolving ethical landscape. From as early as 1990, state bar associations began issuing ethics opinions concerning some version

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appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services."); Fisher-Brandveen & Klempner, *supra* note 14, at 1111 ("Advocates believe that unbundling increases access to justice, promotes efficiency in the courtroom, and furthers business opportunities for attorneys."); Rothermich, *supra* note 28, at 2689; Steinberg, *supra* note 4, at 462 ("Unbundling has particularly caught fire nationally as a way to provide increased legal services to the poor and to stretch the scarce attorney resources provided by federal and local governments to improve access to justice.").

[42] *See* Gideon v. Wainright, 372 U.S. 335, 344 (1963) (holding that, even in state court criminal proceedings, there is a right to counsel).

[43] *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 13–14 (2007) (estimating that eighty percent of the legal needs of the poor are not met).

[44] "Some advocates contend that a litigant is more likely to successfully complete a matter with limited help than with none at all." Fisher-Brandveen & Klempner, *supra* note 14, at 1112 (citing Bradley A. Vauter, *Unbundling: Filling the Gap*, 79 MICH. B.J. 1688, 1689 (2000)). Notably, while this assumption continues and limited scope representation receives tremendous support (perhaps because of the lack of viable, cost-effective alternatives), it has not been supported in the little empirical research that has been completed. *See, e.g.*, Steinberg, *supra* note 4, at 482 ("In the jurisdiction I studied, the provision of unbundled legal services did not have a favorable impact on outcomes. Recipients of unbundled aid fared no better than their unassisted counterparts . . . ."). Steinberg also compared those receiving unbundled services in eviction proceedings to tenants receiving full pro bono representation. She found that "tenants who received full representation retained possession of their homes at a substantially higher rate than did the recipients of unbundled services." *Id.* at 483–84.

[45] Steinberg, *supra* note 4, at 463.

[46] The ABA has even established an "Unbundling Resource Center" as part of the Standing Committee on the Delivery of Legal Services. *See* Standing Comm. on the Delivery of Legal Servs., *Unbundling Resource Center*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/resources/ [https://perma.cc/SZ64-TEG7]. The Resource Center is a collection of cases, articles, books and audio-visual resources intended to help practitioners. *Id.*

of limited scope representation.[47] Since then, the rules governing attorney ethics have changed multiple times, and under recent iterations of the MRPC, limited scope representation is explicitly permitted.[48] In 2002, the ABA's MRPC were changed to allow and regulate unbundling.[49] This change recognized that lawyers were already providing limited scope services and was intended to create "a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services"[50] Various states have moved towards expressly permitting it[51] and state bar associations have issued their own opinions over time, clarifying each state's acceptance of unbundled legal services within the ethical practice of law.[52]

A. Rule 1.2—Scope of Representation

Rule 1.2 of the ABA's MRPC governs the "Scope of Representation [and] Allocation of Authority Between Client [and] Lawyer."[53] Model Rule 1.2(c) explicitly allows limited scope representation "if the limitation is reasonable under the circumstances and the client gives informed consent."[54] While this

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[47] *See* N.Y. St. B. Ass'n Comm. on Prof. Ethics, Op. 613 (1990). Under the disciplinary rules, "[a] lawyer may advise and counsel a pro se litigant to the extent of preparing pleadings for the litigant to sign and file in an action; disclosure to the court and the opposing party is required." *Id.*

[48] MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018).

[49] Steinberg, *supra* note 4, at 466.

[50] A.B.A. CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 55 (2006).

[51] Maine and Wyoming were among the first to permit it, amending:

> their professional conduct and practice rules in July 2001 and January 2002 respectively, to permit lawyers to assist an otherwise unrepresented litigant on a limited basis without undertaking full representation of the client on all issues related to the legal matter for which the lawyer is engaged in both litigated and transactional matters.

Emanuel, *supra* note 36.

[52] *See, e.g.*, Colo. Bar Ass'n, *supra* note 36. Rule 1.2(c) of the Colorado Rules of Professional Conduct was adopted by the Colorado Supreme Court in 1993 and allows limited scope representation. *See* Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal* Service, COL. LAW., Jan. 2000, at 5, 6 (2000). The New York State Bar Association issued Ethics Opinion 604 to describe the reasonableness requirement of limited representation. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 856 (2011) ("(a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision whether to agree to the limitation, (b) the limitation must be reasonable under the circumstances (i.e., the scope of the representation must be sufficiently broad to enable the lawyer to render competent service), and (c) the limitation must not be prejudicial to the administration of justice." (citing N.Y. St. Bar Ass'n Comm. on Prof. Ethics, Op. 604 (1989))).

[53] MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2018).

[54] MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018). In addition, the comments to Rule 1.2 address the limitations, in comments 6, 6(A) and 7. Comment 7 provides:

rule allows limited scope representation, the ABA recommends that limited scope retainers be in writing to prevent any misunderstanding of the agreed-upon scope.[55]

Some states have adopted the model rule verbatim,[56] while others have altered or expanded it.[57] For example, Arkansas added significantly to Rule 1.2(c); Arkansas does not simply allow limited scope representation, it creates a presumption in support of the limitation when certain conditions are met.[58] In New York, Rule 1.2(c) contains a notice requirement not found in the model rules, providing that: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent[59] and where necessary notice is provided to the tribunal and/or opposing counsel."[60]

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 7 (AM. BAR ASS'N 2018) (citing MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018)).

[55] A.B.A. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 472 (2015) ("[T]he Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client." (emphasis omitted)). While the ABA's model rules do not expressly require a writing, "a prudent lawyer will get the client's signature on a written agreement for representation that clearly details what services the lawyer will and will not provide . . . . Without such an agreement, questions can (and inevitably will) arise about whether the lawyer has improperly withdrawn from the representation." Helen Hierschbiel, *The Ethics of Unbundling: How to Avoid the Land Mines of "Discrete Task Representation,"* OR. ST. B. BULL. (July 2007), https://www.osbar.org/publications/bulletin/07jul/barcounsel.html [https://perma.cc/E2ML-QHVA].

[56] *See, e.g.*, N.M. RULES OF PROF'L CONDUCT r. 16-102; LA. RULES OF PROF'L CONDUCT r. 1.2.

[57] *See, e.g.*, KAN. RULES OF PROF'L CONDUCT r. 1.2(c) (requiring the consent to limited scope representation be in writing).

[58] *In re* Ark. Bar Ass'n Petition to Amend Rules 1.2, 4.2, & 4.3 of the Ark. Rules of Prof'l Conduct, 2016 Ark. 132. Arkansas Amended Rule 1.2(c)(2) includes a presumption that "(A) the representation is limited to the attorney and the services as agreed upon[;] and (B) the attorney does not represent the client generally or in matters other than those agreed upon." *Id.*

[59] New York's rules also provide an in-depth definition and commentary regarding the meaning of informed consent, and those engaging in limited scope representation should make sure that the consent received meets the requirements of the definition. *See* N.Y. RULES OF PROF'L CONDUCT r. 1.0 and accompanying commentary.

[60] N.Y. RULES OF PROF'L CONDUCT r. 1.2(c). New York's notice requirements may increase client vulnerability in certain situations—where opposing counsel must be provided with notice of the limited scope, a shrewd lawyer may wait to find weakness in

Wyoming, too, initially added to Model Rule 1.2 (c) to create a "more involved"[61] rule seeming to recognize that limited scope representation is not akin to the magic cure some have made it out to be, and there are potential problems that should be addressed. To that end, Wyoming's rule provides additional specific requirements.[62] Not only must the scope be explained to the client, such explanation must be "in a manner which can reasonably be understood by the client."[63] Wyoming's rule further requires that, except for telephone consultations only, client consent shall be in writing.[64] Such writing, if in a form similar to that approved by the Board of Judicial Policy and Administration, "creates the presumption that: (i) the representation is limited . . . ; and (ii) the attorney does not represent the client generally or in any matters other than those identified in the form."[65]

Generally, as acceptance of limited scope representation became widespread, it has moved beyond the basic model of brief advice and ghostwriting. Now, it is deployed in litigated matters.[66] Concerns have been raised that, in litigated matters, an attorney attempting unbundled representation may have "greater difficulty assessing whether his or her representation will be 'reasonable under the circumstances' and whether the client has given 'informed consent' to the limited representation."[67]

Rule 1.2(c) clearly and explicitly permits limited scope representation.[68] The ABA and many states go a step further and actively encourage such representation in order to increase access to justice.[69] This proliferation of limited scope representation throughout the United States has impacted the

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aspects of the case that arise beyond the scope of representation, striking only once the client is unrepresented.

[61] Davis et al, *supra* note 4, at 27 (citing WYO. R. PROF'L CONDUCT 1.2(c) (repealed)).

[62] WYO. R. PROF'L CONDUCT 1.2(c) (repealed); *see* Order Amending the Rules of Prof'l Conduct for Att'ys at Law (Wyo. Aug. 5, 2015), https://www.courts.state.wy.us/wp-content/uploads/2017/06/proconatt_2002021400.pdf [https://perma.cc/FZU2-BNV4].

[63] *See* Order Amending the Rules of Prof'l Conduct for Att'ys at Law (Wyo. Aug. 5, 2015).

[64] *Id.*

[65] *Id.* Wyoming removed this language requiring specific writing in 2014 amendments to its rules of professional conduct. *See id.*

[66] *See, e.g.*, Althoff, *supra* note 40, at 68.

[67] Klempner, *supra* note 14, at 663 (citation omitted). Klempner indicates that critics of limited scope representation argue that an attorney doing only part of the work is relying on the client for the remainder of the representation. If the attorney argues the motion based on the client's written motion, the attorney's job is dependent upon the client's work "with all its baggage." *Id.* (citation omitted).

[68] *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018).

[69] *See, e.g.*, Amendments to the Rules Regulating the Fla. Bar and the Fla. Family Law Rules of Procedure (Unbundled Legal Services), 860 So. 2d 394, 400 (Fla. 2003); Scott Russell, *Opportunity for All or Pandora's Box?*, BENCH & B. MINN., Feb. 2017, at 16, 17, 19.

application of a number of other rules of professional responsibility, described below.[70]

B. Model Rules of Professional Conduct Implicated by Limited Scope Representation

Once a limited scope representation starts, the rest of the Rules of Professional Conduct become implicated, except where explicitly discussed.[71] For example, a lawyer entering into a limited scope representation still must provide competent representation (Rule 1.1),[72] must still maintain confidentiality (Rule 1.6),[73] and must still exhibit "candor toward the tribunal" (Rule 3.3).[74] These rules still apply in limited scope representations and have not been amended or altered in any way to recognize limited scope representation.[75] While the rules have not been changed, the scope of the representation may impact the actual application of the rules.[76] "[T]he lawyer's duty of competence does not require doing all work necessary to get the answer right, but instead only the amount of work appropriate to the client engagement."[77]

In addition to the explicit permission provided by Rule 1.2(c), Model Rule of Professional Conduct 6.5 was added to encourage pro bono limited scope representation and remove some of the hurdles associated with such representation. Rule 6.5 provides for a modified conflicts of interest rule,[78] resulting in a

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[70] *See infra* Section II.B.

[71] The comments to MRPC 6.5 explicitly state that all Model Rules, except those mentioned in 6.5, remain in effect in limited scope representation. MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 2 (AM. BAR ASS'N 2018) ("Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.").

[72] Model Rule 1.1, titled "Competence," provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2018).

[73] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018) (titled "Confidentiality of Information").

[74] MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2018) (titled "Candor Toward the Tribunal").

[75] *See* MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 2 (AM. BAR ASS'N 2018).

[76] *See, e.g.*, State Bar of Ariz., Op. 05-06 (2005). In analyzing the requirement of competent representation, the limited scope of the representation "is a factor to be considered when determining the amount of knowledge, skill, thoroughness and preparation needed [by the attorney to be competent.]" *Id.*; *see also In re* Seare, 493 B.R. 158, 188 (Bankr. D. Nev. 2013) ("The level of inquiry and investigation required to discharge the duty of competence may be somewhat relaxed, however, under a limited scope agreement."), *aff'd*, 515 B.R. 599 (B.A.P. 9th Cir. 2014).

[77] Paul J. Sax, *When Worlds Collide: Ethics v. Economics*, 20 CAP. U. L. REV. 365, 366 (1991) (symposium on tax ethics).

[78] Rule 6.5 specifically provides that:

relaxation or waiver of some of the traditional rules governing client conflict, specifically Rules 1.7,[79] 1.9,[80] and 1.10.[81] Rule 6.5 relaxes the conflict of interest rules for attorneys performing limited scope pro bono work through legal service providers, allowing them to avoid time-consuming firm-wide, conflict of interest checks that would normally be required.[82] Only known conflicts are considered conflicts of interest for purposes of 6.5, whereas imputed or unknown conflicts are excused by the rule.[83] The comments to Rule 6.5 demonstrate that this rule was created because, in the fast-paced environment of legal hotlines and advice centers, it was not feasible to require attorneys to complete traditional firm-wide conflicts checks.[84]

The comments to Rule 6.5 also describe a potential scenario where a limited scope representation continues beyond its intended limits. Comment 5 to Rule 6.5 provides that "[i]f, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the

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> (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
>
> > (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
> >
> > (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
>
> (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

MODEL RULES OF PROF'L CONDUCT r. 6.5 (AM. BAR ASS'N 2018).

[79] MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2018) (titled "Conflict of Interest: Current Clients").

[80] MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (AM. BAR ASS'N 2018) ("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 gives informed consent, confirmed in writing.").

[81] MODEL RULES OF PROF'L CONDUCT r. 1.10 (AM. BAR ASS'N 2018) (governing the imputation of conflicts of interest of one lawyer to the entirety of that lawyer's law firm).

[82] *See* MODEL RULES OF PROF'L CONDUCT r. 6.5 (AM. BAR ASS'N 2018); *see also* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 1012 (2014) (finding that the relaxed conflicts rule of 6.5 applies even after the limited scope representation, requiring "actual knowledge" of the conflict before representation is precluded).

[83] MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 3 (AM. BAR ASS'N 2018).

[84] MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 1 (AM. BAR ASS'N 2018) ("In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.").

matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable."[85] Thus, in the scenario where an attorney attempts to withdraw after appearing in a limited scope matter and is not permitted to withdraw, all the conflict of interest rules apply in earnest. Such application of the conflict of interest rules, including Rule 1.10's imputation of conflicts to an entire firm, could then result in the loss of business to an attorney's firm.[86]

New York, like many other states, attempts to promote pro bono representation and even requires it for admission to practice within the courts of the State of New York.[87] Applicants for admission to the bar must complete fifty hours of qualifying pro bono service.[88] On December 16, 2016, the New York State Courts issued a policy statement in support of limited scope representation.[89] The statement, issued in the form of an Administrative Order, laid out some specific circumstances under which the Unified Court System supports and encourages limited scope pro bono work.[90] The Order also recognized that limited scope representation is explicitly allowed under the Rules of Professional Conduct.[91] There was no

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[85] MODEL RULES OF PROF'L CONDUCT r. 6.5 cmt. 5 (AM. BAR ASS'N 2018).

[86] *See* MODEL RULES OF PROF'L CONDUCT r. 6.5 (AM. BAR ASS'N 2018). The comments to Rule 6.5, therefore, act as a warning that despite the relaxed conflicts rule, attorneys should remain cautious in deciding whether to expand a representation beyond its initial limited scope. However, if an attorney is denied a request to withdraw, no amount of caution will prevent the conflict rules from operating. Further, "[s]ometimes, because we want to help our clients, we may do more than we originally signed up for. That can be risky." Diel & Watson, *supra* note 15, at 45 (quoting Diane S. Diel, past Wisconsin State Bar president).

[87] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16.

[88] *Id.* ("Fifty-hour pro bono requirement. Every applicant admitted to the New York State bar on or after January 1, 2015, other than applicants for admission without examination pursuant to section 520.10 of this Part, shall complete at least [fifty] hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court.").

[89] CHIEF ADMIN. JUDGE OF THE CTS., AO/285/16, ADMINISTRATIVE ORDER (2016).

[90] The Order provided that it is:

> [T]he policy of the Unified Court System to support and encourage the practice of limited scope legal assistance in appropriate cases, and to encourage judges and justices to permit attorneys to appeal for limited purposes in civil cases under the following circumstances:
>
> 1. the appearing attorney has completed a certified training course in limited scope representation administered by the Office of Court Administration; and
>
> 2. the attorney and client have executed a retainer agreement which clearly articulates the scope of limited representation, and the client has given informed consent to the arrangements; and
>
> 3. The court deems the limited appearance otherwise appropriate under the circumstances.

Id.

[91] *See id.*; MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018).

discussion in the order, nor is there any in New York's Rules of Professional Conduct or in the CPLR, about withdrawal from limited scope representation.

Throughout the expansion and acceptance of limited scope representation, much analysis, practical guidance, and scholarship has been devoted to the ethics of limited scope representation in general,[92] as well as more specific aspects of such representation.[93] Along with the proliferation of limited scope representation and the rise in publications discussing it, there has also been some litigation related to attorneys involved in limited scope representation. These cases sometimes address conflicts or misunderstandings between the attorney and the client about the promised scope of representation.[94] Usually, there is either a misunderstanding or miscommunication leading the client to think that the attorney has failed to deliver the promised scope of services.[95]

Despite changes and additions to the ethical rules and significant scholarly analysis, litigation has continued regarding limitations in scope of representation.[96] The lack of uniformity in the ethical rules harms attorneys, and ultimately clients, by subjecting attorneys to sanctions and potential malpractice claims for slight and unanticipated missteps in the provision of free legal services.[97]

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[92] *See, e.g.*, Mark J. Roberts, *Ethics Consideration in Limited Scope Representations*, 77 OR. ST. B. BULL. 9, 9 (Oct. 2016); Carrie A. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, 32 AM. BANKR. INST. J., Oct. 2013, at 14, 14; Althoff, *supra* note 40, at 67.

[93] *See, e.g.*, Nigh, *supra* note 31, at 1057; Alison Schoenthal & Jeremy R. Feinberg, *The Ethics of Ghost Lawyering*, N.Y. PROF. RESPONSIBILITY REP. (Nov. 2010), http://www.newyorklegalethics.com/the-ethics-of-ghost-lawyering/ [https://perma.cc/9YPA-VUWM].

[94] *See, e.g.*, Seaman v. Sedgwick LLP, No. SA CV 11-0664, 2013 WL 12204741, at *4 (C.D. Cal. July 8, 2013) ("Even with a purportedly limited duty, an attorney's obligations may go beyond that duty depending on the particular factual scenario."); *In re* Smith, 887 So. 2d 449, 451 (La. 2004) (attorney agreed to complete "suit prep" and then avoided phone calls and did not file the suit for the client); Claude v. Elgammal, 958 N.Y.S.2d 644, 2011 WL 134052, at *1 (Sup. Ct. Jan. 14, 2011) (motion to dismiss by attorney denied where attorney was retained solely for closing with no limited scope engagement letter and failed to advise the client); Sharp v. Sharp, No. 02-74, 2006 WL 3088067, at *7–10 (Va. Cir. Ct. Oct. 26, 2006).

[95] *See In re Smith*, 887 So. 2d at 453–54. The court found that a notation on a receipt limiting representation "did not provide adequate information regarding the services nor did it imply [client's] consent to the limitation. Likewise, the notation on the receipt did not adequately explain the fee agreement, causing [client] to again misunderstand." *Id.*

[96] *See, e.g.*, cases cited *supra* note 94.

[97] The adage "no good deed goes unpunished" seems fitting here. *See* FIA Card Servs. N.A. v. Pichette, 116 A.3d 770 (R.I. 2015). *Pichette* was the combined appellate opinion of three distinct cases involving three attorneys sanctioned for ghostwriting. *Id.* at 771. While the Rhode Island Supreme Court ultimately vacated the sanctions, *id.* at 772, clarity and predictability in the ethical requirements would have better served these

III. WITHDRAWAL FROM REPRESENTATION: THE NEED FOR A MODEL RULE TO GUIDE STATES

Within any attorney-client relationship, the ability to withdraw as counsel is not absolute,[98] even where an attorney attempts to protect themself by way of a retainer letter.[99] Within the limited scope context, some states have recognized the implications of their withdrawal rules on limited scope representations, and have sought to clarify some contradictions. Limited scope representation, whereby the intention of the representation is that it ends when the scope is complete, is, by its very nature, antithetical to some withdrawal rules.[100]

Judges accustomed to facing pro se litigants[101] in certain civil matters may embrace the presence of attorneys in those

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three attorneys. The three Rhode Island cases underlying the 2015 *Pichette* decision clearly illustrate the risks associated with limited scope representation and the reason why judges may want to maintain the representation. In the lower court cases, it became clear that the litigants did not understand the defenses and counterclaims raised by their limited scope attorneys. "[The party] also testified, however, that he had not understood the affirmative defenses pled in his answer, the basis or substance of the counterclaims alleged, or the content of the objection to the motion to dismiss and the memorandum in support thereof." *Id.* at 772. "[W]e acknowledge the current lack of parameters in place to guide attorneys as to the boundary that separates reasonable from unreasonable limited-scope representation." *Id.* at 782; *see also* TEXAS COMM'N TO EXPAND CIV. LEGAL SERVS., REPORT OF THE LIMITED SCOPE REPRESENTATION SUBCOMMITTEE app. A, 2017 WL 8316838 (Sept. 29, 2016) ("Critics of limited scope representation believe the risk of malpractice claims is higher when a lawyer is involved with only discrete aspects of a case or matter. They caution that a lawyer may have insufficient understanding of the broader context to provide sound legal advice for discrete aspects of the case or matter."); Nichols v. Keller, 19 Cal. Rptr. 2d 601, 608 (Ct. App. 1993) ("[E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel."). Despite claims that attorneys' fears of malpractice "should be dismissed based on a reading of the ethical rules and the survey of recent case law regarding the topic," it is clear that any survey of the case includes instances where malpractice claims have been raised. Kriste M. Blankley, *Adding by Subtracting: How Limited Scope Agreement for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 704 (2013).

[98] *See* Holmes v. Y.J.A. Realty Corp., 513 N.Y.S.2d 415, 416 (App. Div. 1987).

[99] *See* Klein v. Klein, 800 N.Y.S.2d 348, 2005 WL 89006, at *4 (Sup. Ct. Jan. 14, 2005) (denying motion to withdraw in order to "promote the best interests of the parties and their children and the goal of judicial economy" even where retainer letter permitted withdrawal for non-payment of attorneys' fees).

[100] Model Rule of Professional Conduct 1.6 and its comments do not expressly provide for automatic, or different, withdrawal during pending litigation even if a limited scope agreement exists.

[101] "The statistics on pro se representation in the courts are staggering." Alexander R. Rothrock, *Limited Scope and Lawyer Liability: How Courts View the Lawyer's Role in Unbundling*, 35 FALL FAM. ADVOC. 30 (2012); Greiner et al., *supra* note 7, at 911 (referring to a "pro se crisis" (citation omitted)).

matters. The presence of an attorney in court, even on a limited basis, may ease the confusion and delay sometimes present throughout pro se litigation.[102] Furthermore, the presence of a limited scope attorney may reduce demands by litigants on court personnel.[103] Judges, who experience the benefit of the presence of attorneys for clients who would otherwise appear pro se during litigation, may not want to permit attorney withdrawal. Pro se litigants may not be able to properly articulate claims or defenses once the attorney is no longer present,[104] or may miss deadlines.[105] While issues surrounding the requirement of judicial permission for withdrawal generally do not arise unless an attorney has entered an appearance,[106] enough limited scope representations exist where attorneys do appear in court proceedings to make this a real, concrete problem.

Ghostwriting and legal hotlines are not the only forms of unbundled representations; in family matters, "a lawyer might represent a client in a single hearing on temporary child custody, but the client will represent herself at subsequent hearings on child custody or at trial on all issues."[107] In the limited scope relationship, the intent is that a "[l]awyer and client are in charge of determining the scope of representation and unbundling; in friendly jurisdictions the court and other party are required to honor the lawyer-client decision."[108] The pitfall herein is that in "unfriendly" jurisdictions the lawyer-client decision on the limited scope of the relationship may not be respected. If this occurs, the burden is on the attorney to seek withdrawal from the representation pursuant to the governing rules of procedure and ethical requirements.[109]

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[102] Fisher-Brandveen & Klempner, *supra* note 14, at 1112; *see also* Klempner, *supra* note 14, at 664 ("[U]nbundled court appearances are generally in the best interest of the judiciary, since attorneys are aware of local rules and procedures, rules of evidence, and the scope of legally relevant issues. Counsel can give [judges] a clear presentation of the case, saving significant court resources, while at the same time providing key attorney services, such as argument of a motion of trial representation, which are desired by self-represented litigants." (internal quotation marks omitted) (second alteration in original))); Davis et al., *supra* note 4, at 26.

[103] Fisher-Brandveen & Klempner, *supra* note 14, at 1112.

[104] *Id.*

[105] *Id.*

[106] *See In re* Kiley, 947 N.E.2d 1, 5 (Mass. 2011) ("[W]here the lawyer has entered an appearance on behalf of the client and the rules of a tribunal require approval of the withdrawal by the tribunal, the lawyer shall not withdraw the appearance without the tribunal's permission." (internal quotation marks omitted)).

[107] Forrest Mosten, *Unbundling Legal Services in 2014 Recommendations for the Courts*, 53 JUDGES' J., no. 1, 2014, at 10, 11.

[108] *Id.*

[109] *See, e.g.*, Ostergard, *supra* note 40, at 671 ("[I]n many states it is not clear whether an attorney engaged in limited-scope representation needs permission to withdraw from a case, regardless of the terms of a limited-scope-representation agreement.").

Attorneys attempting to appear for some, but not all, hearings, or draft some, but not all, submissions, may find themselves mired in the rules of withdrawal. In Virginia, for example, signing a pleading, even with the disclaimer that it is a "limited representation," makes the attorney an attorney of record, requiring leave of the court to withdraw from the matter.[110] It is sometimes unclear to the attorneys, to the litigants, and to the courts, which exact act makes an attorney counsel of record.[111] The New York State Bar Association, for example, has opined that an attorney may have an ethical obligation to continue representing the client "beyond the initial limitation contemplated by the lawyer and client if withdrawal from representation requires court permission and the court withholds or denies permission."[112] This Ethics Opinion perfectly captures the problem inherent in the interplay of the current limited scope rules and attorney withdrawal rules—attorneys and clients intending limited scope representations may end up with a larger scale representation than what was desired or planned.[113]

In order to better understand the issues surrounding withdrawal from limited scope representation, it is important to first understand withdrawal generally, then examine how individual states that have amended their rules to address withdrawal from limited scope representation have done so, and, finally, to analyze New York's current withdrawal rules.

A. Model Rule 1.16—Withdrawal, Generally

In general, in any attorney-client relationship, two types of withdrawal from representation exist: mandatory and permissive. Mandatory withdrawal,[114] where withdrawal is required for a specific reason and/or the representation violates the Rules of Professional Conduct, is not addressed in this essay.

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[110] Sharp v. Sharp, No. 02-74, 2006 WL 3088067, at *9 (Va. Cir. Ct. Oct. 26, 2006); *see also* S.D. FLA. LOCAL R. 11.1(d)(1) ("The filing of any pleading shall, unless otherwise specified, constitute an appearance by the person who signs such pleading.").

[111] *See, e.g.*, Walker v. Am. Ass'n of Prof. Eye Care Specialists., 597 S.E.2d 47, 49 (Va. 2004). The *Walker* court reversed a lower court's determination that an attorney who drafted a cover letter and delivered pleadings to the court, but did not sign the pleadings, was counsel of record. The court determined that the attorney did not become "counsel of record simply by virtue of a cover letter enclosing a pleading signed by a party." *Id.*

[112] N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 856 (2011).

[113] *See id.*

[114] *See* MODEL RULES OF PROF'L CONDUCT r. 1.16(a) (AM. BAR ASS'N 2018) (describing that withdrawal is required where "(1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged").

Permissive withdrawal is described in MRPC 1.16(b). Model Rule 1.16(b) lists conditions or occurrences under which permissive withdrawal may occur.[115] This seven-item list includes a number of entries that can arise in any type of litigation, limited scope or otherwise.[116] For example, any client—paying or pro bono, limited scope representation or full representation—may "persist[] in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent,"[117] thus providing grounds for withdrawal. Some provisions of 1.16(b) may be more directly implicated than others in either the attorney's motion to withdraw or the court's allowance or denial of such motion. Rule 1.16(b)(1) provides that a lawyer may withdraw when "withdrawal can be accomplished without material adverse effect on the interests of the client;"[118] and 1.16(b)(4) permits withdrawal where "the client insists upon taking action . . . with which the lawyer has a fundamental disagreement."[119] In general, a withdrawal analysis relates to the interests of the court, the client, and the withdrawing attorney.[120]

Rule 1.16(b)(1) may create the largest hurdle to attorney withdrawal from a pro bono limited scope representation. There are few, if any, arguments to be made that an attorney's withdrawal from a pro bono matter, leaving the client to proceed pro se, "can be accomplished without material adverse effect on the interests of the client."[121] The decision whether to permit this permissive withdrawal is left to the discretion of the trial judge.[122]

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[115] *See* MODEL RULES OF PROF'L CONDUCT r. 1.16(b) (AM. BAR ASS'N 2018) (describing that withdrawal is permitted when "(1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists").

[116] *See id.*

[117] MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(2) (AM. BAR ASS'N 2018).

[118] *Id.* (b)(1).

[119] *Id.* (b)(4).

[120] *See* Holmes v. Y.J.A. Realty Corp, 513 N.Y.S.2d 415, 416 (App. Div. 1987).

[121] MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(1) (AM. BAR ASS'N 2018).

[122] *Holmes*, 513 N.Y.S.2d at 416. Even where a provision in the retainer agreement explicitly allows withdrawal beyond what is listed in the rule, such withdrawal may be denied. *See* Klein v. Klein, 800 N.Y.S.2d 348, 2005 WL 89006, at *3–4 (Sup. Ct. Jan. 14, 2005) (disallowing withdrawal where retainer agreement provided that the attorney may withdraw if any bill remained unpaid for sixty days); First Nat'l Bank of E. Islip v. Brower, 368 N.E.2d 1240, 1242 (N.Y. 1977) (court has "inherent and statutory power to

Rule 1.16(c) of the MRPC governs the notice and permission of the court requirements for withdrawal. "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[123] Even with limited scope retainers for pro bono representation, lawyers may be ordered to continue the representation beyond their desired termination or withdrawal.[124]

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regulate the practice of law"); Gair v. Peck, 160 N.E.2d 43, 50–51 (N.Y. 1959) (discussing rule-making powers of the courts).

[123] MODEL RULES OF PROF'L CONDUCT r. 1.16(c) (AM. BAR ASS'N 2018). In New York, Rule of Professional Conduct 1.16(d) provides:

> If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

N.Y. RULES OF PROF'L CONDUCT R. 1.16(d).

[124] *See, e.g.*, Sharp v. Sharp, No. 02-74, 2006 WL 3088067, at *9 (Va. Cir. Ct. Oct. 26, 2006). The *Sharp* court summarized the issues to be determined on a motion to withdraw from a limited scope representation as follows:

> [W]hile an attorney and client may reach an agreement to limit the objectives of the representation to an extent that it limits the attorneys [sic] role in the litigation, once the matter comes before the court in a litigation posture and withdrawal is sought, the Court must consider the position of the client regarding such withdrawal motion, how any such agreement will affect its docket, the public perception of the litigation, and the other parties to the litigation, before it decides whether to permit withdrawal by counsel of record.

Id.

In New York, appearance and withdrawal are governed by both the Rules of Professional Conduct[125] and the CPLR.[126] CPLR § 321(a) provides that "[i]f a party appears by [an] attorney such party may not act in person in the action except by consent of the court," thus specifically preventing an attorney from making only one appearance and then having the party appear pro se, absent court consent.[127] Withdrawal is specifically governed by CPLR § 321(b). Pursuant to § 321(b), an attorney must seek leave of the court by order to show cause for permission to withdraw as counsel.[128] While these rules are only implicated when an attorney has signed court submissions or physically appeared in court, they may arise in the pro bono context in connection with

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[125] N.Y. RULES OF PROF'L CONDUCT r. 1.16. In New York, RPC 1.16 is divided differently from the Model Rules. 1.16(b) governs mandatory withdrawal and 1.16(c) lists thirteen instances under which withdrawal is permitted. They are:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) the client insists upon taking action with which the lawyer has a fundamental disagreement;
>
> (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
>
> (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
>
> (7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
>
> (8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;
>
> (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
>
> (10) the client knowingly and freely assents to termination of the employment;
>
> (11) withdrawal is permitted under Rule 1.13(c) or other law;
>
> (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
>
> (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

Id. 1.16(c).

[126] N.Y. C.P.L.R. 321.

[127] *Id.* 321(a).

[128] *Id.* 321(b).

"attorney for the day" type programs,[129] appearances in family court, or other contested litigated matters where an attorney is only assisting in part of the representation. Simply making the motion to withdraw is insufficient. Until the motion is granted, the attorney's representation continues[130] and the attorney must continue to act within their ethical obligations to the client, even if the matter has moved beyond the agreed-upon limited scope. Motions to withdraw from representation have been denied for a variety of reasons.[131]

CPLR § 321(a), by its explicit terms, bars an attorney from working on only part of a litigated matter because that would require the client to appear pro se on other parts.[132] Partial representation would require a court order permitting some represented appearance and some pro se appearances by the client.[133] The interplay between the Rules of Professional Conduct and the civil practice rules in New York demonstrate some of the risks associated with limited scope representation in contested litigation.[134] Attorneys retained for pro bono limited scope representation are held to the same withdrawal standard in New York as those attorneys on retainer or being paid their full hourly rates.[135]

B. The Need for ABA Leadership to Address Withdrawal from Limited Scope Representation

States, like New York, that have not yet promulgated rules dealing with withdrawal from limited scope representation need to do so. In fact, the ABA should lead the way and

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[129] Attorney for the day programs allow lawyers to cover "the cases held in a particular courtroom on a specified day. The lawyer interviews and advises the litigants and sometimes represents them in court." Klempner, *supra* note 14, at 667.

[130] Farage v. Ehrenberg, 996 N.Y.S.2d 646, 652 (App. Div. 2014) ("[F]rom the standpoint of adverse parties, counsel's authority as an attorney of record in a civil action continues unabated until the withdrawal, substitution, or discharge is formalized in a manner provided by CPLR 321." (citations omitted)).

[131] *See, e.g.*, *In re* Jamieko A., 597 N.Y.S.2d 72, 73 (App. Div. 1993) (motion to withdraw denied because "no sound reason was provided why counsel should be allowed to withdraw"); Charles Weiner Corp. v. D. Jack Davis Corp., 448 N.Y.S.2d 998, 999–1000 (Civ. Ct. 1982) (denying motion to withdraw for non-payment of fees).

[132] *See* Melnitzky v. City of New York, 767 N.Y.S.2d 97, 98 (App. Div. 2003).

[133] Klempner, *supra* note 14, at 664 ("[T]he prospect of having both counsel and client fading in and out at various stages and for various purposes [is disconcerting] . . . . [,] [and] the orderly processing of cases would be extremely difficult, if not impossible" (quoting N.Y. St. Bar Ass'n Comm. on Civ. Prac. L. and Rules)).

[134] Some risks in limited scope representation "arise from the inherent fluidity of the attorney client relationship." Howard J. Klein, *Limited Scope of Representation: A Caveat*, Orange Cty. Law., July 2009, at 43, 43. Even such risks may be abated by clearer rules.

[135] *See* N.Y. C.P.L.R. 321(b); N.Y. RULES OF PROF'L CONDUCT r. 1.16.

promulgate model rules, providing a template for individual states to work from.

For now, the ABA and those slow-to-act states can look to the proactive states and educate themselves on what has already been done. As described above, to withdraw from representation in a litigated matter, an attorney generally must make a motion for leave to withdraw and then be allowed by the court to withdraw for good cause shown.[136] However, a number of states have created mechanisms to remove this burden of motion practice and court permission procedures in cases where an attorney is providing some limited assistance to a pro se litigant.[137] By enacting protections for the litigant up front (both the litigant and the limited-scope attorney get notices and the limited-purpose is disclosed in advance), states like Vermont allow a smoother, and more predictable, transition for both the attorney and the client at the end of representation.[138] When an attorney seeks to withdraw from limited purpose engagement, withdrawal is allowed as a matter of course when the purpose of the engagement has been accomplished.[139]

Some states that explicitly amended their rules to include a version of 1.2(c) and 6.5 had the foresight to also amend both their appearance and withdrawal rules.[140] The intent of these amended rules is to provide for simpler withdrawal once the discrete tasks are completed.[141] These rules allow an attorney to better evaluate the risks associated with engaging in limited scope representation; they also diminish the risks. States that amended their rules did so in various ways: Maine and other states simply presume that once tasks are complete, representation has ended.[142] Florida is among the states that have issued rules for specific matters and specific courts where limited scope representation is most likely.[143] Iowa promulgated

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136 *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT r. 1.16; N.Y. C.P.L.R. 321.

137 *See, e.g.*, ME. R. CIV. P. 89(a).

138 VT. R. CIV. P. 79.1(h); *see also* KAN. RULES OF PROF'L CONDUCT r. 1.2(c) (requiring that informed consent to limited scope be in writing).

139 WYO. DIST. CT. UNIF. R. 102(c) ("An attorney who has entered a limited entry of appearance shall be deemed to have withdrawn when the attorney has fulfilled the duties of the limited entry of appearance.").

140 *See, e.g.*, N.D. R. CIV. P. 11.2, 11(e), 5(b); OR. UNIF. TRIAL CT. R. 5.170.

141 *See* A.B.A. WHITE PAPER, *supra* note 13, at 19.

142 *See, e.g.*, ME. R. CIV. P. 89(a). Maine's withdrawal requirements simply do not apply in the case of a filed "limited appearance" unless counsel is seeking to withdraw from the actual limited appearance. *Id*; *see also* WYO. DIST. CT. UNIF. R. 102(c). (withdrawal is presumed if an attorney has "entered a limited entry of appearance" and "has fulfilled the duties of the limited entry of appearance").

143 Family court rules of a number of states address withdrawal from limited scope representation in family law matters. *See, e.g.*, FLA. FAM. L. R. P. 12.040(c); CAL. F.L.-950 (2017) (family law form for notice of limited scope representation).

rules to protect both the attorneys and the clients, requiring more than just the presumption that once the task was complete so was the representation.[144] Still other states, like Arizona, require more judicial involvement and allow for clients to contest the withdrawal.[145] The existing state rules governing withdrawal from limited scope representation appear to operate on a continuum,[146] with attorney protections at one end and client protections at the opposite end: some rules provide protection to the attorney at the expense of the client, while others protect the client at the expense of the attorney.

While the existence of these rules is of paramount importance to allow withdrawal from a representation that was only intended to be limited scope from the outset, the drafting and statutory location of these rules also plays an important role. Like in New York, relevant rules may be found in the rules of professional conduct, in a state's rules of civil procedure, and in the rules of each court.[147] Attorneys must therefore cross-reference within these various procedural rules to allow themselves to understand which rules play a role in the provision of ethical limited scope pro bono representation. Even those states that enacted attorney and client protections did so in a way that makes it difficult for practitioners to ensure compliance.

As described above, individual states have chosen to deal with withdrawal from limited scope representation in the absence of a model rule. It would be beneficial for the ABA to suggest a model rule,[148] given the amount of resources already committed to the idea that limited scope representation is the wave of the future.[149] While it is unclear that some representation is always better than no representation,[150] this is the current model and it should be applied with the greatest possible degree of uniformity. Instead, the range of withdrawal requirements is extensive, and the lack of uniformity makes predictability difficult for attorneys engaging in this type of work.

In New York, the lack of specific appearance and withdrawal rules for limited-scope engagements allow judges to override the attorney-client limited scope agreement and require attorneys to remain on matters after an appearance has been

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144 IOWA R. CIV. P. 1.404(4) (requiring a notice of completion).

145 ARIZ. R. FAM. L. P. 9(B)(2)(b).

146 *See* Struffolino, *supra* note 10, at 181–82.

147 *See, e.g.*, Jennings & Greiner, *supra* note 23, at 837 n.67.

148 The ABA model rules specifically address limited appearances in order to explicitly allow them. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2018). The rules do not specifically address withdrawal from such appearances.

149 *See supra* note 6.

150 *See supra* note 5.

entered in court.[151] This lack of protection, for both the attorney and the client, may serve as a deterrent to attorneys wishing to engage in limited scope pro bono work. While apparent ease of withdrawal in states like Maine and Wyoming may leave clients exposed to too much risk,[152] the current lack of specific rules in New York leaves attorneys facing too much risk.

New York has now decided to follow other states and propose specific withdrawal rules for limited scope representation. The Advisory Committee on Civil Practice to the Chief Administrative Judge in New York has proposed amendments to the CPLR.[153] While the effort to promulgate rules is laudable, the end result swings the pendulum from too little protection for attorneys to too little protection for the clients.

The proposed New York amendments require the filing of a "notice of limited scope appearance" signed by the attorney.[154] Thereafter, absent a finding of extraordinary circumstances, all the attorney needs to do in order to withdraw is "file a notice of completion of limited scope appearance which shall constitute the attorney's withdrawal from the action or proceeding."[155]

These amendments would provide additional protections to attorneys seeking to perform limited scope pro bono representation in litigated matters. This action would comply with the administrative Order of the Chief Administrative Judge of the Courts with the Consent of the Administrative Board of the Courts[156] issued on December 16, 2016. In that Order, the Chief Administrative Judge of the State of New York declared it the policy of the Unified Court System to "support and encourage the practice of limited scope legal assistance."[157] While the proposed amendment may "support and encourage the practice,"[158] it does so potentially at the expense of the rights of limited scope clients.[159]

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[151] *See* N.Y. C.P.L.R. 321.

[152] *See, e.g.*, Struffolino, *supra* note 10, at 182 ("This type of de facto approach expedites the withdrawal process and best protects the limited scope retainer agreement.").

[153] REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NY 1, 11–44, 179–88 (Jan. 2018).

[154] *Id.* at 44.

[155] *Id.*

[156] CHIEF ADMIN. JUDGE OF THE CTS., AO/285/16, ADMINISTRATIVE ORDER (2016).

[157] *Id.*

[158] *Id.*

[159] *Id.*

C. A Proposed Model Rule for Withdrawal from Limited Scope Representation

An ideal rule should allow automatic withdrawal upon notice to the court, a sworn statement of completion by the attorney, and the provision of the client's contact information to the court and opposing counsel. The proposed model rule detailed below will protect both the interests of the client in receiving the promised level of representation in a limited scope representation and the attorney's interest in withdrawing upon completion of the limited scope representation. Such a solution will also not unduly burden judicial resources with detailed oversight of limited scope engagements.

While there are risks and benefits to each of the different state rules, if the goal is to balance the interests of the lawyer in withdrawing with the interests of the client in maintaining the promised level of representation, the ideal rule would protect both of those. An analysis of the existing rules, described above, demonstrates that some focus on protecting the lawyer[160] while others protect only the client.[161] A better balanced model rule would protect both, like a modified version of the rule in California.[162] Such protection should take the form of a notice, a presumption, and time to object—with a far lower burden than that of the motion practice currently required in some places.

The ABA Standing Committee on the Delivery of Legal Services has recognized that courts, court rules, and the rules of procedure perceive a "dichotomy" where clients are either represented or not represented.[163] In fact, especially with limited scope representation, client representation operates more on a continuum. The ABA should fill the void in its model rules and promulgate a model rule regarding termination or withdrawal in limited representations.[164] The ABA has demonstrated, through committees and publications, its desire to support and

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[160] *See, e.g.*, ME. R. CIV. P. 89(a); REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE, *supra* note 153, at 44 (proposed amendment N.Y. C.P.L.R. 321(e)).

[161] *See* CAL. CIV. R. 3.36.

[162] *Id.* California's rule is overly burdensome and time consuming for attorneys seeking to withdraw. It allows up to twenty-five days to pass before a hearing on a client's objection to a withdrawal. *See id.*

[163] A.B.A. WHITE PAPER, *supra* note 13, at 26.

[164] While the model rules are silent on the subject, Comment 1 to Rule 1.16 provides that "[o]rdinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded." MODEL RULES OF PROF'L CONDUCT r. 1.16 cmt. 1 (AM. BAR ASS'N 2018). This statement, without accompanying requirements as to how the assistance can be agreed-upon and defined, is too broad to provide necessary guidance for withdrawal in limited scope representations.

encourage limited scope representation.[165] Such desire is inconsistent with its failure to create a model rule to allow greater attorney predictability and, thus, perhaps, greater attorney participation, in limited scope representation. "Now is the time to develop good, practical and clear rules[,] and effective training and education at all levels."[166] A proposed model rule should allow for automatic termination so long as the court and the client are provided with adequate notice of both the existence of the representation and its termination. Further, once notice is received, the client should be given a very limited window within which to object, after which time withdrawal is automatic. The presumption shall be in the attorney's favor, and, should a client object, the burden shall be on the client to prove that the scope has not been completed.

Currently, Comment 1 to Rule 1.16 of the Model Rules provides that "[o]rdinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded."[167] The current rule provides insufficient support in limited scope representation, where the disputes may concern what was "agreed-upon" and whether the assistance has "concluded." At the very least, a model rule should allow automatic withdrawal upon notice to the court, a sworn statement of completion by the attorney, and the provision of the client's contact information to the court.[168] While California's rule may provide too much client protection,[169] and New York's proposed rule provides too little, the ABA can look to these rules to best define withdrawal procedures.

A proposed rule should balance the interests of the client against those of the attorney taking on a limited scope representation and include the following:

> (a) The consent to limited scope representation must be in writing, unless the representation consists only of a telephone conversation; and
>
> (b) If the attorney is signing a pleading or otherwise appearing in a litigation or contested matter, the limited scope of representation must be disclosed to the court upon the initial appearance; and
>
> (c) Upon completion of the scope of services described in the limited scope agreement, the attorney may file a statement of completion

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165 *See, e.g.*, *Unbundling Resources by State*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state/#ca [https://perma.cc/SF2P-CB4Q].

166 Darigan, *supra* note 15, at 4.

167 MODEL RULES OF PROF'L CONDUCT r. 1.16 cmt. 1 (AM. BAR ASS'N 2018).

168 *See, e.g.*, WASH. SUPER. CT. CIV. R. 70.1; ALASKA R. CIV. P. 81(e).

169 CAL. CIV. R. 3.36.

> signed by the attorney and the client. In the absence of a duly signed statement of completion, the attorney shall file an order, a copy of the limited scope agreement, a sworn statement of completion signed by the attorney and proof of service. The client shall have five (5) days from service to object to the court, including by oral objection.[170]
>
> (d)(1) In the absence of objection, the court shall order withdrawal unless doing so would result in a gross miscarriage of justice.
>
> (2) Should the client object to the withdrawal, the client shall be heard within five (5) days of the date of objection and shall bear the burden of demonstrating by a preponderance of the evidence either that:
>
> (i) the scope of representation is not complete; or
>
> (ii) consent to the limited scope representation was improperly obtained; or
>
> (iii) a gross miscarriage of justice will occur if withdrawal is permitted.[171]

This proposed rule, unlike some already existing rules, balances the rights of both the attorney and the client, and provides adequate protections for those rights. The diligent attorney is protected by a written retainer and the conscientious client is protected by the explicitly permitted right to object. This rule allows for timely withdrawal without undue delay or undue burdens on judicial resources. It will allow both attorneys and clients to avoid unpleasant surprises in the provision and receipt of legal services.

CONCLUSION

Limited scope representation is here to stay. In order to ensure that attorneys and clients are adequately protected at all stages of limited scope representation, the beginning, middle, and end of it should be clearly defined and discussed in the ethical rules governing attorneys. In the absence of a model rule, states have created their own rules, some protecting only the attorney while others provide extreme protection to the client. The ABA should step in and offer a model rule protecting both the client and the attorney, as described above, in order to encourage maximum engagement in pro bono limited scope representation by members of the private bar.

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[170] Pro bono clients sometimes do not have the means or ability to appropriately object in writing.

[171] Note that this standard is much higher than the current withdrawal standard of "material adverse effect on the interests of the client." MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(1) (AM. BAR ASS'N 2018).