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Inside the Lines: Scope Limitations and Legal Ghostwriting

Background

As financial pressure from the Great Recession becomes the new normal and even the least tech-savvy Americans tackle most errands from behind a computer screen, consumers have cast a critical eye toward the traditional attorney-client relationship. For many, the cost of a full-service representation creates a barrier to any legal services at all, resulting in a growing army of pro se litigants who frustrate lawyers, exhaust court personnel, and seldom achieve their goals.

Enter the limited scope representation ("LSR"), often referred to as "unbundling," "limited legal assistance" or "discrete task representation," where an attorney provides certain services and excludes others for a lower overall fee. This arrangement has long existed in the transactional realm but has become increasingly common in litigation, particularly in family law, landlord-tenant, and small personal injury and property damage claims.

In reality, the scope of every representation is limited to some degree. Every engagement letter should contain a provision on scope, whether it clarifies that a workers' compensation lawyer will not advise on potential third-party claims, or that a divorce lawyer will not draft a qualified domestic relations order. An LSR in the context of a would-be pro se, consumer client, however, refers to a relationship where the attorney and client split tasks in the case, or the client agrees to handle the lion's share.

A full-service representation typically consists of fact-gathering, legal advice, discovery, legal research, correspondence, document drafting and filing, negotiation, and in-court appearances. An LSR might include any one or combination of these duties, during a defined phase of the matter or as a one-time event. The LSR is a powerful tool that allows attorneys to generate business that they could not otherwise reach and clients to access a level of service that they could not otherwise afford. Attorneys must tread carefully however, especially in areas where these more severe limitations on scope have only recently taken hold.

Client and Case Selection

American Bar Association Model Rule 1.2(c) permits an attorney to limit the scope of a representation as long as the limitation is "reasonable" and the client gives informed consent. This rule, which has been adopted in all but a handful of states, provides the basis, and defines the boundaries, of any LSR.

What is a "reasonable" limitation on a lawyer's services? Two broad categories inform the reasonableness of a limitation: the complexity of the matter and the capabilities of the client. The purposes behind easing ethical and court rules to allow for more LSRs—to help pro se individuals achieve their legal goals and ease the burden on the court system—are not fulfilled where a client is left stranded midway through an engagement with no reasonable chance for success.

Can the matter realistically be broken into discrete tasks? Is the case simple enough that a layperson could achieve a positive result with only limited help from an attorney? Even if these conditions are met, does this specific client possess the abilities, whether referring to intellectual capacity, familiarity with technology, English proficiency, or emotional temperament, to handle the rest of the case without further assistance?

Given these considerations, an LSR is most appropriate for transactional work, uncontested matters, or relatively simple litigation, and should be avoided in foreseeably difficult matters or areas of practice. LSRs in bankruptcy cases have raised eyebrows where attorneys contract out all adversarial or contested aspects of the representation, which led one court to observe that only a "small number of debtors are sufficiently knowledgeable and sophisticated to adequately represent their interests in the complicated world of bankruptcy without a lawyer."[1]

Closely tied to the issue of whether the limitation is reasonable, the attorney must also determine whether the client can provide informed consent to the limitation. Does the client understand what is being contracted away and how the limitation could impact their outcome? The more thoroughly and specifically the attorney is able to inform the client about the potential downsides of an LSR, the more significance will be afforded to the client's consent in the event of a professional liability claim.

Documentation and Disclosures

ABA Rule 1.2(c) does not require an attorney to reduce the scope limitation to writing, although some state variations include this requirement. Nevertheless, in all jurisdictions, an attorney entering into an LSR should include a written clause in the engagement letter defining the scope and obtain the client's written consent.

An attorney should not assume a client is familiar with an LSR, even if the client approached the attorney for such a representation. Moreover, not every attorney will limit a representation in the same way. In light of ethics and court opinions highlighting the need for attorneys to evaluate the suitability of an LSR for each particular engagement and client, attorneys should tailor the scope provision as much as possible to the matter at hand and avoid one-size-fits-all, boilerplate language.

Fully and accurately conveying the scope limitation and the division of labor to the client will often require a written checklist for the attorney and client to review and approve at the outset of the engagement. What tasks will likely be necessary? Of those tasks, which will be the responsibility of the attorney? Which responsibilities will the client assume? Answering these questions requires an evaluation of the matter in its entirety notwithstanding limitations on the attorney's role. Even where a client agrees to complete a task or manage an aspect of the representation, the attorney should emphasize the client's need to meet specific deadlines, adhere to court rules and procedures, and communicate with opposing counsel as to that area of the case.

As the matter progresses, tasks may arise that were not initially anticipated, or the client may ask the attorney to handle tasks that fall outside of the delineated scope. An attorney may offer additional services if the client provides additional informed consent, the attorney is willing and qualified to provide the services, and the change in scope is documented in an addendum to the engagement letter, preferably signed by the client.

An engagement letter for an LSR should also address termination. The appeal of an LSR—that the client is not required to pay for a traditional, soup-to-nuts representation—also means that the attorney will be permitted to withdraw before a matter reaches its conclusion. While less of an issue for transactional representations, an attorney engaging a client for an LSR in a litigation context must carefully explain during the intake process why, how and when the representation may end.

Litigators must also disclose parameters of their representation to the court. A majority of states allow for some variation of a "limited scope appearance," at least in certain practice areas, which requires an attorney to file a disclosure upfront detailing the role and limitations, then permits withdrawal pursuant to that disclosure once the attorney's work is done. State procedures[2] vary: Massachusetts, for example, conditions entry of a limited appearance on the attorney's completion of a training course,[3] and the level of scrutiny applied to each disclosure and request for withdrawal can depend greatly on the jurisdiction where it is filed.

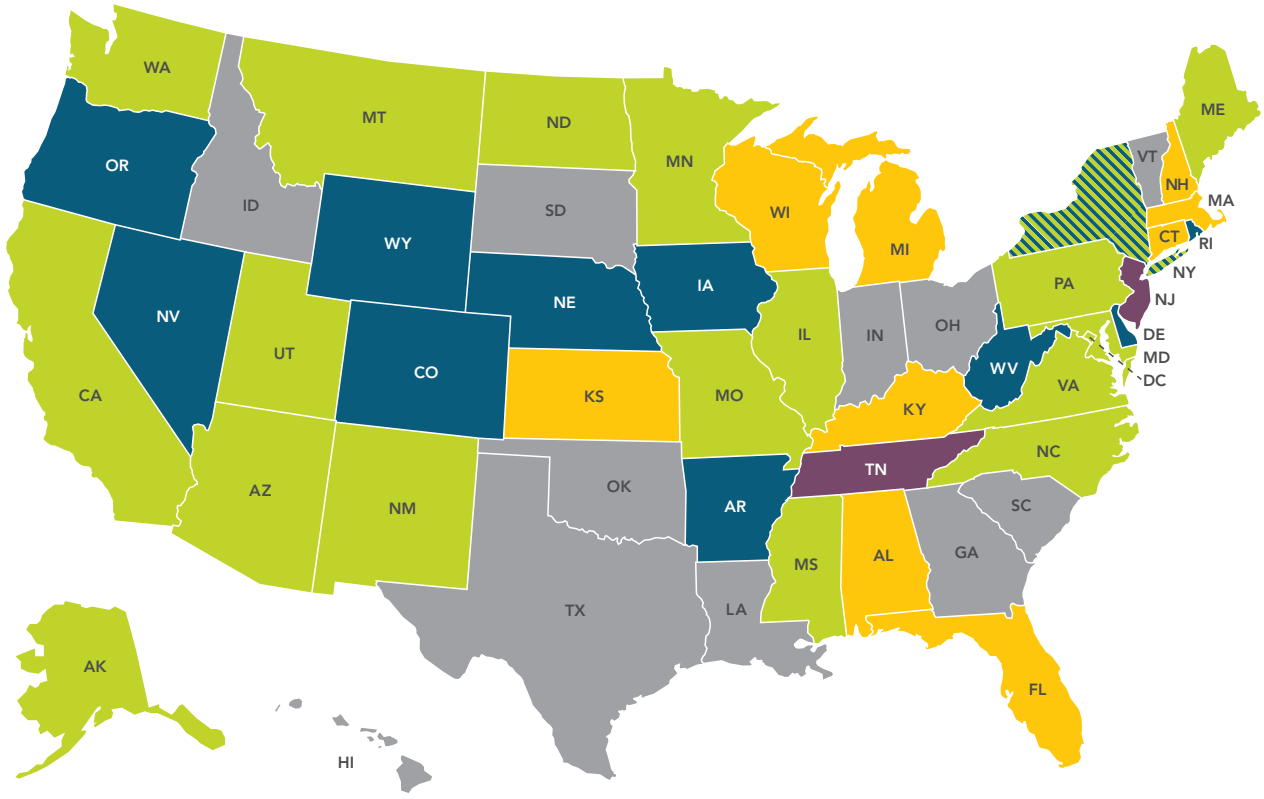
1 *In re Castorena*, 270 B.R. 504, 523 (Bankr. D. Idaho 2001).

2 The federal judiciary takes a strict approach to LSRs, and often prohibits them altogether.
3 *See* Mass. Trial Ct. R. XVI(3).

Ghostwriting

Disclosing an attorney's role in litigation is necessary if the attorney will be appearing before a judge. What if the attorney's role is limited solely to drafting, leaving the client to file the document and handle all in-court appearances? This form of LSR becomes "ghostwriting" where the attorney's role is undisclosed to the court, and has drawn the ire of judges and attorneys alike who argue that it takes advantage of the leeway normally afforded to pro se litigants.

For this reason, as well as Federal Rule of Civil Procedure 11's requirement that attorneys sign the pleadings they prepare, virtually every federal court to consider the issue has prohibited ghostwriting. At the state level, a combination of court rules, ethical rules, and state bar opinions form a patchwork of evolving (and sometimes conflicting) guidance, but there are essentially five camps, as illustrated below.



- Ghostwriting is permissible—no disclosure is required[4]
- Documents must indicate that they were drafted by an attorney ("Complaint prepared with assistance from a [state] licensed attorney")[5]
- Documents must indicate the identity of the attorney-drafter under certain circumstances[6]
- Documents must indicate the identity of the attorney-drafter ("Complaint prepared with assistance from [attorney's name], a [state] licensed attorney, [bar number]")[7]
- No clear guidance

4 Alaska Ethics Op. 93-1 (1993); Ariz. Ethics Op. 05-06 (2005); Calif. R. Ct. 3.37(a); DC Ethics Op. 330 (2005); Ill. Sup. Ct. R. 137 cmts.; Maine Ethics Op. 89 (1988); Md. R. Prof. Cond. 1.2 cmt. 8; Minn. State Bar Ass'n Pro Se Implementation Committee Report; Miss. Ethics Op. 261 (2018); Mo. R. Civ. P. 55.03(a); Mont. R. Civ. P. 11(e); NM R. Prof. Cond. 16-303 cmt.; NC Ethics Op. 2008-3 (2009); ND R. Civ. P. 11(e); Pa. & Phila. Joint Ethics Op. 2011-100 (2011); Utah Ethics Op. 08-01 (2008); Va. Ethics Op. 1874 (2014); Wash. Super. Ct. Civ. R. 11(b).

5 Ala. R. Civ. P. 11(b); "Limited Scope Representation Frequently Asked Questions." Conn. Judicial Branch, www.jud.ct.gov/faq/limited_scope_rep.htm.; Fla. Ethics Op. 79-7 (Reconsideration) (2000); Kan. Sup. Ct. R. 115A(c); Ky. Ethics Op. KBA E-441 (2017); Mass. Trial Ct. R. XVI(9); Mich. R. Prof. Cond. 1.2(b); NH Super. Ct. Civ. R. 17(i); Wis. R. Prof. Cond. 20:1.2(cm).

6 NJ Ethics Op. 713 (2008) (Specific disclosure required where assistance is a "tactic . . . to gain advantage in litigation" or where lawyer is "effectively in control" of the pleadings and litigation.); Tenn. Ethics Op. 2007-F-153 (2007) (Specific disclosure required unless assistance necessary to prevent claim from being barred by statute of limitations.).

7 *In re Revised Rules*, 2017 Ark. 373 (2017); Colo. R. Civ. P. 11(b); Del. Ethics Op. 1994-2 (1994); Iowa R. Civ. P. 1.423(1); Neb. R. Prof. Cond. § 3-501.2(c); Neb. Sup. Ct. R. § 6-1111(b); Nev. Ethics Op. 34 (Revised) (2009); Ore. Unif. Trial Ct. R. 2.010(7); RI R. Prof. Cond. 1.2(d)(1); WV Ethics Op. 2010-01 (2010); Wyo. R. Prof. 1.2 cmt. 7.

In the interest of promoting access to legal services, the trend is to relax restrictions on attorney-drafted documents filed by pro se litigants. Several states that once banned ghostwriting altogether now permit the practice, or require only a general disclosure that a filing was prepared by an attorney without any further information to identify the attorney-drafter.

Most authorities clarify that their disclosure rules apply when an attorney drafts all or part of a document, and not if an attorney merely reviews documents, offers drafting advice or assists a pro se litigant with preprinted forms. A few states, however, require a more careful analysis. The New Jersey Advisory Committee on Professional Ethics advises attorneys to disclose their identities where the drafting assistance amounts to a "tactic" to take advantage of "traditional judicial leniency toward pro se litigants" or where the attorney, and not the pro se litigant, is "effectively in control" of the pleadings and litigation.[8]

Guidance from the Tennessee Board of Professional Responsibility is also less straightforward. Formal Ethics Opinion 2007-F-153 advises attorneys to include their name on any document they prepare unless the document was "required to toll a statute of limitations, administrative deadline or other proscriptive rule," and "so long as the attorney does not continue undisclosed assistance of the pro se litigant."[9] Attorneys in New York, meanwhile, may refer to opinions issued by the New York State, County, and City Bar Associations, each offering conflicting guidance on drafting disclosure.[10]

Where attorneys are uncertain whether disclosure is necessary, or where guidance is unclear or absent, they should disclose their identity and the extent of their role to the court. Failing to include the requisite disclosure on a ghostwritten pleading may result in professional discipline or sanction. Even in the absence of an affirmative disclosure requirement, an attorney cannot counsel a client to mislead or deceive the court about the attorney's role if the client is asked directly, and judges are empowered to compel disclosure should they so choose.

Risk Control Takeaways

- **Keep "reasonable limitations" reasonable.** As a case develops, a seemingly simple case may become too complex, at which point you may need to either recommend a full-service representation or withdraw.
- **Watch for scope creep.** Before performing work that exceeds your agreed-upon scope, memorialize the change in an addendum to the engagement letter, preferably signed by the client.
- **Nothing limited about the conflict risk.** Narrowing the scope of your work can serve as a tool to circumvent potential conflicts, but know when a conflict requires you to seek a waiver or decline the representation.
- **Specificity leads to understanding.** Make the division of labor clear, and in writing, to preclude feigned misunderstanding if the client fails to perform.
- **Give up the ghost?** The rules on ghostwriting are sometimes unclear and are always in flux, so stay abreast of local rules and err on the side of disclosure.

This article was authored for the benefit of CNA by:
Matthew Fitterer
Matt serves as a Risk Control Specialist for CNA's Lawyers' Professional Liability Program. He is responsible for providing risk control expertise to CNA-insured law firms in the form of written publications, seminars, and direct consultations. Matt has been part of the Lawyers' Professional Liability team at CNA since 2015. Prior to joining CNA, Matt worked in the Chicago area as an attorney for a law firm specializing in criminal defense and civil rights litigation, and then for a solo practitioner with a focus on commercial litigation. He received his undergraduate degree from the University of Illinois at Urbana-Champaign, his law degree from Chicago-Kent College of Law, and is licensed to practice law in Illinois. Matt has also been designated as a Commercial Lines Coverage Specialist (CLCS) by the National Underwriter Company.

8 NJ Ethics Op. 713 (2008).
9 Tenn. Ethics Op. 2007-F-153 (2007).
10 NY County Ethics Op. 742 (2010) (requiring no disclosure); NY State Ethics Op. 613 (1990) (requiring attorney's identity); NY City Ethics Op. 1987-2 (1987) (requiring a general disclosure).

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com