Limiting the Scope of Representation in Matrimonial Actions
and Family Court Proceedings
By Chris McDonough and Joel R. Brandes

The right to counsel in a criminal case is a fundamental constitutional right. In matrimonial matters there is no such right. Thus, low-income individuals with marital disputes in court must either qualify for free legal assistance or represent themselves without the benefit of counsel. One solution to this is "unbundled" legal services, also known as "limited scope representation," which involves a lawyer's provision of discrete, selected services to a client who does not want the lawyer's services for all aspects of a matter.[1] Under this approach attorneys assist only with selected aspects of a legal problem.

Generally, there are three situations in which a lawyer may assist a pro se litigant. She may consult with the litigant prior to or after the commencement of an action; she may assist a litigant with drafting papers and pleadings prior to or in connection with a pending action; or she may be retained by the litigant to commence or appear in an action for a limited purpose.

In the past fifteen years there has been an emerging trend supporting limited scope of representation for persons unable to pay for legal services, or qualify for free legal services. In 2007 the American Bar Association adopted the Model Rules of Professional Conduct. ABA Rule 1.2 (c) provides "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." That year it issued an opinion, without distinguishing the circumstances. It did state that "A lawyer may provide legal assistance to litigants appearing before tribunals *'pro se*' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." An attorney must disclose her ghostwriting role only if it amounts to "material assistance." [2] The ABA opinion defines this as the point at which a failure to disclose "would constitute fraudulent or otherwise dishonest conduct on the part of the client." In the ABA view, however, merely submitting motions, pleadings, or other papers to a tribunal is not material assistance and thus need not be disclosed to the court.

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[1] Representation, Black's Law Dictionary (11th ed. 2019)

[2] ABA Formal Ethics Op. No. 07-446 (May 5, 2007).

The New York Rules of Professional Conduct ("RPC" or "Rule") effective April 1, 2009 are generally modeled after the ABA's Model Rules. Rule 1.2 (c) provides that " A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

In obtaining informed consent from the client, the lawyer must adequately disclose the limitations of the scope of the engagement and the matters that will be excluded.[3] Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation,[4] RPC 1.2 (c) permits the assisting lawyer to defer to the pro se 'client' in limiting certain actions that a lawyer representing a client fully might be duty bound to undertake; however, this is an important consideration when evaluating the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[5]

It appears to us that in matrimonial matters Rule 1.2 (c) must be read in conjunction with the matrimonial rules in Part 1400. These rules require counsel to provide a Statement of Clients Rights (22 NYCRR 1400.2), and an appropriate written retention agreement (22 NYCRR 1400.3), which must be filed with the court within 10 days of its execution. It also seems that RPC Rule 1.5 (5)(ii) may apply. It provides that a lawyer may not charge any fee in a domestic relations matter if a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement.

While the letter of engagement rule in 22 NYCRR 1215.1(a) may appear to apply, it specifically exempts representation in domestic relations matters subject to Part 1400.[6]

Consulting or advising a pro se litigant prior to or after the commencement of an action is one means of assisting a pro se litigant. Another is drafting pleadings and other court documents, which is commonly known as "ghostwriting", and raises the problem of potential unethical

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[3] Comment 6A

[4] See Rule 1.1

[5] Comment 7

[6] 22 NYCRR 1215.2(c)

exploitation of court leniency towards pro se litigants, and violations of ethics rules.[7]

In 2010 the New York County Lawyers Association Committee on Professional Ethics,[8] in a "ghostwriting" opinion, addressed the question whether it is ethical for a lawyer to prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the court or adversary. The Committee opined that given New York's adoption of Rule 1.2(c) allowing limited scope representation, it is now ethically permissible for an attorney, with the informed consent of the client, to play a limited role and prepare pleadings and other submissions for a pro se litigant without disclosing the lawyer's participation to the tribunal and adverse counsel. Disclosure of the fact that a pleading or submission was prepared by counsel need only be made "where necessary."

The New York County opinion points out that "where necessary" as used in Rule 1.2(c) means that an attorney must disclose assistance through ghostwriting only in the following circumstances: Where mandated by (1) a procedural rule, (2) a court rule, (3) a particular judge's rule, (4) a judge's order in a specific case, or in any other situation in which an attorney's ghostwriting would constitute a misrepresentation or otherwise violate a law or rule of professional conduct. Even then, unless otherwise required by the particular rule, order or circumstance mandating disclosure, the attorney must only indicate that the ghostwritten document was "prepared with the assistance of counsel admitted in New York." However, it cautioned that even in the absence of overt misrepresentation, there is risk that courts might deem the undisclosed and substantial participation of an attorney on behalf of a *pro se* litigant to be misrepresentation. New York attorneys should err on the side of caution by ensuring that notice is given in circumstances where the court or opposing counsel is giving special consideration to an "unrepresented party" as a result of their pro *se* status. Conversely, if a lawyer is asked merely to review a pleading or a letter for a *pro se* litigant, it appears that there is no duty to disclose under Rule 1.2(c).

The New York County opinion concluded that best practices dictate that until there is clarification, where an attorney's assistance of a *pro se* litigant has been substantial and the

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[7] See John C. Rothermich, Ethical and Procedural Implications Of "Ghostwriting" For Pro Se Litigants: Toward Increased Access to Civil Justice, 67 Fordham L. Rev. 2687

[8] NYCLA Eth. Op. 742 (N.Y. Cty. Law. Assn.Comm.Prof.Eth.), 2010 WL 4260878

circumstances warrant, practitioners should give notice to the tribunal and/or to opposing counsel.

In 2011 the New York State Bar Association Committee on Professional Ethics opined, [9] in a "limited scope representation" opinion, that a lawyer may limit the scope of the representation of a client provided that the client gives informed consent to the limitation, the scope of the representation is reasonable under the circumstances, and the limitation is not prejudicial to the administration of justice. The opinion noted that the ethical obligation to represent the client may extend beyond the initial limitation contemplated by the lawyer and client if withdrawal from the representation requires court permission and the court withholds or denies that permission. As to the language in Rule 1.2(c) concerning notice to the tribunal and/or opposing counsel "where necessary," the Committee indicated that notice is "necessary" only if a court rule requires notice. [10] This does not make sense if the attorney is appearing in the action, unless they were referring to the "ghostwriting" situation.

The Committee concluded that a lawyer may limit their scope of representation provided the lawyer complies with Rule 1.2(c) and Rule 8.4(d). A lawyer can comply by satisfying three conditions: (a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision as to the limitation, (b) the scope of the representation must be reasonable under the circumstances, and (c) the limitation must not be prejudicial to the administration of justice. However, even if the initial limitation on the scope of the representation is permissible, a lawyer's ethical obligation to represent a client may extend beyond the initial limitation if a court's permission to withdraw from the representation is required and the court denies permission. And, if the court does grant permission to withdraw, the lawyer must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client.

Finally, the Committee opined that if a lawyer validly obtains a client's informed advance consent to withdraw after a discrete stage, the lawyer must also comply with Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a

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[9] NY Eth. Op. 856 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2011 WL 1351743

[10] Citing generally N.Y. County Lawyers 742 (2010)

lawyer shall not withdraw from employment in a matter before that tribunal without its permission." Rule 1.16(d) also provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." If the court orders the lawyer to continue the representation, then Rule 1.16(d) requires the lawyer to continue the representation even if the client cannot pay for the representation.

In 2015 the New York City Bar Association, in a "limited scope" opinion, agreed with the New York County opinion that the phrase "where necessary" means that a lawyer must disclose the limited scope of his representation where required by a court rule or order, or in any other situation where nondisclosure constitutes a misrepresentation or other violation of the Rules.[11] This opinion must be referring to a "ghostwriting" situation.

The Second Circuit appears to have relied on the NYCLA "ghostwriting" Opinion 742 in In re Fengling Liu, [12] where the court held that a lawyer who failed to notify the court of his ghostwriting work did not violate the Rules of Professional Conduct

Conclusion

All dictionaries, including Black's Law Dictionary define "representation" similarly: "The act or an instance of standing for or acting on behalf of another, esp. by a lawyer on behalf of a client."[13] Under that definition consultation with a pro se litigant and "ghostwriting" are entirely different than "limited scope representation." In domestic relations matters consultation and ghostwriting initiated *prior to* or after the commencement of a claim, action or proceeding is not representation in a domestic relations matter if that definition of "representation" is accepted.

The opinions agree that Rule 1.2(c) allows ghostwriting in a matrimonial matter, although disclosing the magnitude of counsel's involvement is still murky. Our suggestion is that ghostwriting should always be disclosed, either *directly* "prepared with the assistance of Joe Jones Esq., an attorney admitted to practice in New York" or *indirectly* "prepared with the assistance of an attorney admitted to practice in New York."

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[11] See New York City Formal opinion 2015-4

[12] 664 F.3d 367 (2d Cir. 2011)

[13] Representation, Black's Law Dictionary (11th ed. 2019)

Limited scope representation in the action is a different matter. Involvement in the action as co-counsel to a pro se litigant for a limited purpose, such as making an application for counsel fees, is clearly considered representation requiring compliance with the matrimonial rules in 22 NYCRR Part 1400. Importantly, once involvement in an action is disclosed and representation assumed, the court can insist on counsel's full and continued representation despite the client's inability to pay.

Joel R. Brandes is an attorney in New York City. He is the author of the nine volume treatise Law and the Family New York, 2d, and Law and the Family New York Forms, 2019 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.

Chris McDonough is Special Counsel to Foley Griffin LLP of Garden City. He has over 30 years of experience exclusively in the field of attorney grievances and risk management for lawyers. In addition to grievance defense he writes and lectures extensively on professional ethics and is on retainer to numerous law firms as ethics advisor and consultant. He can be reached at Chris@FoleyGriffin.com or at Newyorkethicslawyer.com.