# THE PROMISE AND POTENTIAL PITFALLS OF LIMITED SCOPE REPRESENTATION AND UNBUNDLED LEGAL SERVICES

by Philip M. Genty, Esq.



#### I. Introduction

The lack of legal services available to low (and even middle) income clients — the "justice gap"—has been well-publicized, and addressing this has become a priority among legal policymakers.<sup>1</sup> In the

face of a scarcity of legal resources for people of limited economic means, it has become increasingly important to find ways to stretch these resources to meet the needs of as many people as possible. One approach is to rely on limited scope or "unbundled" legal services.<sup>2</sup>

"Unbundled legal services" have been defined as "the division of legal assistance into discrete tasks, with an understanding between the lawyer and client that the lawyer will provide only selected legal services that may not address the client's entire legal problem." One might think about legal services as falling on a continuum:

- 1. attorney-client relationship with full representation
- 2. attorney-client relationship with limited representation
- 3. some direct attorney involvement with the client (e.g. providing legal advice or "ghostwriting" pleadings), but no formal appearance or representation in court proceedings or ongoing attorney-client relationship
- 4. *pro se* materials (e.g., handbooks, general information websites, sample forms) not involving any attorney contact with the client.

In discussing "limited scope representation" or "unbundled legal services," this article will focus on the

second and third categories, although the fourth category is also a form of "unbundled legal services." Although the second and third categories may both be thought of as forms of "limited scope representation," there are important differences between them. In the second category, a full attorney-client relationship is established, and the attorney provides actual representation to the client, although the representation is limited in scope. In the third category, something less than actual representation is being provided, and an attorney-client relationship may not even be formed.

The use of limited scope and unbundled legal services offers significant potential for lowering the cost of legal services and making legal resources available to people who would otherwise not have access to them. Limited scope programs also provide excellent opportunities for lawyers who have inflexible schedules and demands on their time to provide *pro bono* services. However, such programs must be designed carefully to avoid important ethical concerns.

Part II of this article presents several examples of limited scope/unbundled legal services models. Part III examines the potential benefits of these models and reviews the ethical rules and opinions that permit the scope of legal services to be limited. Parts IV and V discuss some of the ethical challenges involved. Part IV addresses the danger of violating the ethical duty of competence, while Part V considers the dangers of inadvertently forming a full attorney-client relationship or of assisting in the unauthorized practice of law.

### II. Examples of Unbundled Legal Services Models

Unbundled legal services are provided in a variety of models. Examples of models involving an attorney-client relationship with limited representation, and those involving some direct attorney involvement, but no ongoing representation, are discussed in this section.

# A. Representation by an Attorney but Only for Discrete Portions of the Case or Limited Periods of Time

One type of model limits representation to specific portions of civil cases. This may vary by subject matter and even from case to case. An example of such a

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model is the Limited-Scope Representation Pilot Program run by the United States District Court for the Central District of California:

The Pilot Program enables judges to appoint volunteer attorneys for limited-scope engagements on non-prisoner, pro se, civil cases. Pro bono attorneys will have the opportunity to perform discrete, specifically defined tasks such as representing a pro se litigant during a settlement conference, filing an opposition to a dispositive motion, or appearing at a deposition.<sup>4</sup>

Other programs focus on specific areas of law and limit representation to doing a defined piece of legal work, e.g. obtaining a particular court order or filing a petition and making an appearance at a settlement conference. For example, another California program run by the BayLegal Regional County Office limits representation as follows:

Limited Scope Representation in Domestic Violence Restraining Order Hearings

– Volunteer attorneys provide limited scope representation (approximately 1 or 2 hearings) for domestic violence survivors seeking permanent restraining orders and important related child custody, visitation and support orders. Volunteers receive training, a practice manual and sample pleadings and ongoing mentorship.<sup>5</sup>

Another substantive focus of limited scope programs is bankruptcy. In these programs, representation is typically limited to filing a Chapter 7 petition and attending a meeting of creditors in a case that is not likely to be contested. Connecticut and Massachusetts have examples of such programs.<sup>6</sup>

A third model limits the attorney's representation by time, rather than by work, to be accomplished. Two examples of such "Lawyer for the Day" programs are run by the New York City Civil Court, <sup>7</sup> and the Wisconsin Access to Justice Commission. In New York, the Volunteer Lawyer for the Day (VLFD) Program states that it offers unrepresented litigants in Consumer Debt proceedings the opportunity to have lawyers represent them during their appearance in the Civil Court. In the VLFD Program, the volunteer lawyer and the client meet the

morning of the court appearance and sign a retainer agreement for just that day's appearance. The lawyer files a Limited Notice of Appearance with the Court. The lawyer then appears on the litigant's behalf for the day. Volunteer lawyers are supervised by a knowledgeable attorney program coordinator who reviews cases, discusses strategy, and approves stipulations. The representation is complete at the end of the day, whether the case is resolved or not.9

In the Wisconsin program, Milwaukee's Lawyer for a Day program, volunteer lawyers provide representation to domestic violence victims seeking restraining order injunctions.

The program uses an interesting mix of clinical law students from Marquette University, and volunteer lawyers:

[The law school is provided] with the names of petitioners who receive restraining orders on a Tuesday, and who desire legal representation when they return to court for an injunction hearing on a Tuesday afternoon two weeks later. After Marquette law students have interviewed the petitioners and provided [the volunteer] lawyers with background, the lawyers meet the petitioners briefly at the courthouse on that Tuesday afternoon and then represent them in their attempt to turn the restraining order into an injunction.<sup>10</sup>

Thus, programs, in which attorney-client representation is limited by task or time period, come in a variety of models. A second type of unbundled programs — advice-only models — is described below.

#### **B.** Advice-only Programs

In advice-only programs, the attorney does not make a formal appearance as the client's attorney, and no ongoing attorney-client representation is provided. There are two primary models of such programs — those in which the advice is provided face-to-face, and those in which the advice is provided online.

The District of Columbia and Tennessee provide examples of face-to-face models. In the District of Columbia, the DC Bar *Pro Bono* Program provides advice in a variety of civil matters:

The Advice & Referral Clinic brings teams of volunteer lawyers monthly to ... provide individuals with brief information and advice on most civil legal matters, including unsafe housing conditions, wrongful termination, debt collection, and bankruptcy. ... An Immigration Legal Advice Clinic takes place quarterly to serve individuals with immigration and asylum matters.

The Community Economic Development Project provides pro bono counsel, brief legal advice, and training to communitybased nonprofit organizations and small businesses. ...

Court-Based Resource Centers enable residents to meet with a volunteer attorney to help them navigate the legal system just steps away from the courtrooms where their cases will be heard. These Resource Centers assist in landlord/tenant, probate, consumer, and tax sale redemption matters at D.C. Superior Court. ...

Pro Se Plus Divorce and Custody Clinics assist unrepresented individuals who are pursuing an uncontested divorce and/or custody of their children....<sup>11</sup>

In the Tennessee *Pro Bono* Project run by Legal Aid of East Tennessee, "volunteers who staff Advice Clinics meet with clients who have routine legal questions. If the client's legal problem cannot be resolved at the Clinic, the volunteer has no further obligation to the client." <sup>12</sup>

A variation of the advice-only model is an online version. Indiana and Minnesota have similar examples of this model. These programs are "based on the walk-in clinic or dial-a-lawyer model, where clients request brief advice and counsel about a specific civil legal issue from a volunteer lawyer. Lawyers provide information and basic legal advice without any expectation of long-term representation." <sup>13</sup> These models provide a detailed protocol for both lawyers and clients:

... Users will be asked to select a category (such as "housing" or "debt") that best describes their question. The lawyer may ask for additional information before responding to the user's request, but the user will have a choice to respond to that request or not. Users will provide their name, but no other identifying information will be shared with the volunteer lawyer. Users are informed that there is no guarantee that a question will be answered. If a question is not answered within 30 days, the user will receive an email from the website administrator instructing them to seek assistance elsewhere. The user will also be provided with a list of additional resources ...

Lawyers may log in at any time to review a list of user questions, and select the one(s) they want to answer. Lawyers will use the categories provided by the user (such as "housing" or "debt") to help determine which questions they would like to answer. ... The lawyer's identity is not revealed to the user unless the lawyer decides to do so. Once a lawyer answers a question, the user will be asked to accept the answer or send a follow up question to the lawyer. ...

If a lawyer determines that (s)he cannot answer a question, the lawyer may contact the site administrator to place the question back into the queue so that another volunteer lawyer may try to assist the user. The lawyer should let the administrator know the reason why the question needs to be placed back in the queue.<sup>14</sup>

Significantly, an attorney-client relationship *is* considered to have been formed in such online models, but this relationship comes with important limitations:

When a user submits a question and receives an answer from a lawyer, there will be a lawyer/client relationship formed between that client and the lawyer who responds. ... The representation will be limited to providing an answer to the legal question and will not involve any continuing representation of the client beyond the act of providing such an answer. The lawyer will provide short-term, limited legal services to a client (the eligible user of this site) without expectation by either the lawyer or the client (the eligible user of this site) that the lawyer will provide continuing representation in the matter. Both the eligible users and lawyers must consent to the limited nature of this relationship both as to scope and duration as indicated when they accept the terms of the use agreement. Eligible users and lawyers who do not accept the terms of the use agreement will not be allowed access to the site.15

A final variation on the advice-only model is the interesting hybrid run by the Coalition of Concerned Legal

Professionals (CCLP). This program involves a combination of *pro bono* attorneys and lay advocates. CCLP describes this model as follows:

When an individual seeking assistance contacts CCLP, we schedule them to attend a legal advice session. At those sessions, a lay advocate does the initial interview with the person and will then accompany the person to meet with the attorney, assisting in explaining to the attorney the problem and the request for assistance. ...

The attorneys at the legal advice sessions are generally attorneys in legal practice who are able to field a broad spectrum of legal issues and provide advice and suggested action. Sometimes, however, we hold sessions dealing only with one particular type problem and have an attorney specializing in that area, such as immigration. In regular legal advice sessions, however, if the type of problem coming in the door is one requiring a specialist with knowledge beyond that of the attorney doing the session, CCLP will either get the specialist on the phone to provide advice, or schedule a separate meeting later with an attorney specializing in that area of law.

CCLP advocates then work with the individual on the follow up, sometimes even accompanying the individual to court to provide support or walking them through advocacy with administrative agencies.<sup>16</sup>

The pro bono lawyers sometimes agree to take on full representation. When that happens, the lay advocates typically remain as part of the legal team. There is no expectation that the attorneys will make this additional commitment, however.<sup>17</sup>

#### C. "Ghostwriting"

Like advice-only models, the final type of unbundled model, "ghostwriting," does not involve formal appearances as the attorney for the client or any ongoing attorney-client relationship. In such models, the assistance is limited to drafting pleadings for a client who will then appear in a court proceeding *pro se*.

The pleadings do not contain the name of the lawyer, but may indicate that the pleadings were prepared with the assistance of counsel.<sup>18</sup> This model is employed by many civil legal services offices, for example, to draft motions to stay eviction proceedings. Massachusetts provides one such example of such a model. In a weekly Family Law Clinic at the Suffolk Probate and Family Court, volunteer lawyers "give legal advice and assist with drafting pleadings on a variety of family law topics including divorce, custody, paternity, contempt and modification actions. Volunteers do not file an appearance on behalf of the clients;

... services are limited to advice and assistance with the drafting of family law forms."<sup>19</sup>

As discussed more fully below, unbundled legal services programs, such as those described here, have important potential advantages for both attorneys and clients. Unbundling is also explicitly permitted by the relevant ethical code provisions. At the same time, however, it involves significant risks of failing to satisfy the duties that attorneys owe to clients, particularly the duty of competence. In addition, there is a risk that an attorney who engages in some form of limited scope representation will inadvertently enter into a full

attorney-client relationship with all of the duties that the relationship entails, or will aid in the unauthorized practice of law.

#### III. Potential Benefits and Ethical Permissibility of Limiting the Scope of Representation and "Unbundling" Legal Services

There are obvious potential benefits to all types of limited scope or unbundled legal service programs. For the client, they cost less than full representation. For the attorney, limited time and resources can be stretched to provide some assistance to a larger number of clients.<sup>20</sup>

Unbundled legal services are of particular importance in the public interest context, where the demand for legal services greatly outstrips supply, and where the goal may be to meet at least some of the legal needs of as many people as possible.

Limiting legal services is also explicitly endorsed by the ethical rules. Rule 1.2(c) of the ABA Model Rules of Professional Conduct provides: "A lawyer

may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."<sup>21</sup>

Furthermore, Rule 6.5 — Nonprofit and Court-Annexed Limited Legal Services Programs — provides for the provision of "short-term limited legal services" to clients in programs sponsored by nonprofit organizations or the courts.<sup>22</sup> Such "short-term services" are defined as:

services — such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legaladvice 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.<sup>23</sup>

Rule 6.5 further relaxes the rules relating to conflicts of interest to make it easier for private attorneys to take on such limited representation.<sup>24</sup>

Most states have adopted ethical rules that follow the format of the Model Rules. However, there are significant variations among the states in the content of some of the rules.

California, which does not follow the ABA Model Rules template, has a number of provisions in its court and ethics rules that address limited scope representation. Sections 3.35-3.37 of the California

Rules of Court reflect the distinction between the two types of limited scope services discussed in the Introduction: actual, limited representation, and assistance without ongoing representation:

- Section 3.35 defines limited scope representation generally.
- Section 3.36 sets out the requirements for limited scope services when an attorney is actually appearing in court and representing the client.
- Section 3.37 sets out the requirements when an attorney is assisting a client in the preparation of court documents, but not actually appearing in court, i.e., "ghostwriting." <sup>25</sup>

These provisions provide important and helpful guidelines.

Bar Association ethics committees, while endorsing the use of unbundled legal services models, have offered cautionary notes and provided useful guidance. In a compre-

hensive treatment of the subject, the Pennsylvania Bar Association and the Philadelphia Bar Association issued a joint opinion in 2011, "Representing Clients in Limited Scope Engagements." In addition to outlining ethical guidelines for unbundled programs, the opinion includes a national compilation of relevant court rules. 27

Another thoughtful opinion was issued by the New York County Lawyers' Association on the use of one type of unbundled legal service — "ghostwriting" of pleadings.<sup>28</sup> The Committee on Professional Ethics was asked whether it was permissible for lawyers to draft pleadings for individuals for use in court proceedings in which the

lawyers would not be providing representation to, or appearing in court on behalf of, the individuals. As noted above, such "ghostwriting" is routinely provided by legal services programs to individuals whom the programs are unable to represent but who need assistance with pleadings to get their applications heard by the court.

The Committee concluded that this is a permissible form of limited scope representation under Rule 1.2(c) of the New York Rules of Professional Conduct. The Committee began by discussing the possible benefits of providing limited scope legal assistance to *pro se* litigants. The Committee stated that unbundled legal services are one way to address the needs of people who are unable to afford legal assistance. With respect to "ghostwriting" specifically, the Committee concluded: "[G]hostwriting allows attorneys to fulfill their professional obligation to make the system of justice available to all."

In addressing the possibility that a pro se individual might receive an unfair advantage from such assistance, the Committee distinguished between substantive considerations, relating to the merits of the proceeding, and procedural considerations, relating to the ability of the individual to get access to the courts. The Committee noted: "Treating [pro se] pleadings more leniently does not make it more likely that a pro se litigant will win. It simply makes it more likely that a pro se litigant's cause will be heard on the merits, as opposed to being dismissed at the pleading stage."30 The Committee found that any possible concerns about misleading the court by suggesting that the pro se individual had prepared the pleadings without any assistance could be addressed by indicating on the pleadings that they had been prepared with the assistance of an attorney. The Committee left to the courts the question of whether, in cases where some disclosure of attorney assistance was found to be required, the pleadings could be submitted anonymously or should include the name of the attorney who had provided the assistance.<sup>31</sup>

Other forms of unbundled legal services have also been evaluated by ethics committees. Examples include the courthouse based "pro se clinic," 32 and limited scope bankruptcy projects. 33

Thus, the ability to "unbundle" legal services is an ethically permissible tool of significant importance to both attorneys and clients. Unbundling has the potential to address the problems of rising legal costs and unmet legal needs. However, because unbundling involves a departure from optimal, full-service, "first-class" legal representation, it also implicates fundamental ethical concerns. Three of these — the danger of violating duties to the client, including the duty of competence; the potential for inadvertent formation of a full attorney-client relationship; and the risk of assisting in the unauthorized practice of law — are discussed in Sections IV and V, *infra*.

## IV. Danger of Violating Ethical Duty of Competence

It is important for every attorney to realize that any interaction with a client, even for limited purposes, triggers important duties.<sup>36</sup> Chief among these is the duty of competence. Rule 1.1 of the Model Rules of Professional Conduct states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>37</sup> The mere fact that an attorney is not providing full legal representation to a client does not relieve the attorney from the responsibility of acting competently. Indeed, competence is arguably even *more important* in situations where an attorney will only be seeing an individual for a brief period of time and may not have the opportunity to follow-up with the individual after this encounter and correct any errors or miscommunications.

The Comments to Rule 1.2, which as noted above permits an attorney to limit the scope of services, explicitly link the duty of competence under Rule 1.1 to the requirement that the limitation on the scope of services be "reasonable":

[A]Ithough 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 was 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. See Rule 1.1 [relating to competence of representation].38

Thus, the duty of competence includes a responsibility to determine whether a contemplated limitation or unbundling of legal services is reasonable under the circumstances. Some limitations on the scope of representation are routine and would not generally involve any ethical concerns. For example, an attorney may agree to handle a case at the trial stage but not on appeal. Or an attorney might agree to handle a client's will, but not the client's lawsuit for breach of contract. The Comments to the Model Rules of Professional Conduct provide additional examples.<sup>39</sup>

But there are other situations where the reasonableness of a proposed limitation may be less clear. An attorney's duty of competence involves determining whether the individual will be better off with the limited assistance than without it; i.e., whether *something* is necessarily better than nothing. While it may seem obvious that an individual will always benefit from even limited legal assistance, this is not necessarily true. There may be cases where an attorney risks putting an individual in a worse situation than if the attorney had not become involved in the first place.

One such case provides a cautionary tale for any attorney contemplating limited scope representation. In MCv. GC,  $^{40}$  a law firm attorney had become involved with a *probono* divorce program run by a not-for-profit organization. The attorney, who had no experience handling

divorces, was apparently told by the organization overseeing the *pro bono* program that the assistance she would be providing would be limited to uncontested divorces. The attorney agreed to represent a wife who was referred to her by the organization. When the wife asked the attorney about the possibility of obtaining a custody order that would allow her to relocate with her child, the attorney told her that she would not be able to help with this issue.<sup>41</sup> The attorney explained what she saw as the limited scope of her representation as follows:

> Please be advised that I was not retained for a contested divorce, nor was I retained to advise you regarding relocation. Rather, you originally retained me as pro bono counsel for an uncontested divorce, based on the facts that you presented to [the not-for-profit organization]. As such, if settlement negotiations break down over an unreasonable disagreement as to visitation rights, I will withdraw my representation. Furthermore, I will not negotiate the relocation issue under any circumstances. While I am ... well aware of your desire to move to Florida in the near future, I do not have the experience or the time to handle a lengthy relocation trial.42

The wife subsequently signed a stipulation of settlement prepared by the attorney. Despite the wife's desire to relocate, and the attorney's knowledge of that fact, the stipulation provided that she would not be permitted to do so. In addition, even though the attorney had not discussed equitable distribution of assets with the wife, the stipulation stated that the parties were waiving any right to equitable distribution.<sup>43</sup> The attorney was apparently under the impression that the wife could modify the terms of the stipulation at a later date, but this was not correct.<sup>44</sup>

The wife, thereafter, retained new counsel and moved to vacate the stipulation and litigate the relocation and equitable distribution issues. In granting the wife's application, the court was highly critical of the *pro bono* attorney, as well as her law firm and the not-for-profit

organization. The court found that the attorney lacked appropriate training, supervision, and oversight, and that, as a result, she made material misstatements to the wife and put improper pressure on her to settle.<sup>45</sup>

This case teaches a powerful lesson: An attorney must provide competent representation at all times and may not limit the scope of representation in a way that will unreasonably undermine the effectiveness of the representation. While in  $MC\ v.\ GC$ , it may have been reasonable in the abstract to limit representation to uncontested divorces, the attorney could not permissibly impose that limitation in the face of the client's desire to litigate other issues, including the possibility of relocation. Once the wife was accepted as a client, competent representation required the attorney or someone else in her firm or in the not-for-profit organization to provide full representation of the client on all issues necessary to the effective handling of her divorce, or to secure for the client another attorney who would be able to do this.

It is important to stress that the problems of the lawyer in *MC v. GC* were caused, in part, by her desire to "do good" by participating in a *pro bono* program for women who could not afford representation. Despite these honorable intentions, this is an example of a situation where some representation might actually have been worse than no representation: The court might well have concluded that since the wife had the benefit of counsel when she signed the stipulation, there was no basis for vacating it. In such circumstances, the wife might actually have done better proceeding *pro se* and raising the relocation and financial issues directly with the court.<sup>46</sup>

Another situation involving issues of competence in the context of limited scope legal services arose in Louisiana after Hurricane Katrina. The Louisiana Bar Ethics Committee saw the need to discourage the stampede of well-meaning, but unqualified, lawyers seeking to come to the state to volunteer their services. In the context of a proposed "hot-line" or advice booth for Katrina victims, the Ethics Committee sounded a cautionary note:

> As callers to such a "hotline" and visitors to such a booth will likely be desperate for help, eager for assistance and, therefore, most vulnerable, a lawyer who is

not competent in the areas of law at issue (and unwilling/unable to attain competence through seminars, training and other learning aids) should refrain from volunteering to provide this type of assistance as that lawyer's participation would have a high potential for causing more harm than good.

...[T]he lawyer confronted with a disaster victim who is seeking advice on matters beyond the lawyer's competence should refer that person to another lawyer who would be capable of providing competent advice or — despite the overwhelming desire to help — compassionately but firmly remind the disaster victim of the limitations of the service and decline to offer advice on those matters which exceed the lawyer's competence.<sup>47</sup>

In short, there are risks involved in trying to do too much even in, or perhaps *especially in*, the context of limited scope, unbundled legal services that may require a level of competence that the lawyer does not possess. Sometimes it is better for both the client and the lawyer if the lawyer simply says, "No." This theme is discussed further in the following section.

#### V. Dangers of Inadvertent Formation of Full Attorney-Client Relationship or Assistance in Unauthorized Practice of Law

As discussed above in the context of the *MC v. GC* case, a lawyer who has initially agreed to take on only a limited scope of representation may find that principles of competence require her or him to take on responsibility for full representation, because circumstances have caused the limitation to become unreasonable. Two other possible concerns that arise in limited scope representation or unbundling of legal services are that a lawyer will inadvertently create a full attorney-client relationship involving additional

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ethical duties to the client or will assist in the unauthorized practice of law.

While state laws and court rules may require lawyers to provide clients with retainer agreements or other formal documents concerning the representation, an attorney-client relationship may be entered into without such formalities and may even occur inadvertently through the actions — or inaction — of the lawyer. Section 14 of the Restatement of the Law Governing Lawyers sets out the requirements for formation of an attorney-client relationship:

§14. Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
  - (a) the lawyer manifests to the person consent to do so; or
  - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
- (2) a tribunal with power to do so appoints the lawyer to provide the services.<sup>49</sup>

Under the Restatement's formulation, the burden is on the lawyer, as the person possessing superior relevant knowledge and information, to make sure that the client understands whether an attorney-client relationship has been entered into. Ambiguities and misunderstandings will be construed against the attorney and may result in the inadvertent formation of an attorney-client relationship.

This risk is especially acute in situations involving unbundled, limited scope legal services. Many of these arise in the context of pro bono programs for individuals who will be handling their own legal proceedings without any legal representation. There is a thin line between assistance to such pro se individuals and inadvertent formation of an attorney-client relationship. A lawyer, faced with an individual in need, will naturally want to act out of compassion and do as much as possible for the individual. For example, a lawyer who is participating in a pro bono project ghostwriting pleadings to prevent an eviction may feel the urge to do more to address the individual's problem. The lawyer may, e.g., offer to let the individual call and have a follow-up conversation about her/his case, or ask the individual to send legal papers to the lawyer for review. Or if an individual learns in, say, an advice-only domestic violence clinic that the pro bono lawyer works for a law firm and handles tort actions for money damages, the individual may ask the lawyer for advice about a potential lawsuit arising from an accident.

However, if the lawyer succumbs to these pressures and agrees to take on tasks that are beyond the limited scope of the *pro bono* program, the lawyer may cause an individual to believe that an attorney-client relationship has been formed. If so, the lawyer may inadvertently take on full representational duties, including the duties of competence and confidentiality. This

could then create a conflict of interest for the lawyer and require him or her to withdraw from representation of an existing client.<sup>50</sup> Even if a full attorney-client relationship is not formed, an attorney may create a *prospective* client relationship, which involves similar concerns about competence, confidentiality and conflicts of interest.<sup>51</sup>

A related concern exists for a lawyer involved in a *pro bono* program that utilizes non-lawyer advocates. If such an advocate — again acting out of compassion — provides independent assistance and advice to a client, the

advocate may be engaging in the practice of law. A *pro bono* attorney who works with the advocate in the program may therefore be at risk of violating the ethical rule against assisting in the unauthorized practice of law.<sup>52</sup>

While there is no precise definition of what constitutes the "practice of law," the American Bar Association has suggested that the "practice of law" involves the "application of legal principles and judgment to the circumstances or objectives of another person or entity." This broad definition suggests that the "practice of law" occurs any time legal analysis is applied to the particular facts of a client's case. However, the ABA's suggestion is nonbinding, and the states have developed various definitions of what constitutes the "practice of law." An attorney must therefore carefully consult the laws of the state in which she or he is practicing.

What seems clear, however, is that the "practice of law" includes the giving of legal advice and that there must be a clear line of supervision linking the work of non-lawyers to licensed attorneys. As with the risk of inadvertent formation of an attorney-client relationship, ethical problems arise when a non-lawyer advocate, motivated by concern about the client's needs, goes beyond her or his limited role and offers unsupervised assistance and advice to the client. Thus, attorneys involved in limited scope *pro bono* programs that use non-lawyers must ensure that all of the non-lawyers' work is supervised by a licensed attorney — either an attorney in the sponsoring program or the *pro bono* attorney her or himself.

An example that meets these requirements is the program run by the Coalition of Concerned Legal Professionals, which is described in Section II, *supra*. In that hybrid advice-only program, the lay advocates who conduct the initial interviews with the clients coordinate closely with, and are carefully supervised by, the program's *pro bono* attorneys. This model makes maximum use of limited attorney resources while ensuring that the law advocates are not engaging in the unauthorized practice of law.

#### VI. Conclusion

As noted in the Introduction, limiting the scope of representation and unbundling legal services are potentially

valuable tools for lowering the cost and expanding the availability of legal services. They are a way to allocate scarce legal resources to address the significant problem of unmet legal needs. However, they come with a potential cost. By definition, limited scope, unbundled services cannot be as effective as full, "first-class" representation, and at some point limiting the scope of services becomes unreasonable and fails to meet the standard of competence required of lawyers.

A different concern about limited scope/unbundled legal services is that the individuals served may be confused about whether the lawyer has agreed to represent them. In failing to resolve this ambiguity, a lawyer may inadvertently create a full attorney-client relationship. In addition, where non-lawyers are involved in the program, there is a risk of unauthorized practice of law if the non-lawyers are not closely supervised by licensed attorneys.

For limited scope/unbundled legal services programs, the concerns about effectiveness and competence that are discussed in Section IV, *supra*, are that the attorney will do *too little* for the client. The attorney will fail to provide the client with competent legal services adequate to meet the client's needs.

But on the flip side of these concerns are those about inadvertent formation of an attorney-client relationship and assistance in the unauthorized practice of law discussed in Section V, *supra*: that the attorney or non-lawyer advocate will do *too much* for the client. An attorney may feel that the limited scope, unbundled services are insufficient to meet all of the individual's legal needs competently. The lawyer may therefore feel compelled to offer to do more for the individual. But this act of compassion may inadvertently create an attorney-client relationship with all of its attendant ethical duties. Similarly, risks of unauthorized practice of law arise when a non-lawyer advocate wants to provide additional, unsupervised help and advice to a needy client.

This "do too little" or "do too much" dilemma makes it difficult for an attorney to find the right balance in carrying out limited scope legal services. Attorneys therefore need to proceed with caution and be mindful of the ethical risks, as well as the significant benefits, of limiting the scope of legal services. As in so many other areas of

life, personal and professional, it is important to act with both a "head" and a "heart."

An earlier version of this article was included in the materials of a CLE program conducted by the Practicing Law Institute, "Limited Scope Representation 2014: Ethical & Practical Challenges," April 2014.

- 1. See, e.g., "Justice Gap Remains Wide, Hearing Witnesses Say," N.Y.L.J. 9/23/14 (describing series of public hearings organized by Chief Judge Jonathan Lippman's Task Force to Expand Access to Civil Legal Services in New York).
- 2. The terms "limited scope representation," "unbundled legal services," and variations of both will be used interchangeably throughout this article.
- 3. Mary Helen McNeal, Unbundling and Law School Clinics: Where's the Pedagogy? 7 Clinical L. Rev. 341, 349 (Spring 2001).
- 4. See description of United States District Court for the Central District of California, Limited-Scope Representation Pilot Program (available at http://www.cacd.uscourts.gov/attorneys/pro-bono/pro-bono-limited-scope-representation-pilot-program).
- 5. See description of BayLegal Regional County Office, Limited Scope Representation in Domestic Violence Restraining Order Hearings (available at http://baylegal.org/pro-bonovolunteer-opportunities/pro-bono/). A similar program run by the Legal Aid Society of San Mateo County runs limited scope programs in domestic violence, as well as guardianship cases. See http://www.legalaidsmc.org/pro-bono-program.html).
- 6. See Connecticut Bar Association Professional Ethics Committee, Informal Opinion 2014-06: When Client Consent is Necessary in Limited Scope Representation of Chapter 7 Bankruptcy Debtor

- (available at http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics\_Opinions/Prof\_Ethics\_Comm\_Informal\_Op.pdf); and Boston Bar Association Ethics Committee, Opinion 2008-01: Bankruptcy Pro Bono Initiative (available at http://www.bostonbar.org/docs/ethics-opinions/opinion-2008-1.pdf?sfvrsn=3).
- 7. See description of NYC Civil Court, The Volunteer Lawyer for the Day (VLFD) Program (available at http://www.courts.state.ny.us/COURTS/nyc/civil/vlfd\_civ\_prospectiveattys.shtml).
- 8. See description of Milwaukee's Lawyer for a Day program (available at http://wisatj.org/category/pro-bono).
- 9. See description of NYC Civil Court, The Volunteer Lawyer for the Day (VLFD) Program, supra n. 8.
- 10. See description of Milwaukee's Lawyer for a Day program, supra n. 8.
- 11. See description of DC Bar Pro Bono Program (available at http://dcprobono.tumblr.com/post/97490146832/dc-bar-pro-bono-program-activities). The program also includes a referral service for full pro bono representation in certain cases.
- 12. See description of Tennessee Pro Bono Project (available at http://www.laet.org/Pro-Bono/Advice-Clinic-Schedule.aspx).
- 13. See description of Indiana Pro Bono Commission, INLegal Answers (available at http://www.indianalegalanswers.org/Account/AttorneyFAQ).
- 14. See description of Indiana Pro Bono Commission, INLegal Answers, supra n.13; see also description of Minnesota Legal Advice Online (available at http://www.mnlegaladvice.org/Account/AttorneyFAQ#Q1).
- 15. See description of Indiana Pro Bono Commission, INLegal Answers, supra n. 13; and description of Minnesota Legal Advice Online, supra n. 14.
- 16. Coalition of Concerned Legal Professionals, description of legal advice sessions, January 2015. On file with author.

17. Id.

- 18. See N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Opinion 742 (April 16, 2010).
- 19. See description of Volunteer Lawyers Project of the Boston Bar Association, Family Law Clinic once per week at the Suffolk Probate and Family Court (available at http://massprobono.org/search/item.542621).
- 20. See Mary Helen McNeal, supra n. 3, at 350-51.
- 21. ABA Model Rules of Prof'l Conduct R. 1.2(c) (2014). "Informed consent" is defined as follows: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. ABA Model Rules of Prof'l Conduct R. 1.0(e) (2014).

- 22. ABA Model Rules of Prof'l Conduct R. 6.5 (2014). The California Rules of Professional Conduct, which are numbered and organized differently from the ABA model rules, contain a similar rule, 1-650.
- 23. ABA Model Rules of Prof'l Conduct R. 6.5 cmt. 1(2014).
- 24. ABA Model Rules of Prof T Conduct R. 6.5 (a) (1),(2) (2014).
- 25. Cal. Rules of Court §§3.35-3.37.
- 26. Joint Formal Opinion 2011-100 of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee (available at http://www.padisciplinaryboard.org/documents/PBA-JointFormalOpinion2011-100.pdf).
- 27. Id., app. B.
- 28. N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Opinion 742 (April 16, 2010).
- 29. Id. at 2.
- 30. Id. at 5.
- 31. Id. at 6-8.
- 32. See Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Opinion 2005-F-151 (June 17, 2005) (finding most components of pro se divorce clinic permissible).
- 33. See Connecticut Bar Association Professional Ethics Committee, Informal Opinion 2014-06: When Client Consent is Necessary in Limited Scope Representation of Chapter 7 Bankruptcy Debtor (available at http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics\_Opinions/Prof\_Ethics\_Comm\_Informal\_Op.pdf); and Boston Bar Association Ethics Committee, Opinion 2008-01: Bankruptcy Pro Bono Initiative (available at http://www.bostonbar.org/docs/ethics-opinions/opinion-2008-1.pdf?sfvrsn=3).
- 34. See Stephen Pepper, The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, American Bar Foundation Research Journal 613, 617 (1986) (arguing that the access to law and autonomy that lawyers provide to clients is the means to "first-class citizenship" for the client).
- 35. See David L. Hudson, Jr., A Boost for Unbundling: Lawyers Offering Unbundled Legal Services Must Consider the Ethics Issues, 99 A.B.A.J. (June 2013), at 22-23; Mary Helen McNeal, "Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance," 67 Fordham L. Rev. 2617 (1999).
- 36. Professor W. Bradley Wendel has described the principal duties owed to clients in a formal or quasi-client relationship as the "Four-Cs": competence, communication, confidentiality, and (avoidance of) conflicts. See W. Bradley Wendel, Professional Responsibility: Examples & Explanations 22 (2d ed. 2007).
- 37. ABA Model Rules of Prof'l Conduct R. 1.1 (2014). See also Cal. R. Prof'l Conduct §3-110 and comments.
- 38. ABA Model Rules of Prof'l Conduct R. 1.2 cmt. 7 (2014).

#### 39. Comment 6 to Rule 1.2 states:

When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

ABA Model Rules of Prof'l Conduct R. 1.2 cmt. 6 (2014).

- 40. 25 Misc. 3d 217 (Sup. Ct., Bronx Co. 2009).
- 41. Id. at 220-22.
- 42. Id. at 223 (emphasis in original).
- 43. Id. at 223-24.
- 44. Id.
- 45. Id. at 226-29.
- 46. An even more frightening example of the risks of incompetent pro bono representation is Maples v. Thomas, 131 S. Ct. 1718 (2012). There two law firm associates had undertaken representation of a prisoner on death row. The lawyers left the firm, apparently without making any provisions for the continued representation of the client. When the state court sent a notice to them at their former firm, the firm simply returned the notice to the court. The prisoner's time to appeal expired. Happily, the Supreme Court reinstated the prisoner's right to appeal.
- 47. La. State B. Ass'n., R. of Prof. Conduct Comm., Public Opinion 05-RPCC-005, 2-3 (available at http://files.lsba.org/documents/Ethics/05005RPCC.pdf) (emphasis added).
- 48. The classic case illustrating this principle is Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (finding attorney liable for malpractice based on a finding that he had inadvertently entered into an attorney-client relationship when the client consulted him and had failed to advise the client competently).
- 49. Restatement (Third) of the Law Governing Lawyers §14 (2000).
- 50. See ABA Model Rules of Prof'l Conduct R. 1.7 (2014).
- 51. See ABA Model Rules of Prof'l Conduct R. 1.18 (2014).
- 52. See ABA Model Rules of Prof'l Conduct R. 5.5(a) (2014)
- 53. See ABA Task Force on the Model Definition of the Practice of Law, Guidelines for the Adoption of a Definition of the Practice of Law, January 12, 2005.
- 54. See Model Rules of Prof'l Conduct R. 5.3 (outlining supervisory responsibilities of lawyers over work of non-lawyers); Michigan State Bar Professional Ethics Committee, Opinion #RI-349 (2010) (discussing supervisory responsibilities of lawyers over non-lawyer assistants in communications with clients, and prohibiting non-lawyer assistants from exercising legal judgment and providing independent legal advice beyond that provided by the attorney).