

## Limited Scope Representation

### "Where L.A. Law Meets Home Improvement"

Del O'Roark, Loss Prevention Consultant, Lawyers Mutual Insurance Co. of Ky.

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A New Jersey lawyer has a problem. He accepted a limited scope representation and now faces a \$10,000,000 malpractice claim. The lawyer agreed to review the settlement agreement for a wealthy client's divorce that was mediated by the corporate counsel for her husband's closely held company. Under the agreement she got \$500,000, three of four houses, \$100,000 annually in alimony, and 15% of the stock of the husband's company. The lawyer agreed to review the settlement with the written understanding that he would not conduct discovery, review company tax records, review case documents, or recommend whether the settlement should be accepted. The same day the client signed the lawyer's limited scope agreement she signed the divorce settlement agreement. Shortly thereafter the husband's company went public at a value of \$100,000,000 more than he had represented. The wife got the settlement agreement revoked and obtained an upward adjustment. As a result of a drop in share price, however, she received \$10,000,000 less in stock value than if she had received the shares with the original settlement.

This case is a dramatic example of what can go wrong with a limited scope representation. Even if the lawyer successfully defends the malpractice claim the bad publicity alone makes him a loser. Less colorful limited scope representations are when lawyers do scrivener work or offer unbundled services- sometimes called cafeteria law or discrete task representation. In unbundled services the idea is the "do it yourself" client handles a portion of the matter and the lawyer handles a portion. The client economizes and the lawyer attracts business from middle class clients who often forego legal service as too costly. This is considered good marketing that often leads to full representation when a client, after consulting a lawyer, realizes the lawyer can best handle the entire matter on a cost effective basis.

What is ethically permissible in limiting the scope of representation in Kentucky? Does limited scope alter fiduciary obligations? What is the difference between an agreement limiting the scope of representation, which is OK, and an agreement limiting malpractice liability, which is not OK? What risk management techniques should be followed when representing clients on a limited scope basis? These are the questions this article addresses with the intent of providing a practical guide to limited scope representation that meets professional responsibility standards and avoids malpractice claims.<sup>i</sup>

### Here's The Deal On Limiting Scope In Kentucky

Kentucky Rule of Professional Conduct 1.2(c) and Comments permit limiting the scope of engagement. An overarching consideration in applying Rule 1.2(c) is the tension

between it and Rule 1.8(h) that prohibits agreements with clients that limit malpractice liability:

### **Rule 1.2 Scope Of Representation**

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

#### **Comments: Services Limited in Objectives or Means**

(4) The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent. (5) An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1[Competence], or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

#### **Rule 1.8 Conflict of Interest: Prohibited Transactions**

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

In applying these rules the key professional responsibility considerations are:

- ***Rule 1.8(h) does not prohibit scope limitation as a malpractice prevention tool.*** It prohibits accepting an engagement and then making an agreement prospectively limiting the lawyer's liability to a client for malpractice for the matter accepted. A lawyer has the right to decide what matters are accepted. This discretion is a primary method of controlling malpractice exposure.
- ***The lawyer may limit scope only to a certain extent.*** As Rule 1.2(c) Comment 5 stresses, you cannot limit scope to the point of waiver of competence. The problem for the New Jersey lawyer is his limited scope contracted away so many essential aspects of the representation that it appears to be a thinly disguised agreement prospectively limiting malpractice liability by waiving competence. It appears to violate both Rule 1.2(c) and 1.8(h).

- **Rule 1.2(c) permits limiting scope "if the client consents after consultation."** A lawyer's fiduciary obligations in limited scope representations are not qualitatively altered. The client must receive a thorough consultation on the significance of limitations on representation. This consultation is similar in nature to the full disclosure and informed consent required when resolving a conflict of interest. The following is a gloss of ideas from various commentators that show a lawyer's limited scope duties in the context of an adequate client consultation:

x Develop the full factual circumstances of the representation - not just those facts pertaining to the limited representation.

x Explain all the legal implications of the client's situation to include rights, remedies, and courses of action - not just those that are pertinent to the limited representation. A lawyer has a duty not to ignore circumstances surrounding a representation indicating legal issues for the client because they are outside the scope of representation. A typical example of a violation of this duty is when a lawyer fails to advise on a potential third-party claim while representing a client on a workers' compensation claim. This duty applies equally to limited scope representations. Make sure the client has the big picture.

x Explain the implications of a limited representation in terms easily understood by the client. Stress what the lawyer will do and not do -- and the risk and opportunities of proceeding on that basis.

x When appropriate, advise the client to see another lawyer on legal issues outside the scope of the limited representation stressing time limitations considerations.

x Suggest that the client consider seeking a second opinion on the adequacy of the proposed limited representation for the client's needs.

**Risk Managing Limited Scope Representations** Commentators discuss limited scope representations in two contexts - areas of law and functional services. The areas of law that frequently involve limited scope representations are real estate, personal bankruptcy, estate planning, divorce, and child support. On a functional basis legal service is unbundled into consultation and advice, correspondence review, research, document preparation, investigation and discovery, negotiation, court appearance, and appeal. Regardless of the context in which a limited scope representation is cast the professional responsibility duties and risks remain the same. Key considerations in assessing limited scope risks are:

- **Matter screening:** As a general rule you should be competent to practice all of the client's matter even if you will handle only a part. If you cannot, there is a risk of not meeting your duty to advise on the totality of the circumstances.
- **Client Screening :** In unbundled services representations, in addition to the usual client screening considerations, it is essential to evaluate whether the client is competent to "practice" any part of the matter that will be the client's

responsibility. What are the client's communications skills etc.? If you have reservations about a client's competence, don't accept the limited scope representation.

- **Scrivener:** Lawyers frequently reduce contracts to writing with the understanding that they are only recording the terms and conditions as determined by the parties, owe no other duties to the parties, and are not responsible for underlying deficiencies in the transaction. The role of the scrivener is easily misunderstood and should be carefully explained to the parties to avoid an allegation of a conflict of interest or that other duties were owed.<sup>ii</sup>
- **Litigation document drafting:** Ghostwriting pleadings for pro se clients is a sensitive issue. Does the lawyer risk violating Professional Conduct Rule 3.1 Meritorious Claims and Contentions or Civil Procedure Rule 11 when all the lawyer does is draft pleadings for the client's presentation to the court? KBA Ethics Opinion 343 (1991) approved limiting a representation to assisting in drafting pleadings for indigents. The opinion adopted the majority view that the attorney's name should appear on the pleading even though representation is limited to its preparation. The lawyer should not thereafter provide the client behind the scenes representation. This is inconsistent with the limited scope representation and takes advantage of the leniency typically shown pro se litigants. The Ethics Committee deferred to the courts on the Rule 11 and Rule 3.1 issue, but observed that they should apply to ghostwritten pleadings. I agree. If your name is on the pleading, you need to do the investigation necessary to comply with the rules. When drafting litigation documents for pro se clients be sure to advise on any costs of filing and all deadlines.
- **Research:** If retained to do research only, clearly delineate who is responsible for the facts on which the research is based. If the client places time limitations on the research as a cost control, do not take the representation unless you are sure the time allowed is adequate for a competent effort. Identify any issues not covered by the research if time precludes their consideration.
- **Independent Legal Advice:** Be especially careful when asked to provide outside independent legal advice for an ongoing matter. In addition to all the other limited scope risk concerns, the client usually is in a hurry and the matter is often complex. If you do not have the immediate competence and time to adequately consider the issues, do not take the representation. Do not give business advice - do not express an opinion whether a transaction is a good deal or an appraisal is fair. Warn of the dangers of not investigating an issue further to include what could happen if that is not done. Make sure the client understands your limited scope of representation is advising on the legal consequences of the proposed transaction so the client can make an informed decision whether to continue. Document the file as thoroughly as possible.
- **Opinion letters:** Spell out scope limitations of an opinion letter by specifying its purpose, authorized uses, and restrictions in the letter. Set out the facts and assumptions on which the opinion is based. Be specific about facts based on your own knowledge and those provided by others who bear responsibility for their accuracy. If others are preparing evaluations on other aspects of the transaction, clearly exclude those parts from your opinion. If you are relying on an expert

- opinion as part of your analysis (e.g., an environmental assessment), spell it out in your opinion. Be complete -- include the pro's and con's of the matter. Do not expose yourself to the accusation that you misled by omission. Material limitations must be disclosed.
- ***Strictly adhere to scope limitations:*** Resist the temptation to go beyond the agreed scope limitations. If you do, the door is opened to show you assumed full responsibility for the matter. The New Jersey lawyer negotiated some of the terms of the original divorce settlement agreement. This was inconsistent with the disinterested review his limited scope contemplated and will be used against him in the malpractice claim.
    - ***Limited scope letter of engagement:*** It is axiomatic that all client representations should be documented with a letter of engagement. This is even more crucial when accepting a limited scope representation. One risk management expert recommends that when providing unbundled services the limited scope engagement record contain the following information:
      - The client's situation and goals.
      - The tasks the lawyer will accomplish.
      - The available options and opportunities.
      - The anticipated costs of various tasks necessary to achieve the client's goals.
      - Tasks not assigned the lawyer.
      - The benefits and risks of the tasks that the lawyer will undertake.
      - Tasks the client has agreed to perform.<sup>iii</sup>

## Summing Up

There is nothing wrong with limited scope representations. They are a good way to attract clients and reduce exposure to malpractice claims. Be sure, however, to get client consent after consultation using the ideas suggested in this article. Risk manage the representation by thoroughly documenting the file and strictly adhering to agreed limitations. The most important point to remember is the duty to look beyond the scope of a representation no matter how broad or narrow to at least identify for the client other potential legal issues. In Daugherty v. Runner, Ky.App., 581 S.W.2d 12 (1978) the court held "An attorney cannot completely disregard matters coming to his attention which should reasonably put him on notice that his client may have legal problems or remedies that are not precisely or totally within the scope of the task being performed by the attorney."

## CLIENT SCREENING CHECKLIST

Does the firm have well understood screening criteria for new clients that take into consideration:

- a. Whether the prospective client has changed lawyers, or has been

rejected by other lawyers, or is a chronic litigant?

b. Whether the firm and the prospective client are unable to easily reach an understanding on fees or the client appears to be price shopping?

c. Whether the prospective client has a bad motive or unrealistic expectations for the case?

d. Whether the prospective client has an unreasonable sense of urgency over the matter?

e. Whether the prospective client has done considerable personal legal research?

f. Whether the prospective client wants to proceed as a matter of principle regardless of cost?

g. Whether the case is outside the firm's expertise, staffing capability, or time availability?

h. Whether the case involves an actual or potential conflict of interest?

i. Whether the amount likely to be recovered is less than the cost of pursuing the matter?

### **MATTER SCREENING CHECKLIST**

1. Has the firm identified the range of legal matters in which it has competence and expertise?

2. Prior to accepting new matters outside the normal areas of practice are the following factors considered:

a. Is the new matter so foreign to the firm's routine business that time and resources are not available within the firm to adequately provide the service required?

b. If the new matter requires an outside consultant lawyer, does the firm maintain a list of qualified lawyers or otherwise have the means of identifying a consultant with the requisite expertise?

c. What is the status of the lawyer to be assigned the matter in terms of subject matter knowledge, overall experience, and current workload?

d. What special resource requirements, to include staff support, consultants and travel, will accepting a non-routine matter entail?

e. Is the client prepared to pay for any extraordinary costs because the firm does not routinely work with this area of the law?

### **Endnotes**

<sup>i</sup> Sources for this article include *You Can Limit Your Representation*, Michael M. Bowden, *Lawyers Weekly USA*, 99 LWUSA 1131, 12/13/99; *Afraid of Ghosts*, Elizabeth J. Cohen, *ABA Journal*, Dec. 1997, p. 80; *Avoiding Mal-practice In Unbundled Services*, Katja Kunze, Director of Claims, Wisconsin Lawyers Mutual Ins. Co.; and *'Un-bundling' Your Legal Services Makes Some Clients Happy*, Leigh P. Perkins, *Lawyers Weekly USA*, 95 LWUSA 1173, 12/18/95.

<sup>ii</sup> See *Mallen & Smith*, Sec. 8.3, *Legal Malpractice*, 4th ed. (1996).

<sup>iii</sup> *Avoiding Malpractice In Unbundled Services*, Katja Kunze, Director of Claims, Wisconsin Lawyers Mutual Ins. Co