Unbundled legal services considered for civil cases

By Gary Blankenship

Changes to procedural rules that would make it easier for lawyers to offer "unbundled" legal services in civil as well as family law cases have been endorsed by the Bar Board of Governors.

Presented by the Vision 2016 Committee on Access to the Legal System, the changes are intended to allow lawyers to handle a deposition, summary judgment motion, or other discrete parts of a case without being responsible for other parts or actions by the client.

The Board of Governors gave conceptual approval at its March 22 meeting and will forward the amendments to the affected procedural rules committees.

"This is designed to allow lawyers to come into the other areas, like landlord tenant, foreclosure, some of the consumer issues, and provide a limited appearance for components of those cases, as opposed to having to take the whole case," President Greg Coleman said.

Kathy McLeroy, who chaired the subcommittee that developed the rule amendments, noted that the Supreme Court in 2003 allowed lawyers to engage in limited representation in family law cases. The ABA amended its model rules in 2002 to allow for such activity, she said.

In making limited appearances, the committee looked at withdrawals from such cases, negotiating agreements for limited representation with clients, communicating with clients who are represented in only part of their cases by lawyers, fees for limited representation, conflicts of interest in such cases, training and compliance with limited representation rules,
and ghost writing of pleadings and documents. Most of those, McLeroy added, were already addressed by existing Bar or procedural rules.

The specific changes proposed are:

* Amending Civil Procedure Rule 12.040 to specifically allow limited appearances in civil cases for both parties and nonparties (such as those subpoenaed to appear in a case).

* Amending Rule of Judicial Administration 2.505 to allow for limited appearances in civil as well as family cases.

* Amending Rule of Judicial Administration 2.515 to make clear that attorneys are not responsible for court documents filed by clients that are outside the scope of the limited representation. Documents that were prepared with the assistance of a lawyer would have to contain the language "Prepared with the assistance of counsel," consistent with existing civil procedure rules.

* Amending Rule of Judicial Administration 2.516 to incorporate both the existing service rules in the family law limited representation rule and in the proposed civil procedure limited representation rule, which would include that a lawyer must specify as part of a limited representation which court proceedings he or she will be attending.

McLeroy said the civil rule includes a form for the lawyer to file when making a limited appearance in that case.

"They could come in for a topic, or an event, or a period of time. We created a form we believe could be used in any one of those circumstances" and could be used in civil and family cases, she said.

Board member Andy Sasso asked why the proposed amendments did not include probate procedural rules, which also allow limited legal representation. McLeroy said the committee was told it wasn't necessary to address probate but said probate could be added to the amendments where needed.

Coleman said it was important to begin considering recommendations from Vision 2016's four committees even before its final report is completed next year because some issues need to be addressed now. He asked the board members who are liaisons with the affected procedural committees to approach those committees with the amendments before they meet again in June at the Annual Convention.
March 5, 2015

Via Email (gwc@bclclaw.com)

Gregory W. Coleman, Esquire
303 Banyan Boulevard
Suite 400
West Palm Beach, FL 33401

Re: Recommendation on Rule Changes to Foster Limited Scope Representation in Florida, A Report by the Access to Legal Services Committee of the Vision 2016 Commission

Dear President Coleman:

On behalf of the Access to Legal Services Committee of the Vision 2016 Commission, I am pleased to enclose herewith the Committee’s Report on Limited Scope Representation. Note that the Report includes an Executive Summary and a number of attachments, all of which are included with this letter.

The attached Report is the culmination of Committee work from its inception through the end of last year and as noted in the Executive Summary, a subcommittee was formed to focus solely on Rule changes which would support a limited scope representation practice for a Florida Bar lawyer wishing to engage in same. As you will see from the enclosed Executive Summary, the first several months of the Committee’s existence was focused on a global objective of facilitating greater access to legal services by persons of low and moderate means. Wishing to deliver tangible results to the Board of Governors, the Committee then focused on a short term achievable objective, that of proposing Rule changes for limited scope representation.

I would be remiss if I did not take this opportunity to thank, in a more public way, the following persons who comprised the subcommittee and spent countless hours working on this Report, on their own, via conference calls and through innumerable emails: Kathy McLeroy, Subcommittee Chair, Ted Small, Jay Kim and former Judge William A. Van Nortwick, Jr.

I understand that the next Board of Governors’ meeting is convening in St. Petersburg on March 27th and you have expressed an interest in Kathy McLeroy and/or me attending this meeting to make a formal presentation and answer any questions the Governors may have. As we
discussed, I am happy to attend but given Kathy’s proximity to the meeting location, it may make more sense that she attend the meeting. The Committee will be ably and well represented by Kathy.

Of course, I remain available to discuss this Report and answer any questions you or the Board of Governors may have.

Very truly yours,

ADELE I. STONE

AIS:th
Enclosure

cc:    Jay Cohen, Esq., Vision 2016 Chair
       Ramon A. Abadin, Esq., President Elect
       Kathleen McLeRoy, Esq.,
Rule Changes Re Limited Scope Representation in Florida  
Presented by  
The Access to Legal Services Committee  
of the Vision 2016 Commission  

Executive Summary  

Following months of study and focus on the broader topic of access to legal services for persons of low and moderate means, both from a national and state perspective, the Access to Legal Services Committee of Vision 2016 (“Committee”) with the assistance of nationally recognized expert, John Greacen, developed an Action Plan dated April, 2014, which proposed seven tasks that the Committee believed merited implementation to create better access to legal services for such persons. The Committee then refined its objective and focused on the number one task identified in the Action Plan, that of facilitating a supportive environment for a limited scope representation practice in all types of civil cases in Florida, which would include limited appearances in court proceedings (presently, in Florida, limited scope appearance is included in the Family Law Rules and Probate Rules). In connection with this refined objective, the Committee developed a second, and more limited Action Plan, known as the Short Term Action Plan dated June 5, 2014, which solely focused on limited scope representation. A subcommittee of the Committee was formed and tasked with surveying the rules of other states and jurisdictions, existing Florida rules including The Rules Regulating The Florida Bar, the Florida Rules of Civil Procedure and the Florida Rules of Judicial Administration (collectively, the “Florida Rules”).  

By way of brief background, “limited scope representation” also known as “unbundled legal services,” “limited appearance representation” or “discrete services,” is a concept under which an attorney and his or her client agree that the attorney will provide some but not all services necessary to resolve the client’s legal problem. For instance, instead of representing a client in a “full bundle” of legal services, the client and her attorney can agree that the attorney will merely research the relevant legal authority and prepare a memorandum for the client. Alternatively, both parties can agree that the attorney will only draft the initial complaint and the client will file the document with the court and litigate the matter pro se. Regardless of the services provided, unbundling gives litigants an alternative to either paying a substantial fee for full-service representation or handling the matter on their own. In the context of non-litigation matters, attorneys may already engage in unbundled legal service representation, reflected in the 2003 rule changes referenced below. However, where litigation matters and the attendant court appearances are involved, the present Florida Rules need to be modified to recognize the limited scope representation by an attorney representing a litigant for a limited time or for a specified proceeding. A limited scope appearance rule is not without significant precedent. Numerous states have such a rule with a number of variations among them, and in fact, the topic is so timely that the ABA published a white paper on this very subject dated August, 2014.  

As mentioned above, in 2002, the ABA Model Rule of Professional Conduct 1.2(c) was revised to allow for the unbundling of legal services. As revised, Model Rule 1.2(c) states: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Model Rule 1.2(c) has been adopted verbatim or with  

some modification by some 46 states and the District of Columbia. This concept was embraced in Florida. In November 2003, the Supreme Court of Florida adopted changes to Rules 4-1.2, 4-4.2 and 4-4.3 of the Rules Regulating The Florida Bar as well as Rule 2.060 of the Florida Rules of Judicial Administration which allows lawyers to provided limited legal services to their clients in family law cases.

In the course of its research, the Committee took the opportunity to review many of the Florida Rules which directly or tangentially impact limited scope representation and accordingly, the Committee addressed whether Florida Rule amendments were required in the following seven areas:

1. **Limited Appearance and Withdrawal in Limited Scope Representation: Service of Pleadings.** It is in this context that the Committee is recommending a new rule and in this regard, we propose that a substantial portion of the language from Rule 12.040 of the Florida Family Law Rules of Procedure be incorporated into a new rule within the Florida Rules of Civil Procedure, which will include limited appearances for both parties and non-parties, such as subpoenaed witnesses; that Rule 2.505 of the Florida Rules of Judicial Administration be revised to specifically provide for limited appearances in both civil and family matters; that Rule 2.515 of the Florida Rules Judicial Administration be revised to clarify that for limited appearance representation (both family and civil) as to matters that are outside the scope of the attorney’s representation, the attorney is not responsible for documents filed with the court by the client; and that Rule 2.516 of the Florida Rules of Judicial Administration be revised to incorporate the service requirements of both existing Rule 12.040(f) of the Florida Family Law Rules of Procedure and the service provision of the proposed new rule of the Florida Rules of Civil Procedure.

2. **Negotiation of Limited Scope Representation Engagements.** We reviewed whether a written agreement and judicial review should be required to protect clients who engage lawyers for a limited scope representation. We do not recommend that Florida require judicial review of limited scope representation agreements if the proposed rule includes a form for notice to the court and other parties which the client is required to sign. The Committee has included such form in the proposed new rule.

3. **Communicating with Adverse Parties with Limited Scope Counsel.** In conjunction with our review of issues relating to communication with self-represented parties in matters in which limited scope counsel is involved, we concluded that because Rules 4-1.2(c) and 4-4.2(b) of the Rules Regulating The Florida Bar appear to be consistent with limited scope representation, same do not need additional revision.

4. **Fees Associated with Limited Scope Presentation.** Rule 4-1.5 (a) through (e) of the Rules Regulating The Florida Bar, which addresses fees in legal representation, appears to apply in all contexts, including limited scope representation. We believe that these provisions are sufficient. We propose no additions or alterations to the various Florida Rules to address attorney’s fees in a limited scope representation.
5. **Conflicts of Interest Arising from Limited Scope Representation Matters.** We note that with Rules 4-1.7, 1.8, 1.9 and 1.10 of The Rules Regulating The Florida Bar appear to apply in all contexts, including limited scope representation. We propose no changes.

6. **Training for Compliance with Limited Scope Representation Rules.** Few jurisdictions require training before an attorney can provide limited scope representation and our Subcommittee does not recommend adopting mandatory training in order for an attorney to engage in limited scope representation.

7. **Ghostwriting of pleadings and documents.** Legal ghostwriting occurs when a lawyer drafts documents for a pro se client that will be submitted to a court without the lawyer making a formal appearance in the court or even disclosing the lawyer’s role. State bars have approached the regulation of legal ghostwriting in various ways. For example, some states, such as North Carolina permit anonymous ghostwriting. Other jurisdictions, including Tennessee, require the disclosure of the ghostwriter’s identity when the lawyer was heavily involved in the drafting of a pleading or other legal documents. Still other states, such as Massachusetts ban the practice of ghostwriting. Florida is among those states which require the disclosure of ghostwriting, but do not require the disclosure of the identity of the attorney.

The comment to subsection (c) of Rule 4-1.2 of The Rules Regulating The Florida Bar, Florida’s version of Model Rule 1.2(c), specifically allows legal ghostwriting, but requires that the lawyer must indicate “Prepared with the assistance of counsel” on the document. We recommend that Florida continue to require the disclosure of ghostwriting, but not require the disclosure of the identity of the attorney as this position appears to be an appropriate balance of the ethical issues raised by legal ghostwriting. In furtherance of this recommendation, we propose that Rule 2.515 of the Florida Rules of Judicial Administration be revised to avoid any perceived inconsistency with Rule 4-1.2 of the Rules Regulating The Florida Bar.

Respectfully Submitted,

The Access to Legal Services Committee of Vision 2016

Adele I. Stone, Chair
RULE 12.040. ATTORNEYS

(a) Limited Appearance. An attorney of record for a party, in a family law matter governed by these rules, shall be the attorney of record throughout the same family law matter, unless at the time of appearance the attorney files a notice, signed by the party, specifically limiting the attorney’s appearance only to the particular proceeding or matter in which the attorney appears.

(b) Withdrawal or Limiting Appearance.

(1) Prior to the completion of a family law matter or prior to the completion of a limited appearance, an attorney of record, with approval of the court, may withdraw or partially withdraw, thereby limiting the scope of the attorney’s original appearance to a particular proceeding or matter. A motion setting forth the reasons must be filed with the court and served upon the client and interested persons.

(2) The attorney shall remain attorney of record until such time as the court enters an order, except as set forth in subdivision (c) below.

(c) Scope of Representation.

(1) If an attorney appears of record for a particular limited proceeding or matter, as provided by this rule, that attorney shall be deemed “of record” for only that particular proceeding or matter. Any notice of limited appearance filed shall include the name, address, e-mail address(es), and telephone number of the attorney and the name, address, and telephone number of the party. If the party designates e-mail address(es) for service on and by that party, the party’s e-mail address(es) shall also be included. At the conclusion of such proceeding or matter, the attorney’s role terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance. The notice, which shall be titled “Termination of Limited Appearance,” shall include the names and last known addresses of the person(s) represented by the withdrawing attorney.

(2) An attorney for the State’s Title IV-D child support enforcement agency who appears in a family law matter governed by these rules shall file a notice informing the recipient of Title IV-D services and other parties to the case that the IV-D attorney represents only the Title IV-D agency and not the recipient of IV-D services. The notice must state that the IV-D attorney may only address issues concerning determination of paternity, and establishment,
modification, and enforcement of support obligations. The notice may be incorporated into a pleading, motion, or other document filed with the court when the attorney first appears.

(d) **Preparation of Pleadings or Other Documents.** A party who files a pleading or other document of record pro se with the assistance of an attorney shall certify that the party has received assistance from an attorney in the preparation of the pleading or other document. The name, address, and telephone number of the party shall appear on all pleadings or other documents filed with the court. If the party designates e-mail address(es) for service on and by that party, the party’s e-mail address(es) shall also be included.

(e) **Notice of Limited Appearance.** Any pleading or other document filed by a limited appearance attorney shall state in bold type on the signature page of that pleading or other document: “Attorney for [Petitioner] [Respondent] [attorney’s address, e-mail address(es), and telephone number] for the limited purpose of [matter or proceeding]” to be followed by the name of the petitioner or respondent represented and the current address and telephone number of that party. If the party designates e-mail address(es) for service on and by that party, the party’s e-mail address(es) shall also be included.

(f) **Service.** During the attorney’s limited appearance, all pleadings or other documents and all notices of hearing shall be served upon both the attorney and the party. If the attorney receives notice of a hearing that is not within the scope of the limited representation, the attorney shall notify the court and the opposing party that the attorney will not attend the court proceeding or hearing because it is outside the scope of the representation.

**Committee Notes**

2012 Amendment. Subdivisions (c), (d), and (e) are amended to provide e-mail addresses in accordance with Florida Rule of Judicial Administration 2.516.
Communication with Person Receiving Limited-Scope Legal Services

Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.

Although Rule 4.2 does not require a lawyer to ask a person if he or she is represented by counsel before communicating with that person about the subject of the representation, a lawyer’s knowledge that the person has obtained assistance from another lawyer may be inferred from circumstances. If the lawyer has reason to believe that an unrepresented person on the opposing side has received limited-scope legal services, the Committee recommends that the lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.

If the person states that he or she is or was represented by counsel in any part of a matter, and does not articulate either that the representation has concluded or that the issue to be discussed is clearly outside the scope of the limited-scope representation, the lawyer requesting information should contact the lawyer providing limited-scope services to identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.

The lawyer must comply with Rule 4.2 and communicate with the person’s counsel when the communication concerns an issue, decision, or action for which the person is represented. Under Rule 4.3, however, the lawyer may communicate directly with the person on aspects of the matter for which no representation exists. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.

In this opinion the Committee addresses the obligations of a lawyer under ABA Model Rule of Professional Conduct 4.2, Communication with Person Represented by Counsel, commonly called the “no contact” rule, and ABA Model Rule of Professional Conduct 4.3,
Dealing with Unrepresented Person, when communicating with a person who is receiving or has received limited-scope representation under ABA Model Rule of Professional Conduct 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer. We also provide recommendations for lawyers providing limited-scope representation.

Like all the Model Rules of Professional Conduct, Rules 1.2, 4.2, and 4.3 are intended to be rules of reason and must be construed and applied “with reference to the purposes of legal representation and the law itself.” In a limited-scope representation, the Model Rules in general, and Model Rule 4.2 specifically, must be interpreted accordingly because limited-scope representations do not naturally fit into either the traditional full-matter representation contemplated by Model Rule 4.2 or the wholly pro se representation contemplated by Model Rule 4.3.

Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer

Model Rule 1.2(c) reads: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Today lawyers increasingly represent clients on a limited-scope basis.

Limited-scope representation may include assisting a litigant who is appearing before a tribunal pro se, by drafting or reviewing one or more documents to be submitted in the proceeding. “This is a form of ‘unbundling’ of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter.” See ABA Formal Ethics Opinion 07-446 (2007).

Although limited-scope representation is not restricted to low-income clients or small claims matters, the ABA Ethics 2000 Commission explained that the proposed amendments to Model Rule 1.2(c) and its Comments regarding limited-scope representations were in part “intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services to low- or moderate-income persons who otherwise would be unable to obtain counsel.”

Rule 1.2(c) requires a lawyer to secure the informed consent of a client when providing limited-scope services. Informed consent is defined as: “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and

1. This opinion is based on the Model Rules of Professional Conduct as amended by the American Bar Association House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdiction are controlling.


4. ABA Formal Op. 07-447 (2007) addressed the scope of representation of a client in a collaborative law setting. In that Opinion, the Committee determined 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.” The Committee rejected the argument that courts are deceived by lawyers who “ghostwrite” legal documents for pro se litigants or that such conduct is “dishonest,” noting that the conduct does not mislead the court or any party.

explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."⁶ The Colorado Bar Association advised in Formal Ethics Opinion 101 that a lawyer providing limited-scope services to a client should “clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client’s rights and interests.”⁷ The D.C. Bar Legal Ethics Committee advised in its Opinion 330 (2005) that the “client’s understanding of the scope of the services” is fundamental to a limited-scope representation.⁸ Opinion 330 recommended that lawyers reduce such agreements to writing:

Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement . . . Particularly in the context of limited-representation agreements, however, a writing clearly explaining what is and is not encompassed within the agreement to provide services will be helpful in ensuring the parties’ mutual understanding.⁹

Similarly, the Ethics 2000 Commission recommended adding a formal Comment to Rule 1.2 that a “specification of the scope of representation will normally be a necessary part of the lawyer’s written communication of the rate or basis of the lawyer’s fee as required by Rule 1.5(b).” However, because the House of Delegates rejected the Commission’s parallel proposal to amend Rule 1.5(b) — which would have required written fee agreements that included an explanation of the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible — this proposed Rule 1.2 Comment language was not advanced.¹⁰

Therefore, although not required by Rule 1.2(c), the Committee nevertheless recommends that when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation — including the tasks the lawyer will perform and not perform — in writing that the client can read, understand, and refer to later. This guidance is in accord with Model Rule 1.5(b) which explains:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the

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⁶ MODEL RULES OF PROF’L CONDUCT R. 1.0(c).
⁹ Id.
¹⁰ A LEGISLATIVE HISTORY, supra note 5, at 61-62.
same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The Committee notes that some state rules of professional conduct require a written agreement when a lawyer provides limited-scope services. See, e.g., Maryland Lawyers’ Rules of Professional Conduct, Rule 1.2(c)(3); Missouri Rule of Professional Conduct 1.2(c); Montana Rule of Professional Conduct 1.2(c)(2); and New Hampshire Rule of Professional Conduct 1.2(c) and 1.2(g). Other states explain that a written agreement is preferred. See Ohio Rule of Professional Conduct 1.2(c) and Tennessee Rule of Professional Conduct 1.2(c). Additionally, some state rules of civil procedure require a limited-scope appearance filing with the court identifying each aspect of the proceeding to which the limited-scope appearance pertains. See, e.g., Illinois Supreme Court Rule 13(c)(6). Therefore, lawyers providing limited-scope representation are advised to review their state rules to determine whether a written agreement is required for their limited-scope representation.\(^{11}\)

If a lawyer who is providing limited-scope services is contacted by opposing counsel in the matter, the lawyer should identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services. A lawyer providing limited-scope legal services to a client generally has no basis to object to communications between the opposing counsel and the client receiving those services on any matter outside the scope of the limited representation.

These issues would best be resolved at the inception of the client-lawyer relationship by the client giving the lawyer providing limited-scope representation informed consent to reveal to opposing counsel what issues should be discussed with counsel and what issues can be discussed with the client directly.

Model Rule 4.2, Communication with Person Represented by Counsel:
Is there a duty to ask?

The ABA ethics rules have included a “no-contact” rule since the 1908 adoption of the ABA Canons of Professional Ethics.\(^{12}\) Current Model Rule 4.2 reads:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be

\(^{11}\) Because a tribunal may require disclosure of the scope of the services performed by the lawyer, and because a client receiving limited-scope services may desire to disclose to opposing counsel the scope of services performed by the lawyer, the Committee cautions lawyers providing limited-scope services to draft their limited-scope legal service agreement so that the agreement does not reveal information beyond that necessary for the client, opposing counsel, or the tribunal to determine the scope of the representation. For an example of a limited-scope agreement that lists services to be performed, see Reporter’s Notes to Maine Rule of Professional Conduct 1.2 Limited Representation Agreement. The agreement lists 20 categories of legal services.

\(^{12}\) ABA Canon 9: “Negotiations with Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.” Canon 9 is available at: http://www.americannbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf.
represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Model Rule 4.2 protects clients who have chosen to be represented by a lawyer from having another lawyer interfere with the client-lawyer relationship by, for example, seeking uncounseled disclosure of information and/or uncounseled concessions and admissions related to the representation. A lawyer directly communicating with an individual, however, will only violate Rule 4.2 if the lawyer knows that the person is represented by another lawyer in the matter to be discussed. “Knows” is defined by the Model Rules as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”

ABA Model Rule 4.3 reads:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Lawyers confronted with a person who appears to be managing a matter pro se but may be receiving or have received legal assistance, often are left in a quandary. May the lawyer assume that such persons are proceeding without the aid of counsel and, therefore, speak directly to them about the matter under Model Rule 4.3, or should the lawyer first ask whether they are represented in the matter and then proceed accordingly under either Rule 4.2 or 4.3?

Interpreting Model Rule 4.2 in July 1995, ABA Formal Ethics Opinion 95-396, noted:

It would not, from such a practical point of view, be reasonable to require a lawyer in all circumstances where the lawyer wishes to speak to a third person in the course of his representation of a client first to inquire whether the person is represented by counsel: among other things, such a routine inquiry would unnecessarily complicate perfectly routine fact-finding, and might well...

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14. See, e.g., Okla. Bar Ass’n v. Harper, 995 P.2d 1143 (Okla. 2000) (lawyer did not violate Rule 4.2 without actual knowledge of the representation. “Ascribing actual knowledge to a lawyer based on the facts is not the same as applying the rule under circumstances where the lawyer should have known.”).
15. Model Rules of Prof’l Conduct R. 1.0(f).
unnecessarily obstruct such fact-finding by conveying a suggestion that there was a need for counsel in circumstances where there was none, thus discouraging witnesses from talking.\textsuperscript{16} (Emphasis added.)

Thus, while the black letter of Model Rule 4.2 does not include a duty to ask whether a person is represented by counsel, this Committee reiterates the warning of Comment [8] to Rule 4.2 that a lawyer cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by "closing eyes to the obvious."\textsuperscript{17}

In circumstances involving what appears to be an unrepresented person, but in fact may be a person represented by a lawyer under a limited-scope agreement, a lawyer's knowledge that the person has obtained some degree of legal representation may be inferred from the facts.\textsuperscript{18} Such circumstances include, for example: when a lawyer representing a client faces what appears to be a pro se opposing party who has filed a pleading that appears to have been prepared by a lawyer or when a lawyer representing a client in a transaction is negotiating an agreement with what appears to be a pro se person who presents an agreement or a counteroffer that appears to have been prepared by a lawyer.\textsuperscript{19}

Therefore, the Committee recommends that, in the circumstances where it appears that a person on the opposing side has received limited-scope legal services, the lawyer begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. This may assist a lawyer in avoiding potential disciplinary complaints, motions to disqualify, motions to exclude testimony, and monetary sanctions, all of which could impede a client's matter.\textsuperscript{20} It is not a violation of the Model Rules of Professional Conduct for the lawyer to make initial contact with a person to determine whether legal representation, limited or otherwise, exists.

\textsuperscript{16} ABA Formal Op. 95-396, fn. 39 (1995). Immediately after the release of Formal Opinion 95-396, Rule 4.2, Comment [5] was amended to read: "The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Termination. Such an inference may arise in circumstances where there is a substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." However, the Ethics 2000 Commission recommended to the ABA House of Delegates that the sentence explaining "inference" be deleted, and the House adopted this recommendation in 2002. According to the "Reporter's Observations" document submitted to the House with the Ethics 2000 Commission resolution, this description of the knowledge requirement was "inconsistent with the definition of 'knows' in Rule 1.0(f), which requires actual knowledge and involves no duty to inquire." See A LEGISLATIVE HISTORY, supra note 5, at 566, citing ABA House of Delegates Report 401 (Feb. 2002).

\textsuperscript{17} MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. [8].

\textsuperscript{18} MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (defining "knows").

\textsuperscript{19} See generally State Bar of Arizona Op. 05-06 (2005) (filing of documents prepared by lawyer but signed by client receiving limited-scope representation is not misleading because "... a court or tribunal can generally determine whether that document was written with a lawyer's help.").

\textsuperscript{20} See, e.g., Weeks v. Independent School Dist. No. 1-89, 230 F.3d 1201 (10th Cir. 2000) (affirming district court's disqualification of lawyer who interviewed members of control group in violation of Rule 4.2).
If the person discloses representation under a limited-scope agreement and does not articulate either that the representation has concluded (as would be the case if the person indicates that yes, a lawyer drafted documents, but is not providing any other representation), or that the issue to be discussed is clearly outside the scope of the limited-scope representation, then the lawyer should contact opposing counsel to determine the issues on which the inquiring lawyer may not communicate directly with the client receiving limited-scope services.\textsuperscript{21}

When the communication concerns an issue, decision, or action for which the person is represented, the lawyer must comply with Rule 4.2 and communicate with the person’s counsel.

The lawyer may communicate directly with the person on aspects of the matter for which there is no representation.\textsuperscript{22} For these communications, the lawyer must comply with Rule 4.3. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. We note that Rule 1.6 and the confidentiality of communications between a lawyer and the lawyer’s client does not end when the limited representation concludes. Therefore, any communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about communications between the person and the lawyer providing limited-scope services.

If at any point in the matter the person — or the lawyer providing the limited-scope representation to that person — notifies the communicating lawyer that the scope of the representation was expanded, the communicating lawyer must act in accordance with Rule 4.2 as to any issues, decisions, or actions implicated by the expansion of the scope of services.

Conclusion

Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommends that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.

Although Rule 4.2 does not require a lawyer to ask a person if he or she is represented by counsel before communicating with that person about the subject of the representation, a lawyer’s knowledge that the person has obtained assistance from another lawyer may be inferred from circumstances. If the lawyer has reason to believe that an unrepresented person on the opposing side has received limited-scope legal services, the Committee recommends that the

\textsuperscript{21} \textit{Model Rules of Prof'l Conduct} R. 4.2, cmt. [3] ("A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.").

\textsuperscript{22} \textit{Model Rules of Prof'l Conduct} R. 4.2, cmt. [4] ("This Rule does not prohibit communication with a represented person ... concerning matters outside the representation.").
lawyer begin the communication with that person by asking whether that person is or was represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.

If the person states that he or she is or was represented by counsel in any part of a matter, and does not articulate either that the representation has concluded or that the issue to be discussed is clearly outside the scope of the limited-scope representation, the lawyer requesting information should contact the lawyer providing limited-scope services to identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services.

The lawyer must comply with Rule 4.2 and communicate with the person’s counsel when the communication concerns an issue, decision, or action for which the person is represented. Under Rule 4.3, however, the lawyer may communicate directly with the person on aspects of the matter for which no representation exists. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. Communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about protected communications between the person and the lawyer providing limited-scope services.
RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to RRTFB — May 20, 2016 carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of authority between client and lawyer Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult
with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3). RRTFB – May 20, 2016 At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation. Absent a material change in circumstances and subject to rule 4-1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time. In a case in which the client appears to be suffering mental disability, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to rule 4-1.14. Independence from client’s views or activities Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token representing a client does not constitute approval of the client’s views or activities.

Agreements limiting scope of representation The scope of services to be 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. 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, or which the client regards as financially impractical. Although this rule affords the lawyer and client substantial latitude to limit the representation if not prohibited by law or rule, 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 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. In addition, a lawyer and client may agree that the representation will be limited to providing assistance out of court, including providing advice on the operation of the court system and drafting pleadings and responses. If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate "Prepared with the assistance of counsel" on the document to avoid misleading the court which otherwise might be under the impression that the person, who appears to be proceeding pro se, has received no assistance from a lawyer. If not prohibited by law or rule, a lawyer and client may agree that any in-court representation in a family law proceeding be limited as provided for in Family Law Rule of Procedure 12.040. For example, a lawyer and client may agree that the lawyer will represent the client at a hearing regarding child support and not at the final hearing or in any other hearings. For limited in-court representation in family law proceedings, the attorney shall communicate to the client the specific boundaries and limitations of the representation so that the client is able to give informed consent to the representation. RRTFB – May 20, 2016 Regardless of the circumstances, a lawyer providing limited representation forms an attorney-client relationship with the litigant, and owes the client all attendant ethical obligations and duties imposed by the Rules
Regulating The Florida Bar, including, but not limited to, duties of competence, communication, confidentiality and avoidance of conflicts of interest. Although an agreement for 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 4-1.1. An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and law. For example, the client may not be asked to agree to representation so limited in scope as to violate rule 4-1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue. Criminal, fraudulent, and prohibited transactions A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not assist a client in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See rule 4-1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. See rule 4-1.1. Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary. Subdivision (d) applies whether or not the defrauded party is a party to the transaction. For example, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Subdivision (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last sentence of subdivision (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act RRTFB – May 20, 2016 contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See rule 4-1.4(a)(5). Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); November 13, 2003, effective January 1, 2004. (SC02-2035) (860 So.2d 394); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417)

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer
has the consent of the other lawyer. Notwithstanding the foregoing, a lawyer may, without such prior consent, communicate with another's client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person’s lawyer.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation. This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates. The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule. This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. RRTFB – May 20, 2016 In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by the agent’s or employee’s own counsel, the consent by that counsel to a communication will
be sufficient for purposes of this rule. Compare rule 4-3.4(f). In communication with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See rule 4-4.4. The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious. In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer’s communications are subject to rule 4-4.3.


RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes RRTFB – May 20, 2016 arise when a lawyer for an organization deals with an unrepresented constituent, see rule 4-1.13(d). This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement or settle a matter, prepare documents that require the person’s signature and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations. Amended: November 13, 2003, effective January
1, 2004, Case No. SC02-2035 (860 So.2d 394); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417)
Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

Client-Lawyer Relationship Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if: (1) the representation of 1 client will be directly adverse to another client; or (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

RRTFB – May 20, 2016

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing,
see comment to rule 4-1.3 and scope. As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client’s or another client’s interests without the affected client’s consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.

Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer’s responsibilities of loyalty and confidentiality of the other client might be compromised. Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or RRTFB – May 20, 2016 interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Consideration should be given to whether the client wishes to accommodate the other interest involved. Consultation and consent A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. Lawyer’s interests The lawyer’s own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest. Conflicts in litigation Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivisions (b) and (c) are met. Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in
some other matter, even if the other matter is wholly unrelated. However, there are circumstances in RRTFB – May 20, 2016 which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation. A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court. Interest of person paying for a lawyer's service A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence. Other conflict situations Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved. RRTFB – May 20, 2016 A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director. Conflict charged by an opposing party Resolving questions of conflict of interest
is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope. Family relationships between lawyers Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated. The purpose of Rule 4-1.7(d) is to prohibit representation of adverse interests, unless informed consent is given by the client, by a lawyer related to another lawyer by blood, adoption, or marriage as a parent, child, sibling, or spouse so as to include those with biological or adopted children and within relations by marriage those who would be considered in-laws and stepchildren and stepparents. Representation of insureds The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise. Consent confirmed in writing or stated on the record at a hearing Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not RRTFB – May 20, 2016 feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Jan. 23, 2003, effective July 1, 2003 (838 So.2d 1140); March 23, 2006, effective May 22, 2006 (SO4-2246); revised opinion issued June 29, 2006, (933 So.2d 417); amended May 29, 2014, effective June 1, 2014 (SC12-2234).

RULE 4-1.10 IMPUTATION OF CONFLICTS OF INTEREST; GENERAL RULE

(a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them may knowingly represent a client when any 1 of them practicing alone would be prohibited from doing
so by rule 4-1.7 or 4-1.9 except as provided elsewhere in this rule, or unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) and (c) that is material to the matter.

(c) Representing Interests Adverse to Clients of Formerly Associated Lawyer. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and RRTFB – May 20, 2016 (2) any lawyer remaining in the firm has information protected by rules 4-1.6 and 4-1.9(b) and (c) that is material to the matter.

(d) Waiver of Conflict. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 4-1.7.

(e) Government Lawyers. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 4-1.11.

Comment

Definition of "firm" With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates. Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation. Where a lawyer has joined a private firm after having represented the government, the situation is governed by rule 4-1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by rule 4-1.11(c)(1). The individual lawyer involved is bound by the rules generally, including rules 4-1.6, 4-1.7, and 4-1.9. Different provisions are thus made for movement of a lawyer from 1 private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in rules 4-1.6, 4-1.9, and 4-1.11. However, if the more extensive disqualification in rule 4-1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and thus has a
much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if rule 4-1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in rule 4-1.11. Principles of imputed disqualification The rule of imputed disqualification stated in subdivision (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially 1 lawyer for purposes of the RRTFB – May 20, 2016 rules governing loyalty to the client or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Subdivision (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from 1 firm to another the situation is governed by subdivisions (b) and (c). The rule in subdivision (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where 1 lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm. The rule in subdivision (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See terminology and rule 4.5.3. Lawyers moving between firms When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to 1 field or another, and that many move from 1 association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from 1 practice setting to another and of the opportunity of clients to change counsel. Reconciliation of these competing principles in the past has been attempted under 2 rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and
an associate in modern law firms. RRTFB – May 20, 2016 The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety and was proscribed in former Canon 9 of the Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client. Confidentiality Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not information about other clients. Application of subdivisions (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought. Subdivisions (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of relevant information protected by rules 4-1.6 and 4-1.9(b) and (c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the 2 clients conflict. Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See rules 4-1.6 and 4-1.9. Adverse positions The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by rule 4-1.9(a). Thus, if a RRTFB – May 20, 2016 lawyer left 1 firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters so long as the conditions of rule 4-1.10(b) and (c) concerning confidentiality have been met. Rule 4-1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in rule 4-1.7. The conditions stated in rule 4-1.7 require the lawyer to determine that the representation is not prohibited by rule 4-1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing or clearly stated on the record. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a definition of informed consent, see terminology. Where a lawyer is prohibited from
engaging in certain transactions under rule 4-1.8, subdivision (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer. Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); amended July 7, 2011, effective October 1, 2011 (SC10-1968) amended May 29, 2014, effective June 1, 2014 (SC12-2234).