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The Inherent Dangers of "Limited" Representation and the Need to Define the Scope of Engagement


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You're an attorney, and a colleague seeks your help on a case. You'd rather not get involved, but he makes clear that he will serve as lead counsel and your role will be limited. Should you agree to assist? You can, but regardless of your perceived role, if the case goes bad and the client sues for legal malpractice, she will probably sue both of you. Remember the oft-quoted adage, "no good deed goes unpunished"? By agreeing to provide even limited assistance to a friend or colleague, you might expose yourself to liability for the entire representation if you don't fully define and limit the scope of representation up front.

While the Rules of Professional Conduct allow attorneys to limit the scope of representation with a client, they are still held to the same standard of care and must adhere to the Rules throughout the representation. Absent a clear understanding of the limited scope of representation and informed consent from the client, an attorney may face liability exposure to the same extent as if he or she were lead counsel for the duration of the case. For that reason, lawyers should clearly explain the limited scope of the representation, adjust retainer agreements to reflect the limited nature of services provided, and ensure the client understands and consents, in writing.

Covering for the Sick Lawyer

Take the example of Thomas Warren and Michael Hughes. A general practitioner in the small town of Independence, Virginia, Warren is the only attorney within a 15-mile radius and enjoys assisting his neighbors with a sundry of legal concerns. Claire Stevens, owner of Independence's only flower shop, hired Warren to obtain a divorce from her husband, Jack, after 23 years of marriage. Claire recently learned that Jack had an affair with a co-worker in Wytheville, and she wants to make a clean and quiet break from the marriage absent the gossip and rumors guaranteed to circulate in a divorce hearing held in the small town's courthouse. Jack would like to avoid his own reputational nosedive in the community, and both hope their attorneys can achieve a quick and fair settlement while properly ensuring their respective interests are protected.

The suit is filed in August, and trial is scheduled for the following May. Both sides conduct limited discovery, and Warren has already begun drafting a proposed settlement agreement. In late December, Warren slips on a patch of ice and tears a ligament in his knee, requiring him to undergo surgery and remain away from the office for two weeks.

Warren is worried about falling behind on his caseload, so he calls on Michael Hughes, an old friend from law school who lives 20 miles away and asks him to "keep an eye on his cases for a few weeks." Hughes gladly agrees to help, and Warren tells Claire that Hughes will briefly handle the matter while he recuperates.

Three days later, Hughes drives to Independence and visits Warren's office to retrieve the case file and briefly review the status of the matter. Warren had just served discovery on Jack, and responses were due five days before Warren returned. Warren informs Hughes that he need not worry about reviewing the discovery since he will be returning shortly after responses are due. Hughes calls Claire's flower shop, informs her that he will "cover for Warren" until his knee heals, and answers the few brief questions she has. Claire is grateful for his assistance.

Shortly after Warren returns, the parties reach an agreement to distribute the marital estate, and the matter is resolved. Six months later, Claire learns from the owner of the hardware store that Jack purchased a $2.4 million mansion in Wytheville for himself and his paramour. She immediately calls up Jack and demands to know where he obtained the money for such a luxurious estate. Jack informs her that he had been putting $200 per week in an investment portfolio for the past 23 years. Claire then hires a new attorney to review her file and assess any means of acquiring a share in the portfolio. Her attorney regretfully informs Claire that Warren never asked about Jack's investments during discovery, and she voluntarily endorsed a settlement agreement that resolved all claims to marital property. Claire immediately files a complaint with the state bar and a legal malpractice claim seeking $1.2 million in damages, against both Warren and Hughes.

But I Was Just Acting as "Local Counsel"

Two thousand miles to the West, Sharon Madison operates a small trust and estates practice in Pasadena, California. Sharon receives a telephone call from Diana Wilkins, a friend from law school and a partner in a Washington, D.C. law firm that specializes in immigration law matters. Wilkins has close ties with the Turkish embassy and speaks Turkish fluently. A Turkish diplomat recently asked her to handle an immigration matter pending in Los Angeles. Wilkins is honored to receive the referral but is only licensed in New York and Washington, D.C. Not wanting her relationship with the embassy to suffer, Wilkins calls Madison and asks her to serve as local counsel so that Wilkins may appear *pro hac vice*. Madison warns Wilkins that she has no experience in immigration law, is not a litigator, and cannot speak a word of Turkish. Wilkins assures Madison that she will just be local counsel. Wilkins will handle the case in its entirety and compensate Madison for her attendance at any necessary court proceedings. After Madison agrees, Wilkins accepts the case and informs the client that Madison will appear with her at the hearing.

Upon meeting the client at the courthouse, Madison gives her standard retainer agreement to Wilkins for the client's endorsement. They quickly find a conference room to discuss the matter, and Wilkins and the Turkish client speak in Turkish to prepare for the hearing while Madison finishes drafting a will. The matter is completed after one hearing, albeit unfavorably for the Turkish client, whose visa is ultimately revoked. A few months later, Madison is shocked when the Turkish client sues her for legal malpractice.

Potential Violations

Despite their limited representation and well-intended efforts, Hughes and Madison could face risks of disciplinary actions and potential malpractice liability. Although Warren and Wilkins provided the bulk of the representation, Hughes and Madison's failure to properly limit the scope of their representation may render them liable for the same alleged breaches of the standard of care that Warren and Wilkins face. An eager plaintiff's attorney will undoubtedly argue that they both had an attorney-client relationship on the same representation, so they are "in for a penny, in for a pound."

– Model Rule 1.2

Rule 1.2(c) of the Model Rules of Professional Conduct permits a lawyer to limit the scope of his or her representation, but the limitation must be reasonable under the facts and circumstances of the matter. Most importantly, the client must give informed consent to the limited representation.[1]

Jurisdictions vary on their precise definition of "informed consent," but most generally require the attorney to provide sufficient information to allow the client to appreciate and understand the facts and implications of the limited representation. Most states that have not completely adopted the ABA's Model Rules have similar provisions to Rule 1.2(c). Virginia's Rules of Professional Conduct, for example, provides that "[a] lawyer may limit the objectives of the representation if the client consents after consultation."[2]

Notwithstanding Rule 1.2, some courts have prohibited attorneys from limiting their scope of representation entirely, regardless of a client's informed consent. In 2003, for example, the United States Bankruptcy Court for the Northern District of Georgia held that a bankruptcy attorney representing a Chapter 7 debtor "ordinarily" could not limit the scope of engagement.[3] Quoting an Idaho opinion that reached the same conclusion, the court stated that it is "exceedingly difficult to show that [the attorney] properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required."[4] The court concluded, "[c]ompliance with [Rules of Professional Conduct 1.1, 1.2 and 1.4] is mandatory, and must be proved."[5] It is important to note, however, that this rule appears to have been applied solely in bankruptcy cases thus far.

A court or disciplinary board would likely conclude an attorney-client relationship existed between Hughes, Madison, and their respective clients. In assessing whether an attorney-client relationship exists, most courts will look to whether the client reasonably believed the attorney was representing his or her interests.[6] The Southern District of New York established certain factors it examines when assessing whether an attorney-client relationship exists.[7] These include the following: (1) whether a fee arrangement was entered into or a fee paid; (2) whether a written contract or retainer agreement exists indicating that the attorney accepted representation; (3) whether there was an informal relationship whereby the attorney performed legal services gratuitously; (4) whether the attorney actually represented the individual in one aspect of the matter; (5) whether the attorney excluded the individual from some aspect of a litigation in order to protect another client's interest; and (6) whether the individual reasonably believed that the attorney was representing him or her.[8] Other jurisdictions have employed similar guidelines.

Both Warren and Hughes informed Claire that Hughes would handle her case while Warren was on leave. Given the fact that Hughes spoke with Claire and reviewed her file, a court would likely conclude an attorney-client relationship existed between the two. Claire had no reason to believe otherwise. Similarly, Madison provided a standard retainer agreement to the Turkish woman to confirm that she would represent her in the immigration

case, and Madison later appeared as local counsel. Consequently, a court would likely conclude that an attorney-client relationship also existed in this situation.

A court or disciplinary board might also conclude that both Hughes and Madison failed to adequately limit the scope of representation. Hughes never fully explained the limited scope of his representation with Claire. During the time Warren was out, the husband's counsel responded to discovery. Claire alleged that Hughes should have reviewed the discovery responses and assessed what additional information was needed to ensure that her husband disclosed all property in the marital estate. Had Hughes explained his limited and temporary role to Claire, and hopefully documented it, he'd be in a much better position in the legal malpractice case. Claire will probably have no problem finding an expert to testify that Hughes took over the case during Warren's absence and assumed full responsibility during those two weeks.

Even though Madison was merely serving as local counsel for Wilkins, Madison never personally communicated the nature and scope of her representation to the client, nor could she, since she did not speak Turkish. She may have relied on Wilkins to do so, but she ran the risk that the client was not fully informed of the distinguishing features of her representation. Further, Madison presented her standard retainer agreement to the client, which stated simply that she would represent the client in this matter. Given the language barrier between Madison and the client, coupled with the client's unfamiliarity with the United States legal system, it became even more imperative to clearly establish the terms of the relationship and ensure the client understood and agreed.

To be clear, both Hughes and Madison were permitted to limit their representation and whether either is liable for malpractice is a factual determination for the jury. However, their failure to properly limit the scope of representation pursuant to Rule 1.2 renders them potentially liable to the same extent as the attorneys who were primarily handling the cases. Without the client's informed consent to a limited role, they may be held liable for the consequences incurred as a result of the other attorney's mistakes. Moreover, jurisdictions imposing joint and several liability may leave Hughes and Madison on the hook for payment of the entire judgment.

– Related Considerations in the Rules of Professional Conduct

Notwithstanding Rule 1.2 of the ABA Model Rules of Professional Conduct, attorneys must still adhere to all other provisions of the Rules of Professional Conduct.[9] Attorneys are required to "provide competent representation to a client, [which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[10] In doing so, lawyers must consult with their clients about the means in which their objectives may be accomplished, and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[11] Comment 7 to Rule 1.2 further provides that the limitation "must be reasonable under the circumstances."

Although Wilkins did most of the heavy lifting in the matter, Madison could face additional liability due to potential violations of Rules 1.1 and 1.4. Madison is a trusts and estates lawyer with no background in immigration law and no experience with litigation procedures. She is not required to be an expert in the field of immigration law, but in this instance her representation was akin to a "potted plant" whose only purpose is to allow Ms. Wilkins access to the court. All of these factors increase the chances that a tribunal could conclude Madison violated Rule 1.1 and 1.4.

Means of Avoiding Potential Pitfalls

In contrast to the penny-pound situation that may present itself due to an attorney's failure to appropriately limit the scope of representation, nearly all courts will find that, "if service is limited by consent, then the degree of care is framed by the agreed service."[12]

Informed consent does not necessarily mean that the client must consent to the limited representation in writing. However, "[t]he surest way to avoid ambiguity over what a lawyer has undertaken to do for a client is to execute a written retainer agreement."[13] This means first requiring a client's endorsement of the retainer agreement. Some jurisdictions, including New York, require a written retainer agreement if an attorney agrees to provide legal services.[14] Even in those that do not, however, a written agreement can go a long way in preventing the inevitable "he-said, she-said" between the attorney and client that is guaranteed to arise in a malpractice suit or bar complaint questioning the scope of an attorney's representation.

Many attorneys in circumstances like these mistakenly assume they do not need a retainer agreement because they were hired by the lead counsel just to consult, and the client isn't really their client. However, if the attorney-client relationship is established, all of the privileges and potential liabilities will go along with it. It may not prevent a client from filing a bar complaint or malpractice suit, but a written retainer may be the most effective path to an early and successful dispositive motion.

A simple, run-of-the-mill retainer agreement is not enough. Standard retainer agreements may provide that an attorney will represent an attorney in "the client's suit for [insert cause of action.]" The attorney who fails to clearly delineate the scope of the representation and effectively limit it in writing may unwittingly *expand* the scope of representation by the terms of the retainer agreement. For this reason, an attorney assuming a limited role must clearly define that role in a manner that leaves little room for ambiguity and does not create more responsibility than he or she seeks to undertake. In other words, the attorney should say what he will do and what he will not do in the representation. In Madison's case, she should have used language such as "The client understands that Madison is only acting as local counsel and that her responsibility is limited to providing Wilkins the means to appear in court without a license in this jurisdiction. No other legal services will be provided for Client."

Simply handing a client a generic retainer form to sign may not be sufficient to establish informed consent. The attorney should have a discussion with the client so that he or she fully understands what he is signing, as well as the differences between the services

each of the client's attorneys will be providing. While these steps may seem arduous or encourage an attorney to think twice about handling legal matters in a limited capacity, they can be completed in a manner of minutes while saving hours of heartache, or even worse, one's bar license.

Conclusion

Most clients looking to sue their lawyers for malpractice are not concerned about the specific services each attorney provided; they are interested in which attorney has malpractice insurance that will allow for recovery. For these reasons, an attorney providing limited services may become the primary focus of a bar complaint or legal malpractice suit. Absent informed consent from the client, preferably in writing coupled with a verbal explanation, the attorney may be the recipient of a pound of heartache for a penny's worth of services.

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[1] ABA Model Rules of Professional Conduct R. 1.2(c).

[2] Va. Rules of Professional Conduct R. 1.2(b).

[3] *See In Re Egwin*, 291 B.R. 559 (N.D. Ga. 2003).

[4] *Id.* (quoting In re Castorena,270 B.R. 504, 530 (Bankr. D. Idaho 2001)).

[5] *Id.*

[6] *See, e.g., Roderick v. Ricks*, 54 P.3d 1119, 1125 (Utah 2002).

[7] *See First Hawaiian Bank v Russell & Volkening, Inc.*, 861 F. Supp. 233 (S.D.N.Y. 1994).

[8] *Id.* at 238.

[9] Comment 8 to Rule 1.2 states, in relevant part, "All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law."

[10] ABA Model Rules of Professional Conduct R. 1.1.

[11] ABA Model Rules of Professional Conduct R. 1.4.

[12] *Lerner v. Laufer*, 359 N.J. Super. 201 (N.J. App. Div. 2003).

[13] D.C. Ethics Opinion 116 (1982).

[14] *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 1215 (N.Y.C.R.R.).