LIMITED SCOPE NOT LIMITED COMPETENCE: SKILLS NEEDED TO PROVIDE INCREASED ACCESS TO JUSTICE THROUGH UNBUNDLED LEGAL SERVICES IN DOMESTIC-RELATIONS MATTERS

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I. INTRODUCTION

Providing competent limited representation in family matters requires both family law experience and an understanding of the appropriate use of limited representation. It is only then that the use of limited representation in family matters furthers access to justice. This Article ties together the following two components of providing access to justice in family matters: (1) the availability of some form of legal representation, and (2) representation by competent family law litigators. Competence is required of all attorneys and is generally determined by the test provided in Rule 1.1 of the Model Rules of Professional Conduct (Model Rules).[1] Competence requires not only skill and knowledge but also some level of investigation and diligence.[2] It requires knowing what representation best suits the needs of the client and a careful assessment of whether the attorney can provide these services. And as we are reminded by the Model Rules, providing limited representation does not extinguish the requirement to provide competent representation. Satisfying these basic requirements is the key to the successful use of limited representation in family matters.

Although limited representation is nothing new in other areas of the law, the expansion of the use of limited representation involving litigation

1. *See infra* Part II.A.
2. *See infra* Part II.A.

is a relatively new idea. Sparked by the crisis caused by increasing numbers of pro se litigants in family courts across the nation, the American Bar Association (ABA) responded with a change in the ethical rules to more specifically allow the use of limited representation in matters involving litigation.[3] In addition, the ABA encouraged jurisdictions to adopt procedural rules to address concerns of private attorneys considering offering limited representation. Almost all states have adopted changes to their procedural rules to accomplish this goal.[4] Because these rules are relatively new and practically untested in the family law area, concerns about possible ethical rule violations or malpractice claims may deter attorneys from providing family law litigants in need with this valuable form of limited assistance.

It has been slightly over a decade since the ABA took the first step and changed the Model Rules to encourage the use of limited representation in litigation. Although many articles have been written regarding its use—praising or criticizing its effectiveness—little empirical data has been compiled.[5] There remains little concrete evidence, if any, showing that the use of limited representation has increased access to justice in our family courts—one of the courts most in need of assistance with pro se litigants. While this information would provide a valuable resource for assessing the effectiveness of offering limited representation as well as an examination of how scarce resources can best be allocated, this lack of data should not preclude an analysis based on what is already known about effective legal representation and client needs.

First, this Article will discuss the competency requirements found both in the ethical rules and in the traditional expectations of the family law attorney. Next, this Article will define the phrase "limited representation" and will track its use as a means of providing access to justice in family courts. This will include a discussion of the ABA's role in encouraging changes and the jurisdictional response. After analyzing competency requirements and the rules regarding limited representation, this Article will demonstrate that it is only when attorneys possess experience in family law matters and understand the need to stay within the rules governing limited representation that increased access to justice can be accomplished. Here,

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3. *See infra* Part III.B.

4. D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 904–05 (2013).

5. *Id.* at 905–06 (citing D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2124–25 (2012) (suggesting that one reason for the marginal effect representation has had is that pro se litigants have greater access to the issues)).

both the complex nature of family law and the lessons learned from the use of limited representation in civil cases other than family matters will be examined. Finally, this Article will give suggestions for increasing the number of experienced family law attorneys who can provide competent limited representation to further the goal of increasing access to justice in family matters.

II. COMPETENCE AND THE FAMILY LAW ATTORNEY

Providing competent representation in family matters starts with adhering to the basic competency rule.[6] The competency rule, however, also requires compliance with other ethical and procedural rules and a familiarity with the specialized area of domestic-relations law. In addition, because domestic-relations matters often present intense emotional and complex financial problems, domestic-relations attorneys must have strong client management skills and be able to identify issues outside the traditional family law realm.[7] In the past, family law matters were typically in the hands of a "generalist."[8] Today, however, family law attorneys are expected to be specialists.[9]

A. Model Rule 1.1

Model Rule 1.1 provides the standard for all attorneys: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[10] This is not a random assignment of a rule number. The Model Rules start with the competency rule because it provides the umbrella under which all other ethical rules can

6. Model Rule 1.1 governs all forms of representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

7. *See* Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 U. MISS.-KAN. CITY L. REV. 965, 968 (2007) (noting that the role of the family law attorney requires an understanding of complex legal issues in areas of bankruptcy, tort liability, taxation, and other areas of the law); *see also* Clare Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitations Decisions*, 54 JUV. & FAM. CT. J. 11, 11–12 (2003) (discussing the judges within a family-law matter when the underlying relationships are abusive or feature high-intensity conflict).

8. Andrew S. Grossman, *Avoiding Legal Malpractice in Family Law Cases: The Dangers of Not Engaging in Financial Discovery*, 33 FAM. L.Q. 361, 370 (1999).

9. *Id.* at 368–70 ("[A]n attorney who holds himself out as a specialist will be deemed a specialist, regardless of whether he actually possesses superior skill, knowledge, experience, or expertise . . . .").

10. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

be understood.[11] The term "skill," when used to determine competency, is defined as a "special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience."[12] Determining whether an attorney has the required knowledge and skill to handle a particular matter includes an examination of the "complexity and specialized nature" of the case and the lawyer's "general experience" in the area of the law involved.[13] A lawyer is expected to recognize when, even with "preparation and study," the client's interest will be better served by not taking the case and by referring the client to an attorney with "competence in the field in question."[14] When determining issues within a case, an attorney must be competent to handle an "inquiry into and analysis of the factual and legal elements of the problem."[15] Thus, the competency requirement begins during the initial intake and continues until the representation is complete.[16]

B. *Knowledge and Skill Necessary for Competent Representation in Family Matters*

Over the past fifty years, the changing nature of family law, and the practice of law in general, increased the skills and knowledge a practitioner must have to be considered a competent family law attorney.[17] The family law practice today is "more complex, more specialized, more interdisciplinary, and more expensive, with greater risks for sanction and liability."[18] Today's family law practice, however, also provides a "greater opportunit[y] for financial reward" because of the increasing need for assistance with these sensitive and complex matters.[19] What was once a

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11. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 89 (2012–2013 ed. 2012) ("It is no accident that the first Model Rule requires competence, for the drafters of the Model Rules believed that the first rule of legal ethics is competence.").

12. Grossman, *supra* note 8, at 364.

13. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2013).

14. *See id.*

15. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2013).

16. *See* Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166, 220 (2012) ("The timing of the inquiry is complicated by this determination, which usually occurs, and should occur, during the initial intake.").

17. *See* Barbara Glesner Fines, *Fifty Years of Family Law Practice–The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIMONIAL LAW. 391, 405 (2012).

18. *Id.* at 391–92.

19. *Id.*

term that focused on the relationship between a husband and wife, the term "family" is defined very differently today.[20] Changes in social attitudes, economically driven changes in gender roles, and scientific advancement have led to great diversity in family formation.[21] As a result, the family law practice, which once focused primarily on the dissolution of marriage, now typically includes representing separating unmarried partners, grandparents, and other extended family members.[22]

The issues involved in family law matters also became more specialized and more complex. Even though the emergence of "no fault" divorce simplified the traditional divorce action, child custody and financial issues have expanded in number and complexity.[23] Today, child custody issues are often determined by social science concepts,[24] and joint custody presumptions present logistically and emotionally complicated co-parenting issues.[25] The economic issues involved in family matters today no longer include only a determination of support[26] or the division of the marital home as the primary family asset. Rather, a divorce or separation today often requires the division of intangible personal property, such as "complex financial investments" and pensions.[27] What constitutes property is now defined broadly by family courts, with some jurisdictions including "goodwill" associated with a business and even a professional degree in the definition.[28] To adequately advise clients, family law attorneys must have knowledge of many other areas of state and federal law,[29] such as estate

20. *See id.* at 392–94; *see also* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 384 (2008) ("Dynamic changes . . . occurred in the composition of the American family as the number of divorces grew, unwed fathers won parental rights, and more couples, heterosexual and same sex, chose to live together and have children without getting married.").

21. Fines, *supra* note 17, at 393–95. ("[M]edical science is developing assisted reproductive technologies faster than the laws can keep pace.").

22. *Id.* at 404 ("[T]oday a family law attorney may be called on to resolve disputes over ownership of property between unmarried couples, represent a grandparent in a guardianship for her grandchild, or bring an action to determine parentage.").

23. *Id.* at 397–98.

24. *Id.* at 398.

25. *See id.* at 399.

26. Because the division of property was traditionally determined by property law, and most property was held in the husband's name, property distribution would typically require little analysis. The only remaining financial issue was support. *Id.*

27. *Id.* at 399–400.

28. J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419, 430 (2008).

29. *See* Elrod & Dale, *supra* note 20, at 382–83. While it was once an area of law governed almost exclusively by state and local law, family law matters now often include issues involving federal statutory and constitutional law, and often involve national and international issues. *Id.*

planning, bankruptcy, and tax law.[30] Because of the increasing complexity of parenting and financial issues, family law attorneys must often rely on social science or financial experts.[31]

Further complicating today's family law practice is that these sensitive family issues are decided by judges who enjoy great statutory discretion and whose decisions are given great deference.[32] As a result, every case is truly different: case law on the same issue can vary greatly, making it more difficult to predict outcomes.[33] On a more local level, the outcome of a similar issue can vary from judge to judge within the same courthouse and even with the same judge on a different day.[34] Strong client management skills are necessary to properly educate and advise clients regarding the unpredictability of, and resulting increased cost associated with, litigating family matters.[35] Litigants who cannot afford to hire a skilled family law practitioner will likely become another pro se litigant in an already stressed family court system.[36]

Because of the sensitive financial and highly emotional issues often involved in domestic-relations matters, attorneys are often faced with ethical dilemmas. A skilled domestic-relations attorney can identify red flags and deal with them early on.[37] Attorneys cannot ethically assist clients in making misrepresentations or committing fraud.[38] An attorney also cannot "fail to disclose a material fact" if to do so would be assisting the client in committing fraud.[39] Clients, for example, may raise unsubstantiated accusations about the other side, or they may seek to withhold financial information.[40] A client's desire to not do anything at all can also raise ethical issues for family law attorneys, and attorneys must be

30. *See* Fines & Madsen, *supra* note 7, at 968; *see also* Fines, *supra* note 17, at 400.

31. *See* Fines, *supra* note 17, at 398–400.

32. Struffolino, *supra* note 16, at 177; *see also* Fines & Madsen, *supra* note 7, at 967. "A discretionary standard of review is allowed in family law cases due to the intermingling of psychology and the law within domestic-relations matters." Struffolino, *supra* note 16, at 177 n.26; *see also* People *ex rel.* E.C., 47 P.3d 707, 709 (Colo. App. 2002) (stating that in a post-termination of parental rights proceeding, a trial court's findings and conclusions will not be disturbed on review if the record supports them).

33. Struffolino, *supra* note 16, at 177.

34. *See id.* at 177 n.26 (citing Fines & Madsen, *supra* note 7, at 967).

35. *See id.* at 177–78.

36. *See* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378–384 (2005) (suggesting that not having legal representation is generally perceived negatively and results in inefficiency).

37. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 189 (Bankr. D. Nev. 2013).

38. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2013).

39. Alan C. Eidsness & Lisa T. Spencer, *Confronting Ethical Issues in Practice: The Trial Lawyer's Dilemma*, 45 FAM. L.Q. 21, 22 (2011) (quoting MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2003)).

40. *See, e.g.*, *id.* at 22–23.

careful not to assist a client in delaying proceedings or assist the client in efforts to keep the other side from obtaining a justified outcome.[41] Once these ethical dilemmas are identified, strong client management skills are necessary to explain to the client that he or she is pursuing a dangerous course of action, and the attorney must also convince the client that full disclosure is in the client's best interest.[42] The attorney must also be able to identify when, despite best efforts, the client is unlikely to follow counsel's advice, and the attorney must seek to end the representation.[43] If litigation has begun, this is often no easy task.[44]

The difficulties and dilemmas associated with a domestic-relations practice do not disappear, nor should they be less of a concern, when offering only limited representation. In fact, it is because of the complex and highly emotional nature of family law matters that limited representation requires the services of a competent and experienced family law litigator.

III. AN OLD DOG AND A NEW TRICK: LIMITED REPRESENTATION AS A TOOL TO INCREASE ACCESS TO JUSTICE

The basic idea behind limited representation is that some legal representation is better than none.[45] Offering litigants who could not otherwise afford full representation the opportunity to hire an attorney for only some of the tasks or issues is better than proceeding pro se for the entire case.[46] This alternative is especially attractive to litigants of low- and moderate-income, attorneys facing dwindling numbers of paying clients, and family courts faced with an influx of unrepresented litigants slowing

41. *See id.* at 28 (discussing possible ethical violations for an attorney who complies with a client's request to delay proceedings while the client is receiving temporary spousal support which is set to terminate after entry of the judgment or decree).

42. *See id.* at 23.

43. *Id.* at 25 ("[A] lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law." (quoting MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 2 (2003))).

44. *See id.* at 23–27.

45. Hon. Judith L. Kreeger, *To Bundle or Unbundle? That Is the Question*, 40 FAM. CT. REV. 87, 89 (2002).

46. *See* Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825, 831–32 (2012); *see also* Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 566 (2007) ("[L]imited scope representation provides promise for increasing access to justice for low-income Americans . . . .").

down the wheels of justice.[47] With the ABA taking the lead, a long-used alternative to full representation in matters not involving litigation was expanded to meet the needs of those involved in, or about to be involved in, litigation.

A. Limited Scope Representation

Limited representation is also known as "unbundled legal services" or "discrete task representation."[48] Unlike traditional full-service representation, where the attorney is responsible for utilizing all means to obtain the client's stated goal, the attorney's responsibilities are limited to those chosen by the client.[49] Therefore, the bundle of tasks typically associated with full representation is "unbundl[ed]."[50] For example, rather than hiring an attorney in a divorce action with the ultimate goal of securing a judgment that resolves all issues, the client may hire the attorney to obtain only one objective, such as child support.[51] The client may also hire the attorney to perform only one task, such as drafting the divorce petition.[52] At the heart of limited representation is the agreement between the client and the attorney.[53] It is through this agreement that the client can maintain control over the attorney's responsibilities, thus enabling the client to control the cost of representation.[54] The ability to control the cost of the representation is often cited as the most valuable attribute associated with limited representation.[55]

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47. *See* Struffolino, *supra* note 16, at 205–06 (arguing that pro se litigants present challenges to court clerks and judges by expecting substantial assistance with—or leniency when applying—procedural requirements).

48. Forrest S. Mosten, *Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making*, 2008 J. DISP. RESOL. 163, 163 (2008).

49. *Id.* at 165.

50. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994).

51. This is known as horizontal unbundling. Forrest S. Mosten, *Unbundling Legal Services Today—And Predictions for the Future*, 35 FAM. ADVOC. 14, 15 (2012).

52. This is known as vertical unbundling. *Id.* at 14.

53. *See* Mosten, *supra* note 50, at 423–26.

54. *See id.* at 425; *see also* Kasey W. Kincaid & Kimberly J. Walker, *Managing Litigation Costs: The Client Cannot Start Too Soon*, 41 DRAKE L. REV. 67, 68 (1992) (focusing on the client's point of view regarding the managing of legal expenses for litigation, beginning as early as the selection process).

55. *See* MODEST MEANS TASK FORCE, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, A.B.A. 3–4 (2003), (inferring that clients may wish to limit representation because they think that services are too costly).

Limited representation is not a new concept in matters not involving litigation.[56] It could provide the means to final settlement of family matters through mediation or collaboration.[57] Domestic-relations attorneys routinely limit the scope of their services to review a mediated divorce agreement without being obliged to advocate for a better resolution or to do further investigation.[58] Even before the movement to encourage private attorneys to offer limited representation in matters involving litigation, legal aid attorneys were taking advantage of this option to provide some legal services to those in need.[59] The private bar, however, was reluctant to follow.[60] Because of complex procedural and evidentiary rules associated with litigation, limited representation in matters involving ongoing court involvement was typically viewed as not being an option by private attorneys.[61] It was not until family courts across the country began to feel the effects of the pro se phenomenon[62] that limited representation was seen as an option in contested domestic-relations matters.[63]

B. The Pro Se Phenomenon Triggers Efforts to Expand the Use of Limited Representation as a Mechanism to Increase Access to Justice

Although it was common for litigants to proceed pro se in state trial courts, until two decades ago, litigants in family law matters were typically represented.[64] Today, the opposite is true in family court, where "pro se is

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56. *Id.* at 5. Tasks or objectives associated with one corporate matter are commonly divided between in-house counsel and private counsel. *See id.* at 5–6 ("The corporate client may reduce the overall legal costs by having in-house counsel oversee a project and perform many of the tasks, while retaining outside specialists, such as tax, real estate, or corporate finance lawyers, to provide specific advice on specific questions.").

57. Mosten, *supra* note 51, at 15–16.

58. *See, e.g.*, Lerner v. Laufer, 819 A.2d 471, 482–83 (N.J. Super. Ct. App. Div. 2003).

59. Jennings & Greiner, *supra* note 46, at 826.

60. *Id.* at 827.

61. Struffolino, *supra* note 16, at 190–91; *see also* Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (2006) (espousing that limited scope representation has not been widely used in litigation); Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, 29 COLO. LAW. 5, 6 (2000) ("[I]n litigation matters, lawyers historically have provided full[-]service representation because of the complexity of the procedural rules, as well as the rules of evidence, at trial.").

62. *See* Struffolino, *supra* note 16, at 195 (citing Swank, *supra* note 36, at 374 (defining the rise in pro se litigants as the "the pro se phenomenon")).

63. *Id.*

64. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS, 4 (Nov. 2009), http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf.

no longer a matter of growth, but rather a status at a saturated level."[65] The percentage of pro se litigants in family matters has been reported to be as high as ninety percent.[66] While financial reasons are often cited as the cause of this increase, other emotional and societal factors contributed as well.[67] The availability of no-fault divorce in the 1970s sparked an increase in divorce rates.[68] Shortly after that, an increase in self-help resources and the rising cost of legal representation made self-representation a viable choice.[69] With the average cost of legal representation being over $295 per hour and the average cost of a divorce being $20,000 and as high as $150,000 for a contested case involving trial,[70] it was not just the "poor" who could no longer afford an attorney.[71] Middle-class individuals also could no longer afford to pay for legal representation, especially in matters

65. *Id.* (emphasis omitted) (citing John M. Greacen, *Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*, CAL. CTS. 7, http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf (last visited July 4, 2014)).

66. Swank, *supra* note 36, at 376 (finding that even those who hire an attorney often face an unrepresented opponent).

67. Struffolino, *supra* note 16, at 195 (citing Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1016 n.188 (2007) ("[T]he increase in pro se litigation can be attributed to a variety of financial, societal, and psychological factors.")); *see also* Howard M. Rubin, *The Civil Pro Se Litigant v. the Legal System*, 20 LOY. U. CHI. L.J. 999, 999 (1989) (highlighting that because of a lack of legal aid in rural areas, residents of these areas may have no choice but to litigate alone); Swank, *supra* note 36, at 378–79 (listing a variety of reasons as to why people proceed pro se, such as "an anti-lawyer sentiment," noneconomic reasons, and "a mistrust of the legal system").

68. Struffolino, *supra* note 16, at 198–99; Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 62–63 (2010); *see also* Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 166 (2002) (arguing that the passage of no-fault divorce laws has caused more divorce and more instances of mediation). *But see* Lisa Milot, Note, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701, 706 (2001) ("One text reports succinctly that divorce rates 'dramatically accelerated upward' in the 1960s and 1970s while most of the shift to no-fault divorce laws occurred in the early 1970s and 1980s, '*after* the largest increases in divorce rates had already occurred.'" (quoting IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 221 (3d ed. 1998))).

69. *See* Mosten, *supra* note 50, at 423 (discussing the divorce litigant's use of self-help in the divorce process); Leslie Feitz, Comment, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIMONIAL LAW. 193, 195 (2008) (discussing the use of online forms to aid pro se divorce litigants in the legal process).

70. Struffolino, *supra* note 16, at 200; *see also* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 443 (2009) (pointing to high legal fees as a reason for litigants to proceed pro se); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541 (2005) ("[A]n uncontested divorce that does not go to court will cost around $16,500, whereas a contested divorce that proceeds to trial could cost more than $150,000." (quoting Amy C. Henderson, Comment, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 U. MISS.-KAN. CITY L. REV. 571, 573 (2003) (internal quotation marks omitted))).

71. Struffolino, *supra* note 16, at 199–200.

involving ongoing litigation.[72] Those who typically would qualify for some form of free legal assistance were hit with the effects of a drastic reduction in funding for legal aid services and a shortage of attorneys willing to offer pro bono assistance.[73]

In the wake of the financial crisis over the past decade, matters involving litigation have increased; on the top of the list of cases that increased in number are domestic-relations cases.[74] The number of pro se litigants also increased.[75] The increase in pro se litigants and the decrease in available free legal services threatened to cripple an already stressed legal system.[76] Pro se litigants who showed up in family courts expected substantial assistance from judges, clerks, and other court personnel.[77] Most importantly, the lack of representation had a negative impact on case outcomes. A 2010 ABA survey reported that 62% of the responding judges reported that outcomes were worse for pro se litigants.[78] With the ABA taking the lead, states responded with changes to both ethical and procedural rules. The changes were meant to encourage private attorneys to offer limited representation by alleviating some of the concerns and addressing some of the misconceptions associated with the limited representation.

1. The ABA Response

The ABA effort to encourage and expand the use of limited scope representation in litigation came in a two-pronged approach. First, the 2000 Ethics Commission recommended a change to Model Rule 1.2(c) "to more clearly permit, but also more specifically regulate" limited scope

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72. *Id.* at 200 (citing Sande L. Buhai, *Access to Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979 (2009)); *see also* John L. Kane, Jr., *Debunking Unbundling*, 29 COLO. LAW. 15, 15 (2000) ("[L]awyers continue to increase the gap between cost and value of services. Not only have the poor been left behind . . . they are being joined in alarming numbers by . . . the middle class.").

73. Struffolino, *supra* note 16, at 201–02.

74. Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 45 (2011) (reporting that 49% of the responding judges in a 2010 ABA nationwide survey of state trial judges on the topic of pro se litigation mentioned an increase in domestic-relations cases).

75. *Id.* at 46 (reporting that 60% of the responding judges in a 2010 ABA nationwide survey of state trial judges on the topic of pro se litigation stated that fewer litigants were being represented by counsel).

76. *See* Struffolino, *supra* note 16, at 198–208.

77. Landsman, *supra* note 70, at 451 (citing JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 53 (1998)).

78. Painter, *supra* note 74, at 46.

representation.[79] This change was adopted in 2002.[80] Not long after that, an ABA task force issued the *Handbook on Limited Scope Legal Assistance* as a "practical guide," providing advice to attorneys on how to incorporate the use of limited representation into their practice.[81] These two initial steps—meant to encourage the use of limited scope representation—were presented as a way to improve outcomes for low- and moderate-income individuals who, because they could not afford full representation, were forced to navigate the court system unrepresented.[82] For the task force, it was an issue of fairness: "The process often is not fair for those who cannot afford to pay lawyers to represent them in litigation. They include *most* low[-] and moderate-income families and individuals; that is, the *majority* of the people in our nation!"[83]

a. Model Rule 1.2(c)

Compliance with the ethical rule allowing the use of limited representation in litigation is best accomplished with the involvement of an experienced family law attorney. When the Ethics Commission's recommendations were adopted in 2002, Model Rule 1.2(c) was amended to read: "A lawyer may limit the *scope* of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[84] Prior to this change, the rule stated that "[a] lawyer may limit the *objective* of the representation if the client *consents after consultation*."[85] By replacing the word *objective* with the word *scope*, the Model Rules expanded the use of limited representation to allow not only the ability to limit the goals of the representation but also to permit limiting

79. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8 (emphasis omitted).

80. *See supra* Part III.B.

81. *See* MODEST MEANS TASK FORCE, *supra* note 55, at 1.

82. ETHICS 2000 COMM'N, A.B.A. MODEL RULE 1.2: REPORTER'S EXPLANATION OF CHANGES, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12rem.html (last visited July 4, 2014); *see also* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 3; MODEST MEANS TASK FORCE, *supra* note 55, at 1; Struffolino, *supra* note 16, at 215.

83. MODEST MEANS TASK FORCE, *supra* note 55, at 3.

84. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013) (emphasis added).

85. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8 (emphasis added) (quoting MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1998)). The "objectives" of the representation are to be determined by the client, while the means of accomplishing the objectives are to be carried out by the attorney after consultation with the client. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2013).

the means or tasks to carry out the goal.[86] This expansion is clarified in the comments to the amended rule:

> 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.[87]

In addition to expanding the definition of limited representation to encourage its use in litigation, the changed wording of Rule 1.2(c) also provided a means to "more specially regulate" the use of unbundling by requiring the limitation be both reasonable under the circumstances and based upon the client's informed consent.[88] The foundation for understanding these requirements is the competency rule.

The duty to provide competent representation is not excused when providing limited representation; it is, however, "a factor to be considered when determining the legal knowledge, skill, thoroughness[,] and preparation reasonably necessary for the representation."[89] Even when the scope is limited, the attorney has a duty to investigate the facts and assess the possible legal issues that may arise.[90] Through communication with the client, the attorney must not only investigate the facts as they relate to the client's objectives but also identify any red flags, as well as other areas that are likely beyond the client's knowledge, outside the client's current concern, or otherwise indicate that the use of limited representation would be inappropriate.[91] Effective communication during the initial consultation is therefore essential to assessing the appropriateness of providing limited

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86. *See* Struffolino, *supra* note 16, at 215–16 (citing MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002)).

87. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2013).

88. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8; MODEL RULES OF PROF'L CONDUCT R 1.2'cmt. 7 (2013) ("Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.").

89. MODEL RULES OF PROF'L CONDUCT R 1.2 cmt. 7 (2013).

90. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 188 (Bankr. D. Nev. 2013) (citing Struffolino, *supra* note 16, at 218); *see also* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 917 (1998) ("The codes allow lawyers and clients to limit the scope of representation by agreement, but not to the extent of limiting 'competence' . . . ." (footnotes omitted)).

91. *In re* Seare, 493 B.R. at 189 (quoting State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, *An Ethics Primer on Limited Scope Legal Representation*, ETHICS HOTLINER 1–2 (2004), http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=_gb8teBEN0s%3D&tabid=834); *see also* Nichols v. Keller, 19 Cal. Rptr. 2d 601, 610 (Ct. App. 1993).

representation or, as is often the case, providing an opportunity to work with the client to redefine the client's objectives based upon a better understanding of the legal issues and the advantages and disadvantages of limited representation as a means to attaining the objectives.[92] For this reason, the initial interview should be as extensive as an interview conducted when offering full representation.[93]

It is through this inquiry that the attorney can assess whether limiting the scope of the representation is reasonable under the circumstances.[94] Experienced family law attorneys possess the skills to conduct this assessment. Factors to consider when determining whether the limitation is reasonable include the complexity of the issues involved, the time required to address the issues, and whether other resources are available to assist the client.[95] Another important factor that should be assessed is the client's ability to handle the rest of the case—that part of the case in which the client will continue to proceed pro se—on her own.[96] If the decision to proceed with limited representation is later challenged, the reasonableness of the limitation is governed by the circumstances that existed at the time of the agreement, which was most likely during the initial consultation.[97] Because complex legal issues and high emotion are often present in family matters, the circumstances that exist at the time of the initial consultation are often difficult to navigate.[98]

A competent and experienced family law attorney is also in the best position to satisfy the second requirement of Model Rule 1.2(c): obtaining the client's informed consent.[99] The need for regular attorney–client communication was a recurring theme in the changes to the ethical rules

92. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2013); *see also In re* Seare, 493 B.R. at 190 ("The attorney bears the burden of failing to ascertain the client's objectives . . . or failing to shape the[se] objectives to conform to the remedies available under law."); MODEST MEANS TASK FORCE, *supra* note 55, at 95.

93. MODEST MEANS TASK FORCE, *supra* note 55, at 95.

94. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(h) (2013) ("[The term r]easonable . . . [,] when used in relation to conduct by a lawyer[,] denotes the conduct of a reasonably prudent and competent lawyer.").

95. Struffolino, *supra* note 16, at 221 (citing Farley, *supra* note 46, at 574); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2013); MODEST MEANS TASK FORCE, *supra* note 55, at 63 (noting that "the importance of the interests at stake [and] the complexity of the matter" are, among other things, some considerations that should be taken into account when determining whether limited assistance is appropriate).

96. Struffolino, *supra* note 16, at 222 (citing MODEST MEANS TASK FORCE, *supra* note 55, at 59) (explaining the basic characteristics a successful pro se litigant possesses, such as the absence of mental disorders and the ability to fill out basic court forms).

97. *Id.* at 225.

98. *See supra* Part II.

99. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013).

recommended by the Ethics 2000 Commission.[100] In furtherance of this goal—and as recommended by the Commission[101]—the phrase "informed consent" in Model Rule 1.0 is defined as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[102] There are three steps to obtaining informed consent to support a limited representation agreement: (1) the attorney must obtain sufficient information from the client to determine the client's goals and assess whether offering limited scope representation can further those goals; (2) information regarding the benefits and risks of limited representation must be communicated to the client; and (3) the attorney must determine whether the consent given is valid.[103]

Identifying a clear understanding of the client's objectives is essential to obtaining informed consent.[104] Eliciting information from the client during the initial interview to gain a clear understanding of the client's needs and desires is often difficult, even for the most experienced interviewer.[105] Clients seeking legal assistance in family matters are often stressed and may either not understand, or not be able to articulate, their legal issues and goals.[106] Once the client's objectives are identified, the client must be provided with adequate information on which to base an informed decision concerning whether to limit the scope of representation.[107] Most importantly, a discussion about whether the scope of

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100. COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, A.B.A., REPORT AND RECOMMENDATIONS ON AMENDMENTS TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 3 (2001), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.authcheckdam.pdf.

101. *Id.*

102. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2013).

103. *See* Struffolino, *supra* note 16, at 225, 227–28.

104. *See* Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 220 (Bankr. D. Nev. 2013).

105. Struffolino, *supra* note 16, at 229 (citing Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 79 (1979)); *see also* M. SUE TALIA, A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES: A SIMPLE AND PRACTICAL GUIDE FOR FAMILY LAW LITIGANTS 38 (1997) (noting that clear and thorough communication during the initial interview, although difficult, will save numerous ambiguities regarding each parties' legal responsibilities); Buhai, *supra* note 72, at 989 (recognizing that clients may believe they have a simple issue easily handled by unbundled legal services, only later to discover the complexity and need for further assistance).

106. Spiegel, *supra* note 105, at 109.

107. Struffolino, *supra* note 16, at 230 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002)); *see also id.* at n.283 ("Even reciting back the facts and explaining the circumstances learned by the attorney from the client may be necessary because, although the attorney has no obligation to inform the client of facts or circumstances already known to the client, [the attorney] . . . 'assumes the risk that the client . . . is inadequately informed.'"); Colo.

the representation sought will achieve, or at least advance, the client's overall objective should occur.[108] The client should also be informed of other alternatives available for attaining the goals. For example, the benefits and costs of full representation, as opposed to limited representation, should be explained to the client.[109] Another alternative that should be disclosed is the existence of any pro bono or free legal services programs available to assist the client.[110] The adequate disclosure of information also includes an obligation to advise the client of any other "foreseeable collateral problems" that are related to, or that may arise out of, the issues presented.[111] This includes informing the client of existing legal rights that arise out of the facts obtained from the client.[112]

A valid consent is one that is voluntarily given.[113] Consent is voluntary when it is based on this information-sharing process and an indication that

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Bar Ass'n Ethics Comm., Formal Op. 101 (1998) ("[C]onsult or consultation denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."), http://www.cobar.org/static/comms/ethics/fo/fo_101.htm (last visited Dec. 17, 2013); L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 502 (1999), http://www.lacba.org/showpage.cfm?pageid=431 ("The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention.").

108. *See In re* Seare, 493 B.R. at 220; *see also infra* Part IV.B.2.

109. Struffolino, *supra* note 16, at 230–31; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2002) ("Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation . . . [and] the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.").

110. Limited representation should not be offered if other services are available to the client for no cost. *See* Struffolino, *supra* note 16, at 228–30; Farley, *supra* note 46, at 574 (indicating that an attorney should first assess the merits of the case and then the client's capacity for pro se assistance before choosing to unbundle services).

111. *In re* Seare, 493 B.R. at 200; Struffolino, *supra* note 16, at 232 (citing *Report of the Special Committee on Limited Scope Representation*, MO. SUP. CT. & MO. B. ASS'N 3 (2007), https://www.courts.mo.gov/file.jsp?id=5847); *accord* L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 502 ("The attorney has a duty to . . . inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation.").

112. *See* Nichols v. Keller, 19 Cal. Rptr. 2d 601, 608 (Ct. App. 1993). When an attorney's retention is expressly limited, that attorney may nevertheless have "a duty to alert the client to legal problems which are reasonably apparent" that fall outside the limited scope of representation. *Id.* The *Nichols* court found that the attorney who signed an application for adjudication of a workers' compensation claim had "a duty of care to advise on available remedies, including third-party actions." *Id.* at 610.

113. *See* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 386 (2008) ("[A]ccepting as voluntary only the choices made by litigants aware of their options and the advantages and disadvantages of those options.").

the client fully understands the information provided.[114] The challenge here is determining whether the client fully understands all the risks and alternative options when dealing with a family crisis, or when the client feels that she simply has no other choice but to accept less than full representation.[115]

b. The ABA Handbook on Limited Scope Representation Encourages Unbundling in Litigation

Changing the wording of Rule 1.2(c) was just one step toward expanding the use of limited representation into matters involving litigation. In addition, the ABA published a report written by the Modest Means Task Force of the ABA Section of Litigation titled, *Handbook on Limited Scope Legal Assistance* (the Handbook).[116] The Handbook was presented as a practical guide for lawyers, judges, and those involved in the legal system in an effort to encourage the use of limited representation as a means to increase access to justice for those who would, because of financial limitations, otherwise proceed pro se or not at all.[117] The Handbook focuses on encouraging the use of limited representation in litigation, and specifically promotes the use of such services to assist the "striking" number of pro se litigants in domestic-relations matters.[118] The Handbook suggests that assisting litigants in the preparation of pleadings in uncontested domestic-relations matters that require court approval or the actual drafting of motions or memoranda on contested issues are appropriate ways to provide limited assistance.[119] The Handbook provides models for offering limited representation as a means for providing both out-of-court assistance and limited litigation assistance to those who cannot afford full representation (or do not want it).[120] The Handbook explores the ethical issues involved in providing limited scope representation and follows this discussion with detailed suggestions for avoiding common ethical traps, such as violating competency rules, failing to carefully check for conflicts, and inappropriately communicating with the opposition.[121]

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114. Thomas G. Wilkinson Jr., *Representing Clients in Limited-Scope Engagements*, PA. LAW, Mar.–Apr. 2012 at 50, 51.

115. *See* Engler, *supra* note 113, at 386; *see also* Rachel Brill & Rochelle Sparko, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 567 (2003) (stating that sometimes people have no choice other than representing themselves because they simply cannot afford full legal services).

116. MODEST MEANS TASK FORCE, *supra* note 55.

117. *Id.* at 1.

118. *Id.* at 8.

119. *Id.* at 29–30.

120. *E.g.*, *id.* at 33.

121. *Id.* at 64–70.

Even though the Handbook discusses the few jurisdictions that provide a procedural framework for allowing limited representation, it ends with specific recommendations on how states can expand the use of limited representation to serve the needs of low- and moderate-income litigants.[122] These recommendations encouraged state courts to take the lead by creating a task force to study and make recommendations on how to best use such services to meet the growing number of pro se litigants.[123] The task force recognized that although the ethical rules were amended to clarify that the use of limited representation in litigation is permitted, lawyers still may have had reservations about how to provide such services. The Handbook, therefore, encouraged states to review and revise their procedural rules to reassure attorneys that the use of limited representation in litigation was appropriate and to provide a procedural framework for providing limited services.[124]

2. *Changes to Procedural Rules Address Attorney Skepticism*

Even though amended Model Rule 1.2(c) was adopted in many jurisdictions,[125] the change did not provide a framework for providing limited representation to clients involved in litigation. Existing court procedural rules, which presumed that any appearance on behalf of a litigant was full representation requiring court approval before withdrawal from the case, did not encourage the use of limited representation.[126] Even though a limited-appearance fee agreement could be carefully negotiated to allow the client to pay for one or a few tasks, attorneys could not count on the scope of this agreement being recognized by the court.[127] If the agreement with the client were not honored by the court, attorneys could find themselves providing full representation for limited representation fees.[128] For limited representation to increase access to justice by assisting pro se litigants involved in litigation, a procedural framework was needed

122. *See id.* at 140–49.

123. *Id.* at 140–41; *see infra* Part V.C.

124. MODEST MEANS TASK FORCE, *supra* note 55, at 141.

125. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 8.

126. Jennings & Greiner, *supra* note 46, at 834 ("While some organizations had well-established relationships with judges who allowed limited scope representation and withdrawal, mainstreaming of unbundling depended on firmer assurances." (footnote omitted)).

127. *See supra* Part III.B.

128. *See* Jennings & Greiner, *supra* note 46, at 833–34 (stating that courts interpret unbundled service agreements differently, and it is uncertain whether courts recognize these arrangements and allow for a lawyer's withdrawal after the performance of limited representation).

to address these concerns.[129] As a result, many states amended or added to their procedural rules to provide guidelines for appearing in a limited capacity by keeping the representation limited and withdrawing once the tasks identified in the retainer agreements were accomplished. In 2009, the ABA's Standing Committee on the Delivery of Legal Services issued a publication outlining the steps that some states had already taken to amend their rules to accommodate the use of limited representation in litigation.[130] The goal of the white paper was to encourage policymakers in other jurisdictions to amend or formulate similar rules to encourage attorneys to offer limited scope representation to serve the needs of those who would otherwise proceed into the court system pro se.[131]

a. Limited Representation Appearance

The threshold questions to ask when assisting clients involved in, or about to be involved in, litigation is whether providing limited representation requires disclosure to the court and, if so, how should this information be disclosed. Assisting pro se litigants with document preparation is a common unbundled legal service performed by both private attorneys and legal aid providers.[132] When these documents or pleadings are submitted to the court, a practice known as "ghostwriting,"[133] the pleadings may be subject to Rule 11 of the Federal Rules of Civil Procedure[134] (or the state counterpart), and other procedural requirements. Federal courts, for the most part, have used Rule 11 to discourage, if not completely prohibit, ghostwriting in federal cases.[135] Rule 11 does not expressly prohibit ghostwriting, but it presumes any party receiving legal assistance is

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129. *See id.* at 832 ("[P]roponents have suggested that unbundling constitutes a response to the pro se litigation crisis that has afflicted the adjudicatory systems of state courts, as well as state and federal administrative agencies, for some time.").

130. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 4.

131. *See id.* at 1, 4.

132. *See id.* at 14.

133. Jessie M. Brown, *Ghostwriting and the* Erie *Doctrine: Why Federalism Calls for Respecting States' Ethical Treatment of Ghostwriting*, 2013 J. PROF. LAW. 217, 220 (2013) ("[G]hostwriting occurs when attorneys provide limited services to persons in litigation without appearing as full representatives.").

134. *Id.* at 229. Rule 11 states in pertinent part:

> Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

FED. R. CIV. P. 11(a).

135. Brown, *supra* note 133, at 229–30.

receiving full representation.[136] An attorney providing legal assistance in preparing documents filed in court must sign the documents and otherwise comply with Rule 11.[137] State courts, however, have been more accepting of the practice.[138] States have balanced Rule 11's concern for candor against the needs of pro se litigants by developing procedural mechanisms to provide such services.[139] First, some states have distinguished between assistance with mere document preparation and more substantial assistance, requiring disclosure only for the latter.[140] Second, states that require disclosure either protect candor requirements by simply requiring the document or pleading state that it was prepared with the assistance of counsel,[141] or by requiring the attorney to sign the document and provide identifying and contact information.[142] Both federal and state courts are consistent, however, in requiring an appearance, limited or full, when something more than mere document preparation is being provided.[143]

When an appearance is necessary, the procedural rules in almost all states were amended to assist attorneys willing to provide limited assistance to pro se litigants involved in litigation.[144] While traditional appearance procedures advance the smooth administration of matters pending before the court, allowing a lawyer to file a limited scope representation appearance also accomplishes this goal by minimizing the disruption to court proceedings caused by pro se litigants.[145] As with disclosure requirements, the methods for appearing in a limited representation capacity

136. *See id.* at 230.

137. *Id.* at 248 ("The plain meaning of Rule 11 gives two options for the signing requirement: attorneys sign documents for represented parties and unrepresented parties sign documents themselves. Rule 11 does not address the possibility of attorney assistance short of full representation." (footnote omitted)).

138. *Id.* at 231.

139. *See id.* at 225.

140. Tennessee allows ghostwriting but requires disclosure when there is substantial assistance. *Id.* (citing Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 2007-F-153 (2007)). Colorado permits ghostwriting for minor document preparation but requires disclosure for anything more. *Id.* (citing COLO. RULES OF PROF'L CONDUCT R. 1.2 (2013); COLO. R. CIV. P. 11(b)).

141. Brown, *supra* note 133, at 227. States find that a litigant has an unfair advantage if attorneys "effectively represented a litigant but used the pro se status to obtain judicial leniency." *Id.* at 232–33. Brown also notes that Massachusetts requires anonymous disclosure for document preparation. *Id.* at 225.

142. *See id.* at 236.

143. *See id.* at 224–26.

144. *See Court Rules*, A.B.A., http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (last visited July 4, 2014) (providing a list of all the states that have adopted a provision dealing with limited scope representation).

145. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 18–19.

vary from state-to-state. Nevada appears to be the most lenient, allowing an attorney to simply announce the limited representation at the beginning of the hearing.[146] Most states, however, require written notice identifying the nature of the limitation.[147] Many family courts require the use of court-approved forms that detail the matters in which the litigant is represented.[148] These detailed forms provide clarity regarding the tasks or issues the attorney will handle, and they provide clarity for the court and the opponent, or the opponent's attorney, concerning service and communication issues.[149] Although these procedures allow attorneys to enter a matter on a limited basis, attorneys are usually more concerned with being able to exit when the limited objectives or tasks are accomplished.

b. Staying Limited

Once a limited scope appearance has been entered, becoming involved in matters or tasks outside those noticed in the appearance can result in the court finding that the scope or representation is expanded to full representation.[150] Attorneys face two challenges to keeping within the scope of the representation. The first challenge is overcoming the inherent unpredictability of litigation, especially in family matters.[151] It is nearly impossible to predict at the outset what issues will arise while accomplishing the tasks identified in the limited scope appearance.[152] Pretrial motions are plentiful in family matters, and it is not uncommon for seemingly uncontested issues to become the subject of an emergency motion or an issue requiring an expedited hearing.[153] An attorney who has entered only a limited scope appearance must be careful not to file any pleading or become involved in advocating for the client in any matter not covered by the limited scope appearance.[154] An attorney faced with a new

146. *Id.* at 16 (quoting NEV. 8TH J. DIST. CT. R. 5.28) (requiring a lawyer to indicate they are providing limited representation "in the first paragraph of the first paper or pleading filed on behalf of the client").

147. *Id.* at 19 (citing N.M. Rules of Prof'l Conduct R. 16-303(E) (2009) ("In all proceedings where a lawyer appears for a client in a limited manner, that lawyer shall disclose to the tribunal the scope of representation.")).

148. *Id.*; *see also id.* at B-11 (giving an example of a "Notice of Limited Scope Representation" form).

149. *See id.* at 19.

150. *E.g.*, *id.* at 20; *see, e.g.*, N.H. R. FAM. DIV. 1.19(a) ("An attorney who has filed a limited appearance and who later files a pleading or motion outside the scope of the limited representation shall be deemed to have amended the limited appearance to extend to such filing.").

151. *See* Fines & Madsen, *supra* note 7, at 966–67; Dalton et al., *supra* note 7, at 11.

152. *Limited Assistance Representation (Unbundling) Training Materials*, MASS. PROB. & FAM. CT. 3–5 (2009) (on file with the South Texas Law Review).

153. *Id.* at 28.

154. *See, e.g.*, N.H. R. FAM. DIV. 1.19(A).

issue must either renegotiate the limited scope fee agreement, seek to amend the scope of the original appearance filed with the court, or firmly and clearly decline involvement.[155]

The second challenge attorney's face is that courts are not necessarily bound by the limited scope contract.[156] Judges are concerned with the overall administration of justice. They strive to manage the docket, are concerned about the interest of all parties involved, and the "public perception" of the litigation process.[157] Even when an attorney stays carefully within the scope of a limited representation appearance, the more extensive the scope and the closer in time the representation continues to the actual trial, the more likely the court will order continued involvement after all limited representation contract obligations have been satisfied.[158]

c. Withdrawing From Limited Scope Representation

Because filing an appearance or any pleading in a matter pending before a tribunal is considered a general appearance—which requires leave of court to withdraw before the completion of the case[159]—jurisdictions that specifically amended their rules to allow for a limited-scope-representation appearance were forced to also promulgate or amend existing rules to allow attorneys to withdraw once the limited tasks or objectives were accomplished.[160] The main reason for seeking limited representation is to limit the cost of legal assistance to those tasks specifically bargained for; this process only works in litigation if the courts recognize the contractual rights of the attorney to withdraw once the attorney's contractual obligations are satisfied.[161] As with other procedural rules regarding limited representation, the procedural rules concerning withdrawal vary from state-to-state, and range from requiring no court involvement to requiring actual judicial oversight.[162] On one end of the continuum are those states that

155. *See Limited Assistance Representation (Unbundling) Training Materials*, *supra* note 152, at 5–6.

156. Sharp v. Sharp, No. 02-74, 2006 WL 3088067, at *10 (Va. Cir. Ct. Oct. 26, 2006) ("[An] attorney's agreement with his client is not binding upon the court where counsel seeks to represent such client before the court.").

157. *See id.* at *9.

158. *See, e.g.*, *id.*

159. *Id.* at *8–9.

160. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 19.

161. *See Limited Assistance Representation (Unbundling) Training Materials*, *supra* note 152, at 2.

162. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 19, 23–25 (citing NEV. 8TH J. DIST. CT. R. 5.28) (permitting lawyers to "merely appear" on behalf of a client pursuant to a limited scope agreement and provide notice of the limitation at the beginning of the hearing); *see also* UTAH R. CIV. P. 75(b) ("[T]he attorney shall file a Notice of

adopted a "de facto" approach.[163] Maine, for example, presumes the representation has ended once the limited scope tasks have been accomplished.[164] Similarly, the Wyoming rule states that "[a]n attorney who has entered a limited entry of appearance shall be deemed to have withdrawn when the attorney has fulfilled the duties of the limited entry of appearance."[165] This type of de facto approach expedites the withdrawal process and best protects the limited scope retainer agreement.[166]

Other jurisdictions involve minimal court oversight by simply requiring that the attorney file a "notice of completion" of the limited scope representation with service to the client and other involved parties.[167] The withdrawal is then entered without the need for court approval.[168]

Some states, however, not only require filing a notice of withdrawal but also allow time to contest the end of representation. This approach opens the door to litigation on the issue and increases the chance for involvement beyond that agreed to between the attorney and client.[169] The rule regulating withdrawal of limited scope representation in family matters in California, for example, requires the attorney to serve the client with an application to be relieved as counsel, stating that the scope of the representation is complete.[170] The attorney must also serve a blank objection form along with the application.[171] Even when no objection is filed and the court issues an order allowing the withdrawal, the attorney must serve the client with a court order giving the client another opportunity to object to the withdrawal.[172] If an objection is made, a hearing

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Limited Appearance . . . . The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice.").

163. A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 23 (emphasis omitted); *e.g.*, ME. R. CIV. P. 89(a).

164. *See* ME. R. CIV. P. 89(a).

165. WYO. DIST. CT. UNIF. R. 102(c).

166. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 21.

167. *Id.* at 23; *e.g.*, FLA. FAM. L.R. PROC. 12.040(c)(1); IOWA R. CIV. P. 1.404(4); WASH. CIV. R. CT. LTD. J. 70.1(b); WASH. SUPER. CT. CIV. R. 70.1(b).

168. A.B.A STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 23; *see, e.g.*, FLA. FAM. L.R. PROC. 12.040(c)(1); IOWA R. CIV. P. 1.404(4); WASH. CIV. R. CT. LTD. J. 70.1(b); WASH. SUPER. CT. CIV. R. 70.1(b).

169. *See* A.B.A STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 25; *see also* ARIZ. R. FAM. L. PROC. 9(B)(2)(b) (providing that if the client does not sign the notice of withdrawal form, the attorney must file a motion stating that the tasks outlined in the limited scope notice are completed; furthermore, the other parties have ten days after service to file an objection to the motion, and if an objection is filed, a hearing may be scheduled).

170. A.B.A STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 25.

171. *Id.*

172. *Id.*

is scheduled.[173] This approach protects the limited scope representation agreement the least, but it may best protect the client from the inappropriate use of unbundled services.[174] As a result of the efforts of the ABA and state courts, a procedural framework for providing limited scope representation in matters involving litigation exists in almost all state court systems.[175]

IV. ACCOMPLISHING THE GOAL OF PROVIDING INCREASED ACCESS TO JUSTICE IN FAMILY MATTERS THROUGH COMPETENT LIMITED REPRESENTATION

The decision to provide limited representation in family matters requires more than just knowledge of the rules that govern the use of these services. As explained, the availability of limited representation does not replace the requirement to provide competent representation.[176] Although the effectiveness of limited representation as a tool for improving access to justice in domestic-relations cases remains unclear, there are lessons to be learned from discussing how such services have been viewed in other civil-litigation areas and what weaknesses or problems have been exposed.

Because providing services that are reasonably necessary to assist a client achieve reasonable objectives is essential to providing competent representation, limited representation cannot be used to exclude these necessary services. If the services excluded are reasonably necessary to attain the client's objectives, competent representation cannot be provided, "regardless of how knowledgeable, skilled, thorough, and prepared the lawyer may be."[177] Likewise, services cannot be excluded in an effort to limit responsibility for not having the skill and knowledge required to perform the essential services: "[A] lawyer may not so limit the scope of the lawyer's representation as to avoid the obligation to provide meaningful legal advice, nor the responsibility for the consequences of negligent action."[178] Basic competency when providing limited services begins with the understanding that even if the client is demanding less, to do so may not

173. *Id.*; *see, e.g.*, CAL. R. CT. 3.36(g); CAL. R. CT. 5.425(e)(4); CAL. R. CT. 5.71 (repealed 2013).

174. *See* A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 64, at 25 (discussing safeguards available to clients subjected to the inappropriate use of unbundled services).

175. *See generally Court Rules*, *supra* note 144 (providing examples of state-court rules related to limited scope of representation).

176. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 187–88 (Bankr. D. Nev. 2013).

177. *Id.* at 189 (citing NEV. RULES OF PROF'L CONDUCT R. 1.1 (2011)); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

178. MODEST MEANS TASK FORCE, *supra* note 55, at 93–94 (quoting Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998) (considering unbundled legal services)).

be in the client's best interest;[179] moreover, it may result in sanctions or other court-ordered punishment, or rise to the level of malpractice and bar discipline.[180]

A. Domestic Relations Is Not an Area to Wander Into

Despite the challenges inherent in handling domestic-relations matters, a financial incentive to provide some assistance in this area exists.[181] Accompanying the changes in family dynamics and family law was an increasing demand for representation.[182] Because of the growing need for assistance with family matters,[183] more attorneys are being drawn into the family law arena.[184] General practice attorneys often include domestic relations as a practice area, believing it can supply a steady source of clientele and income. "Many attorneys believe that family law is a bread and butter practice that they can fall back upon when other practice areas decrease."[185] Although family law litigants may benefit from the availability of lower fees associated with more competition,[186] this benefit must be balanced against the harm that can be caused by attorneys who wander into the family courts lacking the skills and knowledge necessary to practice in today's complex and specialized family law atmosphere. "[A]ttorneys who believe they can 'pick up a divorce or two' underestimate the skills and knowledge required for effective family law practice, with the result that family law practice today represents one of the fields of practice with the highest rates of disciplinary complaints and malpractice actions."[187] This concern is heightened when a client who is already experiencing financial instability seeks only limited representation in order to prevent the cost of litigation from further reducing already dwindling financial resources.[188]

Unbundled legal services can provide an attractive opportunity to attorneys who lack family law expertise to earn fees without finding themselves "in over their heads"—that is, doing more than they are qualified for or more than they agreed to in the contract. Representing a

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179. *See id.*
180. *See* Part IV.A.
181. *See* Fines, *supra* note 17, at 405.
182. *Id.* at 403–04.
183. *See id.* at 405 ("Domestic relations and juvenile caseloads together make up sixteen percent of all non-traffic state court trial cases.").
184. *Id.* at 404–05.
185. *Id.* at 405.
186. *See id.*
187. *Id.*
188. *See* Grossman, *supra* note 8, at 362.

client behind the scenes without the need to file an appearance, or in some jurisdictions to even disclose the assistance, may alleviate the concern of being dragged into litigation.[189] The ability to file a limited representation appearance on a simple issue can be seen as protection against being dragged into more complicated matters. The limited, yet clear, message provided by the courts on the use of limited representation for clients involved in litigation is that the attorney's obligations extend beyond the ethical and procedural rules and beyond the agreement between the attorney and the client.[190]

B. Lessons to Learn From Outside the Family Law Arena

Although little empirical data are available that assess whether limited representation is achieving the goal of providing increased access to justice in the family court,[191] a review of how other courts have analyzed the use of limited representation in other areas involving litigation provides valuable guidance for those considering the use of limited representation to assist litigants achieve their legal objectives.[192] The three examples discussed next involve complex legal matters concerning important and sensitive financial and personal issues. Three themes are consistent: (1) the importance of the initial consultation in ascertaining the client's goals and appropriateness of limited representation; (2) the need for the involvement of experienced attorneys; and (3) the need to discourage attorneys from offering this alternative form of representation for any reason other than to attain or further client objectives.

1. A Federal Court Warns: Competence Is the First Domino[193]

Although the idea of unbundled legal services in federal cases was initially met with skepticism, the use of limited representation has been gaining approval in some federal court proceedings.[194] Attorneys who provide unbundled services by excluding representation in adversarial proceedings, however, still face a high burden when trying to show compliance with competency and other rules.[195] A recent bankruptcy court decision provides a warning for attorneys seeking to stay out of the

189. *See infra* Part V.A–B.
190. *See infra* Part V.A–B.
191. *See* Jennings & Greiner, *supra* note 46, at 826.
192. *See infra* Part IV.B.1–3.
193. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 220 (Bankr. D. Nev. 2013).
194. *Id.* at 183.
195. *See id.* at 183–85; *see also In re* Egwim, 291 B.R. 559, 580–81 (Bankr. N.D. Ga. 2003); *In re* Castorena, 270 B.R. 504, 529 (Bankr. D. Idaho 2001).

courtroom when contracting to provide limited representation.[196] In *In re Seare*, the debtors' attorney was sanctioned for violating several ethical rules and provisions of the Bankruptcy Code by providing a one-size-fits-all approach to assisting debtors.[197] In addition to issuing sanctions against the debtors' attorney, the court ordered that the opinion be published with the goal of deterring other attorneys from inappropriately limiting services in the future.[198]

Using the relevant local competency rule[199] as the foundation, the court provided an in-depth analysis of errors made to support its determination that sanctions were appropriate. The court determined that the attorney excluded representation in adversarial proceedings as a means to accomplish his own objectives rather than his clients' objectives.[200] The debtors sought legal assistance after having been served with a wage garnishment issued in connection with a judgment against the husband-debtor.[201] The judgment was based on a finding that the husband-debtor had committed a "fraud upon the court"[202] by providing false information in a discrimination claim against his employer, a health foundation.[203] The debtors sought the assistance of the bankruptcy attorney with the primary goal of permanently stopping the wage garnishment.[204] At the initial consultation, the debtors signed a nineteen-page, boilerplate retainer agreement.[205] How the initial consultation was actually conducted and the level of involvement, if any, of the attorney was a disputed issue, and one that was central to the court's determination that the attorney had not provided competent representation from day one.[206] At the show-cause hearing, the attorney admitted that he did not personally review the limited representation retainer agreement with the clients, and he could not even provide evidence supporting his one-size-fits-all approach of having a paralegal review the agreements with the client.[207] In fact, the debtors testified that they were put in a room, alone, to go over and sign the

196. *See In re* Seare, 493 B.R. at 227–28.
197. *Id.* at 227.
198. *See id.* at 224–27.
199. NEV. RULES OF PROF'L CONDUCT R. 1.1 (2013); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).
200. *In re* Seare, 493 B.R. at 223–24.
201. *Id.* at 171.
202. *Id.* Note that a judgment based on fraud is generally not dischargeable in bankruptcy. 11 U.S.C. § 523 (2012).
203. *In re* Seare, 493 B.R. at 171.
204. *Id.*
205. *Id.* at 172.
206. *Id.* at 179.
207. *Id.* at 204.

nineteen-page retainer agreement.[208] The boilerplate retainer agreement recited a flat fee for a Chapter 7 case.[209] The fee agreement separated the basic services covered by the flat fee and those that would require additional fees.[210] Both matters involving allegations of fraud and those involving adversarial proceedings were listed under services that would require additional fees.[211] The agreement also listed fraud as "DEBTS THAT DO NOT GO AWAY."[212]

Although the attorney was provided with some information during the initial client intake about the lawsuit that resulted in the wage garnishment,[213] a Chapter 7 bankruptcy petition was filed and the representation proceeded within the limits of the retainer agreement.[214] Even after opposing counsel stated at the meeting of creditors that he would seek to enforce the wage garnishment and announced the intention to pursue adversarial proceedings, the effect of these events on the limits of the representation were never reviewed with the clients.[215] As promised, an adversarial complaint was filed shortly before all other debts were discharged; however, the debtors did not learn that the debt justifying the wage garnishment survived bankruptcy until after they received notice of the discharge of all other debts.[216] The attorney's response to the debtors when they questioned the status of the wage garnishment was particularly troubling to the debtors and the bankruptcy court judge.[217] The debtors were not only informed or "reminded" that a debt based on fraud was not dischargeable, but they also learned for the first time that the attorney had a settlement discussion with counsel seeking to enforce the wage garnishment before the adversarial action was filed.[218] The attorney then informed the clients, relying on the executed retainer agreement, that he would not represent them in the adversarial proceeding.[219] As a result, not only was the debtors' primary objective of permanently stopping the wage

208. *Id.* at 172.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 171–72 & n.6. How much information the clients provided to the attorney during the initial consultation was also disputed. *Id.*
214. *Id.* at 173.
215. *Id.*
216. *Id.*
217. *Id.* at 173–74.
218. *Id.*
219. *Id.* at 174.

garnishment not attained, but the clients were also forced to proceed pro se into an adversarial action in federal bankruptcy court.[220]

The judge began the analysis by discussing the importance of attorneys' fiduciary duties and responsibilities, and that these duties transcend mere technical compliance with contract provisions and rules: "Lawyers are not plumbers. . . . [They] are professionals that owe fiduciary duties to their individual clients, and must continue to represent them even if initially rosy predictions turn sour."[221] The problem in this case, however, was not just what happened after the limited representation began; the problem was created at the time of the initial consultation, or even before the initial consultation, because of the one-size-fits-all approach the attorney took to each bankruptcy case.[222]

The attorney's "first failure—the root cause of his other failings—was to not define the goals of the representation" with respect to these specific clients.[223] This failure was the result of a lack of communication with the clients at the initial intake.[224] The attorney either mistakenly assumed that the obligation underlying the wage garnishment was a medical bill because it was owed to a health services organization, or he negligently assumed the debt was dischargeable and failed to put the clients' objective of eliminating the garnishment before his desire to collect a fee.[225] If the desire for the fee was placed above the needs of the clients, the attorney violated his fiduciary duties and did not provide competent representation.[226] The court reasoned: "[A]ttorneys are professionals. Individuals place their financial lives, and more, in their attorney's hands. Attorneys have ethical obligations to their client regardless of the economic pressures which might exist."[227] If the attorney simply misunderstood the clients' objectives or the facts, the attorney still violated his ethical obligations because "[i]f the attorney and the client have different understandings of the goals of representation, viewed objectively, then the lawyer has not fulfilled the duty of competence."[228]

Once the lack of competency knocked over the "first domino,"[229] other ethical violations were almost certain to occur.[230] Because the retainer

220. *Id.*
221. *Id.* at 181–82.
222. *Id.* at 190, 227.
223. *Id.* at 190.
224. *Id.*
225. *Id.* at 190–91.
226. *See id.* at 227.
227. *Id.* at 182 (alteration in original) (quoting *In re* Castorena, 270 B.R. 504, 530–31 (Bankr. D. Idaho 2001)).
228. *Id.* at 190.
229. *Id.* at 220.

agreement did not provide for services that would assist the clients in obtaining their primary goal, providing limited representation was neither reasonable nor based on informed consent; thus, the limited representation retainer agreement could not comply with Model Rule 1.2(c).[231] Viewing the reasonableness of the services at the time of the retainer agreement,[232] the attorney could not have reasonably concluded that the services contracted for, which excluded an almost inevitable adversarial proceeding, would be useful in assisting the clients in attaining their objective.[233] Due to the complex legal nature of bankruptcy proceedings, which include issues governed by both federal and state law and involve "a complicated array of forms and . . . decisions," the attorney faced a high burden to show that the limitation was reasonable.[234] The attorney could not meet this burden.[235] Likewise, the attorney was unable show that both requirements for obtaining valid informed consent were met.[236] First, by failing to adequately investigate the nature of the debt associated with the wage garnishment (or worse, simply ignoring it), the attorney could not have communicated the necessary information to exclude adversarial proceedings from the representation's scope in a manner consistent with informed consent.[237] Because the nature of the clients' problem was of high emotional and financial importance, the attorney could not simply rely on a boilerplate agreement to communicate the most relevant and crucial information for the clients to understand.[238] Second, because the attorney could not show that the clients were adequately informed of the risks associated with excluding adversarial proceedings, he could not show that the clients understood these risks.[239] The boilerplate agreement was again viewed with skepticism: "[I]nitialing and signing [the attorney's] *contract of adhesion* . . . did not sufficiently demonstrate that the [d]ebtors understood the import of proceeding without representation in adversary proceedings."[240] Without this understanding, any consent given by the clients was not valid.[241] *In re Seare* thus provides important lessons on what not to do for attorneys

230. *See id.*
231. *Id.* at 188–89; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2013).
232. *See supra* Part III.B.
233. *See In re* Seare, 493 B.R. at 191–92; *see supra* Part IV.B.1.
234. *See In re* Seare, 493 B.R. at 195.
235. *Id.* at 196.
236. *Id.* at 203–04.
237. *See id.* at 203.
238. *See id.* at 194–95.
239. *Id.* at 203–04.
240. *Id.* at 204 (emphasis added).
241. *Id.* at 203.

practicing in potentially lucrative, yet complicated, areas of the law who are considering the use of limited representation.

2. *Limited Representation Does Not Mean Partial Representation*

As seen in *In re Seare*, limited representation creates an attractive opportunity for attorneys to capitalize on offering services to those of limited means during tough economic times.[242] State-court judges are faced with an increasing number of pro se litigants defending themselves against creditors in state courts, and their experiences can offer some insight into the problems associated with litigants receiving some attorney assistance behind the scenes while proceeding in court on their own. Two trial court decisions from Rhode Island remind attorneys that limited representation cannot be used to carry out tasks that could not have been ethically or legally done when providing full representation, and that judges are not limited by the ethical rules when assessing attorney misconduct.[243] "[L]imited representation does not equate to partial representation."[244]

Rhode Island courts have held that "ghostwriting" as a means of providing limited representation, violated Rule 11 and ethical rules.[245] Much has been written about the efficacy of allowing ghostwriting to assist litigants in state and federal court, but the focus here is on the important lessons that can be learned from the reasoning in two decisions involving legal services provided by the same debt settlement company.[246]

In *HSBC Bank Nevada, N.A. v. Cournoyer*, the court held that even though the attorney's actions preceded the holding in the second case—that using limited representation as a justification for ghostwriting was improper— the attorney should have known that her actions violated clear, established rules.[247] As a result of the judge's colloquy when approving a settlement agreement between a creditor bank and the debtor who appeared pro se, the judge discovered the debt settlement company's involvement.[248] Particularly troubling to the court was the involvement of an attorney who prepared all of the debtor's pleadings, including an answer with three defenses, an objection to the motion for summary judgment, and a seven-

242. *See supra* Part IV.B.1.

243. *See* HSBC Bank Nev., N.A. v. Cournoyer, C.A. No. PC–11–0194, at 3–4 (R.I. Super. Ct. Jan. 17, 2013), http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-0194.pdf; Card v. Pichette, C.A. No. PC 2011-2911, at 10 (R.I. Super. Ct. July 26, 2012), http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-2911.pdf.

244. *Pichette*, at 11.

245. *Id.* at 1; *see also* R.I. SUPER. CT. R. CIV. P. 11.

246. *See Cournoyer*, at 3–4; *Pichette*, at 2.

247. *Cournoyer*, at 27.

248. *Id.* at 2–4.

page memorandum supporting the objection.[249] All of the pleadings were signed by the debtor pro se.[250] At the settlement hearing, the debtor informed the judge that he believed he was represented by counsel even though he had never met his attorney.[251] He added that he was surprised that his attorney was not present in court.[252] At a show-cause hearing in which the attorney was ordered to address whether her actions violated Rule 11 of the Rhode Island Rules of Civil Procedure,[253] the attorney argued that she was providing limited representation as allowed by Rhode Island Supreme Court Rules of Professional Conduct (Rhode Island Rules) Rule 1.2(c), and that she acted in accordance with the "mainstream consensus" that there is "no obligation to disclose . . . ghostwriting activities."[254] In addition, she argued that she spoke to bar counsel prior to her involvement, and that "she had expressly got[ten] his blessing . . . in order to be able to assist these people."[255] Finally, she argued that even if offering such services violated the Rhode Island Rules, she should not be sanctioned because, at the time she provided the services, there was no known prohibition against "ghostwriting."[256]

Relying on the court's equitable powers and inherent authority to impose sanctions to protect the integrity of the court system against fraud and deceitful actions, the judge exercised this power to punish the attorney and to deter future attorney misconduct.[257] This power was in addition to, and not subject to, the attorney disciplinary board process. "Whether a practice is permitted in the abstract by the [Rhode Island Rules],

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249. *Id.* at 2–3.
250. *Id.* at 2.
251. *Id.* at 3.
252. *Id.*
253. R.I. SUPER. CT. R. CIV. P. 11. Rule 11 states in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, any appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.
254. *Cournoyer*, at 6–7.
255. *Id.* at 4 (alterations in original) (internal quotation marks omitted).
256. *Id.* at 7.
257. *Id.* at 13, 27.

enforcement of which may fall outside the scope of this [c]ourt's authority, has no bearing on whether that practice as applied in an actual litigation setting violates Rule 11 of the Rules of Civil Procedure."[258] Indicating that limited representation may be a valuable tool in some cases, the court distinguished the attorney's conduct from that of attorneys using limited representation to offer pro bono services to assist those in need.[259] The attorney was associated with an industry that managed billions of dollars of consumer debt for profit.[260] The judge noted that debtors are often harmed, rather than helped, by such services.[261] The court held that even if ghostwriting was permitted by the Rhode Island Rules, the court still had authority to assess the appropriateness of its use under the court's procedural rules.[262]

The court started its assessment by examining the limited scope retainer agreement itself and found that the attorney did not specifically exclude the obligation for the attorney to attend court hearings.[263] In fact, the agreement listed attending hearings as a service that may be provided "at [the] attorney's discretion."[264] Citing the obligation to provide competent representation even when providing limited representation, the court found that this provision likely violated both Rhode Island Rule 1.2(c) and the competency rule because it was unreasonable.[265] The court reasoned that it was unlikely that Rhode Island Rule 1.2(c) could be read to condone a limited representation agreement that allows the attorney to determine, at her discretion, whether counsel would attend court hearings.[266] Such a reading would not be consistent with the attorney's duty to provide competent representation.[267]

The domino effect articulated by the federal bankruptcy court in *In re Seare* occurred here as well.[268] Even though the court's inherent power to sanction attorneys for procedural-rule violations was viewed independent of the rule of professional conduct—and thus the court need not follow the

258. *Id.* at 13–14.
259. *See id.* at 7.
260. *Id.* at 8.
261. *Id.* In fact, the debtor in the case discussed here eventually filed for bankruptcy. *Id.* at 19, 24.
262. *Id.* at 13.
263. *Id.* at 15.
264. *Id.* at 14.
265. *Id.* at 14–15.
266. *Id.* at 14.
267. *Id.* at 15.
268. Dignity Health v. Seare (*In re* Seare), 493 B.R. 158, 220 (Bankr. D. Nev. 2013).

mainstream by allowing ghostwriting—violations of the ethical rules further supported Rule 11 sanctions.[269]

Once the client's goals were not clearly defined and the services contracted for were not narrowly tailored to attain those goals, the violation of other rules was certain to follow.[270] Because of the leniency given to pro se litigants in court proceedings and the unfair advantage these litigants gain when they submit pleadings prepared by undisclosed counsel,[271] failing to disclose the attorney's involvement was seen as a misrepresentation to the court that was prejudicial to the overall administration of justice and therefore violated Rhode Island Rule 8.4(c).[272] Further, the failure to disclose substantial assistance was viewed as a violation of the duty of candor toward the tribunal as required by Rhode Island Rule 3.3(c).[273] Specifically, the attorney violated Rhode Island Rule 3.3 by failing to disclose her involvement and making a "conscious misrepresentation" to the court by instructing the client to appear pro se, thus being dishonest with the court.[274] In addition, the significant delay in addressing the client's debt issues caused by a one-size-fits-all debt collection practice was seen as a violation of Rhode Island Rule 3.2's duty to "expedite litigation consistent with the interest of the client."[275]

The court found that even though the ABA endorsed ghostwriting activities, this was an unsettled area of law in state courts and certainly one that had not been addressed by Rhode Island state courts at the time the attorney provided these services to the client and other litigants.[276] The court found, therefore, that the attorney had "fair warning" that offering these services was inappropriate.[277] The court reasoned that Rule 11 was not new, and even the ethical rule governing the use of limited representation did not excuse compliance with all other ethical rules.[278] Monetary sanctions were ordered.[279]

While the attorney in *Cournoyer* was sanctioned for the use of ghostwriting as a form of limited representation, even absent a clear prohibition by the state court or disciplinary board, the holding in the

269. *See Cournoyer*, at 15.
270. *See id.* at 14.
271. *Id.* at 17. This is an issue addressed in several court decisions and other scholarly articles, but not the focus here.
272. *Id.* at 20–21; *see also* R.I. RULES OF PROF'L CONDUCT R. 8.4(c) (2013).
273. *Cournoyer*, at 20; *see also* R.I. RULES OF PROF'L CONDUCT R. 3.3(c) (2013).
274. *Cournoyer*, at 24.
275. *Id.* at 19; R.I. RULES OF PROF'L CONDUCT R. 3.2 (2013).
276. *Cournoyer*, at 24–25.
277. *Id.* at 25–26.
278. *Id.* at 26–27.
279. *Id.* at 27.

second case, *Card v. Pichette*,[280] provided clear notice to attorneys within the state that the failure to disclose substantial assistance given to litigants who appear pro se violates Rule 11, as well as the ethical rules.[281] The defendant in *Pichette* was receiving assistance from the same debt settlement company involved in *Cournoyer*.[282] In *Pichette*, counsel for the plaintiff, the creditor, informed the court that despite the fact that the defendant appeared pro se and signed all pleadings pro se, an attorney prepared all of the defendant's pleadings.[283]

Pichette reinforces the lesson that limited representation cannot further the goal of providing increased access to justice unless the client's needs and the goals of the representation are clearly identified at the outset.[284] The scope of the representation must be carefully tailored to attain the client's goals, not those of the attorney.[285] In *Pichette*, at a hearing to determine whether the attorney providing the assistance violated ethical and procedural rules, the attorney admitted to preparing the pleadings in this case as well as several other cases then pending in state court.[286] The pleadings filed in all of these cases were "virtually identical."[287] The defendant testified that the only contact between the defendant and the attorney was a telephone conversation prior to the hearing before the court.[288] When questioned by the judge, the defendant acknowledged that he did not understand many of the defenses or claims included in the pleadings.[289] This indicated that not only were the pleadings prepared by counsel (rather than the defendant), but the defendant was also not involved in the process or the decision-making regarding how the case would proceed.[290]

The court distinguished limited representation from partial representation.[291] While services to clients can be reduced to serve specific,

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280. Card v. Pichette, C.A. No. PC 2011-2911 (R.I. Super. Ct. July 26, 2012), http://www.courts.ri.gov/Courts/SuperiorCourt/DecisionsOrders/decisions/11-2911.pdf. This decision was issued prior to the decision in *Cournoyer*, but was not binding on *Cournoyer* because the attorney's actions in *Cournoyer* preceded the *Pichette* decision. *Cournoyer*, at 9 n.5.

281. *Pichette* at 1.

282. *Id.* at 2; *Cournoyer*, at 3–4.

283. *Pichette*, at 2. These pleadings included an answer with affirmative defenses and counterclaims, an objection to a motion to dismiss, and a memorandum of law. *Id.*

284. *See* MODEST MEANS TASK FORCE, *supra* note 55, at 26.

285. *See id.* at 57.

286. *Pichette*, at 3–4. The attorney was unable to state how many other cases he provided similar services for in the past. *Id.* at 4.

287. *Id.* at 4.

288. *Id.* at 6.

289. *Id.* at 6–7.

290. *See id.* at 11.

291. *Id.*

well-defined needs of a client, services essential to attaining a goal cannot be carved out of the bundle.[292] Because the pleadings and other documents filed with the court were inextricably woven together with the litigation, completely divorcing the two resulted in partial representation, not limited representation. "[Rhode Island] Rule 1.2(c) cannot be interpreted in such a way as to allow an attorney to provide . . . her client with a small piece of the legal puzzle and then walk away in anonymity."[293]

The court in *Pichette* also used the ethical rules to guide its analysis of whether the attorney's representation violated a procedural rule.[294] The court cited the duty of candor and the prohibition against making false misrepresentations to the court to justify sanctions.[295] Then, taking this justification one step further, the court indicated that the debt settlement company was exploiting the ability to use limited representation to gain an "unfair, tactical advantage" in court proceedings.[296]

The sanctions imposed in *Pichette* extended beyond Rule 11 sanctions against the individual attorney and the individual case involved.[297] The judge referred what appeared to be meritless counterclaims to the state disciplinary board to determine what, if any, disciplinary action should be imposed against the attorney and the debt settlement company.[298] The matter was also referred to the state attorney general's office to determine whether the actions of the debt settlement company and the out-of-state attorney were illegal.[299] The power of a judge overseeing a case cannot be underestimated, and a judge's duty to protect the administration of justice can be a valuable tool in both exposing and punishing the inappropriate use of limited representation.[300]

3. *A Massachusetts Study Involving Eviction Proceedings Provides Guidance for Assessing the Appropriate Use of Limited Representation*

The importance of a careful assessment of whether limited representation can assist clients in achieving positive outcomes, and the need for involvement of experienced counsel, is discussed in the findings of

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292. *See id.*
293. *Id.*
294. *Id.* at 9.
295. *Id.* at 10; *see also* R.I. RULES OF PROF'L CONDUCT R. 3.3 (2013); R.I. RULES OF PROF'S CONDUCT R. 8.4(c) (2013).
296. *Id.* at 16.
297. *See id.* at 16–17.
298. *Id.* at 17 n.18.
299. *Id.* at 18.
300. *See id.* at 16–17.

a study conducted in a Massachusetts district court involving litigants facing a summary eviction proceeding.[301] In this study, the authors conducted a randomized trial of carefully selected litigants organized into two groups.[302] The first group, the control group, received only limited or "unbundled" assistance.[303] Limited assistance was provided to this group through both informational sessions, such as reviewing the summary eviction process, and limited litigation assistance, such as help preparing pleadings or discovery requests.[304] The second group, the treated group, accepted an offer of full representation by a legal services attorney.[305] A comparison of the outcomes for the two groups showed an "extraordinary" difference in the positive effect of full representation, as opposed to only limited representation, on at least two tracked outcomes: (1) possession of the housing unit, and (2) the financial consequences associated with ligation.[306] Almost two-thirds of those who did not have full representation lost possession of their housing unit, while only approximately one-third of those with the traditional attorney-client relationship lost possession.[307] Likewise, those who were represented during the entire proceeding realized more positive financial outcomes, saving on average over nine months' rent, whereas the control group saved on average less than two months' rent.[308] Even though this study analyzed the differences in outcomes from those receiving only limited assistance and those receiving traditional full-service representation by legal aid providers at no cost, the suggested findings provide guidance for assessing the appropriateness of offering limited representation by private attorneys.[309] Specifically, the authors addressed two factors that are essential for the appropriate use of limited representation in family matters: (1) careful and in-depth screening to determine representation needs, and (2) the involvement of experienced and competent attorneys.[310]

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301. *See* Greiner et al., *supra* note 4, at 903.
302. *Id.*
303. *Id.*
304. *Id.* at 917–18.
305. *Id.* at 908.
306. *Id.* at 903, 937.
307. *Id.* at 936.
308. *Id.* at 936–37.
309. *See generally id.* at 936–48 (detailing several possible explanations for the results of the district court's study).
310. *See id.* at 937–38, 945–46.

a. Careful Screening to Rule Out the Need for Full Representation

The early face-to-face screening of potential participants to assess the need for full representation was seen as one potential reason for the higher incidence of positive outcomes in the treated group.[311] Each potential participant in the study was interviewed in person, with some interviews "lasting an hour or more."[312] These findings support the need to screen cases carefully in which the client seeks only limited services. The findings of the study further suggest important areas of inquiry and assessment in the initial intake.[313]

Careful screening can identify matters that involve complicated legal issues, which may indicate the need for full representation.[314] The authors identified matters involving complicated legal issues, such as those that implicate multiple sources of law, "including state statutes, state common law, state regulations, federal statutes, and federal regulations."[315] A complex legal issue was viewed as one involving "multiple provisions or doctrines within each source of law," and the need to introduce evidence from third parties.[316] As discussed above, family law matters often involve similarly complicated legal issues.[317]

Also part of the initial intake was the assessment of a client's ability to represent herself adequately in court while receiving only limited assistance outside the courtroom.[318] The inability to do so indicated the need for full representation because pro se litigants could not rely on judges in a busy court system to obtain the information needed "to reach a legally correct judgment."[319] Judges often rely on attorneys to educate them on the relevant facts and law, further increasing the likelihood of a positive outcome for litigants represented by counsel.[320] As discussed above, family courts, along with housing courts, are among the courts that have seen a dramatic increase in filings during these tough financial times.[321]

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311. *Id.* at 937.

312. *Id.* at 938. The authors "hypothesized" that the reason that legal representation had such a small effect on the outcome of a matter in a previous study was partially due "to a service provider's nonspecific and client-initiated intake system" and the uncertainty of assessing through a brief telephone conversation whether the outcome of a case could be altered by the offer of full representation. *Id.* at 937–38.

313. *Id.* at 938.

314. *Id.*

315. *Id.* at 942.

316. *Id.*

317. *See supra* Part IV.A.

318. Greiner et al., *supra* note 4, at 937.

319. *See id.* at 942–43.

320. *Id.* at 943.

321. *See supra* Part IV.A.

Careful screening should also include an assessment of what factual information and documentation will be necessary to obtain a positive outcome.[322] This study reinforces the importance of carefully assessing all possible claims and defenses when defining the attorney–client relationship.[323] The legal aid attorneys who provided full representation to the treated group conducted substantial pretrial factual investigations that would likely not have been conducted in a short client interview offered through limited assistance programs.[324] These pretrial factual investigations often unveiled the grounds for claims or defenses against the landlords that placed the litigants in a much better position to obtain a favorable outcome.[325] Basic competence when providing limited representation requires an investigation into the facts to determine what possible claims or defenses exist.[326] It is only when a potential client is informed of the existence of these possible legal issues that she can give informed consent to limit representation.[327]

b. Experience Makes a Difference

The findings of this study indicate that obtaining legal services provided by attorneys experienced in the applicable field of law will increase the likelihood of obtaining a favorable outcome.[328] The authors list their sixth possible explanation for the higher incidence of positive outcomes in the treated group as being the "Model of Service Delivery."[329] The attorneys who provided full representation in the study were specialists in poverty law, had up to thirty years' experience in litigating housing issues, and spent most of their time in courts that dealt with housing issues.[330] To explain the results of the study, the authors hypothesized that "specialists with long experience in an area of law . . . might produce better case outcomes for potential clients than nonspecialists or those with less experience."[331] Taking their analysis another step further, the authors questioned the propriety of private attorneys offering free legal services to litigants if the attorney providing the services has little or no experience in

322. *See* Greiner et al., *supra* note 4, at 944–45.
323. *See id.* at 945.
324. *Id.*
325. *See id.* For example, a pretrial investigation by the legal aid attorneys found errors in Section 8 income calculations, possible health department violations, and "cross-metering" or overcharging for utilities. *Id.* at 945 & n.136.
326. *See* MODEST MEANS TASK FORCE, *supra* note 55, at 94.
327. *See supra* Part III.B.
328. *See* Greiner et al., *supra* note 4, at 945–46.
329. *Id.* at 945.
330. *Id.* at 946.
331. *Id.* (footnote omitted).

the area.[332] The authors noted that these well-intentioned attorneys seeking to provide free assistance in an unfamiliar area of the law may better serve the goal of providing increased access to justice through donating funds to a legal aid program or to an attorney who can provide experienced and competent representation.[333] As these authors suggest, increased access to justice for litigants with family law issues who cannot afford full representation will not be accomplished by obtaining the limited services of a well-intentioned family law outsider who sees the opportunity to collect some fees without being dragged into complicated cases.[334]

V. INCREASING OPTIONS FOR LITIGANTS THROUGH LIMITED REPRESENTATION WITHOUT SACRIFICING OUTCOMES

The use of unbundled legal services in family law is here to stay.[335] Proponents of its use view limited representation as a necessary component of a family law practice, and its use is predicted to grow in the future.[336] Simply applying the definition of competency when assessing the appropriateness of the use of limited representation in family matters can further the goal of using such services to increase access to justice. If skill is defined as a trait acquired through training and experience, and judged by the complexity of the matter involved,[337] then a system-wide approach can be taken to ensure that those receiving limited representation in our family courts are being assisted by competent counsel, and that the representation is tailored to attain the client's objectives. This approach begins with a careful assessment of the current use of limited representation in family matters involving litigation and efforts to discourage its use when it is not furthering the goals and objectives of the litigants. At the same time, experienced family law attorneys should be encouraged to offer these services when appropriate. Finally, educating those interested in stepping into the family law arena about the realities of the family law practice and the appropriate use of limited representation can further the goal of using such services as a way to increase access to justice in family court.

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332. *Id.* at 946–47.
333. *Id.*
334. *See id.* at 946.
335. Mosten, *supra* note 51, at 16.
336. *Id.* at 15–16.
337. *See supra* Part II.A.

A. *Assessing the Appropriate Use of Limited Representation in Domestic-Relations Matters*

One lesson that can be learned from the examination of how limited representation has fared in other civil litigation areas is the important role the trial judge can play in assessing the appropriateness of the limited services being provided.[338] This assessment should occur both when a limited appearance form has been filed and when the use of substantial assistance behind the scene is discovered in court proceedings.[339] Federal and state judges have already sent a clear message that when pro se litigants are receiving substantial assistance from attorneys, the attorneys are not shielded by Model Rule 1.2(c) or its state counterpart.[340] Inexperienced attorneys and those seeking to use limited representation to further their own personal gain have, when questioned, been exposed—and sanctioned.[341] The use of sanctions for the inappropriate use of limited scope representation discourages inexperienced attorneys from offering services that do not advance client objectives.[342]

Family court judges have frequent contact with litigants. Even when settlement is reached, a judge must often approve the agreements.[343] As seen with other federal and state cases, the existence of substantial legal assistance behind the scenes is usually evident.[344] Once the use of limited assistance is identified and disclosed through a limited appearance or by asking questions of the pro se litigants, family law judges can, and should, use their power to assess whether its use is in accordance with the ethical and procedural rules and, most importantly, if it is in the overall best interest of the litigant.[345]

B. *Encouraging Experienced Litigators to Provide Services*

If efforts to assess the competency of those providing limited representation in family matters are successful, there may be a shortage of experienced litigators available to provide limited services when appropriate. Deterring inexperienced attorneys from providing these services may actually provide an incentive for experienced family law attorneys to fill the gap. Experienced family law attorneys may view the

338. *See supra* Part IV.B.
339. *See supra* Part III.B.2.c.
340. *See supra* Part IV.B.2.
341. *See supra* Part IV.B.2.
342. *See supra* Part IV.B.2.
343. *See* Lerner v. Laufer, 819 A.2d 471, 482–83 (N.J. Super. Ct. App. Div. 2003).
344. *See supra* Part IV.B.
345. *See supra* Part IV.B.

efforts to prevent inexperienced attorneys from providing limited representation as an acknowledgment of the importance of their profession and the high level of difficulty associated with their practice area.

When experienced and competent lawyers are involved, they should be allowed to control, along with their client, the scope of the representation.[346] Judges, regardless of the delay and frustration pro se litigants can cause to the docket, must abide by the court rules allowing an attorney to automatically withdrawal once the limited tasks are complete or the limited issues are resolved.[347]

Massachusetts has instituted a program in which family law attorneys who complete training in the use of limited representation become qualified and can then enjoy this hands-off approach.[348] The attorney becomes qualified as a Limited Assistance Representation Attorney by completing a self-training program for limited scope representation.[349] Once the attorney is deemed qualified, not only can she file a limited scope appearance but the attorney can also automatically withdraw once the limited services are completed by filing a notice of withdrawal of limited appearance.[350] If there is disagreement as to whether the limited representation is complete, the court "cannot intercede."[351] The information materials provided to courts, attorneys, and clients state that "[i]t is incumbent on an attorney to draft and execute a clear and unambiguous limited representation agreement . . . which specifically defines when the attorney will appear and withdraw. If the client and attorney disagree . . . they should resolve the matter pursuant to the terms of that agreement."[352] As an added incentive for completing the training, qualified attorneys are invited to add their name to the list of Limited Assistance Representation Attorneys maintained by the court and posted on the court's website.[353] This opportunity provides private attorneys with the ability to increase income by expanding their client base in their

346. *See* Jennings & Greiner, *supra* note 46, at 826–28.

347. *See id.* at 848.

348. *See In re: Limited Assistance Representation*, MASS. SUP. JUDICIAL CT. 1–2 (Apr. 10 2009), http://www.mass.gov/courts/docs/sjc/docs/rules/limited-assistance-representation-order1-04-09.pdf.

349. *Id.*

350. *Id.* at 2.

351. *Limited Assistance Representation (LAR) Frequently Asked Questions for Judges, Court Personnel and Attorneys*, BOS. MUN. CT. DEP'T 2, http://www.mass.gov/courts/docs/courts-and-judges/courts/boston-muncipal-court/lar-faq-judges-attorneys.pdf [hereinafter *LAR Frequently Asked Questions*] (last visited July 4, 2014).

352. *Id.*

353. *Instructions to Attorneys Completing Self Qualification*, COMMONWEALTH MASS. 1, https://web.archive.org/web/20140617130713/http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/upc/documents/instructions-self-certification.pdf (last visited July 4, 2014).

area of expertise.[354] The Massachusetts Probate and Family Court Limited Assistance Representation program provides an example of how to encourage experienced attorneys to offer limited representation; the training materials provide an example of how to address those areas of concern identified by courts in other civil litigation areas.[355]

C. *Limited Scope Representation Training*

Attorneys providing limited representation and judges dealing with litigants receiving only limited assistance should be trained to ensure that its use is accomplishing the goal of increasing access to justice. The training materials for the Massachusetts Probate and Family Court Limited Assistance Representation program seek to accomplish this goal.[356] The self-training materials explicitly state that the ethical obligation to provide competent representation is not waived when providing limited assistance.[357] Additionally, attorneys are warned not to view limited representation as a means to gain family law experience. Indeed, the training materials instruct: "Work within your expertise. . . . Taking a case for the earning experience is unwise in limited representation. . . . It takes significant expertise in family law to . . . give good counsel and avoid liability."[358]

The training materials emphasize the importance of the intake process in determining whether limited assistance is appropriate.[359] The materials provide a detailed discussion of what should be covered in the initial intake and include sample intake forms.[360] The materials discourage the use of boilerplate agreements and encourage the use of fee agreements specifically tailored to the needs of each client.[361] In order to further discourage a one-size-fits-all approach, a list of "Best Practices" warns attorneys not to provide forms to a client without assisting or reviewing them with the client.[362]

Four sample discussions of intake interviews with possible ending scenarios are provided to exemplify the issues that may arise during the

354. *See id.* at 3.
355. *See LAR Frequently Asked Questions*, *supra* note 351, at 1.
356. *Limited Assistance Representation (Unbundling) Training Materials*, *supra* note 152, at 2.
357. *Id.* at 3.
358. *Id.* at 37.
359. *Id.* at 5.
360. *See id.* at 7, 50.
361. *See id.* at 4.
362. *Id.* at 36, 43–44.

initial interview.[363] The sample intake discussions include tips for avoiding the "unreasonable client" and identifying "litigation lifers," neither of whom are appropriate recipients of limited assistance.[364] The samples also present scenarios in which providing limited representation would be "unreasonable" because the client is unable to handle the balance of the tasks on her own,[365] and when the attorney will not be able to obtain the client's informed consent because of the client's inability to understand the risks associated with limited representation.[366] By providing incentives for experienced family law attorneys to be trained and involved in providing limited representation, those for whom these services are most appropriate can be provided access to justice.

D. Training for Future Lawyers

Neither the need for legal assistance with family law matters nor the financial barriers to full representation are likely to recede in the future. In addition, courts will probably continue to accept the appropriate use of limited representation and embrace it as a means of accomplishing the administration of justice. Because of this, law school students should be exposed to both the appropriate use of limited representation and the complex and changing nature of family law.[367] Limited representation, its related ethical and procedural rules, and necessary client management skills should be included as part of the law school curriculum.[368] The appropriate use of limited representation can be explained and explored as a means to address the system-wide concerns caused by the pro se phenomenon as well as the system-wide responsibility to increase access to justice to those in need.[369] At the same time, in addition to the traditional family law curricula, domestic-relations courses should identify family law as an area that requires an interdisciplinary approach—a broad base of legal knowledge that extends beyond traditional family law doctrine to interpersonal, interviewing, and client management skills.[370] Just as with mediation and collaborative lawyering, students interested in practicing in the family law area should graduate from law school with some exposure to the skills that

363. *Id.* at 7–15.
364. *Id.* at 14–15.
365. *See id.* at 15–17.
366. *Id.* at 29.
367. *See* J. Herbie DiFonzo & Mary E. O'Connell, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 525 (2006).
368. *See id.* at 535.
369. *See id.* at 534–35.
370. *See id.* at 545.

are central to offering limited representation.[371] By exploring the options for providing services to those who cannot afford full representation, students can be encouraged to enter the legal profession with a desire to work toward providing increased access to justice. Whether through individual efforts by providing pro bono assistance or limited representation, or through involvement in the policymaking process, future attorneys should view increased access to justice to those in need as an attainable reality.

VI. CONCLUSION

Limited scope representation is a valuable tool for providing services to those who cannot afford full representation but are not eligible for government assistance because most family law proceedings are civil cases.[372] These litigants, however, are entitled to expect the same quality of representation as those who can afford to contract for full representation. The use of limited representation will continue to expand in litigation and, as it does, its successes will be praised, and its failures will be exposed. Family law is an area in which litigants can be helped through the appropriate use of limited representation, but it is also an area in which litigants can be hurt when these services are inappropriate. For this reason, a system-wide approach is necessary to ensure that these services are only offered by competent and experienced family law attorneys.

371. *See id.* at 525.

372. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that a constitutional right to appointed counsel at public expense exists in serious criminal cases), *abrogated in part by* Scott v. Illinois, 440 U.S. 367 (1979).