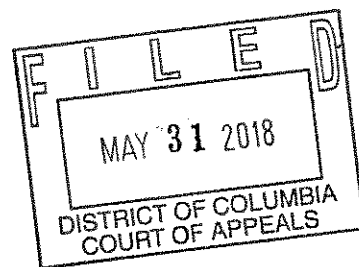


**District of Columbia
Court of Appeals**



No. M-260-18

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, Thompson
Beckwith, Easterly, and McLeese, Associate Judges.

NOTICE
(FILED – May 31, 2018)

In response to a proposal from the D.C. Bar, the court is considering whether to amend D.C. Rules of Professional Conduct 1.2 relating to limited-scope representation. Memoranda explaining the amendments proposed by the Bar are attached. The court specifically invites interested parties to address whether the court should adopt the Bar’s proposal or the approach reflected in the corresponding American Bar Association model rule.

This notice is published to provide interested parties an opportunity to submit written comments concerning the proposals under consideration. Comments must be submitted by July 31, 2018. Comments may be submitted electronically, to rules@dcapeals.gov, or submitted in writing to the Clerk, D.C. Court of Appeals, 430 E Street, N.W., Washington, DC 20001. All comments submitted pursuant to this notice will be available to the public.



D I S T R I C T O F C O L U M B I A B A R

April 18, 2017

The Honorable Anna Blackburne-Rigsby
Chief Judge
District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Dear Chief Judge Blackburne-Rigsby:

On behalf of the District of Columbia Bar, I am pleased to transmit to you for the Court's consideration proposed amendments to D.C. Rule of Professional Conduct 1.2 (Scope of Representation). As explained in the materials that accompany this letter, the Bar believes that these recommendations will improve all legal representations by requiring clarity in the scope and objectives of every representation at its outset, and will in particular provide better guidance to lawyers who wish to provide limited scope legal services to the increasing number of clients in the District who need them.

The proposed amendments to Rule 1.2 are included in the enclosed report, *Proposed Amendments to D.C. Rule of Professional Conduct 1.2* ("January 2015 Draft Report"), of the District of Columbia Bar's Rules of Professional Conduct Review Committee ("Rules Review Committee" or "Committee"). Clean and red-lined versions of the proposed amendments are attached to this letter, and are also included in pages 13 to 19 of the January 2015 Draft Report.

On December 12, 2016, the Board of Governors voted to approve the proposed amendments for submission to the Court. The Board also approved a recommendation of the Rules Review Committee to add clarifying language to Comment [1] of Rule 1.16 (Declining or Terminating Representation) consistent with the changes to Rule 1.2. This recommendation is explained in the Committee's *Final Supplemental Report to the January 2015 Draft Report on D.C. Rule 1.2* ("September 2016 Final Supplemental Report"), which is also included in these materials.

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Chief Executive Officer

Cynthia D. Hill
Chief Programs Officer

A summary of the proposed amendments and the work of the Rules Review Committee is set forth below.

I. Background

The impetus for considering changes to D.C. Rule 1.2 and its Comments was the transmittal of a report to the D.C. Bar from the Limited Scope Working Group (“Working Group”), a joint project of the D.C. Access to Justice Commission and the D.C. Bar Pro Bono Center. In April 2013, after a year of study, the Working Group issued a report recommending action by the Superior Court of the District of Columbia, the D.C. Bar, and prospective limited scope lawyers and clients to help increase access to justice through the provision of limited scope services to underserved communities.¹

Because the Working Group report included a recommendation seeking a revision to the D.C. Rules of Professional Conduct, in May 2013 then-Bar president Thomas S. Williamson, Jr. referred the report to the Rules Review Committee² for its consideration and recommendations. In June 2013 the Rules Review Committee appointed a subcommittee to consider whether to recommend amendments to Rule 1.2.

In November 2014 the Rules Review Committee concluded its review of proposed amendments to D.C. Rule 1.2. The Committee’s review, analysis, and recommendations are set forth in the January 2015 Draft Report.

A request for public comment on the January 2015 Draft Report was published on the Bar’s website for a 45-day comment period from

¹ The Limited Scope Working Group April 2013 Report, which includes its proposed revisions to Rule of Professional Conduct 1.2(c) and Comments, is attached to the Rules Review Committee’s January 2015 Final Draft Report.

² In establishing the Rules Review Committee as a standing committee in 1994, the Board of Governors charged it with responsibility for the on-going review of the D.C. Rules of Professional Conduct. On its own initiative, or upon request by the Court, Board, Bar members, or the public, the committee examines a particular rule or rules and may make recommendations for changes to the Board of Governors. The committee also regularly reviews changes to the ABA Model Rules proposed and adopted by the American Bar Association. On recommendation of the committee, the Board may recommend changes to the D.C. Rules to the District of Columbia Court of Appeals.

January 29 to March 13, 2015. At the request of several commenters, the comment period was extended twice, ending on May 8, 2015.

A summary of the comments received and the Rules Review Committee's review and detailed response to the comments is set forth in the September 2016 Final Supplemental Report. The comments of the Board on Professional Responsibility and the Access to Justice/Pro Bono Committee are included in the Final Supplemental Report in their entirety.

II. Summary of Recommendations

The Board of Governors recommends that under D.C. Rule 1.2, a lawyer bear the responsibility at the outset of a representation of reaching an agreement with a client about the scope and objectives of that representation. This obligation reflects the practical reality of modern legal practice and is consistent with other ethical mandates, including D.C. Rule 1.5(b), which requires a lawyer to set forth the scope of a representation in writing at the beginning or within a reasonable time after commencing a representation (unless the lawyer has "regularly represented a client"). The proposed amendments also affirm and clarify that when a client gives informed consent, the scope of a representation may be limited to only certain aspects of a matter, rather than the matter in its entirety, consistent with other law and the D.C. Rules.

Proposed D.C. Rule 1.2 would provide:

(a) A lawyer shall reach agreement with the client on the scope and objectives of representation. The agreed scope of representation may be limited to only certain aspects of a matter (rather than a matter in its entirety), if the client has given informed consent and the limitation does not preclude competent representation or violate other Rules.

(b) Within the agreed scope of representation, a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (d), (e), and (f), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's

decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

Existing Rule 1.2(b) would be renumbered as 1.2(c), and existing Rules 1.2(d), (e), and (f) would remain the same. Existing Rule 1.2(c) would be deleted because the requirements for limited scope representation would now appear in Rule 1.2(a).

The Board also recommends several amendments to the Comments to Rule 1.2 to provide more specific guidance to practitioners providing limited scope services. A summary of those proposed revisions follows:

i. Revisions to Comment 4

The proposed revisions to Comment 4 are intended to allow it to correspond more closely to the second sentence of the new Rule 1.2(a). The purpose of the Comment is to provide examples of common limitations on the scope of lawyer representations.

ii. Revisions to Comment 5

The proposed revisions to Comment 5 would provide further explanation of the guidance in current Comment 5 about ethical and legal constraints on limited scope agreements. It also would clarify, consistent with the Working Group's proposal and ABA Model Rule 1.2 Comment [7], that the limitation on a representation is "a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for competent representation."

The recommendation includes adding language to Comment [5] reminding lawyers who are before tribunals that they must comply with applicable court rules and orders. This language would underscore that courts can and do impose requirements apart from and in addition to those required by the ethics rules.

iii. Revisions to Comment 6

Comment 6 addresses Rule 1.5(b)'s requirement of a written communication about the scope of representation when the lawyer has not regularly represented the client. It then recommends that limitations on

the scope of representation be addressed in writing, including considerations addressed during the informed consent process. The Comment concludes with cross-references to the definition of “informed consent” and to Comment 28 of Rule 1.7, which notes potential differences between sophisticated business clients and less sophisticated clients in the informed consent process.

iv. Renumbering of Remaining Comments

If the recommendations are accepted, current Comment 6 would become Comment 7, and subsequent Comments would be renumbered accordingly.

The Board believes that these revisions would provide better guidance to limited scope practitioners and increased protection of clients who are the consumers of those services. The revisions also would help to improve all legal representations by more clearly defining the ethical duties attendant to scope and objectives of a representation at the outset of every lawyer-client relationship.

Finally, the Board also recommends a clarifying amendment to Comment [1] of Rule 1.16 (Terminating Representation) to assist lawyers further in understanding ethical duties in providing limited scope representations.

Although the proposed recommendations to amend Rule 1.2 would not modify the obligations of a lawyer seeking to withdraw from a representation under Rule 1.16, the Board recommends that the following underlined language be added to the end of D.C. Rule 1.16 Comment [1].

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.

Timing of Implementation

If the Court decides to adopt any amendments to the D.C. Rules of Professional Conduct on the scope of legal representation, the Bar respectfully asks that the Court delay the effective date of any changes until at least two months after the date of the Court's adoption. Such a delay would allow the Bar to begin the process of notifying members about the Court's amendments; revising Bar content to reflect the rules change; and implementing a member education program similar to the ones conducted in Fiscal Year 2010-11 in response to changes in the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA) and in Fiscal Year 2006-07 in response to the substantial changes to the Rules of Professional Conduct. Because the Bar has found it helpful for the education of our members, the Bar also respectfully asks that the Court publish any rules changes in a red-lined version, in addition to a clean version.

Please let us know if you or other members of the Court have any questions or require anything further from the Bar. You can contact me at 202.274.7322 or by e-mail at annamariasteward@gmail.com.

Respectfully yours,



Annamaria Steward

Enclosure

cc: Board of Governors
Members, Rules of Professional Conduct Review Committee
Katherine A. Mazzaferri, Esq.
Robert J. Spagnoletti, Esq.
James Phalen, Esq.
Wallace E. Shipp, Jr., Esq.
Cynthia D. Hill, Esq.
Carla J. Freudenburg, Esq.
Hope C. Todd, Esq.
Karen Savransky, Esq.

**DISTRICT OF COLUMBIA BAR
RULES OF PROFESSIONAL
CONDUCT REVIEW COMMITTEE**

Supplemental Final Report

to the

January 2015 Draft Report

**PROPOSED AMENDMENTS TO
D.C. RULE OF PROFESSIONAL CONDUCT 1.2**

The views expressed herein are those of the Committee
and not those of the D.C. Bar or its Board of Governors.

September 2016

**Members of
The District of Columbia Bar
Rules of Professional Conduct Review Committee**

John Townsend Rich, Chair	Thomas B. Mason
Marina S. Barannik, Vice Chair	Peter W. Morgan
Kathleen Clark	Victoria S. Nugent
Ellen Efros	Mindy L. Rattan
Yaida O. Ford	Anne M. Scott
Laura E. Hankins	Charles E. "Rick" Talisman
Eric L. Hirschhorn	Steuart Thomsen
Stacy M. Ludwig	

Members of the Committee during its consideration of this supplemental report's recommendations in whole or in part included:

Lauren A. GreenbergNov. 2009 – Nov. 2015

Julia L. Leighton.....Nov. 2009 - Nov. 2015

Paul S. Rosenzweig.....Nov. 2009 – Nov. 2015

Jonathan K. Tycko.....Nov. 2009 – Nov. 2015

I. INTRODUCTION

The D.C. Bar Rules of Professional Conduct Review Committee (“Rules Review Committee” or “Committee”) completed its draft report and proposed amendments on D.C. Rule 1.2 in January 2015: *Proposed Amendments to D.C. Rule of Professional Conduct 1.2* (“January 2015 Draft Report”).

The January 2015 Draft Report recommends that Rule 1.2 be amended (1) to require that the lawyer reach agreement with the client about the scope and objectives of a representation at the onset of representation, and (2) to affirm and clarify that when a client gives informed consent, the scope of a representation may be limited to only certain aspects of a matter, rather than the matter in its entirety, if the limitation does not preclude competent representation or violate other Rules. That report also recommends amendments to the Comments of Rule 1.2 to provide more guidance to lawyers providing limited scope representations pursuant to Rule 1.2.

The Committee believes that its recommendations will achieve the goals of the Limited Scope Working Group (“Working Group”), a joint project of the D.C. Access to Justice Commission and the D.C. Bar Pro Bono Center, by providing guidance to limited scope practitioners thereby increasing protection of clients who are the consumers of those services. The recommendations also will improve all legal representations by requiring clarity in the scope and objectives of a representation at its outset.

Upon further consideration, the Committee also now recommends that additional clarifying language be added to Comment [1] to Rule 1.16 (Terminating Representation) as discussed in this report: *Final Supplemental Report to the January 2015 Draft Report on D.C. Rule 1.2* (“September 2016 Final Supplemental Report”).

II. PROCEDURAL POSTURE

The Rules Review Committee published the January 2015 Draft Report for public comment on January 28, 2015, for a 45-day comment period, but extended that period twice, upon the request of several commenters, closing the comment period on May 8, 2015. The Rules Review Committee received six (6) comments. This report summarizes those comments and provides the Committee’s response to specific comments.¹

The Committee supports its original recommendations set forth in the January 2015 Draft Report and also recommends adding clarifying language to Comment [1] of Rule 1.16 for the reasons set forth below.

III. SUMMARY OF PUBLIC COMMENTS RECEIVED

A. The Committee received six comments as summarized below:

¹ The comment submitted by the District of Columbia Board on Professional Responsibility and joint comment submitted by the Access to Justice Commission and the D.C. Bar Pro Bono Committee are attached to this supplemental report in their entirety as Attachment A and B, respectively.

1. A comment from a Bar member supported the concept of limited scope practice generally and particularly judges' recognition of these arrangements between lawyers and clients, which the commenter notes can be protective of lawyers and also provide needed services to otherwise *pro se* litigants.
2. A comment from a Bar member requested that lawyers should not be required to obtain informed consent from clients when the "limitation of the representation" is "the area of law in which the lawyer is providing services." The commenter recommended that a limitation on the scope of representation that excludes certain fields of law should not be subject to informed consent (e.g., "I do not practice criminal law, and my representation excludes any criminal law aspects of this matter"). If the limitation is of specific aspects of the matter (negotiation, but not representation at trial), then informed consent is required. The commenter believed that the proposed Rule as written implicitly captured this sentiment, but that more specific language in the Rule's comments should explain it.
3. A legal consumer advocacy group generally "endorsed the [c]ommittee's proposed amendments to Rule 1.2" but offered two specific amendments that the organization thought would better achieve the objective of facilitating limited scope representation:
 - a. Amending Rule 1.2 to clarify explicitly that, as a default, service of process in a limited scope matter shall be made on the party, rather than on the lawyer; and
 - b. Exempting telephone and on-line consultations from the requirement of a written fee agreement.
4. A Bar member commented that the proposed revisions go well beyond facilitating or clarifying the ability of lawyers and clients to enter into limited scope representation. Rather, the commenter suggested that the proposed Rule changes the very nature of the lawyer-client relationship from one of fiduciary to contract. The comment addressed several specific issues.
 - a. The proposed Rule shifts the relationship from one in which the lawyer serves the client to one of contract where the lawyer and client first reach agreement, which the commenter thought creates a contractual rather than fiduciary relationship.
 - b. The proposed rule fails to give sufficient prominence to the importance of obtaining informed consent.
 - c. The commenter believed that the proposed Rule's language of, "the limitation does not prevent competent representation," is unclear and suggested that "reasonable under the circumstances" language is better even if imprecise.

- d. The commenter suggested that the Rule is not as clear as it might be on the need for a document memorializing the limited scope representation.
 - e. The commenter believed that the proposed Rule is not clear on what happens when there is no express agreement on the scope of representation. Does that mean that the default position is that the lawyer has assumed responsibility for the entire matter? The commenter suggested that this ambiguity would be resolved if the Rule required a writing.
 - f. The commenter inquired how the proposed Rule would apply when the lawyer charges an hourly fee and the lawyer and the client agreed that the client will spend a limited amount of money for the representation, but the lawyer has exhausted the allotted amount and the client's interests remain in jeopardy. Rule 1.16 appears to limit the lawyer's ability to withdraw from the matter, so it would be helpful to address this situation in the proposed Rule or Comments.
5. The Access to Justice Commission (ATJC) and the D.C. Bar Pro Bono Committee, joined by the Washington Council of Lawyers and the D.C. Consortium of Legal Services Providers, submitted a comment largely in support of the Rules Review Committee's proposal, with one exception in which the Committee's proposal differed from the Working Group's recommendation:

The Working Group recommended that an amendment to Rule 1.2(c) include...[a] requirement that any limited scope representation be "reasonable under the circumstances." The Rules Review Committee proposed instead a requirement that "the limitation does not preclude competent representation or violate other Rules."

The comment further highlighted that at least 42 other jurisdictions have adopted the ABA MR 1.2 "reasonable under the circumstances" language and espoused a concern that the District's failure to adopt the language may somehow signal to future courts, disciplinary counsel or lawyers that there is some "unreasonable" limited scope activity that was intended to be precluded by the Model Rule and not the D.C. Rule. In addition, the comment noted that a dozen D.C. Rules contain a reference to reasonableness and that the D.C. Rule should afford the same protection as the Model Rule.

6. A comment by the Board on Professional Responsibility (BPR) rejected the Committee's proposed changes to Rule 1.2 and recommended instead that the Committee adopt the Working Group's proposal and adopt the language of ABA Model Rule 1.2(c).
- a. The BPR disagreed that Rule 1.2 should require that a lawyer and a client reach agreement on the scope and objectives of the representation at the

beginning of every representation. Because the current Rule assumes the broadest scope of representation, it protects the client and resolves doubt in favor of the client. Even if a limitation is reasonable under the circumstances, there still was a concern that the Rules Review Committee's proposal requires clients to reach agreement on scope at the beginning of the representation.

- b. The BPR recommended staying with the current Rule formulation where the presumption is that a representation is for a whole matter UNLESS a client and a lawyer agree otherwise.
- c. The BPR recommended including Model Rule 1.2(c)'s language requiring that the limitation be reasonable under the circumstances.

IV. COMMITTEE'S RESPONSE TO PUBLIC COMMENTS

The Rules Review Committee has carefully considered all of the public comments and, for the reasons set forth here, has decided to support its original recommendations. The Committee's responses to the commenters' major arguments follow.

- A. The requirement of an agreement on scope does not improperly promote the contractual nature of the attorney-client relationship or destroy the current presumption that representation is for whole matter.

The Committee disagrees that a requirement that a lawyer reach an agreement with the client at the outset of the representation about the scope and objectives of the representation transforms the nature of the lawyer-client relationship from a fiduciary to a contractual one and destroys the current presumption in the Rule that the representation is "for the whole matter."

First, adding a requirement that an attorney reach an agreement at the outset of the representation should not alter the nature of the attorney-client relationship. With the proposed change, a lawyer remains in a fiduciary relationship with a client. The lawyer still serves the client's objectives. No doubt, most lawyers and clients currently discuss the scope and objectives of representation as well as the means by which such objectives will be achieved, including those circumstances in which the client hires the lawyer for a limited purpose. Indeed, it is presumed that currently lawyers and clients reach agreement on such scope and objectives; however, the Committee recommends that such practice be required to ensure that the lawyer and the client have clarity about the scope and objectives of the representation at the beginning of the lawyer-client relationship. The Committee maintains that an agreement at the outset will help to avoid misunderstanding later in the representation.

Second, the requirement that attorneys reach agreement with their clients about the scope and objectives of the relationship at the outset of the representation does not affect how doubts about scope are resolved. Whether an agreement on the scope is reached early or late in the engagement, doubts about the agreement "are resolved in the client's favor." Likewise, the

requirement does not change the presumption that, in the absence of an agreement, the representation is for the “whole of the matter.” The Committee believes that requiring clarity about the scope and objectives of representation will better protect clients, and also thinks that a rule that is silent on this issue favors ambiguity over clarity.

Thus, the Committee believes that the proposed changes to Rule 1.2 do not affect either the presumption that the representation is for the whole of the matter in the absence of an agreement, or the presumption that any ambiguities in the agreement will be resolved in the client’s favor. The proposed changes to Rule 1.2 should not only provide access to legal services through limited scope representation, but also further protect clients by ensuring that the scope and objectives of representation are clear at its outset.

B. The standard for evaluating limited scope representations should not be that any limitation on the scope of representation must be “reasonable under the circumstances”.

Both the BPR and the ATJC urged adoption of the ABA Model Rule 1.2(c) language requiring that any limitation on the scope of representation be “reasonable under the circumstances.” After carefully considering the BPR’s and ATJC’s arguments in support of the “reasonableness” standard, the Committee remains of the view that adding the “reasonable under the circumstances” language to Rule 1.2 (c) is not necessary because the Rule as proposed provides the client with sufficient protections against overly restrictive limitations on a lawyer’s representation. The proposed rule uses the standard “does not preclude competent representation” instead of “reasonable under the circumstances” to provide a clear standard for the undertaking of a limited scope representation, rather than a broad and vague totality-of-the-circumstances one, for the reasons discussed below.

The “reasonable under the circumstance” language is problematic because it (1) imposes a vague standard and permits discipline against lawyers based on a retrospective assessment of whether limitation on the scope and the objectives of representation were reasonable; (2) may preclude the type of representation that clients seek given their resources; and (3) favors paternalism over client autonomy. In the Committee’s view, subjecting lawyers to the malpractice standard-of-care requirement in the context of limited scope representation will discourage lawyers from accepting limited scope representations, thus defeating the very purpose that the revised Rule 1.2 is intended to accomplish, *i.e.*, increasing access to justice through the provision of limited scope legal services.

a. The Committee disagrees that the absence of “reasonableness” language creates potential for mischief by lawyers.

The BPR argued that without the reasonableness language, Rule 1.2 may provide an opportunity for mischief by attorneys who would limit the representation in such a way as to fail to provide any meaningful service to an unsuspecting client. This concern highlights a fundamental philosophical disagreement between the Committee and the BPR and the ATJC as to whether there are scope limitations that are per se unreasonable. The BPR and the ATJC believed that there are, in the words of the BPR, “objectively” unreasonable limitations. Therefore, they maintained that in the absence of a standard that includes “reasonable under the circumstances,” attorneys may engage in misconduct by

undertaking representations that are too limited in scope, and prospective clients need to be protected from such unethical behavior.

The Committee has not been able to imagine a *per se* unreasonable limitation that would not also violate other existing Rules. The BPR provided several examples of limitations that it views as unreasonable, but each of those examples involves conduct that violates other D.C. Rules. A lawyer who “review[s] a matter for a prisoner without communicating the results to the client” violates Rules 1.1 and 1.4. A lawyer who fails to notify a foreign language-speaking client of the hearing date violates Rules 1.1 and 1.4. Bankruptcy lawyers who prepare boilerplate pleadings in bankruptcy matters on behalf of *pro se* litigants, who then file the pleadings, with no understanding of their content have acted in violation of Rules 1.1 and 1.4 by failing to explain the content of the pleadings to the clients to ensure that the clients understand and have given informed consent. If an immigration lawyer enters his or her appearance on behalf of a client and fails to appear at hearings, this lawyer is in violation of Rules 1.16(c) and 3.4(c). If, however, the client retained the lawyer for the limited purpose of drafting court documents and forms (and assuming Immigration Court rules allow *pro se* filings), then the lawyer’s conduct is permissible under the existing Rule 1.2(c).

In fact, the BPR acknowledged that it did not know which specific misconduct the “reasonableness” language is intended to prevent: “Although it may not be possible now to imagine where this [failure to include “reasonable under the circumstances” language in Rule 1.2(c)] might lead, if it leads anywhere, it can only be to mischief.” Neither the ATJC nor the BPR cited an example where a limitation would be unreasonable under the standard that they endorse, and would not also be found unethical under the language proposed by the Committee. To the contrary, the ATJC acknowledged that “the RRC’s proposed language likely would preclude any representation that would be found ‘unreasonable’ under the standard adopted by the ABA and other jurisdictions.”

The Committee remains of the view that it would be improper for the Committee to recommend a “reasonable under the circumstances” standard for the sole purpose of combatting an unidentified harm in the absence of specific misconduct that this standard is intended to prohibit.

- b. While the “reasonableness” language may alert attorneys to consider the standard before entering into a legal services agreement, it inappropriately favors paternalism over client autonomy.

The BPR argued that the omission of the “reasonable under the circumstances” language in the Rule will be perceived as permitting any limitation on the services to which the client agrees. The BPR reasoned that the reasonableness standard is necessary to protect clients who may have difficulty understanding the implications of limited scope representation. This argument favors paternalism over client autonomy.

First, the Committee values client autonomy and prefers to leave the decision to the client whether to retain a lawyer given the risks of a limited scope engagement. The Committee believes that a client should have the right to enter into limited scope agreements with a lawyer as long as: (a) the client fully understands the implications and

risks involved in limited representation, and gives informed consent to such limitation; and (b) the lawyer is confident that the limitation does not violate the Rules of Professional Conduct, including that the scope is not so restrictive as to preclude the lawyer's competent representation.

Second, the Committee believes that requiring lawyers at the outset of a matter to determine - on pain of discipline - whether a particular limitation is "reasonable under the circumstances" puts an unreasonably high burden on the lawyers because it may be difficult to make this assessment at the outset. For example, if a client insists on conducting document review with an outside vendor and does not wish to pay for the trial lawyer's time to review the documents, and the documents are then missed at trial, the trial lawyer may be subject to discipline due to the outside vendor's omission because excluding document review from the scope of the trial lawyer's representation may not have been reasonable when viewed in hindsight. Under the Committee's proposed language, such limitation would not subject the lawyer to discipline as long as the client was adequately informed of the risks and reasonably available alternatives and provided informed consent to the outsourcing of document review. A disciplinary proceeding could examine whether the client provided informed consent, but would not assess in hindsight whether the limitation was reasonable.

- c. The Committee disagrees that failure to include the "reasonableness" language may be viewed as intentional and introducing a more permissive standard than the ABA Model Rule.

The ATJC acknowledged that the proposed Rule 1.2(c) likely would preclude any representation that would be found "unreasonable" under the standard adopted by the ABA and other jurisdictions; however, the ATJC expressed concern that intentional omission of this language from the D.C. Rule would send the wrong message that a more permissive standard attaches to limited scope representation under the D.C. Rule and that some "unreasonable" activity is intended to be precluded by the Model Rule but not by the D.C. Rule.

The Committee remains of the view that the Rule as proposed gives clear and adequate notice to the lawyers that any limitation on their representation must not violate their duty of competence and other ethical obligations.

- d. While the "reasonableness" standard is already included in many other Rules of Professional Conduct, it is used to qualify requirements and not impose a totality-of-the-circumstances standard on attorney conduct.

The BPR argued that many of the Rules already include a standard-of-care requirement and specifically "reasonableness." The BPR cited as examples Rule 1.3(b)(1) (lawyer must seek client's lawful objectives "through reasonably available means"); Rule 1.3(c) (lawyer must "act with reasonable promptness"); Rule 1.4(a) (lawyer must "keep a client reasonably informed"); and Rule 1.4(b) (lawyer must "explain a matter to the extent reasonably necessary . . .").

However, the “reasonableness” language is used very differently in other Rules, mainly as a “minimum” requirement of lawyers in specific, clearly defined types of circumstances. The “reasonableness” language included in other Rules is used to qualify specific requirements. Rule 1.3(b)(1) requires a lawyer to seek a client’s lawful objectives “through reasonably available means” rather than all possible means. Rule 1.3(c) requires a lawyer to “act with reasonable promptness” rather than extreme promptness. Rule 1.4(a) requires a lawyer to “keep a client reasonably informed,” and Rule 1.4(b) requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions” rather than requiring lawyers to inform clients of every possible detail of a matter.

Imposing a “reasonable under the circumstances” standard on lawyers at the start of a limited scope representation is fundamentally different. It invites a retrospective analysis of whether the limitation was reasonable given the totality of circumstances.

C. The Committee declines to remove the requirement of informed consent when the scope of a lawyer’s representation is limited to a particular practice area.

One commenter suggested that lawyers should not be required to obtain informed consent from clients when the “limitation of the representation” pertains to “the area of law in which the lawyer is providing services” unless such limitation violates other ethical rules.

The Committee is wary of sanctioning the general proposition, when in some circumstances such an agreement by a lawyer might violate Rule 1.1. For example, there are instances in which criminal defense lawyers have been sanctioned for incompetence for failing to advise their clients of potential significant immigration consequences of accepting a guilty plea. If such a lawyer had agreed with the client upfront that he/she would only advise on criminal matters to the exclusion of all other areas of law, and/or that the lawyer would not advise on immigration matters, such limitation would be a per se violation of Rule 1.1 and would therefore not comply with the proposed Rule 1.2.

a. The Committee declines to adopt the suggestion to amend Rule 1.2 to clarify explicitly that, as a default, service of process in a limited scope matter shall be made on the party, rather than on the lawyer.

The Committee declines to adopt the suggestion set forth by a commenter that Rule 1.2 should be amended to clarify explicitly that service of process in a limited scope matter shall be made on the party, rather than on the lawyer because this is a matter of court rules and procedure. The ethics rules as they stand and as proposed do not address the requirement of service of process. Such conduct is typically set forth in courts’ rules of procedures. Indeed, the Administrative Orders governing limited scope appearances that the District of Columbia Superior Court issued in June 2014 specifically address service requirements.

b. The Committee declines to adopt the suggestion that Rule 1.2 exempt telephone and on-line consultations from the requirement of a written fee agreement because it is inapposite.

The Committee declines to adopt the suggestion set forth by a commenter that Rule 1.2 exempt telephone and on-line consultations from the requirement of a written fee agreement because there is currently no requirement in Rule 1.2 (or the Rule as proposed) for a written fee agreement. This suggestion is more appropriately considered as a proposed amendment to Rule 1.5(b). While there is a cross reference to Rule 1.5(b) in Rule 1.2 Comment [4], the purpose of the reference is to remind lawyers of their obligation to communicate, in writing, the cost and scope of a representation.

Rule 1.5(b) states:

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

To the extent that these activities occur today, the proposed changes to Rule 1.2 do not change the status quo.

V. THE COMMITTEE RECOMMENDS A CLARIFYING AMENDMENT TO COMMENT [1] OF RULE 1.16

Although the Committee does not think that its proposed recommendations to amend Rule 1.2 modify the obligations of a lawyer seeking to withdraw from a representation under Rule 1.16, as one commenter suggested above,² upon further consideration, the Committee recommends that the following underlined language be added to the end of D.C. Rule 1.16 Comment [1].

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.

The first sentence of D.C. Rule 1.16 Comment [1] and ABA Model Rule 1.16 Comment [1] are currently the same. However, in February 2002, the ABA adopted additional language to Comment [1] of MR 1.16, including the underlined second sentence above that is being proposed by the Committee. The new language to Comment [1] of MR 1.16 was adopted as a result of the ABA's Ethics 2000 Commission review and recommendations in conjunction with the ABA's amendments to Rule 1.2(c). Because the District of Columbia did not adopt the ABA MR 1.2(c) changes during its own review of the Ethics 2000 revisions,³ the District also did not adopt this

² To be clear, the commenter used the example of a limited scope agreement that appeared to turn solely on the lawyer providing legal services up to a certain dollar amount without consideration of what legal services could be provided or completed for that value, or what such a limitation might mean to the client's legal matter. To the extent that such an agreement was so limited as to violate Rule 1.1, it likely would not comply with Rule 1.2 (a).

³ From 1998 through 2005, the Rules Review Committee reviewed the ABA Ethics 2000 changes to the ABA Model Rules and made widespread recommendations for consideration by the Board of Governors for changes to the D.C. Rules. The Board of Governors approved those recommendations, which were then transmitted to the District of Columbia Court of Appeals. The Court adopted the vast majority of the Bar's recommended amendments, which became effective on February 1, 2007.

additional sentence to Rule 1.16 Comment [1]. The Committee concludes that although the language that it proposes to amend D.C. Rule 1.2 varies from the language of ABA Rule 1.2(c), it may be helpful to limited scope practitioners to add this clarifying sentence to the end of Comment[1] to D.C. Rule 1.16.

The legislative history of the ABA Model Rule provides the following explanation for the adoption of the 2002 amendments to MR 1.16 Comment [1], “[t]he additional material addresses the question of when a representation is completed and cross references other Rules, including those in which services are limited in scope or intended to be short term in nature. No change in substance is intended.”

MR 1.16 Comment [1] also adds the following language to the end of the comment: “See Rules 1.2(c) and 6.5. See also Rule 1.3 Comment [4].” The Rules Review Committee does not think the cross references are necessary, and so does not recommend including them.

VI. CONCLUSION

The Rules Review Committee respectfully recommends that the Board of Governors approve for submission to the Court of Appeals the proposed revisions to D.C. Rule 1.2 and its Comments as set forth in the Committee’s January 2015 Draft Report, as well as the Committee’s proposed addition to Comment [1] of D.C. Rule 1.16 as described in this September 2016 Final Supplemental Report.

Attachment A



BOARD ON PROFESSIONAL RESPONSIBILITY

May 8, 2015

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Chair

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Elizabeth J. Branda
Executive Attorney

James T. Phalen
Deputy Executive Attorney

District of Columbia Bar
Rules of Professional Conduct Review Committee
c/o Hope C. Todd, Esquire
District of Columbia Bar
1101 K Street, N.W., Suite 200
Washington, D.C. 20005

Re: Comments on Proposed Amendment to Rule 1.2 of the District of Columbia Rules of Professional Conduct

Dear Ms. Todd:

In response to the D.C. Bar's solicitation of public comment on its final draft report and recommendation to amend D.C. Rule of Professional Conduct 1.2, I submit comments on behalf of the Board on Professional Responsibility and the Office of Bar Counsel.

The Limited Scope Working Group recommended that Rule 1.2(c) be amended to provide that "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." We recommend that the Rules Review Committee adopt the Limited Scope Working Group's proposal.

A. Requiring an agreement on the scope and objectives of a representation.

We respectfully disagree with the proposal that Rule 1.2(a) should be amended to require that a lawyer and client agree on the scope and objectives of the representation at the beginning of the relationship. The current rule assumes the broadest scope of representation. It protects the client, because all doubts as to the scope are resolved in the client's favor.

Our concerns with the proposed amendment to Rule 1.2(a) would remain even if it were amended to provide that any agreement to restrict legal services must be "reasonable under the circumstances." See Section B, *infra*. There is a question whether a "reasonableness" restriction would protect vulnerable clients if they are *required* to reach agreement with their lawyer regarding the scope at the outset of each representation. Thus, we recommend retaining the current version of Rule 1.2(a), and the presumption that a representation is for the whole of the matter *unless* the client and lawyer specifically agree otherwise.

B. Any limitation on the scope of representation should be reasonable under the circumstances.

We recommend adoption of the Limited Scope Working Group's proposal because it is consistent with ABA Model Rule 1.2(c), which was amended by the Ethics 2000 Commission "to more clearly permit, but also more specifically regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client." Reporter's Explanation of Changes at 2, ¶ 7. The "reasonableness" requirement was added to Model Rule 1.2(c) to "specifically preclude[] a limited representation that would not be 'reasonable under the circumstances.'" *Id.* at 2-3, ¶ 7b. At the same time, the Model Rule preserved the requirement that a client give informed consent to a limited representation. *See* ABA Model Rule 1.2(a). "In cases in which the limitation is reasonable, the client must give informed consent as defined in Rule 1.0(e)." Reporter's Explanation of Changes at 2-3, ¶ 7b.

The Ethics 2000 Commission further explained that a "reasonableness" requirement was consistent with Section 30(1) of the then-draft Restatement of the Law Governing Lawyers,¹ which provides that "[s]ubject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances." *See* Proposed Rule 1.2, Working Draft No. 1 at 9-10 (May 3, 1999). The Restatement notes that "[r]estrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others." We believe that the "reasonableness" requirement, which is included in the ethics rules in almost all other U.S. jurisdictions, provides "necessary protection."² It balances the need to protect a client who may have difficulty understanding the implications of limiting a lawyer's duty, with the need of a client for whom the cost of more expensive services may outweigh the benefit. *See* Restatement (Third) of the Law Governing Lawyers § 19, cmt. (b) (2000).

Without an overt "reasonableness" limitation, Rule 1.2 might provide an opportunity for mischief by attorneys who would limit the representation in such a way as to fail to provide any meaningful service to an unsuspecting client. Attorneys may

¹ The final version of the Restatement, published in 2000, moved the relevant language to Section 19, but left it unchanged in substance.

² Forty-five states have adopted the "reasonableness" requirement in their rules. Missouri and California incorporate the requirement in the comments to the rule, while the other 43 states explicitly include the requirement in the text of the rule itself. Massachusetts, North Dakota, Michigan, Texas, and Virginia have not incorporated a "reasonableness" requirement in their versions of Model Rule 1.2; however, we understand that Massachusetts is currently in the process of doing so.

read a rule without a “reasonableness” constraint as permitting any limitation on the services to which the client agrees. Including “reasonableness” in the Rule would alert attorneys to the need to consider this standard before entering into a legal services agreement, and could protect both the lawyer and the client from agreements that are not objectively reasonable. For example, Bar Counsel has unfortunately seen attorneys who wish to limit their services to reviewing a matter for a prisoner without communicating the results to the client, attorneys who undertake immigration matters who file documents, but do not appear at hearings or fail to notify the foreign-speaking client of the hearing date, and young lawyers with the frame of mind that if they write any restrictive retainer agreement everything will be fine. These lawyers often respond to Bar Counsel’s investigations by asserting that these other services were not contemplated or that “the client can read.” The Court has spoken in the past to scope of service, including stating that failing to note an appeal violates the duty of a lawyer representing a client during the sentencing process. *See In re Drew*, 693 A.2d 1127, 1131-32 (D.C. 1997) (per curiam) (citing *Samuels v. United States*, 435 A.2d 392, 395 (D.C. 1981)). “Reasonableness” alerts the lawyer that more is required than a tightly written retainer agreement.

As part of the consideration of this issue, the Office of Bar Counsel posted an inquiry regarding Rule 1.2 on the National Organization of Bar Counsel listserv. In one response, a disciplinary counsel noted that unbundled legal services may be good in theory, but may create problems in practice. As an example, he cited limited scope representation cases involving “debt consolidation companies” in which lawyers prepared boilerplate pleadings for their clients, who then filed the pleadings *pro se*, with no understanding of their content. In one instance, when asked by a judge to explain his *laches* defense, a *pro se* defendant responded that it “has something to do with a door.” *See also In re Seare*, 493 B.R. 158, 184 (Bankr. D. Nev. 2013) (discussing concern “in consumer bankruptcy practice that attorneys will unbundle services that are essential or fundamental to bankruptcy cases and clients’ objectives”), *aff’d*, 515 B.R. 599 (B.A.P. 9th Cir. 2014) (affirming sanctions imposed on lawyer who unreasonably limited the scope of the representation). These examples illustrate our concern.

We understand that the Rules Review Committee believes that a “reasonableness” restriction is unnecessary because other Rules address lack of competence, unreasonable fees or failure to communicate. However, an overlap is not unusual within the Rules of Professional Conduct. Indeed, such an overlap emphasizes the importance of the required or prohibited conduct, *i.e.*, competence (Rule 1.1(a)) and skill and care (Rule 1.1(b)) or dishonesty (Rule 8.4(c)) and dishonesty to a tribunal (Rule 3.3(a)(1)). In addition, including “reasonableness” in the Rule attaches the concept to the conduct so that the attorney is immediately informed, without a review of any other Rule, that such an “unbundled” legal agreement must be reasonable in the circumstances of the case. Finally, as the Model Rule includes the word “reasonable,” an intentional decision to not include it in Rule 1.2(c) implies a more permissive standard for the

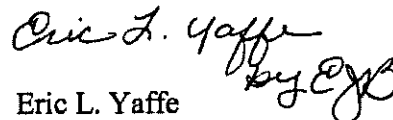
unbundling of services than the Model Rule would allow. Although it may not be possible now to imagine where this might lead, if it leads anywhere, it can only be to mischief. The cautious and conservative approach argues for inclusion of a "reasonableness" requirement.

We also understand that the Rules Review Committee is concerned that including a "reasonableness" limitation "would inappropriately import a standard-of-care requirement into the Rules of Professional Conduct." However, this concern does not seem warranted in light of existing Rules that already use similar standards. Many of the Rules include a standard-of-care requirement and specifically "reasonableness," putting attorneys on notice of these requirements in the ethics context. *See* Rule 1.1(b) (skill and care commensurate with that generally afforded to clients by other lawyers in similar matters); Rule 1.3(b)(1) (lawful objects of a client through *reasonably* available means); Rule 1.3(c) (*reasonable* promptness); Rule 1.4(a) (*reasonably* informed); Rule 1.4(b) (explain a matter to the extent *reasonably* necessary).

I hope that these comments are of assistance to the Rules Review Committee in making its recommendations to the Board of Governors.

We would be pleased to respond to any questions concerning these comments.

With best regards,


Eric L. Yaffe
Chair

cc: Brigida Benitez, Esquire
President
District of Columbia Bar

Wallace E. Shipp, Jr., Esquire
Bar Counsel

Attachment B

April 23, 2015

Rules Review Committee
c/o Hope C. Todd
District of Columbia Bar
1101 K Street NW, Suite 200,
Washington, DC 20005

Dear Rules Review Committee:

The undersigned respectfully provide the following comment pursuant to the D.C. Bar Rules Review Committee's Request for Public Comment to Amend D.C. Rule 1.2. The impetus for considering changes to D.C. Rule 1.2 and Comments was the transmittal in April 2013 of a report to the D.C. Bar from the Limited Scope Working Group ("Working Group"), a joint project of the D.C. Access to Justice Commission and the D.C. Bar Pro Bono Program.

We greatly appreciate the Rules Review Committee's careful consideration of the Working Group's recommendations and of its additional informal comments submitted on October 31, 2013. We believe that the Rules Review Committee's proposed amendment represents a significant step forward in the effort to foster limited scope representation in the District of Columbia. But we provide this limited comment to address one substantive area in which the Rules Review Committee's proposed rule differs from the Working Group's recommendation, from the ABA Model Rules, and from the rules of almost every other jurisdiction in the United States. The Working Group recommended that the amendment to D.C. Rule 1.2(c) include the ABA Model Rule's requirement that any limited scope representation be "reasonable under the circumstances." The Rules Review Committee proposed instead a requirement that "the limitation does not preclude competent representation or violate other Rules."

The ABA modified Model Rule 1.2 in 2002 to require that limited-scope representations be "reasonable under the circumstances." The ABA's purpose in amending the Model Rule was to "more clearly permit, but also more specifically regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client." ABA, *Report of the Commission on the Evaluation of the Rules of Professional Responsibility* 145 (Nov. 2000). Since then, 42 states have adopted a version of the post-2002 model rule; all 42 have included the "reasonable under the circumstances" requirement.¹ At least two other states expressly have adopted the "reasonable under the circumstances" language through a formal ethics opinion (Michigan), or a court order (Massachusetts).

We believe that the Rule Review Committee's proposed language likely would preclude any representation that would be found "unreasonable" under the standard adopted by the ABA and other jurisdictions. But we are concerned that judges, bar officials, and practitioners seeking to apply the proposed D.C. Rule 1.2 in the future would note the intentional omission of the reasonableness requirement and justifiably assume that there is some "unreasonable" activity intended to be precluded by the Model Rule but not by the D.C. Rule. It plainly is not the Rules Review Committee's intent to permit lawyers in D.C. to engage in limited scope representations that would be deemed

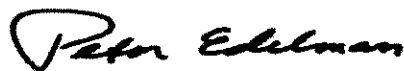
¹ AL, AK, AR, AZ, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MN, MS, MT, NE, NV, NH, NJ, NM, NY, NC, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WI, WY. We are not aware of any jurisdiction that has, as the Rules Review Committee proposes be done here, adopted a version of the Model Rule 1.2 without the "reasonable under the circumstances" requirement.

“unreasonable” and therefore impermissible in at least 44 other states, but that could be the unintended consequence of future efforts to divine the purpose of eliminating the reasonableness requirement.

Of course, the D.C. Bar need not follow other jurisdictions’ rules if it has a reason not to do so. Page 11 of the Rules Review Committee’s proposed recommendation states that it declined to adopt the reasonableness requirement for two reasons: (i) because it is unnecessary in light of the protection provided by the other Rules, and (ii) it would inappropriately import a standard-of-care requirement into the Rules of Professional Conduct. We agree that the proposed Rule *should* be interpreted to provide the same protection as the Model Rule – in part because at least a dozen of the other Rules already import a reasonableness requirement into the Rules of Professional Conduct² – but the express omission of the reasonableness requirement may invite future efforts to determine what, precisely, the omission was intended to mean. If the proposed Rule is intended to provide the same level of protection as the Model Rule, then why not use the language adopted in the Model Rule and 44 other states? Using the same language would make clear the intent to provide the same protection and would permit D.C. practitioners, judges, and Bar officials to take advantage of a growing body of legal and ethical authority interpreting what is, in fact, a reasonable limitation on representation.

Given the overarching goal of achieving greater clarity for lawyers and clients engaging in limited scope representations, we respectfully suggest that the better course here would be to adopt the “reasonable under the circumstances” requirement.³ In all other regards, we support the Rules Review Committee’s proposal and applaud its efforts to make limited scope representation more widely available in the District of Columbia.

Sincerely,



Peter B. Edelman
Chair, DC Access to Justice Commission

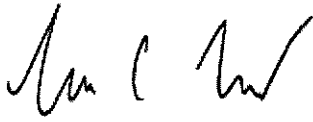


Ann K. Ford
Chair, DC Bar Pro Bono Committee

² See, e.g., Rule 1.1 (“Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.”); 1.3 (requiring lawyers to use “*reasonably* available means” and to act with “*reasonable* promptness”); 1.5 (lawyer shall charge a reasonable fee); 1.6 (lawyer may reveal confidences and secrets to the extent “*reasonably* necessary”); 1.13 (“lawyer shall proceed as *reasonably* necessary”); 2.3 (lawyer must act *reasonably* in connection with evaluations for third persons); 3.2 (“lawyer shall make *reasonable* efforts to expedite litigation”); 3.3 (lawyer shall take “*reasonable* remedial measures” to ensure candor to tribunal); 3.4 (lawyer must “make *reasonably* diligent efforts” in responding to discovery); 5.1 and 5.3 (requiring lawyers to “make *reasonable* efforts” in supervising lawyers and nonlawyers, respectively); 5.7 (requiring “*reasonable* measures” in connection with law-related services); and several rules addressing lawyers’ *reasonable* knowledge and belief (e.g. 1.6, 1.7, 1.14, 1.16).


³ If a decision is made ultimately to adopt the proposed Rule without the “reasonable under the circumstances” requirement, we respectfully urge the Rules Review Committee, the Board of Governors, and/or the Court of Appeals expressly to state that the D.C. Rule is not intended to permit any representation that would be deemed unreasonable under the circumstances and that legal and ethical authority interpreting the Model Rule language is persuasive in the District of Columbia.

Signing on in support of this letter



Charles C. Lemley
Chair, Limited Scope Working Group
Wiley Rein LLP

On behalf of the Washington Council of Lawyers:

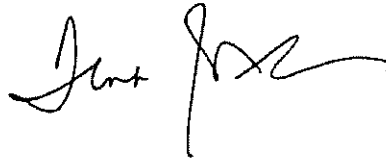


Paul S. Lee
President, Board of Directors

On behalf of the D.C. Consortium of Legal Services Providers:



Chinh Q. Le
Co-Chair



Tina S. Nelson
Co-Chair

**DISTRICT OF COLUMBIA BAR
RULES OF PROFESSIONAL
CONDUCT REVIEW COMMITTEE**

**PROPOSED AMENDMENTS TO
D.C. RULE OF PROFESSIONAL CONDUCT 1.2**

The views expressed herein are those of the Committee
and not those of the D.C. Bar or its Board of Governors.

JANUARY 2015 (DRAFT REPORT)

**Members of
The District of Columbia Bar
Rules of Professional Conduct Review Committee**

Jonathan K. Tycko, Chair	Julia L. Leighton
Lauren A. Greenberg, Vice Chair	Thomas B. Mason
Marina S. Barannik	Peter W. Morgan
Kathleen Clark	Victoria S. Nugent
Yaida O. Ford	John T. Rich
Eric L. Hirschhorn	Paul S. Rosenzweig
Stacy M. Ludwig	Anne M. Scott
	Charles E. "Rick" Talisman

Members of the Committee during its consideration of this report's recommendations in whole or in part included:

Jerri U. Dunston.....	Nov. 2010 - May 2014
Narda M . Newby.....	Nov. 2008 - Nov. 2014
Michael S. Sundermeyer.....	Nov. 2010 - Nov. 2014

I. INTRODUCTION

This report sets forth the recommendations of the District of Columbia Bar Rules of Professional Conduct Review Committee (“Rules Review Committee” or “Committee”)¹ on amendments to Rule 1.2 (Scope of Representation) of the District of Columbia Rules of Professional Conduct (“D.C. Rules”). The impetus for considering changes to D.C. Rule 1.2 and Comments was the transmittal of a report to the D.C. Bar from the Limited Scope Working Group (“Working Group”), a joint project of the D.C. Access to Justice Commission and the D.C. Bar Pro Bono Program. In April 2013, after a year of study, the Working Group issued a report recommending action by the Superior Court of the District of Columbia, the D.C. Bar, and prospective limited scope lawyers and clients to help increase access to justice through the provision of limited scope services to underserved communities.² Because the report included a recommendation seeking a revision to the D.C. Rules of Professional Conduct, in May 2013 then-Bar president Thomas S. Williamson, Jr., on behalf of the Board of Governors, referred the report to the Rules Review Committee for its consideration. In June 2013, the Rules Review Committee received the Working Group’s report and appointed a subcommittee to consider these recommendations.³

II. SUMMARY OF RECOMMENDATIONS

Generally speaking, “limited scope representation” or “unbundled legal service” is a relationship between a lawyer and a client in which they agree that the legal services being provided by a lawyer will be limited to a specified duration, task(s), or subject matter, rather than a matter in its entirety. Recognizing that D.C. Rule 1.2(c) already permits the provision of unbundled or limited scope legal services,⁴ the Working Group proposed revisions to D.C. Rule 1.2(c) and Comments “to provide more guidance to limited-scope practitioners and the client-consumers they serve.”⁵

¹ In establishing the Rules Review Committee as a standing Bar committee in 1994, the Board of Governors charged it with responsibility for the on-going review of the D.C. Rules. On its own initiative, or upon request by the Board, by members of the Bar, or by the public, the Rules Review Committee examines a particular rule or rules and may make recommendations for changes to the Board of Governors. The Board, in turn, may then recommend changes to the District of Columbia Court of Appeals, which promulgates the D.C. Rules. The Rules Review Committee also regularly reviews changes made to the American Bar Association’s Model Rules of Professional Conduct. The ABA Model Rules provide national model standards of professional ethics, but are not binding upon any jurisdiction in the absence of formal adoption.

² The Limited Scope Working Group April 2013 Report is attached to this report. The Limited Scope Working Group’s proposed revisions to Rule of Professional Conduct 1.2(c) and Comments are Appendix B of its report.

³ Subcommittee members included lawyers from the following practice types and settings: large, small and solo firm practitioners, academia, the Public Defender Services, and the U.S. Department of Justice.

⁴ See D.C. Rule 1.2(c) [“A lawyer may limit the objective of the representation if the client gives informed consent.” D.C. Rule 1.2(c); Comment [4] further clarifies that, “[t]he objectives or scope of services provided by the lawyer may be limited by agreement with the client or by terms under which the lawyer’s services are made available to the client....”]; *see also* D.C. Legal Ethics Opinion 330 (2005) (Unbundling Legal Services).

⁵ The Limited Scope Working Group April 2013 Report at 2.

From the outset, the Rules Review Committee supported the Working Group's fundamental goal and recommendation to revise the language of Rule 1.2 and Comments to clarify when a lawyer may provide limited scope legal services and to expand guidance to lawyers on how to comply with their ethical obligations in providing such services while protecting client-consumers. The Committee agrees that clarifying Rule 1.2 and its Comments may increase access to justice through increased use and improved provision of limited scope services to those who otherwise could not afford legal services.

The Working Group's proposed revisions to Rule 1.2(c) and Comments focused on the existing language of D.C. Rule 1.2(c), which explicitly permits a lawyer, with the informed consent of a client, to "limit the objectives of a representation." Upon its initial review, the Rules Review Committee identified a significant concern with the existing language of Rules 1.2(a) and 1.2(c), each of which purports to govern the scope of representation. More pointedly, the committee noted that while D.C. Rules 1.2(a) and (c) presume that each attorney-client representation will have a "scope," the Rules fail to define the origin of the scope of a representation.

To address this concern, the Rules Review Committee recommends a broader revision of Rule 1.2. Specifically, as detailed in this report, the Committee recommends that a lawyer bear the responsibility at the outset of a representation of reaching an agreement with a client about the scope and objectives of that representation. This obligation reflects the practical reality of modern legal practice and is consistent with other ethical mandates, including D.C. Rule 1.5(b) which requires a lawyer to set forth the scope of a representation in writing at the beginning or within a reasonable time after commencing a representation (unless the lawyer has "regularly represented a client"). The proposed amendments also affirm and clarify that when a client gives informed consent, the scope of a representation may be limited to only certain aspects of a matter, rather than the matter in its entirety, consistent with other law and the D.C. Rules.

This report details the considerations and analysis of the Rules Review Committee and sets forth proposed amendments to D.C. Rule 1.2 and Comments.⁶ These proposed revisions will necessarily affect a lawyer's provision of all legal services, including low-cost or no-cost limited scope legal services. Although the Rules Review Committee's proposed amendments differ from those of the Working Group for the reasons described below, the Committee's proposed changes to the Comments are in many instances similar in style, in substance or both. In all instances, the Rules Review Committee believes these revisions will achieve the goals of the Working Group by providing better guidance to limited scope practitioners and increased protection of clients who are the consumers of those services. The revisions also will improve all legal representations by more clearly defining the ethical duties attendant to scope and objectives of a representation at the outset of every lawyer-client relationship. To be clear, limited scope representations are regularly undertaken by lawyers of all practice types and settings, and are regularly delivered to wealthy and/or sophisticated clients as well as clients who cannot afford legal services and/or those without any experience in legal matters. Redlined and clean versions of proposed Rule 1.2 and Comments begin at page 13 of this report.

⁶ The Rules Review Committee's proposed amendments to Rule 1.2 and Comments are shown in redline at the end of this report starting on page 13.

III. ANALYSIS AND CONSIDERATIONS

The Rules Review Committee acknowledges the thorough work of the Working Group and agrees with the conclusion of its April 2013 Report that providing more clarity on limited scope representations in the Rules of Professional Conduct will improve access to justice and will facilitate the provision of *pro bono* legal services by members of the District of Columbia Bar.

A. Proposed Revisions from the Limited Scope Working Group

In light of the charge of the Working Group, its proposed revisions to Rule 1.2(c) focused on the existing language of D.C. Rule 1.2 that governs a lawyer's ability to provide limited scope representation. After examining ABA Model Rule 1.2(c) and Comments, as well as other jurisdictions' rules on limited scope representations, the Working Group proposed that the D.C. Rule 1.2(c) be amended to conform to the language of ABA Model Rule 1.2(c). Thus, the Working Group proposed that D.C. Rule 1.2(c) be amended to say "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The Working Group also proposed that the Comments to D.C. Rule 1.2 be amended to 1) provide better guidance for "assessing the appropriateness and reasonableness of limited scope services;" 2) "encourage lawyers to reduce to writing the limitations of their services;" and 3) "encourage lawyers to obtain informed consent in writing after they are satisfied that their clients have the capacity and sophistication to provide informed consent."⁷

B. Need for Additional Revisions Identified by the Rules Review Committee

The Rules Review Committee also supports improving and clarifying D.C. Rule 1.2 and Comments with respect to the provision of limited scope representations. However, as the Rules Review Committee considered the April 2013 Report, in addition to the need to address limited scope representations, the Committee also identified a more fundamental question about all lawyer-client representations. Specifically, the Committee's review of D.C. Rule 1.2 revealed that although the Rule presumes that each attorney-client representation will have a "scope," it fails to define how the scope of a representation is to be determined.

The Rules Review Committee suggests that the scope of any legal representation should come from an agreement between the lawyer and the client, and that a lawyer should bear the responsibility to reach an agreement with the client about scope at the beginning of each representation. The Committee therefore recommends that Rule 1.2 be amended to require lawyer-client agreement about the scope and objectives of all representations,⁸ and would allow, where the client has given informed consent, that the scope of representation be limited to only certain aspects of a matter rather than the matter in its entirety.

The existing rules do not identify or define the terms "scope" or "objectives." An objectives is what the client wishes to achieve through the lawyer's services or legal representation. Scope, however refers to the extent or reach of the legal services being provided by the lawyer,

⁷ See April 2013 Report, Pages 1-3.

⁸ Rule 1.2 and Comments seemingly interchange both the terms and concepts of "Scope" and "Objectives." The Rules Review Committee thinks that they are distinct words and concepts and should be more precisely used.

such as drafting a contract, negotiating a settlement, representing a client only in settlement negotiations or only through trial, or full-blown representation through trial and any appeal.

The current D.C. Rule 1.2 appears to use the words scope and objectives interchangeably. D.C. Rule 1.2(c) speaks of the ability of a lawyer to limit “the objective of a representation if the client gives informed consent.” Comment 4 clarifies that “[t]he objectives or scope of services provided by the lawyer may be limited by agreement with the client or by terms under which the lawyer’s services are made available to the client.” Indeed, in concluding that unbundled or limited scope legal services are ethically permissible in the District of Columbia, the D.C. Legal Ethics Committee wrote in Opinion 330 (Unbundling Legal Services)(2005), “[t]his conclusion rests on the express language of D.C. Rule 1.2(c), which states that ‘a lawyer may limit the objectives of the representation if the client consents after consultation.’ Unbundling legal services is simply a limiting of the objectives of a lawyer-client relationship.”

This interchangeable use of the words scope and objectives likely resulted at least in part from the language of the original D.C. Rule 1.2, modeled after the original ABA Model Rule 1.2, both of which failed to define and/or make meaningful distinctions between scope and objectives. Ultimately, the ABA revised Model Rule 1.2 to distinguish between scope and objectives, but the District of Columbia did not adopt those specific Model Rule 1.2 amendments. The Rules Review Committee believes that the Rule should distinguish between scope and objectives. A brief summary of the relevant legislative history of the evolution of ABA Model Rule 1.2 and D.C. Rule 1.2 follows.

1. Legislative History of ABA Rule 1.2 and D.C. Rule 1.2

i. The D.C. Court of Appeals adopts the ABA’s 1983 version of ABA Model Rule 1.2

The original 1983 version of ABA Model Rule 1.2 was entitled *Scope of Representation* and provided in pertinent part:

(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

And

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

A long understood ethical principle is that clients have the authority to determine the objectives of a representation. As discussed in Art Garwin’s treatise, *A Legislative History: The*

Development of the ABA Model Rules of Professional Conduct 1982-2013 (2013), several Ethical Considerations (ECs) and Disciplinary Rules (DRs) from the ABA Model Code of Professional Responsibility (the predecessor to the ABA Model Rules) were reflected in Model Rule 1.2. EC 7-7, for example, emphasized the authority of the client to make decisions regarding legal representation, and EC 7-8 acknowledged that it is the client’s decision whether to “forego legally available objectives or methods because of non-legal factors.” DR 7-101(A)(1) stated that a lawyer “shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law” although DR 7-101(B)(1) indicated that a lawyer may “exercise his professional judgment to waive or fail to assert a right or position of his client.” As noted above, the word “scope” did not appear in the original language of ABA Model Rule 1.2(a) or (c), although it did appear in the title, and in several Comments.⁹

Following the ABA’s adoption of the Model Rules in 1983, the D.C. Bar Board of Governors established the D.C. Bar Model Rules of Professional Conduct Committee chaired by Robert Jordan, to analyze and compare the ABA Model Rules to the then-governing D.C. Code of Professional Responsibility and to make recommendations to the District of Columbia Court of Appeals. In 1986, the so-called “Jordan Committee” presented two alternative options for the adoption of D.C. Rule 1.2: “Alternative A” contained substantial edits to the ABA Model Rule; and “Alternative B” -- the unaltered, original ABA Model Rule. The Board of Governors considered each option equally viable and transmitted both versions to the Court of Appeals. The court ultimately adopted the original 1983 version of ABA Model Rules 1.2(a) and (c) as set forth above.

ii. ABA Ethics 2000 Commission proposed significant changes to Model Rule 1.2

In 2002, the ABA adopted extensive amendments to the Model Rules based on recommendations from the ABA Ethics 2000 Commission (“Commission”). The 2002 amendment to ABA Rule 1.2 added a sentence supporting a lawyer’s implied authority to take action on behalf of a client because the Commission wanted to clarify that consultation with a client may not always be required before a lawyer takes action.¹⁰ The Commission also added a cross-reference to Rule 1.4 (Communication), reflecting the Commission’s belief that language about the lawyer’s “duty to communicate” belonged in Rule 1.4 rather than Rule 1.2.¹¹

Most significantly for purposes of this report, the 2002 amendment changed Model Rule 1.2(c) in the following manner: “[a] lawyer may limit the objectives scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation gives

⁹ See 1983 ABA Model Rule 1.2 Comment [1] (“...law defining the lawyer’s scope of authority in litigation varies among jurisdictions.”), Comment [4] (“The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by terms under which the lawyer’s services are made available to the client...”), Comment [5] (“An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.”)

¹⁰ Art Garwin, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, page 55 (2013).

¹¹ Garwin, page 58.

informed consent.”¹² The ABA legislative history indicates that the Commission changed this language to “more clearly permit, but also more specifically regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client.”¹³ Furthermore, “Objectives of the representation” was replaced with “scope of the representation” to reflect the idea that only a client can limit the client’s objectives, whereas scope may be limited by subject matter or means.¹⁴

The Commission also made several noteworthy changes to the ABA Model Rule 1.2 Comments that further clarified the distinction between scope and objectives. The first caption was changed from “Scope of Representation” to “Allocation of Authority between Client and Lawyer”¹⁵ in order to more accurately describe the issues discussed.¹⁶ The first sentence of Comment 1 was deleted, a discussion of the distinction between and disagreements over objectives and means was deleted, and cross-references to Rule 1.4(a)(1) and Rule 1.4(a)(2) were added to clarify the lawyer’s duty to communicate and consult with the client regarding the means by which objectives are to be achieved.¹⁷ The deleted discussion concerning a disagreement between lawyer and client about the means used to pursue objectives was moved to a new Comment 2 and expanded.¹⁸ In addition, the third section of Comments was renamed from “Services Limited in Objectives or Means” to “Agreements Limiting Scope of Representation.”¹⁹ Comment 4 became Comment 6 and “objectives” was removed from the first sentence. The new Comment 6 was modified to further explain that “a client’s decision to seek limited objectives may be relevant to determining the reasonableness of a limitation on the scope of the representation under the circumstances.”²⁰

Comment 7 to ABA Model Rule 1.2 was added to provide examples of limitations to scope that would be “reasonable under the circumstances.”²¹

iii. In 2005, the Rules Review Committee did not recommend adoption of the 2002 changes to ABA Model Rule 1.2

In 2005, the Rules Review Committee recommended changes to the D.C. Rules in light of the 2002 amendments made to the ABA Model Rules. But the Rules Review Committee did not recommend adopting most of the 2002 changes to ABA Model Rule 1.2, including the language distinguishing “scope” from “objective.” The Committee’s 2005 report does not explain why it did not recommend these changes. But the Committee did recommend following the lead of the ABA and adding a sentence to Rule 1.2(a) that, “[a] lawyer may take such action on behalf of the

¹² Garwin, page 55.

¹³ See Garwin, page 59 (“Although lawyers enter into such agreements in a variety of practice settings, this proposal in part is intended to provide a framework within which lawyers may expand access to legal services by providing limited but valuable legal service to low- or moderate-income persons who otherwise would be unable to obtain counsel.”)

¹⁴ Garwin, page 59.

¹⁵ Garwin, page 55.

¹⁶ Garwin, page 60.

¹⁷ Garwin, page 55-56.

¹⁸ See Garwin, page 56.

¹⁹ Garwin, page 56.

²⁰ Garwin, page 60.

²¹ Garwin, page 57.

client as is impliedly authorized to carry out the representation.”²² The Committee also recommended adding “informed consent” language to 1.2(c) (as it did throughout the D.C. Rules). In addition, the Committee added a sentence to Comment[4] that cross-references the writing requirement of D.C. Rule 1.5(b).²³

2. Explanation of Rules Review Committee’s Current Recommendations

The Rules Review Committee believes that requiring a lawyer and client to agree on scope and objectives at the beginning of a relationship will help avoid misunderstanding about the fundamentals of the lawyer-client relationship.²⁴ Rule 1.2’s language confirms that limited scope representation is often appropriate. The recommended changes acknowledge that lawyer-client engagements are often of limited scope and adoption of these changes will make legal services more accessible. The proposed changes to D.C. Rule 1.2 and Comments are shown in a redlined and clean version and follow the conclusion of this report.

D.C. Rule 1.2 (Scope of Representation) currently provides:

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

As previously discussed, the current Rule 1.2 fails to address how the scope of an attorney-client representation should be determined.

i. Proposed amendment to first sentence of Rule 1.2(a)

The Rules Review Committee recommends that, because attorney-client relationships are consensual, the scope of representation should be determined by agreement and that the Rules of Professional Conduct should express that requirement. The Committee therefore recommends that Rule 1.2 should begin with this sentence:

A lawyer shall reach agreement with the client on the scope and objectives of representation.

²² District of Columbia Rules of Professional Conduct Review Committee Proposed Amendments to the District of Columbia Rules of Professional Conduct: Report and Recommendations (June 2006), Rule 1.2(a), page 20.

²³ *Id.* at Comment 4, pages 21-22.

²⁴ Rule 1.5(b) also references the scope of lawyer-client representations, but also fails to define it. Rule 1.5 (b) provides, “[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee, *the scope of the lawyer’s representation*, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.”(emphasis added).

The sentence requires initial agreement about both scope and objectives because the two are related. Once agreement is reached, the basic principle currently found in Rule 1.2(a) still applies: the client determines the objectives, and the lawyer serves the client's objectives.²⁵ This is an important limitation because agreement about scope of representation usually takes into account the nature of a lawyer's expertise and/or the financial relationship between the lawyer and client.

Consequently, the Rules Review Committee recommends that current Rule 1.2(a) become Rule 1.2(b) and be preceded by the clause, "Within the agreed scope of representation,"

ii. Proposed amendment to second sentence of recommended Rule 1.2(a).

With agreement about scope and objectives established in the first sentence of Rule 1.2(a), the Rules Review Committee recommends that conditional approval of limited scope representation be stated in the second sentence of the paragraph:

The agreed scope of representation may be limited to only certain aspects of a matter (rather than a matter in its entirety), if the client has given informed consent and the limitation does not preclude competent representation or violate other Rules.

The first clause of the sentence explains what a limited scope representation is — a representation limited to certain aspects of a matter. For example, in criminal defense practice, for years lawyers have divided defense representations into at least three parts — pre-indictment, post-indictment, and post-conviction. However, from the perspective of the client (and the conflict of interest rules), there is a single matter — defending the client throughout the investigative and judicial process. Depending on when the client contacts the lawyer, that process could include multiple phases: a police or FBI investigation, grand jury investigation, post-indictment motions, trial, direct appeal, and additional post-conviction proceedings. Depending on the phase of the process, the client's objectives could change. The objective initially could be to avoid indictment, but could evolve over time to: avoid conviction, reverse a conviction, avoid retrial, avoid a second conviction, etc. A representation that includes anything less than all of these phases is a limited scope representation.

The second clause of the sentence identifies the two requirements that the Rules Review Committee believes should be imposed on limited scope representations. The first requirement is that the client gives informed consent. The second requirement is that the limitation does not preclude competent representation or violate other Rules. This latter limitation is currently articulated in existing Comment [5] to D.C. Rule 1.2. The Committee concluded that codifying this obligation in the Rule itself would more clearly alert lawyers to the obligation to ensure that any limitation in scope is consistent with other ethical duties, most significantly in this context, as is explained further below, the duty of competence.

²⁵ Of course, a client's objectives may change during a representation, and the lawyer must abide by the client's decision to change objectives—as long as the objectives remain within the agreed scope of representation.

iii. “Reasonable under the circumstances” language rejected by the Rules Review Committee

The Rules Review Committee’s proposed amendments to Rule 1.2 – like the existing Rule 1.2 – do not impose a reasonableness standard on a limited scope or other representation. Thus, unlike the Working Group’s proposed Rule 1.2(c), which adopts the ABA Model Rule 1.2(c) construction described above, the Committee does not recommend the addition of the language “reasonable under the circumstances” to the D.C. Rule.²⁶ The Rules Review Committee considered carefully the proposal of the Working Group to conform the language of D.C. Rule 1.2(c) to the language of the ABA Model Rule. However, in the view of the Rules Review Committee, a lawyer and client should be able to establish an agreed-upon scope of representation based on the client’s informed consent, which requires the lawyer to communicate “adequate information and explanation about the material risks of and reasonably available alternatives” to the limited scope representation, as set forth in Rule 1.0(e), as long as the limitation in scope does not preclude competent representation or violate other Rules.²⁷

The Rules Review Committee believes that imposing a reasonableness standard in addition to requiring informed consent is unnecessary because other Rules provide protection against ethical misconduct that has historically warranted Bar discipline. For example, those Rules require that in any engagement, including a limited scope engagement, a lawyer must act competently (Rule 1.1); act with diligence and zeal (Rule 1.3); communicate with the client (Rule 1.4); and charge a reasonable fee (Rule 1.5). Imposing a reasonableness standard in this setting would inappropriately import a standard-of-care requirement into the Rules of Professional Conduct.

The Rules Review Committee acknowledges that there are situations where a representation is so limited in scope that a lawyer cannot adequately represent the client. However, concerns about adequate representation should be and are already addressed through other existing ethics rules, primarily through Rule 1.1 (Competence), rather than through a reasonableness standard. The Committee believes the addition of the last clause of proposed Rule 1.2(a) resolves this concern.

Finally, the Rules Review Committee also understands that there may be a consumer protection concern: that some lawyers might take “unreasonable” limited scope representations to gouge legal fees without providing value to clients. Again, existing Rule 1.5 requires that a lawyer’s fee must be reasonable, and indicates that one of the factors to consider is “the result obtained” for the client.²⁸ If a lawyer’s fee for a limited scope representation is unreasonable in light of “the result obtained,” discipline is available under Rule 1.5. If the lawyer’s fee is reasonable, it need not be the subject of Bar discipline.

²⁶ ABA Model Rule 1.2(c) provides: “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

²⁷ D.C. Rule 1.0(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

²⁸ D.C. Rule 1.5(a)(4).

iv. Recommended Comment 4.

Comment 4 has been revised to correspond more directly to the second sentence of the new Rule 1.2(a). The purpose of the Comment is to provide examples of common limitations on the scope of lawyer representations.

v. Recommended Comment 5.

Comment 5 provides further explanation of the guidance in current Comment 5 concerning ethical and legal constraints on limited scope agreements. It also clarifies, consistent with the Working Group's proposal and ABA Model Rule 1.2 Comment [7], that the limitation on a representation is "a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for competent representation."

The Rules Review Committee also recommends adding language to Comment [5] reminding lawyers who are before tribunals that they must comply with applicable court rules and orders. This language underscores that courts can and do impose requirements apart from and in addition to those required by the ethics rules.²⁹

vi. Recommended Comment 6.

Comment 6 addresses Rule 1.5(b)'s requirement of a written communication about the scope of representation when the lawyer has not regularly represented the client. It then recommends that limitations on the scope of representation be addressed in writing, including considerations addressed during the informed consent process. The Comment concludes with cross-references to the definition of "informed consent" and to Comment 28 of Rule 1.7, which notes potential differences between sophisticated business clients and less sophisticated clients in the informed consent process.

vii. Renumbering of remaining Comments.

If the Committee's recommendations are accepted, current Comment 6 would become Comment 7, and subsequent Comments would be renumbered accordingly.

IV. CONCLUSION

The Rules Review Committee recommends that D.C. Rule of Professional Conduct 1.2 and its Comments be amended to clarify that lawyers must reach agreement with clients about the scope and objectives of all attorney engagements and confirms that the scope of an engagement may be limited to only certain aspects of a matter with the client's informed consent consistent with other Rules.

²⁹ On June 16 2014, the Superior Court of the District of Columbia issued Administrative Order 14-10 permitting limited appearances in the Civil Division, Probate Division, Tax Division, Family Court and the Domestic Violence Unit pursuant to the Order. In part, the Order provides, "Whereas, limited appearances do not violate the D.C. Rules of Professional Conduct as long as appearances are reasonable under the circumstances..."

The Rules Review Committee believes its proposed amendments to Rule 1.2 and Comments support the goals shared by the Limited Scope Working Group and the Committee by clarifying that a lawyer may provide limited scope legal services with informed consent of a client and by expanding guidance to lawyers about how to comply with their ethical obligations in providing those services. The achievement of these goals will help ensure increased access to justice for those who otherwise might not be able to secure legal services.

Redlined Version (showing proposed changes to existing rule).

**Rules Review Committee Proposal to
Current Rule 1.2 and Comments of the
D.C. Rules of Professional Conduct**

(a) A lawyer shall ~~abide by a client's decisions concerning the~~ reach agreement with the client on the scope and objectives of representation, ~~subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify. The agreed scope of representation may be limited to~~ only certain aspects of a matter (rather than a matter in its entirety), if the client has given informed consent and the limitation does not preclude competent representation or violate other Rules.

(b) Within the agreed scope of representation, a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (d), (e), and (f), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

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

(e) ~~A lawyer may limit the objective of the representation if the client gives informed consent.~~

(d) A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and ~~(e)~~. (b).

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

(f) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comments

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within these limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence From Client's Views or Activities

[3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

~~Services Limited in Objectives or Means~~ Limitations on Representation

[4] ~~The objectives or scope of services provided by the lawyer~~ A representation may be limited to certain aspects of a matter by agreement with the client. ~~or by terms under which the lawyer's services are made available to the client.~~ For example, a retainer may be for a specifically defined purpose. ~~Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles.~~ Such a limited representation may be

appropriate, for example, because the client has limited objectives for the representation or because the client cannot afford to retain or is not willing to compensate a lawyer for representation in the entire matter. Limited representation is also appropriate when a lawyer does not provide or is not willing to provide certain legal services. As additional examples, when a lawyer has been retained by an insurer retains a lawyer to represent an insured, the representation may be limited to matters related to the insurance coverage, services or aspects of the matter covered by insurance; representation provided through a legal aid agency may be subject to limitations on the types of issues that the agency addresses; or in a domestic relations matter, representation could be limited to modification of custody and would not include related matters of child support. In addition, the terms upon which representation is undertaken may exclude specific objectives or means that might otherwise be available to accomplish the client's objectives. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent. For example, a representation may be only for the purpose of assisting the client in negotiating a settlement agreement, but not for the purpose of representing the client in litigation. Rule 1.5(b) requires a lawyer to communicate the scope of the lawyer's representation when the lawyer establishes a new lawyer-client relationship, and it is generally prudent for the lawyer to explain in writing any limits on the objectives or scope of the lawyer's services. A lawyer's representation also may be limited in time and may identify the end point of representation, such as conclusion of a hearing or other phase of litigation.

[5] Although this Rule affords the lawyer and client substantial latitude to limit a representation, an agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, waive or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue. Nor may a limitation preclude provision of competent legal services by the lawyer or violate other Rules. At the same time, limitation on a representation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for competent representation. See Rule 1.1. An agreement concerning limited representation or a limited appearance before a court must comply with applicable court rules and orders.

[6] Rule 1.5(b) requires a lawyer to communicate in writing the scope of the lawyer's representation when the lawyer has not regularly represented a client. In all matters involving limited scope representation, it is generally prudent for a lawyer to state in writing any limitation on representation, provide the client with a written summary of considerations discussed, and to receive a written informed consent from the client to the lawyer's limited representation. The term "informed consent" is defined in Rule 1.0(e) and is discussed in Comment 28 to Rule 1.7. Lawyers also should recognize that information and discussion sufficient for informed consent by more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. See Comment 28 to Rule 1.7.

Criminal, Fraudulent, and Prohibited Transactions

~~{6}~~ [7] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

~~{7}~~ [8] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See* Rule 4.1.

~~{8}~~ [9] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

~~{9}~~ [10] Paragraph (e) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction, for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (e) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (e) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Clean Version of proposed rule.

**Rules Review Committee Proposed
Rule 1.2 and Comments to
D.C. Rules of Professional Conduct**

(a) A lawyer shall reach agreement with the client on the scope and objectives of representation. The agreed scope of representation may be limited to only certain aspects of a matter (rather than a matter in its entirety), if the client has given informed consent and the limitation does not preclude competent representation or violate other Rules.

(b) Within the agreed scope of representation, a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (d), (e), and (f), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take

such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

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

(d) A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (b).

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

(f) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comments

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within these limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence From Client's Views or Activities

[3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Limitations on Representation

[4] A representation may be limited to certain aspects of a matter by agreement with the client. Such a limited representation may be appropriate, for example, because the client has limited objectives for the representation or because the client cannot afford to retain or is not willing to compensate a lawyer for representation in the entire matter. Limited representation is also appropriate when a lawyer does not provide or is not willing to provide certain legal services. As additional examples, when an insurer retains a lawyer to represent an insured, the representation may be limited to services or aspects of the matter covered by insurance; representation provided through a legal aid agency may be subject to limitations on the types of issues that the agency addresses; or in a domestic relations matter, representation could be limited to modification of custody and would not include related matters of child support. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be available to accomplish the client's objectives. For example, a representation may be only for the purpose of assisting the client in negotiating a settlement agreement, but not for the purpose of representing the client in litigation. A lawyer's representation also may be limited in time and may identify the end point of representation, such as conclusion of a hearing or other phase of litigation.

[5] Although this Rule affords the lawyer and client substantial latitude to limit a representation, an agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to waive the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue. Nor may a limitation preclude provision of competent legal services by the lawyer or violate other Rules. At the same time, limitation on a representation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for competent representation. See Rule 1.1. An agreement concerning limited representation or a limited appearance before a court must comply with applicable court rules and orders.

[6] Rule 1.5(b) requires a lawyer to communicate in writing the scope of the lawyer's representation when the lawyer has not regularly represented a client. In all matters involving limited scope representation, it is generally prudent for a lawyer to state in writing any limitation on representation, provide the client with a written summary of considerations discussed, and to receive a written informed consent from the client to the lawyer's limited representation. The term "informed consent" is defined in Rule 1.0(e) and is discussed in Comment 28 to Rule 1.7. Lawyers also should recognize that information and discussion sufficient for informed consent by more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. See Comment 28 to Rule 1.7.

Criminal, Fraudulent, and Prohibited Transactions

[7] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[8] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See* Rule 4.1.

[9] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[10] Paragraph (e) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction, for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (e) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (e) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Attachment

REPORT OF THE LIMITED SCOPE WORKING GROUP

a joint project of the
D.C. Access to Justice Commission
D.C. Bar Pro Bono Program
(April 2013)

The D.C. Access to Justice Commission is dedicated to helping improve the ability of low- and moderate-income residents to access the civil justice system. The D.C. Bar Pro Bono Program strives to mobilize the private bar to assist in making legal advice and representation fully available to low-income persons in the District of Columbia. The views expressed herein represent only those of the Commission and Pro Bono Committee of the D.C. Bar and not those of the D.C. Bar or its Board of Governors.

Report of the Limited Scope Representation Working Group

a joint project of the
D.C. Access to Justice Commission
D.C. Bar Pro Bono Program
(April 2013)

I. Introduction

The Limited Scope Representation Working Group (“Working Group”) was created jointly by the D.C. Access to Justice Commission (“Commission”) and D.C. Bar Pro Bono Program (“Pro Bono Program”) in May 2012 to expand access to counsel for individuals and families of low, limited, and moderate means. Limited scope representation is a relationship between a lawyer and a client in which they agree that the scope of the legal services will be limited to a specified duration, task(s), or subject matter.

The Working Group was comprised of practitioners with experience providing limited scope representation and entering limited appearances in court; solo, small and large-firm practitioners; litigators and transactional lawyers with very diverse practices; a court liaison; ethics and practice management consultants; and members of the Commission and Pro Bono Committee. The roster of Working Group members is attached as Appendix A.

Providing limited scope or unbundled services is practiced widely by most major law firms when serving corporate clients or individual clients with large, complex cases, in order to address all the diverse legal issues with the most experienced legal team. It also is routinely practiced by solo and small firm practitioners when, for example, they are retained to simply review documents, coach clients on how to conduct settlement negotiations, or prepare deeds.

Over the past few years, the Superior Court of the District of Columbia has issued several administrative orders permitting lawyers to enter limited appearances when representing pro bono clients for a specific duration or task. The administrative orders have limited the divisions/branches in which limited appearances are permitted: Landlord and Tenant Branch, Paternity and Child Support Branch, Small Claims and Conciliation Branch and Civil Actions Branch, Calendar 18.

Limited scope representation is becoming more commonly practiced among paid and pro bono counsel for several reasons. First, legal fees have skyrocketed rendering the full retention of counsel unaffordable for many limited and moderate income individuals. Second, lawyers often are reluctant to enter appearances in protracted pro bono matters, but more likely to consider handling certain critical aspects of those same cases. Third, the development of pro se tools provides an alternative for individuals who are able to handle on their own parts of their legal matters, but still need counsel for other parts. Finally, courts are much more open to the notion of limited appearances, recognizing that the alternative is for parties to proceed entirely pro se.

Because it is becoming more routine, there is a national trend to institutionalize the practice of limited scope representation. In fact, the vast majority of states have recognized the need to

establish specific standards of practice though rules of professional conduct and/or court rules, in order to provide guidance to the limited scope lawyer and protect the consumer-client. The D.C. Access to Justice Commission and D.C. Bar Pro Bono Program believe that institutionalizing this practice in the District of Columbia will provide low, limited, and moderate means individuals greater access to counsel when they need it most.

II. Recommendations

The following recommendations are proposed by the D.C. Access to Justice Commission and D.C. Bar Pro Bono Program to institutionalize limited scope practice in the District of Columbia. There are recommendations for action by the court, the D.C. Bar, and prospective limited scope lawyers and clients. Each recommendation stands independently and should proceed towards implementation according to its own necessary process.

A. Revised Rule of Professional Conduct

Rule 1.2(c) and Comments of the D.C. Rules of Professional Conduct permitting limited scope practice have existed since 1991¹, but they provide little guidance to lawyers and insufficient protection for client-consumers. The Limited Scope Representation Working Group researched and analyzed the rules of professional conduct and comments of all the jurisdictions currently permitting limited scope practice, as well as the American Bar Association's Model Rules of Professional Conduct, which were overhauled in 2000 ("Ethics 2000").

The Working Group believes the D.C. Rules of Professional Conduct should be revised to provide more guidance to limited scope practitioners and protections for the client-consumers they serve. The revised rule proposed by the Working Group (Appendix B) adopts the American Bar Association's Model Rule 1.2(c) and its Comments [6] and [7]. The revised Rule 1.2(c) does not substantively change the existing D.C. Rule 1.2(c), but simply conforms the language to the American Bar Association's Model Rule. ABA Model Comments [6] and [7] provide some guidance to lawyers about assessing the appropriateness and reasonableness of limited scope services, and are numbered as Comments [4] and [5] in the proposal.

The Working Group's proposed Comment [6] is derived from existing Comment [4] of Rule 1.2 of the D.C. Rules of Professional Conduct, encouraging lawyers to reduce to writing the limitations of their services.

The Working Group's proposed Comment [7] encourages lawyers to obtain informed consent in writing after they are satisfied that their clients have the capacity and sophistication to provide informed consent. This Comment is included to provide additional

¹ In 2005, Ethics Opinion 333 was issued interpreting the existing rules to permit unbundling of legal services. While ethics opinions are persuasive authority in the District of Columbia, an amended Rule and Comments will afford more certainty and improved guidance to lawyers.

guidance to lawyers and protection to consumer-clients, and to be consistent with other provisions of the D.C. Rules of Professional Conduct.²

Recommendation: The Limited Scope Representation Working Group recommends that the D.C. Bar Rules Review Committee propose a revision to Rule 1.2(c) and Comments of the D.C. Rules of Professional Conduct to the D.C. Bar Board of Governors to provide more guidance to limited scope lawyers and protections for the client-consumers they serve. Once approved, the Board then should recommend the revision to the District of Columbia Court of Appeals, which promulgates the D.C. Rules. The Working Group's proposed revision to Rule 1.2(c) and Comments is attached as Appendix B.

B. Court Rule

The Limited Scope Representation Working Group discussed the current state of limited appearances in the Superior Court of the District of Columbia, which is restricted to lawyers providing pro bono representation in certain divisions of the court. The authority for lawyers to enter limited appearances is delivered through 3 separate administrative orders, which were issued in conjunction with the creation of court-based projects that provide same-day representation by legal services practitioners.

The Working Group believes that limited appearances in Superior Court should be permitted broadly³ through a new court rule, and available to both paid and pro bono counsel in order to expand access to representation for individuals and families of low, limited, and moderate means.

The Working Group researched and analyzed the court rules of all the jurisdictions currently permitting limited scope appearances in their courts. The Working Group then drafted a proposed court rule for the court to consider (Appendix C).

The proposed court rule permits limited appearances by date, time period, activity or subject matter as long as the lawyer complies with Rule 1.2 of the D.C. Rules of Professional Conduct and the limited appearance is reasonable under the circumstances. The limited appearance must be intended from the onset and notice must be served and filed describing the duration and/or nature of the appearance.

² For example, D.C. Rules of Professional Conduct, Rule 1.7 Comment 28.

³ The Working Group's focus was on limited appearances in those branches and divisions that do not appoint counsel to indigent parties, although there may be opportunities for non-indigent litigants in those branches and divisions to benefit from limited appearances. For example, there are instances when a litigant is close to indigency, but not appointed counsel because some resources are available. Lawyers often are reluctant to enter an appearance because the prospective client will most assuredly be unable to afford their services through disposition, and their ability to withdraw is uncertain at best. Although special precautions may be appropriate, permitting limited appearances in these instances may provide litigants with more options and greater access to counsel. The court may want to implement limited appearances starting with those branches and divisions that have successfully tested the concept here and in other jurisdictions (civil, family and probate), and then consider applying it more broadly to other divisions and branches.

Lawyers serve and file a Notice of Limited Appearance which provides to the court and opposing parties/lawyers simultaneous notice of their entry and eventual termination. The ability to designate at the outset of the case when the appearance will terminate is what distinguishes this practice from a general entry of appearance and provides limited scope lawyers the assurances they need to engage in this practice. Termination occurs automatically if the appearance is designated by date or time period, or by the lawyer filing of a Notice of Completion if the appearance is designated by activity or subject matter. The Working Group drafted for the court's consideration a Notice of Limited Appearance and Notice of Completion, which are attached to this report as Appendix D.

The proposed court rule is intended to promote the practice of limited representation to provide access to counsel at those critical points in litigation when proceeding pro se is simply impractical and/or detrimental.

Recommendation: The Limited Scope Representation Working Group recommends that the Superior Court of the District of Columbia create a special committee to draft a court-wide rule and accompanying forms that broadly permit limited appearances by paid and pro bono counsel. The Working Group encourages this special committee to seriously consider the proposed rule and forms as it endeavors to develop the court's final versions.

C. Lawyer Training

The Limited Scope Representation Working Group discussed whether training should be mandatory or optional for lawyers who wish to engage in limited scope practice.

The D.C. Bar does not have mandatory or minimum continuing legal education requirements⁴, although its members are *encouraged* to engage in such continuing legal education as is necessary to maintain their competence to practice law, pursuant to D.C. Rules of Professional Conduct, Rule 1.1, Comment [6].⁵

Recommendation: The Limited Scope Representation Working Group recommends that lawyers who intend to engage in limited scope practice be encouraged to attend such legal education as is necessary to develop and maintain their competence to offer a limited scope practice, pursuant to D.C. Rules of Professional Conduct, Rule 1.1.

The Working Group reviewed the training modules of other jurisdictions that permit limited scope representation and believes free online trainings currently are the most effective and accessible models to educate lawyers on how to comply with their ethical obligations when engaging in limited scope practice.

⁴ The D.C. Bar does administer the Mandatory Course on the D.C. Rules of Professional Conduct and District of Columbia Practice for new admittees to the D.C. Bar. The ethical implications of limited scope practice may be an appropriate topic to present at this course.

⁵ Comment [6]. Maintaining Competence - To maintain the requisite knowledge and skill, a lawyer should engage in such continuing study and education as may be necessary to maintain competence, taking into account that the learning acquired through a lawyer's practical experience in actual representations may reduce or eliminate the need for special continuing study or education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Recommendation: The Limited Scope Representation Working Group recommends that, if a revised rule of professional conduct to govern limited scope practice is adopted by the D.C. Court of Appeals, the D.C. Bar Rules Education Program should be asked to develop a campaign as it deems appropriate to inform lawyers who intend to engage in limited scope practice of the requirements under the new ethics rule.⁶

D. Support

The Working Group researched the support provided to lawyers who engage in limited scope practice and believes there should be model language for limited engagements and informed consent (see Appendix E), and an informative and accessible consumer-client brochure (electronic and hard-copy), similar to what the Working Group drafted and attached as Appendix F. Sample checklists for lawyers to reference as they proceed with the representation may also provide support.

Recommendation: The Limited Scope Representation Working Group recommends that training on limited scope practice includes model language for limited engagements, model language for informed consent, and an informative and accessible consumer-client brochure on limited scope representation, similar to what the Working Group drafted, and possibly checklists for lawyers to reference as they proceed with their limited scope representation.

E. Judicial Training

The Working Group believes limited scope practice may only succeed if judicial officers are well trained on the application of the court rule and the benefits it provides to litigants and the court.

Recommendation: The Limited Scope Representation Working Group recommends that the Superior Court of the District of Columbia provide training to its judicial officers on the implementation, application, and benefits of the court rule permitting limited appearances.

III. Conclusion

The current trend in our courts is that more and more litigants are proceeding unrepresented, which often negatively impacts their ability to present a cohesive and comprehensible case. In addition, more and more individuals are attempting to handle their non-court legal matters without the benefit of counsel, simply because they cannot afford the rising cost of legal services.

Limited scope representation provides an opportunity for the District to expand access to counsel for individuals and families of low, limited, and moderate means. Institutionalizing the practice will ensure that lawyers and clients have the guidance and protection they need and deserve as this practice emerges and forever changes how legal services are delivered.

⁶ The D.C. Access to Justice Commission and the D.C. Bar Pro Bono Program will provide background information and consultation to the Rules Education Program as it develops the training.

APPENDIX A

Limited Scope Representation Working Group
a joint project of the
D.C. Access to Justice Commission
D.C. Bar Pro Bono Program

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APPENDIX B

**Limited Scope Representation Working Group
Proposed Revisions to Rule 1.2(c) and Comments of the
D.C. Rules of Professional Conduct**

Rule 1.2(c): A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.¹

Comments

[4]² The objectives or scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[5]³ Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[6]⁴ Rule 1.5(b) requires a lawyer to communicate in writing the scope of the lawyer's representation. It is generally prudent for a lawyer to reasonably explain any limits on the scope of the lawyer's services in writing.

¹ Proposed Rule 1.2(c) is identical to the American Bar Association's Model Rule 1.2(c), and revises the existing Rule 1.2(c) of the D.C. Rules of Professional Conduct: *A lawyer may limit the objective of the representation if the client gives informed consent.*

² Proposed Comment [4] is identical to the American Bar Association's Model Comment [6], except the Working Group added "objectives or", believing that "objectives" and "scope" are not completely synonymous or interchangeable.

³ Proposed Comment [5] is identical to the American Bar Association's Model Comment [7].

⁴ Proposed Comment [6] is derived from the existing Comment [4] of Rule 1.2 of the D.C. Rules of Professional Conduct: *Rule 1.5(b) requires a lawyer to communicate the scope of the lawyer's representation when the lawyer establishes a new lawyer-client relationship, and it is generally prudent for the lawyer to explain in writing any limits on the objectives or scope of the lawyer's services.*

[7]⁵ It is generally prudent for the lawyer to request and receive a written informed consent, although the rule does not require that it be in writing or in any particular form in all cases. Lawyers should also recognize that the information sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. The term “informed consent” is defined in Rule 1.0(e).

[8]⁶ An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.⁷

⁵ Proposed Comment [7] is included by the Working Group to provide additional guidance to lawyers and protection to consumer-clients, and to be consistent with other provisions of the D.C. Rules of Professional Conduct.

⁶ This Comment is simply renumbered and currently is Comment [5] to Rule 1.2 of the D.C. Rules of Professional Conduct.

⁷ Subsequent Comments to Rule 1.2 of the D.C. Rules of Professional Conduct will need to be renumbered.

**Limited Scope Representation Working Group
Proposed Revisions to Rule 1.2(c) and Comments of the
D.C. Rules of Professional Conduct**

Rule 1.2(c): A lawyer may limit the objective scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.¹

Comments

[4]² The objectives or scope of services to be provided by the lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific objectives or means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude objectives or means actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Rule 1.5(b) requires a lawyer to communicate the scope of the lawyer's representation when the lawyer establishes a new lawyer-client relationship, and it is generally prudent for the lawyer to explain in writing any limits on the objectives or scope of the lawyer's services.³

[5]⁴ Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[6] Rule 1.5(b) requires a lawyer to communicate in writing the scope of the lawyer's representation, when the lawyer establishes a new lawyer-client relationship, and it is

¹ Proposed Rule 1.2(c) is identical to the American Bar Association's Model Rule 1.2(c).

² Proposed Comment [4] is identical to the American Bar Association's Model Comment [6], except the Working Group added "objectives or", believing that "objectives" and "scope" are not completely synonymous or interchangeable.

³ See Comment [6].

⁴ Proposed Comment [5] is identical to the American Bar Association's Model Comment [7].

generally prudent for ~~the~~ lawyer to reasonably explain in writing any limits on the ~~objectives or scope~~ of the lawyer's services in writing.

[7]⁵ It is generally prudent for the lawyer to request and receive a written informed consent, although the rule does not require that it be in writing or in any particular form in all cases. Lawyers should also recognize that the information sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. The term "informed consent" is defined in Rule 1.0(e).

[58] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

⁵ Proposed Comment [7] is included by the Working Group to provide additional guidance to lawyers and protection to consumer-clients, and to be consistent with other provisions of the D.C. Rules of Professional Conduct.

APPENDIX C

**Limited Scope Representation Working Group
Proposed Court Rule to the
Superior Court of the District of Columbia**

Limited Appearance

- (a) Permitted. In accordance with Rule 1.2(c) of the District of Columbia Rules of Professional Conduct, an attorney may enter a limited appearance in a court proceeding, including but not limited to discovery, motions practice, hearings, and trials, or parts thereof.
- (b) Notice. An attorney's appearance may be limited by date, time period, activity, or subject matter if specifically stated in a notice of limited appearance filed and served prior to or simultaneous with the proceeding(s) for which the attorney appears.
- (c) Termination. The attorney's appearance terminates without the necessity of leave of court:
 - i. if the notice of limited appearance specifically states the scope of the appearance by date or time period; or
 - ii. upon the attorney filing a notice of completion. The notice must be served on each of the parties, including the attorney's client.
- (d) Service.
 - i. Service on an attorney who has entered a limited appearance is required only for matters within the scope of the representation as stated in the notice. Any such service also must be made on the party.
 - ii. Service on the attorney for matters outside the scope of the limited appearance does not extend the scope of the attorney's representation.
- (e) Extended Appearance. An attorney may extend a limited appearance only by filing and serving a new notice of limited appearance or a notice of general appearance prior to or simultaneous with the proceeding(s) for which the attorney appears.

Comment

Nothing in this rule precludes an attorney from providing limited scope representation in matters outside court proceedings.

APPENDIX D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

- CIVIL DIVISION**
- FAMILY COURT**
- PROBATE DIVISION**
- _____

Plaintiff/Petitioner

v.

Case No. _____

Defendant/Respondent

NOTICE OF LIMITED APPEARANCE

THE CLERK OF THE COURT will please note that I am entering an appearance limited to (select one and specify):

- date: _____,
- time period: _____,
- activity: _____,
- subject matter: _____,

which will terminate without necessity of leave of court. If the appearance is limited by activity or subject matter, it will terminate upon my filing a Notice of Completion. If the appearance is limited by date or time period, it will terminate without filing a Notice of Completion.

I have informed my client that my appearance is limited and does not extend beyond what is specified above without mutual and informed consent and unless a new Notice of Limited Appearance is filed.

Notices and documents concerning the date, time period, activity, or subject matter described above must be served on me and my client. All other notices and documents must be served only on my client and/or any counsel who has entered an appearance on my client's behalf.

I hereby certify that the foregoing information is true and correct to the best of my knowledge and belief and that on the _____ day of _____, 20____, I served a copy of this Notice of Limited Appearance on all parties or their counsel and on my client by hand, first-class mail, or electronically by agreement of the parties, court rule or court order.

Signature

Street Address

Print Name and Bar Number

City, State, ZIP

Phone Number

Email Address

Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

- CIVIL DIVISION**
- FAMILY COURT**
- PROBATE DIVISION**
- _____

Plaintiff/Petitioner

v.

Case No. _____

Defendant/Respondent

NOTICE OF COMPLETION

THE CLERK OF THE COURT will please note that as of the _____ day of _____, 20____, I completed the (select one):

- activity
- subject matter

specified in my Notice of Limited Appearance. The filing of this Notice hereby terminates my appearance without necessity of leave of court. I informed my client that my appearance was temporary and will terminate upon the filing of this Notice of Completion.

Any new notices or documents pertaining to this case must be served only on my client and/or any counsel who has entered an appearance on my client's behalf.

I hereby certify that the foregoing information is true and correct to the best of my knowledge and belief and that on the _____ day of _____, 20____, I served a copy of this Notice of Completion on all parties or their counsel and on my client by hand, first-class mail, or electronically by agreement of the parties, court rule or court order.

Signature

Street Address

Print Name and Bar Number

City, State, ZIP

Phone Number

Email Address

Date

APPENDIX E

**Limited Scope Representation
Model Engagement Provisions**

Limited Scope Agreement of Services¹

Client and Lawyer agree that Lawyer will provide limited scope legal representation as described below. Limited scope representation is a relationship between a lawyer and a client in which they agree that the scope of legal services will be limited to a specified duration or task(s).

Client and Lawyer agree that Lawyer will NOT perform any services not specifically described below, unless Client and Lawyer agree in writing to extend the scope of representation.

Client shall be responsible for all other aspects of Client's legal matter, unless Client engages another Lawyer.

If Client and Lawyer agree to extend the scope of services provided, those services will be specifically described in an amendment to this Agreement, and signed and dated by Client and Lawyer within a reasonable time after Client and Lawyer agree to extend services. If Client and Lawyer agree that Lawyer will provide full legal representation, Client and Lawyer will enter into a new written Agreement setting forth that fact, and the full scope of services to be provided.

Client and Lawyer agree that Lawyer will perform the following services, and no others:

- Advice Only. Lawyer agrees to meet with Client by telephone or in person and provide a legal assessment of Client's matter.
- Document Drafting. Lawyer agrees to draft the following document(s):

Client agrees that any document(s) drafted by Lawyer will not bear Lawyer's signature or appear on Lawyer's letterhead, unless otherwise agreed to in writing. Any document(s) will bear Client's name, with Client's contact information, and Client's signature. Lawyer will not speak or advocate for Client regarding any document(s), unless otherwise agreed to in writing. Lawyer agrees to include only language and concepts in any document that Client asserts he or she understands and can articulate or advocate for. Client edits document(s) at Client's own risk.

¹ Providing brief pro bono legal services during the course of an intake or pro se clinic may not always rise to the level requiring a written communication.

- Negotiation. Lawyer agrees to participate in settlement negotiations on behalf of Client by providing only the following services:

- Single Event | Transaction | Task. Lawyer agrees to perform the following:

Once Lawyer completes what is described above, Lawyer's representation is concluded. In the event Lawyer determines that the probability of completing what is described above is unlikely, Lawyer may withdraw from Client's matter by providing written notice to Client and opposing party(ies) and counsel(s).

- Appearance(s) Limited by Date, Time Period, Activity, or Subject Matter. Lawyer shall appear in a court of law, before a governmental authority or agency, in an arbitration, deposition, or other meeting, or at a hearing or conference on behalf of Client in the following case:

_____ on the following date(s):

and/or for the following activity or subject matter: _____

For this appearance(s) only, Lawyer is representing Client and is authorized to present Client's case and take all reasonable actions to represent Client's interests. When required, Lawyer agrees to file and serve a Notice of Limited Appearance, Notice of Completion and/or any other notice required by the court of law or governmental authority or agency. If Lawyer and Client agree to extend Lawyer's services, including any appearance(s), those services will be specifically described in an amendment to this Agreement, and signed and dated by Client and Lawyer.

**Limited Scope Representation
Model Informed Consent**

I have read this *Notice and Consent* and understand and agree that:

- The only legal services that will be provided by the lawyer are specified above.
- The lawyer will not be my lawyer for any other purpose or proceeding and will provide no other legal services unless specified and agreed to in writing.
- The lawyer may enter a limited appearance to represent me in a court of law, before a governmental authority or agency, in an arbitration, deposition, or other meeting, or at a hearing or conference. The appearance will terminate either automatically or upon the filing of a Notice of Completion or other notice required by the court of law or governmental authority or agency.
- The address provided below is my permanent address that the lawyer, opposing party(ies) and court may use to contact me. I will inform the lawyer, opposing party(ies) and court if my address changes.
- The lawyer answered all my questions about this agreement and the limited nature of the representation.
- I am able to read and understand English.
- This *Notice and Consent* was read to me by the lawyer.
- This *Notice and Consent* was interpreted and/or translated for me.

This *Notice and Consent* is being provided to you pursuant to Rule 1.2(c) of the D.C. Rules of Professional Conduct.

APPENDIX F

HOW DOES LIMITED SCOPE REPRESENTATION WORK?

What is limited scope representation?

Limited scope representation is a relationship between a lawyer and a client in which they agree that the lawyer will provide legal services limited to a specified time period or tasks. In other words, you may ask a lawyer to help you with only parts of your case, either because you cannot afford to hire a lawyer to fully represent you or because you do not think you need or want a lawyer to handle every part of your case. Examples include:

- You may ask a lawyer for legal advice or to suggest a strategy for how to win your case.
- You may ask a lawyer to help you draft letters or court papers.
- You may ask a lawyer to represent you at a mediation or settlement conference.
- You may ask a lawyer to represent you at a deposition or court hearing.

The only legal services that will be provided by your limited scope lawyer are those that you jointly agree to and are written in an agreement. Your lawyer will not be your lawyer for anything else and will provide no other legal services unless specified and agreed to in a new agreement. You should be prepared to handle the other parts of your case yourself or you may ask another lawyer for help.

Why is it important to discuss my case fully with my lawyer?

Even though your lawyer may only be handling certain parts of your case, he or she still needs to know all the facts. There may be important legal issues in your case that only a lawyer can understand. Your lawyer cannot advise you on how to proceed or effectively help you unless he or she knows all the facts. And just like when a lawyer provides full representation, a limited scope lawyer must not disclose to the court or other side anything you share with him or her.

Also, it is important that you advise your lawyer about every document and notice you receive from the court or other side, even if you think your lawyer may have received a copy.

Remember, you provide your lawyer with all the facts and let your lawyer provide you with information about the law. Never guess about the law and how it may apply to your case. The law shows you see on TV and many websites on the Internet can be inaccurate. Talk to your lawyer!

What if new issues come up after I have spoken with my lawyer?

Sometimes new issues will develop or information will change after you first talked to your lawyer and started working together. If that happens, it is important to tell your lawyer and discuss them immediately, even if it is only a change in address. You and your lawyer are a team, and your lawyer can only help you if you continue to provide all the information about your case during your entire relationship.

Can I change my mind about what I want my lawyer to help me with?

Yes. You and your lawyer may decide together whether and how to change what the lawyer will help you with. You may ask and your lawyer may agree to provide more help. Or you may decide you don't want or need the lawyer's help as much as you first thought. Any change must be in writing so that you and your lawyer are absolutely clear about what the lawyer has agreed to do. Some changes may need to be approved by the court or agency if your attorney filed a notice of appearance.

How much will it cost?

Some limited scope lawyers charge fees for their services. Others provide free legal services for low-income clients. You and your lawyer should agree in writing whether or how much you will pay for his or her services.

What if I have more questions about limited scope representation?

You should only enter into a limited scope relationship with your lawyer if you completely understand how it works and how it is different from full scope representation. If you have any questions, please ask your lawyer.