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WHEN LESS IS MORE: THE LIMITLESS POTENTIAL OF LIMITED SCOPE REPRESENTATION TO INCREASE ACCESS TO JUSTICE FOR LOW- TO MODERATE- INCOME INDIVIDUALS

KRISTY D'ANGELO-CORKER*

Both attorneys and judges take an oath to promote justice for all, however, that is not the case in our current system. The world we live in today looks incredibly different than it did just a few years ago and, as a result, the practice of law must adapt to meet the changing needs of individuals in this new era. Notably, the access to justice problem, specifically affecting low- to moderate-income individuals, requires a shift in the availability of legal services provided. Limited scope representation, which has been accepted by the American Bar Association for 20+ years, where an attorney handles certain aspects of the representation while the client remains responsible for others, allows attorneys to provide services to low- to moderate-income individuals who may not otherwise obtain legal representation. Although many states have begun to lay out guidelines indicating acceptance of the practice as a valid form of representation, many judges and attorneys are still opposed to the practice.

This Article argues that the legal profession should embrace the practice of limited scope representation (and promote that attorneys use it to satisfy pro bono hours, in practice areas of law that do not traditionally engage in limited scope, etc.), to assist with closing the justice gap, and this can be accomplished with the support of the judiciary and law schools. Specifically, judges need to not only accept the practice, but be a driving force behind promoting the practice. Moreover, law schools need to promote the practice by educating students about the concept early on in their legal career in professional responsibility and contract drafting courses. This Article provides a historical

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overview of how the ABA has addressed and supported limited scope representation for the last 20+ years, as a valid means to provide access to justice to those historically underserved. The Article goes on to discuss the access to justice problem most notably affecting low- to moderate-income individuals as well as examines the concept of pro bono and discusses pro bono requirements suggested by the ABA and, required, in varying degrees, by the states. Finally, the Article proposes that the judiciary and law schools should be on the forefront of promoting limited scope representation as yet another solution to assist with closing the justice gap.

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I. INTRODUCTION

*We the People of the United States, in Order to form a more perfect Union, **establish Justice**, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*¹

— *Constitution of the United States of America*

*I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty **and justice for all**.*²

— *United States Pledge of Allegiance*

Although the Constitution of the United States of America and United States Pledge of Allegiance both clearly establish that justice should be afforded to all individuals in the United States, that is currently not the case. The world we live in today looks incredibly different than it did just a few years ago, and, as a result, the practice of law must adapt to meet the changing needs of individuals in this new era. Notably, the access to justice problem, specifically affecting low- to moderate-income individuals, requires a shift in the availability of legal services provided.³

Although “Americans accused of a crime are appointed legal counsel if they cannot afford it,”⁴ generally, “there is no right to counsel in civil matters,”⁵ so individuals with civil legal issues need to seek out counsel on their own and pay the costs of such representation. Thus, with the costs of litigation continually increasing and a plethora of online legal resources and self-help assistance websites available (providing individuals with easy access to

1. U.S. CONST. pmbl. (emphasis added).

2. 4 U.S.C. § 4 (2018) (emphasis added).

3. Stephanie Kimbro, *Using Technology to Unbundle in the Legal Services Community*, HARV. J. L. & TECH. OCCASIONAL PAPER SERIES 1, 1 (2013), <https://jolt.law.harvard.edu/assets/misc/Kimbro-UsingTechnologytoUnbundleLegalServices.pdf> [https://perma.cc/Y5U4-P3VS].

4. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2017) [hereinafter LEGAL SERVS. CORP., THE JUSTICE GAP REPORT], <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [https://perma.cc/2C68-BB72].

5. *Id.*

information to represent themselves), these individuals are not seeking out professional legal help to deal with their civil legal matters.⁶ As a result, individuals are representing themselves more often than ever in the past,⁷ and these pro se litigants end up going it alone without the assistance of counsel or quality representation.

Rather than having individuals represent themselves, possibly ineffectively, other solutions, which may assist with alleviating this problem, should be pursued. For example, limited scope representation, also referred to as ghostwriting, unbundling, etc., has been accepted by the American Bar Association (“ABA”),⁸ which sets the professional standards for attorneys practicing law in the United States,⁹ as a valid means of providing representation for many years, and it has been gaining momentum as a more common practice throughout the states.¹⁰ According to the ABA’s Unbundling Resource Center, which provides information and resources regarding unbundling such as state rules, articles, ethics opinions, etc.:

Unbundling, or limited scope representation, is an alternative to traditional, full-service representation. Instead of handling every task in a matter from start to finish, the lawyer handles only certain parts and the client remains responsible for the others. It is like an à la carte menu for legal services, where: (1) clients get just the advice and services they need and

6. *Id.* at 7 (“Low-income Americans seek professional legal help for only 20% of the civil legal problems they face.”).

7. Charitie L. Hartsig & Kate J. Merolo, *How to Manage Obstacles When Across the Aisle from a Pro Se Litigant*, TRIAL PRAC., Fall 2017, at 13, 13, <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2018/fall2018-how-to-manage-obstacles-pro-se-litigant/> [<https://perma.cc/W3FG-6CR5>]. (“According to the National Center for State Courts, the number of pro se litigants in civil cases continues to rise, and there is every reason to believe this trend will continue. <https://www.ncsc.org/>.”).

8. *Unbundling Resource Center*, A.B.A. [hereinafter *ABA Unbundling Resource Center*], https://www.americanbar.org/groups/delivery_legal_services/resources/ [<https://perma.cc/W9JL-DTL7>] (last visited Oct. 5, 2019).

9. Throughout the document, I use the term attorney to represent an individual who is licensed to practice law. However, since attorney and lawyer are used synonymously in the English language, it should be noted that certain resources use the term lawyer, rather than attorney, and those references were left intact.

10. *Unbundling Resource Center: Rules*, A.B.A. [hereinafter *ABA Unbundling Resource Center*], https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules/ [<https://perma.cc/QF5E-MSF2>] (last visited Oct. 8, 2019).

therefore pay a more affordable overall fee; (2) lawyers expand their client base by reaching those who cannot afford full-service representation but have the means for some services; and (3) courts benefit from greater efficiency when otherwise self-represented litigants receive some counsel.¹¹

Ghostwrite, according to Merriam Webster, is defined as “to write for and in the name of another,”¹² and this practice allows pro se litigants to represent themselves in front of a court, while still having certain limited assistance from a legal professional. Although the terms ghostwriting, unbundling¹³ of legal services, and limited scope representation are used interchangeably, ghostwriting, specifically, seems to suggest secrecy, while limited scope representation and unbundling seem only to suggest a limited relationship between the attorney and client regarding the bounds of the representation. Ultimately, this understanding is beneficial to the client and helps to meet the client’s legal needs and keep costs down, while providing candidness about their relationship to parties outside of the representation. Thus, for the remainder of this Article, I will refer to the practice as limited scope representation and unbundling (unless otherwise described in a document that I am referencing).

Supporters of limited scope representation believe that although many individuals cannot afford full representation, they also cannot provide themselves with an effective day in court when appearing pro se,¹⁴ as they do not have the knowledge or expertise of an attorney. However, as others writing about this topic have pointed out, critics have argued that “[w]hile ghostwriting and the larger availability of limited-scope representation increases access to legal services for clients, ghostwriting raises a number of distinct issues relating to ethical and professional duties, including the ghostwriting attorney’s duty of candor and honesty to the court and opposing parties.”¹⁵ Although many state

11. *ABA Unbundling Resource Center*, *supra* note 8.

12. *Ghostwrite*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

13. *ABA Unbundling Resource Center*, *supra* note 8.

14. Tamara M. Kurtzman, *The Implications of Ghostwriting in State and Federal Courts*, L.A. LAW., Mar. 2016, at 11, 11. (“While limited scope engagements have been widely accepted for years in the realm of transactional law, litigation has remained largely the territory of full-service practice—that is, an attorney represents a client from the beginning of a case to its conclusion rather than limiting his or her service to discrete tasks. Traditionally either litigants were represented by counsel throughout the case or chose to represent themselves and appeared pro se.”).

15. *Id.*

bars and court systems have begun to lay out guidelines regarding participation in the practice,¹⁶ to show support for the practice as a means of providing access to justice for individuals who could not otherwise afford representation, many judges are still opposed to the practice and have sanctioned or reprimanded attorneys (and ultimately their clients) for participating in the practice.¹⁷ Navigating the waters of what is and is not allowed is extremely difficult, and, as a result, motivating attorneys to participate without clear guidance is even more difficult.

Thus, this Article argues that limited scope representation should be accepted generally by the judiciary and taught in law schools, so that it is embraced as a practice generally. Specifically, it should be recommended as a viable means of satisfying the pro bono requirement,¹⁸ along with being used as a low-cost method of representation, as it is another way to provide access to justice to low- and moderate-income individuals. Once embraced, attorneys will be able to engage in limited scope representation regularly and provide

16. ABA *Unbundling Resource Center: Rules*, *supra* note 10.

17. *Unbundling Resource Center: Cases*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/cases/ [<https://perma.cc/22CY-XT3M>] (last visited Oct. 10, 2019). Two cases referenced on the Unbundling Resource Center's Cases webpage are:

The Strand on Ocean Drive Condominium Association, Inc., vs. Jeffrey Haym; John Doe Tenant; and, Jane Doe Tenant, In The Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, CASE NO. 2017 025588 CA 01 (February 2, 2018). A Florida Circuit Court Judge has ordered Ice Legal P.A., a law firm who had prepared documents for an otherwise pro se defendant, to either file a notice of appearance or notice of non-representation. As set out in the responding Notice of Non-Appearence of Limited-Representation Counsel, at a January 25th hearing, upon noticing that the defendant's motion contained the language 'Prepared with Assistance of Counsel,' the Court refused to hear the defendant's motion on the grounds that the defendant was represented by counsel who needed to be present at the hearing and further ordered reimbursement to the plaintiff for an hour's worth of legal fees.

...

In re Petition for Disciplinary Action Against A.B., a Minnesota Attorney, Panel Case No. 35121 (2014). An attorney received an admonition for violating Minnesota Rule of Professional Conduct 8.4(d), to "engage in conduct that is prejudicial to the administration of justice," as a result of failing to appear at a hearing. Because the client instructed the attorney not to attend, pursuant to the terms of a limited-scope representation agreement, the Court reversed the disciplinary panel's finding.

Id. (citations omitted).

18. See *infra* Part IV.

invaluable assistance to those in need without the fear of pushback or repercussions from the courts and fellow attorneys. Additionally, since, at the current time, limited scope representation occurs more frequently within certain areas of law, i.e. family law, estate planning and probate, real estate, etc.,¹⁹ the concept should be promoted as beneficial in various areas of law, rather than the limited fields that it currently happens in, so that the pool of individuals reached can be expanded.

Part II provides a historical overview of how the ABA has addressed and supported limited scope representation through both changes to the ABA Model Rules of Professional Conduct (“ABA Model Rules”) through the Ethics 2000 Commission (the “Commission”), as well as through issuing Formal Opinions. It demonstrates that the changes suggested by the ABA to the Model Rules and in Formal Opinions over the last 20+ years regarding limited scope representation suggest that the ABA wanted to unequivocally show that the practice was allowed and lay out guidelines for attorneys who engage in limited scope representation as a means of providing access to justice. Part III discusses the access to justice problem most notably affecting low- to moderate-income individuals. Part IV examines the general concept of pro bono and discusses pro bono requirements suggested by the ABA and, required, in varying degrees, by the states. Finally, Part V contains recommendations and suggests that the judiciary and law schools should be on the forefront of promoting limited scope representation as yet another solution to assist with closing the justice gap.

II. HISTORICAL EXAMINATION OF HOW THE ABA HAS ADDRESSED LIMITED SCOPE REPRESENTATION

This Part examines how the ABA has addressed limited scope representation and shows that its acceptance of the practice is grounded in the concept of access to justice. Thus, an examination of the ABA’s overall mission and goals, as well as how it has addressed limited scope representation in the ABA Model Rules and through Formal Opinions, is a necessary starting

19. ABA STANDING COMM. ON PRO BONO & PUBLIC SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 14 (2018) [hereinafter ABA SUPPORTING JUSTICE REPORT], https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf [https://perma.cc/XB56-XUAB] (last visited Oct. 10, 2019).

point, as it is logical to begin with an examination of the professional standards clearly delineated for attorneys by the ABA.

According to the ABA's website, its Mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."²⁰ This mission is achieved, "through tireless work toward four Goals,"²¹ with those being:

Goal 1: Serve Our Members

Goal 2: Improve Our Profession

Goal 3: Eliminate Bias and Enhance Diversity

Goal 4: Advance the Rule of Law²²

Goals 2 and 4 are significant to the discussion of limited scope representation, as they focus on an attorney's role with respect to the public. Along with stating its goals, the ABA has set out objectives for each of these goals. Two of the stated Objectives under Goal 2 are to "[p]romote competence, ethical conduct and professionalism" and to "[p]romote pro bono and public service by the legal profession."²³ Among the stated objectives for Goal 4 is to "[a]ssure meaningful access to justice for all persons."²⁴ Thus, taken together, the ABA strives to not only ensure that attorneys are competent, ethical, and professional, but also that they partake in pro bono and public service activities to provide meaningful access to justice for all persons.

Over the years, the ABA has addressed limited scope representation in a number of ways, with some of the most notable efforts being that the ABA tasked the Ethics 2000 Commission with reviewing and suggesting amendments to the ABA Model Rules²⁵ and twice put out Formal Opinions specifically addressing ghostwriting/limited scope representation,²⁶ whereby

20. *ABA Mission and Goals*, A.B.A., https://www.americanbar.org/about_the_aba/aba-mission-goals [<https://perma.cc/MX4C-XCQQ>] (last visited Oct. 10, 2019).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Ethics 2000 Commission*, A.B.A. [hereinafter *Ethics 2000 Commission*], https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/ [<https://perma.cc/P8PR-B39X>] (last visited Oct. 5, 2019).

26. ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 472 (2015) [hereinafter ABA Formal Op. 472], http://www.abajournal.com/files/formal_opinion_472_FINAL.pdf [<https://perma.cc/8TC7-GEW9>]; ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) [hereinafter ABA Formal Op. 07-446],

clearly showing the need to provide clarity for attorneys engaging in this practice. Thus, below is an overview of the ABA's examination and discussion of limited scope representation over the years, as it is key to understanding how and why the ABA Model Rules read as they do, to lay the groundwork for the remainder of the discussion.

*A. Suggested Changes to the ABA Model Rules by the Ethics 2000
Commission to Address Limited Scope Representation*

Model rules of conduct were created to provide guidance to practicing attorneys regarding ethical behavior.²⁷ In 1908, the Committee on Code of Professional Ethics set out the Canons of Professional Ethics,²⁸ which were in place until the 1969 Model Code of Professional Responsibility was instituted.²⁹ The ABA Model Rules of Professional Conduct were first adopted by the ABA in 1983, and they have served to help the ABA meet its

https://www.americanbar.org/content/dam/aba/migrated/media/youraba/200707/07_446_2007.authcheckdam.pdf [<https://perma.cc/K24E-GYWN>]. See also ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS: A WHITE PAPER 4 (2009), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/lis_del_prose_white_paper.pdf [<https://perma.cc/GF9S-P6YG>].

Additionally, in November 2009, ABA Standing Committee on the Delivery of Legal Services prepared a White Paper entitled *An Analysis of Rules That Enable Lawyers To Serve Pro Se Litigants*. *Id.* at 1. Despite not having a stamp of approval from the ABA, the information is still extremely beneficial for policy makers and practitioners attempting to understand and navigate the muddy waters of limited scope representation. The White Paper indicated that:

[it had] been prepared by the American Bar Association's Standing Committee on the Delivery of Legal Services. The purpose of the paper is to provide policy-makers with information and analysis on the ways in which various states are formulating or amending rules of professional conduct, rules of procedure and other rules and laws to enable lawyers to provide a limited scope of representation to clients who would otherwise proceed on a *pro se* basis, and to regulate that representation.

Id. at 4. It further stated that, "The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association." *Id.* at 2.

27. See *Model Rules of Professional Conduct: About the Model Rules*, A.B.A., (Oct. 2, 2019) [hereinafter *About the Model Rules*] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [<https://perma.cc/PP5G-T8C3>] (last visited Oct. 5, 2019).

28. The 1908 Canons of Professional Ethics were last amended in 1963. See *id.*

29. *Id.*

responsibility of representing the legal profession and promoting the public's interest in justice for all.³⁰ These Model Rules "serve as models for the ethics rules of most jurisdictions."³¹ The House of Delegates of the American Bar Association adopted the Model Rules of Professional Conduct at the August 1983 ABA Annual Meeting, with the first presentation of those rules by the Kutak Commission taking place at the January 1982 ABA Midyear Meeting.³² Additionally, in 1997, the ABA Model Rules were examined by the Ethics 2000 Commission with the goals of updating "the Model Rules in light of developments since the Rules were adopted in 1983" and taking "a position of leadership in proposing rules the Commission thinks make the most sense and have the potential to bring greater uniformity among the states."³³

In 1997, a thirteen-member commission, which included judges, practitioners, professors, corporate representatives, and others,³⁴ was appointed by the then-incumbent president of the ABA, President, Jerome J. Shestack, his predecessor, N. Lee Cooper, and his successor, Philip S. Anderson, with approval by the Board of Governors, and was charged with "undertaking a comprehensive evaluation of the Model Rules of Professional Conduct."³⁵ The Commission also appointed two reporters who provided Explanation Memos for the suggested changes to each rule, and these memos provide valuable insight into why the Commission made the suggested changes that it did.³⁶ The

30. ABA Standing Comm. On Ethics & Prof'l Responsibility, Res. 109 (2016); AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 xi (Arthur H. Garwin ed., 2013); MODEL RULES OF PROF'L CONDUCT ix–x (AM. BAR ASS'N 2018).

31. *About the Model Rules*, *supra* note 27.

32. AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 x–xi (Arthur H. Garwin ed., 2013).

33. CHARLOTTE (BECKY) STRETCH, A.B.A., OVERVIEW OF ETHICS 2000 COMMISSION AND REPORT 1, https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/ [<https://perma.cc/AC9A-8GMQ>].

34. *Id.* ("Members included a state supreme court chief justice, a federal circuit court judge, a state court trial judge, a retired judge who is also a former dean and law professor, two professors of legal ethics, one of whom was the principal drafter of the Model Rules, a lawyer formerly with the Department of Justice, several private practitioners, a former in-house counsel, and a nonlawyer member, who is a former college president and member of numerous corporate boards.").

35. *Id.*

36. *Id.* ("The Commission appointed two Reporters: Chief Reporter Nancy J. Moore, a professor of legal ethics at Boston University and an Adviser to the Restatement of the Law Governing Lawyers; and Carl Pierce, a professor of legal ethics at the University of Tennessee and also reporter to the

Overview of Ethics 2000 Commission and Report (the “Overview”) stated that the reasons for undertaking the project were:

1. Growing disparity in state ethics rules – 44 states use the Model Rules format but with some significant variations
2. Lack of clarity in some existing rules; some dissonance between rules and comments
3. New issues and questions raised by the influence that technological developments are having on the delivery of legal services
4. Continuing need to expand access to legal services to low and moderate income persons
5. Changing organization and structure of modern law practice
6. The Commission was also mindful of
 - a. the need to enhance public trust and confidence in the legal profession
 - b. special concerns of lawyers in nontraditional practice settings
 - c. increased public scrutiny of lawyers.³⁷

Even with a quick glance at the above reasons, specifically numbers 4 and 5, one can see that the Commission wanted to directly address the access to justice problem and the changing legal profession. Ultimately, the Report was submitted to the House of Delegates in August 2001, debated at the August 2001 Annual and February 2002 Midyear meetings, and “[t]he changes to the Model Rules as amended during the debate were final at the end of the February 2002 Midyear Meeting.”³⁸

The Ethics 2000 Commission Report on the ABA Model Rules (“Ethics 2000 Report”) made noticeable changes to Model Rules 1.2, 1.1, 1.0, 4.2, and 4.3, all of which are relevant to the concept of limited scope representation. The Ethics 2000 Report contained changes to the body of the rules as well as changes to the Comment sections, and the Reporter’s Explanation of Changes helped to explain specifically why the changes were suggested.³⁹ Ultimately,

committee in Tennessee proposing revisions to the Tennessee Rules of Professional Conduct. Professor Tom Morgan, a professor of legal ethics at George Washington University, also served as a Reporter for one year.”).

37. *Id.*

38. *Ethics 2000 Commission*, *supra* note 25.

39. *Model Rules of Professional Conduct as Adopted by ABA House of Delegates, February 2002* – Center for Professional Responsibility, A.B.A. (Jan. 24, 2012), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_redline/ [https://perma.cc/L79B-8BRW].

an examination of the suggested changes by the Commission to the Model Rules regarding limited scope representation demonstrate that the ABA wanted to unequivocally state that engaging in limited scope representation is an allowed practice and provide guidelines for attorneys who desire to engage in the practice.

1. Changes to ABA Model Rule 1.2

The first noted modification that the Ethics 2000 Commission suggested regarding Model Rule 1.2 was a change of title for the section to Scope of Representation and Allocation of Authority Between Client and Lawyer from, the original title of, Scope of Representation.⁴⁰ This subtle change was done by the Commission to provide more clarification regarding the subject matter of the section.⁴¹ As a result of this clarification, the relationship of an attorney and his client was more clear as well.

After examining the text of Model Rule 1.2, the Commission suggested substantive changes be made to paragraphs (a) and (c), and that section (e) be completely deleted.⁴² With regard to paragraph (a), the Commission suggested changes which increased the requirement of an attorney regarding communication with their client.⁴³ The suggested relevant change to Model Rule 1.2(a) stated that:

A Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation; subject to paragraphs (c), (d) and (e), and, as required by Rule

40. *Ethics 2000 Commission Report on the Model Rules of Professional Conduct Rule 1.2-Center for Professional Responsibility*, A.B.A. (Oct. 5, 2011) [hereinafter *Ethics 2000 Commission Report on Model Rule 1.2*], https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12/ [https://perma.cc/47ZH-J4WB].

41. *Model Rule 1.2: Reporter's Explanation of Changes*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12rem/ [https://perma.cc/L2T3-NGQ4] (last visited Oct. 5, 2019) (According to the Ethics 2000 Commission Reporter's Explanation of Changes for Model Rule 1.2, "The caption has been amended to more accurately describe the subjects addressed by the Rule.").

42. *Ethics 2000 Commission Report on Model Rule 1.2*, *supra* note 40. Section (e), which was deleted, read: "~~(e) 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.~~" *Id.*

43. *Id.*

1.4,⁴⁴ shall consult with the client as to the means by which they are to be pursued.⁴⁵

According to the Ethics 2000 Commission Reporter's Explanation of Changes for Model Rule 1.2:

The phrase "subject to paragraphs (c) and (d)" has been moved to clarify that all of the actions a lawyer may take pursuant to paragraph (a) are properly subject to the restrictions of paragraph (d) and some of them may be subject to the limitation in paragraph (c). In the current Rule, the limitations of paragraphs (c) and (d) only apply to the lawyer's obligation to abide by the client's decisions concerning the representation.⁴⁶

It is important to understand the suggested changes to paragraph (c), as limited scope representation falls directly under this section. Thus, the redlined version of the Committee's suggested changes to Model Rule 1.2(c) are as follows:

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 informed consent.⁴⁷

According to the Reporter's Explanation of Changes regarding Model Rule 1.2:

The Commission recommends that paragraph (c) be modified

44. *Rule 1.4: Communication*, A.B.A. (Oct. 05, 2011), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2_k_rule14/ [<https://perma.cc/M734-859R>] (Model Rule 1.4 deals with Communication requirements for a lawyer communicating with their client, such that they must promptly inform the client of decision and circumstances where the client's informed consent is required, reasonably consult with the client about means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter, promptly comply with reasonable requests for information, and consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the ABA Model Rules or other law.).

45. *Ethics 2000 Commission Report on Model Rule 1.2*, *supra* note 40 (emphasis added) (Additionally, the remainder of Model Rule 1.2(a) says:

"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 SETTLE A MATTER. IN A CRIMINAL CASE, THE LAWYER SHALL ABIDE BY THE client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.")

46. *Model Rule 1.2: Reporter's Explanation of Changes*, *supra* note 41.

47. *Ethics 2000 Commission Report on Model Rule 1.2*, *supra* note 40.

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. 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 nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel.⁴⁸

Thus, it is clear that the Commission wanted to show that the ABA was accepting of limited scope representation and provide a clear framework for attorneys to be able to rely on in order to provide services to individuals that may not otherwise be able to obtain any legal assistance. Moreover, the ABA also realized that clients were beginning to want to be in control of determining the purpose of the representation, as well as to have more leeway in determining the level of service and scope of representation that they could expect from their attorney.⁴⁹ As such, the Ethics 2000 Commission Report suggested changing the heading title over Comments [1] through [4]⁵⁰ for Rule 1.2 to Allocation of Authority between Client and Lawyer (from its original heading title of Scope of Representation) to clearly note a needed change.⁵¹ Additionally, Comment [1] used to begin with the language “Both lawyer and client have authority and responsibility in the objective and means of representation,” however that language was changed to “Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.”⁵² Again, the ABA realized that clients should have more control over the purposes of the representation and wanted to impart that concept on all attorneys using the Model Rules as guidelines while navigating their client relationships.

48. *Model Rule 1.2: Reporter’s Explanation of Changes*, *supra* note 41.

49. *Id.*

50. *Ethics 2000 Commission Report on Model Rule 1.2*, *supra* note 40 (Comments [1] through [4] were originally Comments [1] and [2] however those Comments were edited and additional Comments were added.).

51. *Id.*

52. *Id.*

Additionally, one can argue that the heading title over Comments [6] through [8],⁵³ which was changed to Agreements Limiting Scope of Representation, from its original title of Services Limited in Objectives and Means,⁵⁴ also shows that the Commission wanted to address the existence and emergence of limited scope representation in a meaningful way. For Comment [6] to ABA Model Rule 1.2, the Commission recommended deleting the word objectives, but leaving in the word scope, thus the redlined version of the Comment now reads “[6] 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.”⁵⁵

According to paragraph 7.a. in the Reporter’s Explanation of Changes regarding Model Rule 1.2, “The Commission has replaced the current reference to limiting the ‘objectives of the representation’ with limiting the ‘scope of the representation.’ Only the client can limit the client’s objectives.”⁵⁶ Again, this put the power in the client’s hands to limit the objectives, while giving attorney the opportunity, in agreement with the client, to limit the scope of services. The Reporter’s Explanation of Changes went on to state, “As indicated in Comment [6], the scope of a representation may be limited either by limiting the subject matter for which the lawyer will assume responsibility or the means the lawyer will employ.”⁵⁷ Again, this small change showed that the ABA was attempting to better define the roles of the attorney and client within the attorney-client relationship, with clients being responsible for the objectives of the representation and attorneys being able to determine the scope.

Additionally, in Comment [6] for ABA Model Rule 1.2, the Commission went on to provide an example of when representation may be limited, such as limiting the scope of representation to an attorney representing an insured only in matters relating to insurance coverage.⁵⁸ The Commission suggested adding language to both address that there may be times that a client may desire to limit the objectives of representation or may wish to exclude specific actions if the

53. *Id.* (Comment [6] through [8] were originally Comments [4] and [5], however those Comments were edited, and additional Comments were added.).

54. *Id.*

55. *Id.*

56. *Model Rule 1.2: Reporter’s Explanation of Changes*, *supra* note 41.

57. *Id.*

58. *Ethics 2000 Commission Report on Model Rule 1.2*, *supra* note 40.

client thinks they are too costly,⁵⁹ again acknowledging that representation is not necessarily always all-encompassing.

In Comment [7], which was a completely new addition to the Comments for Section 1.2, the Commission's suggestions attempted to give a clear explanation of boundaries for how limited scope representation should function and ensure that the client's desire for such limited representation is balanced against the attorney's need to still provide competent, thorough representation. Comment [7] begins by stating that, "[a]lthough this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances."⁶⁰ Rather than leaving it up to only the lawyer to determine what is reasonable, the Comment went on to state that:

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.⁶¹

Comment [7] additionally stated that "[a]lthough 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."⁶² Thus, the addition of this Comment [7] serves to ensure that even if a client desires to limit representation, an attorney is still bound to provide competent, thorough representation, which is a basic requirement of the profession.

59. *Id.* Thus, Comment 6 states that:

[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.

Id.

60. *Id.*

61. *Id.*

62. *Id.*

2. Changes to ABA Model Rule 1.1

As limited scope representation allows an attorney to provide certain limited assistance with regard to a specific legal issue at hand, rather than providing full representation to a client on all matters, it must be considered to what extent an attorney is still responsible for providing the same exact level of service and competence to a client in these limited scope relationships. Note that when the Ethics 2000 Commission reviewed ABA Model Rule, Section 1.1, the rule stated that:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁶³

A review of the Comments to Model Rule 1.1 showed that the Commission left some of the Comment language intact, while also again adding language dealing with limited scope representation. As the redlined suggestions to Comment [5] to Rule 1.1 states as follows:

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more ~~elaborate~~ extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).⁶⁴

This additional language suggests that limiting the scope of representation limits the matters for which the attorney is responsible, however since no mention of complexity is mentioned, it suggests that the level of competence required remains high. The Reporter's Explanation of Changes regarding Model Rule 1.1 stated that:

[5] The Commission recommends the addition of a sentence indicating that a Rule 1.2(c) agreement to limit the scope of a

63. *Rule 1.1: Competence*, A.B.A. (Oct. 5, 2011), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2_k_rule11/ [<https://perma.cc/B9BY-GBP8>].

64. *Id.*

representation will limit the scope of the matters for which the lawyer is responsible. Given the increase in the number of occasions in which lawyers and clients agree to a limited representation, the Commission thought it important to call attention to the relationship between Rules 1.1 and 1.2(c). No change in substance is intended.⁶⁵

The Reporter's Explanation at [5] went on to clarify, however, that "A minor change was made to make explicit that the duty to be prepared and thorough varies with the complexity of the matter as well as what is at stake. No change in substance is intended."⁶⁶ This explanation suggests that if a matter is less complex, then the duty to be prepared may be less. Thus, again, based on a review of the suggested changes to the Comments to Model Rule 1.1, the ABA wanted to acknowledge that limited scope representation was occurring more regularly. As a result, they felt it necessary to provide guidance to attorneys participating in limited scope representation to ensure that they are fully aware that it still requires attorneys to ensure that they are providing competent representation in such instances.

3. Changes to ABA Model Rule 1.0

Additionally, the Ethics 2000 Commission suggested adding an entirely new section, Model Rule 1.0(e), to deal with informed consent. In order to ensure that a client is fully apprised of the relationship being entered into, the Commission suggested adding to 1.0(e), as follows:

(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.⁶⁷

65. *Model Rule 1.1: Reporter's Explanation of Changes*, A.B.A. (Oct. 5, 2011), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule11rem/ [<https://perma.cc/76PC-7YLF>].

66. *Id.*

67. *Rule 1.0: Terminology*, A.B.A. (Oct. 5, 2011), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule10/ [<https://perma.cc/YW72-9S2S>] (According to Comment [6] for Rule 1.0: "Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the

This paragraph is an extremely important addition when discussing limited scope representation, as it clarifies that a client must be fully apprised of the course of conduct, and how the representation will proceed, especially if the scope of the representation is limited in some way. Thus, paragraph 7.b. of the Reporter's Explanation of Changes to Rule 1.2 explained that:

In cases in which the limitation is reasonable, the client must give informed consent as defined in Rule 1.0(e). Because a useful limited representation may be provided over the telephone or in other situations⁶⁸ in which obtaining a written consent would not be feasible, the proposal does not require that the client's informed consent be confirmed in writing. Comment [8], however, reminds lawyers who are charging a fee for a limited representation that a specification of the scope of the representation will normally be a necessary part of the lawyer's written communication with the client pursuant to Rule 1.5 (b).⁶⁹

circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.”).

68. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, *supra* note 26, at 8 (In *An Analysis of Rules That Enable Lawyers To Serve Pro Se Litigants: A White Paper*, by the ABA Standing Committee on the Delivery of Legal Services, November 2009, it stated that, “While written consent to a limited representation is clearly a best practice that should be encouraged in many settings, the Committee believed that such an ethical requirement would frustrate the ability of lawyers to provide services through telephone hotlines, such as Hotlines for the Elderly, sponsored by AARP, or other electronic communications that do not lend themselves to an exchange of written or signed documents.”).

69. *Model Rule 1.2: Reporter's Explanation of Changes*, *supra* note 41 (The Reporter's Explanation of Changes went on to state that, “The Commission is recommending that throughout the

As attorneys engaging in limited scope representation should only do so when there is informed consent, this addition to the Model Rules provides guidance to lawyers when navigating the relationship with a client in a limited scope representation. Additionally, according to the Comments for Rule 1.0:

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).⁷⁰

Thus, based on the above, as long as a client gives informed consent, there should be no reason why an attorney cannot engage in a limited scope representation with that client. The key takeaways from the Commission's examination and suggested changes to rules 1.2, 1.1, and 1.0 are that while engaging in limited scope representation, lawyers still have a duty to be clear as to the scope of representation, to allow the client to determine the objectives of that representation, all while providing competent representation in the matters agreed upon. Thus, the ABA's acceptance of changes to the Model Rules clearly showed an acknowledgment that limited scope representation was occurring more frequently and that the ABA wanted to make a concerted effort to address the issue head on to provide guidance to lawyers interested in engaging in the practice to ultimately assist low- and moderate-income individuals obtain access to legal assistance.

B. ABA Formal Opinion 07-446 – Undisclosed Legal Assistance to Pro Se Litigants

In 2007, the ABA again addressed the issue of limited scope representation, this time in a Formal Opinion.⁷¹ In Formal Opinion 07-446, entitled

Rules the phrase 'consent after consultation' be replaced with 'gives informed consent,' as defined in Rule 1.0(e). No substantive change is intended.").

70. *Rule 1.0: Terminology*, *supra* note 67.

71. See generally ABA Formal Op. 07-446, *supra* note 26.

Undisclosed Legal Assistance to Pro Se Litigants, written by ABA's Standing Committee on Ethics and Professional Responsibility ("SCEPR"), the ABA again addressed the appropriateness of providing limited scope legal services,⁷² and took an additional step of addressing whether or not disclosure of such representation and the extent of assistance was necessary or required.⁷³ The Opinion asserted that "[s]tate and local ethics committees have reached divergent conclusions on this topic."⁷⁴ Referencing these divergent conclusions on the topic, the Opinion stated that:

Some have opined that no disclosure is required.⁷⁵ Others, in contrast, have expressed the view that the identity of the lawyer providing assistance must be disclosed on the theory that failure to do so would both be misleading to the court and adversary counsel, and would allow the lawyer to evade responsibility for frivolous litigation under applicable court rules.⁷⁶

72. *Id.* at 1 (The Opinion discussed how sometimes pro se litigants seek limited assistance from a lawyer with regard to the preparation of documents for the proceeding. The Opinion went on to state that "[t]his is a form of 'unbundling' of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter.").

73. *Id.* at 2.

74. *Id.* at 1.

75. *Id.* at 1–2, 1–2 n.3 (Formal Opinion 07-446 specifically cited to, "Arizona Eth. Op. 06-03 (July 2006) (Limited Scope Representation; Confidentiality; Coaching; Ghost Writing); Illinois State Bar Ass'n Op. 849 (Dec. 9, 1983) (Limiting Scope of Representation); Maine State Bar Eth. Op. 89 (Aug. 31, 1988); Virginia Legal Eth. Op. 1761 (Jan. 6, 2002) (Providing Forms to Pro Se Litigants); Virginia Legal Eth. Op. 1592 (Sept. 14, 1994) (Conflict of Interest; Multiple Representation; Contact with Adverse Party; Representation of Insurance Carrier Against Pro Se Uninsured Motorist; Attorney-Client Relationship); Los Angeles County Bar Ass'n Eth. Op. 502 (Nov. 4, 1999) (Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for In Pro Per Litigant); Los Angeles County Bar Ass'n Eth. Op. 483 (Mar. 20, 1995) (Limited Representation of In Pro Per Litigants). *But see* Alaska Eth. Op. 93-1 (March 19, 1993) (Preparation of a Client's Legal Pleadings in a Civil Action Without Filing an Entry of Appearance) (lawyer's assistance must be disclosed unless lawyer merely helped client fill out forms designed for pro se litigants); Virginia Legal Eth. Op. 1127 (Nov. 21, 1988) (Attorney-client Relationship-Pro Se Litigant: Rendering Legal Advice) (failure to disclose that lawyer provided active or substantial assistance, including the drafting of pleadings, may be misrepresentation)).

76. *Id.* at 1–2, 2, n.4. (Formal Opinion 07-446 specifically cited to, "Colorado Bar Ass'n Eth. Op. 101 (Jan. 17, 1998) (Unbundled Legal Services) (Addendum added Dec. 16, 2006, noting that Colorado Rules of Professional Conduct amended to state that a lawyer providing limited representation to pro se party involved in court proceeding must provide lawyer's name, address, telephone number and registration number in pleadings); Connecticut Inf. Eth. Op 98-5 (Jan. 30, 1998) (Duties to the Court Owed by a Lawyer Assisting a Pro Se Litigant); Delaware State Bar Ass'n

The SCEPR indicated that:

“[i]nterpreting the Model Code of Professional Responsibility, predecessor to the Model Rules, this Committee took a middle ground, stating that disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified.”⁷⁷

The SCEPR indicated, in a footnote, that it examined limited scope responsibility assuming “a jurisdiction where no law or tribunal rule requires disclosure of such participation, prohibits litigants from employing lawyers (e.g., pro se courts), or otherwise regulates such undisclosed advice or drafting,” and further stated that, “[i]f there is such a regulation, the boundaries of the lawyer’s obligation are beyond the scope of this opinion.”⁷⁸ Thus, the SCEPR examined the need for the disclosure of a limited scope representation and determined that it “depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).”⁷⁹

The SCEPR concluded that if a pro se litigant receives “legal assistance behind the scenes” that this was “not material to the merits of the litigation,” as “[l]itigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.”⁸⁰ In the Opinion, the SCEPR went on to explain that it is not concerned by the critics claiming that “pro se litigants ‘are the beneficiaries of special treatment,’ and that their pleadings are held to ‘less

Committee on Prof’l Eth. Op. 1994-2 (May 6, 1994); Kentucky Bar Ass’n Eth. Op. E-343 (Jan. 1991); New York State Bar Ass’n Committee on Prof’l Eth. Op. 613 (Sept. 24, 1990).”).

77. *Id.* at 2, 2, n.5 (Formal Opinion 07-446 specifically cited to, “ABA Inf. Op. 1414 (June 6, 1978) (Conduct of Lawyer Who Assists Litigant Appearing Pro Se), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495, at 1414 (ABA 1986). See also Florida Bar Ass’n Eth. Op. 79-7 (Reconsideration) (Feb. 15, 2000); Iowa Supreme Court Bd. of Prof’l Eth. & Conduct Op. 96-31 (June 5, 1997) (Ghost Writing Pleadings); Massachusetts Bar Ass’n Eth. Op. 98-1 (May 29, 1998); New Hampshire Bar Association (May 12, 1999) (Unbundled Services: Assisting the Pro Se Litigant); Utah 74 (1981); Association of the Bar of the City of New York, Committee on Prof’l & Jud. Eth. Formal Op. 1987-2 (Mar. 23, 1987).”).

78. *Id.* at 2, n.6.

79. *Id.* at 2.

80. *Id.*

stringent standards than formal pleadings drafted by lawyers,”⁸¹ as there is “no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of the behind-the-scenes legal assistance,”⁸² and, thus, “the nature or extent of such assistance is immaterial and need not be disclosed.”⁸³

Additionally, in the Opinion, the SCEPR went on to state that “[s]imilarly, we do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c),”⁸⁴ which specifically names actions taken by an attorney which are deemed to be professional misconduct. The Opinion indicated that the discussion of dishonesty turned on “whether the court would be misled by failure to disclose such assistance.”⁸⁵ The SCEPR confirmed its position that, serving in a limited capacity, “[t]he lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obliged under Rules 1.2 and 1.6⁸⁶ not to reveal the fact of the representation.”⁸⁷ Therefore, as Model Rule 1.2 requires a lawyer to abide by a client’s decisions concerning the representation and a lawyer may limit the scope of their representation if it is reasonable under the circumstances, and Model Rule 1.6 indicates that a lawyer shall not reveal information regarding representation without the client’s informed consent, the ABA suggested that nondisclosure of the limited scope representation may actually, at times, be required by the Model Rules.

81. *Id.* at 3, 3, n.8 (Formal Opinion 07-446 specifically cites as follows: *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Compare ABA Model Code of Judicial Conduct, Rule 2.2, Comment [4] (adopted February 2007) (“It is not a violation of this Rule [requiring impartiality and fairness] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”)).

82. *Id.* at 3.

83. *Id.*

84. *Id.*; see also MODEL RULES OF PROF’L CONDUCT r. 8.4(c) (AM. BAR ASS’N 2018) (“It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . .”).

85. ABA Formal Op. 07-446, *supra* note 26, at 3.

86. *Id.* at 4, n.11 (Formal Opinion 07-446 stated that: “Rule 1.6(a) provides: ‘(a) A lawyer shall not reveal information relating to the representation of a client unless the client give informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).’”).

87. *Id.* at 3–4.

The Opinion also addressed limited scope representation within the meaning of Rule 8.4(c)⁸⁸ and determined that “[a]bsent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of [that rule].⁸⁹ Thus, the Opinion’s ultimate conclusion was that there is no prohibition in the Model Rules against undisclosed assistance to pro se litigants, and, thus, the Formal Opinion stands as an additional stamp of approval on limited scope representation.

C. ABA Formal Opinion 472 – Communication with Person Receiving Limited-Scope Legal Services

In 2015, the ABA issued a second Formal Opinion, also written by the Standing Committee on Ethics and Professional Responsibility, further discussing limited scope representation, entitled *Communication with Person Receiving Limited-Scope Legal Services*.⁹⁰ As the ABA serves to lay out professional standards for lawyers, and specifically takes on relevant, timely topics, it seems clear that the ABA saw the need to provide additional guidance to lawyers who may encounter individuals receiving limited scope representation, as the practice is on the rise. Based on the title of the Formal Opinion alone, the ABA seemed to be continuing to be on the forefront of supporting limited scope representation as a viable option for clients, as this Opinion focused more on the individual receiving limited scope assistance⁹¹ (rather than the previous opinion which focused more on whether or not the practice was allowed and, specifically, to what extent it must be communicated to the court).⁹² Neither the previous ABA Formal Opinion nor the Ethics 2000 Commission’s review of the Model Rules addressed the impact of limited scope representation on Model Rules 4.2 or 4.3, which deal with a lawyer communicating with an individual whose interests may conflict with their own client’s interests.⁹³ However, the introductory language to Formal Opinion 472 clearly indicates that the ABA saw a need to provide clarification of an attorney’s obligations under Model Rules 4.2 and 4.3 both when

88. *Id.* at 4.

89. *Id.*

90. ABA Formal Op. 472, *supra* note 26.

91. *Id.*

92. ABA Formal Op. 07-446, *supra* note 26, at 2–3.

93. MODEL RULES OF PROF’L CONDUCT r. 4.2, 4.3 (AM. BAR ASS’N 2018).

communicating with a person who is receiving or has received limited scope representation and when engaging in limited scope representation themselves.⁹⁴

In Formal Opinion 472, the ABA indicated that the Model Rules are rules of reason and, based on the Preamble and Scope of the Model Rules, “must be construed and applied ‘with reference to the purposes of legal representation and the law itself,’”⁹⁵ specifically since “limited-scope representations do not naturally fit into either the traditional full-matter representation contemplated by Model Rule 4.2 or the wholly pro se representation contemplated by Model Rule 4.3.”⁹⁶ Thus, the Opinion examined Model Rule 1.2 generally, as well as looked at its impact on Model Rules 4.2 and 4.3.⁹⁷

1. Client Lawyer Relationship ABA Model Rule 1.2(c)

In Formal Opinion 472, the SCEPR began by analyzing the motivation behind the changes suggested by the Ethics 2000 Commission in addressing limited scope representation, as well as reviewing Formal Opinion 07-446, in order to determine how communication with individuals receiving limited scope representation should be addressed.⁹⁸ At the outset of Formal Opinion 472, it was stated outright that “Under Model Rule 1.2(c), lawyers are authorized to provide limited-scope legal representation. Although not required by Rule 1.2(c), the Committee recommended that lawyers providing limited-scope representation confirm the scope of the representation in writing provided to the client.”⁹⁹ As discussed above, based on the recommendations of the Ethics 2000 Commission, Rule 1.2 of the Model Rules entitled *Scope of Representation & Allocation of Authority Between Client & Lawyer* now allows

94. ABA Formal Op. 472, *supra* note 26, at 1–2 (The introductory language to Formal Opinion 472 states that, “In this opinion the Committee addresses the obligations of a lawyer under ABA Model Rule of Professional Conduct 4.2, *Communication with Person Represented by Counsel*, commonly called the ‘no contact’ rule, and ABA Model Rule of Professional Conduct 4.3, *Dealing with Unrepresented Person*, when communicating with a person who is receiving or has received limited-scope representation under ABA Model Rule of Professional Conduct 1.2, *Scope of Representation and Allocation of Authority Between Client and Lawyer*. We also provide recommendations for lawyers providing limited-scope representation.”).

95. *Id.* at 2, n.2 (Formal Opinion 472 specifically cited to MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [14] (AM. BAR ASS’N 2013)).

96. *Id.*

97. *See id.*

98. *Id.* at 2.

99. *Id.* at 1.

a lawyer to limit the scope of representation as long as the “limitation is reasonable under the circumstances and the client gives informed consent.”¹⁰⁰ The Opinion stated that,

[A]lthough not required by Rule 1.2(c), the Committee nevertheless recommends that when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation — including the tasks the lawyer will perform and not perform — in writing that the client can read, understand, and refer to later.¹⁰¹

The Committee went on to note that while “some state rules of professional conduct require a written agreement when a lawyer provides limited-scope services,”¹⁰² in other states a written agreement is only preferred.¹⁰³ “Additionally, some state rules of civil procedure require a limited-scope appearance filing with the court identifying each aspect of the proceeding to which the limited-scope appearance pertains.”¹⁰⁴ Thus, according to the Opinion, it is imperative that a lawyer engaged in limited scope representation review the state rules within which they practice to understand whether a written agreement is required for the representation.¹⁰⁵

The next issue for an attorney engaging in limited scope representation to consider is the communication allowed when limited scope services are provided to a party. According to the Opinion, “[i]f a lawyer who is providing

100. *Id.* at 2; MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2018).

101. ABA Formal Op. 472, *supra* note 26, at 3–4 (The Opinion goes on to state that, “This guidance is in accord with Model Rule 1.5(b) which explains: ‘The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.’”).

102. *Id.* at 4 (Formal Opinion 472 noted, “*See, e.g.,* Maryland Lawyers’ Rules of Professional Conduct, Rule 1.2(c)(3); Missouri Rule of Professional Conduct 1.2(c); Montana Rule of Professional Conduct 1.2(c)(2); and New Hampshire Rule of Professional Conduct 1.2(c) and 1.2(g).”).

103. *Id.* (Formal Opinion 472 Opinion noted, “*See* Ohio Rule of Professional Conduct 1.2(c) and Tennessee Rule of Professional Conduct 1.2(c).”).

104. *Id.* (Formal Opinion 472 Opinion noted, “*See, e.g.,* Illinois Supreme Court Rule 13(c)(6).”).

105. *Id.* at 4, n.11 (The Opinion goes on to caution that, “[b]ecause a tribunal may require disclosure of the scope of the services performed by the lawyer, and because a client receiving limited-scope services may desire to disclose to opposing counsel the scope of services performed by the lawyer, the Committee cautions lawyers providing limited-scope services to draft their limited-scope legal service agreement so that the agreement does not reveal information beyond that necessary for the client, opposing counsel, or the tribunal to determine the scope of the representation.”).

limited-scope services is contacted by opposing counsel in the matter, the lawyer should identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services,”¹⁰⁶ as the client and opposing lawyer may communicate about “any matter outside the scope of the limited representation.”¹⁰⁷ Thus, the Opinion states that, “[t]hese issues would best be resolved at the inception of the client-lawyer relationship by the client giving the lawyer providing limited-scope representation informed consent to reveal to opposing counsel what issues should be discussed with counsel and what issues can be discussed with the client directly.”¹⁰⁸

2. ABA Model Rule 4.2 and 4.3

Model Rules 4.2 and 4.3 deal specifically with a lawyer communicating with an individual whose interests may conflict with their own client’s interests. Under Model Rule 4.2, a lawyer shall not communicate about the subject matter of the representation with a person that the lawyer knows is represented by another lawyer.¹⁰⁹ The Opinion states that the rule “protects clients who have chosen to be represented by a lawyer from having another lawyer interfere with the client-lawyer relationship by, for example, seeking uncounseled disclosure of information [] or uncounseled concessions and admissions related to the representation.”¹¹⁰ According to Model Rule 4.3:

[A] lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.¹¹¹

106. *Id.* at 4.

107. *Id.*

108. *Id.*

109. *Id.* at 4–5 (This “no-contact rule” has been in place since the 1908. ABA Model Rule 4.2 goes on to state that contact is prohibited “unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”).

110. *Id.* at 5.

111. *Id.*; MODEL RULES OF PROF’L CONDUCT r. 4.3 (AM. BAR ASS’N 2018).

Knowledge is a key aspect of the functioning of Rules 4.2 and 4.3, as the rules seem to suggest that a lawyer cannot be held responsible for that which they are not aware. However, it should be noted that Model Rule 1.0(f) defines knowledge as having actual knowledge, but states that “[a] person’s knowledge may be inferred from circumstances.”¹¹² In a limited scope representation situation, inferring knowledge from the circumstances may provide somewhat of a quandary for a lawyer representing an opposing party, as it is left to that lawyer to use some guesswork to determine whether or not an individual is represented or receiving legal advice.

The Opinion goes on to state that:

Such circumstances include, for example: when a lawyer representing a client faces what appears to be a pro se opposing party who has filed a pleading that appears to have been prepared by a lawyer or when a lawyer representing a client in a transaction is negotiating an agreement with what appears to be a pro se person who presents an agreement or a counteroffer that appears to have been prepared by a lawyer.¹¹³

Thus, the Committee recommended that, in any situation “where it appears that a person on the opposing side has received limited-scope legal services, the lawyer [should] begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3,” and that “[i]t is not a violation of the Model Rules of Professional Conduct for the lawyer to make initial contact with a person to determine whether legal representation, limited or otherwise, exists.”¹¹⁴ Thereafter, a lawyer may then proceed under the Rules laid out in 4.2 and 4.3. Thus, if an individual indicates that they are represented on a limited basis, then the attorney should contact opposing counsel to determine the scope of the representation.¹¹⁵ Moreover, if the individual indicates that they were represented in any part of a matter, “and does not

112. MODEL RULES OF PROF’L CONDUCT r. 1.0(f) (AM. BAR ASS’N 2018) (“‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”).

113. ABA Formal Op. 472, *supra* note 26, at 6, n.19 (“See generally State Bar of Arizona Op. 05-06 (2005) (filing of documents prepared by lawyer but signed by client receiving limited-scope representation is not misleading because ‘... a court or tribunal can generally determine whether that document was written with a lawyer’s help.’).”).

114. *Id.* at 6.

115. *Id.* at 7

articulate either that the representation has concluded . . . or that the issue to be discussed is clearly outside the scope of the limited-scope representation,” then the lawyer should also contact opposing counsel.¹¹⁶ If, however, the individual indicates that the communication is outside the scope of the original representation, then the lawyer may freely communicate with that individual.¹¹⁷

The clarification made by the ABA in this Formal Opinion helped to clarify the communication allowed in a limited scope relationship, which provided further guidance for attorneys attempting to provide limited scope services. As there are now clear guidelines from the ABA as to how individuals should address those receiving limited scope services, attorneys who encounter those receiving limited scope representation have guidance as to how to proceed under such circumstances as well.

III. ACCESS TO JUSTICE

The concept of access to justice “is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances, in compliance with human rights standards.”¹¹⁸ Additionally:

There is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system.¹¹⁹

The access to justice problem reaches across income classes, however it hits low- and moderate-income individuals the hardest.¹²⁰ Across the country, there are many services and organizations which were established to assist low-

116. *Id.*

117. *Id.*

118. *Necessary Condition: Access to Justice*, U.S. INST. OF PEACE, <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice> [<https://perma.cc/H4WZ-7WW3>] (last visited Oct. 2, 2019) (citing to UNITED NATIONS DEVELOPMENT PROGRAM, PROGRAMMING FOR JUSTICE: ACCESS FOR ALL – A PRACTITIONER’S GUIDE TO A HUMAN RIGHTS-BASED APPROACH TO ACCESS TO JUSTICE (2005)).

119. *Id.*

120. AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 9, 13 (1994) [hereinafter ABA NEEDS AND CIVIL JUSTICE SURVEY], https://www.wisbar.org/aboutus/membership/Documents/WisTAFApp_J_ABA_Legal_need_study.pdf [<https://perma.cc/E2SE-EZFS>].

income individuals, however many individuals are unaware of the programs, do not take advantage of such programs, or the programs cannot adequately address all individuals with needs as a result of a lack of resources.¹²¹ Additionally, many times, moderate income individuals in need of legal services are unaware that programs specifically aimed at providing services to them even exist.¹²²

A. Legal Services Corporation – Legal Aid

In 1974, Congress established The Legal Services Corporation (“LSC”), an independent nonprofit, “to promote equal access to justice.”¹²³ The LSC accomplished this by “providing funding to 133 independent non-profit legal aid programs in every state, the District of Columbia, and U.S. Territories.”¹²⁴ “LSC grantees serve thousands of low-income individuals, children, families, seniors, and veterans in 813 offices in every congressional district.”¹²⁵ According to the website, “LSC funded-programs help people who live in households with annual incomes at or below 125% of the federal poverty guidelines.”¹²⁶ These programs ensure that eligible individuals will not have to navigate the legal system without assistance. Eligible clients include “the working poor, veterans, homeowners and renters, families with children, farmers, the disabled, and the elderly. Women – many of whom are struggling to keep their children safe and their families together – comprise 70% of clients.”¹²⁷

The LSC-funded programs are in place to assist low-income individuals and families dealing with family law, housing and foreclosure, consumer,

121. See LEGAL SERVS. CORP., THE JUSTICE GAP REPORT, *supra* note 4, at 7–8.

122. ABA NEEDS AND CIVIL JUSTICE SURVEY, *supra* note 120, at 26.

123. LEGAL SERVS. CORP., THE JUSTICE GAP REPORT, *supra* note 4, at 2 (“LSC operates as an independent 501(c)(3) non-profit corporation and currently serves as the single largest funder of civil legal aid for low-income Americans. More than 93% of LSC’s total funding is currently distributed to 133 independent non-profit legal aid programs with more than 800 offices across America. LSC’s mission is to help provide high-quality civil legal aid to low-income people.”).

124. *Legal Services Corporation: America’s Partner for Equal Justice*, LEGAL SERVS. CORP., <https://www.lsc.gov> [<https://perma.cc/MRT2-3SD6>] (last visited Oct. 6, 2019).

125. *Id.*

126. *What is Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid> [<https://perma.cc/VFA6-4QNJ>] (last visited Oct. 6, 2019).

127. *Id.*

employment and income maintenance issues, as well as helping military families.¹²⁸ Specifically:

LSC supports civil legal aid organizations across the country, which in turn provide legal assistance to low-income Americans grappling with civil legal issues relating to essential human needs, such as safe housing and work environments, access to health care, safeguards against financial exploitation, and assistance with family issues such as protection from abusive relationships, child support, and custody.¹²⁹

Family law cases comprise one-third of the cases closed by LSC grantees, with housing and foreclosure cases as the second largest category.¹³⁰ Some of the family law issues handled include helping victims of domestic violence to obtain protective and restraining orders, helping parents obtain and keep custody of their children, and assisting family members with obtaining guardianship for children without parents, while some of the housing matters include landlord-tenant disputes, foreclosure or loan renegotiation issues, and assisting renters with eviction issues.¹³¹ Additionally, “[e]leven percent of cases involve protecting the elderly and other vulnerable groups from being victimized by unscrupulous lenders, helping people file for bankruptcy when appropriate and helping people manage debt.”¹³² As for the employment and income maintenance issues, “[m]ore than 15 percent of cases involve helping working Americans obtain promised compensation from private employers, and helping people obtain and retain government benefits such as disability, veterans, and unemployment compensation benefits to which they are entitled.”¹³³ As for assisting military families, there is a website, funded by an LSC Technology Initiatives grant, which provides a free service focused “exclusively on federal legal rights and legal resources important to veterans.”¹³⁴

128. *Id.*

129. LEGAL SERVS. CORP., THE JUSTICE GAP REPORT, *supra* note 4, at 9.

130. *What is Legal Aid*, *supra* note 126.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (StatesideLegal.org “enables military families and veterans to access a wide array of legal information and assistance. The Department of Veterans Affairs encourages use of the website in connection with service to homeless veterans.”).

In 2017, LSC “contracted with NORC at the University of Chicago to help measure the justice gap among low-income Americans”¹³⁵ The ensuing report explained that “LSC defines the justice gap as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”¹³⁶ According to the Executive Summary of the Report, “86% of the civil legal problems reported by low-income Americans in the past year

135. LEGAL SERVS. CORP., THE JUSTICE GAP REPORT, *supra* note 4, at 6. The Justice Gap report:

includes analysis of data from the 2017 Justice Gap Measurement Survey, which is the first national household survey on the justice gap in over 20 years. The most recent national study that assessed the justice gap with a household survey was conducted by the Institute for Survey Research at Temple University in 1994, with funding from the American Bar Association. Since that time, a number of individual states have also conducted justice gap studies. Notably, the Washington State Supreme Court conducted a study in 2014 (refreshing work completed in 2003), which took a comprehensive look at the civil legal needs of the state’s low-income households. The Washington State work served as a point of departure for the 2017 Justice Gap Measurement Survey, which is described in more detail below.

Id. at 10 (citations omitted).

This report also presents analysis of data from LSC’s 2017 Intake Census. LSC asked its 133 grantee programs to participate in an “intake census” during a six-week period spanning March and April 2017. As part of this census, grantees tracked the number of individuals approaching them for help with a civil legal problem whom they were unable to serve, able to serve to some extent (but not fully), and able to serve fully. Grantees recorded the type of assistance individuals received and categorized the reasons individuals were not fully served where applicable. LSC sent the resulting data to NORC for analysis. The findings presented in this report are based on data from the LSC grantees that receive Basic Field Grants.

Id. at 10–11. The report went on to state that:

In addition to the 2017 Justice Gap Measurement Survey and LSC’s 2017 Intake Census, this report uses data from the U.S. Census Bureau’s American Community Survey (ACS). More information about the ACS data used can be found in Appendix B1. Finally, this report uses data from LSC’s 2016 Grantee Activity Reports, and more information about these data can be found in Appendix B4. Where the report relies on other data sources, this is referenced in endnotes as appropriate.

Id. at 11.

136. *Id.* at 6 (“NORC conducted a survey of approximately 2,000 adults living in households at or below 125% of the Federal Poverty Level (FPL) using its nationally representative, probability-based AmeriSpeak® Panel.”).

received inadequate or no legal help.”¹³⁷ Moreover, “71% of low-income households experienced at least one civil legal problem, including problems with domestic violence, veterans’ benefits, disability access, housing conditions, and health care.”¹³⁸ Additionally, the report highlighted that, “Low-income Americans seek professional legal help for only 20% of the civil legal problems they face.”¹³⁹

The Executive Summary went on to note that the “[t]op reasons for not seeking professional legal help are: [d]eciding to deal with a problem on one’s own, [n]ot knowing where to look for help or what resources might exist, and [n]ot being sure whether their problem is ‘legal.’”¹⁴⁰ Furthermore, the Report stated that:

In 2017, low-income Americans will approach LSC-funded legal aid organizations for help with an estimated 1.7 million civil legal problems. They will receive legal help of some kind for 59% of these problems, but are expected to receive enough help to fully address their legal needs for only 28% to 38% of them. More than half (53% to 70%) of the problems that low-income Americans bring to LSC grantees will receive limited legal help or no legal help at all because of a lack of resources to serve them.¹⁴¹

Moreover, it has been established that even though LSC-funded legal aid organizations exist, many Americans receive limited or no legal help for their problems,¹⁴² and “[a] lack of available resources accounts for the vast majority (85% - 97%) of civil legal problems that LSC-funded organizations do not fully address.”¹⁴³ Thus, despite having these programs in place, many low-income Americans do not receive adequate, if any, legal help on more than half of the legal issues that they are facing due to a lack of resources. It is clear, then, that despite the availability of such services, many individuals either do not take advantage of these services, do not qualify for such services, or there are not

137. *Id.*

138. *Id.* (The study further stated that, “In 2017, low-income Americans will approach LSC-funded legal aid organizations for support with an estimated 1.7 million problems. They will receive only limited or no legal help for more than half of these problems because of a lack of resources.”).

139. *Id.* at 7.

140. *Id.*

141. *Id.* at 13.

142. *Id.* at 8 (“In 2017, low-income Americans will receive limited or no legal help for an estimated 1.1 million eligible problems after seeking help from LSC-funded legal aid organizations.”).

143. *Id.*

enough resources to help such individuals, and, as a result, many of these individuals choose to represent themselves in court. If limited scope representation was used on a larger scale and fully embraced by the legal community, this would provide yet another resource to individuals lacking access to representation, regardless of the reason, such as that they qualify for LSC's services but are not taking advantage of them or because they do not qualify for the services of an LSC-funded program, but still cannot afford adequate representation.

B. *Access to Justice Commissions*

In order to further the concept of providing access to justice to those in need of legal representation, Access to Justice Commissions, "collaborative entities that bring together courts, the bar, civil legal aid providers, and other stakeholders in an effort to remove barriers to civil justice for low-income and disadvantaged people," first began in 1994 in Washington state.¹⁴⁴ According to the ABA Resource Center for Access to Justice Initiatives, the definition of an Access to Justice Commission, is:

[A] high-level commission or similar formal entity composed of leaders representing, at minimum, the state (or equivalent jurisdiction) courts, the organized bar, and legal aid providers. Its membership may also include representatives of law schools, legal aid funders, the legislature, the executive branch, and federal and tribal courts, as well as stakeholders from outside the legal and government communities.¹⁴⁵

According to "*Access to Justice Commissions: Increasing Effectiveness Through Adequate Staffing and Funding*" (hereinafter the "Access to Justice Commission Report"), a report published in August 2018, compiled for the ABA Resource Center for Access to Justice Initiatives, the purpose of these commissions "involving an expanded range of key justice system stakeholders

144. *Access to Justice Comm'n's*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/atj-commissions/ [<https://perma.cc/LQ8M-4HT6>] (last visited Oct. 6, 2019).

145. ABA RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, *Definition of an Access to Justice Commission* (2014) [hereinafter *Definition of an Access to Justice Commission*], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_commission.authcheckdam.pdf [<https://perma.cc/N5ZA-SJP9>].

from both the public and private sectors,”¹⁴⁶ is to create a body where they can all work “together to develop meaningful systemic solutions to the chronic lack of access for disadvantaged members of society.”¹⁴⁷ The Report points out that, as early as 1998:

[A] handful of access to justice commissions existed around the country. Since then, an amazing phenomenon has occurred: so many additional access to justice commissions were established that we now have forty states and territories with commissions taking responsibility for coordinating efforts to improve the civil justice system.¹⁴⁸

Just as important to the expansion of the Commissions was that, “The Conference of Chief Justices and Conference of State Court Administrators adopted a number of resolutions over the years, beginning in 2004, supporting the establishment of state access to justice commissions.”¹⁴⁹ Specifically, “Resolution 8, adopted by the Conference of Chief Justices and State Court Administrators in 2010, brought significant impetus to the expansion of commissions by encouraging the establishment of a commission in every state and U.S. territory.”¹⁵⁰ Additionally, “[t]he support of chief justices in their own states was also a major factor in the rapid expansion of access to justice commissions. In many states, commissions would not have been established without supreme court leadership.”¹⁵¹

Moreover, “[t]he American Bar Association adopted a formal policy resolution in 2013 supporting the establishment of state access to justice commissions, and its Standing Committee on Legal Aid and Indigent Defendants (SCLAID) has worked hard to support the expansion of commissions.”¹⁵² Along these lines, the ABA has a Resource Center for Access-to Justice Initiatives on its website, which falls under the Standing Committee

146. AM. BAR ASS’N, ACCESS TO JUSTICE COMM’NS: INCREASING EFFECTIVENESS THROUGH ADEQUATE STAFFING AND FUNDING 1, 1 (2018) [hereinafter INCREASING EFFECTIVENESS], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_commission_report_exec_summ.pdf [https://perma.cc/6XQN-XLH5]. Copyright 2018 American Bar Association. Reprinted by permission.

147. *Id.* at 1.

148. *Id.*

149. *Id.*

150. *Id.* at 1–2.

151. *Id.* at 2.

152. *Id.*

on Legal Aid and Indigent Defendants section.¹⁵³ According to the Definition section of the Resource Center page, these ATJ Commissions have, as their core charge, “to expand access to civil justice at all levels for low-income and disadvantaged people in the state by assessing their civil legal needs, developing strategies to meet them, and evaluating progress. Its charge may also include expanding access for moderate-income people.”¹⁵⁴ Typically, this charge, “is from []or recognized by the highest court of the state; the highest court and the highest levels of the organized bar are engaged with the Commission’s efforts and the Commission reports regularly to one or both of them.”¹⁵⁵

Access to Justice Commissions have been “developing all over the country, engaging in a full range of activities and strategies to accomplish their goals and objectives. A major strength of the Commission model is its ability to address the state’s often-fragmented system for providing access to civil justice as a whole.”¹⁵⁶ According to the Access to Justice Commission Report, some examples of activities and successes done by and through the Access to Justice Commissions, specifically dealing with limited scope representation, include enhancing pro bono services¹⁵⁷ and establishing limited scope rules for the courts to allow low- to moderate-income individuals to receive assistance from a lawyer for at least part of their case.¹⁵⁸

Furthermore, the ABA has advanced the development of Access to Justice Commissions through the Access to Justice Expansion Project, where they “made a series of one-time grants to grow the Access to Justice Commission movement in the U.S.”¹⁵⁹ Specifically, “Expansion Grants funded efforts to

153. *Resource Center for Access to Justice Initiatives*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/ [<https://perma.cc/9HF3-KYW8>] (last visited Oct. 6, 2019).

154. *Definition of an Access to Justice Commission*, *supra* note 145.

155. *Id.*

156. *Access to Justice Comm’ns*, *supra* note 144.

157. INCREASING EFFECTIVENESS, *supra* note 146, at 18 (“Many commissions pursue pro bono projects. For example, the Massachusetts Access to Justice Commission has partnered with the ‘Massachusetts Access to Justice Fellows Program,’ where retired partners or retiring judges have volunteered over 80,000 hours, assisting legal services organizations, nonprofits, and courts for a one-year, part-time pro bono commitment. Louisiana and Washington, D.C. have launched similar programs. North Carolina has regional pro bono councils to support pro bono attorneys.”).

158. *Id.*

159. *ATJ Innovation and Expansion Grant Resources*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/

explore creation of new ATJ Commissions and help them get off to a strong start,” while “Innovation Grants enabled ATJ Commissions to develop and test new approaches that can potentially be replicated in other states.”¹⁶⁰ A few of the projects funded through the Innovation Grants dealt with limited scope and access to justice issues, specifically. For example, one funded Innovation Grant Project was used by The Arkansas Access to Justice Commission:

[T]o develop a pro se document assembly form for uncontested divorce with children. The software will be used in a court-house based pilot project in which attorneys assist pro se litigants on a limited scope basis. The pilot is aimed at increasing bench and bar awareness and support for limited scope representation.¹⁶¹

Another project that was funded in Colorado dealt with providing affordable unbundled legal services to moderate-income individuals.¹⁶² The project was a two-part project, with the first part aimed at “providing assistance to low- and middle-income Coloradans, who do not qualify for legal aid, through a referral program. The second is empowering lawyers to create financially viable practices that include representing clients of moderate income.”¹⁶³ Additionally, in another funded project, “[t]he Alabama Access to Justice Commission used an ABA Expansion Grant to implement the web-based pro bono program Online Tennessee Justice, which allows pro bono attorneys to answer questions submitted by clients through a website. In Alabama the website has been launched as Alabama Legal Answers.”¹⁶⁴

ustice/resources---information-on-key-atj-issues/grants/ [https://perma.cc/FP3C-4NMH] (last visited Oct. 10, 2019) (The Access to Justice Expansion Project, is an initiative funded with generous support, most notably with grants in 2012, from the Public Welfare Foundation, Kresge Foundation, and Bauman Foundation.).

160. *Id.*

161. *Arkansas – Document Assembly Software*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/grants/document_assembly_software/ [https://perma.cc/M4P6-GLY7] (last visited Oct. 6, 2019).

162. *Colorado – Serving Modest-means Clients*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/grants/affordable_unbundled_services/ [https://perma.cc/C4JW-WE8Q] (last visited Oct. 6, 2019).

163. *Id.*

164. *Alabama – Online SRL Pro Bono Support*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/grants/online_srl_pro_bono_support/

C. Other Assistance Available – Legal Incubators, Law School Pro Se Assistance Clinics, Online Resources, etc.

Additionally, there are many other programs that have emerged over just the last few years, which are aimed at serving individuals in the low- to moderate-income range to try to address the justice gap. Although many of these solutions involve full representation, many are attempting to use the limited scope model as a way of providing resources, while not providing full representation. For example, legal incubators¹⁶⁵ are new emerging concept with the goal of providing services to those with low- to moderate-incomes.

Legal incubators have emerged as models that enable newly-admitted lawyers to acquire the range of skills necessary to launch successful practices that expand access to legal services for those of low and moderate incomes. The alpha incubator was established at the City University of New York in 2007. Today, there are over 60 incubators nationwide.¹⁶⁶

Despite the goal of incubators to reach low- to moderate-income individuals, there are still many individuals that are unable to take advantage of these resources for numerous reasons, such as that the legal services provided are outside of the area of law needed or that these individuals still cannot afford the fees necessary for even these modified services.

For many years, law schools have had clinical programs so that students, with the oversight of an attorney, can “sharpen their understanding of professional responsibility and deepen their appreciation for their own values as well as those of the profession as a whole,”¹⁶⁷ and typically these programs are aimed at providing legal services in distinct areas of practice to low- to moderate-income individuals in need of legal assistance.¹⁶⁸ As a twist on this

ustice/resources---information-on-key-atj-issues/grants/online_srl_pro_bono_support/
[https://perma.cc/MY3K-MHSP] (last visited Oct. 6, 2019).

165. *Legal Incubators*, A.B.A.,
https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/
[https://perma.cc/755A-BP2T] (last visited Oct. 6, 2019).

166. *Id.*

167. AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 238 (1992).

168. *Id.* at 54 (“The role of the law schools in legal services to the poor is of a special character. While law schools could never be major providers of services to low income clients and fulfill their basic educational mission, their contribution today is highly significant. Principally developed in the past twenty years, the law schools’ clinical programs provide not only training and experience with

model, one law school recently founded a pro se legal assistance program as a means to provide free information, advice, and limited scope services and “seeks to enhance access to justice and improve the litigation process for litigants and the Court by helping *pro se* litigants navigate the court system.”¹⁶⁹

Moreover, the ABA has created the Louis M. Brown Award for Legal Access, which “is presented annually to programs and projects that advance access to legal services for those of moderate incomes in ways that are exemplary and replicable.”¹⁷⁰ This year’s winner was the Court Square Law Project which, according to its website, “thinks everyone should be able to afford justice, so [they] offer sliding scale rates based on what you earn to ensure all New Yorkers have access to quality legal representation.”¹⁷¹

Additionally, there is a plethora of online information for individuals interested in attempting to represent themselves or who are seeking limited representation. First, many courts, usually in specific areas of law, now have online databases full of basic pro se documents covering certain areas of law.¹⁷² Although these resources are beneficial, in that they provide some basic information to those interested in proceeding pro se, these resources fall short,

poverty law issues, but they have given birth to valuable research centers at the schools which contribute on a continuing basis to the improvement in the delivery of legal services to the poor.”).

169. *About – Pro Se Legal Assistance Program*, HOFSTRA U. MAURICE A. DEANE SCH. L. (2019), <https://proseprogram.law.hofstra.edu/about/> [<https://perma.cc/PE5Z-DMYY>] (last visited Oct. 6, 2019). (“([T]he ‘Hofstra Program’) is a free service offered by Hofstra University’s Maurice A. Deane School of Law, and is staffed by members of the law school, including an attorney, a law professor, and law students. The Hofstra Program is not part of, nor run by, the United States District Court. The Hofstra Program staff work for Hofstra University. The Hofstra Program provides free information, advice, and limited scope legal assistance to non-incarcerated *pro se* litigants who have filed, or intend to file, a civil case in the Central Islip Eastern District of New York federal court. The Hofstra Program seeks to enhance access to justice and improve the litigation process for litigants and the Court by helping *pro se* litigants navigate the court system.”).

170. *Louis M. Brown Award for Legal Access*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/louis_m_brown_award_for_legal_access/ [<https://perma.cc/KCQ7-F35A>] (last visited Oct. 6, 2019).

171. *Court Square Law Project*, COURT SQUARE L. PROJECT, <http://www.courtsquarelaw.org> [<https://perma.cc/XRP5-ZBVP>] (last visited Oct. 6, 2019).

172. As a few examples, see the Florida State Courts System’s Self-Help Center found at <https://www.flcourts.org/Resources-Services/Court-Improvement/Family-Courts/Family-Law-Self-Help-Information/Family-Law-Forms> [<https://perma.cc/3LR2-QVGJ>]; the US Courts Civil Pro Se Forms available at <https://www.uscourts.gov/forms/civil-pro-se-forms> [<https://perma.cc/V4K9-LF5F>]; and the New York Courts Resources for Unrepresented Litigants available at <https://www.nycourts.gov/forms/> [<https://perma.cc/4NFC-AN2T>].

as they do not allow those individuals to have actual contact with an attorney. As a step in the right direction, the ABA's website has a link to a service called ABA Free Legal Answers which is:

[A]n online version of the walk-in clinic model where clients request brief advice and counsel about a specific civil legal issue from a volunteer lawyer. Lawyers provide information and basic legal advice without any expectation of long-term representation. The purpose of the website is to increase access to advice and information about non-criminal legal matters to those who cannot afford it.¹⁷³

Furthermore, there are many online for-profit models which provide resources for individuals to handle some legal matters for themselves within specific practice areas, such as wills and trusts, business transactions, intellectual property, landlord tenant, traffic, real estate etc. for flat fee pricing.¹⁷⁴ Again, although somewhat beneficial to an individual who is considering proceeding pro se, document-only resources do not provide the individual with access to an attorney. This access to information can potentially cause an individual to be misled into believing that they have the requisite knowledge to proceed pro se, even though they may not. Furthermore, many of the online models do offer attorney assistance for an additional fee, such as pre-paid plans for attorney assistance with "unlimited 30-minute consultations on new legal matters,"¹⁷⁵ monthly plans for individuals and small businesses,¹⁷⁶ and online business formation services for a set fee plus state fees.¹⁷⁷ However, despite these offerings, many individuals are not taking advantage of such services for reasons such as the inability to afford the fees, a lack of awareness of the availability of such resources, or a discomfort with or willingness to pay

173. *Standing Committee on Pro Bono and Public Service*, A.B.A., https://www.americanbar.org/groups/probono_public_service/ [<https://perma.cc/8PAT-AZAM>] (last visited Oct. 6, 2019).

174. Although there are many online for-profit legal services companies, some examples include Legal Zoom, Legal Shield, Rocket Lawyer, etc. See, e.g., LEGAL ZOOM, <https://www.legalzoom.com/attorneys/> [<https://perma.cc/R7TZ-5ZTU>] (last visited Oct. 6, 2019); LEGAL SHIELD, <https://www.legalshield.com> [<https://perma.cc/STT3-37CY>] (last visited Oct. 6, 2019); ROCKET LAW., <https://www.rocketlawyer.com> [<https://perma.cc/TN6F-MCHE>] (last Oct. 6, 2019).

175. LEGAL ZOOM, *supra* note 174.

176. See, e.g., LEGAL SHIELD, *supra* note 174.

177. See, e.g., INCFILE, <https://www.incfile.com> [<https://perma.cc/SS7Q-T58X>] (last visited Oct. 10, 2019).

for attorney services through an online program. Thus, although all of the above options are constructive resources to assist with addressing the access to justice problem, there is still plenty of room for improvement, since, despite all of the above resources being available, many individuals are still representing themselves in court without any assistance.

IV. PRO BONO REQUIREMENTS

Pro bono is a shorthand term for pro bono publico, a Latin term which means “for the public good,” specifically “[u]ncompensated, esp. regarding free legal services performed for the indigent or for a public cause.”¹⁷⁸

When society confers the privilege to practice law on an individual, he or she accepts the responsibility to promote justice and to make justice equally accessible to all people. Thus, all lawyers should aspire to render some legal services without fee or expectation of fee for the good of the public.¹⁷⁹

The concept is so deeply rooted in the profession that most law schools now have an expectation of participation in pro bono work while a student is in law school, and many schools have gone as far as to require pro bono hours as part of graduation requirements.¹⁸⁰ How pro bono participation is handled at the

178. *Pro Bono*, BLACK’S LAW DICTIONARY (10th ed. 2014).

179. *Pro Bono: A Guide and Explanation to Pro Bono Services*, A.B.A. (July 26, 2018), https://www.americanbar.org/groups/legal_education/resources/pro_bono/ [https://perma.cc/84FS-4T33]. This is a guide and explanation to Pro Bono Services written by the ABA’s Standing Committee on Pro Bono and Public Service. *Id.*

180. *Id.* (“At least 39 law schools require students to engage in pro bono or public service as a condition of graduation. These schools may require a specific number of hours of pro bono legal service as a condition of graduation (e.g. 20–75 hours) or they may require a combination of pro bono legal service, clinical work and community-based volunteer work. Law schools with voluntary rather than mandatory pro bono service policies encourage students to assist lawyers and legal aid organizations by offering incentives, such as awards at graduation or special notations on law school transcripts, or by making pro bono an important part of a school’s culture.”). For an example, see Barry University School of Law Graduation Requirements, which state that “In order to graduate from the School of Law, a student must: . . . Complete 50 hours of Pro Bono Service (Students matriculating prior to Fall 2014 must complete 40 hours of Pro Bono Service) . . . [.]” *Graduation Requirements*, BARRY U. SCH. L., <https://www.barry.edu/law/future-students/academic-program/graduation-requirements.html> [https://perma.cc/WQ2P-UGFY] (last visited Oct. 6, 2019), and the University of Florida Levin College of Law Pro Bono Graduation Requirement, which states that “Beginning with the Fall 2018 entering class, UF Law students must complete 40 hours of law-related pro bono service as a condition of graduation[.]” *UF Law Pro Bono Program*, U. FLA. LEVIN CO. L.,

law school level varies by school, with some examples being designated pro bono programs through which students are matched with outside organizations doing pro bono work, administrative support for student groups involved in pro bono work, and reliance on student groups to form and run projects.¹⁸¹ Additionally, The ABA Standards and Rules for Approval of Law Schools require schools to provide substantial opportunities for students to participate in pro bono activities, including law-related public service activities.¹⁸²

For practicing attorneys, the rule is formalized in Rule 6.1 of the ABA Model Rules which states that:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly

<https://www.law.ufl.edu/areas-of-study/experiential-learning/pro-bono-program>
[<https://perma.cc/D8SY-2UWA>] (last visited Oct. 6, 2019).

181. *Pro Bono: A Guide and Explanation to Pro Bono Services*, *supra* note 179.

182. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019: CHAPTER 3: PROGRAM OF LEGAL EDUCATION 15–16 [hereinafter ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf [<https://perma.cc/AWC9-X97G>] (“(b) A law school shall provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities.”).

deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.¹⁸³

The ABA itself has said that the pro bono obligation, set out in ABA Model Rule 6.1., "recognizes that only lawyers have the special skills and knowledge needed to secure access to justice for low-income people, whose enormous unmet legal needs are well documented."¹⁸⁴ Thus, despite the existence of Model Rule 6.1, and the fact that "many states through their respective rules governing the practice of law, encourage, and in some cases, require, attorneys to provide legal services to those unable to pay, there is still a tremendous difference nationwide between the number of attorneys admitted to practice, and those actually providing pro bono services."¹⁸⁵

The ABA's Standing Committee on Pro Bono and Public Service (the "ABA Pro Bono Committee") has as its mission to:

[E]nsure access to justice through the expansion and enhancement of the delivery of legal and other law-related services to the underserved through volunteer efforts of legal professionals nationwide.¹⁸⁶

The ABA Pro Bono Committee further states that its goals are to "foster the development of pro bono programs and activities by law firms, bar associations, corporate legal departments, law schools, government attorney offices and others; analyze the scope and function of pro bono programs; and propose and review policy that affects lawyers' ability to provide pro bono legal services."¹⁸⁷

183. MODEL RULES OF PROF'L CONDUCT, r. 6.1 (AM. BAR ASS'N 2018)

184. *Pro Bono: A Guide and Explanation to Pro Bono Services*, *supra* note 179.

185. Hon. Laurel Myerson Isicoff, *Pro Bono – No Excuses*, A.B.A. (June 22, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/06/01_isicoff/ [<https://perma.cc/772E-59XV>].

186. *Standing Committee on Pro Bono and Public Service*, *supra* note 173.

187. *Id.*

Based on these goals, the Committee has conducted four national pro bono empirical studies, with the most recent occurring in 2017.¹⁸⁸

According to *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers* (the "Pro Bono Report"), the most recent report issued by the American Bar Association's Committee on Pro Bono and Public Service in April 2018, based on a study conducted in 2017 of the pro bono work of America's attorneys by surveying over 47,000 attorneys in twenty-four states in the prior year (2016), only "20% of the attorneys provided 50 hours or more of pro bono service,"¹⁸⁹ and, moreover, "approximately one out of five attorneys has never undertaken pro bono service of any kind."¹⁹⁰ Additionally, despite the fact that "[m]ost attorneys (81%) have provided pro bono service at some point in their lives, and in 2016, provided an average of 36.9 hours of pro bono,"¹⁹¹ also in 2016, "48% of responding attorneys did not undertake pro bono"¹⁹² services at all. The Pro Bono Report further noted that 81.3% of the responding attorneys "indicated that they had focused their pro bono representation on serving individuals, as opposed to a class of individuals or an organization. And, just over half (54.6%) provided limited scope representation services, as opposed to full representation or mediation."¹⁹³

Although attorneys can provide pro bono services through a plethora of programs, that does not always occur for a number of reasons. The Pro Bono Report noted that attorneys were most discouraged by "1) lack of time, 2) commitment to family or other personal obligations, and 3) lack of skills or experience"¹⁹⁴ The Report also highlighted that although "80.6% of the surveyed attorneys indicated that they believe pro bono services are either

188. ABA SUPPORTING JUSTICE REPORT, *supra* note 19, at 3–4. ("The first study was commissioned in 2004 to establish an accurate and credible baseline for tracking and measuring individual attorney pro bono activity on a national level and to devise replicable materials for use on the state and local levels. The Committee then replicated this study in 2008 to further clarify some of the original findings and to obtain a sense of whether pro bono participation has increased over time. And finally, the most recent national study was completed in 2013, which implemented an Internet-based as opposed to telephone-based survey methodology."). Copyright 2018 American Bar Association. Reprinted by permission.

189. *Id.* at 7, 45.

190. *Id.* at 7.

191. *Id.* at 6.

192. *Id.*

193. *Id.*

194. *Id.*

somewhat or very important,”¹⁹⁵ when those same individuals were asked if they “were likely to provide pro bono in 2017, [only 45%] indicated that they were either likely or very likely to do so”¹⁹⁶ Specifically, the Pro Bono Report noted that the most typical recent pro bono experience was a limited scope representation case, provided to an individual of limited means, referred through a legal aid pro bono program or a personal contact, and within the attorney’s area of expertise.¹⁹⁷ The Pro Bono Report went on to describe that:

Most clients and attorneys connect with each other through referrals from legal aid pro bono programs, family members or friends, present/former clients, or professional acquaintances. Family law was the most common practice area served, and this was true whether the attorney engaged in full or limited scope representation. Of the attorneys that provided full representation, the average amount of time spent on the case was 45.7 hours. Of the attorneys that provided limited scope representation, the average amount of time spent on the case was 16.4 hours.¹⁹⁸

One conclusion in the Pro Bono Report was that, “[a]lthough attorneys face time constraints and other barriers to doing pro bono, there are some policy and program actions that can be taken to expand the ability for attorneys to undertake pro bono work.”¹⁹⁹ One suggested solution was “[f]urther developing rules and policies that allow for the referral of limited scope representation matters and screening cases to identify limited scope pro bono opportunities.”²⁰⁰ Allowing individuals to participate in limited scope

195. *Id.* at 18.

196. *Id.*

197. *See id.* at 10–12. Additionally, the Pro Bono Report stated that,

Family law was the most common practice area served, whether full or limited scope representation was being provided. Specifically, 32% of the full representation cases and 19% of the limited scope representation cases were in family law. Otherwise, there were some differences in which areas were most served based on the type of representation provided. Following family law, the top areas of law for the full representation cases were: criminal, litigation, estate planning/probate, immigration, and real estate. However, the top areas of law for the limited scope representation cases were: estate planning/probate, real estate, non-profit organization, contracts, and criminal.

Id. at 13.

198. *Id.* at 6.

199. *Id.* at 42.

200. *Id.*

representation to satisfy their pro bono hours automatically does away with some of the typical concerns that attorneys express regarding pro bono work generally, such as lack of time, skills, and experience. For example, the time commitment in a limited scope representation would automatically be less, simply by the nature of the fact that a limited scope representation is just that—limited in time and coverage. Additionally, encouraging attorneys with expertise in areas of law not traditionally handled in limited scope representation scenarios would allow individuals to satisfy their own pro bono requirements in areas of law that they are practicing in daily. Thus, these limited scope pro bono opportunities would allow attorneys with expertise in areas of need to provide services, in a limited context, to low-income individuals who may otherwise not be able to receive assistance from an attorney.

V. RECOMMENDATIONS

As it is clear that encouraging limited scope representation in numerous contexts (i.e. to satisfy a lawyer's pro bono hours, in practice areas of law that do not traditionally engage in limited scope, etc.), will allow low- to moderate-income individuals to have greater access to legal representation, the push for the profession to promote the practice needs to occur now. In order to have a proliferation of use, limited scope representation must be promoted by the judiciary and in law schools, such that law schools should begin to teach the practice at the start of a lawyer's career.

A. Promote Judicial Acceptance of Limited Scope Representation

Since all of the changes and clarifications made by the ABA addressing limited scope representation laid the groundwork for how attorneys can navigate participating in or encountering other attorneys participating in the practice, it is now time that limited scope representation be supported by the judiciary. This support would ensure that attorneys who engage in the practice, specifically those engaging in the practice to assist low- to moderate-income individuals, possibly while satisfying pro bono hours, can feel secure in doing so. As judicial support at the forefront of the Access to Justice Commission movement assisted in advancing that cause, so too should the judiciary be on the forefront of promoting limited scope representation in their courtrooms as a positive means to continue promoting access to justice. Rather than having those attorneys that engage in limited scope representation face repercussions

in the courts,²⁰¹ as not all jurisdictions and judges are on board with the practice, there needs to be support from the bench and bar associations within each jurisdiction to ensure that attorneys can truly rely on the rules set forth in that jurisdiction regarding limited scope representation.

As many states have created rules similar to or mimicking the rules set forth by the ABA, judges need to embrace these rules to ensure that attorneys can easily engage in limited scope representation without push back from the courts. Despite the ABA's clear support for limited scope representation, the treatment of limited scope representation varies dramatically by jurisdiction.²⁰² For example, several states do not require disclosure or require it only in certain limited circumstances,²⁰³ while others require disclosure to both the court and opposing counsel.²⁰⁴ Moreover, despite the rules being in place in limited scope-friendly jurisdictions, the rules are not applied uniformly.

For example, in Florida, a state which allows limited scope representation so long as that representation is disclosed, as recent as February 2018, an order was entered against a defendant and attorney's fees awarded to Plaintiff's counsel (for an hour of service).²⁰⁵ The "[c]ourt refused to hear the motion due to its mistaken belief that the Defendant was represented by counsel who needed to be present at the hearing."²⁰⁶ This concern was "triggered by the

201. Samantha Joseph, *South Florida Firm in Hot Water for Ghostwriting Pleadings for Pro Se Defendants*, DAILY BUS. REV. (Feb. 27, 2018), <https://www.law.com/dailybusinessreview/2018/02/27/south-florida-firm-in-hot-water-for-ghostwriting-pleadings-for-pro-se-defendants/> [https://perma.cc/VUF3-VSN6].

202. See *Unbundling Resource Center: Unbundling Resources by State*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state/ [https://perma.cc/MX3N-D68H] (last visited Oct. 7, 2019).

203. *Unbundling Resource Center: Ethics Opinions*, A.B.A., https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/ethics_opinions/ [https://perma.cc/FQ7N-R2T7] (last visited Oct. 7, 2019). There is no disclosure requirement in states such as Alabama, Arizona, Maine, New York, and North Carolina. *Id.*

204. For example, states requiring disclosure are Delaware, Florida, and Nevada. *Id.*

205. See Order on Defendant's Motion to Dismiss Complaint at 1, *Strand on Ocean Drive Condo. Ass'n v. Haym*, (2017-025588-CA-01), <https://images.law.com/contrib/content/uploads/documents/392/14246/Haym-J.-MD-025588-Notice-of-Non-Appearance-of-Limited-Representation-Counsel-with-Exhibit-1.pdf> [https://perma.cc/A9KW-7NKN].

206. See Motion to Vacate Court Order at 1, *The Strand on Ocean Drive Condominium Ass'n, Inc. v. Jeffrey Haym, et al.* (2017) (No. 025588CA1), <https://images.law.com/contrib/content/uploads/documents/392/14246/Haym-J.-MD-025588-Notice->

‘Prepared with Assistance of Counsel’ language on the Defendant’s motion and an apparent belief that *pro se* litigants cannot be assisted by attorneys who do not make an appearance.”²⁰⁷ The Motion argued that, in reality, limited scope representation (unbundling) “is not only permitted by applicable Bar rules, but actually encouraged by The Florida Bar and the American Bar Association . . . as a means of addressing the access to justice problem facing our community and the nation as a whole.”²⁰⁸

As a result of this uncertainty, many attorneys are afraid to engage in the practice. However, with judicial support, those same attorneys may be willing to engage in providing limited scope services, preferably pro bono, as the process would be easier to navigate. Judge Mark A. Juhas, a Los Angeles Superior Court Judge, who has presided in family court since 2002 and chairs the California Commission on Access to Justice, has recently stated that “[l]imited-scope attorneys not only provide the opportunity for better outcomes, they make the court process run smoother from start to finish, resulting in more efficient hearings. This is a ‘win-win’ for both the court and the litigant.”²⁰⁹ Similar support came from Justice Michael B. Hyman, who, in an article entitled *Why Judges Should Embrace Limited Scope Representation*, in Bench & Bar, the newsletter of the Illinois State Bar Association’s Bench & Bar Section, stated that, “[w]hile, like anything new, hiccups may arise, the success of unbundling depends on the bench recognizing that these rules extend the essential role of lawyers as advocates to individuals who cannot afford traditional legal representation.”²¹⁰

of-Non-Appearance-of-Limited-Representation-Counsel-with-Exhibit-1.pdf [https://perma.cc/A9KW-7NKN].

207. *Id.* at 2.

208. *Id.* See also *In Re Fengling Liu*, 664 F.3d 367 (2d Cir. 2011), in the United States Court of Appeals, Second Circuit, where the Committee on Attorney Admission and Grievances recommended that an attorney, admitted to the bar of the Court, be publicly reprimanded for “conduct unbecoming a member of the bar” as a result of providing undisclosed ghostwriting services to a pro se litigant. *Id.* at 368. Although the Court ultimately found that the attorney did commit misconduct regarding other issues, as to the ghostwriting/limited scope issue, the Court found that, “[i]n light of this Court’s lack of any rule or precedent governing attorney ghostwriting, and the various authorities that permit that practice, we conclude that Liu could not have been aware of any general obligation to disclose her participation to this Court.” *Id.* at 372.

209. J. Mark A. Juhas, *A Judge’s View on the Benefits of “Unbundling”*, CAL. B. J., <http://www.calbarjournal.com/July2015/Opinion/JudgeMarkAJuhas.aspx> [https://perma.cc/5X7U-GZJY] (last visited Oct. 7, 2019).

210. J. Michael B. Hyman, *Why Judges Should Embrace Limited Scope Representation*, ILL. ST. B. ASS’N. (Bench & B. Sec., Springfield, Ill.), April 2014, at 1, 3,

Judicial support can be garnered through various avenues with the ABA's Judicial Division being one good resource. The Judicial Division "is the ABA's home to judges, lawyers, tribal members, court administrators, academics and students interested in the courts and the justice system,"²¹¹ and is the umbrella for six membership Conferences, which aim to produce projects and programming in their specialized areas.²¹² Under that umbrella, the Lawyers Conference ("LC") "is the home to lawyers, court managers, legal teachers, writers and publishers, and law students interested in the advancement of the judiciary. The LC is open to lawyers, associates, students, professors, and anyone interested in the judiciary," and "[e]ach Conference has its own governance, committees, projects and programs."²¹³ This Conference, through their programming, could create information sessions that could be shared through various outlets, i.e. annual meetings of the Conferences, online access etc., regarding the benefits of limited scope representation.

Also under the Judicial Division is the National Conference of State Trial Judges ("NCSTJ") which "is the oldest, largest and most prestigious organization of general jurisdiction trial judges in the country, and acts as an advocate for trial judges on issues affecting state trial judges and the courts throughout the nation, and represents trial judges' interests through the voice of the ABA."²¹⁴ The NCSTJ Committees specifically have a "focus on improving the judicial process and the quality of justice."²¹⁵ The Committees have

<http://chicagobarfoundation.org/pdf/resources/limited-scope-representation/why-judges-embrace-limited-scope.pdf> [https://perma.cc/WME8-2NLU].

211. *ABA Groups: Judicial Division*, A.B.A., <https://www.americanbar.org/groups/judicial/> [https://perma.cc/M7LX-PMZH] (last visited Oct. 7, 2019).

212. *ABA Groups: Judicial Division Conferences*, A.B.A., <https://www.americanbar.org/groups/judicial/conferences/> [https://perma.cc/L5ZU-WZNP] (last visited Oct. 7, 2019). The six Conferences are the Appellate Judges Conference (AJC), Lawyers Conference (LC), National Conference of the Administrative Law Judiciary (NCALJ), National Conference of Federal Trial Judges (NCFTJ), National Conference of Specialized Court Judges (NCSCJ), and National Conference of State Trial Judges (NCSTJ). *Id.*

213. *Id.*

214. *National Conference of State Trial Judges*, A.B.A., https://www.americanbar.org/groups/judicial/conferences/state_trial_judges/ [https://perma.cc/99MH-J385] (last visited Oct. 7, 2019).

215. *National Conference of State Trial Judges: Committees*, A.B.A., https://www.americanbar.org/groups/judicial/conferences/state_trial_judges/committees/ [https://perma.cc/5BW2-T362] (last visited Oct. 7, 2019).

produced numerous publications, varying in topics covered.²¹⁶ Thus, the Committee could, through its publications arm, put out a publication addressing limited scope representation to raise awareness of its benefits. Additionally, one specific Committee of the NCSTJ is the Program Committee which, “develops professional education to benefit state trial judges, and cooperates with the Judicial Division Program Committee and other judicial-education providers, to present CLE programs at the ABA Annual and Midyear Meetings, as well as through venues such as webinar, special ABA events like the Judicial Institute and Conclave, etc.”²¹⁷ Again, the Committee could, through their programming, create information sessions that could be shared through various outlets, i.e. annual meetings of the Conferences, online access etc., regarding the benefits of limited scope representation.

Additionally, jurisdictions should consider adopting mandatory training requirements for attorneys engaging in limited scope representation. If this training were in place, judges may be more willing to accept the practice, as it will instill confidence that attorneys engaging in limited scope representation are fully apprised of the rules prior to entering into such arrangements. The Florida Bar recently considered the concept, however, ultimately the recommendation of the Vision 2016 Commission that “[a]dopting mandatory training in order for an attorney to engage in limited scope representation is not necessary” was approved by the Board.²¹⁸ Although not adopted in Florida, state bar associations and judiciaries can determine for themselves if such a requirement may ease the judiciary’s concern regarding the use of limited scope representation in their jurisdiction and, thus, allow the practice to occur more

216. *Id.* (“Our committees have produced numerous publications, including books on juvenile violence, judicial performance evaluation, court delay reduction and judicial fringe benefits, as well as a reference book for the orientation of new judges.”).

217. *National Conference of State Trial Judges Committee Descriptions*, A.B.A. (Sept. 1, 2017), https://www.americanbar.org/content/dam/aba/administrative/state_trial_judges/stj_cmte_description_s.pdf [https://perma.cc/B7LL-9J94].

218. THE FLA. BAR, VISION 2016 FINAL REPORT 1, 13 (2016), <https://www-media.floridabar.org/uploads/2017/04/vision2016full-final-report-ada.pdf> [https://perma.cc/UA7D-B7QU] (“The Vision 2016 Commission of the Florida Bar was appointed in 2013 to perform an in-depth review of four general areas that will impact the future practice of law in Florida: Legal Education, Technology, Bar Admissions, [and] Access to Legal Services. The charge of the Commission is to look at the current impact, as well as the long-term challenges that the legal profession will face. This comprehensive study provides the foundation to ‘prepare today’s lawyer for tomorrow’s practice.’ The four subgroups have completed their work and all recommendations have been acted on by the Board of Governors of The Florida Bar.”).

regularly. Finally, to encourage judicial support for the practice, local bar associations can approach their judiciary regarding potential programming to garner judicial support. Similar to the information sessions described above, local bar associations, through luncheons, local CLE presentations etc., can promote the benefits of limited scope representation both for the judiciary and litigants within their jurisdictions.

B. Introduce Limited Scope Representation in Professional Responsibility and Drafting Courses in Law School

An additional way to increase participation in providing limited scope representation is to teach students about this practice while they are in law school. First, since all law school students are required to take a professional responsibility course,²¹⁹ limited scope representation should be taught in those classes as a valid way of furthering access to justice. If a spotlight is shone on the practice, and students are given the knowledge and skills necessary to properly engage in limited scope representations, as a means to advance their own practice (while aiding those with low- to moderate-incomes) and promote access to justice, many new lawyers may be willing to do so upon entering into practice.

Moreover, contract drafting courses can be designed to include assignments aimed at limited scope agreements, to provide students early on with the tools to properly engage in the practice. Prior to drafting such agreements, the professor can guide the students through a discussion of limited scope arrangements to further explain how they typically are handled. Including such assignments will allow students to feel comfortable with engaging in the practice, as well as provide them with the necessary information to properly engage in such an arrangement. Although some court systems currently provide sample forms for attorneys interested in engaging in limited scope representations,²²⁰ this is not the norm in most jurisdictions. Thus, including

219. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 182, at 16 (“(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members. . .”).

220. See *Limited Scope Representation Agreement*, ST. B. OF WIS., <https://www.wisbar.org/NewsPublications/Documents/Sample-Limited-Scope-Representation-Agreement.pdf> [<https://perma.cc/T74G-DLM5>] (last visited Oct. 7, 2019); *Limited Scope Representation Agreement*, ST. OF KAN. B., <http://www.kscourts.org/programs/self-help/limited->

limited scope agreements at the law school level with allow students to develop a full understanding of the concept prior to entering practice.

VI. CONCLUSION

Attorneys and judges take an oath to promote justice for all. With the support of the judiciary and law schools embracing limited scope representation, making it easier for attorneys to participate in the practice, attorneys with expertise in specific areas of the law will be able to provide limited representation, ultimately benefitting those individuals that otherwise may not have chosen to or been able to receive the assistance of counsel.