FORMAL OPINION NO 2011-183

[REVISED 2022]

Scope of Representation; Limiting the Scope

Facts:

Lawyer *A* is asked by Client *X* for assistance in preparing certain pleadings to be filed in court. Client *X* does not otherwise want Lawyer *A*'s assistance in the matter, plans to appear *pro se*, and does not plan to inform anyone of Lawyer *A*'s assistance.

Lawyer *B* has been asked to represent Client *Y* on a unique issue that has arisen in connection with complex litigation in which Client *Y* is represented by another law firm.

Lawyer *C* has consulted with Client *Z* about an environmental issue that is complicating Client *Z*'s sale of real property. Client *Z* asks for Lawyer *C*'s help with the language of the contract, but intends to conduct all of the negotiations with the other party and the other party's counsel by herself.

Question:

1 May Lawyers *A*, *B*, and *C* limit the scope of their representations as requested by the respective clients?

Conclusion:

1. Yes, qualified.

Discussion:

In each example, the prospective client seeks to have the lawyer handle only a specific aspect of the client's legal matter. Such limited-scope representation[1] is expressly allowed by Oregon RPC 1.2(b):

[1] This is sometimes described as the "unbundling" of legal services, or as discrete task representation.

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

As the examples herein reflect, a lawyer may limit the scope of his or her representation to taking only certain actions in a matter (e.g., Lawyer *A*'s drafting or reviewing pleadings), or to only certain aspects of, or issues in, a matter (e.g., Lawyer *B*'s representation on a unique issue in litigation, or Lawyer *C*'s advising in a single issue in a transactional matter). In order to limit the scope of the representation, Oregon RPC 1.2 requires that (1) the limitation must be reasonable under the circumstances, and (2) the client must give informed consent.[2]

With respect to the requirement that the limitations of the representation be reasonable, comment [7] to ABA Model RPC 1.2 offers the following guidance:

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

The second requirement of Oregon RPC 1.2 is the client's informed consent to the limited scope representation. Oregon RPC 1.0(g) defines informed consent as:

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[2] A lawyer providing a limited scope of services must be aware of and comply with any applicable law or procedural requirements. For example, if Lawyer *A* drafts pleadings for Client *X*, the pleadings would need to comply with Uniform Trial Court Rule (UTCR) 2.010(7), which requires Lawyer A's court contact information under UTCR 1.110(1), as well as Lawyer A's name, email address, and Bar number, and the trial attorney assigned to try the case, if any.

> [T]he 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.

Obtaining the client's informed consent requires the lawyer to explain the risks of a limited-scope representation. Depending on the circumstances, those risks may include that the matter is complex and that the client may have difficulty identifying, appreciating, or addressing critical issues when proceeding without legal counsel.[3] One "reasonably available alternative" is to have a lawyer involved in each material aspect of the legal matter. The explanation should also state as fully as reasonably possible what the lawyer will not do, so as to prevent the lawyer and client from developing different expectations regarding the nature and extent of the limited-scope representation.

By way of example, Oregon RPC 4.2 generally prohibits a lawyer from communicating with a person if the lawyer has actual knowledge that the person is represented by a lawyer on the subject of the communication.[4]

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[3] A limited-scope representation does not absolve the lawyer from any of the duties imposed by the Oregon Rules of Professional Conduct (RPCs) as to the services undertaken. For example, the lawyer must provide competent representation in the limited area, may not neglect the work undertaken, and must communicate adequately with the client about the work. *See, e.g.*, Oregon RPC 1.1; Oregon RPC 1.3; Oregon RPC 1.4. Likewise, a lawyer providing limited assistance to a client must take steps to ensure there are no conflicts of interest created by the representation. *See, e.g.*, Oregon RPC 1.7; Oregon RPC 1.9.

[4] Oregon RPC 4.2 provides that:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
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> (a) the lawyer has the prior consent of a lawyer representing such other person;
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> (b) the lawyer is authorized by law or by court order to do so; or

Mere knowledge of the limited-scope representation may not be sufficient to invoke an obligation under Oregon RPC 4.2.[5] Accordingly, the lawyer providing the limited-scope representation should communicate the limits of Oregon RPC 4.2 with the client. If the client wants the protection of communication only through the lawyer on some or all issues, then the lawyer should be sure to communicate clearly to opposing counsel the

> (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

See, e.g., OSB Formal Ethics Op No 2005-6 (discussing communicating with a represented party in general); OSB Formal Ethics Op No 2005-80 (rev 2016); *In re Newell*, 348 Or 396, 234 P3d 967 (2010) (reprimanding lawyer for communicating in a civil case with a person known to be represented by a criminal defense lawyer on the same subject). See also Oregon RPC 1.0(h), which provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question . . . ."

[5] *See, e.g.*, Colorado RPC 4.2 cmt [9A] ("[a] pro se party to whom limited representation has been provided . . . is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary"); Los Angeles County Bar Association Formal Ethics Op No 502 (1999) ("[s]ince Attorney is not counsel of record for Client in the litigation . . . the opposing attorney is entitled to address Client directly concerning all matters relating to the litigation, including settlement of the matter"); Missouri Supreme Court Rule 4-1.2(e) ("[a]n otherwise unrepresented party to whom limited representation is being provided or has been provided is considered to be unrepresented for purposes of communication under Rule 4-4.2 and Rule 4-4.3 except to the extent the lawyer acting within the scope of limited representation provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is otherwise self-represented"); DC Bar Ethics Op No 330 (2005) ("Even if the lawyer has reason to know that the *pro se* litigant is receiving some behind-the-scenes legal help, it would be unduly onerous to place the burden on that lawyer to ascertain the scope and nature of that involvement. We therefore believe that the most reasonable course for an attorney dealing with a party who is proceeding *pro se* is to treat the party as not having legal representation, unless and until the party or a lawyer for the party provides reasonable notice that the party has obtained legal representation.").

scope of the limited representation and the extent to which communications are to be directed through the lawyer.[6]

In the case of Lawyer *A*, even if the lawyer's participation was announced in compliance with court rules (such as by compliance with UTCR 2.010(7)), Oregon RPC 4.2 would not be implicated because Lawyer *A* is not counsel of record and the limited assistance in preparing pleadings is not evidence that Lawyer *A* represents Client *X* in the matter.[7] In the case of Lawyer *C*, the lawyer should make clear to Client *Z* that that the limited-scope representation does not include communication with the opposing counsel.

Finally, while the client's informed consent to the limited-scope representation is not generally required to be in writing,[8] an effective

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[6] While not required, it may be advisable to clarify the scope of the limited-scope representation in writing to opposing counsel. *Cf.* Washington RPC 4.2 cmt [11] (providing "[a] person not otherwise represented to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation").

[7] *See, e.g.*, Kansas Bar Association Ethics Op No 09-01 (2009): "Attorneys who provided limited representation must include on any pleadings a legend stating 'Prepared with Assistance of Counsel.'" But "[a]n attorney who receives pleadings or documents marked with the legend 'Prepared with Assistance of Counsel' has no duty to refrain from communicating directly with the *pro se* party, unless and until the attorney has reasonable notice that the *pro se* party is actually represented by another lawyer in the matter beyond the limited scope of the preparation of pleadings or documents, or the opposing counsel actually enters an appearance in the matter."

See also State Bar of Nevada Formal Advisory Op No 34 (rev 2009) (an ostensibly *pro se* litigant assisted by a "ghost-lawyer" is to consider the *pro se* litigant "unrepresented" for purposes of the RPCs, which means that the communicating attorney must comply with RPC 4.3 governing communications with unrepresented persons).

[8] Since Oregon RPC 1.2 does not require a writing, Oregon RPC 1.0 does not require a recommendation to consult independent counsel. It is worth noting, however, that

written engagement letter minimizes any such risks if it "specifically describe[s] the scope of the representation, how the fee is to be computed, how the tasks are to be limited, and what the client is to do."[9] *The Ethical Oregon Lawyer* § 16.4-3(c) (OSB Legal Pubs 2015).

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if the lawyer is providing a limited-scope representation with respect to a contingency matter, such an arrangement would need to be in writing. *See* ORS 20.340. *See also Fee Agreement Compendium* ch 8 (contingent-fee agreement) (OSB Legal Pubs 2018).

[9] In addition, "when a lawyer associates counsel to handle certain aspects of the client's representation, the division of responsibility between the lawyers should also be documented in a written agreement." *See Fee Agreement Compendium* ch 9 (hourly fee agreement). *See also* Oregon RPC 1.5(d) (discussing when fees may be split between lawyers who are not in the same firm).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.4-2 (describing scope of representation in the fee agreement), § 7.5-1 (scope of representation), § 8.5-1 (communicating with a represented person) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* § 90 (2000).