

Ghostwriting

Limited Scope Agreements Are Allowed Under Pennsylvania Rules of Professional Conduct

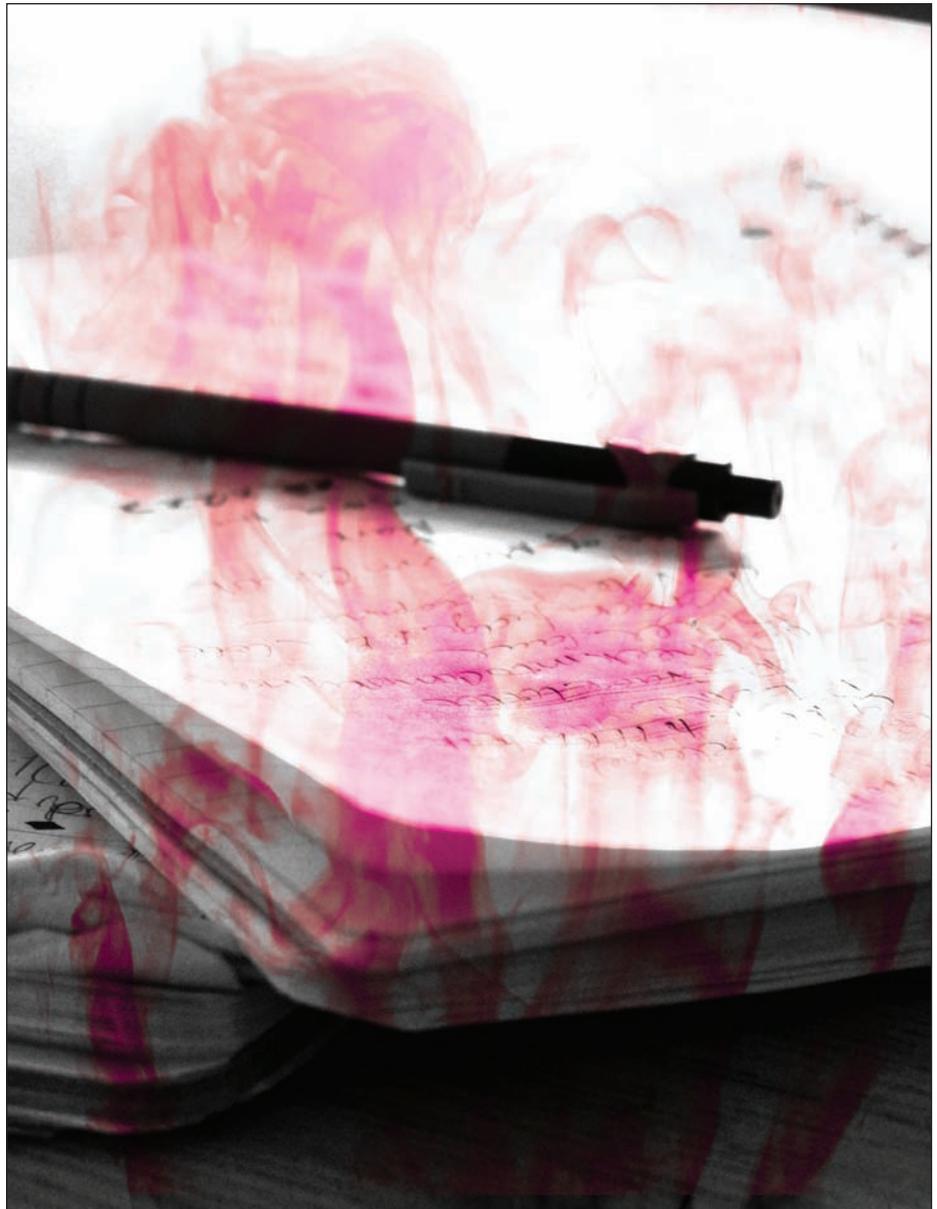
Can you represent a client “behind the scenes?” That is, can you help draft a pleading, such as a complaint or answer to complaint, or review or draft a contract, without disclosure of your representation to the other side or to a court?

This thorny question was addressed recently at length by a formal opinion issued jointly by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association Professional Guidance Committee, No. 2011-100, titled “Representing Clients in Limited Scope Engagements.”

We all know that a lawyer may be engaged by a client to handle all aspects of a matter. On the other hand, there may be a more limited relationship in which the lawyer is engaged only for a discrete task, or a consultation, as part of a larger matter in which the client will otherwise act pro se. In particular, in these economic times, the client may wish, due to financial concerns, to act as his or her own representative, with the seeking of legal advice only when or as needed.

When legal services are provided in part, but not all, of a proceeding or transaction, this practice has been referred to as “discrete task representation,” “limited scope representation” or “unbundling of legal services.” When this kind of representation involves working with pleadings for submission to a tribunal, it is often referred to as “ghostwriting,” not meant to be a pejorative term for the purpose of this discussion.

The issues are whether there are ethical concerns in such representation, and whether there are duties to reveal the lawyer’s existence to the adversary or tribunal, in light of the applicable Pennsylvania Rules of



Professional Conduct.

Certainly a lawyer could be engaged to attempt to negotiate settlement of a dispute. That engagement ends with an agreed resolution, or a determination that an impasse has been reached, and the lawyer is not bound to represent the

client if litigation ensues.

Another example is limiting the scope of a lawyer’s representation by capping the fee or number of hours to be worked.

The committees concluded that the Rules of Professional Conduct permit, and indeed even arguably encourage,

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limited scope engagements.

R. 1.2(c) provides: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” R. 6.1 exhorts a lawyer to “render public interest legal service,” going on to mention doing so at no fee or reduced fee to persons of limited means. R. 6.5 anticipates limited scope engagements by referring to participation in nonprofit and court-appointed legal service programs, performing discrete tasks on a short-term basis. It is clear that all this applies whether or not any fee, or a reduced fee, is charged, but lawyers must keep in mind that approval must occasionally be gotten from a tribunal for certain fees, such as Social Security disability or workers compensation claims.

Under R. 1.2(c), “reasonableness” means consideration of all factors under the circumstances, for the lawyer, even one operating under a limited time engagement, must still render competent representation, with sufficient knowledge, skill, thoroughness and preparation as is necessary.

“Informed consent” means the client knows and understands the limited scope of the engagement, after the lawyer has communicated adequate information and explanation of the risks and reasonably available alternatives, in other words, the advantages and disadvantages of such a relationship. The giving of consent requires an affirmative response from the client, and the taking of consent requires the lawyer to determine that the client has sufficient capacity to give it, in terms of mental ability and language skills, for instance. Being mindful of this is a consideration for risk management issues as well.

The engagement should be

confirmed in writing pursuant to R. 1.5(b), which requires a fee letter to all new clients, specifically memorializing the limitations on the scope of representation, that is, what the lawyer will and will not be doing.

Of course, the full panoply of other rules are triggered by the engagement, meaning the same obligations inherent in a plenary representation:

R. 1.2, Diligence

R. 1.4, Communication

R. 1.6 and 1.9, Confidentiality

R. 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12, Conflicts

There are other factors to remember. The lawyer should not allow his or her services to be used to engage in action the lawyer could not do himself or herself. That would violate R. 8.4(c). The lawyer should not allow his or her services to be used to assert meritless claims. That would violate R. 3.1. The lawyer should not allow his or her services to be used to make a false statement of material fact, or fail to disclose a material fact, to a third person. That would violate R. 4.1.

In short, the lawyer should act as if he or she is fully aware of all of the facts and issues, as if the lawyer was engaged in a full representation, to avoid the foregoing problems.

The committees further concluded that a lawyer is not required to disclose a limited scope engagement to an opposing party or counsel, or to a court in a litigation matter. Some other courts and bar association ethical guidance committees have opined otherwise, for various reasons.

There is no specific rule the committees pointed to in reaching their conclusion, except to say that there is no rule requiring disclosure, and any prohibitions in the rules dealing with candor to the tribunal (R. 3.3), candor to the adversary (R. 3.4), fairness in

dealing with unrepresented parties (R. 4.3) and dishonesty (R. 8.4), deal with specific situations that do not implicate this issue.

The committees stated that entering into a limited representation agreement without disclosure is not inherently dishonest or problematic, as long as representation by either the lawyer or the client is not denied when confronted with, and it is not in any way taking advantage of the court’s possible leniency toward pro se litigants. In fact, in Pennsylvania, the committees said, pro se litigants are not excused from adherence to the rules, and should not expect special accommodation. Finally, the committees felt that requiring disclosure would frustrate and possibly negate the purpose of R. 1.2’s explicit allowance of limited scope engagements. Lawyers should not be forced to be in the whole case or not at all.

All that having been said, caveats are in order. First, a reminder that providing limited assistance does not insulate a lawyer from all other disciplinary consequences, as discussed above. The legal services rendered and work product produced must comply with the Rules and usual standard of care.

Second, disclosure may be required by other rules, such as those of a specific court, tribunal, judge or government agency, and counsel should check this out before entering into the engagement.

All of the foregoing should be kept in mind when considering the undertaking of a limited scope engagement in the nature of “ghostwriting” or otherwise. ■

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