DISTRICT OF COLUMBIA BAR
RULES OF PROFESSIONAL
CONDUCT REVIEW COMMITTEE

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

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

JANUARY 2015 **(DRAFT REPORT)**

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I. INTRODUCTION

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

II. SUMMARY OF RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

III. ANALYSIS AND CONSIDERATIONS

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

A. Proposed Revisions from the Limited Scope Working Group

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

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

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

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

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

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[7] *See* April 2013 Report, Pages 1-3.

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

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

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

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

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

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

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

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

And

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

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

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

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

ii. <u>ABA Ethics 2000 Commission proposed significant changes to Model Rule 1.2</u>

In 2002, the ABA adopted extensive amendments to the Model Rules based on recommendations from the ABA Ethics 2000 Commission ("Commission"). The 2002 amendment to ABA Rule 1.2 added a sentence supporting a lawyer's implied authority to take action on behalf of a client because the Commission wanted to clarify that consultation with a client may not always be required before a lawyer takes action. [10] The Commission also added a cross-reference to Rule 1.4 (Communication), reflecting the Commission's belief that language about the lawyer's "duty to communicate" belonged in Rule 1.4 rather than Rule 1.2.[11]

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

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

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

[11] Garwin, page 58.

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

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

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

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

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

[12] Garwin, page 55.
[13] *See* Garwin, page 59 ("Although lawyers enter into such agreements in a variety of practice settings, this proposal in part is intended to provide a framework within which lawyers may expand access to legal services by providing limited but valuable legal service to low- or moderate-income persons who otherwise would be unable to obtain counsel.")
[14] Garwin, page 59.
[15] Garwin, page 55.
[16] Garwin, page 60.
[17] Garwin, page 55-56.
[18] See Garwin, page 56.
[19] Garwin, page 56.
[20] Garwin, page 60.
[21] Garwin, page 57.

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

2. Explanation of Rules Review Committee's Current Recommendations

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

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

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

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

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

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

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

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

[23] *Id*. at Comment 4, pages 21-22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] D.C Rule 1.5(a)(4).

iv. Recommended Comment 4.

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

v. Recommended Comment 5.

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

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

vi. Recommended Comment 6.

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

vii. Renumbering of remaining Comments.

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

IV. CONCLUSION

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

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

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

Redlined Version (showing proposed changes to existing rule).

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

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

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

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

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

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

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

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

Comments

Scope of Representation

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

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

Independence From Client's Views or Activities

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

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

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

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

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

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

Criminal, Fraudulent, and Prohibited Transactions

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

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

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

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

Clean Version of proposed rule.

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

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

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

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

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

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

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

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

Comments

Scope of Representation

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

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Independence From Client's Views or Activities

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Limitations on Representation

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

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

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

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