

101

**UNBUNDLING/LIMITED SCOPE
REPRESENTATION**
New Opinion Approved May 21, 2016

INTRODUCTION

In 1998, the Colorado Bar Association Ethics Committee (Committee) adopted Formal Opinion 101, entitled “Unbundled Legal Services.” Since then, the use of unbundling (also known as limited scope representation) has become more widespread in Colorado and throughout the country. (In this opinion, we use the terms unbundling and limited scope representation interchangeably.) Originally conceived as a means to encourage pro bono service by attorneys who would agree to participate in only part of a case, limited scope representation is now used as a means of providing legal representation in both pro bono cases and cases in which private attorneys charge a fee. Many private attorneys have found that providing limited scope representation is a useful means to provide some legal representation to modest means clients who could not otherwise afford to hire an attorney for full representation. This use of limited scope representation has been driven, in part, by the increasing number of pro se litigants. For example, statistics for fiscal year 2015 from the Colorado judicial branch indicate that 75% of all litigants in domestic relations cases are proceeding pro se.¹ Some of these pro se litigants have sought limited scope representation from attorneys to enable them to better litigate their cases.

The term “unbundling” was coined by Forrest Mosten, an attorney, mediator, and professor, in a 1994 law review article.² As noted in the original Formal Opinion 101, Mosten described the “full bundle” of representation in litigation as consisting of gathering facts, advising the client, discovering the facts of the opposing party, performing legal research, drafting correspondence and documents, negotiating, and representing the client in court.³ Before this term was coined, many attorneys provided limited scope representation by providing only non-litigation advice to a client or by limiting their services to the drafting of correspondence.

Since Mosten’s article was published, attention has turned to providing limited scope representation in judicial proceedings. Accordingly, in 1999, following the adoption of Formal Opinion 101, the Colorado Supreme Court amended Rule 1.2(c) of the Colorado Rules of Professional Conduct (Colo. RPC) to provide expressly that lawyers may limit the scope of their representation. This change was accompanied by amendments to Rules 11(b) and 311(b) of the Colorado Rules of Civil Procedure (C.R.C.P.) to allow lawyers to “ghostwrite” pleadings for self-represented litigants without entering a formal appearance in, respectively, Colorado district court and county court cases.

In 2011, the Colorado Supreme Court adopted C.R.C.P. 121, § 1-1(5), which required that attorneys file a notice of limited appearance and a notice of completion of limited appearance when providing limited scope representation in a court case. In 2012, the Colorado Supreme Court adopted Colorado Appellate Rule 5(e) to allow for unbundling in appellate proceedings in specific instances. The Supreme Court adopted all of these changes to encourage lawyers to engage in unbundling.

During the past decade, most states have amended their equivalent of Colo. RPC 1.2(c) to allow for limited scope representation. Similarly, many states' ethics committees have promulgated opinions regarding different aspects of unbundling.⁴ Significantly, in 2013, the American Bar Association (ABA) House of Delegates approved Resolution 108, which, among other things, "encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services."⁵

Currently, limited scope representation takes four forms: (1) providing limited litigation assistance to self-represented litigants in court cases; (2) ghostwriting pleadings or briefs for self-represented litigants; (3) providing non-litigation advice to self-represented litigants; and (4) transactional assistance.

Outside the courtroom, unbundled legal services are both commonplace and traditional. For example, clients often negotiate their own agreements, but before the negotiation, ask a lawyer for advice on issues that are expected to arise. Sometimes, a lawyer's only role is to draft a document reflecting an arrangement reached entirely without the lawyer's involvement. Clients involved in administrative hearings (such as zoning or licensing matters) may ask their lawyer to help them to prepare for the hearing, but not to appear at the hearing. In each of these situations, the lawyer is asked to provide discrete legal services, rather than handle all aspects of the total project.

Syllabus

As noted, the Colorado Supreme Court amended Colo. RPC 1.2(c) to provide expressly for limited scope representation. This opinion discusses the provisions of that rule and related rules that enable lawyers to provide limited scope representation in court

cases and to ghostwrite pleadings and briefs for self-represented litigants. This opinion also addresses other rules of professional conduct that lawyers engaged in limited scope representation must follow.⁶

I. Limited Scope Representation Authorized by Colo. RPC

1.2(c)

The Colo. RPC and C.R.C.P. permit limited scope representation. Under Colo. RPC 1.2(c), “[1] [a] lawyer may limit the scope or objectives, or both, of the representation if [2] the limitation is reasonable under the circumstances and [3] the client gives informed consent.”

Colo. RPC 1.2(c)’s provision that a lawyer may limit the scope of the representation means that in either a litigation or a non-litigation context, a lawyer may represent a client in only part of a case, transaction, or other legal matter. As discussed below, the better practice is that a lawyer should set forth the specific scope of the limited representation in a written fee agreement or other writing.

Additionally, attorneys must analyze each case or transaction to ensure it is appropriate for limited scope representation. There may be circumstances where the case is of a level, or other circumstances are present, such that the attorney should conclude that providing unbundled services is not reasonable. In those instances, the attorney, at the very least, must advise the client of that conclusion, and potentially, should decline to represent the client on a limited scope basis.

Colo. RPC 1.2(c) also requires that the limited scope representation be reasonable based on the facts of the particular case. For example, it may be reasonable for a lawyer to represent a client in a post-decree dissolution of marriage case on an issue concerning

modification of child support. In a landlord-tenant case, it may be reasonable to represent the client on the issue of possession or damages. However, in a dissolution of marriage case, it would not be reasonable to represent the client only on the issue of maintenance, because courts have held that issues concerning the division of marital property, maintenance, and attorney fees are intertwined.

Similarly, it may be reasonable to provide limited representation in a specified part of a court case. For example, it may be reasonable to represent a client with respect to a motion for summary judgment or a motion to dismiss, even if the client does not want representation on subsequent trial proceedings if either motion is denied.

Colo. RPC 1.2(c) also requires a client to give informed consent before a lawyer provides limited scope representation. 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.” *See* Colo. RPC 1.0(e). The crux of this requirement is that “[t]he lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.” Colo. RPC 1.0, cmt. [6]. Thus, the lawyer must do more than explain the significance of the decision to hire an attorney for limited scope representation; the lawyer also must make sure the client is sufficiently informed to be able to consider available options and risks prior to making that decision.

The lawyer’s explanation should include advising the client that proceeding with full representation may be desirable because the client will be represented for the entire case, but that such representation is likely to be more costly. The explanation also should

advise the client that it would be less expensive, at least in the short term, to proceed without legal representation and that proceeding without any representation may lead to mistakes that could be expensive to fix later or mistakes that might not be fixable.

Further, informed consent requires that the lawyer advise the client of potential legal pitfalls that might result from choosing to limit the scope of representation and the likelihood that the client will need additional legal advice later. For example, the attorney should inform the client when, after the conclusion of the limited scope representation, a pending discovery request may require greater client effort to follow up without legal assistance. *See* L.A. Cty. Bar Ass's Prof. Resp. & Ethics Comm., Formal Op. 502, "Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for in Pro Per Litigant" (1999).

In the case of limited scope representation, a prerequisite to a client's informed consent is an explanation of exactly which legal services the lawyer will provide and a discussion of additional legal issues that might arise after the completion of the limited scope representation. *See* Colo. RPC 1.4(a)(2) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished."). ABA Formal Comm. on Ethics & Prof. Resp., Formal Op. 472, "Communication With Person Receiving Limited-Scope Legal Services" (2015) (ABA Op. 472), recommends that lawyers providing limited scope representation confirm with the client the scope of the representation — including the tasks the lawyer will perform and not perform — in a written document that the client can read, understand, and refer to later.

Additionally, a lawyer who provides limited services as part of a legal clinic, legal advice hotline or pro se counseling program, must obtain the client's consent to limited scope representation and advise the client of the potential need for further legal assistance after the initial consultation. *See* Colo. RPC 6.5, cmt. [2].

Under C.R.C.P. 11(b) and 311(b), a pleading or paper drafted by an attorney for a pro se party must provide the attorney's name, address, telephone number, and registration number. In providing such assistance, the attorney certifies that, to the best of the attorney's knowledge, information, and belief, the pleading or paper (1) is well-grounded in fact based on a reasonable inquiry, (2) is warranted by existing law or good faith arguments for the extension of the law, and (3) is not being used to harass, cause unnecessary delay, or needlessly increase the cost of litigation. However, drafting the pleading under C.R.C.P. 11(b) or C.R.C.P. 311(b) does not constitute an entry of appearance by the attorney.

Alternatively, a client who wishes to appear pro se can find many forms on the Colorado Judicial Branch website that can be used to file motions, stipulations, or complaints with the courts. *See* <https://www.courts.state.co.us/Forms/Index.cfm>. Forms are available for topics including adoption, appeals, criminal matters, divorce and other family matters, eviction and foreclosure, identity theft, small claims, and trusts, wills, and estates. An attorney whose client seeks limited scope representation in order to appear pro se should be familiar with these forms to properly advise the client about these free resources. Limited scope representation can include advising the client on how and when to fill out and submit these forms. Under C.R.C.P. Rule 11(b) and 311(b), an attorney

who helps a client complete these forms is not required to put his or her name, address, and registration number on the forms.

Perhaps the most commonly known form of unbundled legal services is the practice of ghostwriting pleadings, motions, and other documents. With the ever-growing number of pro se litigants and the corresponding need for low, or lower, cost legal services, clients and consumers are seeking more options, and lawyers are finding a way to fill this demand through ghostwriting, or providing documents written by lawyers for use by pro se parties in litigation.

In amending Colo. RPC 1.2(c), the Colorado Supreme Court expressly permitted ghostwriting and limited scope representation, and therefore does not share the candor concerns — when unbundled representation is handled properly — expressed in some states’ ethics opinions and by the federal district court in Colorado.⁷

Many states have cited the duties of candor to the tribunal and fairness to opposing parties and counsel as the bases for concerns with regard to ghostwriting and limited scope representation generally.⁸ Some state ethics opinions have gone so far as to conclude that ghostwriting is automatically a fraud upon the court. Other states have determined that ghostwriting may be permissible without restrictions. Unbundling is not permitted in the federal district court in Colorado, with one limited exception. *See Johnson v. Bd. of Cty. Comm’rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1993) (unbundling prohibited); D.C. COLO. LAttyR. 2(b)(1) (declining to adopt Colo. RPC 1.2(c) and 6.5 “except, that if ordered, an attorney may provide limited representation to a prisoner in civil actions”); D.C. COLO. LAttyR. 2(b)(5) (declining to adopt Colo. RPC 6.5).

II. Applicability of All Rules of Professional Conduct

Attorneys practicing in the area of limited scope representation should be aware of the ethics rules governing such practice and ensure they are compliant given the activities they propose to undertake. Doing so should ensure the attorney can accomplish the dual goals of providing assistance to people who may need a lesser amount of assistance, or who cannot afford full case representation, while still maintaining compliance with all applicable Colo. RPC.

Attorneys must be aware that, even in the context of limited scope representation, all of the Colorado Rules of Professional Conduct apply, and the limited scope case should be conducted consistent with the attorney's professional obligations. An attorney's responsibilities remain the same — whether he or she represents a client for an entire case, or only on a limited basis for a specific portion of a case.

An agreement to limit legal representation does not exempt a lawyer from the duty to provide competent representation under Colo. RPC 1.1. A lawyer must ensure that the limited scope representation is sufficient for the client to meet his or her legal objective. *See* Colo. RPC 1.2, cmt. [7]. For example, a lawyer should not agree to limit the time allotted to the client's case such that the lawyer could not provide sufficient advice upon which the client could rely.

Attorneys engaging in limited scope representation must communicate with their clients to the extent necessary to keep the client reasonably informed regarding the representation and to provide legally sound advice to the client, as stated in Colo. RPC 1.4. Additionally, the fee charged must be reasonable for the work performed, based on what the attorney will actually do for the client, consistent with Colo. RPC 1.5.

Attorneys also must ensure there are no conflicts in the representation, pursuant to Colo. RPC 1.7.

III. Fee Agreements

Given that the arguments in favor of limited scope representation often center on the issue of affordability and access to justice, attorneys should give careful thought to the fees charged for various tasks and must make sure that the fees are reasonable under the circumstances. *See* Colo. RPC 1.5(a).

A lawyer providing limited representation to a new or only occasional client also must comply with Colo. RPC 1.5(b), which states that, “[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.” Although Rule 1.5(b) requires only a written statement of the basis or rate of the fee and expenses, it is desirable for attorneys to include in their written communication the terms of limited scope representation, including the particular limited services that the attorney will render. Such written communication may be in the form of a written fee agreement. ABA Op. 472 recommends that in accord with Model Rule 1.5(b), lawyers providing limited scope representation confirm with the client the scope of the representation “in writing that the client can read, understand, and refer to later.” Providing such information in writing will help provide clarity to both the attorney and the client regarding the nature of the limited scope representation.

In some circumstances, as the case progresses, a client may wish to retain the lawyer to do more than originally agreed or to provide full representation. In that instance, the lawyer should confirm in writing any changes in the basis and rate of the

fee. This written confirmation may be in the form of an addendum to the original fee agreement or an amended fee agreement. *See* Colo. RPC 1.5(b). The new or amended written communication should define the scope of the additional representation, outlining the work to be undertaken and the new fee to be charged, whether flat or hourly. As with any contract for legal services, an attorney may not seek to prospectively limit his or her liability in the agreement. *See* Colo. RPC 1.8(h)(1).

IV. Unbundled Services and Candor to the Tribunal

When a lawyer provides limited or unbundled representation to a client who has a matter before a tribunal, the lawyer's conduct may implicate Colo. RPC 3.3, which requires candor to the tribunal.⁹ Colo. RPC 3.3(a)(1) provides that “[a] lawyer shall not knowingly . . . (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” This duty would be triggered if a client who is receiving limited representation before a court, typically through filings, gives the court the misimpression that the client is proceeding pro se, without any attorney assistance. In these and similar circumstances, the lawyer must correct any misapprehension that the court may have by disclosing the fact that he or she is providing limited representation.

Problems regarding an attorney's duty of candor to the court are likely to be minimized by C.R.C.P. 121, § 1-1(5), which requires lawyers engaged in limited scope representation to file and serve with the court, other parties, and any attorneys a notice of appearance of limited scope representation and a notice of completion of the limited scope representation. *See* Judicial Department Forms (JDF) 630, 631, and 632 (civil matters); JDF 640, 641, and 642 (appeals); JDF 1334, 1335, and 1336 (family law

matters). The purpose of this provision is to implement C.R.C.P. 11(b) and 311(b) in accordance with Colo. RPC 1.2. *See* C.R.C.P. 121, § 1-1(5) (Comm. Cmt.). *See* <https://www.courts.state.co.us/forms/Index.cfm>. Nevertheless, in some circumstances, a lawyer may need to advise the court and opposing counsel of his or her entry of limited scope representation in the event that the court or the opposing counsel has not received or does not appear to have read those documents. C.R.C.P. 121, § 1-1(5). Ordinarily, if a ghostwriting lawyer complies with C.R.C.P. 11(b) or 311(b), as discussed above, that will satisfy Colo. RPC 3.3, too.

Additionally, Colo. RPC 3.4(c) provides that “[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.” Accordingly, unlike the situations considered by the minority of other ethics committees cited above, C.R.C.P. 11(b)’s and C.R.C.P. 311(b)’s express requirement that the lawyer disclose his or her participation in providing ghostwriting services, combined with Colo. RPC 3.4(c)’s mandate that a lawyer follow the rules of a tribunal, makes it clear that a lawyer owes an ethical obligation to disclose his or her participation in providing unbundled services, unless the lawyer assists a pro se party in “filling out pre-printed and electronically published forms that are issued by the judicial branch for use in court.” *See* C.R.C.P. 11(b) and 311(b).

A lawyer providing limited representation in court should inform the client that the lawyer will be required to disclose the limited representation to the court and opposing counsel. *See* C.R.C.P. 121, § 1-1(5); *see also* ABA Op. 472 (“These 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.”). However, when a lawyer provides only consultation, the lawyer’s involvement need not be disclosed to opposing counsel.

V. Advertising

An additional consideration is whether a lawyer may advertise or market the fact that he or she provides unbundled legal services. For example, a number of lawyers have used Internet-based platforms to advertise and even supply unbundled legal services for many years. *See* William Hornsby, *Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm* (1999), at 4 (“Innovative uses of the Internet, or the adaptation of digital strategies, are being employed to overcome operational inefficiencies in personal plight representation in both full-service models and unbundled services.”); N.C. Formal Eth. Op. 2005-10, “Virtual Law Practice and Unbundled Legal Services” (2006) (N.C. Op. 2005-10) (opining on a virtual law firm’s desire to “offer and deliver its services exclusively over the internet,” including advertising and providing unbundled legal services).

Colo. RPC 7.2(a) permits a lawyer to “advertise services through written, recorded or electronic communication, including public media.” If a lawyer providing unbundling services elects to advertise that fact, he or she may do so as long as he or she ensures compliance with Colo. RPC 7.2(b) – (c), which concerns the costs of advertising, referral agreements, and including the name and office address of at least one lawyer or law firm responsible for advertising content. Additionally, the lawyer’s advertisements or communications about the unbundled services must not be false or misleading. *See* Colo. RPC 7.1(a). Further, the lawyer may not provide communications or

advertisements in a form that resembles a legal pleading or formal legal document, to avoid being misleading or creating a misapprehension by the recipient. *See* Colo. RPC 7.1(c). When describing unbundled services, the lawyer should be clear and accurate about what fees and costs may be charged and should avoid using terms that are likely to be misleading if they cannot be substantiated. *See* Colo. RPC 7.1, cmt. [5] (“Characterizations of a lawyer’s fees such as ‘cut-rate,’ ‘lowest,’ and ‘cheap’ are likely to be misleading if those statements cannot be factually substantiated.”).

Further, a lawyer who advertises on the Internet the provision of unbundled services should be clear to limit the statements to legal matters in Colorado or other states where the lawyer is licensed so that the lawyer is not unwittingly advertising services that cannot be performed because of unauthorized practice of law (UPL) concerns. *See* Colo. RPC 5.5 (addressing UPL); *see also* N.C. Op. 2005-10 (discussing UPL and other advertising concerns).

Colo. RPC 7.3(a) provides that a lawyer “shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.” Given the nature of unbundled legal services, it is difficult to imagine that the lawyer’s “significant motive for” the contact would be “the lawyer’s pecuniary gain,” but a lawyer who provides, or intends to provide, unbundled services to clients and communicates those facts to prospective clients should take care to ensure compliance with Colo. RPC 7.3(a)-(c).

Finally, in any context, including the provision of unbundled legal services, a lawyer must ensure that he or she does not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Colo. RPC 8.4(c).

VI. Dealing With an Opposing Party Who Uses Unbundled Legal Services

In certain cases, questions will arise as to the duties of a lawyer who knows that an opposing lawyer providing unbundled legal services is assisting the opposing party. *See* ABA Op. 472. These questions will most likely arise when an opposing lawyer providing unbundled legal services is assisting with drafting pleadings or other court documents for the opposing party. ABA Opinion 472 addresses the interplay between Model Rules 1.2(c), 4.2 (prohibiting a lawyer from communicating with a person represented by counsel), and 4.3 (governing a lawyer’s interactions with unrepresented persons). The opinion notes that the opposing lawyer providing limited scope legal services generally has no basis to object to communications between the client receiving those services and the lawyer on any matter outside the scope of the limited representation. The opinion recommends that, if asked by the lawyer, the opposing lawyer providing limited scope services should identify the issues on which he or she provided representation and on which the lawyer could not communicate directly with the client.

If the lawyer is told that the opposing lawyer initially providing unbundled legal services is now representing his or her client on *all* communications about a matter, the inquiring lawyer must comply with Colo. RPC 4.2 and communicate only with the opposing lawyer. *See* ABA Op. 472. However, under Colo. RPC 4.2, the lawyer may ask the court for permission to communicate directly with the client receiving unbundled

services in defined areas outside the presence of the opposing lawyer providing those services. For example, during a hearing, issues may arise that the court asks the parties to address during a recess. If the court approves a lawyer's direct communication with an opposing party receiving unbundled services, then the lawyer may do so, keeping in mind any limits that the court has put on this communication. *See generally* ABA Op. 472.

When a lawyer knows that the opposing lawyer is drafting pleadings or other court documents for an opposing party but the opposing lawyer is performing no other services for that party, the first lawyer does not have a duty to communicate with the opposing lawyer providing those unbundled services and instead may communicate directly with the client receiving the unbundled services. In this situation, the opposing lawyer's assistance in drafting court documents is not considered representation in the matter as contemplated by Colo. RPC 4.2. *See* C.R.C.P. 11(b) and 311(b). Under comment [9A] of Colo. RPC 4.2, a pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) or C.R.C.P. 311(b) and Colo. RPC 1.2 is considered to be unrepresented for purposes of Colo. RPC 4.2, unless the lawyer has knowledge to the contrary.¹⁰ Nevertheless, while a lawyer is providing ghostwriting services, an attorney-client relationship undoubtedly exists. However, principles of substantive law, not the Colorado Rules of Professional Conduct, "determine whether a client-lawyer relationship exists." *See* Colo. RPC, Preamble and Scope, ¶ [17]; *People v. Gabriesheski*, 262 P.3d 653, 658 (Colo. 2011).

Therefore, in responding to motions filed by a party who is assisted, but not represented, by a ghostwriting, opposing lawyer, the lawyer may respond directly to the opposing party receiving unbundled services both formally and informally. The lawyer

may confer about motions with the party receiving unbundled services and may serve motions and pleadings on that party without communicating with the ghostwriting, opposing lawyer. Until the lawyer has information that the party receiving unbundled services is being represented in the matter by the opposing lawyer who previously was only ghostwriting pleadings, the lawyer does not need to comply with Colo. RPC 4.2.

A lawyer also may provide unbundled services in negotiations or mediation. When a lawyer knows that a party is represented by an opposing lawyer providing unbundled services in settlement negotiations or mediation, then, pursuant to Colo. RPC 4.2, the lawyer should communicate only with the opposing lawyer providing unbundled services, and not the client, about settlement or mediation issues. If the case does not settle or resolve, and the lawyer has no reason to believe the representation by the opposing lawyer is continuing, then the lawyer may deal directly with the party on other issues. Further, if the lawyer has questions about whether he or she can communicate directly with the party who received unbundled services in the context of mediation or settlement negotiation, the lawyer should seek clarification or, if necessary, permission from the opposing lawyer who provided the unbundled services to communicate directly with that lawyer's client.

In most circumstances, a lawyer whose client is adverse to a party using the services of an opposing lawyer providing unbundled services will need to follow Colo. RPC 4.3, which governs dealing with an unrepresented person. The lawyer needs to be careful not to give legal advice to the party receiving unbundled services, and to make certain, if it is not apparent, that that party understands the lawyer's role in the matter.

VII. Fairness to Opposing Parties

Issues in ensuring fairness to opposing parties may arise in domestic relations cases, especially if both parties request assistance from one attorney. A lawyer should not mediate a divorce agreement between unrepresented parties and also prepare a proposed judgment of dissolution of marriage, a marriage separation agreement, or a joint parenting agreement. When a lawyer drafts these formal documents after mediating between the adverse parties, the lawyer goes beyond the role of mediator and takes on the role of representing both parties, which creates a nonwaivable conflict of interest. *See* Ill. State Bar Ass’n Op. 04-03 (2004). Under Colo. RPC 1.7(b), a lawyer cannot represent a client if that representation would be materially limited by the representation of another client. In the situation explained here, the mediating lawyer who prepares official documents would be effectively representing two adverse parties in one proceeding. *See* CBA Formal Op. 47, “Attorney Representation in Dissolution of Marriage” (1972, Addendum 1995) (“[C]onflicting interests will nearly always exist in dissolution of marriage cases, whether or not one or both clients know or agree that their interests are conflicting[.]”). Alternatively, the mediating lawyer can help the parties draft an informal agreement or a memorandum of understanding and then recommend that each party obtain independent and separate legal counsel to draft the final documents for the court.¹¹

During a limited scope representation, the lawyer should advise the client to decide whether the client wants legal representation at settlement. Then, in fairness to opposing counsel, the lawyer should inform opposing counsel whether opposing counsel should or can communicate with the individual. *See* D.C. Ethics Opinion 330 (2005). On the other hand, if the lawyer believes that the client will not be prepared to negotiate

alone or without having to consult with the lawyer, the lawyer may recommend that the client retain the lawyer for settlement negotiations to avoid unreasonable delay. *See* State Bar of Ariz. Ethics Op. 06-03, “Limited Scope Representation; Confidentiality; Coaching; Ghost Writing” (2006).

¹ See “Cases and Parties without Attorney Representation in Civil Cases,” Fiscal Year

2015, at 2, <https://www.courts.state.co.us/Administration/Unit.cfm?Unit=annrep>.

² See Forrest S. Mosten, “Unbundling of Legal Services and the Family Lawyer,” 28 *Fam. L.Q.* 421 (1994). Much has been written about unbundling in Colorado. See Molly M. Jennings and D. James Greiner, “The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review,” 89 *Denver U. L. Rev.* 825 (2012); Adam J. Espinosa and Daniel M. Taubman, “Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, §1-1,” 40 *The Colorado Lawyer* 89 (Nov. 2011); Adam J. Espinosa, “Ethical Considerations When Providing Unbundled Legal Services,” 40 *The Colorado Lawyer* 75 (2011); Raymond P. Micklewright, “Discrete Task Representation a/k/a Unbundled Legal Services,” 29 *The Colorado Lawyer* 5 (Jan. 2000).

³ Mosten, *supra*, note 2 at 423.

⁴ ABA Standing Comm. on Delivery of Legal Services, Pro Se/Unbundling Resource Center, Ethics Opinions, *available at* <http://apps.americanbar.org/legalservices/delivery/delunbundethics.html>.

⁵ See Forrest Mosten, “Unbundling Legal Services in 2014, Recommendations for the Courts,” 53 *Judges’ Journal* No. 1, at 10, 11 (2014).

⁶ Limited legal representation also may arise where the lawyer represents a client in the insurance context through agreement with the insurance provider. This opinion is not intended to provide an in-depth analysis regarding ethical issues involved in insurance-defense representation or the nuances of the tripartite relationship, which are addressed in the Committee’s Formal Opinion 91, “Ethical Duties of Attorney Selected by Insurer to Represent Its Insured,” (1993, Addendum 2013).

⁷ As noted, some ethics committees have opined that it is permissible under their rules of professional conduct to provide limited representation and ghostwrite pleadings or court filings. See Alaska Bar Ass’n Ethics Comm., Op. 93-1, “Preparation of a Client’s Legal Pleadings in a Civil Action Without Filing an Entry of Appearance” (1993); L.A. Cty. Bar Ass’n Prof. Resp. & Ethics Comm., Formal Op. 502, “Lawyers’ Duties When Preparing Pleadings or Negotiating Settlement for in Pro Per Litigant” (1999) (L.A. Cty. Op. 502); L.A. Cty. Bar Ass’n Prof’l Resp. & Ethics Comm., Formal Op. 483 (1995); *State Bar of Mich. Standing Comm. on Prof. & Jud. Ethics*, Op. RI-347 (2010) (“Unless there is an affirmative misrepresentation that a pro se litigant has not been assisted by a lawyer, assistance by a lawyer need not be disclosed to the tribunal under the Michigan Rules of Professional Conduct.”). The ABA Standing Committee on Ethics and Professional Responsibility and the clear majority opinion among state and local bar ethics committees require some disclosure to the court when the attorney provides assistance to the client in some way that is not complete representation. See ABA Standing Comm. on Ethics & Prof’l Resp., Op. 07-446, “Undisclosed Legal Assistance to Pro Se Litigants” (2007); Conn. Bar Ass’n Comm. on Prof’l Ethics, Op. 98-5, “Duties to the Court Owed by a Lawyer Assisting a Pro Se Litigant” (1998); Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1994-2 (1994); Fla. State Bar Ass’n Comm. on Prof’l Ethics, Op. 79-7 (Reconsideration) (2000); Ky. Bar Ass’n, Op. E-343 (1991); Mass. Bar Ass’n Comm. on Prof’l Ethics, Op. 98-1 (1998); N.H. Bar Ass’n Ethics Comm., “Unbundled Services – Assisting the Pro Se Litigant” (May 12, 1999); N.Y. Cty. Lawyers Ass’n Comm. on Prof’l Ethics, Op. 742, at 1 (2010); Tenn. Bd. of Prof. Resp. Formal Ethics Op. 2007-F-153, “Ghost Writing for Pro Se Litigant” (2007); Utah State Bar Ethics Advisory Comm., Op. 74 (1981); Va. State Bar Standing Comm. on Legal

Ethics, Op. 1127, “Attorney-Client Relationship – Pro Se Litigant: Rendering Legal Assistance” (1988).

⁸ See State Bar of Ariz., Ethics Op. 05-06 “Limited Scope Representation; Candor to the Tribunal; Fees” (2005), for a well-written, detailed discussion of the candor concerns. See also Part IV *infra*.

⁹ See CBA Formal Op. 123, “Candor to the Tribunal and Remedial Measures in Civil Proceedings” (2011); see also Kan. Bar Assn. Ethics Advisory Comm., Op. 09-01 (2009).

¹⁰ See Ore. State Bar Formal Ethics Op. 2011-183, “Scope of Representation; Limiting the Scope” (2011); L.A. Cty. Op. 502; Wash. D.C. Bar Ass’n Ethics Op. 330, “Unbundling Legal Services” (2005). Florida Rule of Professional Conduct 4-4.2 (b) covers this issue explicitly: “An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 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 the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.”

¹¹ This opinion is not intended to preclude self-help personnel as defined in the Chief Justice Directive 13-01 (as issued June 12, 2013) from performing those activities specifically permitted by the Directive.