

# Limited Scope Representation and Fee Agreements in Marital Dissolution Matters

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A lawyer with a family law practice asks whether it is ethically permissible to charge a client a flat (or “fixed”) fee for handling only “the key parts” of a marital dissolution, with the client having the option to “elect along the way” to engage the lawyer for other specific services, on either a flat-fee or an hourly-rate basis, as the need for these services arises.

The requestor’s inquiry gives rise to several related ethical concerns. First, the inquiry suggests that the lawyer intends to offer the same set of services to every marital dissolution client for a uniform, flat fee—offering, in effect, a standard, *prix fixe* “menu” of legal services to all dissolution clients, with additional menu choices available *a la carte*—rather than tailoring each flat-fee, limited scope engagement to the needs of the particular client. Second, the inquiry provides no indication that the requestor intends to provide the client with information sufficient to permit the client to make an informed decision<sup>1</sup> about engaging the lawyer on a limited scope, flat-fee basis. Specifically, while it appears that the agreement the lawyer envisions will identify the “key parts” of the representation for which the lawyer will assume responsibility, the inquiry provides no indication that the agreement will iden-



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tify the tasks for which the client will be responsible, even though the client will be on his or her own with respect to those tasks unless and until the client and lawyer enter into a subsequent agreement assigning responsibility for some or all of them to the lawyer. Additionally, it is not clear from the inquiry that the requestor intends to provide prospective clients with explanations regarding the hybrid fee structure the request envisions adequate to meet the requirements announced in Rule 1.5 of the Connecticut Rules of Professional Conduct.

In the Committee’s view, a limited scope engagement that is not customized to the particular client’s matter, and does not include specific information with regard to the proposed division of labor as between lawyer and client, would run afoul of Rule 1.2(c)’s requirement that any limitation on the scope of representation be “reasonable under the circumstances” and supported by informed client consent.

We conclude, however, that, if the limitation of scope and all fees charged by the lawyer are reasonable under the circumstances, a lawyer may offer a marital dissolution client a limited set of services<sup>2</sup> at a flat fee, and may agree with the client that the lawyer will handle additional tasks on either a flat-fee or hourly-rate basis as the representation progresses, provided that the lawyer, before representation commences: 1) explains to the client the services the flat fee will cover; 2) outlines the other tasks that bringing the matter to conclusion is likely to require and for which—absent subsequent agreement—the client will be responsible; 3) explains the fee structure that will apply if the client elects to expand the scope of representation at a later date or the representation ends without the lawyer having performed all of the work covered by the flat fee; and 4) obtains the informed consent of the client as to the terms of the limited scope engagement, confirmed in writing.<sup>3</sup>

We note, too, that the lawyer must obtain the client's informed consent, confirmed in writing, to any subsequent change in the scope of the representation.

### Limited Scope Representation and Informed Consent

In a limited scope representation (sometimes referred to as “unbundled” representation), a client hires a lawyer to assist with discrete tasks, such as providing legal advice with regard to a specific situation; reviewing, preparing, or “ghost-writing” legal documents; or preparing the client to appear *pro se* in a legal proceeding. The lawyer also may take total responsibility for certain parts of a matter, leaving others solely to the client.

The request before us envisions a standardized, limited scope engagement assigning responsibility for what the requestor terms the “key parts” of a marital dissolution to the lawyer, *i.e.*, “filing the dissolution, obtaining financial records, completing mandatory disclosure requirements, [and] negotiating and drafting a settlement and getting it approved.”<sup>4</sup> The request offers as examples of additional legal services not covered by the fixed fee, but available, as needed, on either a fixed fee or an hourly rate basis as the matter is underway, *inter alia*, handling *pendente lite* custody, child support, and alimony motions. Significantly, it makes no mention of the client's responsibilities in the limited scope arrangement.

A lawyer may provide a limited set of services to clients in marital dissolution matters, but in each such case, the limitation on the scope of representation must be reasonable under the circumstances. *See* Rule 1.2(c). Assuming the limitation is reasonable and the client gives informed consent, Rule 1.2 “affords the lawyer and client substantial latitude to limit the scope of representation....” Rule 1.2 Commentary.

As an initial matter, we conclude that the “one-size-fits-all” limitation described by the request does not meet Rule 1.2(c)'s “reasonableness” standard. Some clients

may not require all of the services in the bundle; a client with financial planning expertise, for example, may not need the lawyer's assistance with preparing mandated financial disclosures, which the requestor deems a “key part” of the dissolution to be handled by the lawyer, and includes within the flat fee in the proposed service model. Other services the requestor categorizes as optional, or “matter[s] of choice,” may be key parts of a particular dissolution matter—e.g., motions addressing custody and child support where the divorcing parties have minor children, or a motion addressing spousal support where one party is employed and the other is not. In fact, it seems axiomatic that a limitation of the scope of representation that is reasonable in one client's circumstances may be unreasonable in another's, such that tailoring each limited scope engagement to the circumstances of the client engaging the lawyer is necessary.

Entering into a limited scope representation agreement with a marital dissolution client, fixed fee or otherwise, requires that the lawyer, at the outset, “determine what kind of legal problems [the client's] situation may involve” (Rule 1.1, Commentary). Conducting an introductory interview to gather the facts necessary for making that determination is critical to assessing whether a particular limitation of the scope of representation will be reasonable under the circumstances.<sup>5</sup> That assessment is likely to turn on, *inter alia*, the importance of the interests at stake, the complexity of the matter, the time required to address the issues presented by the matter, whether the tasks the lawyer will take on are sufficiently segregable from those to be handled by the client, and whether the client is capable of proceeding *pro se* or has access to other resources for assistance with some aspects of the matter.<sup>6</sup>

Both to identify the prospective client's legal problems and to make the crucial “reasonableness” assessment with respect to a contemplated limitation on the scope of the representation, family law attorneys must apply knowledge not

only of the law governing marital dissolution, but also of “many other areas of state and federal law, such as estate planning, bankruptcy, and tax law.”<sup>7</sup>

Further, as is the general rule, the lawyer must obtain the client's informed consent to the limited scope arrangement at the outset of the representation. Rule 1.2(c). “Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation.” Conn. Informal Op. 09-01.<sup>8</sup>

Securing the client's informed consent in this context requires that the lawyer not only identify the client's legal problems, but also disclose to the client—at the outset of the representation—the reasonably foreseeable issues related to the client's problems, and divide responsibility for addressing them as between the client and the lawyer. The lawyer must advise the client not only of the tasks the lawyer will handle, both out of court and in court,<sup>9</sup> but also of the need to plan for self-representation—or additional legal counsel—regarding reasonably foreseeable issues outside of the scope of the engagement, rather than waiting for such issues to arise.<sup>10</sup>

As Mark A. DuBois and James F. Sullivan have noted,

[f]or such a service model to work, the lawyer and the client must be able to reasonably identify the full range of legal work necessary to bring a matter to completion .... Inexperienced practitioners may not be able to adequately identify all of the work necessary for successful completion of a matter, and reaching an important milestone without a clear understanding of which party is responsible is a prescription for disaster. Some tasks involving complex work, such as producing a QDRO in a divorce case, may not be appropriately allocated to the client.<sup>11</sup>

Discharging these preliminary obligations can be particularly challenging in family matters, where emotions run high, “[p]retrial motions are plentiful ... [.] and it is not uncommon for seemingly uncontested issues to become the subject of an emergency motion or ... require[e] an expedited hearing.”<sup>12</sup> Many an experienced family lawyer can attest to the speed with which a dissolution client’s post-filing discovery of marital infidelity, for example, or of an opposing party’s financial improprieties, or of child abuse perpetrated by an estranged spouse’s significant other, or of child pornography on an estranged spouse’s cell phone or computer, can transform what initially seemed a simple, uncontested divorce into a far more complex, fully contested matter.

Accordingly, while we conclude that the Rules require a lawyer contemplating entering into a limited scope agreement, at the outset, to identify the client’s legal problems and the reasonably foreseeable issues related to those problems, and then to allocate responsibility for the tasks likely to be required to bring the matter to conclusion as between lawyer and client, we remain mindful that the most universally foreseeable aspect of family law practice may be that a particular issue not “reasonably foreseeable” as representation begins will emerge and require attention as representation progresses.

A lawyer entering into a limited scope engagement must remain alert to such late-blooming issues, of course, and promptly bring them to the client’s attention if they arise. However, as is always the case, the drafters’ introductory reminder that “[t]he Rules of Professional Conduct are rules of reason”<sup>13</sup> is the touchstone here: while the Rules require reasonable, lawyerly foresight, they cannot, and do not, require clairvoyance. That said, given the inherent unpredictability of family law cases, the prudent lawyer will be well-advised to caution the limited scope client, early on, that unanticipated developments are not uncommon in divorce cases, and sometimes warrant (or necessitate) expanding

the scope of representation as representation progresses in order to protect important client interests.

Once the lawyer has secured the client’s informed consent to the limited scope engagement, “[t]he lawyer must . . . memorialize [it] in the retainer agreement.”<sup>14</sup> Note that not only the initial limitation of the scope of representation (Rule 1.2(c)), but also any change to the scope of representation during its course (Rule 1.5(b)), requires the client’s informed consent, confirmed in writing. If the new tasks require the lawyer to appear in court on the client’s behalf, Rule 1.5(b) requires that the attorney file a new limited appearance in the matter, as well.

Note, too, that limiting the scope of the lawyer’s representation does not limit the lawyer’s ethical obligations to the client, to the court, or to the public. All lawyers, including lawyers providing limited scope representation, among other duties, must perform competently (Rule 1.1), act diligently (Rule 1.3), communicate timely (Rule 1.4), maintain confidentiality (Rule 1.6), and avoid conflicts of interest (Rules 1.7, 1.8, 1.9, and 1.10).

### Fee Agreements

Under Rule 1.5 and its Commentary, a lawyer’s primary ethical obligation in determining the basis or rate of a fee to be charged for legal services is that the fee must be reasonable under the circumstances. Expenses, likewise, must be reasonable. Rule 1.5(a) sets out eight non-exclusive factors for a lawyer to consider—if relevant to the particular matter—in assessing reasonableness, among them: the time, labor, and difficulty involved; the skill required and ability of the lawyer; the fee customarily charged; and whether the fee is fixed or contingent.<sup>15</sup>

Although lawyers may employ flat fee structures less commonly than hourly rates in marital dissolution matters, the Rules do not preclude them so long as the lawyer’s fee is reasonable. “In assessing a fee’s reasonableness, what is ultimately at issue is ‘the reasonable value of the services rendered and value received

by the client.”<sup>16</sup> With a sole exception unlikely to apply to limited scope, flat-fee engagements in the marital dissolution context,<sup>17</sup> Rule 1.5(b) requires that the lawyer communicate “[t]he scope of the representation, the basis or rate of the fee and expenses for which the client will be responsible . . . to the client, in writing, before or within a reasonable time after commencing the representation . . . .”

The Committee’s concern with the requestor’s model in this regard lies with its recitation of the fee structure that would apply to the “*a la carte*” services available to limited scope clients upon request, as representation progresses. Per the request, clients who engage the lawyer in the proposed “key parts of the dissolution” service model would be able to “elect along the way to pursue other interim motions, which are really a matter of choice, also on a flat fee basis, *subject to limitations.*” (*Emphasis added.*) In a follow-up communication, the requestor has explained what “subject to limitations” means: while the envisioned model would make an array of supplemental pretrial services available to clients on a flat fee basis, if a case did not settle and a trial was necessary, the lawyer would provide trial-related services only if the client agreed to pay for those services at the lawyer’s customary, hourly rates.

The Committee discerns no ethical bar to a hybrid arrangement that would shift from fixed fee to hourly billing if a case goes to trial, provided that all fees are reasonable as required by Rule 1.5(a) and explained to the client and memorialized in the fee agreement at the outset as required by Rule 1.5(b). Although the lawyer’s hope, and perhaps even expectation, may be that every limited scope, marital dissolution case will settle in advance of trial, given the aforementioned unpredictability of family law matters (*see* discussion, *supra* at 6-7), that almost any limited scope case may take an unanticipated turn that causes negotiations to collapse such that a trial becomes necessary seems at least reasonably foreseeable. For that reason, to comply with Rule 1.5(b), the lawyer must ex-

plain to the client, at the outset, the fee structure that will apply in that event. So, too, must the lawyer explain to the client the terms upon which the lawyer will reduce the fixed fee, or refund to the client a portion of the fixed fee paid in advance, if the lawyer does not perform some of the tasks covered by the fee (e.g., if negotiations fail such that the lawyer does not draft a settlement agreement or shepherd it through the court, if the client discharges the lawyer (or vice versa) before the matter concludes, or if the case ends because the parties reconcile before the agreed-upon work is complete).<sup>18</sup>

To summarize, we conclude that to pass ethical muster, the limited scope, fixed fee engagement the inquirer describes requires a writing in which the lawyer, 1) sets out the amount of the fee and the expenses for which the client will be responsible, 2) explains which services will be included for the fixed fee and which parts of the matter will be the client's responsibility, and 3) specifies how all charges will be handled for tasks not covered by the fixed fee if the client wishes to expand the scope of representation once work on the matter is underway and the terms upon which the lawyer will reduce the fixed fee, or refund to the client a portion of the fixed fee paid in advance, if the lawyer does not perform some of the tasks covered by the fee. As bears repeating, the basis and rate of all fees, whether fixed or hourly, must be reasonable under the circumstances and explained to the client at the outset.

We offer, too, one final caveat with respect to fixed or flat fee arrangements: A lawyer operating pursuant to such an arrangement, whether in a full or limited scope matter, must take care to ensure that the capped nature of the arrangement does not adversely affect the lawyer's ability to provide competent representation to the client as required by Rule 1.1. In fact, a lawyer may not ethically enter into

[a]n agreement ... whose terms might induce the lawyer improperly to curtail services for the client

or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

### Rule 1.5, Commentary

Even if the legal work necessary to complete the task or tasks specified in the flat-fee agreement takes substantially more time than the lawyer anticipates, then, the lawyer must complete the agreed-upon tasks, and do so competently (Rule 1.1), diligently (Rule 1.3), and at the agreed-upon price. For that reason, a lawyer contemplating entering into such an agreement should consider carefully all that accomplishing each of the agreed-upon tasks may require before setting the fixed fee for the lawyer's services. A fee established in the expectation of negotiating a divorce settlement in a matter of hours, for example, is unlikely to compensate the lawyer fairly if reaching agreement requires months of difficult negotiations. That the fee structure provide no incentive for the lawyer to provide the client with less-than-competent-and-diligent representation is an ethical imperative.

### Conclusion

In sum, in the Committee's view, if the limitation of scope and all fees charged by the lawyer are reasonable under the circumstances, a lawyer may offer a marital dissolution client a limited set of services at a flat fee, and may agree with the client that the lawyer, at the client's request, will handle additional tasks on either a flat fee or an hourly basis as the representation progresses, but only if the lawyer, before representation commences: 1) explains to the client the services the fee will cover; 2) outlines the other, foreseeable tasks that bringing the matter to conclusion is likely to require, for which the client will be responsible absent subsequent agreement;

3) explains both the fee structure that will apply if the client elects to expand the scope of representation at a later date and the terms upon which the lawyer will reduce the fixed fee, or refund to the client a portion of the fixed fee paid in advance, if the lawyer does not perform some of the tasks covered by the fee; and 4) obtains the informed consent of the client, confirmed in writing, as to the limited scope arrangement. We note, too, that the lawyer must obtain the client's informed consent, confirmed in writing, to any subsequent change in the scope of representation. ■

### NOTES

1. See Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.")
2. It is noteworthy that Connecticut's judges first introduced limited scope appearances in family courts, apparently having concluded that limited scope representation, while perhaps not ideal, would be preferable to no representation whatsoever for parties of limited means. See P.B. 3 § 3-8(b); State of Connecticut Judicial Branch, Notice of Limited Appearance Pilot Program, available at <https://www.jud.ct.gov/external/news/press366.htm> (last visited 9/10/19).
3. We note that not all engagements in which a lawyer charges a flat fee for a portion of the representation are limited in scope. If the client and lawyer agree at the outset that the lawyer will represent the client for all parts of the matter, but will charge the client a flat fee for certain services and bill for others at an hourly rate, this would simply be a full scope representation with a hybrid fee arrangement. In such circumstances, neither lawyer nor client envisions the lawyer's allocating responsibility for any part of the representation to the client. Such an arrangement would be acceptable under the Rules so long as its terms are adequately disclosed to the client at the outset and the total amount charged is reasonable under the circumstances.
4. We assume that "get[ting the settlement] approved" refers to completing the procedural steps necessary to secure court approval of the settlement, rather than actually securing court approval, as a fee may not be so conditioned. See *infra* fn. 15.
5. Because the request before us envisions a service model in which the lawyer will handle what the lawyer determines to be the key parts of a dissolution case for a flat fee, we will reserve for another day consideration of the situation in which a client who will handle, or already has handled, the lion's share of a dissolution matter *pro se* seeks to retain a

lawyer to perform a single, discrete task, or a narrowly circumscribed set of tasks (e.g., opposing a motion for sole custody of minor children, drafting a QDRO, or reviewing a stipulation for settlement prior to the client's executing it and filing it in the court).

6. See Mark H. Tuohey III, *et al.*, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE, ABA (2003), at 63; see also Michelle N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. Tex. L. Rev. 159, 164-65 (Fall 2014).
7. Struffolino, *supra* at 164-65; see also Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 U. Miss.-Kan. City L. Rev. 965, 968 (2007).
8. "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." Rule 1.0(f). See also Commentary to Rule 1.0(f).
9. Note that Rule 1.5(b) mandates that, if the

limited scope representation will include court appearances, the lawyer's engagement agreement: identify the proceeding in which the lawyer will file the limited appearance; identify the court events for which the lawyer will appear on behalf of the client; and notify the client that after the limited appearance services have been completed, the lawyer will file a certificate of completion of limited appearance with the court, which will serve to terminate the lawyer's obligations to the client in the matter, and as to which the client will have no right to object.

10. See Rule 1.4(a)(3) and (b), obligating the lawyer to "keep the client reasonably informed" and explain matters well enough "to permit the client to make informed decisions regarding the representation."
11. Mark A. Dubois & James F. Sullivan, CONN. LEGAL ETHICS & MALPRACTICE, §§ 1-3, at 23 (2016).
12. Michelle N. Struffolino, *supra* at 180 (citing *Limited Assistance Representation (Unbundling) Training Materials*, Mass. Prob. & Fam. CT 3-5 (2009) (on file with the South Texas Law Review)).
13. Conn. R. Prof. Conduct, Scope.
14. Tuohey III, *et al.*, *supra* at 71, citing Colo. Bar Ass'n Ethics Comm., Formal Op. 101 (1998).

15. Rule 1.5 prohibits contingent fee agreements in dissolution cases. Rule 1.5(d) provides that "[a] lawyer shall not enter into an arrangement for, charge, or collect: (1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution of marriage or civil union or upon the amount of alimony or support, or property settlement in lieu thereof[.]"
16. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 79 (Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnerson, eds., ABA 8th ed. 2015), citing *Regions Bank v. Automax USA, L.L.C.*, 858 So.2d 593 (La. Ct. App. 2003).
17. Rule 1.5(b) exempts lawyers from the writing requirement "when the lawyer will charge a regularly represented client on the same basis or rate."
18. See Conn. Informal Op. 00-12 for a helpful discussion of the ethical issues that mitigate against lawyers' use of nonrefundable fee agreements (which the opinion distinguishes from nonrefundable retainer agreements) as a general matter, and of the particular ethical issues presented by non-refundable flat fee agreements (which the opinion refers to as nonrefundable, lump-sum advances) in marital dissolution cases.



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