

Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Limited Scope Representation and Family Law: Ethics and a View from the Bench

Presenters:

The Honorable Timothy Gerking, Jackson County Circuit Court Judge

Judge Gerking was appointed to the bench in 2010. Prior to his appointment, he was a partner with the law firm of Brophy, Schmor, Gerking, Brophy, Paradis & Maddox in Medford. Judge Gerking was admitted to practice in Oregon in 1979 and was previously admitted in the state of Arizona where he began his legal career in 1974. Judge Gerking had an active trial practice in Medford representing insurance companies and four Southern Oregon School Districts. He received an undergraduate degree from the University of Arizona and a JD from Arizona State University Law School.

Helen M. Hirschbiel, Executive Director, Oregon State Bar

Helen M. Hirschbiel served as General Counsel and Deputy General Counsel for the Oregon State Bar for a total of 9 years. In those roles she gave ethics guidance to lawyers, served as liaison to the Legal Ethics Committee, wrote over 35 articles and gave over 100 presentations regarding lawyers' ethical obligations. She started working at the OSB in December 2003 in the Client Assistance Office, reviewing and investigating ethics complaints against lawyers. Prior to working for the Bar, she worked in private practice in Portland, Oregon and for DNA-Peoples Legal Services on the Navajo and Hopi Reservations in Arizona. She received her JD from Lewis & Clark Law School in 1991, and is licensed to practice law in Oregon and Arizona (inactive). As of January 1, 2016, Helen became the Executive Director/CEO for the Oregon State Bar. In spite of this change in role, she continues to act as a resource on matters of lawyer ethics, including answering calls on the OSB Ethics Hotline.

Joshua Kadish, Attorney at Law, Wyse Kadish LLP

Mr. Kadish is a graduate of Stanford Law School (1979). He was law clerk to Justice Hans Linde of the Oregon Supreme Court and has been in private practice since 1980. He is a partner at Wyse Kadish LLP, where he practices family law, mediation, estate planning and business law. He is an adjunct professor at Lewis and Clark Law School and has taught negotiation and mediation there for thirty years. Mr. Kadish's mediation practices focuses on families in conflict around divorce, will contests, care of elders and closely held businesses. He received the Oregon Mediation Association's annual award for excellence in 2000, the ADR Section Sidney Lezak award for excellence in the field of dispute resolution in 2011, and a DJC Leadership in the Law award in 2012. He is an Oregon Super Lawyer. He has taught and written extensively about mediation and family law.

Samantha M. Benton, Program Manager, Family Law Program, Oregon Judicial Department

Samantha joined the Juvenile and Family Court Programs Division, OJD in 2014. Previously, she clerked for the Honorable Valeri L. Love at the Lane County Circuit Court, primarily in juvenile dependency, juvenile delinquency, and criminal dockets. Samantha graduated from the University of Oregon School of Law in 2012, with a Certificate of Completion in Estate Planning and was Editor-in-Chief for the Oregon Review of International Law. During law school she participated in the Probate Mediation Clinic, gaining valuable experience in dispute resolution and probate matters, and was a regional finalist for the ABA Client Counseling Competition. She earned her B.A. in History from the University of Puget Sound, and before attending law school worked in state and federal government, most recently as Chief of Staff to State Representative Scott Bruun in the 2009 Oregon Legislature.

LIMITED SCOPE REPRESENTATION

Practical, Ethical & Judicial Considerations in
Unbundling the Family Law Case

What Is It?


Full service

vs.


Mini-service



Unbundled Services

- ▶ Advising/coaching
 - ▶ Gathering facts about client's situation
 - ▶ Discovering facts about opposing party
 - ▶ Researching particular issue of law
 - ▶ Drafting documents
 - ▶ Reviewing documents
 - ▶ Negotiating with opposing parties or their lawyers
 - ▶ Representation in court
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What It Isn't

- ▶ Second class practice
 - ▶ Inherently unethical
 - ▶ Inherently malpractice
 - ▶ Good for every case, every client
 - ▶ A chance to learn a new area of law
- 

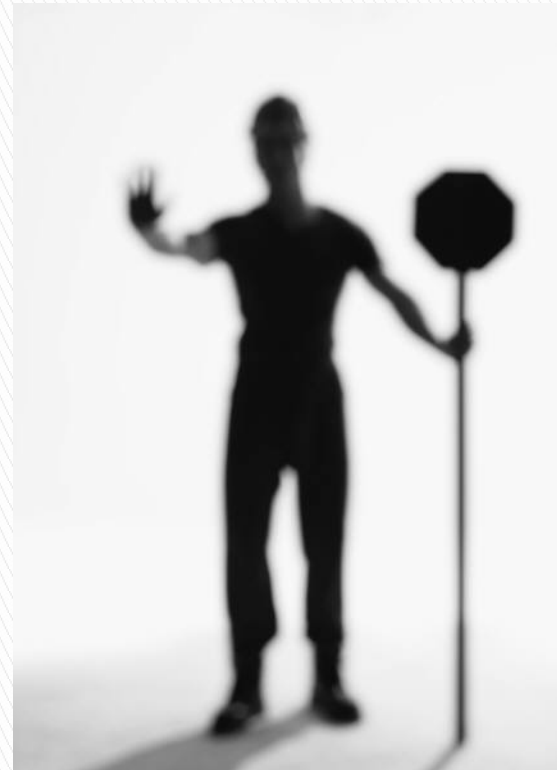
Benefits

- ▶ More affordable
- ▶ Greater access to justice
- ▶ Empower clients
- ▶ Expand practice
- ▶ Improve perception of lawyers and legal system
- ▶ Preserve diminishing court resources



Barriers

- ▶ Discomfort with lack of control
- ▶ Concern for client
- ▶ Fear of malpractice/ethics risks
- ▶ More work than it's worth
- ▶ Concern that court will require full service



Ethical Framework

- ▶ Lawyer may limit the scope of representation of a client as long as:
 - the limitation is reasonable under the circumstances, and
 - the client gives informed consent.

RPC 1.2(b)

What is Reasonable?

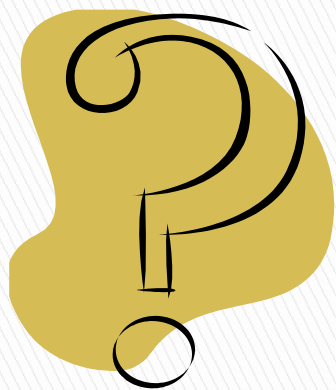
- ▶ **Competent Representation**
 - Requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation
- ▶ **Diligent Representation**
 - Lawyer must not neglect a legal matter entrusted to the lawyer.

RPC 1.1 and 1.3

What is Reasonable?

If a client's objective is limited to securing general information about the law the client needs in order to handle a common and uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.

ABA Model Rules Comment [7] to MRPC 1.2



What is Informed Consent?

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.

RPC 1.0(g)



To Tell.....or..... Not to Tell



Duty of Candor

- Lawyers may not lie to court or third parties
- Lawyers may not fail to disclose information when duty to disclose
- Lawyers may not assist client with illegal or fraudulent conduct


*RPCs 3.3(a)(4),
4.1. 8.4(a)(1)*

Duty of Confidentiality

- Lawyers may not disclose information relating to representation UNLESS
- Necessary to comply with other law or court order or as allowed by rules

*RPCs 1.6(a),
1.6(b)(5)*

How to Decide?

- ▶ Is there duty to disclose? If not, would nondisclosure materially mislead?
 - ▶ If answer to either question is YES, then you **MUST** disclose.
 - ▶ If client says NO, even though you **MUST**, then *do not assist client*.
- 

Duty to Disclose?

All documents must include the author's name, address, telephone number, fax number, if any, and, if prepared by an attorney, the name, email address, and the Bar number of the author and the trial attorney assigned to try the case. Any document not bearing the name and Bar number of an attorney as the author or preparer of the document must bear or be accompanied by a certificate in substantially the form as set out in Form 2.010.7 in the UTCR Appendix of Forms.

UTCR 2.010(7)

Certificate of Document Preparation

You are required to truthfully complete this certificate regarding the document you are filing with the court. Check all boxes and complete all blanks that apply:

A. I selected this document for myself, and I completed it without paid assistance.

B. I paid or will pay money to for assistance in preparing this form/document.

(Signature)

Form 2.010.7

Contact with Represented Persons

When a lawyer knows a person is represented on a subject, the lawyer may not communicate directly or indirectly with the person on that subject or any related subject without the prior consent of the person's lawyer.

RPC 4.2



Scenario 1

Larry Lawyer represents Wife in dissolution of marriage proceeding. Husband files responsive pleading which is on Amber Attorney's pleading paper, but signed by Husband. Larry Lawyer would like to talk with Husband about possible settlement.

May Larry Lawyer communicate with Husband directly, or must he communicate with Amber Attorney?

Knowledge of Representation

- ▶ “Knowledge” defined by RPC 1.0(h)
- ▶ Actual Knowledge
- ▶ May be Inferred from Circumstances
- ▶ *In re Schwabe*, 242 Or 169 (1965)

Scenario 2


Husband has asked Amber Attorney to assist him with drafting a stipulated agreement settling all issues in his divorce from Wife. Wife is represented by Larry Lawyer.

May Amber Attorney prepare a draft stipulation for Husband to submit directly to Wife?


Cause Another to Communicate

- ▶ *OSB Formal Ethics Op No 2005-147*
(Although client has right to negotiate directly with adverse party, lawyer may not instruct client to convey a particular message.)
- ▶ *In re Murray, 287 Or 633 (1979)*(Lawyer who caused client to communicate with opposing party in writing violated rule.)


Avoiding the RPC 4.2 Conundrums: Consent Cures

- ▶ Providing limited scope representation? Notify opposing lawyer of boundaries of your representation and get consent to direct communication between parties, notwithstanding your role.
 - ▶ On the other side of a party receiving limited scope representation? Seek clarification from opposing lawyer about boundaries of his or her representation and get consent to direct communication with opposing party.
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Other Practical Tips

- ▶ Define and document limited scope
 - ▶ Detail factual premises upon which you are basing your advice/services
 - ▶ Explain and document risks of unbundled representation
 - ▶ Outline client responsibilities
 - ▶ Repeatedly remind client of limited scope
 - ▶ Send disengagement letter when your part is done
 - ▶ Document changes in scope
- 


Choose Clients Carefully

- ▶ Does the client have the mental, emotional, physical capacity to carry out his or her portion of the work?
 - ▶ What experience does the client have with the legal system?
 - ▶ What is the distribution of power between the parties?
 - ▶ Do you communicate well with the client and does the client seem to understand?
 - ▶ Are the client's expectations reasonable?
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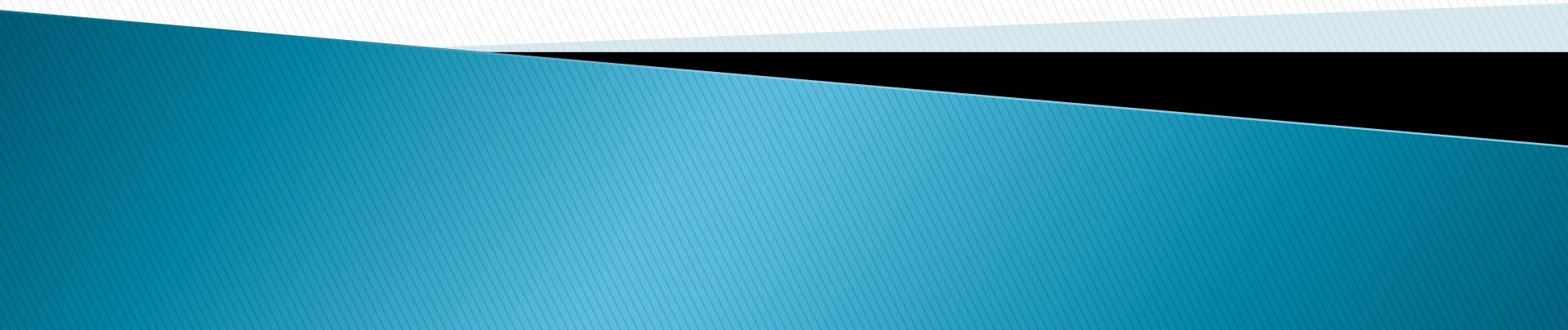
Choose Cases Carefully

- ▶ Can the representation be broken down into discreet steps which can be easily divided between lawyer and client?
- ▶ Are there any complex legal issues?
- ▶ Is there a critical deadline looming and will the client be able to meet that deadline?
- ▶ If you will appear in court, will the court allow you to withdraw?
- ▶ Can you verify the facts? If not, does the client understand consequences?

Honestly Assess Yourself

- ▶ Do you have good client control skills?
 - ▶ Are you a good communicator? Teacher?
 - ▶ Do you have sufficient understanding of the law to be able to identify and avoid the risks inherent in limited scope representation?
 - ▶ Are you willing to accept the risks—of not being allowed to withdraw, of not having complete control, etc.
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UCTR 8.110
and
A View from the Bench




Limited Scope Rule Background

- ▶ Unbundled Legal Services Work Group created in 2015 at the suggestion of the SFLAC.
 - (1) Make unbundling easier for attorneys;
 - (2) Highlight importance of unbundling for Self-Represented Litigants.
- ▶ Members from OJD judges and staff, OSB, practicing family Law attorneys , and mediators took part.
- ▶ Limited Scope Representation rules from other states were studied, including CA, IL, MO, and WA.

Limited Scope Rule Background

- ▶ Oregon Rules of Professional Conduct
- ▶ ABA White Paper – An Analysis of Rules that Enable Lawyers to Serve Self-Represented Litigants
- ▶ ABA Pro Se Unbundling Resource Center:
http://www.americanbar.org/groups/delivery_legal_services/resources.html

Goals of the Proposal

- ▶ Ease of use for attorneys and self-represented litigants.
 - ▶ Restrict to cases where an attorney is appearing with a client in court.
 - ▶ Court and parties know who is represented by whom.
 - ▶ Forms for simplicity.
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UTCRC 8.110 Limited Scope Representation

- ▶ (1) Applicability This rule applies to limited scope representation in domestic relations cases when an attorney intends to appear in court on behalf of a party.
- ▶ (2) Notice of Limited Scope Representation When an attorney intends to appear in court on behalf of a party, the attorney shall file and serve, as soon as practicable, a Notice of Limited Scope Representation in substantially the form as set out on the Oregon Judicial Department website (<http://courts.oregon.gov/OJD/pages/index.aspx>).

UTCR 8.110 Limited Scope Representation

- ▶ (3) Termination of Limited Scope Representation When the attorney has completed all services within the scope of the Notice of Limited Scope Representation, the attorney shall file and serve a Notice of Termination of Limited Scope Representation in substantially the form as set out on the Oregon Judicial Department website (<http://courts.oregon.gov/OJD/pages/index.aspx>), in accordance with UTCR 3.140.
- ▶ (4) Service of Documents After an attorney files a Notice of Limited Scope Representation in accordance with this section, service of all documents shall be made upon the attorney and the party represented on a limited scope basis. The service requirement terminates as to the attorney when a Notice of Termination of Limited Scope Representation is filed and served, or when an attorney withdraws.

UTCRC 8.110 Forms

- ▶ Limited Scope Representation Forms
 - Notice of Limited Scope Representation
 - Notice of Termination of Limited Scope Representation

- ▶ <http://www.courts.oregon.gov/OJD/OSCA/JF/CPD/Pages/FLP/Forms-Miscellaneous.aspx>

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____

_____ Petitioner
and
_____ Respondent

Case No: _____

**NOTICE OF LIMITED
SCOPE REPRESENTATION**

1. Attorney _____ and Petitioner Respondent _____ have an agreement that attorney will provide limited scope representation to the party.
2. Attorney will represent the party in connection with the following court proceedings:
 the appearance on: _____ regarding _____ and for any continuance of that appearance.
 other: _____
3. Attorney is the attorney of record. All court notices should be sent to Attorney and, for all filings in the case, service should be made on Attorney.
4. Additionally, all court notices should be sent to the party directly, and, for all filings in the case, service should be made on the party directly. The party's name, address, and phone number are listed below for that purpose.

Name: _____
Address or Contact Address (for purposes of service):

Phone: _____ Fax: _____

This notice accurately sets forth all matters in connection with court proceedings on which Attorney has agreed to serve as attorney of record for the party in this case. The information provided herein is not intended to set forth all of the terms and conditions of the agreement between the party and Attorney for limited scope representation.

Date

Attorney Signature

Attorney Name (printed)
OSB # _____

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF _____

Case No: _____

Petitioner

and

Respondent

**NOTICE OF TERMINATION
OF LIMITED SCOPE
REPRESENTATION**

1. Attorney _____ and Petitioner Respondent _____
previously agreed to a limited scope representation, as set out in a
previously filed Notice of Limited Scope Representation.

2. Attorney has completed all services within the scope of the Notice of Limited Scope
Representation and has completed all acts ordered by the court within the scope of that
appearance.

3. Attorney and Petitioner Respondent _____ now terminate the
representation referred to in the previously filed Notice of Limited Scope Representation.

4. Date of next hearing (if applicable): _____.

5. All future court notices should be sent to the party, and all service should be made on the
party:

Name: _____

Address or Contact Address (for purposes of service):

Phone: _____ Fax: _____


Date

Attorney Signature


Attorney Name (printed)

OSB # _____

Additional Types of Cases?

- ▶ Recommendation to expand UTCR 8.110 to civil cases.
 - ▶ Primarily to allow for parties who otherwise would not have attorney to retain counsel.
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Self-Represented Litigants: A View From the Bench

- ▶ Self-Represented Litigant Cases. What do you think when someone says a case is self-represented?
 - ▶ Different issues in different judicial districts regarding self-represented litigants. Who completes the judgment? What happens when there is a complex part of the case?
 - ▶ Informal Domestic Relations Trials – Proposed UTCR.
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Resources

- ▶ OSB Fee Agreement Compendium – Limited Scope Representation Fee Agreement, Form 10–1 (Bar Books)
- ▶ PLF Practice Aids and Forms
- ▶ ABA Standing Committee on the Delivery of Legal Services
www.abanet.org/legal/services/delivery/delunbund.html.

Questions?

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Judge Timothy Gerking
Presiding Judge
Jackson County Circuit
Court