LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 502

NOVEMBER 4, 1999

LAWYERS' DUTIES WHEN PREPARING PLEADINGS OR NEGOTIATING SETTLEMENT FOR IN PRO PER LITIGANT

SUMMARY OF OPINION

An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation. These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis.

Generally, where the client chooses to appear in propria persona and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending

If an attorney, who is not "of record" in litigation, is authorized by his client to participate in settlement negotiations, opposing counsel may reasonably request confirmation of the attorney's authority before negotiating with the attorney.

Normally, an attorney has authority to determine procedural and tactical matters while the client alone has authority to decide matters that affect the client's substantive rights. An attorney does not, without specific authorization, possess the authority to bind his client to a compromise or settlement of a claim.

AUTHORITIES CITED

Cases:

Abeles v. State Bar (1973) 9 Cal.3d 603, 108 Cal.Rptr. 359.
Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 212 Cal.Rptr.151
Butler v. State Bar (1986) 42 Cal.3d 323, 228 Cal. Rptr. 499
Flatt v. Superior Court (1995) 9 Cal.4th 275
Joseph E. DiLoreto, Inc. v. O'Neill (1991) 1 Cal.App. 4th 149, 1 Cal. Rptr. 2d 636
Houston General Insurance Co. v. Superior Court (1980) 108 Cal.App.3d 958, 964, 166 Cal.Rptr. 904

Laremont-Lopez v. Southeastern Tidewater Opportunity Center, et al. (1997 E.D, Va.) 968 F.Supp. 1075
Lucas v. Hamm (1961) 56 Cal.2d 583, 591
Lysick v. Walcom (1968) 258 Cal.App.2d 136, 147, 65 Cal.Rptr. 406
Miller v. Metzinger (1979) 91 Cal.App.3d 31, 39-40, 154 Cal.Rptr. 22
Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 181, 98 Cal.Rptr. 837
Nichols v. Keller (1993) 15 Cal.App.4th 1672, 19 Cal.Rptr.2d 601
Ricotta v. State of California (S.D. Cal. 1998) 4 F.Supp.2d 961, 987-988
Sampson v. State Bar (1974) 12 Cal.3d 70, 115 Cal.Rptr. 43

Statutes:

Bus. & Prof. Code §6068(a)-(e)
Bus. & Prof. Code §6090.5
Bus. & Prof. Code §6104
Bus. & Prof. Code §6106
Bus. & Prof. Code §6147
Bus. & Prof. Code §6147.5
Bus. & Prof. Code §6148(a)(2)(3)
Bus. & Prof. Code §6149
Bus. & Prof. Code §§6400 et seq.
Code Civ. Proc. §128.7
Code Civ. Proc. §283(1)
Evid. Code Section 952

Other:

Fed. Rls. Civ. Proc. 11
Rules of Professional Conduct 2-100
Rules of Professional Conduct 3-110
Rules of Professional Conduct 3-210
Rules of Professional Conduct 3-310
Rules of Professional Conduct 3-310(E)
Rules of Professional Conduct 3-400
Rules of Professional Conduct 3-700(A)(2)
Rules of Professional Conduct 5-200
L.A. Co. Bar Assn. Form. Op. 334
L.A. Co. Bar Assn. Form. Op. 350
L.A. Co. Bar Assn. Form. Op. 449 (1988)
L.A. Co. Bar Assn. Form. Op. 476 (1995)
L.A. Co. Bar Assn. Form. Op. 483 (1995)
ABA Inf. Op. 1414
Alaska Bar Assn. No. 93-1, March 19, 1993
Iowa Op. 94-35, May 23, 1995
Iowa St. Bar Assn. Op. 91-31 (1997)
Kentucky Bar Assoc. Op. E-353, January 1991
Maine Ethics Commission No. 89, August 31, 1988
N.Y. State Bar Assn. Op. 613

FACTS AND ISSUES PRESENTED

Client has appeared *in propria persona* in litigation and has engaged Attorney to give legal advice about the litigation and to participate in settlement negotiations. Client has filed a Superior Court complaint which attorney drafted for her on an hourly fee basis. Attorney's written engagement agreement with Client provides that Attorney will not be the attorney of record in the case and that court appearances, calendaring, filing of papers, meeting of deadlines in the case and all other usual responsibilities of counsel of record are Client's responsibility. Attorney's engagement is limited to that of a law consultant who advises Client on matters only as Client requests, assists in or drafts papers that Client will sign and file and attempts to negotiate a settlement with defendants' counsel.

This inquiry raises the following questions:

Is this limited legal representation unethical?

May opposing counsel properly refuse to negotiate with Attorney on the grounds that he is not the attorney of record in the pending case and, therefore has no authority to bind his client regarding settlement negotiations pursuant to Code of Civ. Proc. §283?

If Client has retained Attorney for purposes of settlement negotiations, is Client bound by any agreement Attorney makes on her behalf?

Does Attorney have any obligation to disclose to the court in which the matter is pending the limited scope of Attorney's representation of Client?

DISCUSSION

A. Limited Scope of Representation/p>

Attorney-client relationships can be created by the parties' express or implied oral or written agreement or by assignment of an attorney by the court. (Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 181, 98 Cal.Rptr. 837; Houston General Insurance Co. v. Superior Court (1980) 108 Cal.App.3d 958, 964, 166 Cal.Rptr. 904; Miller v. Metzinger (1979) 91 Cal.App.3d 31, 39-40. 154 Cal.Rptr. 22.)

We previously opined in Formal Opinion 483: "There is nothing per se unethical in an attorney limiting the professional engagement to the consulting, counseling, and guiding self-representing lay persons in litigation matters, providing that the client is fully informed and expressly consents to the limited scope of the representation." (L.A. Co. Bar Assn. Form. Op. 483 (1995); see also Joseph E. DiLoreto, Inc. v. O'Neill (1991) 1 Cal.App. 4th 149, 158, 1 Cal. Rptr. 2d 636, 641.) Any limitations on work to be performed should be stated explicitly and completely.[1]

Limiting the scope of legal services is not an impermissible prospective limitation on an attorneys' liabilities. (See Rule of Professional Conduct 3-400, Discussion.[2])

If the fee agreement is required to be in writing pursuant to Business and Professions Code section 6148, the scope of the legal services as well as the clients' responsibilities should be in writing. (Bus. & Prof. Code, §6148(a)(2)-(3).) Prof. Code §§6147, 6147.5.)

B. Ethical Obligations Resulting from Limiting the Scope of Representation

An attorney who is requested to significantly limit the scope of representation of a client must make the limitations clear. Some of the ethical constraints limiting representation include an attorney's duty of care to advise a client about his or her rights, the alternatives available under the circumstances, the consequences of each, their cost and the likelihood of their success. (Nichols v. Keller (1993) 15 Cal.App.4th 1672, 1684-1687, 19 Cal.Rptr.2d 601.) Thus an attorney should advise the prospective client of the consequences of the attorney providing only "behind the scenes" legal counsel and advice and "ghostwriting" of pleading services to the client including the difficulties which the client may encounter in appearing in court on his or her own behalf or at depositions.

As was held in the Nichols opinion:

"... if counsel elects to limit or proscribe his representation of the client, i.e., to a workers' compensation claim only without reference or regard to any third party or collateral claims which the client might pursue if adequately advised, then counsel must make such limitations in representation very clear to his client."

"However, even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel." 15 Cal.App.4th at 1684.

Failure to advise the client about relevant issues collateral to the subject of representation may constitute a breach of the standard of care. See also rule 3-110(A), Rules of Professional Conduct (Failure to perform competently).

Although an attorney may provide limited services, the legal services nonetheless must be competently provided (see, rule 3-110(A), Rules of Professional Conduct) and the attorney would have the duty to exercise such skill, prudence and diligence as attorneys of ordinary skill and capacity commonly possess respecting the limited scope of services. (Lucas v. Hamm (1961) 56 Cal.2d 583, 591.)

C. Professional Responsibilities Regarding the Limited Scope of Representation

Even though an attorney may limit the scope of legal services, the attorney is required to discharge professional responsibilities relating to legal services within the scope of representation. For example, Attorney would owe Client a duty of undivided loyalty and would therefore be unable to accept employment adverse to Client from other prospective clients even in unrelated matters. (Flatt v. Superior Court (1995) 9 Cal.4th 275.)

Where it is contemplated that the attorney will have ongoing responsibilities throughout the case, abandonment or improper withdrawal from even limited representation may constitute a violation of rule 3-700(A)(2), Rules of Professional Conduct. The attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the limited-representation client. Thus there may be a need to explain the consequences of the attorney's withdrawal in terms of the limited representation, for example where there is pending discovery which will require greater client effort to follow-up without the attorneys' assistance. The attorney must also give notice to the client, time for employment of other counsel and returning of client files, property and unearned fees, as applicable. (L.A. Co. Bar Assn. Form. Ops. 476 and 483 (1995).)

The provision of limited legal services to Client does not eliminate the potential for conflicts of interests, whether the limited representation is concurrent with or sequential to an attorney's possible conflicting representation or relationships. Attorney should carefully comply with the requirements of Rule of

Professional Conduct 3-310 and should be cognizant particularly of maintaining client confidentiality. (Bus. & Prof. Code §6068(e); Rule of Professional Conduct 3-310(E).)

Moreover, an attorney is prohibited from making an agreement with the client to prospectively limit his or her professional liability to the client. (Rule 3-400(A), Rules of Professional Conduct.) Even if the scope of legal representation is limited to specific tasks, that limitation does not, standing alone, violate the rule against an attorney's obtaining prospective limitation on liability for malpractice. Similarly, any limitation upon the scope of representation does not constitute a limitation on the right of the client to file a disciplinary complaint or cooperate with the investigation or prosecution of a disciplinary complaint. (Bus. & Prof. Code §6090.5.)

These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis

D. May Opposing Counsel Refuse to Negotiate with Attorney on the Grounds That Attorney Is Not Counsel of Record in the Pending Case?

Subdivision 1 of section 283 of the Code of Civil Procedure provides that an attorney has the authority to bind the client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered in the minutes of the Court and not otherwise.

The authority conferred by section 283 does not include the authority to agree to a settlement of the case or to dismiss the action. Generally, the attorney has apparent authority as to procedural or tactical matters but it is the client who decides matters that affect her substantive rights, including the settlement of her claim. (Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 404-405, 212 Cal.Rptr. 151, 155-156, 696 P.2d 645.)[3] Outside the scope of section 283, an attorney, like any other agent, can be given authority by his principal. If granted by Client, Attorney has the authority to act for Client in conducting settlement negotiations.

While opposing counsel may refuse to engage in any settlement discussions whatsoever, the fact that Attorney is not counsel of record and does not possess the authority conferred by section 283, is irrelevant to opposing counsel's decision whether or not to engage in settlement negotiations. Opposing counsel might well request a confirmation of Attorney's authority to act for Client in the absence of the authority that is apparent from being attorney of record in the pending litigation.[4] However, we have found no authority requiring Attorney, when **not** the "attorney of record" to have the specific authority conferred by section 283 in order to participate in out of court settlement negotiations.

If Attorney desires to appear at a court sponsored settlement conference, Attorney must obtain the permission of the court. As the Committee opined in Formal Opinion No. 483:

"A party may appear in his own person or by an attorney, but cannot do both, unless approved by the court. [Citations omitted.] The attorney in the circumstance proposed in the inquiry of limited representation to argue motions, whether or not prepared by the attorney, should comply with all applicable court rules and procedures of the particular tribunal. As long as the limited nature of the representation is disclosed to the court and approved by the court, the Committee is of the opinion that there is no ethical impropriety."

E. Can Ex Parte Communications Between Client and Opposing Counsel Continue During Attorney's Representation of Client Respecting Settlement and If So, What Is the Scope of Such Communications? Yes.

Rule 2-100(A) provides:

"While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

Since Attorney is not counsel of record for Client in the litigation, rule 2-100(A) does not preclude the opposing counsel from communicating directly with Client concerning all aspects of the litigation in the civil litigation context.[5] Because Client is representing himself/herself in the representation and has undertaken the role of counsel for all aspects of the case, the opposing attorney is entitled to address Client directly concerning all matters relating to the litigation, including settlement of the matter.[6] The protections afforded by rule 2-100 extend only to clients who are not representing themselves in a case or matter. If and when Client formally substitutes Attorney as counsel of record, rule 2-100 (A) will then attach. (Abeles v. State Bar (1973) 9 Cal.3d 603, 108 Cal.Rptr. 359.)

If opposing counsel communicates directly with Client, the opposing counsel should not render legal advice to Client. (L.A. Formal Opinions 334 and 350.)

If Client and Attorney nevertheless assert that some or all communications must go through Attorney based upon Attorney's representation of Client respecting settlement negotiations, based upon rule 2-100, the opposing counsel may properly communicate with Client or may seek court clarification of a process for communication with Client based upon Attorney's assertions.

F. Disclosure to the Court of the Attorney's Role in Preparation of Pleadings for the Client's Filing in Court

This Committee has concluded that there is no specific statute or rule which prohibits Attorney from assisting Client in the preparation of pleadings or other documents to be filed with the court, without disclosing to the court the attorney's role. (Ricotta v. State of California, 4 F. Supp.2d 961, 987-988 (S.D. Cal. 1998); L.A. County Bar Assn. Form. Op. 483, March 20, 1995. *See also*, Maine Ethics Commission No. 89, August 31, 1988; Alaska Bar Assn. No. 93-1, March 19, 1993.) Moreover, the Committee had found no published court decisions in California state or federal courts which have required an attorney's disclosure to the court regarding his or her involvement in preparing pleadings or documents to be filed by a litigant appearing *in propria persona*.[7] (Ricotta v. State of California, 4 F. Supp.2d 961, 987-988 (S.D. Cal. 1998).) The Committee has found no published California state case or ethics opinion holding that an attorney's preparation of a pleading or document for the signature of a party appearing *in propria persona* without disclosure to the court of the authorship of the pleading or document inherently involves deception or misleading of a court within the meaning Business and Professions Code section 6068(d) or rule 5-200, Rules of Professional Conduct.

There is a nationwide debate concerning the ethical propriety of attorney's "ghostwriting" pleadings and documents for a *pro per* litigant to file with a court [8], including whether an attorney has a duty to disclose to the court the identity and extent of an attorney's involvement in the preparation thereof.

The filing of "ghost drafted" pleadings or documents does not deprive a judge of the ability to control the proceedings before the court or to hold a party responsible for frivolous, misleading or deceit in those pleadings. The *pro per* litigant, not an attorney, makes representations to the court by filing a pleading or document. California Code of Civil Procedure, §128.7 requires that every pleading, petition, written notice of motion or other similar paper must be signed by one attorney of record or by the pro per party and that by presenting a document to the court, the attorney **or the party** is certifying that conditions in subdivision (b) are met.

Even though Client may be responsible for certification that the conditions of CCP §128.7(b) are met, Attorney may still be responsible for harm to Client or the administration of justice resulting from Attorney's

preparation of pleadings. There are a number of statutes and rules that require fair and honest conduct from Attorney even if he or she is not the attorney of record for Client. These include at least the following: Business and Professions Code section 6068(a) requires an attorney to support the laws of the State of California, including section128.7. Business and Professions Code section 6068(c) provides that it is the duty of an attorney to counsel such actions, proceedings or defenses only as appear legal or just, except the defense of a person charged with a public offense. Rule 3-200 prohibits an attorney from accepting or continuing employment, if the member knows that the objective employment is to bring an action or assert a position in litigating without probable cause and for the purpose of harassing or maliciously injuring any person or to present a claim or defense in litigation that is not warranted under existing law unless supported by a good faith argument for extension, modification or reversal of such law. Rule 3-210 prohibits an attorney from advising the violation of any law rule or ruling of a tribunal unless the member believes in good faith that the law, rule or ruling is invalid. Business and Professions Codes section 6106 prohibits an attorney from engaging in any act of dishonesty, corruption or moral turpitude. The attorney who prepares pleadings to be signed and filed by a pro per litigant still must comply with the professional obligations of 5-200; Business and Professions Code sections 6068(b)-(d) and 6106; and other applicable court rules as to the documents' content and form. (Bus. & Prof. Code § 6068(a).)

An attorney who prepares documents to be filed by a pro per litigant which do not comply with section128.7(b) may violate one or more of the ethical duties set forth above. The attorney also has a duty to the client to explain the importance of compliance with section128.7 as well as the consequences to the client for its violation. (See e.g., Lysick v. Walcom (1968) 258 Cal.App.2d 136, 147, 65 Cal.Rptr. 406.)

In the event of a court determination of a violation of section 128.7(b), the court may sanction the pro per litigant for its presentation9 and may lodge a complaint with the State Bar about the attorney's participation in the preparation of the document.

Some non-California federal court decisions have held that by providing anonymous assistance with pro per pleadings, the attorney wrongly avoids the ethical and substantive purposes underlying Rule 11 of the Federal Rules of Civil Procedure or state policies that may be analogous to Rule 11. (Laremont-Lopez v. Southeastern Tidewater Opportunity Center, et al. (1997 E.D.Va.) 968 F.Supp. 1075, 1078-79. But see Ricotta v. State of California (S.D. Cal. 1998) 4 F.Supp.2d 961, 987-988, wherein the court held that "ghost writing" 75-100% of a *pro per* litigant's pleadings was "unprofessional" conduct but would not subject the attorney to contempt because the conduct was not a violation of any rule or law.) The purpose of Rule 11 is to promote fairness and efficiency, by obliging the signer to conduct reasonable inquiry to determine that the pleading is well grounded in fact; is not presented for an improper purpose; and takes a non-frivolous legal position. (Ibid.) Rule 11 also has remedial and deterrent purposes, as it authorizes sanctions against a signer who violates those obligations. (Fed. R. Civ. Proc. 11.)

California practitioners who desire to prepare pleadings or documents for presentation in a California federal court by a *pro per* litigant must comply with that court's rulings on "ghostwriting" and if disclosure is required, comply with such rulings. (Bus. & Prof.§6068(a).)

This opinion is advisory only. The Committee acts on specific questions and its opinions are based on such facts as are set forth in the inquiry submitted to it.

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1. A written fee contract, including any written limitations upon the scope of services and representation, is deemed to be a confidential communication protected by Business & Professions Code section 6068(e) and Evidence Code Section 952. (Bus. & Prof. Code §6149.)

2. All further references to "rules" are to the Rules of Professional Conduct of the State Bar of California unless otherwise noted.

3. There may be disciplinary consequences for an attorney who settles his client's case without authority. (Sampson v. State Bar (1974) 12 Cal.3d 70, 83, 115 Cal.Rptr. 43, 51; Bus. & Prof. Code §6104.)

4. As noted above, the authority conferred by section 283 does not include the authority to bind the client to a settlement of the case or matter without the client's express consent.

5. This opinion does not address limited representation in a criminal matter which may involve countervailing constitutional considerations, including constitutional guarantees of effective assistance of counsel.

6. Settlement of the case is an inherent part of the litigation process for which Client is representing himself or herself in *pro per* because the termination of the case, through settlement, is a formal event which occurs within the litigation process. Thus, settlement of the case is an inherent part of the litigation process upon which Client is representing himself or herself in *pro per*.;

Nor can Attorney and Client be co-counsel with respect to settlement of the matter. In L.A. Formal Op. No. 483, the Committee opined that a client cannot become co-counsel with an attorney without engaging in the unauthorized practice of law. However, even if a client could become a co-counsel, the opposing counsel would still be authorized to communicate directly with the client-co-counsel on all matters regarding the case pursuant to rule 2-100, since the rule does not apply to parties who are themselves represented by counsel.

7. If a court rule or regulation requires disclosure to the court by an attorney assisting a pro se client in the preparation of pleadings and other court documents, the lawyer must comply with any applicable rule or regulation. (Bus. & Prof. Code §6068(a).)

8. Views expressing that an attorney may ethically assist a litigant appearing in *propria persona* with pleadings, free from any special duties to identify the attorney's role to the court in which the litigant's pleading or papers are filed appear to be based upon the following policy arguments: First, the practice promotes access to the courts by *pro per* litigants, who often lack the necessary knowledge or skills to draft their own pleadings without assistance but may not have the resources for full representation in the litigation. Second, as a direct consequence, the practice generally is likely to improve the quality of the *pro per* pleadings and thus results in increased judicial efficiency and fairness to the parties. Third, the practice would support the client's right to control the extent of an attorney's involvement. Fourth, California statutes permit legal documents assistants and unlawful detainer assistants to assist in the preparation and filing of documents under certain circumstances, without making disclosure to courts. (Bus. & Prof. Code, § 6400 et seq..) There may be an uneven application of law if similarly situated attorneys are required to make disclosures to courts.

The contrary view, that anonymous assistance to a pro per litigant with drafting pleadings is unethical, is based on arguments that the practice is dishonest to the court, and permits the attorney to evade the court's authority. Some opinions observe that the attorney deceives, defrauds, misrepresents to, or lacks candor with the court by anonymously assisting the pro per litigant. (Laremont-Lopez v. Southeastern Tidewater Opportunity Center, et al. (1997 E.D.Va.) 968 F.Supp. 1075, 1078-79 and authorities cited therein; Iowa Op. 94-35, May 23, 1995.) Other opinions approve of assistance in the preparation of a *pro per's* pleadings, provided the attorney discloses his identity to the court. (ABA Inf. Op. 1414; Iowa St. Bar Assn. Op. 91-31 (1997); N.Y. State Bar Assn. Op. 613, Kentucky Bar Assoc. Op. E-353, January 1991.))

9. The sanctioned client may argue advice of counsel to a sanctioning court and disclose the identity of the attorney who prepared the objectionable pleading. The court's potential authority to sanction the preparer of the pleading is beyond the purview of this Committee.