

THE MISSISSIPPI ACCESS TO JUSTICE COMMISSION SEEKS
COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE
PROPOSED AMENDMENT TO THE MISSISSIPPI RULES OF
PROFESSIONAL CONDUCT.

Comments should be filed with the Clerk of the Supreme Court,
Gartin Justice Building, P.O. Box 249, Jackson, Mississippi 39205-0249.
Deadline: **July 30, 2010**

MEMORANDUM

The Mississippi Access to Justice Commission recommends adopting four amendments to the Mississippi Rules of Professional Conduct. It is hoped that these amendments will facilitate expansion of legal services available to low- and moderate-income Mississippians.

The proposed amendments are intended (1) to make clear that limited scope representation is permitted and encouraged under the Mississippi Rules of Professional Conduct; (2) to clarify that an attorney may terminate representation upon conclusion of limited representation, and to require that an attorney providing limited representation in litigation notify the court of the limitation; and (3) to address a potential hidden conflicts issue that arises when attorneys provide limited assistance through hotlines or pro se clinics.

The recommendations include amendments to Rules 1.1 (Competency), 1.2 (Scope of Representation), 1.16 (Declining or Terminating Representation), and adoption of a new rule, Rule 6.5 (Nonprofit and Court-Annexed Limited Legal Services Programs). The text of the proposed changes are set out in the attachment.

1. To clarify that limited scope representation is permitted and encouraged under the Mississippi Rules of Professional Conduct.

Lawyers have long provided limited representation in the form of counsel and advice or brief services, such as letter-writing or negotiating a settlement. Limited representation does not violate the lawyer's duty of competence under Rule 1.1 if the matter is amenable to limited representation, the lawyer has properly advised the client of the scope of representation and matters that may present problems, and the client has given informed consent. In fact, Rule 1.2(c) explicitly allows a lawyer to limit representation if the client gives informed consent. However, the Pro Se Committee recommends that Rules 1.1 and 1.2 be amended to make clear that all forms of limited representation are permitted and encouraged as a means of expanding legal services, so long as the client gives informed consent and the matter is appropriate for limited representation.

2. To clarify that an attorney may terminate representation upon conclusion of limited

representation, and to require that an attorney providing limited representation in litigation notify the court of the limitation.

Limited representation in matters in litigation presents additional concerns, since the lawyer's withdrawal may require court approval. Rule 1.13 of the Uniform Rules of Circuit and County Practice and Rule 1.08 of the Uniform Rules of Chancery Practice provide that a lawyer may not withdraw without permission of the court. The Committee recommends that Rule 1.16 be amended to clarify that ordinarily, a lawyer's obligation to a client terminates when the limited representation is concluded. The amendment to the comments makes, clear, however, that the lawyer must inform the court of the limited scope of representation at the beginning of the representation.

The Committee also recommends that appropriate language be included in the *Judge's Benchbook* addressing this issue.

3. To address hidden conflicts in some limited representation contexts.

Providing legal services through limited representation creates an attorney-client relationship that carries with it the obligations of that relationship, including the duty of confidentiality and the duty to check for conflicts of interest. Identifying conflicts is problematic with regard to certain forms of pro bono limited representation. For example, assume an attorney who volunteers to provide counsel and advice on a Saturday at the local legal aid office, or who answers calls on a bar association hotline, is asked for advice by a tenant who is being evicted. The young lawyer is unaware that his firm represented the landlord in drafting his lease and handles evictions for the landlord when they are appealed.

Rule 1.9 of the Mississippi Rules provides that "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes: (1) the representation will not adversely affect the relationship with the other client; and (2) each client has given knowing and informed consent after consultation." The attorney may give the legal services client limited advice about his rights in eviction without knowing that his firm's client is the landlord. Conflicts checks under these circumstances are not realistic.

Many states have resolved this issue by amending the Rules to limit conflicts in this situation to known conflicts, removing the need for extensive conflicts checks, but preserving the protection against misuse of confidential information. The Pro Se Committee proposes addressing this issue by adopting ABA Model Rule 6.5.

The ABA Model Rule provides that a lawyer providing one-time, limited assistance through a bar association or nonprofit organization does not violate ethical rules regarding conflicts unless he or she is aware of a conflict. Nor does the lawyer's firm violate conflicts rules by continuing to represent a party adverse to the one-time, pro bono client. If the lawyer decides to expand representation of the pro bono client, he is required to check for conflicts. If a conflict is revealed, the lawyer may not accept ongoing or continued representation of the pro

bono client. However, he or she must continue to preserve all confidences received in the short-term representation. A lawyer who later learns of a conflict within his or her firm must take all necessary steps to insulate himself from the firm's ongoing representation of a party adverse to the pro bono client.

PROPOSED AMENDMENTS TO MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

The recommended changes highlighted in italics are based on recent amendments to ABA Model Rules 1.1 and 1.2(c). Those highlighted in bold were drafted by the Pro Se Committee. Suggested deletions are enclosed in brackets.

M.R.P.C. 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Thoroughness and Preparation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence. *An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).*

M.R.P.C 1.2 SCOPE OF REPRESENTATION

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

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

(c) A lawyer may limit the objectives or *scope* of the representation if the *limitation is reasonable under the circumstances and the client gives informed consent.*

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

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

Comment

Services Limited in Objectives or Means. The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage.

DELETE: [The terms upon which representation is undertaken may exclude specific objectives or means that the lawyer regards as imprudent.]

A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

It is the policy of the State of Mississippi to provide access to justice for all persons regardless of financial resources. Limited scope representation is an important means of providing such access. Lawyers are encouraged to offer limited services when appropriate, particularly when a client's financial resources are insufficient to secure full scope of services. For example, lawyers may provide counsel and advice and may draft letters or pleadings. Lawyers may assist clients in preparation for litigation with or without appearing as counsel of record. Within litigation, lawyers may limit representation to attend a hearing on a discrete matter, such as a deposition or hearing, or to a specific issue in litigation.

DELETE: [An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.]

Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically 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. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

M.R.P.C. 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without materially adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. *Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. A lawyer who agrees to limited scope representation as counsel of record should notify the court in advance of the limitation.*

...

Optional Withdrawal. A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives **or scope** of the representation.

MODEL RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

*[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, **including the duty of confidentiality** set out in Rule 1.6 and 1.9(b) are applicable to the limited representation.*

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client

being represented under the program's auspices. The lawyer participating in the program is disqualified from continued representation of the program's client or from participating in his firm's representation of a client with interests adverse to the program client. However, his personal disqualification will not be imputed to other lawyers in his firm.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.