

EMERITUS PRO BONO ATTORNEY TRAINING STRATEGIC AND ETHICAL APPROACHES

TRAINING FOR MONTANA LEGAL SERVICES ASSOCIATION EMERITUS PRO BONO ATTORNEYS



Created with funding from a Legal Services Corporation Pro Bono Innovations Grant



INTRODUCTION



- This training is intended to provide guidance for Montana Legal Services Association (MLSA) pro bono attorneys about strategic and ethical approaches to pro bono work.
- This training will last approximately one hour, and is not intended to be comprehensive.
- If you are volunteering with a different organization, that organization may have different processes. This training only addresses MLSA's approaches.

INTRODUCTION (CONTINUED)



- **How can you best approach work in MLSA's pro bono program strategically and ethically?**
 - A. Ask MLSA for pro bono work no one else likes to do, even if you don't like it either.
 - B. Just get your assignments from MLSA, turn in your pro bono hours, and never communicate with them otherwise.
 - C. Tell clients that MLSA will take care of all their problems and provide unlimited services.
 - D. It's just pro bono work, so who cares?
 - E. None of the above.

INTRODUCTION (CONTINUED)



So if the answer on the last slide is “none of the above,” what should you do?

- “Big picture” takeaways you should have at the end of this training
 - Remember both you and MLSA have ethical obligations and can be strategic in how you approach pro bono work.
 - Follow MLSA’s protocols to help both you and MLSA comply with ethical requirements and to save yourself some steps.
 - Communicate with MLSA about your work, and make sure you are on the same page.
 - Be consistent with in your communications with the client, MLSA, adverse parties, and tribunals.
 - Document your work, including outcomes.

STRATEGIC APPROACHES—WHY IS MLSA STRATEGIC?



- MLSA needs to be strategic in providing civil legal services because the demand far outstrips the supply.
 - MLSA generally serves low-income people, meaning those whose income is at or below 125% of the federal poverty level (FPL). In 2019, the FPL for a family of four is \$25,750.
 - In 2017, MLSA had 7,879 requests for services and could only assist half of these people.
 - Of the 2,904 cases closed in 2017, 88% were through “counsel and advice” only.
 - MLSA currently has 17 “casehandler” attorneys (14 in 2017), some of whom are funded by grants that limit their clients or types of cases they can handle.

STRATEGIC APPROACHES—WHY IS MLSA STRATEGIC?



- MLSA needs to be strategic because federal regulations limit what MLSA can do.
 - MLSA receives funding from the Legal Services Corporation (LSC), a corporation established by Congress to administer funding to legal aid programs across the country. LSC funding is absolutely crucial in MLSA operations.
 - Recipients of LSC funding are bound by numerous federal regulations (starting at 45 CFR 1600), which prohibit them and their employees from assisting with certain issues, providing certain types of services, and acting in certain ways (e.g., staff attorneys cannot run for partisan elective office under 45 CFR 1608.5).
 - Many LSC regulations extend to all of MLSA's work, even work not funded by LSC.

STRATEGIC APPROACHES--WHY IS MLSA STRATEGIC?



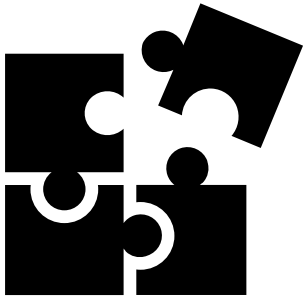
■ Staff Morale

- “Casehandler” legal aid attorneys and other legal aid staff typically want to help people and make a difference. That is why they are drawn to this work.

- But they may feel:
 - Overwhelmed by the sheer volume of cases;
 - Inadequate because they know how many clients they can't help; and
 - Unable to “make a dent” because they keep seeing the same fact patterns.

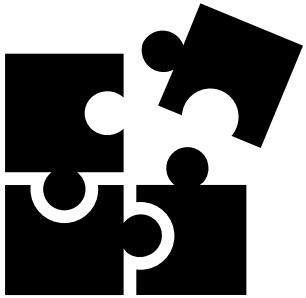


STRATEGIC APPROACHES—HOW IS MLSA STRATEGIC?



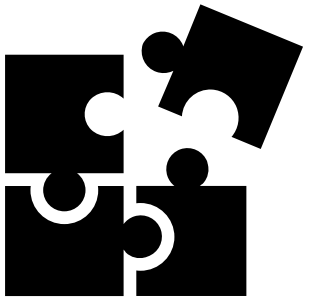
- MLSA, with many other legal aid programs, focuses on what it can do (rather than what it can't) in light of limited resources and federal regulations.
- LSC is more than okay with this! In fact, LSC encourages legal aid programs to focus on permissible broad-based advocacy approaches. Among other things, LSC funds particular initiatives including a Technology Initiative Grant program and the Pro Bono Innovations Grant that is funding this training and the associated MLSA pro bono emeritus attorney program.
- MLSA is strategic both in litigation and non-litigation approaches.

STRATEGIC APPROACHES—HOW IS MLSA STRATEGIC?



- Litigation approaches—MLSA “triages” cases in deciding the level of services that will be provided, considering factors including:
 - Likelihood of success
 - Client characteristics (e.g., a senior who cannot read versus a savvy client with experience going to court)
 - Available resources
 - Potential effect on people other than the individual client (see next slide)

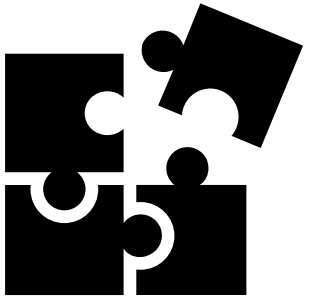
STRATEGIC APPROACHES—CONTINUED



A “broad-based” or “impact” or “systemic” case is one where the outcome affects more than the individual client as follows:

- Changes the behavior of an adverse party in a way that would affect multiple low-income people. Examples:
 - negotiating a settlement to change “boilerplate” language in a lease,
 - convincing a government agency to change how it processes certain paperwork, or
 - deterring a “bad actor” that repeatedly breaks the law.
- Decides an issue of first impression. Setting precedent can be an important strategy.
- Empowers a client community. Certain clients may be prioritized because a good outcome would empower them and their respective communities in other areas of their lives.

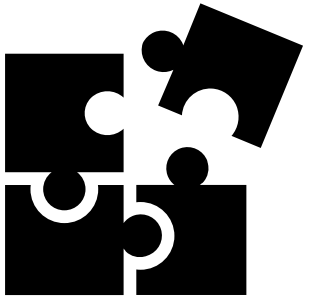
STRATEGIC APPROACHES—CONTINUED



Non-litigation approaches include:

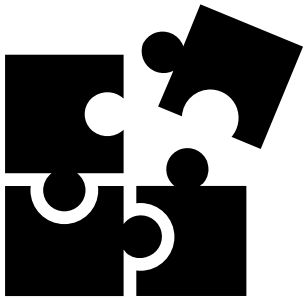
- Empowering clients by developing “know your rights” resources, creating forms for pro se litigants, and commenting on court rules that affect pro se litigants;
- Technology—MontanaLawHelp.org, askKarla.com, videoconferencing
- “Community lawyering” efforts to engage potential partners in promoting access to justice (e.g., libraries, domestic violence shelters, tribal organizations, government agencies, other nonprofits)
- Administering a pro bono program. Yes, pro bono attorneys are “strategic”!

STRATEGIC APPROACHES--HOW IS PRO BONO STRATEGIC?



- Increases efficiency. MLSA's intake system can help community-based pro bono programs determine that clients are financially and otherwise eligible.
- Bar Partnerships. The State Bar and several local bar associations are crucial partners for MLSA in many projects. Bar members with working knowledge of MLSA cases can help further those partnerships.
- Capacity building. MLSA staff attorneys cannot handle all cases. If pro bono attorneys take on some duties, staff attorneys can be freed up to focus on cases that require specific competencies (e.g., subsidized housing).
- Specific capacity building. MLSA can focus pro bono attorneys on certain areas of the law or specific needs that current staff cannot meet.
- Tracking outcomes. Pro bono attorneys can help MLSA follow up on cases to discern outcomes and provide feedback to help MLSA improve its services.

STRATEGIC APPROACHES--HOW IS PRO BONO STRATEGIC?



The most strategic approach to pro bono work is to recruit and retain attorneys who are happy with their roles. Tell MLSA what you want to do!

- Litigation is always a huge need, and limited scope work is an option.
- Help clients fill out paperwork or review paperwork they've already done.
- Advice appointments, either initial or follow up.
- Help MLSA develop and review forms and resources on MontanaLawHelp.org (this opportunity may not always be available).
- Act as a mentor for a newer attorney.
- Other ideas? Ask MLSA's pro bono coordinators (see last slide).



STRATEGIC APPROACHES—CONTINUED

- **What can you do as a pro bono attorney to be strategic? Options:**
 - Help MLSA spot “impact” cases in advice appointments, either by making notes in the case file or telling MLSA’s pro bono coordinators. NOTE: You do not have to take on the full case!
 - Provide higher levels of service. Whether your case is an “impact” case or not, you can help empower individual clients and free up MLSA attorneys to focus their resources strategically.
 - Build skills by developing competency to handle certain cases, or mentor others.
 - Discern and report outcomes (e.g., follow-up calls with clients) to help MLSA with administrative tasks like grant reports and with developing systemic approaches.
 - Be “systemic eyes and ears” for trends you are seeing, improvements MLSA can make, or possible partnerships. NOTE: Communicate with MLSA before reaching out to another group to avoid duplicating efforts or “crossed wires.”

STRATEGIC APPROACHES—CONTINUED



If I do an advice appointment, how do I decide whether this is the case to do more?

- First, you are not obligated to do more in any case. MLSA appreciates any help, and you can tell MLSA you only want to do advice appointments, forms review, or whatever you are comfortable doing in any given case or at all times.
- Otherwise, consider:
 - Your skill set, including whether you see an opportunity to build skills;
 - Your availability (i.e., if you handle this case, you won't do x number of advice calls);
 - Whether you want to help this client in particular for whatever reason;
 - That MLSA has already triaged the case and, unless you learn something new during the appointment, there may be another case that MLSA could point you to for higher services.

STRATEGIC APPROACHES—CONTINUED



- What else should I be on the lookout for?
 - Overlapping issues. A client may tell you about an issue that isn't in their case notes. For example, you may be advising on a public benefits issue, and the client discloses that a collection agency is trying to collect on what sounds like a “zombie debt.” Tell MLSA that the client disclosed the issue and let MLSA follow up.
 - Client capacity issues. If you believe the client is displaying cognitive issues and may not be able to proceed without a lawyer, tell MLSA and talk about options. It is important to note that Rule 1.14 of the MRPC addresses issues relating to client capacity, including how to handle confidential information if the attorney believes the client needs to be referred to a particular service.
 - MLSA special requests. MLSA may ask pro bono attorneys to look for particular issues.

STRATEGIC APPROACHES—CONTINUED



Recap: How can you be strategic?

- Tell MLSA the kind of work you want to do.
- Help MLSA spot issues, especially for things they have already identified as "trends."
- Communicate with MLSA about your work.
- Communicate with others about MLSA's work in the community.
- Help MLSA track outcomes. If you help a client negotiate a \$500 liability down to \$300, you've helped the client avoid paying \$200. Or you can do follow-up calls to help MLSA gauge the effectiveness of initial advice calls. MLSA needs to know both positive and negative outcomes, for grant reporting and to make decisions about service delivery.
- Be a mentor, or ask for a mentor.

ETHICAL APPROACHES: CONFLICT/LIMITED SCOPE SCENARIO



You've agreed to volunteer with MLSA once every other week to help clients review their paperwork before they file or mail them once a week. You are willing to do a variety of cases, but your former law firm represented a lot of entities that are adverse to MLSA clients.

One day, you are helping Candy Client review her family law paperwork. After you make a few changes, you believe she is ready to file her paperwork for dissolution, child support, a parenting plan, and an order of protection. You don't have time to represent the Candy in all the family law proceedings. But you want to represent Candy in hearings on her petition for temporary orders under 40-4-121, MCA.

- What should you and/or MLSA do about potential conflicts re your paperwork reviews?
- For Candy's case, can you represent her only in part of the case? If so, how should you proceed? (Hint: what should you tell MLSA, the client, and/or the adverse?)

Rule Section ~ Rule Section ~ Rule Section ~

Rule Section ~ Rule Section ~ Rule Section ~

MONTANA RULES OF PROFESSIONAL CONDUCT

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 03-264

) ORDER

On April 25, 2003, the State Bar of Montana, together with its Ethics Committee, petitioned this Court to revise the Montana Rules of Professional Conduct. On May 20, 2003, we issued an order inviting the bench and bar and any interested persons to file written comments, suggestions or criticisms with the Clerk of this Court regarding the proposed revisions to the Montana Rules of Professional Conduct by September 1, 2003. We received all comments on that date.

The Court has considered each and every proposed revision and comment. We have accepted most, but not all, of the proposed revisions and have, after discussion, amended several of the proposed revisions. The attached Rules are the complete Montana Rules of Professional Conduct. Many existing Rules are not changed, others are changed subtly, some include entire new subsections and a few are entirely new. For ease of reading, no underlining or strikeouts are shown. In addition, we are deferring consideration of the proposed revisions to Rule 5.5 on the unauthorized practice of law and Rule 8.5 on disciplinary authority and choice of law until the comment period has run on the State Bar's petition for proposed revisions to the Rules which would—if adopted—establish multijurisdictional practice in Montana. Accordingly, the attached Rules 5.5 and 8.5 do not reflect any revisions.

THEREFORE, pursuant to the authority granted this Court by Article VII, Section 2(3) of the 1972 Montana Constitution, IT IS ORDERED that the Montana Rules of Professional Conduct attached to this order are ADOPTED.

IT IS FURTHER ORDERED that any existing Rules which are attached but were not revised remain in full force and effect.

IT IS FURTHER ORDERED that Rules revised during this process are effective April 1, 2004.

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and mail copies of this Order with attached Montana Rules of Professional Conduct to: Robert J. Sullivan, President of the State Bar of Montana; Michael G. Alterowitz, Chair of the State Bar of Montana Ethics Commission; Chris Mance, Executive Director of the State Bar of Montana with the request that this Order be published in the next available issue of

This 2011 order (also before rules in the deskbook) amended the rules to encourage limited-scope representation.

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. AF 09-0688

IN RE: CHANGES TO THE MONTANA RULES OF
PROFESSIONAL CONDUCT to encourage
limited scope representation (LSR) in Montana

)
) ORDER
)

In September of 2010, the Montana Supreme Court Equal Justice Task Force, the Montana Supreme Court Commission on Self-Represented Litigants, and the State Bar Access to Justice Committee petitioned the Court to adopt rule changes in order to encourage limited scope representation (LSR) by Montana attorneys, as one means of addressing the unmet legal needs of low-to moderate-income Montanans. For that purpose, changes were proposed to the Montana Rules of Civil Procedure and the Montana Rules of Professional Conduct.

We invited and received written public comment on the proposed rule changes. At the end of the comment period, we also heard public comment at several public meetings. At our public meeting on March 1, 2011, we voted to adopt most, but not all, of the changes proposed to the Montana Rules of Professional Conduct and the Montana Rules of Civil Procedure.

IT IS NOW ORDERED:

Rules 1.2, 4.2, and 4.3 of the Montana Rules of Professional Conduct are amended by the addition of the language highlighted and underlined below:

Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer [existing subsections (a) and (b)]

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

(1) The client's informed consent must be confirmed in writing unless:

(i) the representation of the client consists solely of telephone consultation;

(ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or

(iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

(i) the representation is limited to the attorney and the services described in writing; and

(ii) the attorney does not represent the client generally or in matters other than those identified in the writing.

[existing subsection (d)]

Rule 4.2 – Communication with Person Represented by Counsel

(a) [existing rule]

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is

In March 2019, the State Bar petitioned the Court to revise the Rules of Professional Conduct, sometimes recommending to conform them to ABA model rules and other times to retain “Montana rules.”

MLSA met with the Bar during this process, and believed its practices would conform with the rules as they existed or the Bar’s proposed rules.

ORIGINAL

No. AF 09-0688

IN THE SUPREME COURT
OF THE STATE OF MONTANA

IN RE PETITION OF THE
STATE BAR OF MONTANA
FOR REVISION OF THE MONTANA
RULES OF PROFESSIONAL CONDUCT

FILED

03/01/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

FILED

MAR 01 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

Petition in Support of Revision of the Montana Rules of Professional Conduct

An Original Proceeding

This is Attachment A to the Bar's petition summarizing its recommended changes. It is in the binder of resources accompanying this training.

Attachment B, which is also in the binder of resources, is a comparison chart of each Montana rule with any recommended changes side-by-side with the ABA rule. An excerpt from Attachment B is on the next slide.

ATTACHMENT A

Summary Page

Recommend Adopting ABA Model Rule

Rule 1.2 Scope and Allocation of Authority
Rule 1.6, Confidentiality, with two additional commas;
Rule 1.13, Organization as a Client
Rule 1.20, Duties to Prospective Clients
Rule 4.2 Communication with Person Represented by Counsel
Rule 4.3 Dealing with Unrepresented Person
Rule 3.8, Special Responsibilities of a Prosecutor
Rule 5.5, Unauthorized Practice of Law; Multi-jurisdictional Practice of Law
Rule 5.7, Responsibilities Regarding Law-Related Services
Rule 7.2, Advertising, with slight modification
Rule 7.4, Communication of Fields of Practice and Specialization --eliminated, per ABA

Retain Montana Rule with Amendment

Rule 1.0, Terminology
Rule 1.5, Fees
Rule 1.8, Conflicts: Specific Rules
Rule 1.10, Imputation of Conflicts
Rule 1.15, Safekeeping Property
Rule 1.18 Montana's Interest on Lawyer Trust Accounts (IOLTA) Program
Rule 8.5, Jurisdiction and Certification

Retain Montana Rule with No Amendment

Rule 1.16, Declining or Terminating Representation
Rule 1.17, Government Employment
Rule 1.19, Sale of Practice (the ABA's Rule is 1.17)
Rule 3.1, Meritorious Claims and Contentions
Rule 3.5, Impartiality and Decorum of Tribunal
Rule 5.1 Responsibilities of Partners, Managers
Rule 6.1, Voluntary Pro Bono
Rule 7.1, Communications Concerning a Lawyer's Services
Rule 7.3, Direct Contact with Prospective Clients
Rule 7.5, Firm Names and Letterheads

Rejected ABA Rule

Rule 7.6, Political Contributions

Unique Montana Proposal

Preamble, paragraph 6 in lieu of requested amendment to Rule 1.2(d), addressing Cannabis

MONTANA RULE

Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) in matters in which a lawyer wishes to assert a retaining lien against client property, papers or materials in the lawyer's possession to secure payment for the lawyer's services and costs advanced relating to such property, papers or materials, a written agreement for such a lien shall expressly set forth the limitations contained in paragraph (i)(3);

(3) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(4) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent,

ABA RULE

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent,

RECOMMENDATION

The State Bar recommends retaining the Montana language, but also absorb the ABA language in (c) "or individual with whom the lawyer or the client maintains a close, familial relationship."

The 2002 version of the ABA's rule extended this exception to a client with whom the lawyer maintains "a close, familial relationship," intending to mean that a lawyer may draft a self-enriching will for a cohabiting domestic partner or a longtime friend with whom the lawyer has a family-like relationship.

On October 29, 2019, the Court ordered that the rules be amended in accordance with the Bar's petition.

The Bar's petition addressed many more rules than we will discuss here. It is a VERY good idea to read the Court's order and the attached revised rules. They are in the binder of resources accompanying this training, or available at:

<https://courts.mt.gov/Portals/189/orders/caseinfo.html?id=AF%2009-0688> (or you can search for AF 09-0688).

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 09-0688

IN RE THE RULES OF PROFESSIONAL
CONDUCT

O R D E R

On March 1, 2019, the State Bar of Montana, together with its Ethics Committee, petitioned the Court for revisions to eighteen of the Montana Rules of Professional Conduct and a portion of its preamble. The revisions would make the Rules more consistent with the model rules of the American Bar Association, although some differences would remain.

The Court opened a 90-day comment period on the petition, and after review and consideration of the petition at a public meeting on August 6, 2019, the Court determined that the revisions were well taken.

IT IS ORDERED that the proposed revisions as approved by the Court are ADOPTED. The Montana Rules of Professional Conduct are amended to read as shown in the attachment to this Order, effective January 1, 2020.

This Order and the attached rules shall be posted on the Court's website. In addition, the Clerk is directed to provide copies of this Order and the attachment to the State Law Library, to Todd Everts and Connie Dixon at Montana Legislative Services, to Chad Thomas at Thomson Reuters, to Patti Glueckert and the Statute Legislation department at LexisNexis, and to the State Bar of Montana, with the request that the State Bar provide notice of the revised rules on its website and in the next available issue of the *Montana Lawyer*.

DATED this 29th day of October, 2019.

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ JIM RICE

FILED

10/29/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: AF 09-0688

Rule 6.1 is Montana's overarching rule about pro bono. The Bar did not recommend amending this rule, and it is **unchanged**. You are at this training, so you are already well on your way to complying with this rule!

PUBLIC SERVICE

RULE 6.1: PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should render at least fifty (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the fifty (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

What about conflicts?

Rule 6.5 provides an exception to other conflict rules if you are providing short-term limited legal services under the auspices of a program sponsored by a nonprofit (like MLSA) or court “without expectation ... [of] continuing representation.”

Other conflict-related rules apply only if the attorney **knows** of a conflict or disqualification.

The Bar did not ask for any changes to Rule 6.5 and it was NOT changed by the Court.

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.

Even though Rule 6.5 doesn't require it for "short-term limited legal services," MLSA sends an email to each pro bono attorney before a scheduled appointment to give them an opportunity to do a conflict check.

You may hear MLSA staff refer to "advice" or "brief services." These both fall under "short-term limited legal services." An example of "brief services" is helping a client review paperwork.

You will usually know at the outset whether you are doing "advice/brief services" or more extensive services.

Sample email (client information changed)

Hello Elaine,

Thank you for participating in the Pro Bono Phone Advice Project. We have you scheduled to speak with the following clients on Wednesday, June 12 at 2:00 p.m. If there is not a conflict of interest with this client, I will assign you to the case in LegalServer and send you the client's case notes.

CL: Cathy Client

Legal Issue: Private landlord/tenant

Adv Party: Annie Adverse

CL's Phone: (406) 555-5555

Please let me know if you have any questions. Thank you again for volunteering your time.

Sincerely,

So what are the other conflict rules?

- 1.7 Conflict of interest: Current Clients
- 1.8 Conflict of Interest: Current Clients: Specific Rules
- 1.9 Duties to Former Clients
- 1.10 Imputations of Conflicts of Interest: General Rule
- 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
- 1.12 Former Judge, Arbitrator, Settlement Master, Mediator or Other Third-Party Neutral

We will not spend a lot of time discussing the specifics of each rule, but will highlight changes the Bar requested and the Court made.

RULE 1.7 - CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

The Bar did not propose amending Rule 1.7, so it is **unchanged**.

Rule 1.8 addresses specific situations (e.g., media rights, sexual relations with clients). It has “Montana language” about liens and loans not in the ABA. It is pages longer than this snippet.

Per the Bar’s request as reflected in Attachment B (right), the Court inserted “close, familial relationship” language in (c) re gifts to comport with ABA rules. The rule remains otherwise unchanged.

MONTANA RULE

Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
- (2) in matters in which a lawyer wishes to assert a retaining lien against client property, papers or materials in the lawyer’s possession to secure payment for the lawyer’s services and costs advanced relating to such property, papers or materials, a written agreement for such a lien shall expressly set forth the limitations contained in paragraph (i)(3);
- (3) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (4) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

ABA RULE

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

RECOMMENDATION

The State Bar recommends retaining the Montana language, but also absorb the ABA language in (c) “or individual with whom the lawyer or the client maintains a close, familial relationship.”

The 2002 version of the ABA’s rule extended this exception to a client with whom the lawyer maintains “a close, familial relationship,” intending to mean that a lawyer may draft a self-enriching will for a cohabiting domestic partner or a longtime friend with whom the lawyer has a family-like relationship.

The Bar did not propose changes to Rule 1.9, so it is **unchanged**. That means there are still requirements prohibiting certain representation or requiring a former client's informed consent in writing in certain situations.

RULE 1.9 - DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RULE 1.10 - IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

This is the former Rule 1.10 re imputation of conflicts of interest.

The Bar proposed, and the Court adopted, **substantial changes to section (a) regarding screening.** See next two slides.)

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.10 – Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless

(1) the prohibition is based on a personal interest of the ~~prohibited~~ disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Montana's Rule 1.10 (c) includes "safe harbor" language, permitting representation in instances where Montana's small-town nature creates conflicts of interest.

The State Bar recommends inclusion of the ABA's 2009 screening provisions to Montana's current language.

Subsection (c) already existed in Rule 1.10.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Rule 1.11 is unchanged, and there was a recent training on this rule here in the courtroom.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and (2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12 is **unchanged**, and there was a recent training on this rule in the courtroom.

RULE 1.12: FORMER JUDGE, ARBITRATOR, SETTLEMENT MASTER, MEDIATOR, OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, settlement master, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, settlement master, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

NOTE: MLSA will provide a memo re State policy and avoiding conflicts re Rules 1.11 and 1.12 on request.

ETHICAL APPROACHES: CONFLICTS RECAP



- You need to comply with ethical rules re conflicts. But realize that there are some provisions specially designed to address pro bono work with MLSA like Rule 6.5.
- MLSA will give you the opportunity to do a conflict check, even for “limited” cases.
- If you **know** of a conflict (e.g., if the client changed names and the former name wasn’t “caught”), you need to avoid or quickly terminate the services OR you can sometimes obtain informed consent from each affected client/government entity if you believe you’re still compliant with Rules 1.7-1.12 (matters are unrelated, you don’t have confidential info, etc.).
- There are practical considerations underlying the ethical rules, such as the discomfort a client might have from you providing her pro bono services when you aggressively cross-examined her two years ago. Consider the perspectives of current and former clients when evaluating any given situation.

Re limited scope representation, the Bar recommended revising Rules 1.2, 4.2 and 4.3.

This is an excerpt from the Bar's memorandum in support in support of its petition. In another portion of the argument, the Bar advocated to change Rule 1.5 to address "any changes in scope" in written fee agreements.

F. Rules on Limited Scope Representation: Rule 1.2, 4.2 and 4.3

The State Bar unanimously recommends adoption of the Model Rules on Rule 1.2 Scope of Representation, Rule 4.2 Communication with Person Represented by Counsel and Rule 4.3 Dealing with Unrepresented Person.

The Committee and the State Bar believe that the ABA rules are simpler, that the ABA and most states construe them to authorize limited-scope representation, that most states have adopted them, and that the details of Montana's limited scope rules are now unnecessary and potentially create disciplinary traps for failure to comply with the details of the Montana rules. As to the writing requirements of the limited scope rules, it was noted that Rule 1.5 already requires a writing for most fee agreements, to include any limitations to the scope of representation as described below.

Continuation of the Bar's argument to amend Rules 1.2, 4.2 and 4.3.

Among other things, the Bar argues that the 2011 amendments re limited scope are not necessary and “the ABA fully embraces limited scope and teaches best practices that absorb the requirements of Montana’s rules.”

Montana’s Supreme Court was ahead of the curve in encouraging access to justice. District Court Judge Russell Fagg worked with his law clerk to develop Montana’s unique modification of these rules in 2011. Fast forward to 2018, where now the ABA fully embraces limited scope and teaches best practices that absorb the requirements of Montana’s rules. The Committee believes that Montana’s specific


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PETITION & MEMORANDUM IN SUPPORT OF REVISION OF MONTANA RULES OF PROFESSIONAL CONDUCT

rule components can be removed without harming Montana’s clients.

The proposed rules are simply an elimination of the extra Montana language tacked on to the Model Rules, and read:

https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/resources---information-on-key-atj-issues/limited_scope_unbundling/

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At a Glance >

Key Resources

ACCESS TO JUSTICE TOPICS

Limited Scope Representation

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At a Glance


"Limited Scope Representation" refers to the concept of a lawyer agreeing with a client to handle only some part(s) of the client's legal matter. The term "unbundling" is sometimes used to refer to this method of client service.

Limited Scope Representation is linked to the [Self-Represented Litigation movement](#), because the flipside to a lawyer handling only some aspects of a client's larger case is that the client will handle other aspects of their case.

Key Resources

- ABA Pro se/Unbundling Resource Center, including:
 - state court rules on unbundling
 - state ethics opinions on unbundling
- [ABA White Paper analyzing state unbundling rules](#)
- [Handbook on Limited Scope Legal Assistance](#) - ABA Section of Litigation
- [Model Code of Judicial Conduct Provisions on Self-Represented Litigants](#) (Self-Represented Litigation Network)
- [Modest Means Task Force of Colorado Bar Ass'n, 2013 Report](#) - Includes unbundling as part of solution to serving modest-means clients.
- [Toolkit from the Colorado ATI Commission: Successful Business Planning](#)

https://www.americanbar.org/groups/delivery_legal_services/resources/


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Unbundling Resource Center



About Unbundling

Unbundling, or limited scope representation, is an alternative to traditional, full-service representation. Instead of handling every task in a matter from start to finish, the lawyer handles only certain parts and the client remains responsible for the others. It is like an a la carte menu for legal services, where: (1) clients get just the advice and services they need and therefore pay a more affordable overall fee; (2) lawyers expand their client base by reaching those who cannot afford full-service representation but have the means for some services; and (3) courts benefit from greater efficiency when otherwise self-represented litigants receive some counsel.

Unbundling Resources

ARTICLES

Articles
→

RULES

Rules
→

RULE 1.2 - SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the 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 scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(1) The client’s informed consent must be confirmed in writing unless:

- (i) the representation of the client consists solely of telephone consultation;

- (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer’s representation consists solely of providing information and advice or the preparation of court-approved legal forms; or

- (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client,

there shall be a presumption that:

- (i) the representation is limited to the attorney and the services described in writing; and

- (ii) the attorney does not represent the client generally or in matters other than those identified in the writing..

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the 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.

RULE 1.3 - DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 - COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(g), is required by these Rules;

- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

- (3) keep the client reasonably informed about the status of the matter;

- (4) promptly comply with reasonable requests for information; and

- (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.2 as adopted by the Court in October 2019

Note much of the language in (c) has been cut, and now only requires that limited scope representation be “reasonable under the circumstances” and the client’s “informed consent.”

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the 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 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 the 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.

RULE 1.5: FEES [Note: this is an excerpt—the rule goes on. See added language underlined below.]

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) The scope of the representation, any changes in the scope, and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing. This paragraph does not apply in any matter in which it is reasonably foreseeable that total cost to a client, including attorney fees, will be \$500 or less.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered,

These are the prior Rules 4.2 and 4.3. The Bar proposed cutting paragraph (b) from each rule.

These paragraphs stated that a person receiving limited scope services is considered unrepresented unless the opposing party or lawyer has been provided with written notice of the limited scope representation.

RULE 4.2 - COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL


(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

RULE 4.3 - DEALING WITH UNREPRESENTED PERSON

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.



Rules 4.2. and 4.3 as adopted by the Court (cutting the second paragraph of each rule)

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ETHICAL APPROACHES: LIMITED SCOPE SCENARIO



What does MLSA do in relation to limited scope representation? (Keep in mind that the Bar's petition states that the ABA best practices “absorb” many of the 2011 amendment provisions.)

- MLSA confirms to the client the scope of services to be provided in writing before they are provided.
- If the services are beyond “advice” or “brief services,” MLSA obtains a limited scope retainer signed by the client setting forth the scope of services.
- MLSA gives pro bono attorneys a case management guide to assist them in communicating with clients during advice appointments.
- MLSA provides forms that attorneys can use if they want to file a limited notice of appearance in court.
- MLSA closes the case in writing.

See the next slides for examples.

Template MLSA Appointment Confirmation Email to Client

Hello []:

This is a reminder of your advice appointment on [xx-xx-xxxx] at [x:xx] with a Montana Legal Services Association (MLSA) volunteer lawyer. You will have forty-five minutes to speak with the volunteer lawyer. If the lawyer cannot answer all of your questions, MLSA will review your case again to see if we can find you more help.

Take full advantage of the appointment, we recommend that you

- Keep in mind that this may be the only help we can provide,
- Make sure to be available and prepared,
- Write down any questions you have in advance,
- Send us your documents in advance, and
- Let the attorney guide the conversation.

Again, please note that your advice appointment is with a volunteer attorney, not a member of MLSA. Please be available at the number you provided us (xxx-xxx-xxxx) at the time your appointment is scheduled. If your phone number has changed, call us right away at 1-800-666-6899. Some attorneys block their phone numbers, so you may receive the call from a private number. If the attorney does not call you at the scheduled time, call us at the number listed above, and we will schedule another appointment for you. However, give the attorney a few minutes before calling MLSA in case the attorney is running behind schedule.

The attorney who calls you can only help you by providing you with advice during your phone appointment. The attorney cannot help you in court and cannot provide you more advice. If you need more additional assistance, please call MLSA. Neither the volunteer attorney nor MLSA represents you. It is up to you to keep track of any deadlines and to take any action necessary to preserve your rights.

If you need to cancel your appointment, please either respond to this email or call us immediately at the number provided above. There is no guarantee that we will be able to find you another appointment with a lawyer, so you should do your best to make your appointment time. If you have any additional questions, please respond to this email.

Sincerely,
Montana Legal Services Association

This template email communication from MLSA is for a client receiving an advice appointment with a pro bono attorney. Note it says the attorney “cannot help you in court and cannot provide you more advice . . . Neither the volunteer attorney nor MLSA represents you.” It also says the client should contact MLSA if the client needs more help.



PRO BONO PROGRAM

Case Management Guide

Cover of MLSA's
Advice Call
Guide
for Pro Bono
Attorneys (in
the binder of
resources)
←

Advice Appointment Model Language re Scope from MLSA's Case Management Guide

Conversations with the Client

Before the legal advice appointment, MLSA will have already outlined in writing the scope of services to your client (Figure 10). However, MLSA recommends that volunteers reiterate this point by opening the appointment with the following script:

“My name is _____, and I'm a volunteer attorney with Montana Legal Services Association. I'm calling for our advice appointment. Is now still a good time for you?”

[If the client says no, tell the client that MLSA will contact to reschedule and add that to your notes.]

“Over the next forty-five minutes or so, I want to find out more about the situation you're wanting help with. I can answer whatever questions you have and can give you legal advice about your next steps, but MLSA's assistance to you is limited to this one advice appointment by phone. MLSA is not committing to representing you after this phone call; there just aren't enough attorneys to represent everyone who needs an attorney.”

**MONTANA LEGAL SERVICES ASSOCIATION
RETAINER AGREEMENT FOR LIMITED ASSISTANCE**

I, _____, hereby authorize the Montana Legal Services
Association (MLSA) to help me with the following: _____

I understand and agree to the following:

1. MLSA has not agreed to help me or represent me in any way that is not stated above.
2. I agree to keep MLSA advised of my current address and telephone number. If MLSA is unable to contact me after a diligent attempt, I understand MLSA will close my case.
3. I agree to fully cooperate with MLSA. I will make myself available for appointments and will give MLSA releases, papers, documents and other information as requested.
4. I have told and will continue to tell MLSA the truth in all oral and written communications.
5. MLSA may have to report information about me and my case to the national Legal Services Corporation, but it will not report my name or address if I will be physically harmed by the disclosure. I agree to tell MLSA if I believe that reporting my name and address to the national Legal Service Corporation will put me in danger.
6. I understand that I will not be charged attorney fees by MLSA but that I may have to pay for costs in handling my case. Such costs can include court costs, filing fees, expert witness fees, photocopying fees or other expenses.
7. If I am not happy with MLSA's services, I can ask any staff member for a copy of the MLSA Client Grievance Procedure.

I have read this agreement, or have had it explained to me, and I understand and agree to its terms.

Date: _____ Signed (Client): _____

Date: _____ Signed (MLSA): _____

I AM A CITIZEN OF THE UNITED STATES.

Signature

Date

**MONTANA LEGAL SERVICES ASSOCIATION
RETAINER AGREEMENT FOR PRO BONO ASSISTANCE**

I, _____, hereby authorize the Montana Legal Services
Association (MLSA) to help me with the following: MLSA has not agreed to represent me. MLSA will try and refer me to a pro bono resource.

I understand and agree to the following:

1. MLSA has not agreed to help me or represent me in any way that is not stated above.
2. I agree to keep MLSA advised of my current address and telephone number. If MLSA is unable to contact me after a diligent attempt, I understand MLSA will close my case.
3. I agree to fully cooperate with MLSA. I will make myself available for appointments and will give MLSA releases, papers, documents and other information as requested.
4. I have told and will continue to tell MLSA the truth in all oral and written communications.
5. MLSA may have to report information about me and my case to the national Legal Services Corporation, but it will not report my name or address if I will be physically harmed by the disclosure. I agree to tell MLSA if I believe that reporting my name and address to the national Legal Service Corporation will put me in danger.
6. I understand that I will not be charged attorney fees by MLSA but that I may have to pay for costs in handling my case. Such costs can include court costs, filing fees, expert witness fees, photocopying fees or other expenses.
7. I understand that the pro bono program will ask attorneys to volunteer their services to help me and that there is no guarantee that an attorney will be found to help.
7. If I am not happy with MLSA's services, I can ask any staff member for a copy of the MLSA Client Grievance Procedure.

I have read this agreement, or have had it explained to me, and I understand and agree to its terms.

Date: _____ Signed (Client): _____

Date: _____ Signed (MLSA): _____

I AM A CITIZEN OF THE UNITED STATES.

Signature

Date

Limited
Assistance
Retainer
←

Pro Bono
Retainer
→

MLSA
has a
slightly
different
process
for in-
person
clinics re
retainers
and
releases.

[ATTORNEYS]

MONTANA [NUMBER] JUDICIAL DISTRICT COURT, [COUNTY] COUNTY

IN RE THE MARRIAGE OF:

[PETITIONER],

Petitioner,

vs.

[RESPONDENT],

Respondent.

) Cause No.: DR [NUMBER]

)

) [JUDGE], District Judge

)

) **CONSENT TO LIMITED SCOPE**

)

)

)

)

)

)

This is an example form that an attorney could file in court showing the client consents to limited scope representation. You could adapt this to your specific case requirements, such as Candy's 40-4-121, MCA temporary order proceedings.

[ATTORNEY] has agreed to represent me in connection with [LEGAL ISSUE (sample: the establishment of an interim parenting plan and response to Petitioner's motion for contempt)]. I acknowledge that the scope of [ATTORNEY] representation is limited to these matters. I consent to the limitation on the scope of [ATTORNEY]'s representation.

Dated this ____ day of [MONTH/YEAR].

[PETITIONER/RESPONDENT]

[ATTORNEY]

Notice of limited
scope appearance
template.
This notice
template includes
(on the next page) a
certificate of
service to opposing
counsel. Again, this
could be adapted.

[ATTORNEY BLOCK]

Attorneys for [Petitioner/Respondent]

MONTANA [NUMBER] JUDICIAL DISTRICT COURT, [] COUNTY

IN RE THE MARRIAGE OF:

[PETITIONER],

Petitioner,

vs.

[RESPONDENT],

Respondent.

) Cause No.: [CAUSE]

)

) [JUDGE], District Judge

)

) **NOTICE OF LIMITED SCOPE**
) **APPEARANCE**

)

)

)

)

)

I, [ATTORNEY], agree to provide limited scope representation to the Respondent,
[CLIENT]. Pursuant to Rules 4.2 and 4.3 of the Montana Rules of Civil Procedure, the scope
of my representation is limited to the hearing scheduled for [DATE]. M.R.Civ.P. 4.2-4.3.
My representation of [CLIENT] shall terminate upon my filing notice of completion of
limited appearance following the hearing.

//

//

Dated this ____ day of September, 2012.

Notice of completion of limited scope representation. This includes (in subsequent pages) a portion to be signed by both the client and the attorney, and a certificate of service.

attorney name

attorney address

attorney city state zip

attorney phone

In the _____ Judicial District Court of _____ County,
(number) (county)
State of Montana

<div>In re the <input type="checkbox"/> Marriage of <input type="checkbox"/> Parenting of Minor Children of: _____ (name of petitioner) Petitioner, and _____ (name of respondent) Respondent. (check a box and fill in blanks to match the caption of the original case)</div>	<div>Cause No.: _____ Dept. No.: _____ Notice of Completion of Limited Scope Representation Family Law Case</div>
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1. (Attorney’s name) _____
filed a Notice of Limited Scope Representation in this case (date) _____,
and agreed to provide limited scope representation to ☐Petitioner ☐Respondent ☐Other party whose last known
contact information is _____

Party’s name

Template Closing Letter After Advice Appointment

(There is a similar template closing letter if other services were provided.)

Montana Legal Services Association

Provide, protect and enhance access to justice.

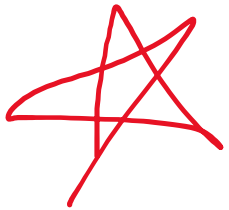


Kathryn Hartfield
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Montana Legal Services Association
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Toll Free: (800) 666-6124
E-mail: khartfie@mtlsa.org
Website: www.mtlsa.org

September 28, 2019

Dear ..,



Thank you for contacting Montana Legal Services Association. We hope you found the information from your advice appointments helpful. We have closed your file in our office and we will not be doing anything further for you unless you contact us again. We do not represent you. It is up to you to keep track of any deadlines and to take any action necessary to preserve your rights. If you have any questions or need more help, please do not hesitate to contact our HelpLine at 1-800-666-6899.

Sincerely,

Kathryn Hartfield, Pro Bono Assistant
Montana Legal Services Association

ETHICAL APPROACHES



Bonus questions:

1. If I'm in an advice appointment, do I need to communicate with MLSA if I just need to look something up and get back to the client?

- No. If you are just doing some research because a question you weren't expecting came up during the advice appointment, that is a continuation of the same appointment. You can arrange another time to talk with the client. Just be very clear in your communications with the client and your notes that it is not a separate advice appointment and that you aren't committing yourself or MLSA to provide additional services.

2. What if I'm in an advice appointment and the client describes an emergency situation?

- Nothing about the process really changes. MLSA told the client they would get an advice appointment only, presumably based on the information the client gave MLSA. You can of course advise the client of things they can do, but you still need to contact MLSA before promising that you would do anything more. And unfortunately, it sometimes happens that clients tell you something at 4:00 on a Friday afternoon that needs to be resolved by 5:00 (for example) and there's nothing you or MLSA can realistically do in time.

ETHICAL APPROACHES: LIMITED SCOPE SCENARIO



So what should you do as an MLSA pro bono attorney for Candy under Rules 1.2., 4.2 and 4.3?

1. Be consistent with MLSA's communications. Since MLSA has told Candy she is only getting an advice appointment, stick with that message until you have a chance to check in with MLSA. You can tell Candy that you will ask MLSA about whether further services might be available, but be clear that you aren't guaranteeing anything. It will be easier to tell Candy she's getting more services later than to tell her you will do something and then "back out" later.
2. Coordinate paperwork with MLSA. Once you tell MLSA that you'd like to help, MLSA will get a retainer to Candy setting forth the scope of representation. Candy will still file her family law papers on her own. Once they are filed, you and Candy can file her consent to your limited scope representation and your notice of limited appearance. And then, when you are done, you can file your notice of completion. MLSA may have forms you can use or adapt.
3. Communicate with the adverse about the limited scope issues. If you aren't litigating, you can still send the adverse written notice of the scope of your representation.
4. Stay within the bounds of your limited scope representation. Be consistent with Candy and the adverse that you are not representing Candy beyond the limited scope that you've agreed to.

ETHICAL APPROACHES—LIMITED SCOPE RECAP



- MLSA does a lot of communications with you and the client that will help you comply with ethical rules relating to limited scope work.
- Before you promise anything to the client beyond what you and MLSA have already agreed to do, contact MLSA's pro bono coordinators.
- During the advice appointment, stay consistent with the client that they will not get any additional service (which is what MLSA and you have already told them). You can communicate later that they will get more.
- Tell MLSA what you want to do so they can send out a retainer and any other communications addressing the scope of services you are agreeing to provide.
- Let the adverse/court know the scope. You can either do this by filing and serving a notice in court (if you are litigating) or by sending written notice to the adverse.
- Notify everyone when you are done. Tell the client, the adverse, the court (if applicable), and MLSA so that MLSA can close the case.

ETHICAL ISSUES



- MLSA's pro bono coordinators can be contacted at awagenha@mtlsa.org or you can click "Volunteer" at www.mtlsa.org.
- Questions or comments?
- Thank you!

THIS CONCLUDES EMERITUS PRO BONO ATTORNEY TRAINING: STRATEGIC AND ETHICAL APPROACHES

TRAINING FOR MONTANA LEGAL SERVICES ASSOCIATION EMERITUS PRO BONO ATTORNEYS



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