

Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-441
Issued: July 28, 2017

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Question1: What is “limited scope representation?”

Answer: When the lawyer and client agree that the lawyer’s representation will be limited to matters specifically defined in the agreement.

Authority: SCR 3.130(1.2(c); *Persels*, 481 S.W.3d 501 (Ky. 2016).

Question 2: What are the requirements of a “limited scope representation” in litigation?

Answer: 1) Informed consent by the client; 2) a writing adequately describing the agreement; and; and 3) the limitation is reasonable.

Authority: Rule 1.2(c); *Persels*, which adds to Rule 1.2(c) the requirement that the agreement be signed by the client or confirmed in writing. Rule 1.0(e).

Question 3: What is required of an attorney who “ghost writes” an initial pleading (complaint, answer, cross-claim or counter-claim) for a pro se litigant?

Answer: 1) The attorney must investigate the matter sufficiently to reasonably conclude that the pleading is supported by a non-frivolous basis in law and fact; and 2) the attorney must indicate on the pleading that it was prepared “with the assistance of counsel.” The attorney is not required to sign the pleading or indicate the name of counsel.

Authority: *Persels*, S. Bhojani, Attorney Ghostwriting for Pro Se Litigants – Practical and Bright-Line Solution to Resolve the Split of Authority among Federal Circuits and State Bar Associations, 65 SMU L. Rev. 653 (2012).

Question 4: What is required of an attorney who provides assistance to a pro se litigant beyond preparation of the initial pleadings?

Answer: The attorney must provide the following information to the court and opposing counsel: the attorney’s contact information (name address, phone number) and the scope of the limited representation agreement. This is not an entry of appearance.

Authority: *Persels*

Question 5: May opposing counsel contact a party directly who has filed a pleading that indicates it was prepared with the assistance of counsel?

Answer: Yes, the attorney should ask the opposing party for the scope of the limited representation. If it appears that the opposing party is, or may be, represented by counsel on the matter at issue, the attorney should ask the party for the name of counsel and contact that person to confirm the scope of the limited representation. The attorney should deal directly with the opposing party if the limited representation has concluded or is otherwise not applicable.

Authorities: ABA Formal Op. 472 (2015), Rules 4.2 and 4.3.

Introduction

This opinion describes “limited scope representation,” as interpreted and applied by the Kentucky Supreme Court in *Persels & Associates v. Capital One National Bank*, 481 S.W.3d

501 (Ky. 2016). This opinion supersedes E-343 (1991). This opinion is limited to limited scope representation in litigation.

Discussion

In *Persels*, while the Kentucky Supreme Court was primarily motivated by the need to allow lawyers to help pro se litigants unable to afford full representation, the Court also recognized that some litigants simply want to represent themselves, employing lawyers as necessary for discrete tasks. Providing unbundled service allows the client, not the attorney, to control the case and hire counsel as needed for a set price. Bhojani at p. 656.

Providing unbundled services is authorized by Rule 1.2(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 litigation matters *Persels* requires that the agreement be in writing.

In *Persels*, Justice Cunningham adopted Bhojani’s bright-line recommendation for ghost-written pleadings: the pleading must disclose that it was prepared with the assistance of counsel but does not need to include the name of the attorney. The rationale for requiring disclosure is to put the court and opposing counsel on notice that the pro se litigant had help, while protecting the attorney and client from a claim of deceit. ABA Formal Op 07-446.

The rationale for not requiring the name of the attorney is to encourage attorneys to help pro se litigants with their initial pleadings; this is based on the assumption that attorneys required to give their names will be less likely to provide the service. “[B]y not requiring disclosure of the attorney’s identity, attorneys will have sufficient incentive to provide unbundled legal services, represent the indigent population, and increase access to justice.” Bhojani at 680. However, if the attorney provides further assistance, the attorney must provide name and contact information to the court and opposing counsel.

An attorney helping a litigant with an initial pleading (complaint, answer, counter-claim, cross-claim) must be satisfied that there is a basis in law and fact for the allegations in the pleading. In *Persels*, the Court referred to this as a duty of investigation to ensure that the pleading is filed in good faith; the Court referred to Rule 3.1, which corresponds to Rule 11 of the Rules of Civil Procedure. What the Court meant by “investigation” is unclear; to require an attorney to delve into facts underlying a client’s statement would be inconsistent with *Persels*’ aim of encouraging attorneys to provide unbundled services.

If an attorney represents the litigant beyond the initial pleadings, the attorney must disclose contact information and the scope of representation to the court and opposing counsel. The attorney may not be required to enter an appearance. The purpose of this requirement is to notify the court and opposing counsel of the scope of the agreement so they will know whom to contact on a particular matter. For example, an attorney might help a client obtain a divorce but not provide representation on property issues. The court and opposing counsel need to know who is responsible on particular matters.

Rule 1.2(c), as interpreted by *Persels*, requires that the client give informed consent, in writing, to the limited scope representation, and that the limitation be reasonable. The attorney must make sure that the client knows what the attorney is, and is not, responsible for. An attorney, retained only to help with the initial pleading, should, nonetheless, warn the client about foreseeable dangers. For example, an attorney retained to help draft an answer to a complaint should tell the client about the compulsory counterclaim rule.

The attorney must inform the client of *Persels*’ requirements: a written agreement specifying the lawyer’s services, that “prepared with the assistance of counsel” appear on the initial pleading, and that any further assistance (for example advising the pro se litigant on

procedural steps) must be reflected in a written agreement. The attorney must inform the client that the opposing party or counsel may contact the client directly on all matters except those within the limited scope agreement.

Note To Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.