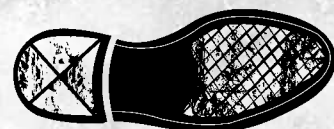
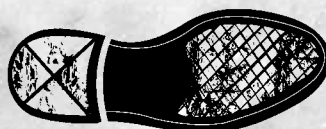
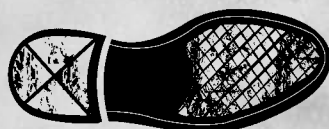
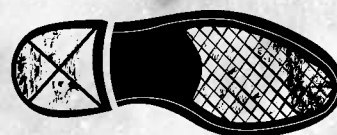
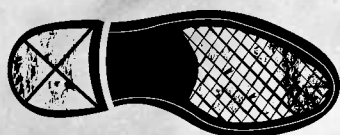
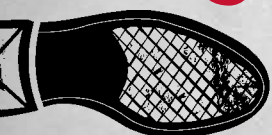


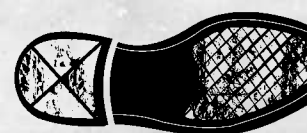
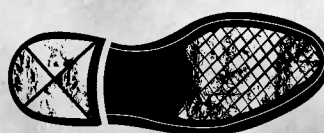
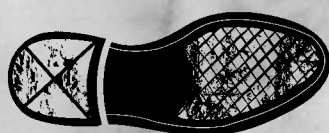
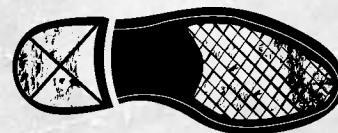
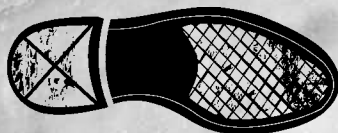
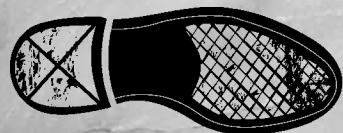
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THE
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Approaching Ethical Issues Involving Unrepresented Litigants

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Among the ethical challenges that legal aid lawyers face are quandaries involving unrepresented or partially represented litigants.¹ We negotiate with unrepresented adverse parties, interview adverse witnesses, and observe lawyers overreaching in their dealings with the unrepresented poor. Ethical issues arise under labels of unbundling, discrete-task representation, or ghostwriting and involve hotlines, *pro se* clinics, or court-based assistance programs. Unrepresented litigants present ethical challenges to judges, court-connected mediators, clerks, and lawyers. Yet “[t]oo often the ethics training we experience ... is geared to a practice that bears little resemblance to our day-to-day challenges.”²

Here I offer a framework for approaching these ethical issues: first, I focus on interactions with unrepresented adverse parties; second, I discuss the provision of assistance short of full representation; third, I turn to ethics and the roles of players in the court system; and, fourth, I set forth a framework for handling ethics issues generally.³ While I focus on litigation in court, much of the analysis applies to administrative proceedings as well.

The discussion connects ethics and politics, which should not surprise the legal aid community. The application of rules favors those with power over those without, requiring aggressive and sustained advocacy to counter the pressure. The ethics rules are no different. Our approach to ethics must prevent misconduct and promote good lawyering practices and justice for the poor.

Dealing with Unrepresented Adverse Parties

Legal aid lawyers are painfully aware of the ethical dilemmas that arise in cases pitting lawyers against unrepresented adverse parties. Most of us have observed lawyers “crossing the line” but also have struggled to pursue our clients’ goals in an ethical manner when our own cases implicate this scenario. Cases involving lawyers and unrepresented litigants often are settled, under pressure from the court, typically following unmonitored hallway negotiations. Many unrepresented litigants are indigent, silenced by court process and power imbalances, and ill-positioned to distinguish between permissible and impermissible conduct. They appear without counsel not “voluntarily” but due to a shortage of lawyers for the poor. Negotiations between lawyers and lay people are common in administrative proceedings and in transactional contexts as well.

The ethical rules do not speak directly to negotiations. Rule 4.1 (Truthfulness in Statements to Others) is the primary source of restrictions where negotiations are

¹I favor the term “unrepresented” over “self-represented” since most unrepresented poor people are truly “without” representation.

²Richard P. Weishaupt, *Ethics and Legal Aid: The Beginning of a Discussion*, 42 CLEARINGHOUSE REVIEW 173 (July–Aug. 2008).

³Cornell Law School’s American Legal Ethics Library is an excellent ethics resource; see www.law.cornell.edu/ethics/.

between lawyers; Rule 4.3 governs when adverse parties are unrepresented.⁴ Rule 4.3 prohibits a lawyer from stating or implying “that the lawyer is disinterested” and from giving “legal advice to a person who is not represented by a lawyer, other than the advice to secure counsel....”⁵ The analysis applies to interactions with all unrepresented persons, including witnesses, in adverse positions.⁶

Lawyers must refrain from overreaching, misleading, pressuring, and threatening when negotiating with an unrepresented party.⁷ The prohibition against advice giving carries with it prohibitions against persuading an unrepresented litigant to adopt certain terms, making predictions about what will happen in court, and opining on the applicability of the law to the facts of the case beyond the exceptions articulated in the comment.⁸ Permissible behavior includes negotiating the terms of a transaction or settling a dispute and informing the unrepresented person of the terms on which the lawyer’s client will settle; the lawyer may prepare documents requiring the person’s signature and explain the lawyer’s own view of the meaning of the document or the underlying legal obligations.⁹

The rules on paper bear little relation to what occurs daily in courts that handle housing, family, and other civil cases in which litigants are often unrepresented. Negotiating tactics that would be standard between lawyers include behavior that is impermissible when the opposing party is unrepresented. Judges and court personnel tacitly condone the behavior when they send unrepresented litigants into the hallway with instructions to discuss settlement rather than with warnings to protect themselves from attorney

misconduct. Ethics decisions rooted in such “settlement discussions” are rare since unrepresented litigants do not typically file ethics complaints against opposing counsel, and disciplinary bodies are unlikely to initiate proceedings.

The absence of meaningful enforcement should not become a license to ignore the rules. Lawyers might negotiate in the presence of court personnel to reduce the incidence of unmonitored negotiations. At a systemic level, weakening the rules to conform to current practice might be tempting. Yet the ethical rules should demand more where the other party is unrepresented.

The better response is to ensure that lawyers understand, and the profession enforces, the rules. Demanding adherence to the rules will benefit poor people on balance since legal aid lawyers face unrepresented adverse parties in only a tiny percentage of the pool of cases pitting a lawyer against an unrepresented litigant. Highlighting the unfairness of scenarios where lawyers routinely face unrepresented litigants might help develop allies in campaigns, including those to expand a civil right to counsel, to correct what is a breakdown of the adversary system.

Assistance Short of Full Representation

Certain forms of representation and assistance raise familiar ethical issues in new contexts. I discuss unbundling and ghostwriting first before turning to assistance programs generally.

Unbundled Legal Services. Representation involves a package of discrete tasks, such as gathering facts and advising the client, and clients should be in charge of

⁴MODEL RULES OF PROF'L CONDUCT R. 4.1, R. 4.3 (2009), <http://bit.ly/7XDwe>.

⁵*Id.* R. 4.3.

⁶*Id.*

⁷See my *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIFORNIA LAW REVIEW 79 (1997). Rule 4.3 derived from its predecessor in the Code of Professional Responsibility, DR 7-104(A)(2), which succeeded Canon 9 of the Canons of Professional Ethics.

⁸*Out of Sight and Out of Line*, *supra* note 7, at 93–101.

⁹MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2.

“selecting from lawyers’ services only a portion of the full package and contracting with the lawyer accordingly,” argue proponents of “unbundled legal services.”¹⁰ The term burst onto the scene as a partial response to the flood of unrepresented litigants. Consistent with the trend in which consumers act as their own travel and real estate agents, proponents urged formal rules permitting unbundling. While the label may be new, legal aid offices already, through hotlines and *pro se* clinics, delivered assistance short of full representation. As assistance programs for the underserved population proliferated, legal aid attorneys, bar associations, and the courts analyzed the ethical issues involved.

The primary ethical issue beyond ghostwriting involves the scope of representation: to what extent do the ethical rules permit a lawyer-client relationship that delivers services short of full representation? Will clients be forced to accept the model? Will conflict-of-interest and confidentiality protections be ignored?¹¹ The growth of court-based assistance programs increased the focus on conflict-of-interest issues.

The American Bar Association’s Ethics 2000 Commission responded to these concerns. Rule 1.2(c) now authorizes lawyers to limit the scope of representation “if the limitation is reasonable under

the circumstances and the client gives informed consent.”¹² While permission to limit the scope of representation does not alleviate the need for competent representation, the standard for competence relates to the extent of the assistance.¹³

Rule 6.5 modifies the conflict-of-interest rules in the context of nonprofit and court-annexed limited legal services. Under traditional conflict-of-interest analysis, if a volunteer lawyer at a court-based program assisted a litigant, the lawyer’s entire firm or office would be barred from assisting the adverse party.¹⁴ Unlike the traditional analysis under Rules 1.7 and 1.9, only actual knowledge triggers disqualification under Rule 6.5.¹⁵ Unlike Rule 1.10, only the lawyer with knowledge, rather than the entire firm, is disqualified.¹⁶

The rule modifications mirror state and local trends to endorse unbundled practices.¹⁷ Surveys of judges and court personnel show support for assistance programs.¹⁸ Litigants express satisfaction with self-help programs.¹⁹ Even among the private bar, attitudes are in flux. The bar in Massachusetts resisted a pilot limited-representation program in family law; after the program was in operation, attorneys involved overwhelmingly were “satisfied” or “very satisfied” with it and recommended its expansion.²⁰

The trend toward increased delivery through unbundling should continue, but

¹⁰Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAMILY LAW QUARTERLY 421, 423 (1994). Mosten identifies “(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court.”

¹¹See, e.g., Richard Zorza, *Discrete Task Representation, Ethics and the Big Picture*, 40 FAMILY COURT REVIEW 19 (2002).

¹²MODEL RULES OF PROF’L CONDUCT R. 1.2(c).

¹³*Id.* R. 1.2 cmt. 7.

¹⁴*Id.* R. 1.7–1.10.

¹⁵*Id.* R. 6.5(a).

¹⁶*Id.* R. 6.5(b).

¹⁷Maine and Colorado were leaders in adopting rule changes (Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URBAN LAW JOURNAL 1145, 1190, nn. 232–33 (2002)). State-by-state activity through 2004 is collected at www.unbundledlaw.org.

¹⁸John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know 2* (2002), <http://bit.ly/4esE>.

¹⁹*Id.*

²⁰The Supreme Judicial Court Steering Committee on Self-Represented Litigants, *Addressing the Needs of Self-Represented Litigants in Our Courts: Final Report and Recommendations* 16–17 (2008), <http://bit.ly/gSNuo>.

with careful monitoring and assessment. For legal aid clients, the paramount issues are less those of ethics than of resource allocation. Evaluation of case outcomes should guide both decisions as to which resources support full representation and which support limited assistance, and which forms of limited assistance are most effective in a given context. Beyond legal aid, a consumer-protection analysis should guide any expansion. Clients positioned to make informed choices in retaining legal services for discrete tasks should be permitted to do so, while vulnerable clients, such as the elderly, need protection.

Ghostwriting. The controversy surrounding one unbundled task—ghostwriting—predates the move toward self-help. Ghostwriting involves a lawyer’s preparation of pleadings or other court papers for a litigant who appears without counsel. This fact pattern challenges the unstated assumption in the ethics rules that litigants either are or are not represented by counsel. Decisions characterize ghostwriting as fraud and misrepresentation, arising from the appearance that the litigant is without counsel when a lawyer is pulling the strings.²¹ The cases rarely allege specific harm from the alleged deception; that a litigant has received assistance is usually obvious from the court papers.²²

Bad facts make bad law. The leading American Bar Association (ABA) opinion, from 1978, involved a lawyer who as-

sisted a litigant at every stage of the proceeding, including trial, without filing an appearance.²³ That opinion relied on cases involving a “habitual litigant who in the past five or six years [had] commenced well over thirty lawsuits against a very large number of defendants.”²⁴ Moreover, “[g]hostwriting complaints are primarily raised by attorneys who wish to maintain their advantage over pro se litigants.”²⁵ The interests of frustrated judges and opposing lawyers drive the case outcomes.

Ethics opinions related to the more typical legal aid scenarios suggest practical solutions. Rather than prohibit ghostwriting, they focus on the extent of the involvement and the nature of disclosure. A pair of New York ethics opinions approved the practice, conditioned on disclosures on the pleadings revealing the assistance.²⁶

The justifications for ghostwriting prohibitions are under attack.²⁷ Ghostwriting restrictions ignore the client’s interests, the assisting lawyer’s interest in not being dragged into the proceeding, and the benefits to the court of coherent papers that articulate claims and arguments, even if ghostwritten. The trend among jurisdictions is to permit ghostwriting through state ethics decisions and court rules.²⁸ In 2007 the ABA superseded the 1978 opinion on which many ghostwriting decisions relied, replacing it with a formal opinion permitting undisclosed legal assistance.²⁹

²¹See, e.g., ABA Formal Op. 07-446 (2007), <http://bit.ly/PIR7p>, and ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1414 (1978) (discussing Rules 1.2(d), 3.3(b), 4.1(b) and 8.4(d) and their predecessors); *Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971) (discussing Rule 11 of the Federal Rules of Civil Procedure).

²²Goldschmidt, *supra* note 17, at 1147–78.

²³ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1414 (1978).

²⁴*Klein v. Spear, Leeds and Kellogg*, 309 F. Supp. 341, 342 (S.D.N.Y. 1970); *Klein v. H.N. Whitney, Goadby and Company*, 341 F. Supp. 699 (S.D.N.Y. 1971).

²⁵Goldschmidt, *supra* note 17, at 1158.

²⁶Compare New York State Bar Ethics Op. 613 (1990), <http://bit.ly/Ekxf6>, with New York City Bar Op. No. 1987-2, <http://bit.ly/iwdJm>. Each requires disclosure that the litigant received assistance; only the latter requires disclosure of the attorney’s identity.

²⁷See, e.g., Goldschmidt, *supra* note 17.

²⁸See, e.g., State Bar of Ariz. Comm. on Rules of Prof’l Conduct, Op. 05-06 (2005); Wash. State Rule CR 11(b); Utah Ethics Op. 08-01 (2008).

²⁹ABA Formal Op. 07-446 (2007), <http://bit.ly/PIR7p>. For a comparison of decisions that do and do not require disclosure, see *id.* nn. 3-4.

The trend toward permitting ghostwriting should continue. Legal aid offices can protect themselves and their clients by disclosing in court papers that assistance was provided. Private attorneys will increasingly be comfortable doing so to the extent that judges refrain from pressuring them to appear in court and recognize the benefits that flow from coherent filings.

Assistance Programs Generally. While unbundling and ghostwriting are the hot button labels, each component of an assistance program can give rise to ethics issues. The ethics analysis turns on the completeness of issue spotting, enhanced by consideration of the familiar categories of who, what, when, where, how, and why.

“Who” can involve legal aid lawyers, volunteer lawyers, lay advocates, and law students. “What” turns on the nature of the work (e.g., general information, advice on a particular case, document preparation, limited representation). “Where” could include at the legal aid office, at the courthouse, or another site. “How” could be in person, by phone, by e-mail, or on the Internet. “When” is likely subsumed under other categories (assistance in advance of court versus intervening to rescue a desperate litigant midhearing, on-the-spot, or after investigation). “Why” raises issues of goals and effectiveness; these are important but more tangential to the ethics analysis.

Lawyer-Client Relationship. Is a lawyer-client relationship created? Programs that offer information only, without advice, do so in part to make clear that no attorney-client relationship exists.³⁰ Of course, the line between information

and advice is hard to recognize in practice.³¹ The use of disclaimers and retainer forms is important, and the briefer the encounter the less likely the relationship is created. Because case law analyzing the relationship starts from the client’s perspective, clarity is crucial.³²

Scope of Representation. As the unbundling discussion above reveals, lawyers may limit the scope of representation with the client’s informed consent under the amended Rule 1.2(c). Attorneys still must represent their clients competently and preserve client confidentiality.

Competence. A Colorado Ethics Opinion on unbundling illustrates the interrelationship between the scope of representation and unbundling: “[A] lawyer may not so limit the scope of the lawyer’s representation as to avoid the obligation to provide meaningful legal advice, nor the responsibility for the consequences of negligent action”; however, “the duty of competence of Rule 1.1 is circumscribed by the scope of the representation agreed to by Rule 1.2.”³³ The Model Rules note that the limitation of the representation is “a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”³⁴ Another factor is whether the lawyer is giving advice or assistance “in an emergency.”³⁵

Confidentiality. While the measure of competence is affected by the scope of representation, the duty to preserve client confidentiality is not. The prohibitions, and exceptions, set forth in Rule 1.6 apply to both full and partial representation.³⁶

³⁰See, e.g., Zorza, *supra* note 11, at 22.

³¹See, e.g., John M. Greacen, “No Legal Advice from Court Personnel”: What Does that Mean?, 34 JUDGES’ JOURNAL 10 (Winter 1995).

³²See, e.g., *Togstad v. Vesely, Otto, Miller and Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (plaintiff was injured when defendant attorney advised her that she had no medical malpractice claim, despite attorney’s claim that no attorney-client relationship was formed).

³³Colorado Bar Association Ethics Commission, Formal Opinion 101 (1998), <http://bit.ly/uR1W0>.

³⁴MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 7.

³⁵*Id.* R. 1.1 cmt. 3.

³⁶*Id.* R. 1.6.

Candor. The ghostwriting discussion above reveals the relevance of the duty of candor, as embodied in provisions related to fraud, candor, and truthfulness.³⁷ The duty of candor also explains Rule 1.6(b)'s exceptions to the duty to preserve confidentiality.³⁸

Conflicts of Interest. Rule 6.5, discussed above, was adopted precisely to avoid the problems caused by applying traditional conflict-of-interest rules to limited assistance programs. The traditional rules, by creating the risk that an entire law office would be "conflicted out" in subsequent encounters with a client, placed an enormous burden on providers of high-volume assistance programs and diminished the pool of those willing to assist. Rule 6.5 responds to these concerns.

Nonlawyers. Where nonlawyers staff assistance programs, the ethics analysis depends on the tasks the nonlawyers perform and the supervisory structure. Rules 5.3 and 5.5, regulating Responsibilities of Nonlawyer Assistants and Unauthorized Practice of Law, govern.³⁹ Rule 5.5, Comment 2, illustrates the connection: "This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."⁴⁰ If nonlawyers are not supervised by lawyers, the analysis turns on the tasks involved: by definition, the unauthorized-practice-of-law prohibitions bar acts involving the practice of law. Since providing legal advice is a core component of the practice of law, the distinction often turns on the murky line between information and advice.⁴¹ While unauthorized-practice-of-law statutes, and cases interpreting them, often proscribe specific activities,

exceptions to the statutes may include lay representation before certain local courts and state administrative agencies.⁴² Context matters in predicting resistance. Lay assistance might be welcome where no one objects and cases move smoothly, but unwelcome if private lawyers fear losing paying clients to nonlawyers or the goals of opposing counsel are impeded.

Law Students. Student-practice rules frame the analysis where law students are involved. Outside the scope of permissible law-student representation, law students are lay advocates. Within the scope of permissible representation, the ethical strictures that apply to lawyers apply to law students, with the rules also establishing obligations for supervisors.

Despite the variations in program structure, analysis of the most common ethics labels suggests the governing rules and their application. Given the trend to facilitate self-help and increase access to justice, the relevant interests will generally favor the provision of assistance, with ghostwriting remaining the possible outlier. The systemic analysis mirrors the long-standing dilemma in legal aid of how to assist more people without delivering second-class justice.

Judges, Court-Connected Mediators, and Clerks

The rules governing the conduct of judges, court-connected mediators, clerks, and other court personnel are relevant to legal aid advocates for a variety of reasons. Advocates assist litigants who interact with court players and need to know what to expect. Lawyers undertake representation that requires assessing, supporting, elaborating, and sometimes undoing or challenging what has occurred prior

³⁷*Id.* R. 1.2(d), 3.3(b), 4.1(b), 8.4(d).

³⁸*Id.* R 1.6.

³⁹*Id.* R. 5.3, 5.5.

⁴⁰*Id.* R. 5.5 cmt. 2.

⁴¹See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM LAW REVIEW* 2581, 2588 (1999) (identifying the three categories prohibited by unauthorized practice statutes: (1) representation of another in a court or administrative proceeding, (2) preparing legal instruments or documents that affect legal rights and responsibilities, and (3) advising another of the person's legal rights and responsibilities).

⁴²*Id.*

to representation, including amending court filings or vacating defaults or stipulations. For potential clients who do not reach our offices, the only source of help may be from the court.

The rules that implicate the analysis are general.⁴³ Consistent with the Code of Judicial Conduct, judges must perform their duties “impartially, competently and diligently.”⁴⁴ Further, they must perform their duties “fairly and impartially” and “without bias or prejudice,” while remaining “patient, dignified and courteous.”⁴⁵ Since they may not practice law, neither clerks nor mediators may give legal advice, and they must remain impartial.⁴⁶

How courts apply these rules to fact patterns that their personnel confront daily depends more on the court’s customs than on the rules’ text. Since the judicial canons and commentary do not address cases involving unrepresented litigants, they give little direct guidance as to how active or passive judges should be.⁴⁷ Decisional law complicates the analysis since the cases ignore daily tasks beyond construing pleadings and conducting trials and recycle general language without regard to context.⁴⁸ The difference between legal information and legal advice challenges clerks and mediators, leading to a trend toward lists of “do’s” and “don’ts” for clerks’ office personnel.⁴⁹

The debate over the roles of the key players extends beyond a narrow ethics analysis to considerations of context, interests of the players, and policy. While judges

and clerks historically assumed a passive role in their interactions with unrepresented litigants, the past decade has seen a shift in attitudes. Conferences, trainings, access-to-justice resolutions, and the work of state access to justice commissions accelerated the trends.⁵⁰

The intersection of ethics and politics is unavoidable. Our notions of the proper roles for judges, court-connected mediators, and clerks are evolving, and the legal aid community can help shape the roles. I expressed elsewhere my views that the revised roles of judges, mediators, and clerks are essential to a broad access-to-justice strategy that includes the increased use of lay advocates and an expanded civil right to counsel.⁵¹ While the provision of inaccurate information and assistance is a risk, the response should be education and training, not a prohibition against the court providing meaningful assistance.

Framework, Underlying Assumptions, and Enforcement Realities

The ethical issues I discuss here illustrate how traditional ethics training bears little resemblance to our day-to-day challenges. New forms of assistance programs, new labels such as “unbundled” legal services, and a willingness to deal with issues long ignored, such as negotiations with unrepresented parties and the roles of court players, complicate the analysis. We may expect that new ethical issues will arise, offices will continue to

⁴³See generally my *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 *FORDHAM LAW REVIEW* 1987 (1999).

⁴⁴*Id.* Canon 2 (formerly Canon 3).

⁴⁵See *supra* note 43; MODEL RULES OF PROF’L CONDUCT R. 2.2, 2.3(A), 2.8(B).

⁴⁶See *supra* note 43, at 1992–98, 2007–11.

⁴⁷The exception is the recent addition of Comment 4 to Model Code of Judicial Conduct R. 2.2: “It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”

⁴⁸See *supra* note 43, at 2013–14.

⁴⁹Greacen, *supra* note 31.

⁵⁰See my *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 *NOTRE DAME JOURNAL OF LAW, ETHICS AND PUBLIC POLICY* 367 (2008).

⁵¹See my *Toward a Context-Based Civil Gideon Through “Access to Justice” Initiatives*, 40 *CLEARINGHOUSE REVIEW* 196 (July–Aug. 2006).

innovate, and traditional ethics training will continue to bear little resemblance to our work.

Five-Step Framework for Approaching Ethical Issues. Here I set out a five-step framework, drawn from my discussion above, for approaching ethical issues that arise in a legal aid setting to help practitioners approach new ethical issues or variations on existing ethical dilemmas.

1. *Label the Issue in Ethics Terminology.* Is it an issue of client confidentiality? Conflict of interest? The discussion of limited assistance programs reveals the importance of accurate and complete issue spotting.

2. *Identify the Applicable Rules.* Begin with your jurisdiction's analog to the Model Rules of Professional Conduct (e.g., Rules 1.7–1.10 and 6.5 for conflict-of-interest issues). The applicable law also includes local and national ethics opinions, local court rules, and case law. As with any other area of law, some authority is controlling while ABA Ethics Opinions or decisions from other jurisdictions are instructive.

3. *Apply the Rules.* Applying the rules is easier said than done in some cases, particularly where scenarios that legal aid lawyers face are not the ones envisioned by the drafters of the rules. The rules might clarify what steps are prohibited, even if they fail to prescribe the best course of action.

4. *Analyze the Context and Interests of the Players Involved.* Compare interpretations of ethical rules facilitating limited assistance programs with cases prohibiting ghostwriting. Context matters.

5. *Assess Your Moral Compass on Individual Issues and the Interests of Your Client Pool on Systemic Ones.* Where ethics rules permit a range of behavior, remember your need to sleep at night and maintain your

reputation. Notions of zealous advocacy suggest that we aggressively pursue our client's stated goals at every turn. Yet ethical rules that emphasize our role as advisor, and that discuss our duties to third parties, the court, and the legal system, imply that a range of behavior is permissible. On systemic issues, the interests of the communities we serve should affect our interpretations of existing ethical rules or changes that we promote.

Unstated Assumptions in Ethics Rules and Enforcement Realities. Since the ethical rules were not drafted with a legal aid practice in mind, articulating unstated assumptions enhances the analysis even where it does not simplify the issues. First, although poor people appear in great numbers without counsel in civil proceedings, few ethical rules acknowledge unrepresented parties. Second, despite the desperate shortage of legal services for the poor, the ethical rules assume that clients have the resources to obtain lawyers.⁵² Third, the ethical rules assume a full-representation model—a reality challenged by the world of counsel and advice, limited assistance, ghostwriting, and unbundled legal services.⁵³ And, fourth, the ethical rules do not envision technological changes—an ongoing challenge for the profession far beyond the issues facing legal aid programs.

Complicating the analysis further, enforcement mechanisms are ill-equipped to respond to many ethical issues involving unrepresented litigants. We are a self-regulated profession, with rules written by lawyers and judges. Where the interests of lawyers and judges clash with those of nonlawyers and the public, we know whose interests will prevail.

Enforcement targets the “bad apple.” Lawyer behavior far outside the mainstream is more likely to draw attention than if “everybody does it.”

⁵²Rule 4.3(b) permits lawyers to advise an unrepresented person to secure counsel. Rule 1.16(d) envisions that lawyers terminating employment allow “time for employment of other counsel.”

⁵³Rule 6.5, an exception, has not been adopted in all jurisdictions.

While ethics issues generally have multiple enforcement mechanisms, two such mechanisms—the enforcement of ethical rules by disciplinary bodies and legal malpractice cases—typically involve actions between lawyers and their clients. They would be ineffective in regulating the conduct I discuss here. A third mechanism, oversight by the court, offers the only viable check on improper conduct.



Over thirty years ago Gary Bellow and Jeanne Kettleton recognized that our responses to persistent ethical dilemmas in public interest practice were inher-

ently political: “they reflect choices about what is and ought to be the parameters of power between lawyers, clients, and others, and between the public and the profession.”⁵⁴ Our response to the persistent problem of underrepresentation of the poor should include revising the roles of the key players, robust assistance programs, and expanded access to full representation where basic human needs are at stake and lesser forms of assistance cannot protect those basic needs. Where ethical issues prevent modes of assistance that poor people need, the battle to shape the ethics rules must be part of a law reform agenda.

⁵⁴Gary Bellow & Jeanne Kettleton, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 BOSTON UNIVERSITY LAW REVIEW 337, 389 (1978). [Editor’s Note: Gary Bellow, 1935–2000, inspired generations of poverty lawyers. He served as deputy director of California Rural Legal Assistance in the mid-1960s before joining the faculty of Harvard Law School, where he pioneered clinical legal education. Jeanne Kettleton, also known as Jeanne Charn, was married to Bellow, was often his coauthor, and is the director of the Bellow-Sacks Access to Civil Legal Services Project at Harvard Law School.]

COMMENTS?

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—The Editors

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