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### The Settlement Problem in Public Interest Law

Susan Carle

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# THE SETTLEMENT PROBLEM IN PUBLIC INTEREST LAW

Susan D. Carle\*

*Public interest lawyers, of many types and political persuasions, play a vital role in pursuing “public justice.” For public interest (as for all) lawyers, settlement provides an important means of resolving cases. Yet a persisting ambivalence about case settlement in public interest law contributes to the difficulties public interest practitioners face in sustaining themselves in practice. Indeed, public interest lawyers identify case settlement as posing some of the most vexing legal ethics problems they routinely confront.*

*The trouble often stems from the fact that, in public interest law where clients do not pay for legal services, the economic incentives that encourage paying clients to settle their cases do not apply. Clients of public interest lawyers do not have to pay for more legal services when they decide against settling, and clients may direct their lawyers to continue litigating far beyond any rational hope of favorable judgment. Yet public interest lawyers have limited time and other resources, and must triage among many clients with worthy cases who need their attention. What, in this situation, are public interest lawyers to do?*

*Cognizant of legal academics’ responsibility to help practitioners solve real world problems, this Article tackles this basic legal ethics conundrum in public interest case settlement. It starts by exploring what legal ethics principles dictate that public interest lawyers cannot do in case settlement, and then moves on to propose several alternatives that can help public interest lawyers protect their legitimate interests. The directions this Article proposes include: (1) using limited scope representation agreements to curtail the duration and scope of lawyers’ representation obligations; (2) introducing fee-for-service arrangements after a certain point in case representations; and (3) transferring case funding risks to third-party payers, such as nonprofit organizations, to which legal ethics strictures do not apply.*

*The underlying point of this Article is to spark creative yet practical discussion, in an experimental problem-solving spirit, about specific ethics problems that confront public interest practitioners. In so doing it joins a collective scholarly effort aimed at assisting public interest lawyers to maintain*

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\* Professor of Law, American University Washington College of Law. I wish to thank Bruce Green and Paul Tremblay, both legal ethics scholars extraordinaire, for helpful comments on an earlier draft; and Alison Hopkins, Matt (Brooks) Hagler, Danli Lan, Isaac Morales, Rachel Nadas, and Caitlin Whaley for excellent research assistance. Most importantly, I wish to thank the many public interest lawyers with whom I have been discussing legal ethics issues over the past two decades. This Article is dedicated to them.

*their long-term ability to practice, in order to promote the interests of the most vulnerable and marginalized persons in American society.*

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## INTRODUCTION

More than thirty years ago, in a famous article entitled *Against Settlement*, Professor Owen Fiss argued against settlement in public interest cases.<sup>1</sup> Fiss's provocation spawned an outpouring of responses over many years. Many commentators criticize Fiss's argument for a host of reasons.<sup>2</sup> Today, no one argues that public interest lawyers should not settle cases. Yet, an ongoing preoccupation with Fiss's article arguably reflects a deep, continuing ambivalence about case settlement in public interest law.

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1. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that judges' duty "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes" and "bring reality into accord with them . . . is not discharged when the parties settle").

2. See, e.g., Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1663 (1985) (arguing that "Fiss's model of traditional dispute resolution is flat; it is only an abstraction, and is therefore also a caricature. It has no relation to the world as it is"). In 2009, a retrospective symposium on Fiss's article collected critiques from many quarters. See Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117, 1119-21 (2009) (synthesizing leading commentators' many critiques of Fiss's classic article, including that it fails to confront "hard, practical realities"; that trials have "no monopoly on justice"; and that settlement can often achieve "greater justice" than adjudication) (internal quotations and citations omitted).

The issues that confront public interest lawyers in settling cases are often basic but thorny ones.<sup>3</sup> For example, what should a lawyer do when a non-fee-paying client decides against accepting a settlement offer the lawyer believes is the best outcome the client is likely to obtain? Sometimes it may be the client who wants to settle and the lawyer who wants to continue pursuing a case in order to establish a certain point of law.<sup>4</sup> Ethics precepts instruct lawyers to follow the client's instructions in both of these situations. Yet, when public interest lawyers are called upon to continue providing legal services to clients with hopeless cases, these lawyers face financial detriment and may soon find themselves out of business if they receive no compensation for their services.<sup>5</sup>

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3. Other issues that plague public interest lawyers involve complex cases such as class actions as well as the difficult demands of the aggregate settlement rule. Legal ethics scholars have written many important articles addressing these legal ethics issues, while more basic issues remain underexplored. For important articles addressing the aggregate settlement rule in MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2014), see, e.g., Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784-95 (2005) (examining various types of aggregate settlements and the ethics issues they present); Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233, 3257-66 (2013) (presenting expert thoughts on solutions to the problems created by Model Rule 1.8(g)); Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 513-30 (2012) (applying fundamental ethics principles to think through what should be required in aggregate settlements). Classic articles on ethics and class action settlements include Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1164-1219 (1995) (discussing ethics issues in class action settlements); and Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186-1202 (1982) (addressing conflicts in institutional reform litigation).

4. Derrick Bell explored this scenario in his classic article that spurred the growth of a public interest lawyering ethics literature. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472-513 (1976) (analyzing ethics issues presented when the parents of child plaintiffs in school desegregation cases wanted to settle with school districts for improved resources, but NAACP Legal Defense Fund lawyers wanted to litigate to push the principle of school integration). In my experience in the contemporary context, the scenario of lawyers recommending settlement but clients refusing is the more problematic one for public interest lawyers, so it is the problem of the non-settling client I focus on here. I address the opposite scenario of the lawyer who does not want to settle in Susan Carle & Scott Cummings, *A Reflection on the Ethics of Movement Lawyering*, 30 GEORGETOWN J. LEGAL ETHICS \*(forthcoming 2018).

5. For data suggesting a causal link between court doctrines making it harder for public interest lawyers to fund their practices and a decline in the number of practicing public interest lawyers, see Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1116-31 (2007) (finding that judicial attacks on attorney fees have restricted what cases public interest lawyers bring); Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & THE L. 268, 290 (2014) (explaining that states approving *cy pres* awards to public interest lawyers are increasing access to justice for those otherwise unable to afford representation); Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 89-90 (2017) (showing a positive link between the availability of donations and the number of public interest lawyers); Louise G.

Settlement poses special difficulties for public interest lawyers because, in economic terms, clients who receive free legal services do not have to “internalize” the costs of these services. They do not face the economic considerations that help discipline clients’ decisions about how much legal services to consume. Practical and monetary considerations necessarily constrain the ambitions of fee-paying clients. Clients who do not have to pay for legal services do not need to focus on the financial implications of settlement decisions in the same way that fee-paying clients do.

Moreover, political and ideological goals, rather than strictly monetary ones, often motivate clients in public interest cases. The potential complexity of such goals can further complicate client decisions about when and whether to settle. And clients who have decided to sue powerful institutions for breaches of the public interest often may not be the “settling” type. They may have a greater-than-average willingness to confront authority, and they may not be disposed towards accepting their counsel’s advice about when and how to end legal confrontations. In this Article, I refer to this basic set of problems involving non-fee-paying clients who do not want to heed their lawyers’ advice about whether to accept settlement offers as the *settlement problem in public interest law*.

Following many commentators and the Supreme Court in *In Re Primus*,<sup>6</sup> I define *public interest law* as having two features. First, public interest law involves legal services arrangements in which clients typically do not pay for the services they receive, usually because they cannot afford to do so. Second, in public interest law, attorneys typically provide legal services primarily for public-regarding reasons rather than primarily out of pecuniary motives. Public interest lawyers must make a living, of course, but their primary motive, as the Supreme Court has pointed out, is to advance public justice rather than to enrich themselves financially.<sup>7</sup> This, indeed, was why Fiss so ardently opposed

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Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417, 421-27 (2011) (proposing several methods, such as reducing public interest lawyers’ taxes and starting a public interest lawyers program, to help compensate public interest lawyers and encourage more lawyers to take public interest cases); *Perspectives on Finding Personal Legal Services: The Results of a Public Opinion Poll*, AM. BAR ASS’N STANDING COMM. ON THE DELIVERY OF LEGAL SERVS. (Feb. 2011), [https://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2012/05/national\\_meetingofstateaccessjusticechairs/ls\\_sclaid\\_atj\\_limited\\_scope.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/05/national_meetingofstateaccessjusticechairs/ls_sclaid_atj_limited_scope.authcheckdam.pdf) (explaining how limited assistance programs benefit low-income clients by helping lawyers get paid).

6. 436 U.S. 412, 429-31 (1978) (noting that the ACLU case representing indigent women who were being involuntarily sterilized was not motivated by pecuniary gain).

7. *Id.* More specifically, there are two kinds of public interest lawyers. One kind provides legal services without pay while someone other than the client pays the lawyer’s salary. These employers include the federal Legal Services Corporation, state legal aid systems, law school clinics, and nonprofit organizations funded by donors. A second kind of public interest lawyer supports her work solely or primarily through attorneys’ fees awards. Lawyers in the first kind of practice arrangement like receiving attorneys’ fees awards to support their work, but are not completely dependent on them and thus face less acute

case settlement in public interest cases and why ambivalence about settlement in this context remains: the role of public interest lawyers is or should be to achieve public justice, rather than to simply “settle” for something less.<sup>8</sup> Drawing from *In Re Primus*, Fiss, and many other sources, I use this two-part definition of *public interest law*, i.e., nonpaying clients + public regarding objectives = public interest law, for operational purposes in this Article.<sup>9</sup>

Public interest lawyers not only face potentially difficult clients, but also confront many other difficulties in settling cases. As many critics of Fiss’s anti-settlement position have pointed out, in the real world—as opposed to Fiss’s ideal world of pure “public justice”<sup>10</sup>—public interest lawyers confront an imperfect and harried judiciary. Over the past several decades, the judiciary has

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financial pressures of the type I discuss in this Article. Lawyers of the second type, who are often organized into small law firms, are dependent on attorneys’ fees awards to continue in business and face the problems I write about in this Article most acutely. Both kinds of public interest lawyers face the problem of clients who lack financial pressure in making settlement decisions, so I discuss them together here.

8. See Fiss, *supra* note 1, at 1084-85.

9. This definition of public interest lawyering can be subject to critique, but it works for the practical purposes of this Article. For a summary of the problems surrounding definitions of public interest law, see ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 5-32 (2013); see also Kathryn A. Sabbeth, *What’s Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 442-43 (2014) (discussing definitional problems). For the purpose of this Article, *public interest lawyers* refers to lawyers who: (1) represent clients who do not pay them for their services, and (2) do so out of nonpecuniary, altruistic motives related to promoting the public interest. See *In re Primus*, 436 U.S. at 422, 428-29, 438-39 (using this definition of public interest lawyering). Thus, a third party may pay a public interest lawyer to represent clients, and/or she may be hoping for attorneys’ fees at the end of a successful representation, which will help fund future cases. *Id.* In either situation, however, the usual disciplining mechanism on clients of having to pay for their lawyers’ services, and to pay more for more of their lawyers’ services, does not exist. As I will argue further in Part II.B.2 below, contingency fee arrangements may or may not fit within the public interest lawyering paradigm depending on their specific terms. See *infra* Part II.B.2.

Closely related to public interest law is the concept of providing access to justice to the many people who cannot afford to pay for legal representation. The U.S. Constitution provides no right to an attorney in civil cases, and the access to justice problem in the United States is enormous. See generally DEBORAH L. RHODE, ACCESS TO JUSTICE: AGAIN, STILL 1013 (2004) (noting that approximately four-fifths of the civil needs of the poor and two to three-fifths of the civil needs of middle income persons remain unmet); see also U.S. DEP’T OF JUSTICE, WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE TOOLKIT 3 (Feb. 2016), <https://www.justice.gov/lair/file/829321/download> (finding that 63 million Americans qualify for free civil legal assistance, but more than 50% of those seeking help are turned away for lack of resources); *Natural Allies: Philanthropy and Civil Legal Aid*, PUB. WELFARE FOUND. & THE KRESGE FOUND (2013), <http://www.publicwelfare.org/wp-content/uploads/2014/10/NaturalAllies.pdf> (finding that about 80% of the serious legal needs of low-income people do not have sufficient funding and support).

10. Professor Fiss described his ideal of public justice as best reflected the heroic work of Judge Frank M. Johnson, Jr., who presided over the desegregation of school districts in Montgomery, Alabama in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954). See Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1277 (2009). Judge Johnson faced extreme hostility from his local community for his heroic work. *Id.* at 1273.

crafted increasingly restrictive legal doctrines, which embody values far different from those Professor Fiss would endorse under the public justice banner. Public interest lawyers typically handle crushing caseloads, striving to do the best they can for as many desperate clients as possible. Public interest lawyers have altruistic motives; they want to help people, and they realize that the clients who end up in their offices lack the resources to obtain legal help elsewhere. They thus face great pressure to do as much for as many people as possible. They commonly must perform triage among many needy clients, while facing long odds with few resources in David-versus-Goliath-type legal contests.<sup>11</sup>

At the same time, public interest lawyers must sustain financially viable practice models. Scott Cummings and Deborah Rhode have tracked public interest lawyers' experimentation with new practice forms in response to decreases in public funding for delivering legal services to poor and other vulnerable populations.<sup>12</sup> In this environment (as, indeed, in all practice settings), settling cases offers an important avenue for resolving disputes. Settlement may produce better results for clients than going forth with the risks of litigating claims to final judgment.<sup>13</sup>

Legal ethics rules strictly regulate lawyers' actions in handling case settlements. Quite properly, the American Bar Association's ("ABA") Model Rule of Professional Conduct ("Model Rule" or "MR") 1.2(a) and its state equivalents dictate that lawyers may settle cases only when their clients authorize them to do so.<sup>14</sup> Moreover, as the Supreme Court has held, public interest lawyers are ethically required to accept settlement offers that deprive

11. See Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2487 (1999). For an analysis of how the calculation of odds in the David versus Goliath story can be turned on its head, see MALCOM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* (2015).

12. Scott Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 89 (2012) (noting the tradeoff private public interest lawyers face between their public interest mission and their need to pay their bills); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2036 (2008). Other kinds of law practice have some characteristics of public interest law. For example, traditional for-profit firms may do pro bono work and need attorneys' fees to continue to fund such work, and some plaintiffs'-side law firms may view themselves primarily as profit-making enterprises, yet still face tensions between their financial interest in case settlement and their ethical obligations to clients. See Howard M. Erichson, *Settlement in the Absence of Anticipated Adjudication*, 85 FORDHAM L. REV. 2017, 2022-23 (2017) (discussing conflicts of interest lawyers face in court-awarded attorneys' fee cases as a general matter).

13. See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 67 (2010) (reporting on how civil rights cases are particularly vulnerable to dismissal under the Court's new pleading standards); Paul Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 11 (2008) (examining various ways in which the Court's developing jurisprudence has rendered public interest litigation unsustainable).

14. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2014) (stating that "[a] lawyer shall abide by a client's decision whether to settle a matter").

lawyers of statutory attorneys' fees when this is best for their clients or when their clients want them to do so.<sup>15</sup> Many critics have argued that the Court's picture of public interest lawyers as able to continue to practice despite receiving no payment for their services when they settle cases ignores practice reality.<sup>16</sup> Public interest lawyers who rely on attorneys' fees can continue to practice only if they are able to receive the attorneys' fees Congress has authorized. Congress has done so in more than one hundred statutes that shift attorneys' fees to plaintiffs when they have successfully pursued cases affecting the public interest in areas such as civil rights, environmental law, and whistleblower protection.<sup>17</sup>

This Article addresses the basic but pressing legal ethics problems public interest lawyers face when non-fee-paying clients do not want to accept lawyers' settlement advice.<sup>18</sup> After analyzing the problem, this Article offers several ethically permissible paths towards a solution. Part I addresses the law under MR 1.2(a) and other legal ethics rules.<sup>19</sup> These rules provide a legal baseline for how the settlement problems in public interest law can be addressed. The rules state that clients must have unrestrained rights to instruct their lawyers as to settlement. Lawyers who disregard this principle face potential disciplinary consequences, and no lawyer should risk this, no matter how frustrating settlement problems in public interest law may be. This does not necessarily mean, however, that public interest lawyers must accede to unreasonable demands. Just as in any other representation, lawyers who agree to represent non-fee-paying clients are entitled to legally appropriate protections against clients monopolizing their time, efforts, and other limited resources in pursuit of unreasonable or unattainable goals. In public interest representations, the costs of client unreasonableness fall on lawyers' shoulders (as well as other potential clients in need of services). Solutions must be found that shift these costs away from lawyers (and, indirectly, other clients). Such

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15. *Evans v. Jeff D.*, 475 U.S. 717, 727-28 (1986). This Article discusses in detail the problems posed after the Court's decision in *Evans v. Jeff D.* in Part II.B.1 below.

16. See, e.g., David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 241-45 (2003) (presenting an important critique of *Evans v. Jeff D.*). See also sources cited *infra* note 55.

17. For a discussion of these many attorneys' fees statutes, see generally HENRY COHEN, CONG. RESEARCH SERV., ORDER CODE 94-970, AWARD OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (June 20, 2008), <https://fas.org/sgp/crs/misc/94-970.pdf>.

18. On the "flip side" problem of the client who wishes to settle rather than litigate to judgment, see *supra* note 4, the answer would in most circumstances be the same: lawyers must abide by their client's decisions on settlement, even if the client has previously bound herself in a retainer agreement to handle settlement in a different way, as I discuss *infra* Part I.

19. In the United States, which will be my focus here, most jurisdictions in general terms follow the ABA Model Rules. Each state adopts its own version of these rules, so the precise language of the applicable rules may vary depending on jurisdiction. On the legal ethics principles regarding case settlement, most jurisdictions track the Model Rules, so I cite to them throughout this Article.



solutions must reconcile the important interests on all sides of the problem. They should preserve the legal ethics principle that grants primacy to clients' rights to make settlement decisions. At the same time, they should protect lawyers' traditional rights to shape the duration, costs, and structure of the legal representations they provide.

Part II outlines three such possible approaches. They involve: (A) crafting limited scope or duration representation agreements more often in public interest representations, (B) designing representation agreements that reduce clients' obliviousness to the costs of lawyers' services by imposing some expenses on clients in protracted representation scenarios, and (C) adopting representation arrangements that transfer responsibility for funding and for the risks of irrational settlement decisions away from lawyers and to third-party payers.

### I. WHAT LAWYERS MAY NOT DO

Before examining what lawyers ethically *may* do in the face of settlement problems in public interest law, it is helpful to examine in some detail existing law on what lawyers *cannot* do to interfere with clients' control of settlement decisions in their cases. Abundant law addresses the prohibitions on: (A) lawyer control over client settlement decisions, (B) lawyer use of retainer agreement provisions to alter the default allocation of decision-making to clients, and (C) lawyer withdrawal from a case following a client's rejection of a lawyer's advice about settlement.

#### A. *Lawyers May Not Take Away Clients' Rights to Make Settlement Decisions*

Model Rule 1.2(a) states, in no uncertain terms, that clients, not lawyers, have the right to make settlement decisions in their cases. Lawyers may and should advise their clients about settlement offers, but the ultimate decision is for the client to make, even if the lawyer thinks it ill advised. Thus, in plain language, this rule states that "[a] lawyer shall abide by a client's decision whether to settle a matter."<sup>20</sup>

There is no wiggle room in this default allocation of decision-making authority about settlement between client and lawyer. Moreover, as I will explain below, the case law makes it clear that this default allocation may not be changed by agreement—*i.e.*, in the case of a contract for the provision of legal services, through the parties' retainer agreement. The matter is one of inalienable right, not contract.

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20. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983).

B. *Lawyers May Not Vary the Allocation of Decision-Making Authority on Settlement through Contract*

Although I have met public interest lawyers who want to argue to the contrary, the overwhelming weight of legal authority provides that retainer agreements cannot alter the allocation in MR 1.2(a) of settlement decision-making authority between lawyer and client. In other words, lawyers and clients may not by agreement alter the policy embodied in MR 1.2(a).

When courts examine retainer agreements that purport to give an attorney control over settlement decisions in a particular case, they typically declare such agreements contrary to the applicable state rules of professional responsibility, and/or contrary to public policy, and thus void.<sup>21</sup> Even more to the point, courts sometimes find lawyers who have improperly contracted with clients in this way to have violated the applicable state rules of professional responsibility.<sup>22</sup> State legal ethics committees routinely reach the same result.<sup>23</sup>

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21. See, e.g., *Walton v. Hoover, Bax & Slovacek, L.L.P.*, 149 S.W.3d 834, 843 (Tex. Ct. App. 2004) (clients have the right to decide whether to accept a settlement offer under Texas Disciplinary Rule of Professional Conduct 1.02(a)(2), and “a fee agreement may not contain a provision that infringes on this right”), *on reh’g*, 206 S.W.3d 557 (Tex. 2006), *vacated as moot due to settlement*, 2007 WL 416694 (Tex. Ct. App. 2007); *Parents Against Drunk Drivers v. Graystone Pines Homeowners’ Ass’n*, 789 P.2d 52, 55 (Utah Ct. App. 1990) (declaring that fee agreements that give attorneys control over the settlement of clients’ cases are contrary to the Utah Code of Professional Responsibility as well as contrary to public policy and thus void).

22. See, e.g., *In re Grievance Proceeding*, 171 F. Supp. 2d 81, 84-85 (D. Conn. 2001) (finding, in a case a judge referred to the Grievance Committee of the United States District Court for the District of Connecticut, that an attorney’s conduct in using a written fee agreement that delegated all settlement authority to the attorney violated the Connecticut Rules of Professional Conduct); *In re Coleman*, 295 S.W.3d 857, 864 (Mo. 2009) (en banc) (holding that a lawyer improperly contracted with his client for the exclusive right to settle her case without her consent, violating Missouri Rule of Professional Conduct 4-1.2(a), by including a provision in the retainer agreement stating that “you agree I shall have the exclusive right to determine when and for how much to settle this case. That way, I am not held hostage to an agreement I disagree with”).

For some cases reaching contrary results, see Alex B. Long, *Attorney-Client Fee Agreements that Offend Public Policy*, 61 S.C. L. REV. 287, 312-15 (2009) (noting that some courts have not disciplined lawyers for such provisions, but arguing that lawyers who include such provisions have engaged in “serious misconduct”).

23. See, e.g., OH Adv. Op. 2010-6, 2010 WL 4038613, at \*3 (Ohio Bd. of Comm’rs on Grievances & Discipline 2010) (stating that, “[a]s required by Prof. Cond. Rule 1.2(a) and as explained in Comment [1], a decision to settle must be made by the client, not the lawyer. Further, as required by Prof. Cond. Rule 1.4(b), there is a duty for a lawyer to explain a matter so that a client is able to make an informed decision. Neither of these rules is fulfilled when a client signs a contingent fee agreement at the onset of representation granting the attorney authority to take action and execute the documents the attorney deems necessary in the matter, including the settlement of a matter”); *Lawyer Approval of Settlement*, RPC145 (N.C. State Bar 1993), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-145> (concluding that a lawyer may not include language in an employment agreement with a client that divests the client of her exclusive authority to decide whether to settle her case); *Utah Opinion No. 98-05* (1998) (stating that the client must have the final say on settlement and this ultimate client authority cannot be contracted away).

The *Restatement of the Law Governing Lawyers* and the ABA Section of Litigation's *Ethical Guidelines for Settlement Negotiations* say the same.<sup>24</sup>

Nor are the disciplinary consequences insignificant. Courts that discover that lawyers have used retainer provisions in which clients purportedly assign the right to make settlement decisions to their lawyers may suspend from practice the lawyer involved.<sup>25</sup> Although the law is clear on this point, some public interest lawyers do use this approach to insure against runaway client decisions. I have not attempted to investigate systematically how often such arrangements are offered to clients for the simple reason that I would find myself ethically compromised if I knew that this practice was occurring despite the rules of professional conduct that forbid it. Suffice it to say that public interest lawyers expose themselves to potential legal ethics censure if they attempt to assign the right to make settlement decisions to themselves through retainer agreements.

C. *Lawyers May Not Contract with Clients for the Right to Withdraw Following Rejection of Settlement Advice*

Another approach public interest lawyers may consider is asking clients to agree, at the start of a representation, to consent to their lawyer's withdrawal from the client's representation if the client rejects the lawyer's settlement advice. To determine the legality of this approach, one must turn to the rules of professional conduct governing a lawyer's withdrawal from client representation. Those rules typically divide the considerations that apply to lawyer withdrawal into two categories, one involving a lawyer's potential mandatory duty to withdraw, and the second dealing with situations in which withdrawal might be permissible. The conditions for mandatory withdrawal exist only when a lawyer's continued representation of a client would result in

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24. See RESTATEMENT OF LAW GOVERNING LAWYERS § 22 cmt. c (2000) (stating that lawyers are prohibited from irrevocable contracts stating that the lawyer will decide on the terms of settlement); Am. Bar Ass'n Section of Litig., ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS § 3.2.3, "Avoiding Limitations on Client's Ultimate Settlement Authority" (Aug. 2002) [hereinafter ABA LITIGATION SECTION ETHICAL GUIDELINES FOR SETTLEMENT] ("A lawyer should not seek the client's consent to, or enter into, a retainer or other agreement that purports to . . . grant the lawyer irrevocable authorization to settle"); *id.*, at 16 ("Conditioning agreement to representation on a waiver of the client's right to approve a future settlement, or on the client's agreement not to settle without the lawyer's approval, would fundamentally and impermissibly alter the lawyer-client relationship and deprive the client of ultimate control of the litigation. A lawyer's insistence on such a provision would seem calculated to place the lawyer's interests ahead of the client's interests, and is potentially coercive.").

25. See, e.g., *In re Lansky*, 678 N.E.2d 1114, 1115 (Ind. 1997) (suspending a lawyer for entering into an agreement with his client which, *inter alia*, improperly stated that clients "hereby authorize our attorney to settle this matter for any amount he determines is reasonable without further oral or written authorization."); *In re Coleman*, 295 S.W.3d at 864 (suspending a lawyer for one year for improperly including retainer agreement language under which the client gave up her right to decide whether to settle her case).

the lawyer violating the rules of professional conduct or other law, or when a client wants to fire her lawyer. These conditions probably will not exist in most situations in which a client has simply rejected settlement advice.<sup>26</sup> The factors supporting permissive withdrawal may be more promising, however, since they include situations in which “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”; when “the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client”; or when “other good cause for withdrawal exists.”<sup>27</sup> Some or all of these factors may well exist when a client and a public interest lawyer have disagreed about a lawyer’s settlement advice. Thus, there would be no apparent ethical problem in a lawyer asking to withdraw from a client representation after a client refuses settlement advice on grounds of financial burden, fundamental disagreement with the client, or, in some situations, the client having rendered the representation unreasonably difficult. The hitch is whether this approach will be *successful*, which is a question of a different order.

There are important kickers to Model Rule 1.16(b), however. First, as stated in MR 1.16(b)(1), withdrawal must not have a material adverse effect on the interests of the client. Second, as stated in Model Rule 1.16(c), “[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”<sup>28</sup> As lawyers know all too well from practice experience, courts are loath to grant permission to terminate representations

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26. MODEL RULES OF PROF’L CONDUCT R. 1.16(a) (1983), “Mandatory Withdrawal,” states:

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  - (1) the representation will result in violation of the rules of professional conduct or other law;
  - (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
  - (3) the lawyer is discharged.

27. MODEL RULES OF PROF’L CONDUCT R. 1.16(b) (1983), “Permissive Withdrawal,” (4), (6) & (7). The full text of MR. 1.16 (b) states:

- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
  - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
  - (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
  - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
  - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
  - (7) other good cause for withdrawal exists.

28. MODEL RULES OF PROF’L CONDUCT R. 1.16(c) (1983).

when a case is ongoing—especially if the client cannot pay for substitute counsel and thus is unlikely to secure any. From the perspective of judges, it is in the interests of justice to order lawyers to continue handling matters presently before the court, even if those lawyers are less than pleased to be doing so. Courts know that they can typically count on lawyers' ethics and professionalism to do a good job anyway.

Thus, a provision in a retainer agreement purporting to bind a client to agree to a lawyer's permissive withdrawal from her case if she and her lawyer disagree about settlement is not likely to meet with the court's sympathy. The lawyer and client cannot contract out of the lawyer's duty to request permission from the tribunal before withdrawing on non-mandatory grounds. The lawyer may request permission to withdraw from a case where a client refuses to accept settlement advice, provided the lawyer can do so without material adverse effect on the client. In public interest cases where a client has little chance of finding other counsel, this condition may often not be satisfied *ab initio*. But, even if the lawyer believes she can withdraw without any material adverse effect on the client, judges' institutional incentives are to deny permission to withdraw based on justifiable concerns about the smooth functioning of the judicial system. Granting the lawyer permission to withdraw leaves the lawyer's client *pro se* and thus becomes the *judge's* problem. From courts' institutional perspective, lawyers are officers of the court and have the responsibility to help its processes run smoothly.<sup>29</sup>

If legal ethics analysis led only this far, there would be no particular harm in including retainer agreement provisions under which clients purport to give consent to lawyer withdrawal in the event of a disagreement about whether to settle; the provision simply might not be enforced. But some legal authorities point to a more troublesome conclusion. When asked to focus on specific retainer agreement provisions in which clients purportedly promise that they will consent to their lawyer's withdrawal from representation in the event of a dispute about settlement, some courts and ethics committees conclude that lawyers have violated the professional rules in putting such a provision in their retainer agreement.<sup>30</sup> Decision-makers in these cases reason that such

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29. See, e.g., ABA Comm. on Professional Ethics, Informal Op. C-455 (1961) (concluding, under Model Rules predecessor Canon 44, that a client's refusal to settle does not constitute good cause for withdrawing from the representation); see also *May v. Seibert*, 164 W. Va. 673, 679 (1980) ("No cases are cited and we have found none that state that refusal by a client to accept a 'reasonable' settlement is good cause for withdrawal. [String of case citations omitted] state that withdrawal because a client refuses to accept a settlement is unjustified."). There are, of course, many contrary authorities in which courts do grant lawyers permission to withdraw from representations, but in many of these cases it is a host of difficult client behaviors, such as refusing to cooperate with counsel, that constitute the grounds for permissive withdrawal. See, e.g., *Team Obsolete Ltd. v. A.H.R.M.A. Ltd.*, 464 F. Supp. 2d 164, 166 (E.D.N.Y. 2006) (holding that client's refusal to pay legal fees warranted lawyer's withdrawal from the representation).

30. See, e.g., Conn. Bar Ass'n Comm. On Prof'l Ethics, Informal Op. 95-24 (1994), 1995 WL 18241185 (a provision in a fee agreement that gives the attorney the absolute right

agreements are unduly coercive and in essence take settlement decisions away from clients—especially clients who cannot pay for substitute counsel since those clients will effectively be unable to proceed without their lawyers' representation. On this reasoning, the client may be coerced by their lawyer's imminent withdrawal to accept the lawyer's settlement advice they otherwise would want to reject.<sup>31</sup>

One might argue against the reasoning in these cases, but it nevertheless reflects the view of some courts and other legal ethics authorities. In light of these opinions, the possibility exists that a court considering a lawyer's request to withdraw from representation might discipline the lawyer if the lawyer points to an agreement under which the client has purported to grant advance consent to the lawyer's withdrawal if the client refuses settlement advice. The practice of including such provisions in retainer agreements should thus be avoided. The lawyer clearly may ethically request permission to withdraw, but runs the risk of censure if she purports to obtain advance consent from the client for such withdrawal. Other solutions must be found instead.

## II. WHAT LAWYERS MAY DO

This Part will consider other possible approaches to the settlement problem in public interest law. It proposes several possible avenues for solution, each attacking different aspects of the problem. One aspect of the problem, as noted above, is the lack of effective limitations on the scope and duration of the lawyer's duty to provide legal services. Another aspect of the problem is the lack of financial incentives on the client who is not paying for services. A third is the coupling of the lawyer's resources with the client's decisions, which is

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to withdraw if the client refuses to accept a settlement proposal the attorney thinks should be accepted violates the Rules of Professional Conduct because it diminishes the client's right to decide whether to settle and on what basis); Mich. Eth. Op. C-233 (1984), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/settlementnegotiations.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf) (under the Michigan ethics rules, it was unethical for a staff attorney of a group legal services plan to require a client to sign an "authorization to settle" form with an amount indicated and to grant the lawyer permission to move to withdraw from the representation if the client refused to settle for that amount); cf. *Florida Bar v. Hollander*, 607 So. 2d 412, 415 (Fla. 1992) (disciplining an attorney who had moved to withdraw over the client's objection, stating that "it is also the Court's view that any contingency fee contract which permits the attorney to withdraw from representation without fault on the part of the client or other just reason, and purports to allow the attorney to collect a fee for services already rendered would be unenforceable and unethical.").

31. See, e.g., Conn. Bar. Ass'n Comm. On Prof'l Ethics, Informal Op. 95-24, *supra* note 30; ABA LITIGATION SECTION ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS, *supra* note 2424 § 3.2.3 ("A lawyer should not seek the client's consent to, or enter into, a retainer or other agreement that purports to (a) grant the lawyer irrevocable authorization to settle; (b) authorize the lawyer to withdraw if the client refuses the lawyer's recommendation to settle; (c) require the lawyer's assent before the client can settle; or (d) otherwise attempt to relieve the lawyer of ethical obligations.").

not the usual situation in fee-for-services arrangements. This Part proposes solutions targeted to each of these aspects of the problem in turn.

A. *Lawyers May Limit the Scope and Duration of Their Representation Obligations*

To recap the analysis offered thus far, one aspect of the settlement problem facing public interest lawyers is the lack of reasonable limits to the duration or scope of the lawyer's duty to provide legal services to the client. The reason this tends to be more of a problem in public interest law than in fee-for-service arrangements is that having to pay for legal services tends to discipline client desires, yet no such disciplining mechanism exists when the client is not paying for services. This formulation of the problem suggests a solution. If the problem is a lack of limitations on the scope and/or duration of the lawyer's services, then perhaps a solution can be for public interest lawyers to exercise options that typically allow lawyers to limit the scope and/or duration of the services they provide clients.

Model Rule 1.2(c), as embodied in similar rules adopted by the states, articulates the applicable principle. That rule states that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."<sup>32</sup> At a basic level, there is nothing novel or controversial about this principle; virtually all legal representations are limited in scope to some degree. Lawyers and clients together define the scope of the legal problem or problems they intend for the lawyer to address, and lawyers then typically draft a provision defining the scope of the representation being undertaken, which they include in the retainer agreement they offer the client.

What is more novel and somewhat more controversial are experiments innovators in the access to justice movement have undertaken. These innovators seek to push the bounds of the limited scope representation concept. They champion "unbundling" various aspects of the legal services lawyers typically provide clients in order to lower the cost of legal services. The idea is that clients can agree to receive only some aspects of the legal services lawyers generally perform.<sup>33</sup> Thus, for example, a client might represent herself in court pro se, yet seek limited legal help from a lawyer in drafting pleadings she must submit to the court. Or, as often happens in traditional representations, a client might pay a lawyer for an initial consultation on a matter but then not retain the lawyer for subsequent representation throughout the legal process in which it will be resolved.

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32. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983).

33. See generally, AM. BAR ASS'N SECTION OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html).

Unbundled legal services arrangements must meet the ethics requirements for any representation arrangement. Most significantly, as the comments to Model Rule 1.2 (c) advise, “[a]lthough this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.”<sup>34</sup> The lawyer still has the “duty to provide competent representation,”<sup>35</sup> and all of the other ethics considerations laid out in the rules of professional conduct typically also apply, including the duties of confidentiality, avoidance of conflicts of interest, and the like.

Members of the access to justice movement have worked to educate courts about the benefits of permitting limited representation arrangements. They have convinced some courts to adopt reforms on a variety of issues, including permitting ghostwriting of pleading for pro se plaintiffs.<sup>36</sup> In some but not all states, access to justice advocates have persuaded courts to adopt new rules that explicitly permit and lay out various requirements for unbundled or limited legal services arrangements.<sup>37</sup> To give just a few examples, California and Kansas allow limited scope legal services arrangements for some but not all types of cases. These jurisdictions usually permit such arrangements in cases in which pro se representation is common, such as consumer law, wills and estates, bankruptcy, domestic violence, and divorce.<sup>38</sup> Other states allow

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34. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) cmt. 7 (1983).

35. *Id.* Comment 7 further states, “for example, if a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *See* Rule 1.1.”

36. In Florida, Iowa, Louisiana, Kansas, Massachusetts, Nebraska, New Hampshire, Wisconsin, and Wyoming, a lawyer who drafts or assists in drafting pleadings or other documents for a client must specify in the pleading or other documents that they are prepared with the assistance of a counsel. *See* FL. R. PROF. CONDUCT 4-1.2; IOWA R. CIV. P., 1.423(1); LA. DIST. CT. R. 9.12; KS. SUP. CT. 115A(c); MASSACHUSETTS SUPREME JUDICIAL COURT ORDER REGARDING LIMITED ASSISTANCE REPRESENTATION, <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/lar.html>; NEB. R. OF PROF. CONDUCT 501.2(c); N.H. SUPER. CT. R. CIV. R. 17(g); WI. SUP. CT. R. 1.2(cm); WYO. R. PROF. CONDUCT R. 1.2 cmt. 7. However, in Illinois, Mississippi, Missouri, and Montana, a lawyer can help pro se litigants prepare pleadings and other court documents without informing the court that the documents are prepared by a lawyer. *See* ILL. SUP. CT. R. 137; MISS. R. OF PROF. CONDUCT R. 1.2(c) cmt.; MO. R. CIV. P. 55.03(a); MONT. R. CIV. P. 11. In California, a lawyer can assist a client in drafting legal documents without disclosing the lawyer's identity on the documents, but must notify the court about the limited scope representation if the lawyer is to appear in court. CAL. R. CT. 3.37.

37. *See* Appendix A *infra* (summarizing these rules).

38. *See, e.g.*, Superior Court of the District of Columbia Administrative Order 14-10, Limited Appearances in the Civil Division, Probate Division, Tax Division, Family Court, and Domestic Violence Unit – Supersedes Administrative Order, Nos. 08-02, 11-07 and 12-08D.C [hereinafter Superior Court of the District of Columbia Administrative Order 14-10]



limited scope representations in all cases but with controls. The Illinois Superior Court, for example, permits attorneys to file a “Notice of Limited Scope Appearance” that identifies “each aspect of the proceeding to which the limited scope appearance pertains.”<sup>39</sup> This Notice of Limited Scope Appearance gives attorneys the opportunity to: limit their appearance to specific proceedings, clarify that the representation does not extend to all matters within the proceedings, and identify the discrete issues within a proceeding that are governed by the appearance.<sup>40</sup> Similarly, the Superior Court of the District of Columbia provides that in some of its divisions an attorney may limit an appearance in court to a specific date, time period, activity, or subject matter, by filing a Notice of Limited Appearance with the clerk of the court.<sup>41</sup>

Most states require a lawyer who offers limited representation to notify the court, the opposing counsel, and all of the parties involved in the case of the scope, subject matter, and time period of the limited representation.<sup>42</sup> States differ widely in their requirements for terminating a limited scope representation, with some states requiring no more than the filing of a notice of completion but others imposing more onerous steps.<sup>43</sup> Thus, various

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(June 16, 2014) (allowing limited scope representation in the civil division, probate division, tax division, family court, and the domestic violence unit, but not in jury trials; attorneys who accept representation in a matter that continues to a jury trial must either withdraw before voir dire begins or continue representation through the return of the verdict).

39. ILL. SUP. CT. R. 13.

40. *Id.* The rule further states that the non-attorney remains responsible for any matter not specifically identified in the Notice of Limited Scope Appearance.

41. Superior Court of the District of Columbia Administrative Order 14-10. Other states that explicitly permit a lawyer to enter a limited appearance in court as long as the lawyer files a notice of limited appearance prior to or simultaneously with the proceeding include Colorado, Florida, Indiana, Iowa, Kansas, Massachusetts, Mississippi, Montana, and Washington. *See* COLO. R. CIV. P. 121; IND. R. TRIAL P. 3.1; IOWA R. CIV. P. 1.404(3); KS. SUP. CT. R. 115A(b)(1); Massachusetts Supreme Judicial Court Order Regarding Limited Assistance Representation (effective May 1, 2009), <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/lar.html>; MISS. R. OF PROF. CONDUCT r. 1.2(c); MONT. R. CIV. P. 4.1(c); WASH. SUPER. CT. CIV. R. 4.2. California allows limited appearance in civil proceedings only, particularly in family court. *See* CAL. R. CT. 3.35-3.36. Maine allows a lawyer to file a limited appearance only if the client consents in writing. ME. R. PROF'L CONDUCT 1.2(c). Maryland requires a lawyer who enters limited appearance to submit a form of acknowledgement of the scope of limited representation. MD. R. P.2-131.

42. *See* ABA Standing Comm. on the Delivery of Legal Services, Rules, AM. BAR ASS'N, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/court\\_rules.html](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html) (last visited Nov. 17, 2016). These additional states include Alabama, Alaska, Arkansas, California, Florida, Kansas, Louisiana, North Dakota, and Washington. *Id.*

43. To withdraw from a limited-scope representation in most states, including Alaska, Arkansas, Indiana, Kansas, Maryland, Massachusetts, Nebraska, New Mexico, Tennessee, Utah, Vermont, Washington, and Wyoming, a lawyer is required to file a notice of completion of representation and serve it on all parties involved. *See* KS. SUP. CT. R. 115A(b)(6); MD. R. P. 2-132; Massachusetts Supreme Judicial Court Order Regarding Limited Assistance Representation, <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/lar.html>; Nebraska Court Rules of Pleading in Civil Cases Rule 6-1109(i); N.M. R.

jurisdictions approve of different degrees of limited scope representation, ranging from an attorney's very short-term and behind-the-scenes giving of help to an otherwise pro se litigant to far more complex and robust arrangements that eventually approach the typical full-service yet limited-scope representations lawyers traditionally provide.

In classic public interest areas involving civil rights or "Section 1983" litigation, such as police misconduct and anti-discrimination cases, as well as whistleblower lawsuits and the like, I have found little evidence that limited scope representation has taken on noticeable popularity once past the stage of the filing of a complaint. (Prior to filing a complaint, of course, there is much limited scope representation in all matters, in fact, if not in name, as lawyers meet with prospective clients to determine whether to take their cases and, if so, to advise on the feasibility of litigation and other preliminary matters.) The most likely reason there is no particularly noticeable uptick in parties' use of limited scope representation arrangements in classic civil rights and other public interest representations is that such cases tend to be complex; they are not the type of relatively straightforward matters for which innovators first designed the unbundled legal services concept. Yet it bears exploring whether certain types of limited scope representation agreements might be helpful to

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CIV. P.1-089(C); TENN. R. CIV. P. 11.01; UTAH R. CIV. P.74(b); VT. R. CIV. P. 79.1(3); WASH. SUPER. CT. CIV. R. 70.1; WYO. U.R.D.C.102(a)(2)(C). Similarly, in Colorado, Florida, and Idaho, Iowa, Maryland, and Nebraska, a lawyer is allowed to terminate representation without leave of court as long as the lawyer files a notice of completion of limited appearance. *See* COLO. R. CIV. P. 121(5) cmt.; FLA. FAM. L.R.P.12.040(b)-(c); IDAHO R. CIV. P. 11(b)(5); IOWA R. CIV. P. 1.404(4); NEB. CT. R. PLDG. 6-1109(i). In Connecticut, when a lawyer has filed a notice of limited appearance and has completed the representation described in the limited appearance, the lawyer is not required to obtain permission of the tribunal to terminate the representation before filing the certificate of completion. *See* CONN. R. PROF'L CONDUCT 1.16 cmt. In Illinois, there are two alternative ways for an attorney to withdraw when the limited representation has been completed. ILL. SUP. CT. R. 13 (c)(7) cmts. The first method, an oral motion, can be used whenever the representation is completed or before a hearing attended by the party the attorney represents. Prior notice of such a hearing is not required. The second method, filing a "Notice of Withdrawal of Limited Scope Appearance," allows the attorney to withdraw without having to make a court appearance, except when there is a genuine dispute about the attorney's completion of the representation. The notice must be served on the presiding judge, the parties involved, and other counsel in the case. *Id.* In Maine, a lawyer is exempt from the standard withdrawal procedure and may automatically withdraw upon completion of representation. *See* ME. R. CIV. P. 89(a). Some states impose more onerous requirements for withdrawing from limited representation, such as requiring new permission from the client, the court and/or other parties in the case. In Arizona, for example, a lawyer must file a "Notice of Withdrawal," signed by both the lawyer and the client, to withdraw from representation or, if the client does not consent, the lawyer must file a motion to withdraw. *See* ARIZONA R. CIV. P. 5.2(c). In California, in order to withdraw from a limited scope representation a lawyer must file with the court an "Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation," and serve this application on all parties in the case. *See* CAL. R. CT. 3.36 (e) and (h). If a party to the case files an objection against the lawyer's withdrawal, the court must schedule a hearing no later than 25 days from the date the objection is filed. CAL. R. CT. (g).

public interest lawyers seeking to avoid the settlement problem in public interest law, even in complex cases.

Several types of limited scope arrangements might work along these lines. For example, a lawyer can certainly limit her obligations to a client by agreeing at the outset only to provide an initial consultation to discuss the law applying to the case. The lawyer in this scenario should define this limited scope representation agreement in writing. There is no ethical proscription against such an agreement, provided the lawyer meets all other ethical duties including the duty to do adequate legal research and investigation of the facts.<sup>44</sup> Lawyers routinely enter into such limited scope representations in all areas of law.

Another relatively straightforward limited representation arrangement in many cases would have a lawyer agree to represent a client through initial negotiations with an opposing party to attempt to resolve a dispute before formal filing of a complaint with the relevant adjudicatory tribunal. It is common knowledge that this type of representation agreement occurs frequently; in legal practice outside the public interest context, no one would think it odd or possibly impermissible for a lawyer and client to contract for this type of legal service before or without committing to full-scale litigation.<sup>45</sup> If lawyers can contract with fee-paying clients for this type of limited-scope obligation, there would appear to be no reason they could not do so in public interest practice.

To be sure, when a client cannot afford to pay for legal services, he has far fewer (or even no other) options for obtaining a lawyer to represent him in litigation if negotiations to resolve the dispute fail. But there is no reason that a public interest lawyer who has agreed to represent a client through negotiations but no further should have more obligation to continue representation than lawyers with fee-paying clients do. To conclude otherwise is to impose stricter requirements on public interest lawyers than other members of the bar. On this issue, as on others I will discuss below, courts should avoid treating public interest lawyers representing vulnerable clients differently than other lawyers. Imposing stricter requirements on public interest lawyers has the perverse effect of making it harder for them to practice and, in the long run, limiting the availability of legal services for the very people the courts are trying to protect.

In short, all lawyers have an obligation to reach agreements with clients about a reasonable scope of representation after informed consent.<sup>46</sup> If it is reasonable for a fee-for-service lawyer to agree to represent a client through

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44. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) cmt. 6 (1983).

45. *Cf. Id.* ("A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly . . .").

46. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983).

negotiations but not beyond, as it undoubtedly can be for many reasons,<sup>47</sup> then it is likewise reasonable for a public interest lawyer to do so. This lawyer's client may not find someone to handle her litigation if negotiations fail, but that would be the case even if the lawyer had not agreed to provide limited-scope representation. The client is better off than she would be if she had no lawyer at all. Clients without financial means may be forced to choose between less than ideal options, but this is true of most choices individuals make. Within the bounds of all other applicable ethical rules, the client's financial dilemma should not mandate that the public interest lawyer take on a commitment broader or longer than that required in other client scenarios.

As already noted, public interest lawyers do not often avail themselves of the option of limited-scope representation in the phase prior to the formal filing of a case in court. They may choose not to do so out of concerns about protecting especially vulnerable clients; they may, for example, worry about "abandoning" a client if negotiations fail. But here as in other scenarios I will discuss below, the public interest lawyer might be counseled to keep in mind her obligations to other present and future clients, as well as the limits on resources and time she faces. Getting in too deep with one client may impinge on her ethical duties to other clients, as well as other aspects of ethical prudence in sustaining her law practice in the long term. Just as fee-for-service lawyers in the United States have the right to select their clients and define the scope of the legal representation they offer the clients they choose to represent, public interest lawyers should exercise prudent discretion on these matters as well. Public interest lawyers, like all lawyers, have the right to husband resources, time, and energy, and to attend to the financial health of their practice. One way they can do so is by making prudent decisions, within reasonable limits, about the scope and duration of the legal representation they offer worthy clients.

In the scenario discussed above, the client agrees, after informed consent, to accept a representation arrangement that ends before litigation starts. Thus, the lawyer has not yet filed a notice of appearance before a tribunal. This leaves limited scope representation fairly straightforward. Once a lawyer files a notice of appearance, however, the relevant tribunal begins to monitor the process through which the parties' dispute will be resolved, and this adds a further layer of complexity. The filing of a case triggers an outside adjudicator's involvement, and different considerations come into play. The adjudicator typically has the power to order the lawyer to continue representation. The lawyer must not only attend to ethics considerations, but also must consider her actions from the perspective of the adjudicator, who can exercise discretionary

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47. In the context of fee-paying clients, for example, a lawyer might not specialize in litigation, might have too many other pending matters to commit to full litigation for a new client, or might regard litigation as too much of a long shot. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) cmt. 6 (1983) ("Such limitations may exclude actions that . . . the lawyer regards as . . . imprudent").

authority to order the lawyer to be especially solicitous of the client's needs, especially when the client cannot afford to obtain alternative representation.

Although judges sometimes order lawyers to continue to represent clients that cannot pay for legal services, as already noted in Part I.C above, courts' approval of limited scope representation arrangements should make it possible for public interest lawyers to limit the duration of their representation of clients even after a case has been formally filed. This is especially true in the many jurisdictions that specifically allow limited scope representation arrangements, as documented in Appendix A. In Illinois and the District of Columbia, for example, a lawyer can, after obtaining informed consent, offer a client a retainer agreement that states that she will file a notice of limited representation and handle the client's case through the pleadings and dispositive motions stage, including motions to dismiss and summary judgment, but then withdraw from representing the client even if the case is set for trial (but before voir dire commences). Such arrangements provide the lawyer the option of terminating representation prior to trying a case that appears difficult or impossible to win after discovery. The client obtains limited *duration* legal services—in other words, the lawyer provides services for only a limited period of time, so that the lawyer avoids taking on the obligation to represent the client indefinitely.<sup>48</sup>

There are, to be sure, some problems with limited duration representation arrangements. Most obviously, since most jurisdictions require a lawyer to file "a notice of limited representation," which defines how the lawyer will limit her representation, the lawyer has in a sense shown her hand to opposing counsel. Opposing counsel knows that, if his client survives the stage of dispositive motions, there is likely to be no lawyer to take the case through trial. This may reduce opposing counsel's interest in settling.

This potential problem should not deter use of limited appearance arrangements, however. A plaintiff who survives the dispositive motions stage, where the vast majority of public interest cases are resolved, has shown herself to have a winnable case, which other lawyers may be interested in handling at trial. In fee-for-service arrangements, too, litigators frequently hand off cases to trial experts, so transition of counsel at the trial stage is not unusual. Moreover, the lawyer who has filed a notice of limited appearance may choose to continue with the case by filing a new notice of appearance.

What the limited appearance arrangement offers the public interest lawyer is a chance to end a client representation after reaching the end of a given stage of litigation. By obtaining informed consent to this arrangement from the client before the representation begins, the lawyer has the option of controlling the

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48. Tom Williamson, *From the President: Limited Scope Representation: Progress and Prudence*, Washington Lawyer (2013), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/june-2013-from-the-president.cfm> (defining limited scope representation as "a relationship between a lawyer and a client in which they agree that the scope of the legal services will be limited to a specific duration, task(s), or subject matter;" in other words, limited duration representation is one kind of limited scope representation, which limits the lawyer's representation by time).

duration of her involvement. The arrangement might not be as beneficial to the client as a full service representation, but that is not the standard M.R. 1.2(c) defines; that standard calls for determining the *reasonableness* of the limited scope representation arrangement.<sup>49</sup> Where the arrangement is reasonable, the client is certainly much better off with a limited duration arrangement than he is without any such arrangement.<sup>50</sup> Rules applications that require public interest lawyers to represent clients to the bitter end of every case in which they become involved deprive other worthy clients of that lawyer's services for the duration of the period in which the lawyer's time is bound to the first client's cause. If fee-for-service lawyers and their clients can enter into limited scope representation arrangements, about which there is no doubt, then public interest lawyers and clients should be able to do so too. To reach a different conclusion is to impose unreasonable and counterproductive additional demands on public interest lawyers, which, in the end, reduce rather than increase the availability of legal services to low-income clients.

All of this is not to say that there are not limits to how public interest lawyers can ethically use limited scope or limited duration representation agreements. One clear limit brings us back to a lawyer's use of a limited scope representation arrangement in a way that would pressure a client to accept a settlement. For all of the reasons already discussed in Part I above, a lawyer ethically should *not* tie the termination point for a limited scope representation to a client's decision on settlement, or even to the existence of a settlement offer. To tie termination of a representation agreement to settlement is arguably to commit the very type of ethics breach in violation of MR 1.2(a) that courts have disapproved in the many other permutations discussed in Part I.

In short, this Part has argued that public interest lawyers may enter into limited duration representation agreements, provided they are reasonable. To reach this conclusion is not to predict that all courts will always understand and accept such arrangements. There is still a risk that courts that have not been well educated about the permissibility of unbundled legal services arrangements will reject a limited duration notice of appearance and/or order a lawyer to continue representing a client beyond the bounds of the limited scope representation agreement where, in the eyes of the court, doing so would serve the justice process. Thus, public interest lawyers must be careful to comply with the requirements for limited scope representation that the rules of the relevant jurisdiction impose, proceed cautiously and candidly with full disclosures to the court and to opposing counsel, and continue to work to educate the judiciary on the need for limited scope representation options in public interest cases.

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49. MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

50. See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) cmt. 7 (articulating the standard of reasonableness for limited scope representation).

### B. *Lawyers May Recoup Fees for Client Representations*

As noted earlier, the settlement problem in public interest law arises from several factors. The first, regarding the lack of limits on the scope and duration of the public interest lawyer's representation obligation to client, has been addressed in Part II.A above. The second, regarding the potentially perverse financial incentives created for clients receiving free services, will be discussed in this Part.

If public interest lawyers must accept their client's decisions about settlement, might they at least require clients to pay reasonable fees for services after a certain point in a representation? Their clients cannot pay them out of pocket for services; that is why the lawyers are providing the services for free. But might public interest lawyers require clients to begin paying for services under certain conditions, such as if clients want to accept a settlement that does not provide for attorneys' fees? As I explain below, courts view agreements about how clients will ensure lawyer *payment* for legal services not as going to clients' fundamental rights to make settlement decisions but simply as agreements about how their lawyer will be paid. Courts grant lawyers wide deference in how they wish to structure client payment obligations, even in cases involving statutory fee awards.

Any discussion about settlement and attorneys' fees in public interest litigation<sup>51</sup> must start with the Supreme Court's holding in *Evans v. Jeff D.*<sup>52</sup> That case held that defendants in public interest litigation may refuse to provide attorneys' fees in settlement offers they present to plaintiffs. Moreover, the Court held, a public interest lawyer is ethically bound to accept such a settlement on behalf of a client if it is in the client's best interest and the client wants to accept it.<sup>53</sup> A divided majority of the Court adopted this holding over the strong dissent of liberal Justices Brennan, Marshall, and Blackmun.<sup>54</sup> It has proved vexatious to public interest lawyers and arguably provides a road map for defendants to insist that plaintiffs waive attorneys' fees in settlements.

A significant literature has addressed the problems *Evans v. Jeff D.* causes the public interest bar.<sup>55</sup> Researchers have concluded that this case and others

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51. Federal civil rights statutes provide for the award of attorneys' fees for litigation filed under 42 U.S.C. § 1983, and similar statutes provide for court awards of attorneys' fees to prevailing parties in other types of litigation aimed at enforcing public policy. *See, e.g.*, 42 U.S.C. § 1988 (providing for attorneys' fee awards in § 1983 litigation).

52. 475 U.S. 717 (1986).

53. *Id.* at 739.

54. *Id.* at 743.

55. *See, e.g.*, Ashley E. Compton, *Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 GEO. J. LEGAL ETHICS 761 (2009) (criticizing this case and subsequent state bar legal ethics opinions agreeing with it); Reingold, *supra* note 13 (presenting a comprehensive critique of the U.S. Supreme Court's jurisprudence shrinking the efficacy of § 1983 litigation and emphasizing *Evans v. Jeff D.* in this analysis); *see also* Daniel Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 GEO. J. LEGAL ETHICS 499, 500 n.5 (2004) (presenting a critique of *Evans v. Jeff D.* and citing earlier

deserve considerable blame for drastically shrinking the number of public interest lawyers in practice who substantially rely on attorneys' fee awards.<sup>56</sup> Scholars have offered a variety of proposals for reform,<sup>57</sup> but as of yet no one has claimed to have found a solution. Nor do I claim to do so here. Instead, I point out a neglected aspect of the Court's jurisprudence on attorneys' fees that may spark creative thinking about paths forward in seeking to prevent the demise of the public interest bar.

As commentators have noted, public interest lawyers have responded to *Evans v. Jeff D.* in a number of ways. Some public interest lawyers explain, either orally or in writing, that they hope and expect that their client will understand the importance of lawyers receiving attorneys' fees so that they may continue to represent future clients.<sup>58</sup> This approach leaves to the client's conscience at a later time the ultimate decision as to whether to accept a settlement proposal that does not provide for attorneys' fees. The lawyer hopes the client will insist on reasonable attorney fees in any settlement offer she accepts, but does not attempt to impose a binding commitment on the client to do so. Public interest lawyers report to me that many clients do abide by such nonbinding commitments to insist on attorneys' fees as part of any settlement agreement they will accept. Thus, this approach is all to the good to the extent that it works, but it leaves public interest lawyers exposed to the risk of not being paid for services if their clients have a change of heart in the throes of settlement negotiations.

Moreover, commentators have argued that leaving decisions to the voluntary conscience of clients has other downsides. This approach means that lawyers can only feel comfortable accepting clients when they are confident the clients will refuse fee waiver settlements. In other words, this approach requires lawyers to be cautious, and only accept representations of clients they feel they "understand." Such clients are likely to be more demographically similar to the lawyers than would otherwise be the case.<sup>59</sup> This, in turn, hurts the objective of making representation available to more people, including people with few

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scholarship on this issue). Nazer's analysis relied in part on a particular ethics opinion, which the California State Bar Association later revoked. See CA Ethics Op. 2009-176 (2009), WL 1653156 (concluding that fee waiver settlements are ethically permissible, in contrast to its earlier view); see also Steven M. Goldstein, *Settlement Offers Contingent upon Waiver of Attorney Fee: A Continuing Dilemma After Evans v. Jeff D.*, 20 CLEARINGHOUSE REV. 693 (1986).

56. See, e.g., Reingold, *supra* note 13, at 3 (concluding that "it is clear that *Evans* destroyed § 1983 as a remedy for civil rights plaintiffs with only modest damages," and did so "by driving their lawyers out of the civil rights business.")

57. See *id.* at 21-28 (outlining a variety of these proposals scholars have offered and adding his own proposal that Congress pass legislation abrogating *Evans v. Jeff D.*).

58. See, e.g., Nazer, *supra* note 55, at 530-33 (discussing this option).

59. See, e.g., *id.*; Compton, *supra* note 55, at 769 (arguing that "[t]his selection technique . . . may make it more difficult for a non-activist plaintiff to gain representation" and that " 'client education' borders on coercion") (internal citations omitted).



means who appear most susceptible to the temptations of a favorable settlement containing a fee waiver provision.

A second option involves placing a provision in client retainer agreements through which clients promise *ex ante* not to accept settlement offers that contain attorney fee waivers. One can imagine a court holding that such an agreement runs afoul of the MR 1.2(a) prohibition on restricting clients' rights to make settlement decisions, for all the reasons discussed in Part I above. However, as I explain in more detail below, there is a good argument that allowing clients to pre-commit in this way respects their dignity and autonomy rights, and philosophical work on pre-commitment supports this claim. At bottom, neither of the two options—of either non-enforceable or purportedly enforceable *ex ante* client promises—are entirely satisfactory, although they are, to my knowledge, the ones on which public interest lawyers most often rely.

Happily, however, other options exist as well. As I will explain below, it is well settled that a public interest lawyer may require in a retainer agreement that the client will pay a contingency fee to the lawyer if the lawyer does not receive sufficient attorneys' fees after successful litigation. There is no reason lawyers cannot use a similar provision to cover settlements as well. The Supreme Court approved such an arrangement in the fully litigated case of *Venegas v. Mitchell*,<sup>60</sup> and a number of federal courts of appeals have applied *Venegas* in a range of other situations, indicating that such an approach should be relatively invulnerable to challenge. The Parts below provide in-depth analysis. To fully explain these options, it is necessary to dig more deeply into the Court's holdings in both *Evans v. Jeff D.* and *Venegas*, which I do in the subparts below.

### 1. *The Problem of Evans v. Jeff D.*

*Evans v. Jeff D.* involved a class action lawsuit against the public officials responsible for educating and treating children with emotional and cognitive disabilities in the state of Idaho. The defendants eventually offered the members of this class a settlement that provided virtually all or even more relief than that to which they would have been entitled if they won their case. The defendants conditioned this offer, however, on plaintiffs waiving their rights under 42 U.S.C. § 1988 to attorneys' fees and costs. The plaintiffs' legal services lawyer, Charles Johnson of the Idaho Legal Aid Society, decided that his ethical obligations required him to accept this proposal on behalf of his clients, which he did. He also, however, filed a motion for an award of attorneys' fees to his legal aid office despite the language in the settlement agreement waiving such fees. The district court denied his motion but the Ninth

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60. 495 U.S. 82 (1990).

Circuit reversed, and the Supreme Court granted certiorari to resolve a split in the circuits.<sup>61</sup>

By a split majority, the Court decided that Johnson faced no ethical dilemma. The Court reasoned that Johnson's professional obligation to place his clients' interests above all else meant that he *must* accept the settlement proposal, despite its failure to provide fees for the legal aid society that employed him.<sup>62</sup> Citing Judge Wald's concurrence in a then recently-decided D.C. Circuit case, which had considered the same issue, the Court noted that fee waivers "cut both ways." Such waivers not only allow defendants to settle cases knowing the full costs of doing so, but also allow plaintiffs in weaker cases, where defendants feel confident about going to trial, to obtain at least some relief in situations in which they otherwise would be likely to obtain nothing.<sup>63</sup>

In a strong dissent, Justice Brennan, with Justices Marshall and Blackmun joining, pointed out the potential deterrent effect on public interest litigation of allowing defendants to condition settlement on waiver of rights to statutorily granted attorneys' fees. Brennan stated that "[t]he conclusion that permitting fee waivers will seriously impair the ability of civil rights plaintiffs to obtain legal assistance is embarrassingly obvious."<sup>64</sup> However, Brennan suggested, in the face of the majority's holding civil rights lawyers should simply obtain advance agreements from their clients not to waive attorneys' fees. Such advance agreements, Brennan pointed out, would "replicat[e] the private market for legal services in which attorneys are not ordinarily required to contribute to their clients' recovery." Such agreements might make it economically feasible, as Congress had hoped in passing attorneys' fees statutes, for civil rights lawyers to continue to pursue cases despite *Jeff D.*<sup>65</sup>

Significantly, no one on the Court contested Brennan's view that a contractual advance waiver of the right to relinquish attorneys' fees is a perfectly proper solution to the problem *Jeff D.* presents. Thus, *Evans v. Jeff D.* indirectly supports the contention that public interest lawyers may insist ex ante that clients hold out for attorneys' fees in settlement negotiations. It is no secret that some public interest lawyers do include such provisions in their retainer

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61. *Evans*, 475 U.S. at 726.

62. *Id.* at 740. The majority noted that district courts have discretion to appraise the reasonableness of particular class action settlement proposals on a case-by-case basis, and that a court might choose to deny approval to a settlement proposal that included an attorney fee waiver where the fee waiver reflected a defendant's practice of always refusing to pay attorneys' fees or "a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits." *Id.* At least one court of appeals has held that a preliminary injunction was appropriate to bar a defendant, the County of Los Angeles, from insisting on lump sum settlements including all attorneys' fees in civil rights litigation. See *Bernhardt v. Los Angeles County*, 339 F.3d 920 (9th Cir. 2003).

63. 475 U.S. at 731-32.

64. *Id.* at 759 (Brennan, J., dissenting).

65. *Id.* at 766.

agreements,<sup>66</sup> Brennan's dissent provides a basis for defending such agreements.

Public interest attorneys should proceed with care in using such agreements, however. They should especially ensure that the retainer agreement does not impinge on clients' rights to *decide* on settlement, for all the reasons discussed in Part I above. A magistrate judge in *Gray v. Dummitt*, for example, found language to be unlawful where it barred a client asked to waive attorney fees from settling. He reasoned that such language restricted the client's right to make her own settlement decision based on the situation presented at the time the settlement is offered.<sup>67</sup> The district court reversed this ruling, however, deciding, after questioning the client, that the attorney and client's understanding was that the client could choose to settle if she wanted to do so.

The principle that public interest lawyers should be treated the same as all other lawyers further supports the position that public interest clients should be

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66. See, e.g., Nazer, *supra* note 55, at 533 (reporting that one interviewee stated he used this method with cooperating organizations). It is difficult to collect such data, since lawyers are understandably loath to discuss practices of untested ethicality.

67. *Gray v. Dummitt*, 2007 WL 6925690, *rev'd*, 2009 WL 210865 (E.D.N.Y. 2009), involved a § 1983 allegation that the plaintiff's constitutional rights had been violated in the New York City foster care system. Several defendants sought to disqualify the plaintiff's law firm, challenging its retainer agreement with its client on the ground that it was "unethical and jeopardize[d] the integrity of the litigation." *Id.* at 1. This retainer agreement stated that "if the defendants make a settlement offer that would require my attorneys to take less than their full fees under the Civil Rights Law, my attorneys may reject the offer or seek the opinion of the judge regarding the reasonableness of the fee." *Id.* at 2. After questioning the plaintiff about her understanding of this retainer agreement, Judge Orenstein concluded that it "improperly curtails Gray's exclusive right to settle her claims on terms she finds acceptable," because "the Firm has improperly arrogated to itself the right to reject any settlement offer" under which it would receive less than full fees, and also created a conflict of interest "that produces an incentive for [her attorneys] to compromise their independent professional judgment." *Id.* at 4. Citing the N.Y. County Law Ass'n, Op. No. 699 (1994), the judge noted that "[r]egardless of informed consent, an attorney may not oblige her client to get the attorney's consent before accepting a settlement agreement," and that, although lawyers may collect on fee arrangements through charging liens, lawyers cannot protect their interests "through the otherwise illegitimate arrogation of the client's right to accept or reject a settlement offer." *Id.* at 6. The judge concluded that the entire retainer agreement thus was unenforceable. *Id.* at 7. The district court, however, did not accept Magistrate Judge Orenstein's conclusion. See *Gray v. Dummitt*, 2009 WL 210865 (E.D.N.Y. 2009). Instead, the court found, the testimony of the plaintiff and the lawyers indicated that the law firm would not make settlement decisions without discussing them with their client. Thus assuming that the client would be permitted to make decisions about settlement despite the contrary language in the retainer agreement, the court upheld the legitimacy of the retainer agreement and denied the defendants' motion to disqualify counsel. In a subsequent § 1983 foster care case that the same law firm handled before Magistrate Judge Orenstein, the judge noted that the law firm was continuing to use the same retainer language he had previously disapproved and again expressed his displeasure with it. See *Denes Q. v. Caesar*, 2009 WL 2877155, \*5 n.4 (E.D.N.Y. 2009) ("I continue to believe that the express language of the retainer agreement is deeply troubling and impermissible, even if the attorneys who use it would never seek to withhold a settlement offer from their client.").

permitted to enter into advance waiver agreements just as fee-paying clients are permitted to do. There is no legal ethics rule prohibiting this practice, and it does not raise the same concerns as those that apply when lawyers ask clients to bind themselves in advance to accept a lawyer's settlement decision. Instead, the client simply agrees that any future settlement she may decide to accept will include a provision to ensure that her lawyer gets paid.

Legal scholars and philosophers have explored the value of permitting individuals to bind their future selves through advance waivers generally; they argue that permitting advance commitments recognizes individuals' autonomy and rights to dignity and respect.<sup>68</sup> A good argument can be made that public interest clients should likewise be granted autonomy and respect in being permitted to make specific, concrete advance waiver decisions, provided these decisions are uncoerced. Regardless of income level, competent and autonomous clients should not be deprived of choice as to an option that is clear, specific, and foreseeable—and also may increase the possibility<sup>69</sup> of obtaining legal representation. Thus, a potentially persuasive argument supports lawyers' and clients' ability to make advance agreements in which clients agree not to accept settlement offers that do not provide for attorneys' fees.

Such provisions could potentially face challenge, as happened in *Gray v. Dummitt*, so caution may counsel approaches that do not limit clients' settlement options in advance. Such approaches should look to ensuring that lawyers receive payment for services even if a client chooses to accept a settlement that does not provide for attorneys' fees. These directions emerge more clearly in the Court's subsequent case of *Venegas v. Mitchell*.<sup>69</sup>

## 2. *The Solution in Venegas v. Mitchell*

In *Venegas v. Mitchell*,<sup>70</sup> a case decided shortly after *Evans v. Jeff D.*, the Court provided insight into how it views the relationship between statutory fees and contractual obligations between clients and attorneys in public interest cases. *Venegas* involved a § 1983 police misconduct claim litigated by civil rights lawyer Michael R. Mitchell.<sup>71</sup> Mitchell had entered into a contingent-fee contract with his client Venegas. The contract provided that Mitchell would receive a percentage of any gross recovery Venegas obtained, which would

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68. See, e.g., Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 80, 81 n. 35 (2014) (citing philosopher Derek Parfit).

69. 495 U.S. 82 (1990).

70. *Id.*

71. Mitchell would later litigate several additional post-*Evans v. Jeff D.* challenges to government defendants' practices of insisting on attorney fee waivers in settlement agreements. See, e.g., *Mitchell v. Cty. of Los Angeles*, 211 F.3d 1274 (9th Cir. 2000) (challenging the City and County of Los Angeles and individual officers for offering and accepting lump-sum settlements in federal civil rights cases); *Willard v. City of Los Angeles*, 803 F.2d 525 (9th Cir. 1986) (requesting attorneys' fees under the Civil Rights Attorney's Fees Awards Act).

then be offset by any court-awarded attorneys' fees.<sup>72</sup> Mitchell's contingency fee claim against his client ended up being larger than the amount the court awarded to the client under § 1988. Mitchell filed a lawyer's lien against his client for the remainder due under the contingency fee contract. The Supreme Court granted certiorari to resolve a conflict among the circuits as to whether § 1988 invalidates contingent-fee contracts that would require a prevailing civil rights plaintiff to pay his attorney more than the statutory award the plaintiff received.

Under these facts, a unanimous Court agreed with the Ninth Circuit that "§ 1988 does not prevent the lawyer from collecting a reasonable fee provided for in a contingent fee contract even if it exceeds the statutory award."<sup>73</sup> The Court noted that § 1988 in no way regulates what plaintiffs may promise to pay their attorneys, and certainly "does not on its face prevent the plaintiff from promising an attorney a percentage of any money judgment that may be recovered."<sup>74</sup> The Court further noted that it had implicitly accepted that "statutory awards of fees can coexist with private fee arrangements." Citing *Evans v. Jeff D.*, the court noted that it is the client's right to waive, settle or negotiate attorney fee eligibility.<sup>75</sup> The Court reasoned that, if plaintiffs can waive their claims altogether, they certainly should be able to "assign part of their recovery to an attorney."<sup>76</sup> Moreover, the Court stated, there was no bar in its prior decisions or in the statutory scheme that "protects plaintiffs from having to pay what they have contracted to pay."<sup>77</sup> In short, the Court concluded, while § 1988 controls what a losing defendant must pay, it says nothing about a plaintiff's contractual payment obligations to a lawyer.

Following *Venegas*, many courts have upheld plaintiffs' obligations in public interest cases to pay attorneys' fees to lawyers, separate and apart from amounts covered under fee-shifting statutes.<sup>78</sup> While all of these cases involve

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72. The retainer agreement also prohibited *Venegas* from waiving rights to court-awarded attorneys' fees, a feature the Court reported without negative comment. This may suggest that the Court sees no problem with such a restriction, although the legality of this feature of the retainer agreement was not under review. 495 U.S. at 84.

73. 495 U.S. at 86, citing *Venegas v. Skaggs*, 867 F.2d 527, 533 (9th Cir. 1989).

74. *Id.* at 87.

75. *Id.* at 88.

76. *Id.*

77. *Id.* at 89.

78. *See, e.g.,* *Gobert v. William*, 232 F.3d 1099 (5th Cir. 2003) (holding that provisions in civil rights statutes that permit the award of reasonable attorneys' fees do not bar enforcement of a 35% contingent fee agreement for any damages awarded to a client in addition to a court-ordered attorney fee award); *Quint v. A.E. Staley Manufacturing Co.*, 84 Fed. Appx. 101 (1st Cir. 2003) (enforcing both an attorneys' fee award and private contingency fee agreements between an ADA plaintiff and various attorneys who represented her through trial, appeal, remand and settlement); *US v. Cooper Health System*, 940 F. Supp. 2d 208, 214-15 (D. N.J. 2013) (holding in a False Claim Act case that "[u]nder the reasoning in *Venegas*," an agreement between a lawyer and client that entitled the lawyer to both an attorneys' fee award and a contingency fee meant that the lawyer could both accept the attorneys' fees provided for in a settlement agreement with the defendant and

attorneys' fees in successfully litigated judgments, there is no reason that *Venegas* and subsequent court rulings following *Venegas* would not apply to settlement as well. The upshot is that the Court views plaintiffs' rights to statutory attorneys' fees and their contractual obligations to their lawyers as two separate questions. The plaintiff may contract to pay her lawyer a fee related to her monetary recovery. If she does, she must fulfill that promise, regardless of whether she has collected—or waived the right to—statutory attorneys' fees from the defendant. Similarly, the plaintiff may agree to provide her attorney with a percentage of any monetary recovery she receives through a settlement. Public interest lawyers who wish to ensure they receive fees when their clients accept a monetary settlement can thus use contingency fee arrangements.

Of course, this solution only helps lawyers when their clients receive monetary compensation in a settlement agreement. A contingency fee agreement would not have helped a lawyer such as Charles Johnson of the Idaho Legal Aid Society. That legal aid society had a policy forbidding lawyers from asking clients to pay for any costs of litigation.<sup>79</sup> Even more importantly, the settlement in *Jeff D.* granted only injunctive relief, so there was no monetary relief to divide between the plaintiffs and their attorney. The *Venegas* line of cases does not directly help lawyers whose clients receive no monetary recovery in settlement.

But *Venegas* does indirectly suggest additional ideas for lawyers with cases that do not lead to monetary recovery. Another acceptable option given the Court's reasoning in *Venegas* would have public interest lawyers contract with clients to switch to a fee-for-services arrangement after a certain stage in a representation. It would be ethically improper to tie such agreements to a client's decision about accepting a settlement offer, for all the reasons discussed in Part I above.<sup>80</sup> It would appear reasonable, however, to contract for a switch to a fee-for-services arrangement after a certain period of time or certain stage of the litigation had passed. The result would be much like the limited duration arrangement discussed in Part II.A above, except that the lawyer and client would be agreeing to change the nature of payment for legal services rather than to terminate the representation altogether. Like a limited

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request that his client pay him under their contingency fee agreement; "nothing prevents the attorney for the prevailing party from gaining additional fees, pursuant to contract, from his own client.") (citations omitted). This court noted that such fee arrangements are subject to the reasonableness standard articulated Rule 1.5. 232 F.3d at 217 & n.4.

79. *Evans v. Jeff D.*, 475 U.S. 717, 721 (1986).

80. *See, e.g., Nehad v. Kubasey*, 535 F.3d 962 (9th Cir. 2008) (stating that lawyers may not "ratchet up the cost of representation [ ] if the client refuses an offer of settlement."); *Compton v. Kittleson*, 171 P.3d 172 (Alaska 2007) (voiding a retainer agreement that converted a contingency fee arrangement to an hourly fee if the client decided to accept a settlement amount that did not compensate the attorney at a level at least equivalent to his hourly rate for the time spent on the case); *Philadelphia Ethics*, Op. 88-16 (1988) (disapproving of an agreement that stated that a client would pay costs and expenses in rejecting any settlement offer the lawyer regarded as fair and reasonable).

duration representation agreement, such a contract could protect a lawyer from resource drains caused by interminable representations. The parties' agreement would provide for the client to assume financial obligations to the lawyer at a specified reasonable point, such as after five years of representation. On the Court's reasoning in *Venegas*, such an arrangement would be a private matter of contract, not an ethics concern.

Some public interest legal organizations, as well as government and private funders, disapprove of all arrangements in which a client could end up paying for representation. These funders want to provide services to vulnerable clients without any expectation of payment from those clients. Funders of course have the right to establish the policies of their choice, but charging clients something, even a small amount, for legal services in some situations might preserve resources for other worthy cases. Thus, where permissible and feasible, it may make sense for public interest lawyers to reexamine policies that reject client payment for legal services in all situations. I am not arguing that public interest lawyers must or should adopt fee arrangements that place potential financial responsibility on clients, but merely suggesting that they should *consider* them, perhaps more frequently than they do now.

In sum, another helpful strategy for public interest lawyers facing the prospect of representing a client well past any chance of favorable results would be to place limits on the duration of *free* legal services. This could be through retainer agreements with clients that provide for a fee-for-services, contingency, or other cost-bearing provision to come into effect after a certain time period or stage in litigation other than rejection of a settlement offer. This agreement could be subject to possible re-negotiation by the parties at a later date, but a lawyer should not be under an obligation to do so. Through such arrangements, public interest lawyers could protect themselves from having to continue representation without payment for services far past any feasible chance of success or recovery of fees.

C. *Lawyers May Use Representation Arrangements that Transfer Funding Risks to Third-Party Payers*

Corporate America has perfected the art of transferring risk to third-party intermediaries; why should the public interest bar not do the same? A third possible solution to the settlement problem in public interest law would transfer the risk of litigation resource drains from public interest lawyers to third-party funders. Legal ethics rules do not constrain third-party funders, so they would be free to determine whether further pursuit of a case is worthwhile.

Thus, a possible third solution to the settlement problem in public interest law would involve transferring the funding of public interest cases from public interest law firms or legal services organizations to non-legal organization third-party payers. These third-party payers could be public interest organizations that are not organized as law firms. They could likewise be membership organizations, organizations dedicated to particular political or

ideological causes, labor unions, civic improvement associations, and the like. These organizations can agree to pay for the representation of public interest clients as third-party funders, as, indeed, already often occurs.

Simply put, the advantage of third-party payers is that they are not bound to the legal ethics rules regarding settlement that public interest lawyers are. In other words, third-party payers can make litigation funding decisions without regard to whether such decisions might be coercive or restrictive of the client's right to decide about settlement.

Consider the following hypothetical: A non-legal services public interest organization wants a public interest lawyer to represent a client in pursuing a cause the organization champions. The lawyer agrees to do so. The organization enters into a contract with the client agreeing to provide legal services, but further provides that it may withdraw funding if it decides the individual should accept a settlement offer but the individual does not wish to do so. Is such an arrangement lawful? I believe the answer clearly is yes, for reasons I explain below.

### 1. *Third-Party Payer Arrangements*

It is, of course, well settled that third parties may fund a client's case, provided, as emphasized in MR 5.4(c), MR 1.7(b), and MR 1.8(f) and their state equivalents, that lawyers do not allow their independent judgment in representing a client to be diminished or otherwise adversely affected by the fact of a third-party payer.<sup>81</sup> The question thus arises whether third-party funding arrangements bypass the ethics issues raised by the settlement problem in public interest law. Legal ethics authorities indicate that the answer to this question is yes, especially if, as this Article proposes, public interest lawyers are treated the same under the ethics rules as all other lawyers.

State bar advisory legal ethics opinions are instructive on this question. The New Hampshire Bar Association, for example, considered whether a lawyer could take on litigation on behalf of an individual client, which a labor union wanted to fund because it might establish a legal precedent of broad interest to

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81. State bar ethics committee opinions can illustrate this proposition under facts analogous to the issues being considered in this Article. The Florida State Bar Association explained that a lawyer may not follow a third-party payer's instruction to file for summary judgment where the lawyer has determined that such a motion would be against the client's interests. Equal Employment Opportunity Commission, Fla. St. Bar. Ass'n, FL Eth. Op. 97-1, WL 461086 (1997). However, the Michigan Bar Association has opined that a lawyer may represent a university professor being accused of sexual harassment where his defense was to be paid for by his university employer, and where the university wanted to receive periodic updates about the case, provided that the client gave informed consent, preferably after consultation with an independent lawyer, and where it did not appear that the lawyer would breach any ethics responsibilities to the client. State Bar of Michigan Standing Committee on Professional and Judicial Ethics Op. No. RI-293 (June 2, 1997).



its membership.<sup>82</sup> The union wanted to pay the attorney to represent its individual member in this case, but recognized that the case might end up being resolved through a prejudgment settlement. Such a settlement would be beneficial only to the individual member; it would not produce the final judicial determination that would be of precedential value to the union. Accordingly, the union wanted to condition its payment for legal services by requiring either that the case could not be resolved without the union's prior permission or that the member would be required to reimburse the union for the legal services it had funded if the member decided to accept a settlement prior to judgment.<sup>83</sup>

The Bar Association concluded that both of these proposed arrangements are ethically permissible. To reach this conclusion it reasoned by analogy to third-party funding in the insurance context. The Bar Association first addressed the proposal that the member reimburse the union for its legal fees if the member decided to settle the case prior to judicial resolution. It concluded that, as long as the union and its member reached this contractual arrangement prior to the commencement of the lawyer's representation and the lawyer was not a party to the contract, the matter was one of contract between the member and the union. It thus did not implicate any legal ethics rules, provided that the lawyer's independence of judgment in the case was not compromised.<sup>84</sup>

The New Hampshire Bar Association found "more difficult" the question of whether the union could condition settlement on the union's prior approval.<sup>85</sup> It again turned to the analogous situation of insurance carriers, where counsel for an insured may be required to render an evaluation of the merits of a case to the insurance carrier, as well as to consult with the insurance carrier in the course of representation of the insured.<sup>86</sup> The Bar Association

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82. N.H. Bar Ass'n Ethics Comm., *Control of Settlement by Third Party Paying the Lawyer's Fees*, (Dec. 8, 1993), <https://www.nhbar.org/pdfs/PEA12-93.pdf>.

83. *Id.* at 1.

84. *Id.* at 2.

85. *Id.*

86. A large literature discusses the ethics issues insurance defense raises, focusing especially on questions about whether the insurance defense lawyer represents only the insured or both the insured and the insurance carrier that is funding the defense of the insured. See, e.g., Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 261 (1997) (concluding that insured parties are entitled to know that their attorneys are salaried employees of insurance companies); Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27, 74 (1997) (concluding that the single-client model, under which counsel represents the insured party only, works best to avoid conflicts and other ethics problems for lawyers); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1606 (1994) (arguing that insurance defense counsel may represent both the insured and the insurance company). Analogously, for purposes of the analysis here, the public interest lawyer receiving third-party funding must determine whether she represents only the client or the client and the third-party funder; this question turns in large part on the understandings and agreement between the parties. If the public interest lawyer has two clients (i.e., the litigant and the third-party funder), she must determine, using traditional conflicts analysis, whether this arrangement poses a conflict of interest, in which case she may not be able to proceed. See

concluded that, if the attorney's independence of judgment was not influenced by a desire to maintain the good will of the third-party funder (whether it be a union or an insurance carrier), the attorney could represent the client in litigation funded by the third party under this condition. It noted that the lawyer should not be involved in negotiating the agreement, and that it would be best for the individual member to seek independent legal advice from another lawyer who was not involved in the action before entering into an agreement where control of litigation decisions rests with a third-party funder.<sup>87</sup>

Similarly, The State Bar of Michigan Standing Committee on Professional and Judicial Ethics concluded that it would be permissible for a university to pay for a professor's legal representation in a case involving allegations of sexual harassment of a student, where the university wanted to condition such funding on the lawyer's agreement to disclose information about legal theories and defenses and to consult with the university before any major turns in the direction of the defense.<sup>88</sup> Applying Michigan Rules of Professional Conduct 1.7(b) and 5.4(c), which parallel the ABA Model Rules in all relevant respects, the Committee concluded that it was ethically permissible for the lawyer to operate under this third-party funding arrangement, as long as there were no circumstances or facts that would interfere with the lawyer's ability to exercise independent judgment in the representation.<sup>89</sup> The Committee also emphasized that there must be full and knowing consent by the client, and that the lawyer would not be able to attain such consent if he knew of factors that would compromise his independent judgment.<sup>90</sup> The Committee further noted that it would be prudent for the lawyer to recommend that the client seek independent advice on the arrangement from another disinterested lawyer.<sup>91</sup>

Yet another relevant scenario, which the New York State Bar Association Committee on Professional Ethics considered, involved a nonprofit organization that wished to provide legal services to its beneficiaries as part of its mission.<sup>92</sup> The attorney in this situation was a salaried employee of the nonprofit organization, which existed to provide financial counseling to low-income individuals. The organization wanted this lawyer to advise clients on certain legal matters and also to help these individuals file for bankruptcy protection in situations in which they could not pay for such legal services.

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MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983). In all events she must obtain the informed consent of both clients before going further. *Id.* If the lawyer's only client is the litigant, then she must proceed with full loyalty to that client, not allowing any compromise of her independent judgment due to the presence of a third-party funder. MODEL RULES OF PROF'L CONDUCT R. 5.4(c), 1.7(b), 1.8(f) (1983).

87. See N.H. Bar Ass'n Ethics Comm., *supra* note 82.

88. Mich. Ethics Op. RI-293 (June 2, 1997), 1997 WL 452262.

89. *Id.* at 2.

90. *Id.* at 3.

91. *Id.* at 4.

92. Nonprofit Organization Offering Legal Services and Seeking Grants to Subsidize the Legal Services Programs, N.Y. State Bar Ass'n Comm. on Prof. Ethics 957 (2013), 2013 WL 589087.

In considering this scenario, the New York Committee on Professional Ethics first noted that, under New York law, lawyers may practice within entities that are organized as nonprofits.<sup>93</sup> It then concluded that the inquiring attorney could provide legal services while being paid by the nonprofit. It explained that the attorney should obtain consent from each client to receive compensation from the nonprofit, and should not permit the organization to interfere with his independent judgment in rendering legal services.<sup>94</sup>

In sum, several bar association legal ethics committees that have considered third-party funding arrangements in the nonprofit context have approved arrangements in which funders retain some control over the expenditure of funds for further litigation as opposed to settlement. Such arrangements are not at all uncommon, in fact, and their use could be expanded to allow nonprofit organizations, rather than public interest lawyers, to assume the risks of litigation and to take steps to mitigate those risks through their contractual agreements with the clients the lawyer represents.

The fact that third-party funding of litigation is permissible does not, of course, mean that any such arrangement will fly as a matter of legal ethics law. By way of contrast, consider a different Michigan opinion, involving a scenario in which a defendant in a lawsuit filed by the U.S. Environmental Protection Agency (EPA) proposed to pay the legal fees of other defendants in connection with negotiating certain matters with the EPA. In this case, however, the defendant offered to pay the attorney representing the other defendants only if these clients agreed to settle.<sup>95</sup> On these facts, the Committee concluded that such a third-party payment arrangement would *not* be acceptable under the Michigan ethics rules. The lawyer's desire for payment would limit his ability to adequately counsel his clients not only about alternatives to settlement, but also about the viability of the settlement proposal for each particular client.<sup>96</sup> In short, to be ethically acceptable, any third-party funder arrangement must be structured so as to preserve lawyers' ability to render independent legal judgment on behalf of the client in the representation.

## 2. *Third-Party Funder Requests for Litigation Risk Assessments from Public Interest Lawyers*

The final legal ethics issue this Article considers in examining the basic ethics issues raised by the settlement problem in public interest law involves third-party funders' requests for candid case and/or settlement assessments from public interest lawyers, whether these third-party funders be public interest organizations, membership organizations, unions, legal services benefits providers, alternative litigation financiers, or others. In any of these

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93. *Id.* at 1.

94. *Id.* at 5.

95. Mich. Ethics Op. RI-132 (1992), 1992 WL 510824.

96. *Id.* at 3.

third-party payer scenarios, funders may request assessments from lawyers about whether a settlement offer a client receives should be accepted. Can lawyers provide such candid assessments? Do such requests violate the lawyer's obligation of confidentiality to the client, especially as to adverse assessments that may damage the client's interests as the client defines those interests? These are questions that arise in all third-party funder situations, including public interest representations.

At first blush, this question may appear difficult, especially in light of the obligations the lawyer owes the client to vigilantly protect the client's interests as the client defines them. On closer analysis, however, a straightforward application of the relevant rules of professional responsibility provides an affirmative answer, especially if public interest lawyers are held to the same principles as all other lawyers. MR 2.3, dealing with lawyer evaluations for third-party use, is directly on point. Rule 2.3 allows a lawyer to provide an evaluation to a third party regarding a matter affecting a client if, for starters, the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.<sup>97</sup> Rule 2.3 further states that if the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer should not provide the evaluation "*unless the client gives informed consent.*"<sup>98</sup> The question is how Rule 2.3 applies when a third party is paying the client's legal fees and has an interest in obtaining the lawyer's evaluation in order to decide whether to continue funding the litigation if the client decides not to accept a settlement offer in the case.

As just noted, Rule 2.3 allows a lawyer to provide such an evaluation to a third party, so long as the lawyer is "satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken [on] behalf of the client."<sup>99</sup> In situations where the lawyer reasonably believes that providing an evaluation to a third party poses a significant risk to the interests of the client—for example, where the lawyer's evaluation of a settlement offer would likely undermine the third party's continued willingness to fund the litigation but the client does not want to accept the offer—the lawyer must obtain the client's consent "after the client has been adequately informed concerning the important possible effects on the client's interests."<sup>100</sup> MR 2.3 further provides that any agreement to provide an evaluation to an interested third party should not affect the lawyer's independent professional judgment in the case. In other words, the lawyer should not be swayed by the fact of third-party funding to alter her evaluation. If the lawyer reasonably believes that providing an evaluation to the third party

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97. MODEL RULES OF PROF'L CONDUCT R. 2.3(a) (1983).

98. *Id.* R. 2.3(b).

99. *Id.* R. 2.3 cmt. 3.

100. *Id.* R. 2.3 cmt. 5; *see also* In re Ethics Advisory Panel Opinion, 554 A.2d 1033, 1034 (R.I. 1989).

will affect the lawyer's judgment, Rule 5.4(c) states that the lawyer should not take the representation in the first place, or should withdraw from representing the client immediately.<sup>101</sup> Thus, Model Rule 2.3 does not give the lawyer unlimited ability to engage in evaluations for third parties; rather, the client must give informed consent and the lawyer must determine that the fact of third-party funding will not affect her independent judgment.<sup>102</sup> As noted above, if the evaluation is "likely to affect the client's interest materially and adversely," which might be the case when a lawyer provides her candid, independent judgment assessing a settlement offer her client may not want to accept, the lawyer must obtain the client's informed consent before entering into such a representation arrangement.

Informed consent in this context is particularly important, because the client's consent to the lawyer providing independent judgment may well affect the client's interests adversely. For example, the client may wish to continue litigating a case when the lawyer's judgment is that an offered settlement proposal is a better idea. Or, the lawyer might possess damaging information about the client's case that the client does not want the lawyer to disclose to the third-party funder but which the lawyer believes she must disclose in order to explain her evaluation. (Of course, the lawyer would have no duty to, and should not, disclose client information to the third-party funder unless necessary.) If the lawyer is to proceed in giving an evaluation of the case to the third-party funder in such situations, the possibilities that the lawyer may be compelled to state an opinion or disclose a fact contrary to the client's interests must be clearly explained to the client as part of the process of obtaining informed consent at the outset of the representation. As in all informed consent

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101. MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (1983).

102. Such an impermissible influence on a lawyer's independent judgment might occur, for example, if the lawyer felt she was more loyal to the third-party funder's interests than those of her client. This might occur, for example, when the third-party funder was a repeat player on whom the lawyer relied for continued business. In such a situation, if the lawyer knew the third-party funder favored early settlement, though the lawyer's independent judgment was that a settlement offer was inadequate, the lawyer might face an impermissible conflict of interest because she might feel pressured to recommend settlement despite her independent judgment to the contrary. Here the lawyer must withdraw from the representation or not accept it in the first place. In contrast, if the lawyer's judgment was that a settlement offer was the best that could be expected even though her client wanted to hold out for more, and the lawyer was not swayed by the third-party payer's interests, the lawyer would not be barred from providing her best independent judgment to the third-party payer that the settlement offer should be accepted, provided that her client had consented to her doing so as a condition of her acceptance of his representation. The client would of course prefer that her lawyer recommend against settlement despite her lawyer's best judgment to the contrary, but the client has consented to the lawyer providing her independent, candid assessment to the third-party funder as a condition of obtaining that party's funding. The lawyer's decision to recommend settlement based on her independent assessment is not the client's highest preference in the situation, but it is the choice that leads the client to be able to bring the case. The client's choice remains supreme; the client has simply made the choice prior to knowing what her lawyer's assessment of a particular settlement offer will be. I have further discussed this issue through the lens of ABA MR 2.3 in Part II.C.2 below.

situations, these risks disclosed to the client should be captured in writing so that it is clear that the client understood and consented to them at the outset. If the client changes her mind later, the lawyer will be cast in a conflict of interest and most likely will have to withdraw from the client representation.

The client may also be helped by knowing what the third-party funder's policies are on case settlement—for example, what kinds of settlement terms will the funder regard as reasonable in the particular case? It may be useful for these terms to be spelled out in the agreement between the third-party funder and the client, which should be independent of the retainer between the lawyer and client. Whether the lawyer can advise the client about the reasonableness of the third-party funder's policies depends again on the lawyer's conflict of interest analysis, but if the lawyer determines that she would have a conflict of interest in rendering such advice because of her relationship with the third-party funder, then she very well may have a deeper conflict as well that should prevent her from taking on the representation.

Thus, conflict of interest issues require serious analysis in third-party funder situations but are not inherently a bar. Likewise, other applicable ethics rules do not present an inherent bar; rather, the rules contemplate and permit lawyer evaluations for third-party use with client informed consent. MR 2.3, and particularly Rule 2.3(b), mainly concern instances in which a lawyer may be called upon to perform an evaluation that would result in disclosure of confidential client information against the client's substantial interests.<sup>103</sup> Rule 2.3(b) clarifies that, even in such cases of adverse disclosure, a sufficiently informed client may be willing to accept the risk of adverse disclosure because of the greater benefits to be derived from the transaction supported by the lawyer's willingness to provide an evaluation to a third party.<sup>104</sup> Rule 2.3 allows the lawyer to proceed in this instance, provided the client has given informed consent.

In this connection, the *Restatement (Third) of the Law Governing Lawyers* § 95 provides further clarification. That section states that a lawyer can provide to a non-client his evaluation of his client's case. As Restatement § 95(1) explains: "(1) In furtherance of the objectives of a client in a representation, a lawyer may provide to a non-client the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter."<sup>105</sup> In line with Rule 2.3, the Restatement emphasizes that "[w]hen providing the information, evaluation, or opinion under Subsection (1) is reasonably likely to affect the client's interests materially and adversely, the lawyer must first obtain the client's consent[.]" and the client should be adequately informed of important possible effects of disclosure of information

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103. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95, rep. note cmt. d (A.L.I. 2000).

104. *Id.*

105. *Id.* § 95 (1).

to the third party.<sup>106</sup> In addition, the Restatement requires a lawyer to exercise care with respect to the non-client, and not to make false statements.<sup>107</sup> The Restatement thus holds the same view as that expressed in MR 2.3(b). In situations where providing an evaluation may require the lawyer to disclose confidential client information that is contrary to the client's interests, the lawyer must appropriately consult with the client and obtain the client's consent before undertaking the evaluation.<sup>108</sup> The lawyer must abide the client's decision as to whether to offer the evaluation to a third party.<sup>109</sup>

A legal ethics opinion helps flesh out the lawyer's duties in such situations. In 2012, the Supreme Court of Ohio issued a legal ethics opinion concerning a lawyer who was representing a client whose legal fees were being advanced by an alternative litigation finance (ALF) provider.<sup>110</sup> The client entered into a contract with the ALF provider under which the provider would advance funds to the client with pending civil claims, and the client would later pay the provider the amount advanced plus additional financing fees.<sup>111</sup> The client was required to repay the advance and remit contractual fees only if the client received proceeds in the underlying case.<sup>112</sup> Under these facts, the court stated, Rule 2.3 would allow the lawyer to provide a case evaluation to the ALF provider if the lawyer had determined that providing the evaluation was compatible with the lawyer-client relationship.<sup>113</sup> However, the court cautioned, "there is a significant risk that disclosure of information to an ALF provider about a client representation will constitute a waiver of attorney-client privilege."<sup>114</sup> Therefore, the court required that the lawyer obtain the client's informed consent before providing an evaluation to the ALF provider.<sup>115</sup>

Another analogous case comes from an advisory opinion of the Michigan State Bar Standing Committee on Professional and Judicial Ethics. In this case, a state agency established a program under which it appoints advocates to represent parties in certain employment matters.<sup>116</sup> These advocates represent parties at administrative hearings. Under the terms of the state agency's program, advocates who find cases assigned to them to be without merit are required to provide a non-merit statement to the client explaining why the case lacks merit. The program further requires the advocate to submit the non-merit

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106. *Id.* § 95 (2).

107. *Id.* § 95 (3).

108. *Id.* § 95 cmt. d.

109. *Id.*

110. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, 2012 WL 6591524, at \*1.

111. *Id.* at \*2.

112. *Id.*

113. *Id.* at \*9.

114. *Id.*

115. *Id.*

116. MI Eth. Op. RI-103 (1991); 1991 WL 519856.

statement to the state agency in order to be paid.<sup>117</sup> Relying on an ABA ethics opinion,<sup>118</sup> the Michigan Ethics Committee concluded that lawyers acting as advocates under the state program may, consistent with their ethical responsibilities, submit non-merit statement to the state agency, provided that their clients have consented to their doing so.<sup>119</sup> Although the Michigan Ethics Committee did not consider Rule 2.3 in reaching this conclusion, the analytic thrust of its opinion remains consistent with this Rule: whether a lawyer may provide a candid case assessment to a third-party funder depends on having received a client's informed consent.

In short, Rule 2.3, read in conjunction with other ethics rules, allows a lawyer to provide a case evaluation to a third party that is funding a client's litigation, provided that the lawyer has obtained the client's informed consent if such disclosure may adversely affect the client's interests. Public interest lawyers who wish to avoid assuming the financial risks of representing non-fee-paying clients past the point of reasonable settlement offers may wish to represent such clients under third-party payer arrangements in which the third-party payer independently contracts with the client on matters of case funding. If the client gives the lawyer informed consent to give the third-party payer a candid case evaluation, the lawyer may do so provided that the lawyer reasonably believes her independent judgment is not compromised by the existence of the third-party payer.

#### CONCLUSION

This Article has addressed what a public interest lawyer can do when confronted with a client who disregards the lawyer's settlement advice. A related set of concerns involves how lawyers can get reimbursed for the legal services they have performed when a defendant refuses to pay attorneys' fees as part of a settlement offer that is otherwise beneficial to the client's interests.

One way some lawyers may deal with these problems is simply to ignore the legal ethics rules, out of sheer frustration with how the law handles these problems. This Article has argued that this approach is both unwise and unnecessary. The requirements of MR 1.2(a) and its state equivalents dictating that clients control settlement decisions about their cases are not principles that can be varied by the terms of a retainer agreement; the ABA Model Rules and comments, the professional responsibility rules and comments of the states, and

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117. *Id.* at \*1.

118. See ABA Formal Ethics Op. 324 (1970) (stating that legal aid attorneys may disclose certain client information to non-lawyer governing boards). This opinion has since been refined and expanded; for a general summary of ABA opinions discussing legal aid lawyers' disclosure of client information to non-lawyer supervisors and auditors, see Peter Geraghty, *Legal Aid Clients: What's in a Name?*, YOUR ABA (April 2015), <https://www.americanbar.org/publications/youraba/2015/april-2015/legal-aid-clients---whats-in-a-name-.html>.

119. *Id.* at \*3.



the vast weight of other legal authorities are unequivocal on this issue. So too, the Supreme Court does not appear likely to reverse its decision in *Evans v. Jeff D.* any time soon.

However, lawyers can use other approaches to protect themselves without violating ethics principles. They may do so by investigating the legality of limited scope or limited duration representation arrangements in their relevant jurisdictions, and by designing fee arrangements that impose some legal fees on clients when a representation endures for a certain period, and/or results in the lawyer being unable to recoup statutorily authorized attorneys' fees. They may also explore the use of third-party funders to shift litigation risks away from the lawyers who are under ethics constraints. Third-party funders are free to offer contractual terms that protect them against the risks of clients rejecting reasonable settlement offers or deciding to accept offers that do not grant attorneys' fees to their lawyers.

This Article has offered some general observations about applying legal ethics strictures to public interest lawyers, noting in particular that sometimes what is required is for public interest lawyers to be treated the same for legal ethics purposes as lawyers in representation arrangements based on pecuniary motives. Courts do not always do this, in part out of laudable concern for the interests of the especially vulnerable clients whom public interest lawyers typically represent. However, as this Article has pointed out, too much such solicitude on the part of courts can backfire, exacerbating the severe problems of access to justice that vulnerable clients face.

More broadly, the underlying intent of this Article has been to spark creative yet practical discussion, in an experimental problem-solving spirit, about the special ethics problems that confront public interest lawyers. In so doing, it joins a nascent collective effort to supply legal ethics scholarship, focused on the appropriate application or modification of existing rules, to support the currently endangered public interest bar.<sup>120</sup>

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120. For other examples of this growing literature, see Susan Bennett, *Creating a Client Consortium: Building Social Capital, Bridging Structural Holes*, 13 CLINICAL L. REV. 67, 100, 107 (2006) (arguing that lawyers for poor clients should be allowed to experiment with new transactional representation arrangements in the same way that lawyer for rich clients are permitted to do); Carle & Cummings, *supra* note 4; Lucie Jewell, *The Indie Lawyer of the Future*, SMU SCI. & TECH. L. REV. 325, 327 (2014) (noting the ways in which traditional ethics rules block experimentation with methods of providing low cost legal services and arguing for reform); Carolyn Grose, "Once Upon a Time, in a Land Far, Far Away": *Lawyers and Clients Telling Stories about Ethics (and Everything Else)*, 20 HASTINGS WOMEN'S L.J. 163, 163 (2009) (criticizing legal ethics rules for treating clients as abstractions and arguing that better ethics results arise out of contextually based analysis flowing from lawyer client discussion).

## APPENDIX

## State-by-State Summaries on Limited Scope Representation

The chart below offers a survey of the requirements for limited scope representation for each state and for the District of Columbia.<sup>121</sup>

State	Type Of Case Restriction	Notice Requirement	Other Restrictions
1. Alabama	All types of cases	<ul style="list-style-type: none"> <li>• Opposing counsel must be provided with written notice of the limited-scope of representation</li> </ul>	<ul style="list-style-type: none"> <li>• Client's consent to limited representation must be in writing</li> </ul>
2. Alaska	All types of cases	<ul style="list-style-type: none"> <li>• Opposing counsel must be provided with notice of the subject matter of the limited representation and the time period of the limited representation</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
3. Arizona	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
4. Arkansas	If the representation is reasonable under the circumstances and the client gives consent	<ul style="list-style-type: none"> <li>• Opposing counsel must be provided with written notice of the limited scope of representation</li> </ul>	<ul style="list-style-type: none"> <li>• If the representation is provided by a lawyer from a nonprofit program, and the lawyer's representation consists solely</li> </ul>

121. The Chart is organized according to the American Bar Association state-by-state summary on rules of limited scope representation, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/court\\_rules.html](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html) (last visited Jan. 28, 2017). I owe special thanks to Alison Hopkins and Danli Lan for its preparation.

			of providing information and advice or the preparation of legal documents, the client's consent in writing is not necessary
5. California	<p>Allow two types of limited scope representation in civil cases:</p> <p>1) noticed representation (an attorney and a party notify the court and other parties of the limited scope representation);</p> <p>2) undisclosed representation in a civil proceeding (a lawyer assisting a client to draft legal documents, but not to make an appearance in the case)</p>	<ul style="list-style-type: none"> <li>• If an attorney is providing limited representation, then the attorney needs to notify the court and other parties of the scope of limited representation</li> </ul>	<ul style="list-style-type: none"> <li>• A lawyer can draft documents in family law proceedings without disclosing the assistance, as long as the attorney is not making an appearance in the case;</li> <li>• A lawyer must file an "Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation," to the court and serve on all parties in the case to relieve himself from the representation. If an objection is filed against the lawyer's withdrawal, there must be a hearing scheduled no later than 25 days from the date the</li> </ul>

			objection is filed
6. Colorado	All types of cases, but limited representation must be reasonable	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• A party receiving limited services is presumed to be unrepresented for purposes of communication;</li> <li>• Permits limited appearances in court as long as the lawyer files a notice</li> </ul>
7. Connecticut	All types of cases; the limited representation must be reasonable and the client must give informed consent	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• The scope of the representation, the basis or rate of the fees 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</li> </ul>
8. Delaware	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
9. District of Columbia	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Superior Court of the District of Columbia Administrative Order 14-10 permits limited scope representation in the Civil,</li> </ul>

			Probate and Tax Divisions, the Family Court, and the Domestic Violence Unit
10. Florida	All types of cases (requires written consent)	<ul style="list-style-type: none"> <li>• A self-represented party to whom limited representation is being provided is presumed to be unrepresented unless the opposing lawyer is notified about the limited representation in writing</li> </ul>	<ul style="list-style-type: none"> <li>• A lawyer is not required to sign pleadings prepared for pro se litigants; but must include on each pleading that it is prepared with the assistance of counsel.</li> </ul>
11. Georgia	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
12. Hawaii	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
13. Idaho	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
14. Illinois	All types of cases	<ul style="list-style-type: none"> <li>• Must provide written notice specifying that the client is being represented by specified counsel with respect to an identified subject matter and time frame</li> </ul>	<ul style="list-style-type: none"> <li>• An attorney may assist a pro se plaintiff in drafting or reviewing a pleading or other paper without making a general or limited scope appearance and without the attorney signing the pleading or other paper</li> </ul>

15. Indiana	All types of cases	<ul style="list-style-type: none"><li>• N/A</li></ul>	<ul style="list-style-type: none"><li>• A lawyer can enter a limited appearance in court by filing a notice of temporary or limited representation that includes a description of the representation. A lawyer is required to file a notice of completion of representation to withdraw representation.</li></ul>
16. Iowa	All types of cases	<ul style="list-style-type: none"><li>• N/A</li></ul>	<ul style="list-style-type: none"><li>• Permit the lawyer to advertise that he/she provides limited representation;</li><li>• If the pleading or other paper is prepared with the drafting assistance of a lawyer, the document must include the lawyer's name, personal identification number and a statement that a lawyer assists the preparation of the document before the signature line, but the lawyer's signature is not</li></ul>

			<p>required; however, providing identifying information on pleading or paper does not constitute an entry of appearance and does not authorize service on the attorney;</p> <ul style="list-style-type: none"> <li>• Service on an attorney who has made a limited appearance shall be considered valid only when the service is in connection with the specific proceedings for which the attorney appeared.</li> </ul>
17. Kansas	In civil cases	<ul style="list-style-type: none"> <li>• An attorney making a limited appearance must file a notice of limited entry of appearance that states the precise court proceeding and issues to which the limited appearance pertains</li> </ul>	<ul style="list-style-type: none"> <li>• Allow an attorney to assist in the preparation of pleadings as long as "prepared with assistance of a Kansas licensed attorney" is inserted at the bottom of the paper. The attorney is not required to sign the paper</li> </ul>

18. Kentucky	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
19. Louisiana	All types of cases	<ul style="list-style-type: none"> <li>• A notice of limited appearance shall specifically state the limitation of legal services by subject matter, proceeding, date or time period</li> </ul>	<ul style="list-style-type: none"> <li>• Any pleading filed by an attorney making a limited appearance shall state in bold type of the signature page of that pleading "Attorney for limited purpose of [matter or proceeding]."</li> </ul>
20. Maine	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Allows a lawyer to file limited appearance if the client consents in writing;</li> <li>• Exempts an attorney from the standard withdrawal procedure and allows for automatic withdrawal of a lawyer upon completion of representation</li> </ul>
21. Maryland	All types of cases (scope and limitations of a limited representation by an attorney be set forth in a writing)	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Permit an attorney to enter a limited appearance, but requires the attorney submit a form of acknowledgment of scope of limited representation</li> </ul>



22. Massachusetts	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Permit limited appearance with a filed notice of appearance;</li> <li>• Allow a lawyer to assist in preparing a pleading, motion or other document as long as the phrase "prepared with the assistance of counsel" is included on the document</li> </ul>
23. Michigan	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
24. Minnesota	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
25. Mississippi	All types of cases	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• The state encourages lawyers to offer limited scope representation; indicating that lawyers may provide counseling, advice, draft letters or pleadings, with or without appearing as counsel of record; and in litigation, the lawyers can attend hearing on discrete matters or</li> </ul>

			specific issues
26. Missouri	N/A	<ul style="list-style-type: none"> <li>• The lawyer must provide written entry of limited appearance to the court</li> <li>• The lawyer must file a notice of termination of limited appearance</li> <li>• If the lawyer does not want opposing counsel to contact the client, the lawyer must notify opposing counsel of limited representation in writing</li> </ul>	<ul style="list-style-type: none"> <li>• The client must sign a document that acknowledges the limited scope representation and provides informed consent.</li> <li>• A lawyer can draft pleadings and motions for client without signing.</li> </ul>
27. Montana	Limitation of representation must be reasonable	<ul style="list-style-type: none"> <li>• Lawyer must file entry of limited scope appearance with the court</li> <li>• Without leave of court, the lawyer must file a notice of completion with the court when representation ends</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement</li> </ul>
28. Nebraska	N/A	<ul style="list-style-type: none"> <li>• Attorney must file “Certificate of Completion of Limited Representation” to withdraw (501.2(e)) and provide copy to opposing counsel (6-1109(i))</li> <li>• Copy of client’s</li> </ul>	<ul style="list-style-type: none"> <li>• Rule 501.2(c) allowing an attorney to prepare court filings for pro se litigants so long as the filings include “Prepared By” with the name, business address</li> </ul>

		written informed consent must be provided to client and opposing counsel and must be clearly defined	and bar number of the attorney. It clarifies that such disclosure does not create an entry of appearance while also requiring the pro se litigant to sign the filing; <ul style="list-style-type: none"> <li>• Rule 501.2(d) client's informed consent must be in writing</li> </ul>
29. Nevada	N/A	<ul style="list-style-type: none"> <li>• If practicing in the Eighth Judicial District Court of Nevada, Lawyer must include summary of limitation of 1<sup>st</sup> paragraph of pleadings and must notify the court at the beginning of a hearing (5.28(a))</li> <li>• Must serve notice of withdrawal (along with copy of retainer agreement) with the court and all parties involved (5.28(b))</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement</li> <li>• In Eighth District of Nevada, must have retainer agreement specifying limited services (5.28(b))</li> </ul>
30. New Hampshire	N/A	<ul style="list-style-type: none"> <li>• <i>Rule 17(f)</i> – allows automatic termination of representation when an attorney files a “withdrawal of limited</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement but state provides sample Consent</li> </ul>

		<p>appearance” and gives notice of the completed representation to all parties;</p> <ul style="list-style-type: none"> <li>• <i>Rule 17(g)</i> permitting an attorney to prepare documents without signing them so long as the statement “This pleading was prepared with the assistance of a New Hampshire attorney” appears on the document</li> </ul>	to Limited Representation form (Rule 1.2)
31. New Jersey	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(C))</li> </ul>
32. New Mexico	N/A	<ul style="list-style-type: none"> <li>• Lawyer must disclose scope of representation to court (16-303(E))</li> <li>• Lawyer can withdraw without court order by filing and serving notice of withdrawal with court (1-089(c))</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (16-102(c))</li> </ul>
33. New York	N/A	<ul style="list-style-type: none"> <li>• Must give notice of limited scope representation to court if necessary (1.2(c))</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
34. North Carolina	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no</li> </ul>

			express written requirement (1.2(c)); Comment 7
35. North Dakota	N/A	<ul style="list-style-type: none"> <li>• A Certificate of Completion of Limited Appearance must be filed to withdraw appearance in court (11.2)</li> <li>• If preparing pleadings, must notify all parties of representation scope (11(e))</li> </ul>	<ul style="list-style-type: none"> <li>• Requires informed consent from client in writing after consultation (1.2(c))</li> </ul>
36. Ohio	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement, but writing is preferred (1.2(c))</li> </ul>
37. Oklahoma	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
38. Oregon	N/A	<ul style="list-style-type: none"> <li>• Pro se litigant must file Certificate of Document Preparation, disclosing whether he/she had paid assistance from a lawyer in completing/selecting pleading (2.010(7))</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(b))</li> </ul>

39. Pennsylvania	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
40. Rhode Island	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
41. South Carolina	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
42. South Dakota	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
43. Tennessee	N/A	<ul style="list-style-type: none"> <li>• Attorney required to file notice with court of limited representation at beginning of representation and file notice of completion upon satisfying obligations of representation (11.01)</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement – but written consent is encouraged (1.2(c))</li> </ul>
44. Texas	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Requires informed consent from client after consultation – no written requirement (1.02(b))</li> </ul>

45. Utah	N/A	<ul style="list-style-type: none"> <li>• Attorney can file Notice of Limited Appearance (signed by Attorney and client) that specifically describes purpose and scope of appearance (75)</li> <li>• Attorney can withdraw from case by filing and serving notice of withdrawal with court (74(b))</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
46. Vermont	N/A	<ul style="list-style-type: none"> <li>• Attorney must provide written notice of limited appearance (describing scope) to court (79.1(2))</li> <li>• Attorney may be granted leave to withdraw once terms of representation are complete (79.1(3))</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>
47. Virginia	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Requires informed consent from client after consultation – no written requirement (1.2(b))</li> </ul>
48. Washington	N/A	<ul style="list-style-type: none"> <li>• Attorney must notify opposing party of limited scope representation if Attorney wants to be informed of</li> </ul>	<ul style="list-style-type: none"> <li>• Client must give informed consent – no express written requirement (1.2(c))</li> </ul>

		<p>case developments (4.2)</p> <ul style="list-style-type: none"> <li>• Attorney must file Notice of Limited Appearance prior to court appearance (4.2)</li> <li>• Attorney can withdraw by filing a Notice of Completion of Limited Appearance (70.1)</li> </ul>	
49. West Virginia	N/A	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Requires informed consent from client after consultation – no written requirement (1.2(c))</li> </ul>
50. Wisconsin	N/A	<ul style="list-style-type: none"> <li>• Court filings prepared by attorney must state, “this document was prepared with the assistance of a lawyer”</li> <li>• In family court, the Lawyer must file a Notice of Appearance that states when Lawyer will be present (5.6(C)) – allows attorney to withdraw after making appearance by submitting proposed order</li> </ul>	<ul style="list-style-type: none"> <li>• Requires informed consent from client in writing (1.2(c))</li> </ul>



		and serving all parties (5.6(D))	
51. Wyoming	N/A	<ul style="list-style-type: none"><li>• Documents prepared by Attorney must include statement confirming that documents prepared by counsel, name and address of attorney (1.2[7])</li><li>• Attorney can appear in court after filing notice of entry of appearance and can withdraw once appearance is complete (102(a)(1)(C) – 102(a)(2)(C))</li></ul>	<ul style="list-style-type: none"><li>• Requires informed consent from client in writing (1.2(c))</li></ul>