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Sighting the Scope of a Lawyer's Representation

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ARTICLE

Douglas R. Richmond

Sighting the Scope of a Lawyer's Representation

Abstract. Clients engage lawyers for many reasons. Regardless of the circumstances, however, the lawyer and the client need to agree on the scope of the lawyer's representation, meaning the legal services the lawyer will perform for the client. The client must agree to and understand the scope of the lawyer's representation as aspects of establishing her objectives for the matter and thereafter evaluating whether the lawyer is achieving those objectives. The client must also understand the scope of the representation to be able to decide whether the matter's potential expense justifies its pursuit and to gauge the reasonableness of the lawyer's fees. At bottom, the importance of the client's agreement to, and understanding of, the scope of representation is most easily appreciated if the attorney-client relationship is analogized to a joint venture.

From a lawyer's perspective, the scope of representation is central to various forms of professional responsibility and liability risk. Indeed, a lawyer's duties to a client are framed by the scope of the representation. As a component of scope, a lawyer normally must abide by a client's decisions concerning the objectives of the representation. From a professional liability standpoint, a lawyer typically is not liable for professional negligence—commonly referred to as legal malpractice—for failing to act outside the scope of representation. Similarly, while lawyers are fiduciaries to their clients, a lawyer's fiduciary duties are confined to the scope of the representation.

In summary, few, if any, professional responsibility and liability concepts are as consequential for lawyers and clients as the scope of representation.

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of this Article analogizes to the process by which a marksman adjusts the elevation and windage dials on the scope of a rifle so that when the marksman places the scope’s reticle on the target, the bullet strikes the target at the intended point.

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I. INTRODUCTION

Clients engage lawyers for many reasons. For instance, individuals engage lawyers to prepare and document estate plans, assist with real estate purchases, represent them in marital dissolutions, form businesses, sue another party on their behalf, and defend them in criminal cases. Corporations and other organizations hire lawyers to guide them on governance issues, represent them in litigation and arbitrations, negotiate and document transactions, render tax advice, and counsel them regarding regulatory compliance, among many other institutional legal issues. Regardless of the circumstances, the lawyer and the client need to agree on the scope of the lawyer's representation, meaning the legal services the lawyer will perform for the client.

The scope of a lawyer's representation has critical implications for both the client and the lawyer. The client must agree to and understand the scope of the lawyer's representation as aspects of establishing her objectives for the matter and thereafter evaluating whether the lawyer is achieving—or at least competently and diligently attempting to achieve—those objectives. Among other things, the client cannot effectively communicate with the lawyer about the objectives of the representation and the progress of the matter if the client and the lawyer are not aligned on the scope of the representation. The client must also understand the scope of the representation to be able to decide whether the matter's potential expense justifies its pursuit and to gauge the reasonableness of the lawyer's fees. At bottom, the importance of the client's agreement to and understanding of the scope of representation is most easily appreciated if, as legal ethics rules envision, the attorney-client relationship is analogized to a joint venture.¹

From a lawyer's perspective, the scope of representation is central to various forms of professional responsibility and liability risk. As a matter of professional responsibility, a lawyer generally must communicate the scope of the representation to the client before beginning the representation or within a reasonable time thereafter.² As a component of scope, Rule 1.2(a)

1. See 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 6.04, at 6-13 (4th ed. 2023) (“As envisioned by Rule 1.2(a), a client-lawyer relationship is thus similar to a joint venture in which each of the parties presumptively takes on certain tasks, but without a sharp dividing line between their responsibilities.”).

2. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.5(b) (AM. BAR ASS'N 2024) (“The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client . . . before or within a reasonable time after commencing the

of the Model Rules of Professional Conduct provides that a lawyer must “abide by a client’s decisions concerning the objectives of representation” in most instances.³ Thus, to use a common example, a lawyer must obey a client’s instruction to settle a case.⁴ A lawyer cannot override a client’s exclusive right to control settlement in an engagement letter or retainer agreement.⁵ If a lawyer wishes to limit the scope of a representation, whether at the client’s behest or for the lawyer’s own reasons, the limitation must be “reasonable under the circumstances” and the client must give informed consent.⁶

From a professional liability standpoint, it is essential that a lawyer clearly define the scope of a client’s representation in an engagement letter. The scope of the representation specified in the engagement letter establishes “the contours of [the] representation and, therefore, the contours of [the] lawyer’s duties to the client.”⁷ A lawyer generally may not be liable for

representation”); *see also* *Fitch v. McDermott, Will & Emery, LLP*, 929 N.E.2d 1167, 1184 (Ill. App. Ct. 2010) (stating apart from any retainer agreement, a lawyer must inform the client about the scope of the lawyer’s representation). Model Rule 1.5(b) does not require a lawyer to communicate the scope of representation in writing; it states a writing is preferable. MODEL RULES OF PROF’L CONDUCT R. 1.5(b). Some states, however, generally require a lawyer communicate the scope of representation in writing. *See, e.g.*, MASS. RULES OF PROF’L CONDUCT R. 1.5(b)(1)–(2) (2024) (“Except as provided in paragraph (b)(2) [governing single-session legal consultations and matters where the fee likely will be below \$500], the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.”).

3. MODEL RULES OF PROF’L CONDUCT R. 1.2(a).

4. *See* Fla. Bar v. Rush, 361 So. 3d 796, 801–02 (Fla. 2023) (concluding the lawyer violated Florida’s version of Rule 1.2(a) when he continued to negotiate for benefits and thus frustrated the clients’ desire to resolve the case quickly); *In re Hardy*, 890 S.E.2d 770, 775–76 (Ga. 2023) (agreeing with the special master that the lawyer violated Georgia’s Rule 1.2(a) by settling a client’s case and negotiating the settlement check without the authority to do so). Likewise, in a criminal case, a lawyer must, after consulting with the client, honor the client’s decision to enter a plea. MODEL RULES OF PROF’L CONDUCT R. 1.2(a); *see also* Iowa Sup. Ct. Att’y Disciplinary Bd. v. Johnson, 988 N.W.2d 399, 408 (Iowa 2023) (acknowledging the lawyer violated Iowa’s version of Rule 1.2(a) by placing the client’s signature on a guilty plea without the client’s knowledge or consent and submitting the forged plea to the court).

5. *See* *Amjadi v. Brown*, 283 Cal. Rptr. 3d 448, 452 (Ct. App. 2021) (“The commentary [to California’s Rule 1.2] permits clients to provide their attorneys advance authorization to settle, but does not permit an attorney to settle a case over the client’s contemporaneous objection. In fact, it expressly forbids such a maneuver”).

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

7. 1 RONALD E. MALLEEN, LEGAL MALPRACTICE § 2:31, at 111 (2024) (footnote omitted); *see also* *Howard v. Adams*, 424 S.W.3d 337, 348 (Ark. Ct. App. 2012) (“[T]he attorney’s duty is only as extensive as the specific contract for legal services . . . with the client.”); *Advanced Analytics Lab’s*,

professional negligence—commonly referred to as legal malpractice—for failing to act outside the scope of representation.⁸ Similarly, while lawyers are fiduciaries to their clients, a lawyer's fiduciary duties are confined to the scope of the representation.⁹ Furthermore, under the attorney immunity doctrine,¹⁰ a lawyer is usually not liable to third parties for conduct during

Inc. v. Kegler, Brown, Hill & Ritter, L.P.A., 773 N.E.2d 1081, 1090 (Ohio Ct. App. 2002) (citing Practical Offset, Inc. v. Davis, 404 N.E.2d 516, 520 (1980)) (“An attorney’s duty to his or her client exists in relation to the scope of representation sought by the client and undertaken by the attorney.”).

8. See Eichengrun v. Panasci, 202 N.Y.S.3d 569, 574 (App. Div. 2024) (concluding a law firm could not be liable for failing to obtain a stay in an action pending an appeal because appellate work was outside the scope of its representation); Kohler v. Polsky, 195 N.Y.S.3d 122, 124 (App. Div. 2023) (holding the lawyer could not be liable for failing to advise the plaintiff about personal injury claims against third parties when the plaintiff had signed an engagement letter which stated the lawyer agreed to represent him solely in connection with his workers’ compensation claim and not for any other claims arising out of the underlying accident); Nat’l Air Cargo, Inc. v. Jenner & Block, LLP, 165 N.Y.S.3d 643, 645–46 (App. Div. 2022) (holding the law firm had no duty to ascertain the client’s insurance coverage because the task was outside the scope of the representation based on the firm’s engagement letter); Freude v. Berzowski, No. 2023AP764, 2024 WL 3686605, at *6 (Wis. Ct. App. Aug. 7, 2024) (enforcing the parties’ representation agreement which specifically provided the lawyer handling the client’s workers compensation claim would not pursue related third-party claims and stated a separate fee agreement would be necessary for the lawyer to prosecute such claims); see also *infra* Part III.B (outlining cases in which a lawyer’s scope of representation was at issue).

9. See Fed. Sav. & Loan Ins. Corp. v. McGinnis, Juban, Bevan, Mullins & Patterson, P.C., 808 F. Supp. 1263, 1268 (E.D. La. 1992) (“[T]he attorney-client relationship (and, therefore, the scope of the lawyer’s fiduciary duty to the client) is defined and limited by any contractual agreement between the lawyer and client as to the scope of the representation.”); Stender v. Blessum, 897 N.W.2d 491, 506 (Iowa 2017) (“The creation of an attorney-client relationship does not, however, impose upon the attorney fiduciary duties that extend on indefinitely or . . . outside the scope of the attorney-client relationship.”); Moody v. Herz, No. 01–22–00202–CV, 2024 WL 1260278, at *11 (Tex. App.—Houston [1st Dist.] Mar. 26, 2024, no pet.) (mem. op.) (citing Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159–60 (Tex. 2004)).

10. The attorney immunity doctrine is widely recognized. See Kozel v. Kozel, 299 F. Supp. 3d 737, 752 (D.S.C. 2018) (“In South Carolina, an attorney is immune from liability as long as he acts within their professional capacity, on behalf of a client, and with that client’s knowledge.” (citing Gaar v. N. Myrtle Beach Realty Co., Inc., 339 S.E.2d 887, 889 (S.C. Ct. App. 1986))); Pursuit Inv. Mgmt. LLC v. Alpha Beta Cap. Partners, L.P., 8 N.Y.S.3d 283, 284 (App. Div. 2015) (“Dismissal of the action as against Harris, a law firm, is also warranted because it is immune from liability ‘under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice, or bad faith[.]’” (quoting Purvi Enters., LLC v. City of N.Y., 879 N.Y.S.2d 411, 412 (App. Div. 2009))); Scholler v. Scholler, 462 N.E.2d 158, 159–60 (Ohio 1984) (“An attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously.”). As Texas courts explain the doctrine, attorney immunity applies when the third party’s claim rests on conduct by the lawyer that:

- (1) constitutes the provision of “legal” services involving the unique office, professional skill, training, and authority of an attorney *and* (2) the attorney engages in to fulfill the attorney’s duties

clients' representations if the lawyer's conduct is consistent with the normal duties of a lawyer and is within the scope of the representation.¹¹

Lawyers who are concerned about conflicts of interest, which have both professional responsibility and professional liability implications, may avoid some conflicts by limiting the scope of a client's representation.¹² The Restatement (Third) of the Law Governing Lawyers offers an example:

in representing the client within an adversarial context in which the client and the non-client do not share the same interests and therefore the non-client's reliance on the attorney's conduct is not justifiable.

Haynes & Boone, LLP v. NFTD, LLC, 631 S.W.3d 65, 78 (Tex. 2021) (citing Landry's, Inc. v. Animal Legal Defense Fund, 631 S.W.3d 40, 52 (Tex. 2021)). The Oregon Supreme Court has embraced the same basic principles but has phrased a lawyer's defense as a privilege rather than as immunity:

[I]f a person's conduct as an agent or on behalf of another comes within the scope of a privilege, then the person is not liable to the third party. In this case, we extend those well-recognized principles . . . and hold that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship is protected by such a privilege and is not liable for assisting the client in conduct that breaches the client's fiduciary duty to a third party. Accordingly, for a third party to hold a lawyer liable for substantially assisting in a client's breach of fiduciary duty, the third party must prove that the lawyer acted outside the scope of the lawyer-client relationship.

Reynolds v. Schrock, 142 P.3d 1062, 1069 (Or. 2006).

11. See Hager v. McCabe, Trotter & Beverly, P.C., 869 S.E.2d 886, 889–90 (S.C. Ct. App. 2022) (rejecting fraud and conversion claims against the law firm based on attorney immunity); Yan v. State Bar of Tex., No. 4:23–CV–758–P, 2024 WL 1739368, at *6–7 (N.D. Tex. Apr. 23, 2024) (agreeing with the Magistrate Judge's recommendation that attorney immunity barred the plaintiff's claims because the lawyers' allegedly tortious acts were part of their representation of the plaintiff's wife in the underlying divorce case); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 485 (Tex. 2015) (footnote omitted) (“Cantey Hanger has conclusively established that its alleged conduct was within the scope of its representation of Simenstad in the divorce proceedings, was not foreign to the duties of an attorney, and is thus protected by attorney immunity.”); 1st & Trinity Super Majority, LLC v. Milligan, 657 S.W.3d 349, 368 (Tex. App.—El Paso 2022, no pet.) (“[A]n attorney is generally entitled to immunity from a civil lawsuit brought by a non-client for conduct taken within the scope of the attorney's representation of a client.”).

12. See Jefferson St. Holdings, LLC v. Otter Prods., LLC, No. 1:23–CV–01514–RMR-SBP, 2023 WL 7551560, at *22 (D. Colo. Nov. 14, 2023) (concluding an engagement letter's exclusion of corporate affiliates from the scope of representation prevented an affiliate from being treated as the law firm's client for Rule 1.9 conflict of interest purposes); Keefe Commissary Network, LLC v. Beazley Ins. Co., No. 4:20–CV–00176–SNLJ, 2020 WL 4673782, at *6 (E.D. Mo. Aug. 12, 2020) (concluding a representational disclaimer in the firm's engagement letter controlled and defeated the alleged conflict of interest); Oneida Indian Nation v. Cnty. of Oneida, 802 F. Supp. 2d 395, 425 (N.D.N.Y. 2011) (upholding the law firm's limitation on the scope of its representation to avoid a conflict of interest); Indianapolis Podiatry, P.C. v. Efroymson, 720 N.E.2d 376, 380–81 (Ind. Ct. App. 1999) (limiting the scope of representation avoided a concurrent client conflict of interest); State *ex rel.* Foy v. Vanderbilt Cap. Advisors, LLC, 511 P.3d 329, 348 (N.M. Ct. App. 2020) (limiting the scope of representation is a valid method of eliminating conflicts of interest when the representations are not directly related); D.C. Bar Legal Ethics Comm., Op. 343 (2008) (discussing the extent to which a lawyer

Lawyer has been retained by Client to represent Client in general business matters. Client has a distribution contract with Manufacturer, and there is a chance that disputes could arise under the contract. Lawyer represents Manufacturer in local real-estate matters completely unrelated to Client's business. An agreement between Lawyer and Client that the scope of Lawyer's representation of Client will not extend to dealing with disputes with Manufacturer would eliminate the conflict posed by the chance otherwise of representing Client in matters adverse to Manufacturer. Such an agreement would not require the consent of Manufacturer.¹³

This Article examines scope of representation issues that are critical to lawyers from professional responsibility and liability perspectives. Our examination begins in Part II with an analysis of limited scope representations under Rule 1.2(c) of the Model Rules of Professional Conduct, which provides that a lawyer may limit the scope of a client's representation "if the limitation is reasonable under the circumstances and the client gives informed consent."¹⁴ Next, Part III relates the scope of representation to the lawyer's professional duties. As Part III explains, a lawyer's duties to a client are bounded by the scope of the representation. A lawyer generally may not be liable for failing to act outside the scope of representation. Bringing up the rear, Part IV discusses the peripheral duty doctrine. The peripheral duty doctrine essentially provides that a lawyer may have a duty to at least alert the client to legal issues that may adversely affect the client's interests or rights, even though the issues are outside the scope of the representation, if the issues should be apparent to an ordinary lawyer in the same or similar circumstances.¹⁵

may limit a representation to a discrete legal issue or stage of litigation so the current matter is not substantially related to a prior matter for conflict of interest purposes); State Bar of Mich. Standing Comm. on Prof'l & Jud. Ethics, Op. RI-358 (2013), 2013 WL 9660911 at *1 (listing the conditions a lawyer must satisfy to limit a current or prospective client's representation to obtain consent to a conflict from another client); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2016-2 (2016), 2016 WL 8997250 at *2 [hereinafter N.Y. Ethics Op. 2016-2] (concluding a lawyer may limit the scope of representation to avoid a conflict of interest if the prospective client consents after adequate disclosures and the restrictions do not render the lawyer's counsel objectively inadequate); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS, § 132 cmt. e (AM. L. INST. 2000) (explaining a lawyer may limit the scope of representation specifically for the purpose of avoiding a conflict of interest).

13. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS, § 121 cmt. c(iii), illus. 4 (AM. L. INST. 2000) (citations omitted).

14. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (AM. BAR ASS'N 2024).

15. *See* Daugherty v. Runner, 581 S.W.2d 12, 16-17 (Ky. Ct. App. 1978) (stating the standard for legal malpractice liability and then asserting a lawyer cannot ignore matters about which she knows

II. LIMITING THE SCOPE OF REPRESENTATION

A. Overview

“A lawyer may limit the scope of [a client’s] representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹⁶ Any representation may be characterized as a limited scope representation if the lawyer limits or excludes any services the client might otherwise reasonably expect to be included in the representation.¹⁷ In contrast, a representation where a client engages a lawyer to perform a discrete task—such as reviewing a contract to determine whether key provisions comply with applicable law—is not a limited scope representation.¹⁸ That is a full representation, albeit for a singular purpose.

Limiting the scope of representation does not excuse a lawyer from complying with duties imposed by rules of professional conduct.¹⁹ “Inside the ring of the limited scope representation, the lawyer’s duties to the client remain in full force.”²⁰ Accordingly, clients in limited scope representations are owed all the ethical duties lawyers owe clients in full-service representations, including competence, communication, confidentiality, conflict of interest avoidance, and diligence.²¹

should reasonably put her on notice the client may have legal problems or remedies outside the scope of the representation); MALLEEN, *supra* note 7, § 8:8 at 1017 (discussing the peripheral duty doctrine).

16. MODEL RULES OF PROF'L CONDUCT R. 1.2(c); *see also* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 19 (AM. L. INST. 2000) (imposing the same conditions).

17. *See* N.Y. Ethics Op. 2016–2, *supra* note 12, at *2 (defining a limited scope representation as “one that limits or excludes services that the client would reasonably expect to be included in the representation under the circumstances”).

18. *See, e.g.*, Glob. Data Sci., Inc. v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C., No. 2–15–0141, 2016 WL 281651, at *9 (Ill. App. Ct. Jan. 19, 2016) (explaining a lawyer hired by the client for the purpose of reviewing an employment contract for two job candidates was not involved in a limited scope representation within the meaning of Rule 1.2(c)).

19. Or. State Bar Ass'n, Formal Op. 2011–183 (2011), 2011 WL 11741924, at *2 n.3; Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011–100 (2011), 2011 WL 7574467, at *5 [hereinafter Pa. Ethics Op. 2011–100].

20. Douglas R. Richmond, *Touring Deposition Conflicts by Rail*, 57 S. TEX. L. REV. 81, 90 (2015) (citing *Greenwich v. Markhoff*, 650 N.Y.S.2d 704, 706 (App. Div. 1996)).

21. Pa. Ethics Op. 2011–100, *supra* note 19, at *5; *see also* D.C. Bar Legal Ethics Comm., Op. 330 (2005) (stating “all the usual duties of the D.C. Rules of Professional Conduct” attach to limited scope representations (citing D.C. Bar Legal Ethics Comm., Op. 316 (2002))); Miss. Bar Ethics Comm. Op. 261 (2018) (stating the “full panoply of ethical obligations” apply to lawyers in limited scope representations).

Limited scope representations are sometimes equated with “unbundled” legal services.²² These two types of representations—limited scope representation and unbundled legal services—are not necessarily synonymous. “Unbundling is the practice of limiting the scope of services that an attorney will provide—’dividing comprehensive legal representation into a series of discrete tasks, only some of which the client contracts with the lawyer to perform.’”²³ Unbundled legal services have also been described this way:

A lawyer providing unbundled legal services works with clients only on certain legal tasks instead of taking on the entire case, based on what the clients can afford and need help with the most. Unbundled legal services . . . are becoming a more popular and less expensive way to help people who cannot afford to hire a lawyer for the entirety of their case. Lawyers can offer unbundled services in their practice to increase their clientele and also to provide help to many who are unable to pay for full-scale legal help.²⁴

Or, as a New York federal court observed, unbundled legal services reflect a “buffet approach to legal representation” with the goal of expanding access to legal services for people who could not otherwise afford to hire a lawyer.²⁵

In contrast to a buffet approach, a limited scope representation may be much more cohesive, such as where a lawyer agrees to handle all aspects of a client’s transaction except for escrowing funds due to the counterparty at closing, a lawyer agrees to represent a client through trial but declines to handle any appeal, or a lawyer agrees to represent a client in connection with a workers’ compensation claim but declines to sue third parties who may be responsible for the client’s injuries. Furthermore, limited scope representations frequently are enlivened not by affordability but by what

22. See, e.g., *In re Mawson*, No. BT 18–05012, 2021 WL 4073376, at *4 (Bankr. W.D. Mich. Sept. 7, 2021) (“Limiting the scope of representation, or ‘unbundling’ as it is sometimes called . . .” (citing Carrie A. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, 32 AM. BANKR. INST. J. 14 (2013))).

23. *In re Seare*, 493 B.R. 158, 183 (Bankr. D. Nev. 2013) (quoting Amber Hollister, *Limiting the Scope of Representation: Unbundling Legal Services*, 71 OR. ST. B. BULL. 9, 9 (2011)).

24. Michael Houlberg & Janet Drobinske, *Unbundled Legal Services in the New Normal*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Sept. 30, 2022) <https://iaals.du.edu/publications/unbundled-legal-services-new-normal> [https://perma.cc/Y9M7-CTMA].

25. *Askew v. New York State*, No. 1:09–CV–553 (GLS/RFT), 2010 WL 11680343, at *3 (N.D.N.Y. June 7, 2010).

responsibilities the lawyer is willing to assume based on the time involved, the resources required, the avoidance of conflicts of interest, or the lawyer's skills or expertise. In sum, while all unbundled representations are limited scope representations, the reverse is not necessarily true.

B. *Reasonable Limitations with the Client's Informed Consent*

Again, for a lawyer to permissibly limit the client's representation, two conditions must be met. First, the limitation must be reasonable under the circumstances.²⁶ Second, the client must give informed consent to the limitation.²⁷ These conditions go hand-in-hand.²⁸

1. Reasonable Limitations Under the Circumstances

The reasonableness of a limited scope representation is assessed at the time the client agrees to the representation.²⁹ There is no clear-cut rule for determining whether a limited scope representation is reasonable.³⁰ The reasonableness of any limitations on the scope of a representation is a case-and fact-specific inquiry.³¹ For instance, the reasonableness of a limitation on the scope of representation may depend on the client's objectives, the possible means of achieving those objectives, the client's sophistication, whether the client or the lawyer sought the limitation, the nature of the matter, the complexity of the matter, the potential costs and expenses associated with the matter, whether the client has retained co-counsel in the matter,³² time constraints, the amount of labor or time required on the

26. MODEL RULES OF PROF'L CONDUCT R 1.2(c) (AM. BAR ASS'N 2024).

27. *Id.*

28. *See In re Collmar*, 417 B.R. 920, 922 (Bankr. N.D. Ind. 2009) ("Both requirements must be satisfied for the limitation to be proper: the limitation must be reasonable *and* the client must give informed consent to it." (emphasis added)).

29. *In re Seare*, 493 B.R. 158, 192 (Bankr. D. Nev. 2013) (first citing NEV. RULES OF PROF'L CONDUCT R. 1.2(c) (2011); and then citing Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic Relations Matters Involving Litigation*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 166, 176 (2012)).

30. *See* N.Y. Eth. Op. 2016-2, *supra* note 12, at *4 (viewing New York's position to determine the reasonableness of a limited scope representation without referring to a bright-line rule).

31. *See In re Seare*, 493 B.R. at 194 (discussing timing when limiting the scope of representation).

32. *See* *Armor v. Lantz*, 535 S.E.2d 737, 749 (W. Va. 2000) ("[T]he duties of a lawyer acting as local counsel, while they may be limited by contractual agreement between lawyer and client, generally may not fall beneath the responsibilities expressly or impliedly imposed by the relevant rules of practice pertaining to the association of local counsel."); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2015-4 (2015), 2015 WL 13333125, at *4 [hereinafter N.Y. Ethics Op. 2015-4] (stating a lawyer serving as local counsel cannot limit the scope of representation to exclude the lawyer's duty to avoid filing frivolous claims, circumvent local court rules requiring a lawyer with sufficient knowledge of the

lawyer's part, possible conflicts of interest, the rights or interests of other parties, the lawyer's expertise or practice focus, or the availability of other lawyers capable of handling the matter.³³ More generally, the Restatement (Third) of the Law Governing Lawyers indicates that a limitation on the scope of a representation is reasonable if the benefits to the client "could reasonably be considered to outweigh the potential risk posed by the limitation."³⁴ Alternatively, a scope limitation may be considered reasonable if any effect on the client's representation is or will be harmless.³⁵

At the same time, Model Rule 1.2(c) does not empower a lawyer "to exclude whatever services he or she may find too time-consuming, onerous, or fraught with potential liability."³⁶ A limitation on the scope of a representation is clearly unreasonable if the lawyer knows, or reasonably should know, when forming the attorney-client relationship that the limitation will not allow the client to achieve the objectives of the representation.³⁷ In *Attorney Grievance Commission v. Sanderson*,³⁸ for example, Olugboyega Odubanjo retained Garland Sanderson on January 18, 2013, to represent him in a criminal trial set for January 24, 2013.³⁹ Sanderson conditioned the representation on his ability to obtain a continuance of Odubanjo's trial.⁴⁰ The limitation was necessary because Sanderson knew he had a scheduling conflict and could not appear in court for Odubanjo's case on January 24, 2013.⁴¹ Indeed, he had to appear in another court for a different client that day.⁴² In accepting Odubanjo's case, Sanderson assumed he could get the trial postponed.⁴³ Sanderson told Odubanjo about

case to appear at all conferences, or abdicate responsibility for ensuring the client receives information about developments related to the local counsel's designated responsibilities).

33. This list of factors is not intended to be exclusive. Not all factors will apply in all cases.

34. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 19 cmt. c (AM. L. INST. 2000).

35. See HAZARD, JR. ET AL., *supra* note 1, § 6.15 at 6-38 (stating a scope limitation is reasonable if it is not harmful to the client).

36. *In re Minardi*, 399 B.R. 841, 851 (Bankr. N.D. Okla. 2009).

37. *In re Seare*, 493 B.R. 158, 193 (Bankr. D. Nev. 2013).

38. Att'y Grievance Comm'n v. Sanderson, 213 A.3d 122 (Md. 2019).

39. *Id.* at 130–31. Odubanjo's trial was originally set for August 9, 2012, but, because he was unrepresented at the time, the court continued his case to January 24, 2013, so he could retain counsel. *Id.* Sanderson does not consistently describe Odubanjo's court appearances; sometimes the court describes the same proceeding or scheduled proceeding as a hearing and other times as a trial. *Id.*

40. *Id.* at 146.

41. *Id.* at 131.

42. *Id.* at 137.

43. *Id.* at 137, 144.

the conflict, although he did not document the limitation on the scope of his representation in writing.⁴⁴

On January 23, 2013—the day before Odubanjo’s trial—Sanderson entered his appearance on Odubanjo’s behalf and moved for a continuance.⁴⁵ In his motion, Sanderson wrote that he was unable to participate in Odubanjo’s trial because of a scheduling conflict.⁴⁶ The following day, the trial court denied the motion.⁴⁷ When Sanderson did not appear for trial (Odubanjo appeared alone), the court continued the case.⁴⁸ Odubanjo then fired Sanderson as his lawyer, and the trial court judge filed an ethics complaint against him.⁴⁹

Maryland’s highest court succinctly determined Sanderson violated Maryland’s version of Rule 1.2(c).⁵⁰ Sanderson conditioned Odubanjo’s representation on his ability to continue the trial date.⁵¹ The limitation was obviously unreasonable, considering Sanderson entered his appearance and filed his motion for continuance the day before Odubanjo’s scheduled trial.⁵² Odubanjo’s knowledge that Sanderson would not appear for the January 24 trial did not change the fact that Sanderson’s limitation of the scope of the representation was unreasonable.⁵³

In addition to failing the reasonableness test if a limitation frustrates the achievement of the client’s objectives, a limitation on the scope of representation is plainly unreasonable if it violates rules of professional conduct or other law.⁵⁴ A lawyer could not, for example, agree to limit the scope of representation to exclude responsibility for inquiring into the

44. *Id.* at 146.

45. *Id.* at 131.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 146–47.

51. *Id.* at 146.

52. *Id.*

53. *Id.* at 146–47.

54. *See In re Seare*, 493 B.R. 158, 193–94 (Bankr. D. Nev. 2013) (“A limitation is *per se* unreasonable if it violates a rule of ethics or provision of substantive law”); MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 8 (AM. BAR ASS’N 2024) (“All agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct and other law.” (citing MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.8, 5.6)); RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.2-3(a), at 119 (2023) (“[T]he power to draft a specific contract (or retainer) between the lawyer and client may not be used to violate the ethical codes or other law.”).

legality of a client's transaction to avoid assisting the client in criminal or fraudulent conduct that was prohibited under Model Rule 1.2(d).⁵⁵ Nor could a lawyer limit the scope of representation in litigation so as to deprive the client of the right to control settlement.⁵⁶ In a criminal matter, a lawyer could not limit the scope of the representation so that the client lost the right to waive a jury trial, decide whether to testify, or decide whether to accept or deny a plea.⁵⁷

Fundamentally, a limitation on the scope of representation is unreasonable if it violates the lawyer's duty of competence.⁵⁸ Indeed, in this context, reasonableness and competence are synchronous.⁵⁹ So, a limitation on the scope of representation is unreasonable if it excludes responsibility for advice, a service, or a task that is necessary to achieve the client's objectives in the matter.⁶⁰ A limitation is also unreasonable if it will cause the lawyer to prepare inadequately.⁶¹ A lawyer cannot cure such problems by obtaining the client's consent to the improper limitation because a client cannot consent to incompetent representation.⁶² Finally, although a lawyer cannot craft a scope limitation that violates the lawyer's duty of competence, limitations on the scope of a representation are factors for courts and disciplinary authorities to consider when "determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁶³

2. The Client's Informed Consent to the Limitation

Assuming that a proposed limitation on the scope of a representation is reasonable, the client must still give informed consent to the

55. See ABA Comm. on Ethics & Prof'l Resp., Formal Op. 491, at 11 (2020).

56. ROTUNDA, *supra* note 54, at 119 (citing MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt 8).

57. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (reserving these decisions to the client).

58. *In re: Day v. Kacol*, No. 23-52197-JRS, 2024 WL 1506751, at *23 (Bankr. N.D. Ga. Apr. 5, 2024); *In re Seare*, 493 B.R. at 193; *In re Slabbinck*, 482 B.R. 576, 588 (Bankr. E.D. Mich. 2012); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 751 (2002), 2002 WL 1303477, at *3 [hereinafter N.Y. Ethics Op. 751] (opining that a lawyer and client may not limit the scope of representation in a way that would cause the lawyer "to neglect the matter, prepare inadequately, or otherwise represent the client incompetently").

59. See *In re Seare*, 493 B.R. at 193 (stating that competence and reasonableness are coextensive).

60. See *id.* ("[A] limitation on [a lawyer's] services violates the duty of competence if the unbundled service is reasonably necessary to achieve the client's reasonably anticipated result.").

61. See N.Y. Ethics Op. 751, *supra* note 58, at *3 (stating that a lawyer's obligation to comply with client directions does not encompass the direction to prepare inadequately).

62. *Id.*

63. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (AM. BAR ASS'N 2024).

representation.⁶⁴ “Informed consent” in this context, as elsewhere in the Model Rules, “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁶⁵ In limited scope representations, communicating the risks of the limitations on the representation is arguably the most important consideration.⁶⁶ In any event, the amount of information the lawyer will need to share with the client to achieve informed consent in a given matter depends on the facts and circumstances.⁶⁷ The nature of the matter, the nature of the limitation, the client’s sophistication, whether the client is experienced in legal matters generally, and whether the client is represented by separate counsel (as perhaps in a matter involving an organization with in-house counsel) are some of the factors that may come into play when evaluating the informational adequacy of a lawyer’s disclosures. Although a lawyer need not inform a client or prospective client about facts or potential ramifications about which the person already knows, a lawyer who assumes too much about a client or prospective client’s knowledge risks the person being inadequately informed and any consent later being declared invalid.⁶⁸

In many cases, an engagement letter that clearly describes the limited scope of the representation will suffice to establish the client’s informed consent to the limitations spelled out in the letter.⁶⁹ There is no guarantee, however, that even a well-written engagement letter will pass muster when it comes to achieving or evidencing informed consent.⁷⁰ It is clearly

64. *Id.* R. 1.2(c).

65. *Id.* R. 1.0(e).

66. *See In re Seare*, 493 B.R. 158, 199 (Bankr. D. Nev. 2013) (“The primary goal of the information disclosure is to communicate the risks of limited representation.”).

67. *Id.* at 198–99 (“The nature of the required disclosure is fact-specific and depends on the client’s particular situation.”).

68. *See* Pa. Ethics Op. 2011–100, *supra* note 19, at *4 (“[A] lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.”).

69. *See Flatow v. Ingalls*, 932 N.E.2d 726, 730–31 (Ind. Ct. App. 2010) (rejecting the client’s legal malpractice claim arising out of a limited scope representation because it was evident from the parties’ written engagement agreement that some consultation had occurred between the lawyer and the client and the client did not allege that he misunderstood the agreement); *see also Lerner v. Laufer*, 819 A.2d 471, 483 (N.J. Super. Ct. App. Div. 2003) (enforcing an engagement agreement that limited the scope of the lawyer’s representation in a matrimonial case).

70. *See, e.g., Benet v. Schwartz*, No. 93 C 7295, 1995 WL 117884, at *4 (N.D. Ill. Mar. 15, 1995) (“The fact that defendants and Benet executed the retainer agreement does not establish that

preferable for the lawyer to personally discuss the matter with the client before documenting the limited scope of the representation in an engagement letter.

Model Rule 1.2(c) does not require either that the client consent to the limitation on the scope of the representation in writing or that the lawyer confirm the client's consent to the limitation in writing.⁷¹ Some courts, however, do require engagement agreements that limit the scope of representation to be in writing.⁷² Furthermore, some states' versions of Rule 1.2(c) impose writing requirements.⁷³ And even if a lawyer is not ethically required to confirm a client's informed consent to a limited scope representation in writing, doing so is a beneficial risk management practice.⁷⁴

C. *Recommendations for Lawyers*

The burden of defining the scope of a representation rests on the lawyer's shoulders.⁷⁵ If a lawyer proposes to assume fewer responsibilities or do less work than she would normally do on a matter, or if a client would reasonably expect an excluded task to be included in a representation, the lawyer should

defendants satisfied Rule 1.2(c)'s disclosure requirement. The retainer agreement therefore cannot prevent Benet from asserting that defendants owed her a duty of disclosure arising out of Rule 1.2(c).")

71. See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (AM. BAR ASS'N 2024) (stating a lawyer has the authority to limit the scope of a representation when such limitation is both reasonable and consented to by the client but does not require such consent to be in writing).

72. See *Persels & Assocs., LLC v. Cap. One Bank, (USA), N.A.*, 481 S.W.3d 501, 508 (Ky. 2016) ("[I]n addition to being reasonable under the circumstances, all agreements which limit representation must be in writing, require the informed consent of the client(s), and must comport with our rules, including the rules of professional conduct."); *FIA Card Servs., N.A. v. Pichette*, 116 A.3d 770, 784 (R.I. 2015) (stating lawyers may assist pro se litigants under Rule 1.2(c) provided that the pro se litigant consents to the limited scope representation in writing).

73. See FLA. RULES OF PROF'L CONDUCT R. 4-1.2(c) (FLA. BAR ASS'N 2024) (requiring the client to give informed consent in writing); MD. RULES OF PROF'L CONDUCT R. 1.2(c)(3) (MD. BAR ASS'N 2016) (requiring the scope and limitations of any representation to be "clearly set forth in a writing"); MO. RULES OF PROF'L CONDUCT R. 4-1.2(c) (MO. SUP. CT. 2020) (requiring a client to provide "informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role").

74. See ABA Comm. on Ethics & Prof'l Resp., Formal Op. 472, at 3 (2015) (recommending when a lawyer provides limited-scope representation to a client, the lawyer should confirm with the client the scope of the representation in writing using language that the client can understand and refer to later); N.Y. Ethics Op. 2015-4, *supra* note 32, at *3 ("Even where a writing is not required, the better practice is to obtain the client's consent in writing."); Pa. Ethics Op. 2011-100, *supra* note 19, at *5 (expressing the "strong view . . . that the client's informed consent to a limited engagement . . . should be confirmed in writing . . . by memorializing it within the context of the representation agreement").

75. *Disciplinary Couns. v. Lee*, 49 N.E.3d 1255, 1262 (Ohio 2016) (applying Kentucky law); *State ex rel. Okla. Bar Ass'n v. Vincent*, 48 P.3d 797, 801 (Okla. 2002).

comply with the Model Rule 1.2(c) requirements for a limited scope representation.⁷⁶ Whether a lawyer's planned limitation is reasonable will vary with the circumstances. When it comes to obtaining the client's informed consent to the limited scope representation, the lawyer should discuss the limitations with the client, taking care to explain the advantages and disadvantages attending the limitation and the client's alternatives. The lawyer should thereafter document the limited scope representation in an engagement letter using straightforward language that the client can understand. The letter should clearly specify what services the lawyer will or will not provide in the representation.⁷⁷ Among other advantages, accurately documenting the scope of the representation in an engagement letter avoids the potential for confusion and disagreement over the scope of services that can occur in the absence of writing.⁷⁸ Although there is no requirement that an engagement letter specifically label the matter a "limited scope . . . representation[,]"⁷⁹ the lawyer is smart to do so in addition to clearly describing the nature of the limited scope representation and framing the related advantages and disadvantages.⁸⁰ Finally, the engagement letter should acknowledge the client's consent to the representation.⁸¹ It is a good idea for the lawyer to have the client sign and return a copy of the letter.⁸²

76. See N.Y. Ethics Op. 2016-2, *supra* note 12, at *2 (defining a limited scope representation).

77. See Nathan M. Crystal, *Limited Engagement Agreements: An Important Tool for Limiting Liability and Dealing with Conflicts*, S.C. LAW., May 2011, at 10, 13 (recommending that an engagement letter for a limited scope representation both specify the services that the lawyer will provide and exclude services not specifically covered by the engagement).

78. See, e.g., *In re Hodges*, 342 B.R. 616, 620-21 (E.D. Wash. 2006) (involving a dispute over the scope of a bankruptcy representation and the fees to be charged for the allegedly agreed legal services, with the court ultimately accepting the client's testimony concerning the scope of representation).

79. *Lerner v. Laufer*, 819 A.2d 471, 484 (N.J. Super. Ct. App. Div. 2003).

80. See Crystal, *supra* note 77, at 13 (urging lawyers to specifically state in the engagement letter that it is a "Limited Engagement Agreement").

81. A client's agreement to a limited scope representation is not equivalent to consent to a concurrent conflict of interest, which requires the lawyer to confirm the client's consent to the conflict in writing. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (AM. BAR ASS'N 2024) (stating the conditions for a lawyer to represent a client when a concurrent conflict of interest exists). Rather, a client's acceptance of a limited scope representation is simply the client's agreement to the scope of services to be provided by the lawyer. Thus, absent a contrary state rule, written confirmation of the limited scope of representation is a prudent risk management measure rather than an ethical requirement.

82. In some states, the client's signature may be required by the state's version of Rule 1.2(c). See, e.g., MO. RULES OF PROF'L CONDUCT R. 4-1.2(c) (MO. SUP. CT. 2020) (requiring a client to provide "informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role").

III. RELATING THE LAWYER'S DUTIES TO THE SCOPE OF REPRESENTATION

A. *Overview*

As indicated earlier, the reach of a lawyer's duties to a client is measured by the scope of the representation.⁸³ Usually, the client and lawyer agree on the scope of the representation at the outset of the matter. That agreement is a natural product of the lawyer's ethical duty to communicate with the client, which obligates the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and to explain the matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁸⁴ The

83. See *Oakland Police & Fire Ret. Sys. v. Mayer Brown, LLP*, 861 F.3d 644, 651 (7th Cir. 2017) ("Under Illinois law, the scope of the attorney's duty to a client is limited by the representation sought."); *Coves of the Highlands Cmty. Dev. Dist. v. McGlinchey Stafford, P.L.L.C.*, 526 F. App'x 381, 383–85 (5th Cir. 2013) (concluding a law firm retained as bond counsel had no duty to perform environmental due diligence); *Macawber Eng'g, Inc. v. Robson & Miller*, 47 F.3d 253, 256 (8th Cir. 1995) ("[A]n attorney's duty is defined and limited by the scope of the overall attorney-client relationship." (citing *Spannaus v. Larkin, Hoffman, Daly, and Lindgren, Ltd.*, 368 N.W.2d 395, 398 (Minn. Ct. App. 1985))); *Shim v. Lawler*, No. 17-CV-04920-EMC, 2019 WL 2996443, at *9–12 (N.D. Cal. July 9, 2019) (rejecting the plaintiff's claims because the lawyers' duties were limited by the scope of representation stated in the engagement letter); *Howard v. Adams*, 424 S.W.3d 337, 348 (Ark. Ct. App. 2012) ("An attorney does not owe a client a duty to pursue all of the legal claims that an attorney may have knowledge of—the attorney's duty is only as extensive as the specific contract for legal services that he or she has entered into with the client." (citing *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996))); *Flatow v. Ingalls*, 932 N.E.2d 726, 731–32 (Ind. Ct. App. 2010) (rejecting the plaintiff's malpractice claim because the task the lawyer allegedly failed to perform was outside the scope of the lawyer's representation); *Kan. Pub. Emps. Ret. Sys. v. Kutak Rock*, 44 P.3d 407, 416 (Kan. 2002) ("The scope of the attorney's duty in the circumstances of this case is commensurate with his or her undertaking."); *Patel v. FisherBroyles, LLP*, 1 N.W.3d 308, 315 (Mich. Ct. App. 2022) ("[W]hen an attorney and a client expressly limit terms of the attorney's representation, the duty imposed on the attorney for purposes of a legal malpractice action is limited to the agreed-upon scope of representation." (footnote omitted)); *Boukari v. Schwartzberg Assocs., LLC*, 206 N.Y.S.3d 296, 297 (N.Y. App. Div. 2024) ("Plaintiff's legal malpractice action should have been dismissed. . . . [D]efendants had clearly informed plaintiff . . . that [they] were only assisting her in substituting counsel in a Workers' Compensation matter and that they had declined to represent her in any personal injury action . . ."); *Genesis Merch. Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC*, 69 N.Y.S.3d 30, 33 (N.Y. App. Div. 2018) ("An attorney may not be held liable for failing to act outside the scope of the retainer . . .") (citing *Ambase Corp. v. Davis Polk & Wardell*, 866 N.E.2d 1033 (N.Y. 2007)); *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 536 S.E.2d 349, 355 (N.C. Ct. App. 2000) (enforcing the limitations on the scope of representation set forth in the firm's engagement letter in rejecting the plaintiff's negligence claims); *Jones v. Bresset*, 47 Pa. D. & C.4th 60, 70–73 (Pa. Ct. Common Pl. 2000) (upholding the limitation of the scope of the representation).

84. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2), (b).

lawyer then documents the attorney-client relationship and any limits on the scope of the representation in an engagement letter, which the client may or may not be required to sign.⁸⁵ Any limits on the scope of the representation should be clearly stated. If the scope of representation in an engagement letter is ambiguous, the lawyer risks a court finding the scope to be broader than the lawyer intended, and the lawyer may therefore be subject to duties she never intended to assume.⁸⁶ After all, under contract law,⁸⁷ any ambiguities in an engagement agreement will generally be construed in favor of the client and against the lawyer as the drafter.⁸⁸

B. *Representative Cases*

1. The Scope of Representation Favors the Lawyers

*AmBase Corp. v. Davis Polk & Wardwell*⁸⁹ illuminates a lawyer's need to identify a client's objectives and precisely define the scope of

85. Although many law firms require clients to sign engagement letters, many others do not, and the lack of a client signature will not render an engagement agreement unenforceable. *See* Ullman, Perlmutter & Sklaver v. Byers, 900 A.2d 602, 605–06 (Conn. App. Ct. 2006) (rejecting the client's claim that she did not have a contract with the law firm because she did not sign the engagement letter the firm mailed to her, and thus the firm had violated Rule 1.5(b)); *see generally* Wright v. Hernandez, 469 S.W.3d 744, 756–57 (Tex. App.—El Paso 2015, no pet.) (explaining how a party's signature on a contract creates a presumption that the party has assented to the terms of the agreement, but the absence of a party's signature does not necessarily invalidate a contract and does not determine whether the parties intended to be bound by the contract's terms).

86. *See, e.g.*, Rodowicz v. Feldman, Perlstein & Greene, LLC, No. 3:20-CV-00777 (JAM), 2021 WL 3290706, at *5 (D. Conn. Aug. 2, 2021) (asserting that if the engagement agreement was unclear, it was the lawyer's responsibility to clarify the scope of representation and concluding that given the lack of clarity, the plaintiff had plausibly alleged that lawyer agreed to represent him individually in the underlying dispute).

87. *See* M'Guinness v. Johnson, 196 Cal. Rptr. 3d 662, 673 (Ct. App. 2015) (stating courts construe agreements between lawyers and clients under traditional principles of contract interpretation).

88. *See* Banning Ranch Conservancy v. Superior Ct., 123 Cal. Rptr. 3d 348, 355 (Ct. App. 2011) (“Any ambiguity in a retainer agreement is construed in favor of the client and against the attorney.”); *Arbus, Maybruch & Goode, LLC v. Cohen*, 294 A.3d 1196, 1200 (N.J. Super. Ct. App. Div. 2023) (“We acknowledge lawyers typically prepare retainer agreements, clients rely on the integrity of their lawyers who fashion those agreements, and, as such, an agreement susceptible to two reasonable interpretations should be construed in favor of the client.”); *Albunio v. City of N.Y.*, 11 N.E.3d 1104, 1107 (N.Y. 2014) (“The general rule that ‘equivocal contracts will be construed against the drafters’ is subject to particularly rigorous enforcement in the context of attorney-client retainer agreements.” (citations omitted)).

89. *AmBase Corp. v. Davis Polk & Wardwell*, 866 N.E.2d 1033 (N.Y. 2007).

representation.⁹⁰ In *AmBase*, AmBase Corporation's (AmBase) corporate parent, Citi Investing Co. (Citi Investing), decided to liquidate.⁹¹ As part of the liquidation process, Citi Investing transferred substantial assets to another entity, Citi Trust, to ensure payment of Citi Investing's post-liquidation liabilities.⁹² In addition, AmBase and Citi Investing agreed that AmBase would assume primary liability for Citi Investing's federal income taxes and secondary liability for debts Citi Trust was unable to pay.⁹³ Soon thereafter, the Internal Revenue Service (IRS) determined that Citi Investing was liable for six years' worth of withholding taxes owed in connection with payments to a related entity.⁹⁴ The IRS claimed a tax deficiency of nearly \$21 million.⁹⁵ AmBase retained Davis Polk & Wardwell (Davis Polk) to resolve the tax dispute.⁹⁶ Davis Polk successfully litigated the matter, with the United States Tax Court rejecting the IRS's claim for the subject taxes.⁹⁷

AmBase was a sore winner. After refusing to pay Davis Polk's outstanding fees and demanding a refund of fees already paid, AmBase sued the firm for legal malpractice on the theory that Davis Polk had failed to advise AmBase that AmBase was only secondarily liable for the payment of taxes under its agreement with Citi Investing.⁹⁸ AmBase alleged that Davis Polk's negligence caused it to maintain a \$21 million loss reserve, which, in turn, created the impression that the company was in the red and caused it to lose business opportunities.⁹⁹ Davis Polk responded that AmBase retained the firm to "litigate only whether taxes were due, not to determine who was responsible for such taxes."¹⁰⁰

The *AmBase* court sided with Davis Polk based on the scope of representation fixed in the parties' retainer agreement.¹⁰¹ As the court explained:

90. *See id.* at 1035 (holding the "defendants did not commit legal malpractice, and a money judgment was properly awarded to defendants").

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1036.

100. *Id.*

101. *See id.* at 1037 (explaining how the issue of secondary liability was outside the scope of the representation articulated in the retainer agreement).

The retainer agreement states that AmBase has “engaged [Davis Polk] to represent [it] as agent for City Investing to resolve the tax issues currently before” the IRS. The plain language of the retainer agreement indicates that Davis Polk was retained to litigate the amount of tax liability and not to determine whether the tax liability could be allocated to another entity. Thus, the issue whether plaintiff was primarily or secondarily liable for the subject tax liability was outside the scope of its representation.¹⁰²

Consequently, it was apparent to the *AmBase* court that the Davis Polk lawyers “exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” when they concentrated their efforts on AmBase’s dispute with the IRS as the firm contractually agreed to do and won the case.¹⁰³ In fact, AmBase had publicly praised Davis Polk’s performance in winning the tax dispute.¹⁰⁴

In a more recent New York case, *Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*,¹⁰⁵ the law firm again defeated the plaintiff’s claims based on the scope of representation set forth in its engagement letter.¹⁰⁶ In *Attallah*, Milbank, Tweed, Hadley & McCloy, LLP (Milbank) agreed to represent Ahdy Attallah in connection with his dismissal from the New York College of Osteopathic Medicine (the College) on a pro bono basis.¹⁰⁷ The firm’s engagement letter tightly limited the scope of Attallah’s representation:

The letter of engagement provided, in relevant part, that: “Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from the New York College of Osteopathic Medicine (the ‘College’). This engagement does not, however, encompass any form of litigation or, to the extent ethically prohibited in this circumstance, the threat of litigation, to resolve this matter. This engagement will end upon your re-admittance to the College or upon a determination by the attorneys working on this matter that no non-litigation mechanisms are available to assist you. The scope of the engagement may not be expanded

102. *Id.*

103. *Id.*

104. *Id.*

105. *Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 93 N.Y.S.3d 353 (App. Div. 2019).

106. *Id.* at 356–57.

107. *Id.* at 355.

orally or by conduct; it may only be expanded by a writing signed by our Director of Public Service.”¹⁰⁸

Milbank could not persuade the College to reconsider Attallah’s dismissal.¹⁰⁹ Attallah then sued the firm for breach of fiduciary duty, legal malpractice, and violations of two New York statutes.¹¹⁰ He alleged that the firm breached its duties to him by failing to negotiate the administrative reconsideration of his dismissal, declining to sue the College on his behalf, and failing to advise him regarding the advisability of suing third parties for defamation.¹¹¹ Milbank successfully moved to dismiss the case in the trial court and Attallah appealed.¹¹²

The *Attallah* court found that Milbank’s engagement letter conclusively showed that the firm never promised to negotiate Attallah’s administrative readmission to the College.¹¹³ Rather, the firm promised only to “investigate and consider options that may be available to urge administrative reconsideration of [Attallah’s] dismissal from the New York College of Osteopathic Medicine”¹¹⁴ Any other tasks, including negotiating Attallah’s administrative readmission to the College, suing the College, and advising Attallah regarding defamation claims against other parties, were outside the scope of the representation specified in the engagement letter.¹¹⁵

As signaled in *AmBase*, under New York law, a lawyer may not be held liable to a client for failing to act outside the agreed scope of representation.¹¹⁶ Accordingly, because Milbank’s alleged failure to negotiate with the College, claimed failure to sue the College, and purported failure to advise Attallah concerning possible defamation litigation against third parties were outside the scope of the parties’ engagement terms, the trial court properly dismissed Attallah’s legal malpractice claim.¹¹⁷ Attallah’s

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 356.

112. *Id.* at 355.

113. *Id.* at 356.

114. *Id.* (quoting Milbank’s Engagement Letter).

115. *Id.*

116. *Id.* (citing *AmBase Corp. v. Davis Polk & Wardwell*, 866 N.E.2d 1033 (N.Y. 2007)).

117. *Id.*

breach of fiduciary claim and statutory causes of action failed on other grounds.¹¹⁸

Last in this line of authority is *Damian v. SmithAmundsen, LLC*.¹¹⁹ The plaintiff, Melanie Damian, was the receiver of Today's Growth Consultant Inc. (TGC), which was founded by Kevin Courtright.¹²⁰ Damian sued SmithAmundsen, LLC (SA) for legal malpractice and for aiding and abetting TGC's breach of fiduciary duty, based on SA's legal advice to TGC prior to the Securities and Exchange Commission (SEC) suing TGC for running a Ponzi scheme.¹²¹ Basically, Damian alleged that the SEC would not have sued TGC but for SA's deficient advice.¹²²

Foundationally, TGC had entered "Consulting Performance Agreements" (CPAs) with investors, under which the investors agreed to pay TGC for interests in "revenue generating websites" developed, maintained, and hosted by TGC.¹²³ When TGC could not meet the required payments to investors using website revenues, it resorted to paying old investors with new investors' funds.¹²⁴

In May 2015, the SEC issued a subpoena to TGC for documents and information related to the CPAs as part of an investigation into another company, Smart Money Financial Group, Inc. (Smart Money).¹²⁵ The subpoena set off alarms inside TGC because "if a CPA was a 'security,' then TGC was required by law to file a registration statement with the SEC."¹²⁶ In June 2016, TGC's general counsel, Michael Polachek, retained SA as TGC's securities counsel.¹²⁷ SA's engagement letter described the scope of the firm's representation as follows:

1) To analyze whether a certain instrument [*i.e.* the Agreement], which [Ken Courtright] will send to us, constitutes a "security" for state or federal regulatory purposes, or otherwise requires Today's Growth or its employees

118. *Id.* at 356–57.

119. *Damian v. SmithAmundsen, LLC*, No. 22 C 2830, 2023 WL 319524 (N.D. Ill. Jan. 19, 2023).

120. *Id.* at *1.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

to be licensed, and 2) counsel Today's Growth in connection with complying with an SEC subpoena to it in *In the Matter of SMFG, Inc.*¹²⁸

Early in the representation, SA lawyer John Collen advised Courtright that the SEC might expand its investigation of Smart Money to include TGC because Smart Money was a Ponzi scheme and was “in the same basic business as TGC.”¹²⁹ Ultimately, SA concluded that the CPAs were securities.¹³⁰ Unfortunately for TGC, soon after SA shared its conclusion, the SEC sued TGC, obtained a temporary restraining order that froze TGC's assets, and named Damian as TGC's receiver.¹³¹ As outlined earlier, Damian then sued SA.¹³² In response, SA moved to dismiss Damian's complaint.¹³³

The court observed that SA's engagement letter with TGC explicitly stated that SA's representation was limited to analyzing two legal questions.¹³⁴ SA did exactly what it promised to do.¹³⁵ Damian instead sought to saddle SA with a broader duty to probe TGC's business, uncover an intricate Ponzi scheme, help TGC meet its legal obligations, and take any other steps necessary to forestall the SEC action.¹³⁶ The terms of the engagement letter, however, simply did not support the duties that Damian sought to impose, as she finally conceded.¹³⁷

Shifting gears, Damian argued that SA's obligations extended beyond the engagement letter's terms because (1) SA breached the implied duty “of every attorney to inform a client of the available options for alternative legal solutions” and (2) SA impliedly expanded its duties beyond the engagement letter's “by rendering legal advice not related to the specific issues” mentioned there.¹³⁸ Damian's argument failed for two reasons.¹³⁹

First, while lawyers owe clients duties of “fidelity, honesty, loyalty [and] good faith[,]” including the duty under Illinois law to inform them of

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at *1–2.

132. *Id.* at *2.

133. *Id.*

134. *Id.* at *3.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (internal quotation marks omitted).

139. *Id.*

“available options for alternative legal solutions[.]” those “duties are professional, implicit in any contract for legal services and more closely related to the standard of care.”¹⁴⁰ Such “free-floating” duties do not obligate lawyers to address all substantive issues that surface in a case.¹⁴¹ To the contrary, the contract between the lawyer and client defines the scope of representation, and the lawyer’s performance of the duties within that scope competently, loyally, and faithfully is all the law requires.¹⁴²

Second, although the scope of representation may expand if the lawyer advises the client on issues beyond the topics or tasks originally agreed upon, Damian did not furnish “enough facts to suggest that SA offered meaningful advice” to TGC on subjects beyond those listed in the engagement letter.¹⁴³ Collen’s reports to Courtright that the SEC’s investigation into Smart Money might expand to TGC because TGC operated “the same basic business” only raised the possibility that TGC might face additional litigation.¹⁴⁴ Damian’s complaint did not plead facts indicating that SA provided legal advice to TGC in connection with a pending SEC investigation, securities law, or TGC’s corporate structure or even that TGC ever asked SA to do so.¹⁴⁵ Damian offered no evidence that SA had expanded the scope of its representation beyond the terms stated in the engagement letter.¹⁴⁶ The court reasoned that if SA had expanded the scope of its representation beyond that originally agreed, there surely would be some evidence of that expansion.¹⁴⁷

After rejecting Damian’s aiding and abetting claim on different grounds, the court granted SA’s motion and dismissed the case without prejudice.¹⁴⁸ The court gave Damian a few weeks to file an amended complaint.¹⁴⁹ If that deadline passed before Damian filed an amended complaint, then the dismissal would be converted to one with prejudice.¹⁵⁰

140. *Id.*

141. *Id.* (citing *Majumdar v. Lurie*, 653 N.E.2d 915, 918 (Ill. App. Ct. 1995)).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at *4.

149. *Id.*

150. *Id.*

2. An Ambiguous Scope of Representation Is No Defense

Just as a tailored scope of representation in a lawyer's engagement letter may provide a stout defense to a legal malpractice claim, an imprecise description of the scope of representation may prevent the dismissal of a malpractice case at the outset or prevent summary judgment for the law firm.¹⁵¹ *Barack v. Seward & Kissel, LLP*¹⁵² is instructive.¹⁵³

The plaintiff in *Barack*, Mitchell Barack, owned ESCO, a company that was in the energy business.¹⁵⁴ Barack signed a letter of intent to sell ESCO to ForceField Energy, Inc. (ForceField).¹⁵⁵ The letter of intent memorialized the purchase price, which would yield Barack \$2.5 million in cash and another \$5 million either in or backed by ForceField stock.¹⁵⁶ The letter of intent also stated that ESCO was not bound to close the transaction.¹⁵⁷ Finally, the letter of intent included a provision permitting the parties to conduct due diligence on each other.¹⁵⁸

The same day, Barack asked Seward & Kissel to represent him in connection with the potential sale of ESCO to ForceField.¹⁵⁹ Barack, ESCO, and Seward & Kissel executed an engagement letter that identified ESCO and Barack as the firm's clients and described the scope of representation as follows: "Representation of the Client as lead transaction counsel in connection with the proposed sale of Client's common stock to ForceField Energy, Inc. and related agreements, documents and transactions."¹⁶⁰

151. *See, e.g.,* *Damian v. Nelson Mullins Riley & Scarborough, LLP*, 317 F. Supp. 3d 1228, 1235, 1241–42 (N.D. Ga. 2017) (precluding summary judgment for the law firm based on the scope of the duty owed to the client where the engagement letter described the scope of representation as "in connection with certain legal matters that may arise from time to time" and observing that the scope description failed to "expressly address any specific purpose of the representation, nor [did] it purport to limit the representation in any way").

152. *Barack v. Seward & Kissel, LLP*, No. 16CV9664, 2017 WL 4023141 (S.D.N.Y. Sept. 12, 2017).

153. *See id.* at *1 (denying Seward & Kissel's motion to dismiss). In the interest of full disclosure, I have had many dealings with Seward & Kissel over the years and think it is a superior firm with excellent lawyers. Nothing written here should be understood to impugn the firm or any of its lawyers.

154. *Barack*, 2017 WL 4023141, at *1.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at *1–2.

After ESCO's sale to Forcefield closed, ForceField encountered serious financial problems that prevented it from honoring its financial commitments to Barack.¹⁶¹ Then, ForceField's Executive Chairman was charged with securities fraud and conspiracy, and a securities fraud class action lawsuit was filed against ForceField and its senior managers.¹⁶² ForceField soon crumbled.¹⁶³ "As a result, Barack repurchased ESCO at a 'fire sale' price of \$900,000 . . . and resold it to another buyer for \$1 million—a mere fraction of the \$7.5 million in compensation that was originally negotiated."¹⁶⁴

Barack sued Seward & Kissel for legal malpractice in negligently advising him with respect to ESCO's sale.¹⁶⁵ He alleged that if Seward & Kissel had conducted due diligence on ForceField, the firm "would have discovered several publicly available 'red flags' regarding fraud and financial misconduct by ForceField executives, including the manipulation of ForceField's stock price."¹⁶⁶ Seward & Kissel moved to dismiss the lawsuit.¹⁶⁷

Seward & Kissel argued that Barack retained the firm "only to close the sale of ESCO to ForceField" and that "the scope of its representation did not include [performing] due diligence on ForceField."¹⁶⁸ The firm met a skeptical court, which observed that the scope of the firm's representation expressed in its engagement letter appeared to be much broader.¹⁶⁹ Rather than limiting the firm's representation, the engagement letter stated that Seward & Kissel would "serve as 'lead transaction counsel' for the proposed transaction 'and related agreements, documents and transactions.'"¹⁷⁰ The engagement letter did not explicitly disclaim Seward & Kissel's responsibility for conducting due diligence on Forcefield.¹⁷¹ Nor did the engagement letter define "lead transaction counsel" or otherwise clarify the scope of Seward & Kissel's responsibilities.¹⁷² Furthermore, there was at

161. *Id.* at *2.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at *1.

166. *Id.* at *2.

167. *Id.* at *1. At the motion to dismiss stage of a case, the court accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. *Id.* at *3 (citing *Gonzalez v. Hasty*, 802 F.3d 212, 219 (2d Cir. 2015)).

168. *Id.* at *3.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

least some case law authority for the proposition that the scope of transaction counsel's representation generally is broader than the scope that Seward & Kissel advocated.¹⁷³

In arguing that it could not be liable for acting outside the scope of its representation, Seward & Kissel relied on the New York Court of Appeals' holding in *AmBase Corp. v. Davis Polk & Wardwell*,¹⁷⁴ discussed earlier.¹⁷⁵ But *AmBase* did not help Seward & Kissel because, as the *Barack* court pointed out, the engagement letter in that case clearly limited the scope of the law firm's representation.¹⁷⁶ In comparison, Seward & Kissel's engagement letter did not similarly limit the scope of the firm's representation, much less do so clearly.¹⁷⁷

The *Barack* court went on to address Seward & Kissel's other arguments for dismissal but determined that there was no need to "wade into the thick of the parties' dispute" at this stage of the litigation.¹⁷⁸ Barack's complaint plausibly alleged a cause of action against Seward & Kissel, so the court denied the law firm's motion to dismiss.¹⁷⁹

*Rodowicz v. Feldman, Perlstein & Greene, LLC*¹⁸⁰ was one of several lawsuits that arose out of an extended intra-family fight over the Alma Rodowicz Irrevocable Trust (the Trust).¹⁸¹ The Trust's sole asset was a limited partnership owning property leased to a company running a nursing home.¹⁸² The nursing home's operation and finances were hotly litigated in state court and arbitration.¹⁸³ Carter Rodowicz (Rodowicz) and two of his siblings, Deborah Bernard and Nadine Rodowicz, hired Feldman, Perlstein & Greene, LLC (Feldman) to defend them in a state court case over an

173. See *id.* (citing *Schweizer v. Sikorsky Aircraft Corp.*, No. 10-CV-6547, 2014 WL 5460504, at *10 (W.D.N.Y. Oct. 27, 2014)) (observing the seller's transaction counsel also negotiated specific language in a stock purchase agreement).

174. *Id.* at *4.

175. See *supra* notes 89–104 and accompanying text.

176. *Barack*, 2017 WL 4023141, at *4 (quoting *AmBase Corp. v. Davis Polk & Wardwell*, 866 N.E.2d 1033, 1037 (N.Y. 2007)).

177. *Id.*

178. *Id.* at *6.

179. *Id.*

180. *Rodowicz v. Feldman, Perlstein & Greene, LLC*, No. 3:20-CV-00777 (JAM), 2021 WL 3290706 (D. Conn. Aug. 2, 2021).

181. *Id.* at *1 (granting Feldman's motion to dismiss as to three of Rodowicz's claims, but denying with respect to one).

182. *Id.*

183. See *id.* at *2 (discussing the court proceedings and arbitration).

amendment to the Trust and an intertwined effort to remove Rodowicz as a trustee of the Trust.¹⁸⁴

Feldman agreed to represent the three family members.¹⁸⁵ The firm prepared an engagement letter “addressed to ‘Carter, Deborah and Nadine,’ and stat[ing] that ‘you have retained this firm to represent you in the above captioned matter,’ in which each of the three signatories were named defendants.”¹⁸⁶ The engagement letter also stated that “[e]ach client [was] jointly and individually responsible for the entire amount of fees” charged by Feldman, and the clients assigned their interests in the Trust to Feldman, including the Trust’s assets and income, to collateralize their financial obligations to the firm.¹⁸⁷

Rodowicz’s relationship with Feldman eventually soured; Rodowicz believed Feldman had mishandled the litigation to his serious financial detriment, while Feldman thought Rodowicz had stiffed the firm on its fees.¹⁸⁸ Rodowicz sued Feldman on several theories, including a count for negligence and “breach of the implied covenant of good faith and fair dealing” (Count I).¹⁸⁹ This was effectively a claim for legal malpractice.¹⁹⁰ Feldman moved to dismiss Count I on the theory that Rodowicz lacked standing to sue the firm.¹⁹¹ Rodowicz’s standing to sue Feldman pivoted on whether he was seeking to enforce his own rights or whether he was attempting to enforce the rights of the Trust under which he was a beneficiary.¹⁹²

Feldman contended that Rodowicz lacked standing to pursue Count I because the firm only represented the Trust and not Rodowicz personally.¹⁹³ According to Feldman, this characterization of its representation was clear from the parties’ engagement letter, which, the firm argued, “unambiguously

184. *Id.* at *1.

185. *Id.* (memorializing this agreement in the firm’s engagement letter).

186. *Id.* (footnote omitted).

187. *Id.* (internal quotation marks omitted).

188. *Id.* at *2–3.

189. *Id.* at *3.

190. *Id.* at *5.

191. *Id.* at *3. Feldman similarly moved to dismiss the other three counts in Rodowicz’s complaint. *Id.* The court granted the firm’s motion with respect to the other three counts in Rodowicz’s amended complaint. *Id.* at *1. Those claims are not relevant to our discussion.

192. *Id.* at *4.

193. *Id.* at *5.

state[d] that [Feldman] was retained jointly by the three co-trustees of the Trust.”¹⁹⁴

This interpretation of the engagement letter reflected wishful thinking on Feldman’s part.¹⁹⁵ The engagement letter only used the term “jointly” in regard to the three clients being “jointly and individually responsible” for the legal fees incurred in the representation.¹⁹⁶ The engagement letter’s references to “[e]ach of the clients” and “each client,” as well as holding the three clients individually responsible for paying the firm’s fees, strongly suggested that Feldman meant to represent them individually.¹⁹⁷ Nor did the engagement letter mention the three clients’ capacities as trustees or state they had hired the firm to jointly represent them on the Trust’s behalf.¹⁹⁸ And, on top of everything, the underlying lawsuit that brought them to Feldman’s door did not name them as defendants in their capacities as trustees.¹⁹⁹ Finally, if the engagement letter was simply unclear as to the scope of representation, basic legal ethics principles made it Feldman’s responsibility to clarify the scope.²⁰⁰

The court concluded Rodowicz had adequately alleged Feldman’s agreement to represent him individually insofar as Count I of his amended complaint was concerned.²⁰¹ The *Rodowicz* court therefore denied Feldman’s motion to dismiss Count I.²⁰² The court did, however, dismiss Rodowicz’s other claims.²⁰³

*Kee v. Howard L. Nations, P.C.*²⁰⁴ began as a potential product liability case.²⁰⁵ In 2009, Sylvia Kee was involved in a car accident and later developed deep vein thrombosis in her right leg.²⁰⁶ Doctors placed an

194. *Id.* (emphasis omitted).

195. *See id.* (portraying Feldman’s interpretation of the Engagement Agreement to be unambiguous, thus proving his argument for lack of standing).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (citing RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 14 (AM. L. INST. 2020)).

201. *Id.*

202. *Id.* at *7.

203. *Id.*

204. *Kee v. Howard L. Nations, P.C.*, No. 4:20-CV-127-SA-JMV, 2022 WL 3438467 (N.D. Miss. Aug. 16, 2022).

205. *See id.* at *7 (concluding “the Attorney-Client Contract is ambiguous as to whether the pursuit of a medical malpractice claim was included within the scope of representation”).

206. *Id.* at *1.

inferior vena cava (IVC) filter in her leg, which led to numerous complications.²⁰⁷ As a result, she had the IVC filter partially removed in a 2014 surgery performed by Dr. Scott McPherson.²⁰⁸

In June 2015, Kee was admitted to a Mississippi hospital for issues related to the 2014 surgery.²⁰⁹ After her discharge, she saw an advertisement by Howard L. Nations, P.C., doing business as The Nations Law Firm (Nations), which promoted the firm's pursuit of litigation against the manufacturer of IVC filters.²¹⁰ Kee communicated with Nations regarding a potential claim concerning her IVC filter and, in September 2015, signed an attorney-client contract the firm sent her.²¹¹ The contract stated in relevant part: "Client retains Attorneys to prosecute all claims against all necessary defendants arising out of Event: Injury(ies) after implantation of IVC filter."²¹² In August 2017, the firm informed Kee that it appeared she had "received an ALN Optional IVC filter" that was not known to be defective and that the firm was therefore "closing [her] file."²¹³

Kee then sued Nations for legal malpractice.²¹⁴ She alleged that she had a medical malpractice claim against Dr. McPherson, and by waiting as long as it did to inform her it would not file suit on her behalf, Nations blew the two-year statute of limitations for that claim.²¹⁵ Nations moved for summary judgment on the theory that the scope of its representation of Kee did not encompass potential medical malpractice litigation.²¹⁶ The firm argued its contract and other communications with Kee "made clear that it was pursuing only a potential *products liability* claim—not a potential *medical malpractice* claim."²¹⁷

The *Kee* court began its analysis by referring to the parties' contract, which, again, stated: "Client retains Attorneys to prosecute all claims against

207. *Id.*

208. *Id.*

209. *Id.*

210. *See id.* (supporting the sequence of events leading to the hiring of the Nations). On its website, Nations warns potential clients of the dangers posed by IVC filters, touts its pursuit of litigation against the manufacturer, and encourages potential clients who visit the website to "Click Here to File Your Claim Today." *IVC Filters*, THE NATIONS LAW FIRM, <https://www.howardnations.com/practice-areas/ivc-filter> [<https://perma.cc/E4FT-QADS>].

211. *Kee*, 2022 WL 3438467, at *1.

212. *Id.* (quoting the Attorney-Client Contract between the two parties).

213. *Id.*

214. *Id.*

215. *Id.* at *1–2.

216. *Id.* at *2.

217. *Id.* at *3.

all necessary defendants arising out of Event: Injury(ies) after implantation of IVC filter.”²¹⁸ Nations contended the contract clearly did not contemplate the prosecution of a medical malpractice claim; indeed, the contract never mentioned a medical malpractice claim.²¹⁹ Conversely, Kee argued that the contract plainly covered a potential medical malpractice claim.²²⁰ In her view, “[t]here [was] nothing ambiguous regarding the terms ‘all claims’ and ‘all defendants’ and the scope [was] otherwise limited to injuries suffered after the implantation of the filter which reasonably suggest[ed] a causal relation between injury and filter.”²²¹ The court found both Nation’s and Kee’s interpretations of their contract to be reasonable:

On the one hand, the Contract does state that The Firm will prosecute *all claims* against *all necessary defendants* arising out of injuries *after implantation of the filter*. The injuries Kee sustained certainly arose after implantation of the filter, and there were no specific caveats listed in the Contract. On the other hand, the Court finds the Contract can also reasonably be read in such a manner that it does not include a medical malpractice claim. The “after implantation of IVC filter” language could reasonably be read to limit the injuries to those related to the damage caused by such implantation—not the related follow up medical treatment.²²²

Under controlling Texas law, a contract is ambiguous if it is “reasonably susceptible to more than one interpretation.”²²³ Because the parties’ contract was “susceptible to more than one reasonable interpretation”, the court deemed it to be ambiguous.²²⁴ Consequently, the *Kee* court denied Nation’s summary judgment motion.²²⁵

Finally, and perhaps obviously, a law firm’s ability to defend itself on the basis that its alleged malpractice involved a task outside the scope of the firm’s representation becomes materially more difficult if the firm does not

218. *Id.* at *1.

219. *Id.* at *3.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (quoting *RPC, Inc. v. CTMI, LLC*, 606 S.W.3d 469, 484 (Tex. App.—Fort Worth 2020, pet. denied)).

224. *Id.*

225. *Id.* at *4.

have a written engagement agreement with the client. *Genesis Merchant Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC*²²⁶ is illustrative.²²⁷

In *Genesis*, two affiliated venture capital firms, “Genesis Merchant Partners, L.P. and Genesis Merchant Partners II, LP (collectively, Genesis) . . . agreed to make four secured loans totaling \$4.425 million to nonparty Progressive Capital Solutions LLC (Progressive) to finance Progressive’s purchase of several portfolios of life insurance policies.”²²⁸ Genesis intended to partly secure the loans with the insurance policies.²²⁹ Genesis retained Gilbride, Tusa, Last & Spellane, LLC (Gilbride) to represent it in connection with the loans, and Gilbride subsequently drafted the necessary documents and filed UCC-1 financing statements for each loan.²³⁰ Progressive repaid the first loan but defaulted on the remaining three.²³¹ Genesis then tried to collect on the life insurance policies, but the insurers balked.²³² Perfection of security interests in life insurance policy proceeds requires either possession of the insurance policies by the creditor or collateral assignments of the policies to the creditor that is then filed with the insurers.²³³ Here, the insurers had no record of any collateral assignments to Genesis.²³⁴

Genesis sued Gilbride for malpractice in failing to perfect Genesis’s security interests in the life insurance policies that collateralized the three unpaid loans.²³⁵ The crux of the dispute was whether Gilbride owed a duty to perfect Genesis’s security interests in the loans.²³⁶ The trial court awarded Genesis summary judgment.²³⁷ The trial court reasoned that even if Gilbride explicitly limited the scope of its representation, the firm “voluntarily assumed the obligation to perfect the security interests’ by filing the UCC-1 financing statements and billing Genesis for that work, and

226. *Genesis Merchant Partners, L.P. v. Gilbride, Tusa, Last & Spellane, LLC*, 69 N.Y.S.3d 30 (App. Div. 2018).

227. *See id.* at 31 (reversing summary judgment for the plaintiff on the issue of liability for legal malpractice).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 32.

234. *Id.* at 31.

235. *Id.*

236. *Id.* at 32.

237. *Id.*

that Gilbride negligently discharged that duty.”²³⁸ Gilbride appealed, and the appellate court reversed the trial court, concluding that genuine issues of material fact remained as to whether Genesis limited the scope of Gilbride’s representation to preparing the loan documents, and, if so, whether Gilbride confirmed that Genesis grasped the limits of the firm’s representation.²³⁹

Gilbride’s defense suffered from the lack of a written engagement agreement defining the scope of the firm’s representation, which left the court to pore over competing affidavits and email messages.²⁴⁰ Gilbride argued that despite the firm’s filing of the UCC-1 financing statements, Genesis barred the law firm from filing the collateral assignment forms covering the life insurance policies.²⁴¹ Gilbride rested its argument on a provision in the loan documents, which the firm alleged was included at Genesis’s urging, that appeared to charge Progressive and Genesis with obtaining the collateral assignments of the insurance policies and thus perfecting Genesis’ security interests in them.²⁴² In opposition, Genesis highlighted email exchanges with Gilbride that raised questions about whether Gilbride’s scope of representation included perfecting the security interests in the policies.²⁴³ Again, the resulting issues of material fact prevented summary judgment for Genesis and meant both parties would remain enmeshed in litigation upon remand to the trial court.²⁴⁴

Genesis illustrates the importance of lawyers’ use of engagement letters to manage their professional risk by avoiding misunderstandings with clients.²⁴⁵ Relatedly, the lawyer must also ensure that the client understands any limits on the scope of the lawyer’s representation.²⁴⁶ In *Genesis*, had Gilbride sent Genesis an engagement letter that plainly excluded the duty to perfect Genesis’s security interests in the life insurance policies from the

238. *Id.* (quoting the trial court).

239. *Id.* at 32–34.

240. *Id.* at 33.

241. *Id.*

242. *Id.*

243. *See id.* at 34 (showing emails where Gilbride suggested they would perfect the insurance policy).

244. *See id.* at 31, 35–36 (holding the lower court erred in granting Genesis summary judgment for legal malpractice).

245. *Id.* at 33.

246. *See id.* (“In order for Gilbride to limit the scope of its representation, it had a duty to ensure that Genesis understood the limits of its representation . . .”); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (AM. BAR ASS’N 2024) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

scope of the firm's representation, the firm might have been spared the aggravation and expense of this litigation.

3. Scope Creep

Somewhere between lawyers' successful defense of malpractice claims in cases where they clearly defined the scope of representation and thereafter acted consistently with those specifications and cases where the lawyers could not terminate malpractice litigation through dispositive motions because of vague or overbroad descriptions of the scope of representation, lie representations in which the scope changes over the life of the matter. The expansion or enlargement of the scope of representation during a matter beyond the services the lawyer originally agreed to provide may be described as "scope creep."²⁴⁷ Scope creep animates the principle that the scope of representation may be established not only by the lawyer's and client's express agreement but by implication based on the lawyer's conduct and the client's expectations.²⁴⁸

There is nothing necessarily wrong with scope creep. For the client, the expansion of the lawyer's scope of representation results in the delivery of additional legal advice or services the client requires even though the client did not recognize that need at the outset of the representation. For the lawyer, expanding the scope of the representation often creates opportunities to earn additional legal fees. The key for lawyers is managing the risk that may accompany scope creep. *Esterman v. Law Office of Gideon Stephen Schwartz*²⁴⁹ evidences the ills that can befall a lawyer when the scope of representation shifts.²⁵⁰

247. See generally Keith A. Call, *Ten Tips for Avoiding Malpractice*, 28 UTAH BAR J. 44 (2015) (warning lawyers about scope creep).

248. *Ratonel v. Roetzel & Andress, L.P.A.*, 67 N.E.3d 775, 777 (Ohio 2016); see also *Macawber Eng'g, Inc. v. Robson & Miller*, 47 F.3d 253, 256 (8th Cir. 1995) ("[T]he terms of the representation agreement and the nature of the legal advice sought and received define the scope of the relationship." (emphasis added)); see, e.g., *Lennar Mare Island, LLC v. Steadfast Ins.*, 105 F. Supp. 3d 1100, 1113–14 (E.D. Cal. 2015) (involving an engagement agreement which stated the law firm "shall not be deemed to represent any of [the named client's] parents, subsidiaries, or other affiliates unless [the firm] expressly agree[d] in writing to do so" and holding the limitation was overridden because the law firm's conduct implied all the parties understood the firm was representing more than just the named client, including firm's post-agreement acceptance of matters that involved the client's "entire corporate family").

249. *Esterman v. L. Off. of Gideon Stephen Schwartz*, No. 114405/08, slip op. (NY. Sup. Ct. July 8, 2009).

250. See *id.* at *14 (denying the defendant lawyer's motion to dismiss the plaintiff's claims for negligence and legal malpractice).

In *Esterman*, the owners of 18 townhomes (the Owners) in a residential development on Staten Island called Skyline Point sought legal assistance following the collapse of Skyline Point's waterfront retaining wall.²⁵¹ The court in a prior lawsuit brought by the waterfront homeowners held that the retaining wall was a common area of the development, meaning all Skyline Point property owners shared the cost of repairs.²⁵² So, the Owners, whose townhomes were inland, met with lawyer Gideon Schwartz about possibly suing the parties involved in the wall's design and construction—including the City of New York and some of its agencies (the City).²⁵³ Under the parties' May 2008 retainer agreement, Schwartz agreed "to research and analyze [the Owners'] status in regard to a possible lawsuit emanating from the alleged negligent construction of [the retaining wall]."²⁵⁴ The retainer agreement also stated that the current retainer encompassed only an investigation into the Owners' potential claims, and a new retainer agreement would be required if the Owners decided to file a lawsuit.²⁵⁵ Subsequently, the nine townhome owners whose properties lined the waterfront at Skyline Point sued the Owners for interfering with the retaining wall's repairs.²⁵⁶ In July 2008, Schwartz entered into a second retainer agreement with the Owners to defend them in their neighbors' lawsuit.²⁵⁷

Schwartz did not sue the City by the applicable deadline and the Owners, in turn, sued him for legal malpractice.²⁵⁸ Schwartz moved to dismiss the lawsuit on the basis that the Owners never retained him to sue the City.²⁵⁹ In their complaint, however, the Owners alleged they had a July 2008 meeting with Schwartz before signing the second retainer agreement where Schwartz promised to take "all measures' and pursue 'all remedies' to protect their interests in 'all proceedings' stemming from the [retaining wall's] collapse"²⁶⁰ In addition, several Owners submitted affidavits swearing that Schwartz told them at the July 2008 meeting he would sue the

251. *Id.* at *3.

252. *Id.* at *3–4.

253. *Id.* at *4.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at *5.

258. *Id.* at *5–6.

259. *Id.* at *6.

260. *Id.* at *7.

City on their behalf before the time limit expired and he never disclaimed responsibility for suing the City.²⁶¹

Schwartz argued that even assuming the truth of the Owners' allegation that he orally agreed to sue the City, the parol evidence rule compelled dismissal of the Owners' claim because the scope of his representation "was 'expressly and narrowly limited' in the [two] retainer agreements."²⁶² The *Esterman* court, however, concluded that Schwartz's alleged oral promises did not contradict the agreements' terms because neither agreement expressly stated that Schwartz would not sue the City on the Owners' behalf.²⁶³ Moreover, neither retainer agreement contained a merger or integration clause that would have precluded oral modification of the agreements,²⁶⁴ and the additional emails submitted by the Owners corroborated their claim that Schwartz orally agreed to represent them in a lawsuit against the City.²⁶⁵ Accordingly, the court denied Schwartz's motion to dismiss the plaintiffs' legal malpractice claim.²⁶⁶

C. Summary

Engagement letters are essential risk management tools for lawyers.²⁶⁷ Many firms provide their lawyers with engagement letter templates that, among other features, require the lawyers to define the scope of any representation. Even if a law firm has a continuous attorney-client relationship with a client governed by a master engagement agreement that encompasses future matters, as may be the case with institutional clients such as banks and insurance companies, a lawyer should still send an acknowledgment letter or email message to the client specifying the scope of the representation for a new matter.

When defining the scope of representation in engagement or acknowledgment letters, lawyers should eschew vague or overbroad descriptions of their responsibilities, like serving as "lead transaction

261. *Id.*

262. *Id.* at *7–8.

263. *Id.* at *8–9.

264. *Id.* at *9 (citing *Jarecki v. Louie*, 745 N.E.2d 1006, 1009 (N.Y. 2001)).

265. *Id.* at *10.

266. *Id.* at *15.

267. See J. Randolph Evans & Shari L. Klevens, *Engagement Letters Prevent Needless Risk*, LAW.COM (Jan. 15, 2016), <https://www.law.com/dailyreportonline/2016/01/15/engagement-letters-prevent-needless-risk> [<https://perma.cc/B95X-J8A8>] ("The single best tool an attorney has to manage risk and reduce the likelihood of [legal malpractice] claims is the engagement letter.").

counsel,”²⁶⁸ performing such “due diligence as . . . may [be] require[d].”²⁶⁹ representing the client “in connection with certain legal matters that may arise from time to time[.]”²⁷⁰ or assisting the client in its “business dealings.”²⁷¹ Similarly, lawyers should not raise clients’ expectations through promises of “sensitive and professionally responsive” representation or other self-promotional claims.²⁷² Certainly, lawyers should expressly exclude from the scope of representations services they will not be performing or responsibilities they will not be assuming.²⁷³

To combat scope creep, an engagement letter should state that any services beyond those included in the initial scope of representation will have to be mutually agreed to in writing by the lawyer and the client. A lawyer responsible for managing a matter will also need to reasonably monitor colleagues’ work to ensure (1) that any services provided are within the scope of the representation; or (2) that where the scope is changed by agreement, any services beyond those originally contemplated are consistent with the revised scope of representation.

Finally, as valuable a risk management tool as clearly worded engagement letters are, they will not necessarily shield a lawyer against all legal malpractice liability outside the stated scope of representation. For instance, if a lawyer gives a client erroneous advice in an initial meeting, a subsequent engagement letter describing the scope of the client’s representation more narrowly than discussed in the meeting will not absolve the lawyer of

268. *Barack v. Seward & Kissel, LLP*, No. 16CV9664, 2017 WL 4023141, at *3 (S.D.N.Y. Sept. 12, 2017).

269. *Kan. Pub. Emps. Ret. Sys. v. Kutak Rock*, 44 P.3d 407, 412 (2002) (observing that the trial court found similar wording in the firm’s engagement letter to be ambiguous).

270. *Damian v. Nelson Mullins Riley & Scarborough, LLP*, 317 F. Supp. 3d 1228, 1235 (N.D. Ga. 2017).

271. Paul L. Stoller, *Documenting the Client Relationship: Protecting Yourself and the Client*, ARIZ. ATT’Y, Mar. 2014, at 38, 40.

272. *Abramson v. Wildman*, 964 A.2d 703, 706, 711 (Md. Ct. Spec. App. 2009).

273. *See* 180 E. 88th St. Apt. Corp. v. L. Off. of Robert Jay Gumenick, No. 600039/09, slip. op. at 9 (N.Y. Sup. Ct. Dec. 21, 2010), *aff’d*, 923 N.Y.S.2d 474 (App. Div. 2011) (reasoning the lawyer’s failure to advise the plaintiffs of the tax consequences of the sale of a co-operative building was immaterial where the retainer agreement stated the lawyer would “negotiate and consummate the sale of the . . . premises” and would “not render tax advice in this matter but [] [would] be available to discuss the transaction with [the co-op’s] tax advisor/accountant” (alteration in original)); *Smookler v. Kronish Lieb Weiner & Hellman LLP*, No. 604165/02, slip op. at 9–11 (N.Y. Sup. Ct. Jan. 11, 2006) (granting the law firm summary judgment where the clients alleged that the firm negligently advised them concerning NASD rules, but the parties’ engagement letter explicitly excluded “regulatory matters” from the scope of representation and the client retained another law firm specifically to handle regulatory matters).

potential liability.²⁷⁴ As *Esterman* illustrates, the casual expansion of a lawyer's scope of representation beyond that specified in an engagement letter may also expose a lawyer to unanticipated risk.²⁷⁵ And, of course, the lawyer must capably perform the duties she agreed to perform within the scope of a limited scope representation.²⁷⁶

IV. THE PERIPHERAL DUTY DOCTRINE

A. Overview

Although a lawyer generally cannot be liable for failing to act outside the scope of a representation, a lawyer may be required to at least alert a client to legal issues that may adversely affect the client's interests or rights even though the issues are beyond the scope of the lawyer's representation.²⁷⁷ For a lawyer to owe a client such a peripheral duty, the issue must be apparent to an ordinary lawyer in the same or similar circumstances.²⁷⁸ To give some examples, a lawyer representing a client in connection with a workers' compensation claim generally owes a duty to advise the client that

274. See, e.g., *Lam v. Weiss*, 195 N.Y.S.3d 488, 493 (App. Div. 2023) (concluding that a malpractice claim based on the lawyer's erroneous advice to the client in an initial meeting about options for avoiding foreclosure on the client's home was not defeated by the lawyer's engagement agreement limiting his representation to pursuing a mortgage modification agreement).

275. See generally *Esterman v. L. Off. of Gideon Stephen Schwartz*, No. 114405/08, slip. op (NY. Sup. Ct. July 8, 2009) (discussing potential risks and liabilities lawyers face by not limiting their scope of representation in engagement letters).

276. See, e.g., *Willey v. Paulsen*, 894 N.E.2d 862, 869 (Ill. App. Ct. 2008) (“[E]ven if Paulsen represented Willey in the limited capacity that she now claims, Paulsen still had a duty to provide competent representation and advice within the parameters of that limited capacity.”).

277. See *Janik v. Rudy, Exelrod & Zieff*, 14 Cal. Rptr. 3d 751, 758 (Ct. App. 2004) (“[A]n attorney who undertakes one matter on behalf of a client owes that client the duty to at least consider and advise the client if there are apparent related matters that the client is overlooking and that should be pursued to avoid prejudicing the client's interests.”); see also MALLEN, *supra* note 7, § 8:8 at 1017 (explaining the duty applies even though neither the lawyer nor the client intended the issue to be within the scope of the representation). But see *Future Lawn, Inc. v. Steinberg*, No. L-08-1030, 2008 WL 3582801, at *5 (Ohio Ct. App. Aug. 15, 2008) (concluding where the lawyer expressly limited the scope of his representation to pursuing a lawsuit against a law firm, he had no duty to alert the clients to possible causes of action against other people or entities).

278. See *Daugherty v. Runner*, 581 S.W.2d 12, 16–17 (Ky. Ct. App. 1978) (stating the standard for legal malpractice liability and asserting a lawyer cannot ignore matters about which she knows and should reasonably put her on notice that the client may have legal problems or remedies not expressly or wholly within the scope of the representation); MALLEN, *supra* note 7, § 8:8 at 1017 (“A lawyer may be obligated to advise the client regarding collateral matters, or at least, alert the client to the need for legal representation. . . . The controlling standard is whether the remedy or liability should have been apparent to the ordinary lawyer under the circumstances.” (footnote omitted)).

the client may have a potential personal injury claim against a third party arising out of the same accident.²⁷⁹ Similarly, a lawyer hired by an insurer to defend an insured in litigation may have a duty to advise the insured that the insured may have a counterclaim against the plaintiff.²⁸⁰ Regardless of the specific circumstances, the peripheral duty doctrine assumes, as between a lawyer and a client, the lawyer is best qualified to recognize and evaluate the client's legal needs.²⁸¹

For a lawyer to owe a client a duty to advise or inform the client about legal issues outside the scope of the representation, the client must be otherwise unaware of those issues.²⁸² A lawyer has no duty to advise a client about legal issues that are already known to the client.²⁸³ Moreover, the lawyer need not alert the client to all issues potentially affecting the client's

279. *Nichols v. Keller*, 19 Cal. Rptr. 2d 601, 607 (Ct. App. 1993); *Keef v. Widuch*, 747 N.E.2d 992, 998 (Ill. App. Ct. 2001); *Smith v. Becnel*, 396 So. 2d 444, 446 (La. Ct. App. 1981); *Greenwich v. Markhoff*, 650 N.Y.S.2d 704, 706 (App. Div. 1996), *superseded by statute*, N.Y.C.P.L.R. § 214 (MCKINNEY 2021), *as recognized in* *Ruffolo v. Garbarini & Scher, P.C.*, 668 N.Y.S.2d 169, 169 (App. Div. 1998). No such peripheral duty arises, however, if the lawyer in her engagement agreement expressly limits the scope of the representation to prosecuting the client's workers compensation claim and excludes any responsibility for advising the client regarding potential third-party claims. *See, e.g.*, *Freude v. Berzowski*, No. 2023AP764, 2024 WL 3686605, at *4–6 (Wis. Ct. App. Aug. 7, 2024).

280. Insurance defense representations are limited-scope representations. *In re Zuber*, 101 So. 3d 29, 33–34 (La. 2012). The defense lawyer's representation is generally confined to defending the insured in the lawsuit brought by the third-party plaintiff. The lawyer typically has no duty to prosecute any affirmative claims that the insured may wish to pursue.

281. *In re JTS Corp.*, 305 B.R. 529, 551–52 (N.D. Cal. 2003); *Nichols*, 19 Cal. Rptr. 2d at 608; MALLEEN, *supra* note 7, § 8:8 at 1017.

282. *Janik*, 14 Cal. Rptr. 3d at 758 (“[A]n attorney who undertakes one matter on behalf of a client owes that client the duty to at least consider and advise the client if there are apparent related matters *that the client is overlooking* and that should be pursued to avoid prejudicing the client's interests.” (emphasis added)); *see, e.g.*, *Jackson v. Pollick*, 751 F. Supp. 132, 133–34 (E.D. Mich. 1990) (concluding a lawyer who was retained to handle the plaintiff's workers' compensation claim had no duty to advise or represent the plaintiff regarding his desired reverse discrimination claim where the plaintiff was aware of that claim when he retained the lawyer); *Teague v. Scott*, 597 So. 2d 1060, 1065 (La. Ct. App. 1992) (holding the plaintiff could not maintain a legal malpractice claim against his workers' compensation lawyer for failing to pursue a product liability claim against the manufacturer of the plaintiff's eye drops when the plaintiff was aware of his potential claim against the manufacturer when he retained the lawyer); *Jamison v. Norman*, 771 S.W.2d 408, 410 (Tenn. 1989) (determining a lawyer retained by the plaintiff to represent him in his personal injury claim had no duty to advise the plaintiff with respect to his possible workers' compensation recovery where the plaintiff was aware of his workers' compensation remedy when he hired the lawyer and he expressly excluded workers' compensation from the lawyer's representation).

283. *Jackson*, 751 F. Supp. at 133–34 (maintaining a lawyer has no duty to represent the plaintiff regarding a secondary discrimination claim where the plaintiff was aware of that claim and did not pursue it when he retained the lawyer); *Janik*, 14 Cal. Rptr. 3d at 758; *Teague*, 597 So. 2d at 1065; *Jamison*, 771 S.W.2d at 409–10.

interests or rights.²⁸⁴ First, and as already indicated, the lawyer need only alert the client to *legal* issues that may affect the client's interests or rights.²⁸⁵ The peripheral duty doctrine does not extend to providing a client with business or financial advice.²⁸⁶ Second, the lawyer's duty, if any, is limited to legal issues that have possible adverse consequences for the client if not appreciated or considered.²⁸⁷ This is consistent with lawyers' ethical duties as clients' advisors, as explained in a comment to Model Rule 2.1:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation.²⁸⁸

Finally, for now, the lawyer is not obligated to represent the client with respect to any collateral issues the lawyer identifies.²⁸⁹ After alerting the client to those issues, the lawyer may refer the client to another lawyer or simply advise the client of the need to engage separate counsel if the client chooses to pursue related remedies.²⁹⁰

284. See generally *Shim v. Lawler*, No. 17-cv-04920-EMC, 2019 WL 2996443, at *10 (N.D. Cal. July 9, 2019) (“[T]here are limits on an attorney’s duty of care even where that duty exceeds the express bounds of a retainer agreement.”).

285. *Id.* at *10.

286. See *id.* (referring to “purely financial advice”); see, e.g., *Catler v. Arent Fox, LLP*, 71 A.3d 155, 172 (Md. Ct. Spec. App. 2013).

287. *Nichols v. Keller*, 19 Cal. Rptr. 2d 601, 608 (Ct. App. 1993).

288. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (AM. BAR. ASS'N 2024).

289. *Nichols*, 19 Cal. Rptr. 2d at 608.

290. See *id.* (stating while the lawyer need not represent the client on identified peripheral matters, the lawyer should inform the client of the limited scope of the lawyer's representation and of the possible need for separate counsel); *Long v. Parry*, No. 2:12-CV-81, 2016 WL 814861, at *18 (D. Vt. Feb. 29, 2016) (holding the lawyer owed the client no duty to provide tax advice regarding the settlement of the client's lawsuit where the client admitted he did not retain the lawyer to render tax advice and, “insofar as brief tax advice with respect to the settlement was reasonably related to the scope of [the lawyer's] representation,” the lawyer adequately provided such advice by advising the client to consult with his accountants); *Berggreen v. Gordon*, Nos. 94 C 4924, 90 B 18498, 91 A 00530, 1994 WL 700244, at *7 (N.D. Ill. Nov. 29, 1994) (representing the plaintiffs in a California case was beyond the scope of the lawyer's representation and the lawyer fulfilled his duty to the plaintiffs by repeatedly informing them they needed to hire a California lawyer to replace their former counsel who withdrew from the case); *Fakhrai v. Rosenberg*, No. D075117, 2019 WL 4149356, at *5 (Cal. Ct. App. Sept. 3, 2019) (ruling the lawyer had no duty to advise the client concerning the client's malpractice action against his prior counsel where the lawyer's engagement letter expressly limited his representation to preparing a petition for a writ of mandamus, and while the lawyer advised the client

B. *Illustrative Peripheral Duty Cases*

*Decker v. Mitchell (In re JTS Corp.)*²⁹¹ is a leading peripheral duty case.²⁹² JTS Corporation (JTS) was in the computer disk drive business.²⁹³ In 1996, JTS was struggling financially and decided to raise operating funds by selling eight properties spread across California and Texas it had acquired through a recent merger.²⁹⁴ A JTS director, Jack Tramiel, negotiated the purchase of the properties with JTS's chief financial officer, Virginia Walker.²⁹⁵ JTS agreed to sell the properties to Tramiel for their book value of \$10 million.²⁹⁶ JTS also retained an option to repurchase the properties from Tramiel.²⁹⁷ After Tramiel and JTS agreed on the terms of the sale, Walker contacted Anna Pope, a partner with Cooley Godward LLP, to finalize the transaction and draft the associated contract.²⁹⁸ During their initial conversation, Walker told Pope that the properties' combined value was \$15–16 million.²⁹⁹ Working with Tramiel's lawyer, Pope ultimately closed the sale of the properties for \$10 million.³⁰⁰

JTS was forced into bankruptcy in 1998.³⁰¹ The trustee for JTS's bankruptcy estate alleged that several JTS directors, including Tramiel, siphoned millions of estate dollars out of JTS that were property of the estate.³⁰² Relatedly, the trustee sued the lawyers who represented JTS in various transactions that allegedly were unlawful.³⁰³ With respect to the sale of the properties to Tramiel, the trustee alleged that Pope breached fiduciary duties owed to JTS and committed legal malpractice because she failed to inform JTS's board of directors that the properties were being sold for less than their fair market value,³⁰⁴ which the trustee's expert appraised at nearly

he may have claims against his prior counsel, the lawyer repeatedly refused to represent him in such a lawsuit).

291. *In re JTS Corp.*, 305 B.R. 529 (Bankr. N.D. Cal. 2003).

292. *See id.* at 558 (believing the best outcome would be produced at trial).

293. *Id.* at 534.

294. *Id.* at 541, 549.

295. *Id.* at 550–51.

296. *Id.* at 541.

297. *Id.*

298. *Id.* at 551.

299. *Id.*

300. *Id.* at 541.

301. *Id.* at 535.

302. *Id.* at 534.

303. *Id.*

304. *Id.* at 551.

\$16 million.³⁰⁵ The trustee further asserted Pope should have advised JTS's board to structure the deal as a secured loan rather than as a sale with a repurchase option.³⁰⁶

Pope moved for summary judgment on the trustee's complaint on the basis that she had no duty to provide business advice to JTS.³⁰⁷ Pope argued that a lawyer's duties to a client pivot on the scope of the agreed representation, that JTS retained her solely to draft the documents for the sale of the properties to Tramiel, and that the trustee did not allege she erred in papering the transaction.³⁰⁸ The court rejected Pope's cramped interpretation of her duty:

JTS hired Pope to be its legal representative in the . . . transaction. Although many of the terms had been negotiated at the time she was retained, Pope still settled several details of the agreement on JTS's behalf. These facts indicate that her role was greater than that of mere scrivener. The undisputed facts also establish that Pope was aware from the beginning that JTS, a struggling company, was about to sell its eight parcels of property for approximately \$5–6 million less than their appraised value. Even if she had not been retained specifically to investigate the fair market value of the properties, the potential harm to JTS from such a deal should have been reasonably apparent. While Pope may have believed it was outside the scope of her representation to solve the problem, that does not relieve her of the duty to inform her client of the possible need for further legal advice.³⁰⁹

The court also rebuffed Pope's related argument that she breached no duty to JTS because the company knew the property's value when it retained her.³¹⁰ Indeed, Pope learned the properties' appraised value from Walker.³¹¹ But according to the court, Pope's duty was not limited to advising JTS of the properties' value.³¹² Rather, her duty was to advise JTS that given the properties' appraised value, the sale to Tramiel might have adverse legal consequences for the company.³¹³ Construing matters in the light most favorable to the trustee, it was reasonable to conclude JTS would have acted

305. *Id.* at 541.

306. *Id.* at 551.

307. *Id.*

308. *Id.* at 551–52.

309. *Id.* at 552.

310. *See id.* (rejecting Pope's argument).

311. *See id.* at 551–52 (stating Pope learned the value from JTS's chief financial officer).

312. *Id.* at 552.

313. *Id.*

differently had Pope warned that selling the properties for \$5–6 million less than their fair market value could breach JTS's duties to its creditors.³¹⁴

The court ultimately decided that given the multiple claims and many disputed facts—going well beyond the trustee's claims against Pope and her law firm—summary judgment across the board was not appropriate.³¹⁵ Although the court awarded the various defendants complete or partial summary judgment on many of the trustee's claims, the court declined to grant Pope and her firm summary judgment on the trustee's peripheral duty claim.³¹⁶

*Peterson v. Katten Muchin Rosenman LLP*³¹⁷ is another leading peripheral duty case.³¹⁸ *Peterson* arose out of the bankruptcy of the Lancelot Investors Fund and other entities (collectively, the Funds).³¹⁹ The Funds' bankruptcy trustee (the Trustee) sued various firms for allegedly failing “to detect the peril the Funds were in and help curtail their risks.”³²⁰ This case involved the Trustee's claim that Katten Muchin Rosenman LLP (Katten) committed legal malpractice while it advised the Funds on structuring transactions with entities controlled by Thomas Petters,³²¹ an ostensible business mogul who was actually running an epic Ponzi scheme.³²² The Funds loaned money to companies controlled by Petters, which in turn purportedly financed inventory for prominent big box retailer Costco.³²³ Petters discouraged the Funds from communicating with Costco because

314. *Id.*

315. *See id.* at 558 (denying the defendants' multiple motions for summary judgment).

316. *See id.* at 558–59 (awarding summary judgment on two claims and partial summary judgment on five claims, and denying the rest); *see also* *Int'l Tele-Marine Corp. v. Malone & Assocs.*, 845 F. Supp. 1428, 1433–34 (D. Colo. 1994) (concluding the scope of the law firm's representation was limited to Blue Sky filings, but the firm was not entitled to summary judgment on the client's legal malpractice claim because genuine issues of fact remained as to whether the firm should have advised the client about related regulatory issues).

317. *Peterson v. Katten Muchin Rosenman LLP*, 792 F.3d 789 (7th Cir. 2015).

318. *See id.* at 791 (reversing the district court's dismissal of the Trustee's complaint for legal malpractice).

319. *Id.* at 790.

320. *Id.*

321. *Id.*

322. *See* Warren Richey, *Minn. Man Sentenced to 50 Years for \$3.7 Billion Ponzi Scheme*, CHRISTIAN SCI. MONITOR (Apr. 8, 2010), <https://www.csmonitor.com/USA/Justice/2010/0408/Minn.-man-sentenced-to-50-years-for-3.7-billion-Ponzi-scheme> [<https://perma.cc/5FFF-5MVW>] (“Petters and a close circle of associates created the illusion of a successful company selling bulk electronic goods to big-box retailers like Costco and Sam's Club . . . [I]t was all a façade.”).

323. *Peterson*, 792 F.3d at 790.

doing so would supposedly impair his business relationship with the company.³²⁴

The Funds' loans to Petters's businesses were supposed to be secured through (1) documents that showed the inventory Petters furnished and Costco's promise to pay; and (2) "a 'lockbox' bank account into which Costco would deposit its payments for the Funds to draw on," thereby preventing Petters from misappropriating the money.³²⁵ The Funds so described their arrangement with Petters to investors.³²⁶ But, in fact, Costco never paid into the account; all the money in the account came from a Petters entity.³²⁷ Regrettably, Gregory Bell, who formed and managed the Funds, became complicit in Petters's fraud,³²⁸ and he and the Funds lied to investors about the security for the Funds' loans.³²⁹ "The actual setup left the Funds at Petters's mercy—and he had no mercy, just as he never had any dealings with Costco."³³⁰ When Petters's Ponzi scheme imploded, so did the Funds.³³¹

The Trustee alleged that Katten violated its duty to the Funds by not advising Bell that the arrangement with Petters (including no contact with Costco and the receipt of no money directly from Costco) posed a risk that Petters's business was a sham.³³² The Trustee asserted that the Funds retained Katten to structure their transactions with Petters, and a transactional lawyer's duty includes advising the client about what contractual devices are appropriate in the circumstances.³³³ In particular:

The [Trustee's] complaint focuse[d] on two periods: first, a time during 2003 when principal contracts were being negotiated and signed; second, a time during 2007 when Petters fell behind in payments to the lockbox (he asserted that Costco was late paying him) and the Funds consulted Katten about what

324. *Id.*

325. *Id.* The lockbox arrangement is further explained in *Peterson v. McGladrey, LLP*, 792 F.3d 786, 787 (7th Cir. 2015).

326. *Peterson*, 792 F.3d at 790.

327. *Id.*

328. See John Welbes, *Hedge Fund Owner Gets 5 Years in Petters Scam*, PIONEER PRESS (Nov. 12, 2015, 9:26 AM), <https://www.twincities.com/2010/09/29/hedge-fund-owner-gets-5-years-in-petters-scam> [https://perma.cc/7Z7J-CBB3] (reporting that Bell was sentenced to six years in federal prison for his role in facilitating Petters's Ponzi scheme).

329. *Peterson*, 792 F.3d at 790.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

to do. According to the complaint, in 2003 Katten did not advise the Funds to ask for additional protections—the Trustee believe[d] that Katten's lawyers did not recognize the risk from the combination of no contacts and no direct payments, plus the potential that the paperwork purporting transactions with Costco had been forged. The complaint also allege[d] that in 2007 Katten advised the Funds to defer the due dates on the payments, and that no other change was necessary, even though the delay coupled with the other indicators should have alerted any competent transactions lawyer to the possibility of fraud, and the lawyer should have counseled the client to obtain better security.³³⁴

Katten successfully moved to dismiss the Trustee's complaint in the district court, but the Trustee appealed, and the Seventh Circuit found multiple flaws in the district court's reasoning.³³⁵ Among other problems, the district court did not address the Trustee's claim that Katten was obligated to alert the Funds to the hazard of allowing Petters to be the conduit for repayments.³³⁶ The Trustee alleged that Bell did not understand the difference between money from Costco and money from Petters.³³⁷ According to the *Peterson* court, a competent transactional lawyer should recognize that the former arrangement offers far better security than the latter and so caution the client.³³⁸ If a client rejects the lawyer's advice, the lawyer need say no more.³³⁹ Here, however, the Trustee's complaint alleged that Katten never offered the Funds such advice, thereby blinding them to the risk they were assuming.³⁴⁰

Additionally, the district court did not identify any principle of controlling Illinois law differentiating business advice from legal advice.³⁴¹ The *Peterson* court conceded that it was hard to imagine cleanly drawing such a line.³⁴² Nonetheless, a lawyer must sometimes furnish a client with legal advice concerning the degree of business risk a transaction poses:

[O]ne function of a transaction[al] lawyer is to counsel the client how different legal structures carry different levels of risk, and then to draft and negotiate

334. *Id.* at 790–91.

335. *See id.* at 791 (discussing three main issues with the lower court's decision).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

contracts that protect the client's interests. A client can make a business decision about how much risk to take; the lawyer must accept and implement that decision. But it is in the realm of legal advice to tell a client that the best security in a transaction such as this one is direct verification with Costco plus direct deposits to a lockbox; the second-best is direct deposits to a lockbox; and worst is relying wholly on papers over which Petters had complete control, for they may be shams with forged signatures by Costco managers who have never heard of Petters. Knowing degrees of risk presented by different legal structures, a client *then* can make a business decision; but it takes a competent lawyer, who understands how the law of secured transactions works (and who also knows what's normal in the world of commercial factoring that Petters claimed to practice), to ensure that the client knows which legal devices are available and how they affect risks.³⁴³

Continuing, the court asserted that a critical aspect of a transactional lawyer's role is advising clients how best to secure their loans to others.³⁴⁴ The court acknowledged that a transactional lawyer is tasked with proposing, preparing, and negotiating contracts that accomplish a client's business goals rather than counseling the client to change its goals or advising the client to deal with a different counterparty.³⁴⁵ Lawyers are not business consultants.³⁴⁶ At the same time, the court said, within the scope of the representation, a lawyer must advise the client which legal forms may be employed to achieve the client's business objectives, and how (if at all) different legal forms potentially affect the client's risks.³⁴⁷

The *Peterson* court concluded that the Trustee's complaint stated a legally cognizable legal malpractice claim.³⁴⁸ The Seventh Circuit, therefore, reversed the district court and remanded the case for further proceedings.³⁴⁹

Peterson is not favorable from a lawyer's standpoint, but nor is it cause for heartburn. First, the case was decided at the pleadings stage.³⁵⁰ When reviewing a district court's dismissal of a complaint, an appellate court

343. *Id.*

344. *Id.* at 792.

345. *Id.* at 793 (citing *Behrens v. Wedmore*, 698 N.W.2d 555, 572–73 (S.D. 2005)).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *See id.* at 791 (noting that the district court granted Katten's motion to dismiss the Trustee's complaint for failure to state a claim).

accepts all factual allegations in the complaint as true.³⁵¹ The court also views the facts in the light most favorable to the plaintiff³⁵² and draws all reasonable factual inferences in the plaintiff's favor.³⁵³ Given those standards, the Trustee enjoyed a substantial advantage over Katten when the case reached the Seventh Circuit. Second, and relatedly, there were key issues requiring further factual development that could not be decided short of summary judgment or trial.³⁵⁴ For instance, the Trustee's complaint did not indicate how sophisticated Bell and the Funds were about commercial factoring and the legal tools available to protect lenders.³⁵⁵ Nor did the complaint outline the Funds' objectives in engaging Katten; that is, the complaint did not specify what sort of advice the Funds wanted and what advice Katten agreed to provide.³⁵⁶ If Bell and the Funds were sophisticated in commercial lending, or if the Funds never sought advice from Katten about the legal means of protecting secured lenders, then the law firm may well have owed the Funds no peripheral duties. Third, the *Peterson* court reiterated the general rule that lawyers are not business consultants.³⁵⁷ Fourth, the court did not expand the peripheral duty doctrine beyond its traditional confines; that is, the court limited Katten's duty to advise the Funds on issues outside the scope of the firm's representation, if any, to legal issues with possible adverse consequences for the Funds if the Funds

351. *Adams v. Palm Beach Cnty.*, 94 F.4th 1334, 1337 (11th Cir. 2024); *Doe 1 v. Apple Inc.*, 96 F.4th 403, 414 (D.C. Cir. 2024); *Fouts v. Warren City Council*, 97 F.4th 459, 464 (6th Cir. 2024).

352. *Palm Beach Cnty.*, 94 F.4th at 1337; *Espinal v. City of Hous.*, 96 F.4th 741, 745 (5th Cir. 2024).

353. *Doe 1*, 96 F.4th at 414; *Halsey v. Redcap Rehab. Servs., Inc.*, 95 F.4th 1, 10 (1st Cir. 2024).

354. *See Peterson v. Katten Muchin Rosenman LLP*, 792 F.3d 789, 792–93 (7th Cir. 2015) (stating that certain factual issues describing the “needs and sophistication of the client” were not mentioned in the initial complaint).

355. *Id.* at 792–93.

356. *Id.* at 793.

357. *Id.*; *see also Abrams v. DLA Piper (US) LLP*, No. 2:12–CV–19–TJS, 2013 WL 2634767, at *7–8 (N.D. Ind. June 12, 2013) (explaining how the law firm's failure to give a hospital business advice did not state a legal malpractice claim because it was the hospital's directors who had the expertise necessary to give business advice); *Alberts v. Tuft (In re Greater Se. Cmty. Hosp. Corp.)*, 333 B.R. 506, 529 (D.D.C. 2005) (rejecting the debtors' claims for breach of fiduciary duty and legal malpractice based on the lawyers' failure to advise them of the consequences of their deepening insolvency because the scope of the lawyers' representation did not include business advice); *Parks v. Miles & Stockbridge, P.C.*, No. 2123, 2016 WL 6664926, at *19 (Md. Ct. Spec. App. Nov. 10, 2016) (“Maryland courts do not hold attorneys liable for their clients' business judgments.” (citing *Catler v. Arent Fox, LLP*, 71 A.3d 155, 172 (Md. Ct. Spec. App. 2013))); *Lamb v. Barbour*, 455 A.2d 1122, 1126 (N.J. Super. Ct. App. Div. 1982) (refusing to impose a duty on the lawyer to advise his clients that they lacked the experience to operate two bakeries because the decision to buy the bakeries was properly left to the clients' exercise of their business judgment).

did not recognize or consider them.³⁵⁸ Fifth, given that Bell eventually “threw in his lot with Petters” and, like Petters, went to prison for fraud,³⁵⁹ it is hard to see how Katten could have provided any advice to the Funds that would have prevented their collapse due to Petters’s dishonesty. In other words, the Trustee likely could never show that Katten’s alleged legal malpractice proximately caused the Funds’ damages as required for liability.³⁶⁰

In contrast to the courts in *In re JTS* and *Peterson*, the Ohio Court of Appeals in *Landis v. Hunt*³⁶¹ rejected the plaintiff’s peripheral duty claim.³⁶² *Landis* was rooted in a doctor’s 1981 misdiagnosis of Tom Landis’s cancer.³⁶³ In April 1984, Mr. Landis and his wife, Deborah, consulted lawyer Robert Herkins about minimizing the value of Mr. Landis’s estate in light of his cancer, which had metastasized.³⁶⁴ Herkins had previously prepared the couple’s wills and once represented them in a real estate closing.³⁶⁵ Herkins now reviewed their assets and prepared a quitclaim deed, so their house would be in Mrs. Landis’s name alone when Mr. Landis died.³⁶⁶ Mr. Landis passed away soon after the meeting with Herkins.³⁶⁷ Mrs. Landis then engaged Herkins to probate her late husband’s estate.³⁶⁸

Approximately five years later—and apparently spurred to action by a television show on malpractice claims—Mrs. Landis sued Herkins for legal malpractice.³⁶⁹ The trial court awarded Herkins summary judgment, and Mrs. Landis appealed.³⁷⁰

358. See *supra* Part IV.A.

359. *Peterson v. McGladrey LLP*, 792 F.3d 785, 786 (7th Cir. 2015).

360. See *Midwest Sanitary Serv., Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 211 N.E.3d 448, 452 (Ill. 2022) (“The plaintiff must prove that he suffered actual damages proximately caused by the attorney’s malpractice.” (citing *Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman*, 18 N.E.3d 884, 891 (Ill. 2014))); *Suburban Real Est. Servs., Inc. v. Carlson*, 193 N.E.3d 1187, 1191 (Ill. 2022) (“No action can be sustained against the attorney unless that negligence proximately caused damage to the client.” (citing *Northern Illinois Emergency Physicians v. Laundau, Omahana & Kopka, Ltd.*, 837 N.E.2d 99, 107 (Ill. 2005))).

361. *Landis v. Hunt*, 610 N.E.2d 554 (Ohio Ct. App. 1992).

362. *Id.* at 561–62.

363. See *id.* at 556 (describing Tom Landis’s misdiagnosis regarding a malignant mole).

364. *Id.*

365. *Id.*

366. *Id.*

367. See *id.* (detailing the 1984 meeting between Robert Herkins and the Landises followed by Tom Landis’s death in 1984).

368. *Id.*

369. *Id.*

370. *Id.* at 557.

It was clear from the trial court record that Mrs. Landis and Herkins never discussed the circumstances of Mr. Landis's death beyond its attribution to cancer.³⁷¹ Although the Landises considered pursuing a medical malpractice claim arising out of Mr. Landis's misdiagnosis, they did not consult with Herkins about such a claim, he did not represent them while they explored that option, and he was unaware of their related consultations with other lawyers.³⁷² Upon further review of the record and, specifically, the testimony of Mrs. Landis's expert witness, the *Landis* court deduced that the theory of Mrs. Landis's malpractice claim against Herkins must be that a lawyer who probates estates owes a duty to every client to inquire into the potential for a wrongful death claim.³⁷³ Mrs. Landis offered no legal authority for so broad a duty.³⁷⁴ The court concluded that no such duty exists without the client saying something that would prompt the lawyer to ask about the circumstances of the decedent's death for the purpose of exploring a possible wrongful death claim.³⁷⁵ Because that was not the situation at hand, the *Landis* court affirmed the trial court judgment for Herkins.³⁷⁶

C. *Lawyers' Uncertain Duty to Advise Clients About Insurance Coverage*

One of the harder peripheral duty questions is whether a lawyer who is defending a client in litigation must advise the client that there may be insurance coverage for the lawsuit, such that an insurer may have a duty to pay for the client's defense in addition to indemnifying the client should the client lose the case or opt to settle. There is no uniform answer to this question. Rather, the answer will depend on the scope of the lawyer's

371. *Id.* at 561.

372. *See id.* at 561–62 (discussing Herkins' involvement in the Landises' estate and probate cases and his lack of involvement in their medical malpractice suit).

373. *Id.* at 561.

374. *Id.*

375. *Id.*

376. *Id.*

representation and the circumstances.³⁷⁷ *Darby & Darby, P.C. v. VSI International, Inc.*³⁷⁸ is a prominent case in this area.

VSI International, Inc. (VSI) retained Darby & Darby, P.C. (Darby) to defend it in two Florida lawsuits asserting that VSI was guilty of “patent, trademark, and trade dress infringement.”³⁷⁹ The litigation was expensive, and while VSI paid a portion of Darby’s fees, the company was over \$200,000 in arrears when the law firm finally withdrew as counsel.³⁸⁰ After withdrawing from VSI’s representation, Darby sued the company to recover the firm’s unpaid legal fees.³⁸¹ VSI counterclaimed for legal malpractice and breach of fiduciary duty based on Darby’s failure to advise the company of possible coverage for its defense costs under VSI’s general liability insurance

377. As the court in *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 827 N.Y.S.2d 231 (App. Div. 2006) explained:

[I]t seems self-evident that the question whether . . . an attorney could be found negligent for failing to investigate insurance coverage would turn primarily on the scope of the agreed representation—a question of fact—and on whether, in light of all relevant circumstances, the attorney “failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession”

Id. at 236 (quoting *Arnav Indus., Inc. Ret. Tr. v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 751 N.E.2d 936, 938–39 (N.Y. 2001)); see *Nat’l Air Cargo, Inc. v. Jenner & Block, LLP*, 165 N.Y.S.3d 643, 645–46 (App. Div. 2022) (holding the law firm had no duty to ascertain the client’s insurance coverage because that task was outside the scope of the representation based on the firm’s engagement letter); *VPC Projects, LLC v. Golenbock Eiseman Assor Bell & Peskoe LLP*, No. 156097/2016, 2020 WL 3545687, at *5–6 (N.Y. Sup. Ct. June 2, 2020) (concluding the law firm had no duty to pursue the client’s insurance coverage issues when there was no evidence the coverage was within the scope of the firm’s representation and the firm did not assume a duty to pursue coverage by asking the client’s insurance broker to forward the plaintiff’s complaint to the client’s insurance company); *Matz v. Aboulafia Law Firm, LLC*, No. 155506/2016, slip op. at *7–9 (N.Y. Sup. Ct. Oct. 10, 2017) (dismissing the plaintiff’s legal malpractice claim against the law firm for allegedly failing to investigate additional insurance coverage for the plaintiff’s loss where the firm’s engagement letter clearly limited the scope of the representation to suing one specified insurance company). The court may also factor accepted practices into the analysis. As a Connecticut trial court explained:

An attorney’s obligation to his client arguably includes the duty to advise his client on the most affordable course of action including an investigation of potential insurance coverage. It is not important that this duty has not, as yet, been recognized, or that it might have proven to be unsuccessful. It is a reasonable claim and is in accord with *what this court believes to be the accepted practice* of the Connecticut bar.

Rozbicki v. Sconyers, No. LLICV156012417S, 2018 WL 1769206, at *5 (Conn. Super. Ct. Mar. 21, 2018) (emphasis added), *aff’d in part, rev’d in part*, 234 A.3d 1061 (Conn. App. Ct. 2020).

378. *Darby & Darby, P.C. v. VSI Int’l, Inc.*, 739 N.E.2d 744 (N.Y. 2000).

379. *Id.* at 745.

380. *Id.* at 745–46.

381. *Id.* at 746.

policy that was in force while Darby was conducting the defense.³⁸² VSI asserted that the lawyers it engaged to replace Darby had successfully obtained coverage for VSI's defense costs under the policy but the insurer had denied coverage for any costs incurred while Darby represented VSI.³⁸³

A New York appellate court held that "absent a factual allegation that [Darby's] representation specifically encompassed advice on insurance coverage, [Darby] owed [VSI] no duty to inquire into the nature and scope of that coverage."³⁸⁴ The case then reached the New York Court of Appeals, the state's highest court.³⁸⁵

VSI's claims against Darby were predicated "on a then novel theory" that insurance coverage was available to VSI for the Florida litigation under the advertising injury provisions of VSI's general liability policy.³⁸⁶ VSI also reminded the court that Darby's successor counsel obtained coverage for VSI's defense costs following Darby's withdrawal.³⁸⁷ Even accepting VSI's allegations as true, the *Darby & Darby* court concluded that Darby owed no duty to VSI to secure insurance coverage for the Florida litigation.³⁸⁸

The court observed that while Darby was representing VSI, courts in New York and Florida (the two relevant states) had not recognized a liability insurer's duty to defend patent infringement claims under a policy's advertising injury coverage; additionally, the theory was largely embryonic elsewhere.³⁸⁹ Thus, Darby had no duty to advise VSI about the prospect of insurance coverage for the intellectual property claims against it in the Florida cases.³⁹⁰

Undeterred, VSI argued that while its theory of liability might be novel, Darby, "as a highly specialized patent law firm," owed VSI "a duty to keep abreast of emerging legal trends."³⁹¹ This argument did not persuade the court, which, while agreeing that lawyers should track current legal developments so they can properly advise clients, concluded that holding Darby liable for failing to advise VSI about "a novel and questionable"

382. *Id.*

383. *Id.*

384. *Id.*

385. *See id.* (explaining the appellate court certified a question to the court of appeals).

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 747.

390. *Id.*

391. *Id.* at 748.

insurance coverage theory was too great a reach.³⁹² In short, Darby fulfilled its duty to VSI by conducting the company's defense in a reasonable manner, in line with the law as it stood at the time.³⁹³

Although *Darby & Darby* was the last word on the dispute between Darby and VSI, the lower appellate court's opinion, which we will call *Darby I*, is also interesting.³⁹⁴ The *Darby I* court, like the court of appeals, concluded that VSI's legal malpractice and breach of fiduciary duty claims against Darby failed.³⁹⁵ According to the *Darby I* court, VSI's retention of Darby to defend the two Florida cases did not incorporate responsibility for determining whether there might be applicable insurance coverage.³⁹⁶ Unlike the court of appeals, however, the *Darby I* court volunteered that different facts in a different case might yield a different result: "There may be particular circumstances, such as personal injury actions arising out of automobile collisions, in which an attorney who is retained to defend an action has an obligation to bring to the client's attention the possible existence of an insurance policy applicable to the claim"³⁹⁷

D. Summary

The outcomes in cases involving lawyers' alleged peripheral duties are difficult to predict because such cases are heavily fact dependent. Among other possible influences, the client's objectives in engaging the lawyer in the first place may be a factor in assessing the lawyer's alleged peripheral duty, as may be the client's level of involvement in the relevant industry or business, the client's level of sophistication, or the client's experience with the same legal issue or similar legal concepts. The greater the client's sophistication, business or industry experience or knowledge, or legal acumen, the more reluctant a court should be to recognize a peripheral duty or, alternatively, the less likely it will be that the lawyer's failure to give the allegedly required advice or take the allegedly necessary action caused the client's claimed damages.

392. *Id.*

393. *Id.*

394. *Darby & Darby, P.C. v. VSI Int'l, Inc.*, 701 N.Y.S.2d 50 (App. Div. 2000), *aff'd*, 739 N.E.2d 744 (N.Y. 2000).

395. *Id.* at 51.

396. *See id.* (stating counsel's responsibility was limited by the nature of the claim they were initially retained for).

397. *Id.* (citing *Campagnola v. Mulholland, Minion & Roe*, 543 N.Y.S.2d 516 (App. Div. 1989), *aff'd*, 555 N.E.2d 611 (N.Y. 1990)).

For lawyers, courts' recognition of the peripheral duty doctrine should drive home three points. First, and at the risk of repetition, lawyers should carefully describe the scope of their representations in their engagement letters. Second, lawyers should exclude from the scope of their representations services or tasks for which they are unwilling to assume responsibility.³⁹⁸ For instance, a lawyer hired to defend a client in litigation may wish to exclude from the scope of the representation responsibility for advising the client on insurance coverage issues or for seeking coverage for the lawsuit.³⁹⁹ At the very least, it will be difficult for a plaintiff to successfully argue that a lawyer had a peripheral duty (or any duty, for that matter) to render some type of advice or to perform some service if the lawyer plainly excluded the advice or service from the scope of the representation.⁴⁰⁰ Third, a lawyer who identifies a legal issue outside the scope of the client's representation with the potential to prejudice the client's interests or rights should promptly alert the client to the issue and document the advice to the client.⁴⁰¹ If the lawyer does not intend to expand

398. *See* *Shim v. Lawler*, No. 17-CV-04920-EMC, 2019 WL 2996443, at *9 (N.D. Cal. July 9, 2019) (stating the terms of the lawyers' retainer agreement, which clearly limited the scope of their representation to assisting the clients in applying for EB-5 visas, undermined the plaintiffs' claim that the defendants owed them a duty to provide financial advice); *Freude v. Berzowski*, No. 2023AP764, 2024 WL 3686605, at *4–6 (Wis. Ct. App. Aug. 7, 2024) (declining to impose a peripheral duty that would have contradicted the express limit on the scope of the lawyer's representation stated in the parties' retention agreement).

399. *See* *Nat'l Air Cargo, Inc. v. Jenner & Block, LLP*, 165 N.Y.S.3d 643, 645–46 (App. Div. 2022) (holding the law firm had no duty to ascertain the client's insurance coverage because that responsibility was outside the scope of the representation according to the firm's engagement letter); *VPC Projects, LLC v. Golenbock Eiseman Assor Bell & Peskoe LLP*, No. 156097/2016, slip op. at *5–6 (N.Y. Sup. Ct. June 2, 2020) (concluding the law firm had no duty to pursue the client's insurance coverage issues where there was no evidence that coverage was within the scope of the firm's representation and the firm did not assume a duty to pursue coverage by asking the client's insurance broker to forward the plaintiff's complaint to the client's insurance company); *Matz v. Aboulaflia Law Firm, LLC*, No. 155506/2016, slip op. at *7–9 (N.Y. Sup. Ct. Oct. 12, 2017) (dismissing the plaintiff's legal malpractice claim against the law firm for allegedly failing to investigate additional insurance coverage for the plaintiff's loss where the firm's engagement letter clearly limited the scope of the representation to suing one specified insurance company).

400. Of course, a lawyer cannot exclude legal advice or services from the scope of a representation if, in doing so, the lawyer unreasonably limits the scope of the representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (AM. BAR ASS'N 2024) ("Although [Rule 1.2(c)] affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.>").

401. *See, e.g., Shim*, 2019 WL 2996443, at *11 (describing the lawyer's communications with the client as he continuously explained the limits of his representation).

the scope of the current representation to encompass the issue, the lawyer should tell the client and document that communication.

V. CONCLUSION

A lawyer's duties to a client are framed by the scope of the representation. Lawyers may reasonably limit the scope of clients' representations with the clients' informed consent. In fact, lawyers are often wise to limit the scope of representations for practice management and risk management purposes. In limiting the scope of a representation, a lawyer should document the limitations in an engagement letter the client can understand and consult as needed. Of course, within the confines of a limited scope representation, the lawyer's ethical duties to the client remain in full force. Furthermore, a lawyer may owe a client a peripheral duty to advise the client on legal issues outside the scope of the representation that have possible adverse consequences for the client if not appreciated or considered. For clients, on the other hand, understanding the scope of representation is essential to accomplishing their objectives in the matter and in managing associated costs. In sum, few, if any, professional responsibility and liability concepts are as consequential for lawyers and clients as the scope of representation.