Reprinted with permission from the New York State Bar Association Journal, July/August 2021, Vol 93, No. 4.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

TO THE FORUM:

I am the founder and managing partner of a boutique criminal defense firm. An old law school classmate of mine who works for a not-for-profit public defender's office that represents criminal defendants as part of the county's assigned counsel program recently contacted me to tell me that the county has defunded the public defender's office and is moving to an alternate program. While many of their pending cases are being transferred to the new alternate program, the program has limited capacity, and he asked that I take on one of the outstanding client matters pro bono. I am always looking for an opportunity to help the underserved community through pro bono work and would be interested in taking on the matter, provided I am ethically permitted to do so. Do I have any ethical obligations with respect to taking on such representation?

In addition, my firm has been asked to represent another criminal defendant for the limited purpose of preparing for her upcoming trial. Given that I anticipate that the pro bono matter will substantially monopolize my time in the foreseeable future, I'd like the matter to be handled by an of counsel attorney at my firm. The engagement agreement would be limited in scope to obtaining a pretrial deposition and state that representation of the client at trial requires the client to separately engage the of counsel attorney for that purpose, and we would pay him a flat fee for his services. Is such a limited scope retainer and flat fee payment permissible under the ethical rules? If so, are there any special precautions I must follow to make sure our firm is complying with the rules of professional conduct?

Sincerely,
Amy Advocate

DEAR AMY:

Your desire to take on pro bono legal work is admirable, as pro bono representation is an important service offered by lawyers. Based on your question, there doesn't appear to be any ethical reason you would be prohibited from taking on such representation. In fact, the Rules of Professional Conduct (RPC) encourage every lawyer to provide at least 50 hours of pro bono legal services each year to poor and indigent clientele. *See* Rule 6.1(a)(1). As a general matter, pro bono representation is no different from representing a paying client, and you must consider your ethical obligations when undertaking such pro bono representation. The RPC does not have specific or separate ethical rules that an attorney must follow when representing pro bono clients; the entire gamut of the RPC applies to the representation. We would need additional facts to give you a complete list of the ethical rules that would be implicated during your representation; however, discussed herein are a few important rules that appear to be relevant to your specific situation as we understand your question.

WHAT TO CONSIDER WHEN TAKING ON PRO BONO CASES

First, you must carefully consider whether taking on such representation conflicts with your representation of an existing or former client, which means that you should run an internal conflict check before agreeing to represent a pro bono client. Put differently, "undertaking pro bono legal work does not exempt lawyers from the rules governing conflicts of interests." *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1411 (2019 ed.). We discussed an attorney's obligations to a former client at length in a prior *Forum*. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., November 2020, Vol. 92, No. 8.

As we have discussed in several prior *Forums,* RPC 1.7 governs conflicts of interest related to current clients, while RPC 1.9 governs an attorney's ethical obligations to former clients and provides, among other things, that a lawyer may not represent a client adverse to a former client in a matter that is the same or substantially related to the matter in which the attorney represented the former client. *Id.; see also* Vincent J. Syracuse, Maryann C.

Stallone & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., March/April 2021, Vol. 93, No. 2.

Determining whether a conflict exists early on is especially important in criminal cases, because in criminal matters conflicts of interest have the potential to implicate the client's Sixth Amendment right to effective assistance of counsel. Conflicts in criminal matters can arise in different ways. For example, we see this issue in successive representations where you or someone from your firm previously represented a prior witness or cooperator. Given the complexities of conflicts of interest in criminal matters, certain conflicts must be raised with the court so that the judge can independently verify whether the conflict so impedes the effective assistance of counsel that it overcomes a defendant's right to counsel of his or her choosing. In some cases, the conflict cannot be waived because representation is prohibited by applicable law, and we call your attention to the fact that there are federal criminal statutes that prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. *See* RPC 1.7, Comment [16].

As discussed below, under certain circumstances, RPC 6.5 allows a lawyer to bypass a conflict check when the scope of the engagement is specifically limited, even in criminal matters where limited scope engagement is permitted. However, that limited exception does not appear to be relevant to the first part of your question. Accordingly, we recommend that you run a robust internal conflict check before agreeing to take on the representation.

ENSURING COMPETENT REPRESENTATION

Next, when taking on a pro bono matter, you should carefully consider whether you are competent to represent the client with regard to the specific subject matter that may be involved. RPC 1.1(b) explicitly prohibits a lawyer from representing a client in a legal matter that "the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." RPC 1.1(b). In determining whether a lawyer has the requisite competence to handle a matter, the lawyer should consider factors such as "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question." RPC 1.1 Comment [1]; *see also* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., November 2020, Vol. 92, No. 8.

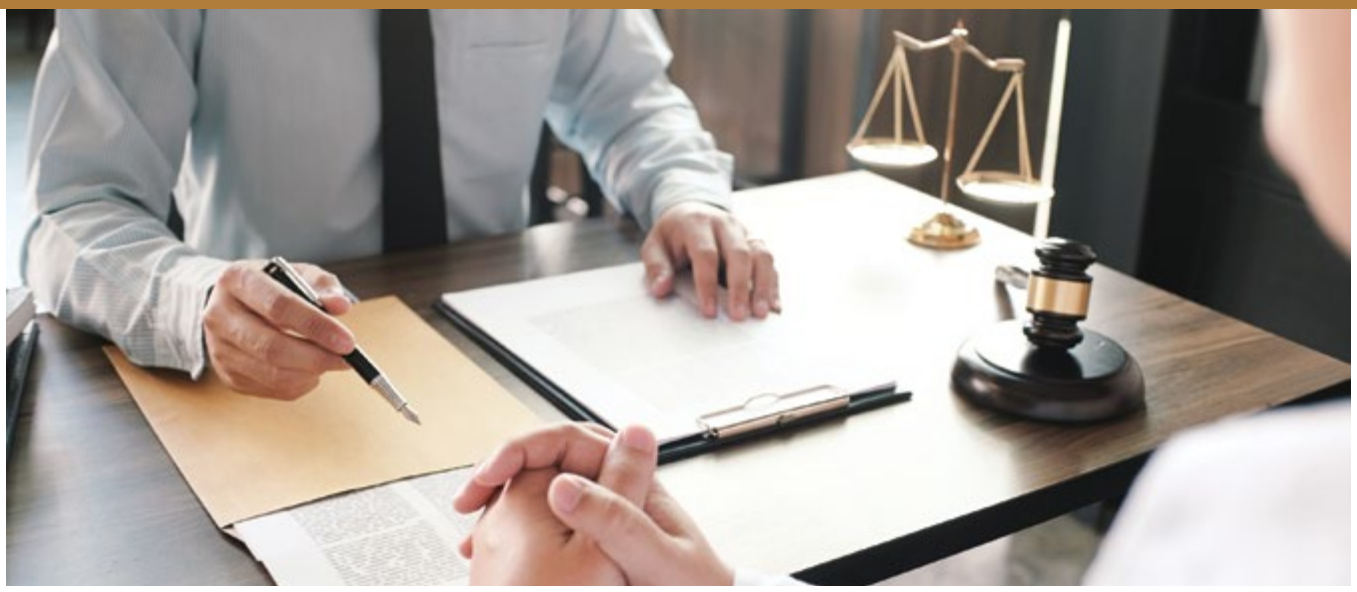
Given that you have noted that you are the managing partner of a boutique criminal defense firm and have provided little detail as to the specific subject matter of the proposed pro bono representation, we will assume, for purposes of your question, that you have the competence required by RPC 1.1(b) to handle this specific matter. However, if, for some reason, the matter you receive is outside the scope of your general expertise, you may still be ethically permitted to represent the client provided that you have the ability and opportunity to consult with an experienced attorney who has the skill and ability to handle the matter. *See* RPC 1.1 Comment [2]. For example, if you have experience representing criminal defendants in pre-trial matters but have little experience trying criminal matters before a jury, you may be required to consult with an experienced trial attorney to comply with your ethical obligations and avoid prejudicing your client's position.

Next, you must obtain the client's informed consent in order to proceed with the representation. Because the matter at issue was previously being handled by another attorney and legal services program, the client must consent to your representation. Indeed, the RPC gives great deference to the client's right to choose his or her counsel. *See* Vincent J. Syracuse, Maryann C. Stallone, Carl F. Regelmann & Alyssa C. Goldrich, *Attorney Professionalism Forum*, N.Y. St. B.J., November 2020, Vol. 92, No. 8. The fact that your representation is free of charge does not diminish the client's fundamental right to choose his or her counsel.

Once you have determined that there are no conflicts, that you have the requisite skill and experience to handle the matter and that the client has consented to your representation, we see no reason why you would not be permitted to proceed with the representation. However, keep in mind that, as with any matter, other ethical issues might arise during your representation.

Now, turning to the second part of your question, which we assume is completely unrelated to the pro bono matter discussed above, we are not aware of any ethical prohibition on law firms entering into agreements with clients identifying an individual of counsel attorney who will be handling the client's representation, provided, however, that the of counsel attorney is competent to perform the agreed-upon services. *See* RPC 1.1(b). Nevertheless, there are a number of ethical rules that a lawyer must consider when the retainer agreement provides for a limited scope of *pretrial* representation *only.* As an aside, although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In any case, an attorney wishing to undertake limited scope representation must consider RPC 1.2, which pro-



vides that a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." *See* NYSBA Comm. on Prof'l Ethics, Op. 1215 (2021). Essentially, the key to appropriate (and ethically compliant) limited scope representation is transparency.

INFORMED CLIENT CONSENT

With respect to the issue of informed client consent, Comment [6A] to RPC 1.2 is instructive: "A lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation." In making such disclosures, consider whether additional representation might be required and, if so, it is prudent to explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense and complications.

Thus, in your situation, you would first need to disclose what matters would be *excluded* from your limited representation. In our view, such exclusions might include selecting a jury, delivering an opening statement and calling witnesses at trial. In addition to disclosing what information is excluded, you will need to disclose the reasonably foreseeable consequences of that limitation, including the potential risk that a trial court might deny the firm's motion to withdraw from the representation if the case were to proceed to trial.

It is important to keep in mind that even if a lawyer validly obtains a client's informed consent to withdraw after a discrete stage, the lawyer must also comply with RPC 1.16(d), which provides that "if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission and when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." In your situation, once you have entered an appearance in the criminal matter, you are likely to need the consent of the tribunal to withdraw.

There is also a possibility that a court might deny that defendant's application to substitute successor counsel, despite compliance with the retainer agreement, if that application is made too close to trial. If a motion to withdraw or to substitute other counsel is denied, the client's representation could be impacted because the trial would then proceed with the defendant represented by the originally retained lawyer, notwithstanding the understanding of the lawyer and the client to the contrary in the retainer agreement.

Even if you provide all the disclosures required, RPC 1.2(c) permits limited scope representation only if the limitation is reasonable under the circumstances. Determining whether the limited scope representation is reasonable under the circumstances requires a close look at your specific facts. Comment [7] to RPC 1.2 provides some further insight: "If . . . a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely."

However, as noted in NYSBA Comm. on Prof'l Ethics, Op. 1215 (2021), in many criminal matters, a bright line cannot be drawn between pretrial work and trial work. Prop-

erly conducting witness interviews and exploring potential defenses fall under the aegis of the constitutional right to effective assistance of counsel. In addition, decisions about which legal defenses to present at trial are often made long in advance of trial. In fact, many of the provisions of the criminal procedure law require notice to be provided in advance of trial for things such as defendant's intent to proffer psychiatric evidence at trial (CPL § 250.10).

In our view, based on the foregoing, limiting the scope of criminal defense legal services to pretrial work would ordinarily be unreasonable in most criminal matters, especially where there is more than a small possibility that the case will actually proceed to trial.

In any case, as a practical matter, many criminal cases end up turning on facts that are unknown at the time the criminal defendant is arrested and charges are initially filed. Accordingly, it is very difficult to predict, at the beginning stages of a criminal matter, the likelihood of a negotiated disposition prior to trial. For example, information obtained from the police and other law enforcement authorities post-arraignment through pretrial discovery may reveal a basis for a successful motion to suppress eyewitness testimony, admissions or physical evidence. Perhaps one way to limit the scope of representation while still preserving the client's rights is to ensure that the agreement limiting the scope of the representation to pretrial matters requires the attorney to take the necessary steps to ensure that successor counsel is able to provide all the defense services that are necessary to the provision of competent and effective representation until the final deposition of the case.

Finally, with regard to whether you are ethically permitted to pay a flat fee to of counsel attorneys associated with your firm for the representation of such criminal defendants, we are not aware of any provision of the RPC preventing you from doing so, with a few caveats. First, it is important that you and your firm be honest with the of counsel attorney about the reality of their representation; namely, that if the client fails to engage successor trial counsel, and if the court denies the of counsel lawyer's motion to withdraw, then the obligation of defending the client at trial may fall to the of counsel lawyer. This is of crucial importance if the of counsel lawyer does not have much experience representing criminal defendants at trial, as such representation may breach the duty of competence set forth in RPC 1.1(b). The fully informed of counsel then has the ability to accept the limited scope representation or insist upon additional payment from the law firm if required to continue the representation through trial.

In sum, your desire to provide legal services to the underserved community pro bono is commendable but not without ethical considerations. Be sure to consider your own professional limitations that may inhibit your ability to competently represent the client before agreeing to take on such representation. And, as in nearly all cases of client representation, transparency is critical.

Sincerely,
The Forum by
Vincent J. Syracuse
(syracuse@thsh.com)
Adam M. Felsenstein
(felsenstein@thsh.com) and
Alyssa C. Goldrich
(goldrich@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt

QUESTION FOR THE NEXT FORUM:

TO THE FORUM:

I am a mid-level associate at a small general practice litigation firm where I am routinely tasked with helping clients fight traffic violations. While I enjoy representing clients before the Traffic Violations Bureau because it allows me to hone my litigation skills, my firm has recently encouraged me to generate business and expand my practice, but I have no idea how to do that.

A colleague told me about a lawyer-matching service called Legal Lynk, which matches potential clients facing traffic violations with attorneys willing to represent them. The way the Legal Lynk platform works is that the potential client uploads their traffic ticket and pertinent information relating to the violation. Then, Legal Lynk's proprietary algorithm matches the potential client with the "best local traffic lawyer" for their case based on a variety of factors such as geographic location, fee schedules, success rates, local competition and customer service. In addition, Legal Lynk quotes a legal fee that is determined by the lawyer selected by the algorithm. Once the fee is paid, the client is paired with the lawyer, who has 24 hours to accept the case, or the client is referred to another lawyer determined by the algorithm. If the lawyer accepts the case, the legal fee is transferred by Legal Lynk to the lawyer minus a service charge, which is retained by Legal Lynk for providing the service.

When I mentioned the idea to my mentor, she recommended that I review the Rules of Professional Conduct to make sure that such a service is ethically permissible. Specifically, she expressed concern with respect to the service charge retained by the company. Is there any ethical rule that would prohibit me from using Legal Lynk's service?

Sincerely,
Ann E. Bitious

Reprinted with permission from: *New York State Bar Association Journal*, July/August 2021, Vol. 93, No. 4, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.