Responsive Law
The Consumer's Voice in the Legal System

Comments on: Limited Scope Representation

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Comments to the

Wisconsin Supreme Court Planning and Policy Advisory Committee, Subcommittee on Limited Scope Representation

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Consumers for a Responsive Legal System ("Responsive Law") thanks the Court for the opportunity to provide its input on how to define and support limited scope representation ("LSR"). Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people. We support policies that expand the range of legal services available to meet consumers' legal needs.

LSR represents an important component of the continuum between pure self-representation and full representation by a lawyer.

LSR benefits consumers by allowing them to access lawyers' services when they might not be able to afford full representation, or when they are capable of handling most of a legal matter on their own but need assistance for some of it. However, lawyers who wish to provide LSR have legitimate concerns about running afoul of rules of procedure and ethics drafted to accommodate full-service representation.

The rule changes we propose herein are designed to provide consumers the greatest possible access to LSR while providing them the full protection of the Wisconsin Rules of Professional Conduct for Attorneys. They are also designed to provide clarity to lawyers about their obligations to clients, opposing parties, and the court in cases involving LSR.

The American Bar Association Standing Committee on the Delivery of Legal Services has released a white paper on unbundling legal services.[1] We use the ABA's outline of issues to organize our analysis herein:

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[1] Available at http://www.americanbar.org/content/ dam/aba/migrated/ legalservices/delivery/downloads/prose_white_paper. authcheckdam.pdf se_white_paper.authcheckdam.pdf (last visited May 26, 2011).

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1. Defining the scope of representation;
2. Providing for clear communication between counsel and parties;
3. Creating parameters for the lawyer's role in document preparation, including disclosure of the lawyer's assistance;
4. Governing the entry of appearances and withdrawals for limited representation; and
5. Excusing conflicts checks for limited services programs.

In addition to these issues, we have added one more:

6. Conforming the definition of "attorney."

1. Defining the scope of representation

Wisconsin SCR 20:1.2(c) allows lawyers to limit the scope of representation. However, it does not provide guidelines for the creation of representation agreements that are easy to understand and implement. The following rule, adapted from the Wyoming Rules of Professional Conduct for Attorneys Rule 1.2(c) accomplishes this, and should replace Wisconsin's SCR 20:1.2(c)**:**

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> The limitation(s) must be fully disclosed and explained to the client in a manner that can reasonably be understood by the client.
>
> Unless the representation of the client consists solely of telephone consultation, the disclosure and consent required by this subsection shall be in writing.
>
> The use of a written notice and consent form approved by, or substantially similar to, a form approved by the Wisconsin Supreme Court shall create the presumptions that:
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> the representation is limited to the attorney and the services described in the form; and
>
> the attorney does not represent the client generally or in any matters other than those identified in the form.

The Wyoming rule allows greater latitude in what services a lawyer may unbundle while simultaneously providing both clients and lawyers the protection of a written agreement outlining the scope of

the representation.[2] A comment to the Wyoming rule, which may be appropriate as a comment in Wisconsin's rule, clarifies that the agreement to limit the representation in scope does not exempt the lawyer from his or her duty to provide competent representation within that limited scope.

Although some states require a written agreement even for short phone consultations, the administrative burden created by such a requirement would discourage many lawyers from providing such consultations. The burden would be especially acute for lawyers providing services through legal aid hotlines. The decrease in the availability of brief phone consultations would hurt consumers more than the unlikely possibility that a client would come away from a brief answer on the phone with the expectation of full-service representation.

2. Providing for clear communication between counsel and parties

In the context of LSR, ethical rules regarding communication with unrepresented persons, and procedural rules regarding service of process on attorneys or litigants, can be problematic. The following rule changes would establish clear guidelines for these issues, ensuring that the role of the limited-representation attorney is respected while the self-represented litigant retains overall control of litigation.

Communication with unrepresented persons

We recommend adding the following comment to SCR 20:4.2, based on a comment to Colorado's Rule 4.2, to establish that opposing counsel must direct communications to limited representation counsel once that counsel's presence is known:

> A *pro se* party to whom limited representation has been provided is considered to be unrepresented in the instant or related matters for purposes of this Rule unless the lawyer has knowledge to the contrary.

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[2] Responsive Law recommends such an agreement for all representation, whether or not it is part of LSR (*See* Client's Bill of Rights, http://www.responsivelaw. org/) (last visited May 26, 2011).

Some states require opposing counsel to direct communication towards limited-representation counsel only if opposing counsel receives *written* notice of the appearance of limited representation counsel. This rule is too narrow – if opposing counsel knows that a limited representation attorney has been retained, it is inappropriate to then ignore such knowledge and treat the *pro se* litigant as wholly unrepresented. SCR 20:4.2 and 20:4.3 exist precisely to ensure that people who retain counsel enjoy the full protection that such retention affords; this protection should be viewed broadly.

SERVICE

This modified version of Federal Rule of Civil Procedure 5(b)(1), based on Missouri Rule of Civil Procedure 43.01(B), clarifies the circumstances under which service shall be made upon a limited-representation attorney.

> Service: How made —
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> If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party. If an attorney has filed a notice of limited appearance for an otherwise self-represented person, service shall be made on the self-represented person and not on the attorney, unless the attorney acting within the scope of limited representation serves the other party or the other party's attorney with a copy of the notice of limited appearance setting forth a time period within which service shall be upon the attorney.

This provision clarifies that, absent action by a limited-representation attorney, the party (not the attorney) should always be served. This is an appropriate default position because the self-represented party plays a greater role in overall litigation strategy than the limited-representation attorney. The Missouri rule also creates a simple mechanism for limited-representation attorneys, with client consent, to direct service towards themselves for a specified period of time. We recommend that this language replace the current rules regarding service in W.S.A. 801.14(2).

3. Creating parameters for the lawyer's role in document preparation, including disclosure of the lawyer's assistance

Attorneys may be reluctant to enter limited-representation document preparation relationships for fear that they will assume ethical obligations to conduct burdensome inquiry into their clients' representation of facts. In order to alleviate that fear, we propose that Wisconsin adopt the enhanced version of W.S.A. 802.05(2) below. Sections 2 and 3 of this proposed statute are based upon the Washington state Rules of Civil Procedure, and the Nebraska Rules of Professional Conduct. This statute would allow limited-representation attorneys to rely upon their clients' representation of facts, where reasonable, without further inquiry, and to certify these documents without signature:

> Representations to the Court —
>
> 1. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that, to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,:
>
> (A) It is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (B) The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (C) The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (D) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

> 2. An attorney assisting a person otherwise unrepresented in the instant or related matters, in drafting a motion, pleading, or other document may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.
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> 3. An attorney assisting a person otherwise unrepresented in the instant or related matters, may prepare pleadings, briefs, and other documents to be filed with the court if such filings clearly indicate thereon that they have been "Prepared by: [name, business address, and bar number of the lawyer preparing the same.]

It is imperative that states require attorneys to clearly state their involvement in documents they draft or help to draft even when they are engaged in limited document-preparation tasks. This requirement would provide the best protection for lawyers against malpractice claims and the best protection for consumers. However, many states' Rules of Civil Procedure state that an attorney's signature on or submission of a document indicates that they have made a full and complete inquiry into the facts in that document. This goes too far in the document-preparation context; attorneys must be able to engage in short-term, limited and inexpensive document preparation without accepting the burdensome duty of full inquiry. We therefore urge the adoption of rules of civil procedure that allow limited-representation attorneys to accept their clients' factual representations, where reasonable, without further inquiry.

4. Governing the entry of appearances and withdrawals for limited representation

Effective unbundling rules must clearly delineate acts that do and do not constitute full appearances. The following rules address this issue.

Preventing inadvertent appearances

We recommend Wisconsin adopt the following rule, which is based upon Wyoming Rule 102(a)(1), to clarify that mere document

preparation in the course of a limited representation does not constitute a full appearance:

> Appearance and withdrawal of counsel —
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> An attorney appears in a case:
>
> 1. By attending any proceeding as counsel for any party
> 2. By permitting the attorney's name to appear on any pleadings or motions, except that an attorney who assisted in the preparation of a pleading and whose name appears on the pleading as having done so shall not be deemed to have entered an appearance in the matter.

This rule would allow lawyers to provide services similar to those provided by document preparation services without inadvertently assuming the burdens of a full appearance in the instant matter.

Notice of limited scope representation and application to be relieved as attorney

California Rule of Court 3.36 formalizes how attorneys enter appearances in limited-representation matters and ensures that attorneys cannot withdraw until they have completed their agreed-upon duties. We recommend Wisconsin adopt a similar rule and that the Supreme Court create forms similar to those referenced therein.[3]

(a) Notice of limited scope representation

A party and an attorney may provide notice of their agreement to limited scope representation by serving and filing a *Notice of Limited Scope Representation*.

(b) Notice and service of papers

After the notice in (a) is received and until either a substitution of attorney or an order to be relieved as attorney is filed and served, papers in the case must be served on both the attorney providing the limited scope representation and the client.

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[3] The forms can be found at http://www.courtinfo.ca.gov/cgi-bin/forms.cgi. (Last visited May 26, 2011.)

(c) Procedures to be relieved as counsel on completion of representation

An attorney who has completed the tasks specified in the *Notice of Limited Scope Representation* may use the procedures in this rule to request that he or she be relieved as attorney in cases in which the attorney has appeared before the court as an attorney of record and the client has not signed a *Substitution of Attorney-Civil.*

(d) Application

An application to be relieved as attorney on completion of limited scope representation must be directed to the client and made on the *Application to Be Relieved as Attorney on Completion of Limited Scope Representation.*

(e) Filing and service of application

The application to be relieved as attorney must be filed with the court and the client and served on all other parties or attorneys for parties in the case. The client must also be provided a blank *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation*.

(f) No objection

If no objection is served and filed with the court within 15 days from the date that the *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* is filed with the client, the attorney making the application must file an updated form indicating the lack of objection, along with a proposed *Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation*. The clerk must then forward the order for judicial signature.

(g) Objection

If an objection to the application is served and filed within 15 days, the clerk must set a hearing date on the *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation*.

The hearing must be scheduled no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and the attorney.

> ### (h) Service of the order
>
> If no objection is served and filed and the proposed order is signed under (f), the attorney who filed the *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* must serve a copy of the signed order on the client and on all parties or the attorneys for all parties who have appeared in the case. The court may delay the effective date of the order relieving the attorney until proof of service of a copy of the signed order on the client has been filed with the court.

For the purposes of establishing, and withdrawing from a limited-representation appearance, we encourage the adoption of rules that require a form-based written agreement between counsel and client and that provide an opportunity for the client to object if a limited-representation attorney attempts to withdraw prematurely. These provisions provide the greatest possible protection for self-represented parties and impose only modest burdens upon limited-representation attorneys. Basing limited representation agreements upon a fixed period of time is particularly useful for minimizing ambiguity in determining whether an attorney has met his or her obligations under that agreement.

5. Excusing conflicts checks for limited services programs

SCR 20:6.5 substantially follows ABA Model Rule 6.5, which allows attorneys to provide limited, short-term legal services to otherwise unrepresented clients without the need to conduct a full conflicts check. Attorneys operating under SCR 20:6.5 need only avoid conflicts of which they are actually aware. This rule greatly facilitates part-time volunteer or court-appointed service without compromising clients' interests.

6. Conforming the definition of "attorney"

It is difficult to anticipate all of the uses to which limited-representation attorneys might be put, or future questions that might arise regarding their conduct. Such uncertainty can, however, be minimized by adopting a general definition of "attorney" that

includes limited-representation counsel. We recommend that Wisconsin adopt the following rule for this purpose:

> Limited-representation counsel to be regarded as attorneys—
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> "Attorney," as used in these Rules, shall be read to include limited-representation counsel when:
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> 1. The limited-representation counsel and client have signed a Notice of Limited Appearance;
> 2. The Notice of Limited Appearance has been served upon the Court;
> 3. The Notice of Limited Appearance has been served upon opposing counsel.
>
> It would not be contrary to the terms of the Notice of Limited Appearance to afford the limited-representation counsel the status of a party's attorney under these Rules.

CONCLUSION

Once rules governing LSR are in effect, lawyers must be encouraged to provide unbundled services and consumers must be made aware of their availability. A recent Harris poll commissioned by the ABA showed that two-thirds of consumers were unfamiliar with unbundled legal services but would be interested in exploring the option if they needed representation.[4]

The Court and the bar must promote a culture in which limited scope representation is both well-known and acceptable if it is to have any real benefit to consumers. The proposed rule changes above are a necessary first step toward accomplishing that goal.

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[4] "Perspectives on Finding Legal Services," ABA Standing Comm. on the Delivery of Legal Services, Feb. 2011. (Avail. at http://www.americanbar.org/content/dam/aba/migrated/2011_build/vdelivery_legal_services/20110228_aba_harris_survey_report.authcheckdam.pdf. (Last visited May 26, 2011.)