Responsive Law
The Consumer's Voice in the Legal System

Comments on:

Petition to Amend ERs 1.5, 4.2, 4.3 and 6.5, and Rules of Civil Procedure 5.1 and 11 (Limited Scope Representation)

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Comments to the

Supreme Court of Arizona

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Consumers for a Responsive Legal System ("Responsive Law") appreciates the opportunity to provide the following comment in response to the request for public comments on the Petition. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people.

Responsive Law generally endorses the Court's recent amendments to the Rules of Professional Conduct and Rules of Civil Procedure, which greatly facilitate limited scope representation in Arizona. The recent amendments will provide low- and middle-income Arizonans with greater access to affordable legal assistance, and will provide all Arizonans with greater choice when selecting legal services.

Although we support the amended rules in large part, we propose certain limited changes in order to better achieve the objective of facilitating limited scope representation:

1. Amending ER 1.2(c) to require a written agreement in most cases;
2. Amending Ariz. R. Civ. P. 5.1(c)(2) to limit the scope of service in a limited appearance;
3. Amending Ariz. R. Civ. P. 5.1(c)(3) to simplify withdrawal following a limited appearance.

1. ER 1.2(c) should require that, in most cases, limited scope agreements be in writing.

ER 1.2(c) currently provides that, in order to undertake limited scope representation, a lawyer must obtain the client's informed consent. This consent need not be in writing, however. A written agreement is only required when a lawyer makes a limited

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appearance in a proceeding in court.[1] In most instances, therefore, lawyers can undertake limited scope representation without any written agreement.

Requiring a limited scope representation agreement to be in writing clarifies the lawyer–client relationship for both parties. This is particularly important where the client is not a frequent user of legal services – as is often the case in limited scope representations – and is less likely to understand the scope of the lawyer-client relationship as comprehensively as the lawyer. When the representation is brief, however, as in telephone consultations and walk-in clinics, a client is less likely to mistake the relationship for full-service representation. In such situations, a written agreement would provide minimal benefit, and requiring written consent would have a chilling effect on the provision of these types of services.

In order to accommodate both considerations, ER 1.2(c) should be amended to require *written* informed consent in most, but not all, limited scope agreements. As an example, the Court can look to Rule 1.2(c) of the Montana Rules of Professional Conduct, set out below:

> 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 in writing.
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> (1) The client's informed consent must be confirmed in writing unless:
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> (i) the representation of the client consists solely of telephone consultation;
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> (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or
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> (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.
>
> (2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:
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> (i) the representation is limited to the attorney and the services described in the writing; and
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> (ii) the attorney does not represent the client generally or in matters other than those identified in the writing.

[1] Ariz. R. Civ. P. 5.1(c)(1)(A).

2. Ariz. R. Civ. P. 5.1(c)(2) should limit effective service to matters, hearings, or issues, within the scope of the lawyer's representation.

A lawyer makes a limited appearance if he undertakes limited scope representation in a court proceeding.[2] If a lawyer makes a limited appearance in an action, service on that lawyer "constitute[s] effective service . . . with respect to *all matters in the action*."[3] Accordingly, a lawyer who makes a limited appearance, however narrow in scope, becomes a service agent for anything and everything potentially involved in the case, however unrelated it may be to the scope of his representation.

Expanding the lawyer's duties beyond the scope of his limited representation undermines the basic purpose of limited scope representation.[4] This expanded service obligation can also potentially impose a considerable burden on a lawyer, especially if the underlying action is particularly complex – precisely the kind of action in which limited appearances are most likely to be the most helpful. For example, if a thorny tax law issue arises in the midst of an intricate estate action, one of the parties may want to retain a tax lawyer for a limited appearance in order to resolve the narrow issue. Under the current service rule, however, the tax lawyer would likely be understandably reluctant to undertake that limited representation, as it would render him a service agent for "all matters" pertaining to the broad estate action.

This problem can easily be remedied by limiting effective service under Ariz. R. Civ. P. 5.1(c)(2) to matters, hearings, or issues that are connected to the lawyer's representation or the specific proceeding for which the lawyer appeared. Any concern that this will restrict other parties' ability to serve the client can be addressed by simply requiring service on the actual party. Such a requirement would also be in keeping with the recent Ethical Rule amendments, which provide that a limited-scope client is generally considered unrepresented for purposes of communication.[5]

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[2] *Id.* at 5.1(c).
[3] *Id.* at 5.1(c)(2).
[4] Although service cannot extend a lawyer's "*responsibility for representing* the party," *id.* (emphasis added), it can nonetheless expand his duties.
[5] ER 4.2 comment [4], 4.3 comment [3]

3. Ariz. R. Civ. P. 5.1(c)(3) should only require simple notice filed with the court in order to withdraw from a limited appearance.

In order to make a limited appearance, a lawyer must file and serve a notice specifying the scope of the representation.[6] Once a lawyer has completed the representation described in his initial notice, the amended rule permits him to withdraw from the action by filing a Notice of Withdrawal. However, this notice must be signed by both the lawyer and the client, include the client's last known address and telephone number, and must be served on all parties to the action.[7] A lawyer who is unable to obtain his client's signature can only withdraw by motion.[8] This motion must also be served on all parties to the action, as must the final withdrawal order, together with the client's last known address and telephone number.[9] Accordingly, under either withdrawal method, a lawyer who makes a limited appearance and completely discharges his duties cannot withdraw from the action until he has procured specified client information and ensured service on all parties. In the ordinary case, obtaining a client's signature and contact information is unlikely to be especially difficult. At the outset, however, the presence of these additional hurdles will likely dissuade lawyers from undertaking limited appearances for fear that they may find themselves unable to disentangle themselves from the underlying actions.

The requirement that the client sign the Notice of Withdrawal is not necessary to protect the client. A written agreement is a mandatory prerequisite to a limited appearance,[10] and the lawyer is already bound by the scope of that agreement. Requiring the client to sign a separate document after the representation has concluded is superfluous. It is, of course, always best practice to obtain a client's informed consent before terminating any representation. Procuring the client's signature, however, should not be an absolute requirement. When the scope of representation was made

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[6] Ariz. R. Civ. P. 5.1(c)(1)(A). The notice must additionally state that the lawyer and client have a written agreement for limited representation in the action. *Id.* at 5.1(c)(1)(B).
[7] *Id.* at 5.1(c)(3)(A).
[8] *Id.* at 5.1(c)(3)(B). The court must issue the proposed withdrawal order ten days after the date of service, unless the client objects or the court finds good cause to hold a hearing. *Id.*
[9] *Id.*
[10] *Id.* at 5.1(c)(1)(A).

sufficiently clear and specific at the outset, a post-representation signature is simply not necessary. Nor does procuring the client's signature necessarily demonstrate that the client indeed fully understands and consents. The client is far more effectively protected by the initial representation agreement and by the legal and professional consequences for lawyer who fails to abide it. A lawyer who files a notice of withdrawal that falsely claims he has completed the scope of his representation exposes himself to sanctions by the court, disciplinary action by the state bar, and a possible civil suit by his former client.

Accordingly, Ariz. R. Civ. P. 5.1(c)(3) should simply provide that a lawyer is withdrawn from the action upon the conclusion of the proceeding for which the lawyer appeared and the filing of a notice of withdrawal specifying that the lawyer has completed his representation.[11]

Responsive Law hopes that the Court will consider these amendments to further protect consumers and clients as they take advantage of the growing continuum of legal services available in Arizona.

[11] Montana, under its similar limited scope representation regime, provides for precisely this kind of streamlined withdrawal mechanism. Mont. R. Civ. P. 4.2(b).