Limited Scope Legal Representation

Issues for the Illinois Bench & Bar

Prepared for the Joint Task Force on
Limited Scope Legal Representation

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I. Introduction

This issue paper will provide the Joint Task Force with general background information on limited scope legal representation. Limited scope legal representation (hereafter "limited scope representation"), also known as "discrete task representation" or "unbundled legal services," is the provision of legal services by a lawyer only on some portions of a client's legal matter. It contrasts with a traditional representation where a lawyer handles all aspects of a legal matter.

Limited scope representation can take many forms such as advising a client on certain aspects of a transaction or proposed course of conduct, coaching a client how to respond to proposals or arguments of an adverse party, how to argue a particular position, reviewing or drafting pleadings to be filed by the client, and attendance and participation at depositions or court hearings.

Over the last decade, state judiciaries, bars and legal commentators have focused increased attention on limited scope representation, particularly in a litigation context. It is viewed as a means to serve the ever increasing number of self-represented litigants appearing in state courts, particularly high volume courts. Approximately 40 states have adopted a version of the ABA Model Rules of Professional Conduct which ethically permits limited scope representation. In addition, at least 18 states have adopted court rules that facilitate limited scope representation in a litigation context. In Illinois,

the Supreme Court's adoption of new rules of professional conduct effective January 1, 2010 included the ABA Model Rule language allowing limited scope representation. Following this action by the Court, the Illinois Lawyers Trust Fund ("LTF") drafted a number of proposed amendments to various Supreme Court rules to facilitate the provision of limited scope representation. Given its importance, the Illinois State Bar Association, the Chicago Bar Association, and the Illinois Judges Association formed this Joint Task Force to consider the issue of limited scope representation, and if warranted, to make recommendations to their governing bodies and perhaps the Court.

This issue paper will briefly describe the policy justification for limited scope representation, the current ethical environment surrounding it, and a number of practical issues facing Illinois lawyers who may want to engage in it and courts that may be confronted by it. These issues include: appearing and withdrawing from a matter in which a lawyer's representation is limited; document preparation (ghostwriting); communications to and from lawyers involved in a limited scope representation; and professional liability concerns.

This issue paper may also provide a foundation upon which the Task Force, the bar, and the judiciary can discuss limited scope representation. This paper does not take positions on the issues raised or offer critiques or recommendations of the LTF proposals. Nevertheless, it is anticipated that

once the Task Force has examined and considered the issue, including receipt of comments from the practicing bar, recommendations can be made.

II. Policy Background

The last ten years has seen increasing numbers of self-represented litigants in state courts across the country.[1] Not surprisingly, most self-representation occurs in "high volume" courts such as traffic, small claims, housing, and family law.[2] In some states, the extent of self-representation is significant. For instance, New Hampshire reports that 48% of the cases brought in its general jurisdiction trial court, and 85% of cases brought in its district courts (cases involving misdemeanors, juvenile, domestic violence, small claims, etc…), involves at least one party that is self-represented.[3] In Utah, 47% of domestic relations and 98% of small claims cases involve no attorneys. [4] California reports that in 2003, 4.3 million court users were self-represented, including the petitioners in 67% of family law cases, 22% in the

[1] While not always statistically documented, a number of states have witnessed increases in self-represented litigants. See An Analysis of Rules That Enable Lawyers To Serve Pro Se Litigants, ABA Standing Committee on the Delivery of Legal Services, November, 2009; Statewide Action Plan for Serving Self-Represented Litigants, Judicial Council of California – Task Force on Self-Represented Litigants, February 27, 2004; Addressing the Needs of Self-Represented Litigants in Our Courts, The Supreme Judicial Court Steering Committee [of Massachusetts] on Self-Represented Litigants, November, 2008; Report of the Joint Iowa Judges Association and Iowa State Bar Association Task Force on Pro Se Litigation, May 18, 2005; Report of Nebraska Supreme Court Committee on Pro Se Litigation, November 22, 2002; Meeting the Challenge of Self-Represented Litigants in Wisconsin, Report to the Chief Justice of the Wisconsin Supreme Court, December, 2000.

[2] See ABA Report, p. 4.

[3] Challenge to Justice, A Report on Self-Represented Litigants in New Hampshire Courts, Findings and Recommendations of the New Hampshire Supreme Court Task Force on Self-Representation, January, 2004.

[4] Committee on Resources for Self-Represented Parties, Strategic Planning Initiative, Report to the Judicial Council, July 25, 2006.

probate courts, and 16% in the general civil courts.[5] Although there is no empirical data in Illinois to confirm this nationwide trend, anecdotal evidence tells us that Illinois is not unique.[6] A number of causes for self-representation have been identified including: an inability of legal consumers (including middle class consumers) to afford lawyers; decreasing government funds for legal aid services for those of limited means; and a preference for self-representation, encouraged by the availability of non-traditional legal assistance such as on-line information and forms.

Whatever the causes, the increasing number of self-represented litigants is adversely affecting the administration of justice. Self-represented litigants, unfamiliar with judicial process, require time consuming individualized assistance from court personnel. Not surprisingly, court personal become the focus of inquiries on process and procedure and, often times, substantive law which they are ill-prepared to answer (and likely prohibited from answering). The fundamental role of judges as impartial neutrals can be strained when self-represented litigants seek the help or active assistance of the judge, or at least believe that the judge will play a much more active role in the presentation of their case or preservation of their procedural or substantive rights. Procedural or substantive missteps by

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[5] "Statewide Action Plan for Serving Self-Represented Litigants, Judicial Council of California – Task Force on Self-Represented Litigants, February 27, 2004.

[6] See Eaton & Holtermann, Limited Scope Representation Is Here, CBA Record, April, 2010. In addition, a 2005 Report on the Legal Needs of Low-Income Illinoisans, February, 2005, reported that 67% of low-income persons with legal problems attempted to resolve those problems without resort to legal services.

self-represented litigants may require additional court proceedings in the future. Substantive rights may be lost. All of these effects reflect poorly on the image of the courts and the bar. Not only do they raise questions of access to justice, but also questions of securing fair and reasonable justice.

The courts and the bar have not been idle in addressing these issues. Responses to these concerns have been varied and include everything from court house guides, courthouse facilitators who assist with procedural questions and form preparation, volunteer lawyers providing individual, but limited, information, pro se clinics, and self help centers.[7] Many in the legal profession, view limited scope representation as an important aspect of addressing this crisis.

In addition to impacting access and administration of justice issues, advocates of limited scope representation support it for a number of additional reasons. First, it makes legal advice available to those legal consumers who cannot afford, or do not want, a traditional full service representation. Second, for the self-represented litigant who takes advantage of it, it gives him or her a better understanding of legal process and substantive aspects of the law that may be applicable to their cause. This has a number of ancillary benefits such as reducing the involvement of court

[7] See ABA Report, p.5, November, 2009, *supra* at footnote 1; In Illinois, organizations such as CARPLS, provide such services as hotlines and court-based "Advice Desks." In addition, court-house assistance is being facilitated in Illinois by new RPC 6.5 that allows a lawyer to give "short-term limited legal services" to a client under the auspices of a nonprofit or judicial program without any obligation of a continuing representation and which also substantially limits the applicability of conflict of interest requirements.

personnel for assistance or guidance, reducing the need (or temptation) for judges to step in and render individualized assistance, and increasing more concise and accurate legal and factual presentations.[8] Third, it serves the bar by tapping a large pool of legal consumers who may be willing to seek out, and pay for, legal advice. Finally, it may limit the unauthorized practice of law by discouraging legal consumers from using non-lawyers (including generic forms providers) as sources of legal information and advice.

Notwithstanding the perceived benefits of limited scope representation, it is not without critics. Many in the legal community have expressed concerns about it. There is a professional reluctance to offer or provide less than a traditional full representation because that is inconsistent with longstanding professional and ethical concepts of a lawyer's duty to diligently and zealously represent a client.[9] Underlying this reluctance may be a fear that that limited scope representation exposes legal services as nothing more than a fungible commodity that may not demand the leaned judgment and skill trained lawyers provide via a traditional full representation. There is also a concern that a legal consumer seeking only

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[8] Documenting whether any of the perceived benefits of limited scope representation is difficult. However, a survey of Massachusetts judges involved in a limited scope representation pilot program reported that limited scope representation clients had more realistic expectations about their cases; had a better understanding of the court's rulings; reduced frivolous motions; and resulted in more complete and correct submissions. See Addressing the Needs of Self-Represented Litigants in Our Courts: Final Report and Recommendations, The Supreme Judicial Court [of Massachusetts] on Self represented Litigants, November, 2008.

[9] See Zacharias, Limited Performance Agreements: Should Clients Get What They Pay For?, 11 Geo. J. Legal Ethics 915 (Summer, 1998). In this interesting article that pre-dates much of the limited scope representation discussion, Professor Zacharias notes: "traditional legal ethics presumes aggressive lawyers who leave no stones unturned on their client's behalf."

limited advice from a lawyer may not receive the quality service a full representation provides.[10] Further, if limited scope representation results in deficient or incomplete representation a client and the court may be burdened in the long run attempting to rectify the deficient representation. Perhaps most significantly, a number of practical impediments, ethical and substantive, may discourage lawyers from engaging in limited scope representation, particularly in the litigation arena. These impediments, discussed in greater detail below in Section IV, relate to: procedures for properly appearing and withdrawing from a case; ensuring candor to the court; communicating with represented parties; and professional liability.

In response to the issues raised, many states have considered the benefits and concerns of limited scope representation. To date, 18 states have enacted specific court rules, both ethical and substantive, to facilitate the provision of limited scope representation.[11] These court rules facilitate limited scope representation by addressing the ethical and practical concerns noted above. In Illinois, as noted above, the LTF has authored a number of proposals to amend court rules to facilitate limited scope representation in the litigation arena. Like the majority of states that have adopted limited scope representation rules, the LTF proposals touch upon the areas of

[10] See Hazard & Hodes, The Law of Lawyering, 3d Ed. 2010, Sec. 5.
[11] The 18 states are: Alaska, Arizona, California, Colorado, Florida, Iowa, Kansas, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Utah, Vermont, Washington, and Wyoming.

appearances and withdrawals, candor to the courts, and communication. These proposals are referenced in greater detail below.

III. Ethical Propriety

Limited scope representation is ethically permissible. Illinois Rule of Professional Conduct ("RPC") 1.2(c) provides that: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[12] Notwithstanding this recent amendment, limited scope representation has likely been appropriate since at least 1990 and probably before then.[13] A number of formal ISBA Ethics Advisory Opinions prior to 2010 generally accepted the practice.[14] Other authorities also recognize the propriety of allowing, as a matter of contract, lawyers and clients to limit the scope of representation. Most notably, the Restatement of the Law Third recognizes the right of a client and a lawyer to limit the scope of a representation as long as the limitation is

[12] Illinois RPC 1.2(c) is the same as the ABA Model Rule and has been adopted by approximately 40 states. Illinois' 1990 Rules of Professional Conduct provided that a lawyer, with client consent, could limit the objectives of a representation.

[13] Illinois' former RPC 1.2(c) provided that a "lawyer may limit the objectives of the representation if the client consents after disclosure." In addition, limited scope representation in transactional matters, although perhaps not labeled as such, has been widespread and carried out by lawyers for years, such as when they are asked to prepare a document such as a lease or sales contract after a deal has been agreed to, or generally render advice on a discreet portion of a transaction.

[14] See Opinion 04-03 (April, 2005) acknowledging the availability of limited representation but prohibiting "ghostwriting"; Opinion 85-06 (December, 1985) acknowledging the propriety of limited representation but prohibiting any attempt to limit participation in litigation while an appearance is on file with the court; and Opinion 849 (December, 1983) approving a representation limited to preparing pleadings as long as the client consents and the lawyer does not file an appearance.

reasonable, the client is adequately informed of the consequences of the limited scope representation, and the client consents.[15]

Notwithstanding the ethical propriety of limited scope representation, little guidance exists on its proper scope, restrictions, or requirements. Illinois RPC 1.2(c) does provide that a limited scope representation must be *reasonable*. Reasonableness is a defined term in the Illinois RPC and establishes an objective "reasonably prudent and competent lawyer" standard. [16] The official Comments to Illinois RPC 1.2(c) provide that a reasonable limited scope representation could be as limited as a "brief telephone conversation" but not so limited as to provide insufficient advice upon which the client could rely.[17] It is also clear that to be reasonable, it must be competent and in compliance with other Illinois RPC and law.[18] In addition to reasonableness, Illinois RPC 1.2(c) requires that the client give *informed consent* to the limited scope representation. Informed consent is also a defined term in the Illinois RPC.[19] Informed consent to a limited scope representation would require disclosure of all the facts and circumstances surrounding the limited scope representation, its material advantages and

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[15] The Law Governing Lawyers, Restatement of the Law, Sec.19(c), p. 162; see also Legal Ethics, The Lawyer's Deskbook on Professional Responsibility, Rotunda & Dzienkowski, 2010-2011, sec. 1.2-3(a).
[16] RPC 1.0(h).
[17] RPC 1.2 [Comment 7]
[18] Id. and [Comment 8]
[19] RPC 1.0(e) defines informed consent as 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."

disadvantages, and a discussion of all options and alternatives.[20] Importantly (see discussion *infra* at IV.A.1.), informed consent does not require a writing or a written confirmation, but it does require some form of affirmative response from the client.[21]

Finally, the Illinois RPC does not restrict the availability of limited scope representation to any particular area of law. States that have adopted rules to facilitate limited scope representation have taken a variety of approaches to their applicability. The majority of states with substantive rules to facilitate limited scope representation permit it in all types of litigation and proceedings. These States include Alaska, Colorado, Florida, Iowa, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Utah, Washington, and Wyoming. Three additional states, California, Massachusetts and Vermont, which adopted rules to facilitate limited scope representation on a pilot basis in certain limited jurisdiction courts, have now made those rules applicable to all proceedings. Finally, at least one state, Arizona, currently limits their limited scope representation rules to family law courts.

IV. Issues for Consideration

As noted above, limited scope representation in transactional fields is common. However, an Illinois lawyer who wants to engage in limited scope representation in litigation is confronted with a number of very specific

[20] RPC 1.0, [Comment 6]
[21] RPC 1.0, [Comment 7]

ethical and procedural issues. These issues are not unique to Illinois and those States that have adopted court rules to facilitate limited scope representation have addressed these common issues in substantially similar ways. The three primary issues of concern broadly relate to: participation in court proceedings; communicating with others; and professional liability.

A. Participation in Court Proceedings

1. Appearances and Withdrawals

Notwithstanding the ethical propriety of limited scope representation, such representation before a court is problematic because of substantive rules of procedure. Illinois S.Ct. Rule 13 requires a lawyer to file an appearance to participate in litigation. When a lawyer files an appearance, that lawyer is bound to represent his or her client zealously on all matters and to fully protect the client's rights.[22] In addition to zealous representation, an appearance also requires continuous representation .[23] Further, as S. Ct. Rule 13(c)(2) (and Illinois RPC 1.16(c)) requires, once an appearance has been filed, a lawyer can not withdraw without leave of court. Here too, the purpose is to ensure continued representation. The failure to properly and

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[22] *In re Berkos*, 93 Ill.2d 408, 444 N.E.2d 150, 67 Ill.Dec. 111 (1982)(Notwithstanding the lawyer's claim that he was only involved in a limited representation, the Court noted that "until he withdrew it, it was respondent's duty to see that his client's rights were protected.").

[23] *In re Marriage of Pitulla*, 202 Ill.App.3d 103,120, 147 Ill.Dec. 479 (1st Dist. 1990)("Under paragraph (c) of the rule [S.Ct. Rule 13], an attorney's written appearance on behalf of a client binds the attorney to continue to represent that client until the court grants leave to for the attorney to withdraw."; *Firkus v. Firkus*, 200 Ill.App.3d 982, 146 Ill.Dec. 591 (5th Dist. 1990("As the committee comments noted above and cases which interpret Rule 13 indicate, the concern is for the client's continued representation and full notice and opportunity to contest withdrawal if he or she so desires.").

formally withdraw leaves a lawyer subject to potential disciplinary action as well.[24] Without express recognition of limited scope representation in substantive court rules, a lawyer who files an appearance intending to represent a client on a discrete portion of litigation may find himself or herself locked into the representation and obligated to do more than the lawyer, or the client, wants or intended. This is entirely inconsistent with a limited scope representation.

Triggering comprehensive and continuing duties upon an entry of appearance is not unique to Illinois. In an effort to accommodate limited scope representation, states facilitating limited scope representation have amended their rules on appearances and withdrawals to allow limited appearances. Many of these states require a formal limited appearance document, often a standardized form, identifying the scope and nature of the limited representation by date, time period, or subject matter. Notice of the limited representation to parties, the court, and opposing counsel is also typically required. The issue of withdrawal has also been addressed by these states in a number of ways. The majority of jurisdictions provide for automatic withdrawal upon completion of the limited representation, in some cases requiring an absence of objection from the client, with or without court order. Typically, court approval of withdrawal is required only if the limited scope representation has not been completed. In addition, these states vary

[24] *In the Matter of Feder*, 04-CH-93 *Petition for Discipline on Consent*, M.R. 20139 (May 20, 2005)(lawyer violated RPC 1.16(c) for simply ceasing work on a pending case thereby "constructively withdrawing" from it without court approval.

on whether notice of withdrawal is required upon termination of the limited scope representation.

In Illinois, the LTF suggests amending S.Ct. Rule 13 to specifically allow limited appearances. The proposed amendment would require the lawyer and self-represented litigant to have entered into a written limited scope representation agreement under Illinois RPC 1.2(c). It would then require a "Notice of Limited Appearance" to be filed with the court. The "Notice of Limited Appearance" would be a standardized fill-in-the-blank form that would identify the precise nature of the limited scope representation, such as the specific proceeding at which the self-represented litigant would be represented by a lawyer. The proposed amendment also specifies that a lawyer may not file a limited appearance for the sole purpose of making evidentiary objections (a restriction imposed by a number of states). To withdraw, the lawyer must file and serve upon the client and opposing parties a standardized "Notice of Withdrawal of Limited Appearance" certifying that the lawyer has completed all services identified in the "Notice of Limited Appearance." The proposed amendment provides that leave of court is not required for withdrawal as long as the notice of withdrawal conforms to the requirements of the Rule.

Of particular note is the LTF requirement that a written agreement setting out the terms of the limited scope representation be entered into between the lawyer and client as a prerequisite to filing a limited

appearance. As noted above, the Illinois RPC 1.2(c) does not require a written agreement to enter into a limited scope representation, only the client's informed consent. Nevertheless, a written agreement may be extremely important in documenting and limiting any ethical or professional liability.[25] Several states that have adopted limited scope representation rules require some form of written documentation of the relationship. Alaska and New Mexico require a limited representation to be reflected in any required fee agreement. Arizona and Maine require it when entering a limited appearance. Others, including Florida, Iowa, Missouri, and Wyoming require it as evidence of a client's informed consent. A number of states, including California, Colorado, Kansas, Massachusetts, Nebraska, New Hampshire, North Dakota, Utah, Vermont, and Washington, require no documentation of the limited scope representation.

2. Document Preparation (Ghostwriting)

i. Candor to the Courts

Arguably, a lawyer's most fundamental duty is to deal with the courts with candor and honesty.[26] Notwithstanding this fundamental duty, perhaps

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[25] See discussion below at IV. C. In addition, albeit it in another context, the Illinois Supreme Court recognizes the importance of written agreements as a means to "reduce the risk of misunderstandings between a lawyer and a client…". *Dowling v. Chicago Options Exchange*, 226 Ill.2d 277, 294, 875 N.E.2d 1012, 314 Ill.Dec. 725 (2007).

[26] Illinois RPC 3.3(a) sets out the general obligation that a lawyer shall not "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Official Comment [2] to the Rule discloses the breadth of the obligation by noting that a lawyer "must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false. In addition, case law has made it clear that lawyers appearing before tribunals are, in effect,

the most debated feature of limited scope representation is whether disclosure of a lawyer's involvement is required when a self-represented litigant files pleadings that were drafted ("ghostwritten") by a lawyer.

A number of states have concluded that failure to disclose that a self-represented litigant's pleadings were drafted by a lawyer is improper.[27] Although there are no reported Illinois cases on the issue, ISBA Ethics Advisory Opinion 04-03, concluded that a lawyer could not prepare various marital settlement agreements and then have the pro se litigants submit them as their own.[28] Ethics opinion from other state bars such as Deleware, Florida, Kansas, Massachusetts, and Nevada also prohibit the practice.[29] The primary objection expressed by these state bars is that non-disclosure is misleading to the court. Finally, the federal courts, including those sitting in Illinois, appear to uniformly prohibit the practice.[30] The federal courts addressing the issue rely on the requirements of Fed. R. Civ. P. 11, requiring lawyers to sign the papers they prepare, as well as general ethical concepts of candor to the tribunal and notions of litigation fairness.

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partners with the court, assisting it in the administration of justice and arriving at correct conclusions. *In re Smith*, 168 Ill.2d 269, 659 N.E.2d 896, 213 Ill.Dec. 550 (1995).

[27] *Iowa Supreme Court Board of Professional Ethics and Conduct v. Lane*, 642 N.W.2d 296 (2002)(In discussing an issue of plagiarism, the Iowa Supreme Court noted that it was analogous to the "widely condemned" practice of ghostwriting which constituted a "misrepresentation on the court").

[28] In Opinion 04-03, the Professional Conduct Committee relied on Illinois S.Ct. Rule 137 requiring lawyers to sign pleadings they have prepared for clients they represent.

[29] Deleware Opinion 1994-2 (May 6, 1994); Florida Opinion 79-7 (February, 2000); Kansas Opinion 09-01 (November 24, 2009); Massachusetts Opinion 98-1 (1998); and Nevada Formal Opinion 341 (June 24, 2009).

[30] E.g. *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001); *Johnson v. City of Joliet*, No. 04-C-6426, 2007 U.S.Dist. LEXIS 10111 (N.D.Ill. February 13, 2007).

In contrast to the views of the states and federal courts noted above, a number of jurisdictions see no ethical prohibition on permitting self-represented litigants to file pleadings prepared by a lawyer without any disclosure to the court of the lawyer's involvement. A recent ABA formal ethics opinion approving the practice articulates the rationale.[31] The ABA Opinion first notes that there is no prohibition in the ABA Model Rules against undisclosed assistance to a pro se litigant. The ABA then recognizes the principles of candor and honesty at issue, but focuses on the question of materiality. In concluding that undisclosed assistance is not material, the ABA focuses on the question of whether self-represented litigants receive an unfair advantage by using pleadings prepared by a lawyer. Because a lawyer prepared pleading will be evident to the court, it is likely that no special treatment will be given to the self-represented litigant. Similarly, if the lawyer prepared pleading is not persuasive, no unfair advantage will have been gained. The ABA concludes that because no unfair advantage will be obtained by a self-represented litigant, any lawyer assistance is immaterial and need not be disclosed. The ABA further notes that if a lawyer has not appeared or signed any pleading, rules subjecting a lawyer to some responsibility for the legitimacy of the pleading, such as Fed. Rule 11, is not at issue.[32] A number of state bar ethics opinions take the same approach

[31] ABA Formal Opinion 07-446, May 5, 2007.
[32] See discussion below at IV.A.2.ii

and conclude that there is no ethical obligation to disclose a lawyer's participation in drafting a self-represented litigants pleadings.[33]

In Illinois, the LTF suggests amending Illinois S. Ct. Rule 137 to require disclosure when a lawyer has drafted a pleading on behalf of a self-represented litigant. The amendment would allow a lawyer to draft pleadings for a self-represented litigant as long as the lawyer drafted pleading bears the notation "Prepared with the Assistance of Counsel under Supreme Court Rule 137." This notation would be followed by the drafting lawyer's name and business information. Filing a pleading with this notation would not constitute a general or limited appearance. The lawyer's signature would not be required. However, if the lawyer were to sign the pleading, it would constitute a general appearance.

ii. Meritorious Claims and Contentions

In addition to candor and honesty, one of the most significant duties of a lawyer involved in litigation is to act as a gatekeeper for meritorious claims and contentions. The purpose of this duty is to: avoid clogging the courts with baseless claims that burden the administration of justice; to maintain the integrity of the profession and the courts; and to protect third-parties from baseless claims. The duty is expressed in both ethical and substantive rules. Illinois RPC 3.1 prohibits lawyers from bringing or defending a proceeding, or asserting or opposing an issue, unless the lawyer has a basis

[33] Alabama Opinion 2010-01 (undated); Arizona Ethics Opinion 05-06 (July, 2005); Michigan Opinion RI-347 (April 23, 2010); North Carolina 2008 Formal Ethics Opinion 3 (January 23, 2009); and Utah Opinion 08-01 (April 8, 2008).

for doing so that is not frivolous.[34] The prohibition is expressed in substantive rules as well, most notably S. Ct. Rules 137 and 375(b).[35] These court rules, like their ethical counterpart, impose an affirmative duty on attorneys to conduct an investigation of the facts and law before filing an action, pleading, or other paper.[36] In a limited scope representation, where a lawyer may not have the benefit of a long term relationship with the client, or the time or resources to research or investigate particular claims or contentions, the ability of a lawyer to comply with this gatekeeping duty may be problematic.

The question of meritorious claims and contentions in the context of limited scope representation is not novel. However, it does not appear that jurisdictions with court rules facilitating limited scope representation have addressed it. New Hampshire, New Mexico and North Dakota merely apply the traditional standard that when a lawyer prepares and files (even if by a self-represented litigant) a pleading the lawyer is representing the pleadings are well grounded in fact and law. Other States, exemplified by Colorado, Iowa, and Washington follow the traditional standards but provide further that a lawyer preparing a pleading in a limited scope representation may rely

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[34] RPC 3.1; *In re D.D. v. R.S.*, 198 Ill.2d 309, 763 N.E.2d 251, 261 Ill.Dec. 281 (2001).
[35] Illinois S.Ct. Rule 137 provides in part that any pleading a lawyer has signed is "to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose…." Illinois S.Ct. Rule 375(b) applies the same standard to appeals.
[36] *In the Marriage of Schneider*, 298 Ill.App.3d 103, 697 N.E.2d 1161, 232 Ill.Dec. 231 (1st Dist. 1998); *Belfour v. Schaumburg Auto et al.*, 306 Ill.App.3d 234, 713 N.E.2d 1233, 239 Ill.Dec. 383 (2nd Dist 1999).

upon the self-represented litigant's representation of facts *unless* the lawyer *believes* they are false. Still other states, such as Missouri, require compliance with traditional standards but allow a lawyer to rely upon the self-represented litigant's factual representations *unless* the lawyer *knows* they are false. In Illinois, the LTF addresses the meritorious claims and contentions issue by amending S.Ct. Rule 137 to allow a lawyer to rely upon the facts presented by a self-represented litigant without further investigation unless the lawyer *knows* that those representations are false.

B. Communication with Others

i. Service of Court Papers

Efficient service of court documents notifying parties of hearings and other proceedings is essential for the smooth administration of justice. Illinois S. Ct. Rule 11 provides that court papers are to be served on a party or, if represented, on the party's attorney. In litigation where a lawyer is participating pursuant to a limited scope representation, confusion may exist with respect to service of papers on self-represented parties, their limited scope lawyers, or both. Those states that have court rules facilitating limited scope representation have addressed the issue in a number of ways, including: service solely on the self-represented litigant; service on both the self-represented litigant and the limited scope lawyer; service on parties and lawyers in all matters (not just those involving the limited scope

representation); and service on just those matters on which a limited scope lawyer has filed an appearance.

In Illinois, the LTF proposal seeks to amend S. Ct. Rule 11 to require service on both the self-represented litigant and the limited scope lawyer for those matters within the scope of the limited representation as identified in the lawyer's "Notice of Limited Appearance." The proposal specifically provides that service on the limited scope lawyer is not required for: (1) matters outside the limited representation; (2) matters arising after a notice of withdrawal has been filed; and (3) papers related to documents prepared, but not signed, by an attorney (as allowed under the proposed amendments to S.Ct. Rule 137).

ii. Communication Between Limited Scope Attorney and Opposing Party or Counsel

A number of professional conduct rules proscribe communications between lawyers and others during the course of a representation. These rules apply equally in transactional and litigation situations but may raise potential questions in a limited scope representation. Illinois RPC 4.1 prohibits a lawyer from making false statements of material fact or law to a third person or failing to disclose such facts if necessary to avoid assisting a client in a fraudulent or criminal act during the course of a representation. Does Illinois RPC 4.1 require a lawyer participating in a matter pursuant to a limited scope representation to disclose it to an opposing party? At least

once state bar ethics opinion has said "no."[37] Illinois RPC 4.3 provides that when a lawyer is representing a client, the lawyer must not imply that the lawyer is disinterested when communicating with an unrepresented party. Does a limited scope representation trigger this obligation when a lawyer is communicating with an unrepresented party? The answer is probably "yes."[38]

Unlike Illinois RPC 4.1 and 4.3 which do not seem to present particular problems in a limited scope representation situation, the application of Illinois RPC 4.2 may be problematic. Illinois RPC 4.2 generally prohibits a lawyer from communicating with an adverse represented party.[39] The Rule is designed to protect the client of a lawyer from overreaching by opposing counsel.[40] To avoid violating Illinois RPC 4.2, a lawyer initiating a communication with an opposing party must know whether the opposing party is represented by counsel or not. Participation by a lawyer in a matter on a limited scope representation basis, particularly if undisclosed, makes it

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[37] Arizona Ethics Opinion 06-03 concluded that RPC 4.1, in contrast to RPC 3.3 duty of candor to a court, generally places no affirmative duty on a lawyer to disclose the lawyer's limited scope representation of a client.

[38] See Illinois RPC 1.2(c), Official Comment [8] where it is made reasonable clear that all RPC's apply in limited scope representations.

[39] RPC 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

[40] . The Rule is also designed to safeguard the attorney-client relationship from interference by opposing counsel and to reduce the likelihood that clients will reveal privileged, or other, information that may harm the client's interests. *In the Matter of Peters*, 04-CH-127 (Hearing Board, January 17, 2006) *Administrator's petition for leave to file exceptions denied*, M.R. 21252 (January 12, 2007)(citing *Parker v. Pepsi-Cola General Bottlers, Inc.*, 249 F.Supp.2d 1006 (N.D. Ill. 2003).

difficult for the initiating lawyer to know of the limited scope representation and thus to comply with the Rule.

To minimize these concerns, some of the states that facilitate limited scope representation have amended their versions of RPC 4.2 for greater clarity in addressing the issue. A majority of the states addressing the RPC 4.2 concerns of limited scope representation generally provide that self-represented litigants are considered unrepresented *unless* written notice is provided to opposing counsel.[41] In a smaller number of states, actual knowledge of the representation, with or without written notice, will trigger the obligations of the Rule.[42]

In Illinois, the LTF proposal would amend Illinois RPC 4.2 and consider self-represented litigants represented only when the lawyer engaged in a limited representation has provided the other party or opposing counsel with a "Notice of Limited Appearance" or other written notice. The proposal also specifically provides that the preparation of pleadings pursuant to amended Rule 137, including the notation "Prepared with assistance of

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[41] As an example, Missouri provides that in its version of RPC 1.2 that: "(e) An otherwise unrepresented party to whom limited representation is being provided or has been provided is considered to be unrepresented for purposes of communication under Rule 4.-4.2 and Rule 4-4.3 except to the extent the lawyer acting within the scope of limited representation provides other counsel with a written notice of a time period within which other counsel shall communicate only with the lawyer of the party who is otherwise self-rep[resented."

[42] These states include Colorado, Iowa and Washington and address the issue in the official Comments of the RPC. For instance, Colorado RPC 4.2, Comment [9A] provides that "a pro se party to whom limited representation has been provided in accordance with [various Colorado rules] and Rule 1.2, is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary."

counsel under Supreme Court Rule 137") does not constitute notice under Illinois RPC 4.2.

C. Professional Liability

Lawyers owe comprehensive fiduciary duties to their clients. Failure to provide these duties can result in disciplinary proceedings but also claims of professional negligence. These fiduciary duties may be just as comprehensive in a limited scope representation as they are in a traditional full representation.[43]

This liability issue is highlighted in the often cited California case of *Nichols v. Keller*.[44] In *Nichols*, the defendant lawyers were retained to represent plaintiff for the limited purpose of pursuing a worker's compensation claim. In accordance with this limited representation, defendant lawyers did not advise plaintiff as to any potential third party claims. When viable third party claims became time barred, plaintiff sued for professional negligence. The California court of appeals reversed the trial court's grant of summary judgment for the defendant lawyers and held that notwithstanding the limited scope of representation, the defendant attorneys

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[43] As succinctly put by one legal commenter, "limited representation does not mean limited liability." David Dodge, Eye on Ethics: Limited Representation Revisited"; Arizona Attorney (June 2006) (42 AZ Attorney 8).

[44] 15 Cal. App.4th 1672; 19 Cal.Rptr.2d 601 (1993). Although an older case, the principle stated in *Nichols* remains valid authority in California. See *Janik v. Rudy, Exelrod & Reif*, 119 Cal.App.4th 930, 14 Cal.Rptr.3d 751 (2004).

owed plaintiff a duty to advise on any available third party claims. This rule appears to be the law in Illinois and other jurisdictions as well.[45]

Notwithstanding the rule announced in cases like *Nichols*, it may serve only to establish a bare minimum of professional duty. A reasonable legal question exists about whether a lawyer's duty, and in turn any potential professional liability, can be limited by a carefully crafted limited scope representation agreement. The answer appears to be that such limitations are effective. In Illinois, at least one case has so held.[46] Other jurisdictions agree.[47] Finally, at least one state has reported that a professional insurance carrier will provide coverage for claims relating to conduct

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[45] In *Keef v. Widuch, et al.*, 321 Ill.App.3d 571, 254 Ill.Dec. 580 (1st Dist. 2001), the court was faced with the same question presented in *Nichols*. The defendant lawyers argued they had no duty to advise a workers compensation client to the existence of any third party claims because such advice was beyond the scope of the representation sought by the plaintiff. The First District rejected this argument and noted that "not all duties of an attorney are limited to the terms of the attorney-client agreement." The Court specifically noted a lawyer's duty of competence and communication to inform a client about available remedies. This rule also appears to be the law in other jurisdictions. See *Greenwich v. Markoff*, 650 N.Y.S.2d 704 (App.Div. 1996).

[46] *Practical Offset, Inc. v. Davis*, 83 Ill.App. 3d 566, 39 Ill.Dec. 132 (1st Dist. 1980)(In a case addressing a lawyer's duty to ensure the filing of certain financial statements to perfect security interests, the court held that "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." Other Illinois authority tends to support the validity of agreements limiting a lawyer's duty. Illinois RPC 1.2, Comment [7] states that: "Although an agreement for 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."

[47] *Lerner v. Laufer*, 819 A.2d 471 (N.J. Super. Ct. App. Div. 2003)(In affirming a trial court's grant of summary judgment in favor of an attorney who provided a limited scope representation pursuant to a written agreement, a New Jersey appellate court found that "if the service is limited by consent, then the degree of care is framed by the agreed service."

occurring outside of a limited scope representation as long as the agreement was carefully documented.[48]

As should be clear from the above analysis, questions of professional liability are primarily driven by case law. Understandably, issues of professional liability are not specifically addressed in the substantive rule amendments adopted in other states to facilitate limited scope representation. Likewise, the LTF proposal does not specifically address this concern. However, the LTF's proposal to require a written agreement before a lawyer can file a limited appearance appears to be an important requirement of self protection for the lawyer.

V. Conclusion

The issue of limited scope representation is an important one to the courts, the legal profession, and the public. It has many facets on practical and philosophical levels. While the practice is appropriate under Illinois' Rules of Professional Conduct, significant questions exist with respect to the degree the courts and the bar should facilitate the practice. This issue paper has highlighted some of the issues that should be carefully considered before the courts allow, and members of the bar engage, in limited scope representation. In this regard, the Task Force on Limited Scope Legal Representation can serve as a vital component in the limited scope

[48] The New York State Bar Association: Commission on Providing Access to Legal Services for Middle Income Consumers, Report and recommendations on "Unbundled" Legal Services, December, 2002, noting that one carrier's position was that a standard professional liability policy covers the [limited scope representation] exposure as long as the lawyer has an explicit engagement letter clearly stating the limited scope of service.

representation debate, soliciting, collecting, and considering the comments and concerns of the courts and the profession and ultimately contributing in a positive way to the resolution of the debate.