

Limited Scope Legal Representation

Final Report, Findings & Recommendations

Prepared by the Joint Task Force on
Limited Scope Legal Representation

May 19, 2011



This report and the views expressed herein do not represent the policy of the Chicago Bar Association, Illinois Judges Association, or the Illinois State Bar Association unless and until adopted by the Associations.

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SPECIAL THANKS

Consideration of limited scope representation, or “unbundling,” by the Illinois State Bar Association, Chicago Bar Association and the Illinois Judges Association was initiated by the efforts of the Illinois Lawyers Trust Fund (“LTF”). In addition, the LTF’s work in drafting, proposing, and revising amendments to existing court rules to accommodate limited scope representation was invaluable to the Joint Task Force. Substantial background materials prepared by the LTF were made available for the Joint Task Force’s review. Also, LTF’s participation at all three Joint Task Force roundtable forums around the State of Illinois was an important component in hearing the views of the legal community on this issue. Without the LTF’s preparatory efforts, assistance, and participation, the work of the Joint Task Force would have been much more difficult.

The Joint Task Force also thanks all the participants who attended the roundtable forums or submitted written comments. The comments received were well reasoned, insightful, and contributed to the Joint Task Force’s analysis and conclusions.

I. EXECUTIVE SUMMARY

This Final Report, Findings and Recommendations of the Joint Task Force on Limited Scope Representation represents a significant expenditure of time and effort studying, considering, and debating how best to implement limited scope representation in Illinois. These efforts focused primarily on the applicability of limited scope representation in litigation. While limited scope representation is authorized by the Illinois Supreme Court, existing procedural rules, and in some cases rules of professional conduct, do not sufficiently reflect this and likely impede or discourage its practice.

Accordingly, the fundamental question for the Joint Task Force was how procedural or professional conduct rules should be amended to specifically accommodate the provision of limited scope representation for those lawyers who wish to engage in it. The answer to that question is reflected in a number of recommendations to amend both procedural and professional conduct rules. These recommendations are set out in this Final Report, and are summarized as follows: (1) establishing a formal “Limited Appearance” for lawyers engaging in a limited scope representation; (2) requiring a written agreement as a prerequisite for filing a “Limited Appearance”; (3) clarifying that the procedural changes proposed are applicable only to civil matters; (4) providing that upon completion of a limited scope representation withdrawal is automatic; (5) requiring that service of court papers on both a party and lawyer engaged in a limited scope representation; (6) relaxing a

lawyer's duty to investigate the facts of a client's underlying claims and contentions; (7) allowing lawyers to prepare court papers to be filed by self-represented litigants; and (8) clarifying prohibited communications with a party represented under a limited scope representation.

This Final Report contains three sections: Background, Findings, and Recommendations. The "Background" section sets out why the Joint Task Force was formed, its mission, and its efforts to reach out to the bar on the limited scope representation issue. Next, the "Findings" section expresses a number of informed conclusions by the Joint Task Force on the need, benefits, and propriety of limited scope representation. Finally, building upon the Joint Task Force's findings, the "Recommendations" section sets out specific rule amendments on how best to accommodate the provision of limited scope representation for those lawyers wishing to engage in it. These amendments, dealing with such fundamental procedural areas as appearances, withdrawals, signing pleadings, service of papers, and communication, are intended to provide clarity for the courts and the bar.

It is the recommendation of the Joint Task Force that, upon the adoption of this report by the ISBA, CBA and IJA, it be submitted to the Illinois Supreme Court for formal consideration.

II. BACKGROUND

A. Limited Scope Representation

Limited scope representation, also known as “unbundled” legal services, is a lawyer’s provision of legal services on a single or limited portion of a client’s legal matter. It can take the form of: advising a client on discrete aspects of a transaction or proposed course of conduct; advising a client as to how to respond to proposals or the arguments of an adverse party; reviewing or drafting pleadings to be filed by the client; attending and participating in certain depositions or court hearings; or engaging in a whole host of other activities. It contrasts with a traditional representation where a lawyer handles all aspects of a client’s matter.

Some form of limited scope representation has been used by clients and lawyers for many years, particularly in transactions. Over the last decade however, at least 18 states have adopted court rules that facilitate limited scope representation in litigation. These states view limited scope representation as an important means to serve an ever-increasing number of self-represented litigants appearing in high volume courts, such as small claims, family law, and housing.

B. The Joint Task Force on Limited Scope Legal Representation

Limited scope representation was brought into focus in Illinois by the Illinois Supreme Court’s adoption of new Rules of Professional Conduct (“RPC”) in 2010. Those new RPC and their Comments provided a clear

statement that limited scope representation is an acceptable method of providing legal services.

At the time of the Court's adoption of the new RPC, the Illinois Lawyers Trust Fund ("LTF") proposed a series of amendments to Illinois Supreme Court Rules to accommodate the provision of limited scope representations in litigation. The impetus for the LTF's proposed amendments was: (1) the Court's recent revision of RPC 1.2(c) clarifying the propriety of engaging in limited scope representations; and (2) a reduction in legal services provided to those of limited means occasioned, in part, by declining IOLTA revenues (managed and distributed by the LTF). The LTF strongly believed that facilitating the provision of limited scope representation would result in an increase in the availability of legal services to those in need.

The LTF proposal included amendments to S.Ct. Rules 11 (Manner of Serving Papers Other Than Process and Complaint on Parties Not in Default in the Trial and Reviewing Courts), 13 (Appearances – Time to Plead – Withdrawal), 137 (Signing of Pleadings, Motions and Other papers – Sanctions), and RPC 4.2 (Communication with Person Represented by Counsel). These LTF proposed amendments were shared with the Chicago Bar Association ("CBA") and the Illinois State Bar Association ("ISBA") for review, comment, and support.

In response to the LTF's proposal and request for CBA and ISBA review, the Joint Task Force on Limited Scope Legal Representation ("Joint Task Force") was formed in the Spring of 2010. Given the impact on Illinois courts, the Illinois Judges Association also agreed to participate. The Joint Task Force's mission was to consider broadly the issues related to limited scope representation and, in particular, whether it would be beneficial to the bar, the courts, and legal consumers to accommodate it. The primary vehicle for the Joint Task Force's consideration and review of limited scope representation issues was the LTF proposed amendments to S.Ct. Rules 11, 13, 137, and RPC 4.2.

C. Legal Community Outreach

The Joint Task Force's mission included, in part, the collection and consideration of the bar's views on the full range of limited scope representation issues. To collect these views, the Joint Task Force engaged in a number of activities.

As an initial effort to stimulate the bar's consideration of the limited scope representation issues, the Joint Task Force posted a number of educational items on its ISBA webpage. These items included: the LTF proposed amendments; a survey (prepared by the LTF) of other states' treatment of the issue; a number of relevant articles from legal publications; and a Joint Task Force issue paper. These items remain available at <http://www.isba.org/committees/limitedscopelegalrepresentation/resources>

The Joint Task Force next held three roundtable forums on limited scope representation. The roundtable forums were held in geographically diverse regions of Illinois in October and November 2010. The roundtable forums were advertised to achieve the greatest potential participation. The times and locations of the roundtable forums were displayed on the Joint Task Force's webpage and were highlighted, along with substantive articles on limited scope representation, in publications including the April 2010 *CBA Record*, the October 2010 *Illinois Bar Journal*, the Fall 2010 *Illinois Lawyer Now Quarterly*, and the *Illinois Lawyer Now* blog. In addition to these "general" notices, letter invitations to attend the roundtable forums were sent to all circuit court Chief Judges, presidents of county and specialized bar associations, legal aid agencies, the LTF, professional liability insurance carriers, chairpersons of all CBA committees, and a number of in-house general counsels. In addition, written comments were welcomed from any lawyer who was interested in attending a roundtable forum but could not be present.

As a result of these outreach efforts, the Joint Task Force heard from representatives of legal services organizations, individual practitioners, bar associations, academics, and others. Comments were also received from a number of ISBA section councils and committees. A synopsis of the comments received are contained in the: "Limited Scope Legal

Representation, Interim Activity Report” found at

<http://www.isba.org/committees/limitedscopelegalrepresentation/resources>

III. FINDINGS

After careful review of a number of resources, and consideration of the comments received from the bar, the Joint Task Force adopted a number of findings related to limited scope representation:

1. ***The Joint Task Force finds that increasing numbers of litigants are self-represented.***

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,

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.

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 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 the experience in Illinois is consistent with the nationwide trend.⁶

The causes for the growing trend of self-representation remain subject to speculation. However, a number of contributing factors have been identified including: an inability of legal consumers (including middle class consumers) to afford lawyers; decreasing government funds for legal aid services; and a preference for self-representation encouraged by the availability of non-traditional legal assistance such as on-line information and forms.

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.

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.

2. *The Joint Task Force finds that the increase in self-represented litigants presents unique challenges to the courts and the administration of justice.*

The increasing number of self-represented litigants adversely affects the administration of justice. Self-represented litigants, unfamiliar with judicial process, often seek individualized assistance from court personnel. Not surprisingly, court personnel become the focus of inquiries regarding process and procedure and, often times, substantive law which they are ill-prepared to answer (and likely prohibited from answering). Also, 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 believe the judge will play a much more active role in the presentation of their case or preservation of their procedural or substantive rights.

In addition to strains on court personnel, procedural or substantive missteps by self-represented litigants may require additional court proceedings in the future. Substantive rights may be lost by uninformed self-represented litigants. A self-represented litigant who experiences the complexities and perceived impediments noted above may be left with a sense of dissatisfaction with the justice system. This in turn contributes to a poor, if not negative, image of the courts and the bar. It not only raises questions

of access to justice, but also raises questions of securing fair and reasonable justice.⁷

3. *The Joint Task Force finds that the availability of limited scope representation serves the courts interests.*

Limited scope representation allows a legal consumer to consult with a lawyer on important aspects of his or her case. The lawyer can answer questions, point out troublesome areas, identify available remedies, and establish reasonable client expectations. It gives the self-represented litigant a better understanding of legal process and substantive aspects of the law that may be applicable to his or her cause. This in turn results in a number of benefits for the courts such as: reducing requests for information, assistance, or guidance from court personnel; reducing the need (or temptation) for judges to render individualized assistance to litigants; and potentially contributing to the more efficient use of the courts' time via better prepared litigants.⁸

⁷ See ABA Report, p.5, November, 2009, *supra* at footnote 1; 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. In Illinois, organizations such as the not-for-profit Coordinated Advice and Referral Program for Legal Services ("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.

⁸ Documenting 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

4. *The Joint Task Force finds that limited scope representation serves legal consumers' interests.*

Legal consumers willing to pay for legal services have expressed a clear interest in limited scope representation. A recent public opinion poll conducted by the ABA highlights the consumer demand for limited scope representation.⁹ In this nationwide poll of legal consumers, seventy (70) percent of poll respondents had never heard of limited scope representation (or “unbundling”), but once it was described, 66% said they would consult a lawyer about it. For poll respondents making \$30,000 to \$50,000 a year, 50% said they would be interested in a limited representation. For those making over \$100,000, one quarter said they would be interested in it. Of the youngest group surveyed, 80% said that in selecting a lawyer it would be important if the lawyer would be willing to provide limited scope representation. In hiring a lawyer, 62% of all respondents said it was very, or somewhat important, that the lawyer provide an option for a limited scope representation. Four out of five respondents between the ages of 18 and 24 said it was very or somewhat important. Half of those respondents with incomes over \$100,000 indicated it was very or somewhat important.

A traditional representation where a client can rely upon a lawyer on all aspects of a matter remains ideal. However, for those legal consumers

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 “Perspectives on Finding Personal Legal Services” conducted by the ABA’s Standing Committee on Delivery of Legal Services, February, 2011. Additional poll results were shared by the ABA during one of the Joint Task Force Roundtables.

who cannot afford a traditional representation but are able to pay something for legal services, limited scope representation provides flexibility to consult with a lawyer on the more complex, or important, aspects of their legal matter for which they need legal expertise and guidance. It also benefits legal consumers by making trained and knowledgeable Illinois lawyers economically and procedurally available to them. Such availability may tend to reduce reliance upon non-traditional and likely non-lawyer, legal providers.

The needs of those unable to pay for legal services are also served by the availability of limited scope representation. During the roundtable forums, numerous legal aid agencies commented on their inability to provide litigation services to all those in need. Contributing to this inability is the obligation (discussed further below at Recommendation No. 1) of agencies to provide full representation to their clients whenever an appearance is filed. This results in the expenditure of agency resources on potentially non-critical aspects of a representation for a reduced number of clients. If agencies could represent clients on a limited scope basis, their limited resources could be more efficiently used to address more important matters of a greater number of clients. In addition, limited resources often leads to a geographic bias in favor of potential clients who reside closest to an agency's office. Roundtable forum commentators, particularly downstate, noted that potential clients who are geographically distant require additional resources (in terms of

unproductive travel time and actual travel costs), which is often factored into the initial decision as to whether a particular client should be represented. Limited scope representation would minimize this bias. Finally, many legal aid agencies commenting at the roundtable forums believed that limited scope representation would increase the number of private practice lawyers willing to provide pro bono service.

5. *The Joint Task Force finds that limited scope representation serves lawyers' interests.*

As the national poll results referenced above indicate, potential legal consumers are interested in consulting and retaining a lawyer on terms other than the traditional full-service model. In the expanding marketplace for legal services it is important that lawyers are able to accommodate and satisfy this consumer interest. It demonstrates that the legal profession is responsive to client demand. It also shows a greater willingness to partner with clients (individual or business) to achieve their legal goals in a manner the client feels is in his or her best interest. Providing limited scope representation also enhances the ability of lawyers to compete financially with non-traditional legal service providers, such as national forms or document providers. All of these factors have the potential to result in greater economic benefit to those lawyers willing to engage in limited scope representation.

Finally, all lawyers have a broad professional interest in ensuring that those in need have meaningful access to the justice system. To the extent limited scope representation assists in meeting these needs through pro bono or legal aid activities, the charitable interests of the bar are furthered.

6. *The Joint Task Force finds that the practice of providing limited scope representation is ethical in Illinois.*

There is no question that limited scope representation is ethically permissible.¹⁰ It likely has been appropriate since at least 1990 and probably long before then.¹¹ In addition to its express treatment in the RPC, other authority recognizes the right of a client and lawyer to limit the scope of a representation as long as the limitation is reasonable, the client is adequately informed of the consequences of the limited scope representation, and the client consents.¹²

7. *The Joint Task Force finds that many other jurisdictions have established rules of procedure to accommodate the provision of limited scope representation.*

¹⁰ Illinois Rule of Professional Conduct 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.” This Rule is the same as the ABA Model Rule and has been adopted by approximately 40 states.

¹¹ 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 draft a lease or sales contract after a deal has been agreed to, or generally render advice on a discreet portion of a transaction.

¹² 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).

Eighteen states have enacted court and lawyer ethics rules to accommodate limited scope representation.¹³ Like the LTF proposed amendments and the Joint Task Force's Recommendations set out below, these state rules address a number of common procedural areas. These areas include: appearances and withdrawals, document preparation, and communication. A compilation of these state rules can be found at: <http://www.isba.org/committees/limitedscopelegalrepresentation/resources>

IV. RECOMMENDATIONS

In light of the findings above, the Joint Task Force believes that limited scope representation is professionally proper and beneficial to the courts, legal consumers, and the bar. While Illinois lawyers are currently free to engage in the practice without any further analysis or comment from the courts or the bar, many commentators (and jurisdictions) have recognized a number of impediments that may discourage lawyers from engaging in the practice, particularly in litigation. The Joint Task Force believes that any such impediments should be minimized.

Specifically, the Joint Task Force has identified eight procedural and ethical areas involving four Illinois Supreme Court rules that are problematic for lawyers wishing to engage in limited scope representation in litigation.

¹³ 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. See also footnotes 1, 3 and 4, *supra* for citations to some of these States' reports on limited scope representation.

These areas include: (1) appearances; (2) written agreements; (3) applicability; (4) withdrawals; (5) service of papers; (6) factual investigation of claims; (7) candor with the court; and (8) communication with represented parties. To address issues in these areas, the Joint Task Force recommends a number of rule amendments. These recommendations are designed to provide procedural and ethical clarity for lawyers when providing, or dealing with an opposing counsel or party who is represented, in a limited scope representation.

1. Appearances (Supreme Court Rule 13)

A. Concern

Illinois S.Ct. Rule 13 requires a lawyer to file an appearance to participate in litigation. As a practical matter, an appearance is necessary to provide notice to the court and opposing parties of the lawyer's involvement in litigation. It is necessary to accommodate the administration of justice and the orderly progress of a case, but also to ensure that a client's decision to be represented is respected.

An appearance also serves to define duties owed to a client by the lawyer. When a lawyer files an appearance in litigation, that lawyer is bound to represent his or her client on all matters and to fully protect the client's rights with respect to that litigation.¹⁴ In addition to this full representation,

¹⁴ *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.").

an appearance requires continuous representation until the court grants leave to withdraw or the matter is concluded.¹⁵

In a limited scope representation the purposes of an appearance are the same. However, the duties are not. A limited scope representation lawyer is not bound to represent his or her client on all aspects of a matter, but just certain discrete portions of a matter. Also, the representation is not continuous throughout the duration of the matter, but terminates when the specific services of the representation are completed notwithstanding the continuation of the matter. To ensure clarity and define these limited duties, care must be taken to give the court, parties, and lawyers involved proper notice.

B. Recommendation

The Joint Task Force recommends that S.Ct. Rule 13(c) be amended to provide for a formal “Limited Appearance” in civil matters to reflect limited scope representations. Under the proposed amendment, a Limited Appearance must identify with specificity the scope of the services the lawyer will provide to the client. The scope of services must be defined by task or duration. Multiple Limited Appearances can be filed for multiple tasks. A standard form is also recommended to ensure uniformity throughout the

¹⁵ *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.”)).

state. In addition, and notwithstanding anything in the proposed amendments to the contrary, nothing in the proposed amendment is intended to restrict the ability of a court to manage the cases before it, including taking appropriate action in the face of client or lawyer abuse of the limited scope representation procedures. Finally, a Committee Comment providing additional explanation of the Limited Appearance is also recommended.

These proposed amendments establishing a Limited Appearance are identified in Appendix 1. These recommendations are substantively identical to those proposed by the LTF in its January, 2011 revised proposal. In addition, the recommendations are consistent with the practices of other states. The proposed amendments are not intended to address or alter rules that require a corporation or other entity to be represented by counsel in connection with court proceedings.

2. Written Agreements (Supreme Court Rule 13)

A. Concern

A number of commentators expressed a general concern that limited scope representations would increase a risk of professional liability or disciplinary claims. Such concerns center on the potentially vague nature of a limited representation and the potential for miscommunication between the lawyer and client. This concern is not unreasonable in light of the case of

Keef v. Widuch, where an ill-defined scope of representation resulted in a lawyer owing greater duties to a client than the lawyer anticipated.¹⁶

B. Recommendation

Whenever a lawyer provides legal services to a client, he or she owes the client ethical and fiduciary duties. These duties are owed regardless of whether the legal services are provided via a limited or traditional representation. However, in order to minimize any miscommunication as to the scope of the legal services to be provided, and in turn the possibility of professional liability or disciplinary disputes, the Joint Task Force recommends that a written agreement expressly defining the relationship be entered into prior to providing service to the client and filing a Limited Appearance. This recommendation is expressed in S.Ct. Rule 13(c) and the accompanying “Limited Appearance” form. This written agreement requirement applies only to those limited scope representations where a “Limited Appearance” is filed. While written agreements are prudent, the proposed rule does not require a written agreement in limited scope representations that do not involve an entry of appearance.

An express written agreement gives clarity and definition to the limited scope relationship. It should minimize disputes on the question of

¹⁶ In *Keef v. Widuch, et al.*, 321 Ill.App.3d 571, 254 Ill.Dec. 580 (1st Dist. 2001), 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.

whether a lawyer has fulfilled the scope of a limited representation that might ripen into professional liability or disciplinary claims.¹⁷ It also appears that written agreements limiting the scope of representation may be effective to limit the scope of a lawyer's duties.¹⁸

Finally, it is important to emphasize the voluntary nature of providing limited scope representation services. Nothing in the Joint Task Force's recommendations compels lawyers to engage in it. If a lawyer, in his or her own judgment, perceives the risk of professional liability or disciplinary claims to be too great, the lawyer need not provide limited scope services. With respect to professional liability, one roundtable forum commentator noted that professional liability and disciplinary claims typically arise from missed statutes of limitations or client neglect. The commentator further noted that the very nature of a limited scope representation, most often a one time consultation or activity within an already pending case, minimizes the risk of these types of claims.

The requirement that a written agreement be entered into prior to filing a "Limited Appearance" is identified in Appendix 1. This

¹⁷ The Illinois Supreme Court, albeit in another context, 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).

¹⁸ *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."

recommendation is identical to that proposed by the LTF in its January 2011 revised proposal.

3. Applicability (Supreme Court Rule 13)

A. Concern

The Illinois Public Defender Association (“IPDA”) expressed strong opposition to the applicability of limited scope representation to criminal matters. Through written comments, the IPDA commented that limited scope representation in criminal cases presents an unacceptable level of risk to the legal interests of an indigent accused. The IPDA further felt that limited scope representation in criminal matters contravenes of nationally-accepted standards of criminal practice, particularly the principle of a “continuity of representation.” The IPDA reported its members’ experience that oftentimes a private criminal defense lawyer will withdraw from a matter as soon as the accused’s resources have been exhausted, with a public defender then being appointed. According to the IPDA, not only does this cause financial harm to the accused but it puts the appointed public defender in the difficult position of having to “get up to speed” on the entirety of the case well after the case has been filed. It also negatively affects the development of the attorney-client relationship and it is possible that rights of the accused may be lost in the interim.

B. Recommendation

In light of the concerns raised by the IPDA, the Joint Task Force recommends that limited scope representation only be applicable to civil cases. References to this limited applicability are set out in proposed

amendments to S.Ct. Rule 13 and identified in Appendix 1. This recommendation is consistent with the LTF's January, 2011 revised proposal.

4. Withdrawals (Supreme Court Rule 13)

A. Concern

S.Ct. Rule 13(c)(2) currently requires that once an appearance has been filed a lawyer cannot withdraw from the matter without leave of court. Failure to properly and formally withdraw also leaves a lawyer subject to potential disciplinary action.¹⁹ Further, a lawyer who files an appearance intending to represent a client on a limited basis nevertheless may find himself or herself locked into the representation and obligated to do more than the lawyer, or the client, wanted or intended. This concern that the court would not permit a lawyer to withdraw from a matter after completing a limited scope representation was a consistent and significant concern expressed at all the roundtable forums. It was viewed as a major impediment to lawyers engaging in limited scope representations, including on a pro bono basis.

B. Recommendation

The Joint Task Force recommends that upon completion of a limited scope representation where a "Limited Appearance" has been entered, the lawyer's withdrawal be automatic. Upon completion of the representation as specified in the Notice of Limited Appearance, the limited scope

¹⁹ *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.

representation lawyer must file, unless excused by the court, a “Notice of Withdrawal of Limited Appearance.” This conclusively terminates the representation. This avoids a situation where a limited scope representation may evolve into an open-ended commitment. Nothing in the proposed amendment, however, is intended to restrict a client’s right to file a motion challenging such a withdrawal if he or she believes that it is in conflict with the written agreement. The proposed amendment would allow a lawyer to withdraw from a limited scope representation for purposes other than the completion of the representation with court approval.

These proposed amendments are identified in Appendix 1. They are identical to those proposed by the LTF in its January, 2011 revised proposal. In addition, the recommendations are consistent with the practices of other states. A majority of jurisdictions with limited scope representation rules provide for automatic withdrawal upon completion of the limited representation (with some variation such as requiring an absence of objection from the client).

5. Service of Papers (Supreme Court Rule 11)

A. Concern

Efficient service of documents notifying parties of hearings and other proceedings is essential for the smooth administration of justice. Illinois S.Ct. Rule 11 requires that a lawyer serve court papers on an opposing 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 whether and when a lawyer should serve papers on self-represented parties, their limited scope lawyers, or both.

B. Recommendation

In order to ensure that papers are appropriately served on those participating in a limited scope representation, the Joint Task Force recommends that service must be made on both the party who is being represented and the lawyer providing the limited representation. Such comprehensive service ensures that the proper person, whether it is the party or the lawyer, will receive notice of papers filed with the court. In addition, by requiring service on both the party and the limited scope representation lawyer the service obligations of the opposing party are clear. Any additional burden on an opposing counsel to serve both a party and limited scope representation lawyer should not be significant.

The Joint Task Force also recommends that papers related to matters beyond the scope of the limited representation as defined by the Limited Appearance need not be served on the limited scope representation lawyer. However, when a limited scope representation lawyer specifically requests in writing that an opponent give him or her notice of papers, even if those papers concern matters outside of the limited representation, the opponent must do so.

Finally, once a lawyer files a Notice of Withdrawal of Limited Appearance, no further service on that lawyer is required.

The proposed amendments to S.Ct. Rule 11 are identified in Appendix 2. They are identical to those proposed by the LTF in its January, 2011 revised proposal. Of those states that address service requirements in limited scope representation matters, the majority require service on both the party and the limited scope lawyer.

6. Document Preparation – Factual Investigation (Supreme Court Rule 137)

A. Concern

Supreme Court Rule 137 requires that every paper prepared by a lawyer for a party be signed by the lawyer. The lawyer's signature constitutes a certification that the attorney has conducted an investigation of the facts and law contained in the papers.²⁰ A similar, but broader, duty to investigate is expressed in Illinois RPC 3.1 which prohibits a lawyer from bringing or defending a proceeding, or asserting or opposing an issue, unless the lawyer has a basis for doing so that is not frivolous.²¹

However, in a limited scope representation where the lawyer will not be filing a Limited Appearance, but has merely drafted, reviewed, or revised papers, compliance with S.Ct. Rule 137 may be problematic. In such

²⁰ *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).

²¹ RPC 3.1; *In re D.D. v. R.S.*, 198 Ill.2d 309, 763 N.E.2d 251, 261 Ill.Dec. 281 (2001).

circumstances, the lawyer will likely not have the time, resources, or benefit of a long-term relationship with the client to investigate the factual claims or contentions made by the client. Furthermore, to carry out such an investigation may defeat the purposes and benefits of a particular limited scope representation.

B. Recommendation

Reconciling a lawyer's duty under S.Ct. Rule 137 (and others) to avoid non-meritorious claims with the drafting, review, or revision of papers for a self-represented client is difficult. To give any effect to this type of limited scope representation the investigation contemplated under S.Ct. Rule 137 cannot be done without defeating the benefits of a limited scope representation. Accordingly, the Joint Task Force recommends that when a lawyer drafts, reviews, or revises papers on behalf a client who will file and present those papers the obligations under S.Ct. Rule 137 should be relaxed. Specifically, the Joint Task Force recommends that a lawyer should be able to rely upon the factual representation of the client unless the lawyer knows those facts are false.

Eliminating the need for a comprehensive factual investigation of factual claims is appropriate. First, it gives practical effect to one form of acceptable limited scope representation. As noted above, requiring a comprehensive investigation would defeat the purposes and benefits of a limited scope representation.

Second, the court has recourse where non-meritorious claims are pursued because the self-represented litigant who files the lawyer drafted, reviewed, or revised papers must certify their factual legitimacy. Nothing limits the courts authority to impose sanctions against the party for any non-meritorious filings. The court is also likely protected even by a lawyer's limited involvement on behalf of a client regardless of the absence of the lawyer's certification. A lawyer should counsel a self-represented litigant not to pursue clearly non-meritorious claims, and in any case, should refuse to participate in such claims. Also, the Joint Task Force recommendation retains a "knowing" standard as a check on lawyer conduct. It is also important to note that the full obligations under S.Ct. Rule 137 remain in place where a lawyer has filed a formal Limited Appearance.

Finally, although perhaps overly semantic, because the lawyer is not signing the papers he or she has drafted, reviewed, or revised, the lawyer is not making any improper certification to the court. In the absence of a signature, the obligations of S.Ct. Rule 137 are not triggered in the first instance.

These proposed amendments are identified in Appendix 3A (and 3B). The relaxation of the investigation requirement is identical to the LTF's January, 2011 revised proposal. In addition, the recommendation is consistent with some states that have addressed the issue.

As noted at the outset, reconciling a lawyer's duty to avoid non-meritorious claims with achieving the important goals of limited scope representations is difficult. At least one member of the Task Force believes that the recommended revisions to S.Ct. Rule 137 should apply only to instances where the limited legal services are provided on a pro bono basis and not where the lawyer is paid a fee for his or her services (making the point that S.Ct. Rule 137 is an important check on the integrity of the bar and any limitations on that rule should be applied sparingly and only to the extent reasonably necessary to accomplish an important policy objective).

7. Document Preparation – Lawyer identification (Supreme Court Rule 137)

A. Concern

A common form of a limited scope representation is when a lawyer drafts, reviews, or revises court papers on behalf of a self-represented litigant that will be filed by that litigant. Such assistance may range from merely revising or completing a fill-in-the-blank form to drafting an original pleading. It can be performed in a for profit environment or on a pro bono basis. While this form of limited scope representation is clearly contemplated under Rule 1.2(c), it raises the most debated issue of limited scope representation: whether a lawyer's involvement in drafting, reviewing, or revising of court papers to be filed by the litigant must be disclosed to the

court. The treatment of this question of “ghostwriting” has divided the states and other authorities.

A number of jurisdictions permit self-represented litigants to file pleadings drafted, reviewed, or revised by a lawyer without disclosure of the lawyer’s involvement to the court. A recent ABA ethics opinion articulates the rationale.²² First, the ABA Opinion notes that there is no prohibition in the ABA Model Rules of Professional Conduct against undisclosed assistance to a self-represented litigant. Second, the ABA addresses the question of materiality. In concluding that undisclosed assistance is not material, the ABA focuses on whether self-represented litigants receive any unfair advantage by using papers prepared by a lawyer. It concludes that because lawyer-prepared papers will be evident to the court, it is likely that no special treatment will be given to the self-represented litigant. Also, 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. Lastly, the ABA finds court rules requiring the assumption of responsibility for the factual contents of papers, such as Federal Rule 11 (or, in Illinois, S.Ct. Rule 137), inapplicable because those rules impose obligations only when a lawyer signs those papers. Without signing, in effect an identification requirement, the lawyer is making no affirmative statement to the court about the papers’ contents. Thus no

²² ABA Formal Opinion 07-446, May 5, 2007.

obligation to the court is being violated. A number of state bar ethics opinions take the same approach and conclude that there is no ethical obligation to disclose a lawyer's participation in drafting a self-represented litigant's pleadings.²³

Conversely, a number of states have concluded that the failure to disclose a lawyer's involvement in the drafting, review, or revision of a self-represented litigant's papers is improper.²⁴ Thirteen states have adopted procedural or professional responsibility rules that explicitly permit lawyers to provide document preparation assistance to self-represented litigants. Eleven of those states require disclosure of the lawyer's assistance: seven appear to require a notation stating the document was prepared with the assistance of a lawyer and specifically require that lawyer to identify himself or herself²⁵, and four require disclosure of lawyer assistance but not the name of the lawyer providing the assistance.²⁶ 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.²⁷ Ethics opinions

²³ 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).

²⁴ *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").

²⁵ Colorado, Iowa, Maine, Missouri, Nebraska, Washington and Wyoming.

²⁶ Florida, Kansas, Massachusetts and New Hampshire.

²⁷ 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.

from other state bars such as Delaware, Florida, Kansas, Massachusetts, and Nevada also prohibit the practice.²⁸ 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.²⁹ 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.

B. Recommendation

The Joint Task Force believes that a permissible limited scope representation encompasses assisting a self-represented litigant by drafting, reviewing, or revising court papers that ultimately will be filed by the litigant. A lawyer's assistance in document preparation will clearly benefit both the litigant and the court by, in part, focusing the issues, addressing required elements, and requesting reasonable and appropriate remedies. For these reasons, the Joint Task Force recommends that S.Ct. Rule 137 be amended specifically to acknowledge the propriety of such assistance. This proposed amendment is identified in Appendices 3A and 3B. It is substantively identical to the LTF's January 2011 revised proposal.

²⁸ Delaware 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).

²⁹ 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).

With respect to whether a lawyer needs to identify his or her assistance in document preparation, and despite substantial debate, the Joint Task Force has not reached a consensus sufficient to support a recommendation. Accordingly, rather than expressing a recommendation, the Joint Task Force identifies below the arguments which may be of assistance to the Court in considering and resolving this important issue.

(i) Lawyer Identification Not Required Option

Requiring lawyer identification on papers drafted, reviewed, or revised by a lawyer but filed by a self-represented litigant would negatively impact services to those legal consumers most in need. During the roundtable forums, numerous legal aid agencies noted the incompatibility of requiring identification with the type of limited services they often perform – e.g, minor drafting, or review or revision of previously prepared papers brought to them by potential clients. Oftentimes such review is rendered over the phone, or during a brief office visits. This type of assistance may result in minor changes to client prepared drafts. Requiring staff resources to add lawyer identification was viewed as too burdensome and impractical. Related to this burden is the difficult issue of determining how much lawyer assistance requires the identification. Do major stylistic revisions by a lawyer require identification? Do minor revisions on material matters require identification? The need to answer these questions can be eliminated by simply not requiring lawyer identification on any pleadings.

Roundtable forum commentators were also concerned that requiring lawyer identification would discourage private practitioners from providing pro bono services. Private practitioners providing pro bono services are faced with the same practical concerns as legal aid agency lawyers noted above. However, it was also noted that private practitioners providing pro bono services, particularly through the auspices of a legal aid agency, enjoy a certain degree of anonymity. This anonymity often leads lawyers to participate in pro bono activities, particularly through legal aid seminars, workshops, help lines, or courthouse help desks. The loss of this anonymity might impact accessibility to services.

Roundtable forum commentators were also very concerned with the inability of a lawyer to ensure his or her final version of a drafted or revised paper is the version that ultimately is filed with the court. Once papers are drafted or revised and given to the self-represented litigant, the lawyer loses control of the document and nothing prevents the self-represented party from making additional modifications to those papers. As a result, the version a lawyer affixes his identification to may not be the final version of paper that the self-represented party ultimately files. Requiring that the lawyer be identified with the filing would implicitly misrepresent to the court that the lawyer approved the subsequent alterations. Moreover, those subsequent alterations might reflect poorly on the lawyer who is unaware of them.

Finally, lawyer identification in and of itself adds nothing to the value of the papers, client protection, or the administration of justice. Presumably, a court will rule on the issues raised in the papers based upon the facts, law, and arguments, not the identification of a lawyer who may have prepared it. It is also likely that papers drafted by a lawyer will be easily recognized by a court thus minimizing any perceived advantage to the self-represented litigant. Of course, the self-represented litigant is obligated to disclose lawyer participation if asked by the court. Also, where a lawyer is relieved of any responsibility for the legitimacy of the facts (other than facts known to be false) presented in the court paper he or she drafts, reviews, or prepares (as is recommended above), it is reasonable that the preparing lawyer should not be compelled to sign it (or otherwise identify himself or herself). Otherwise, lawyer identification might be viewed as some level of validation of the client's facts.

In terms of client protection, requiring lawyer identification does not protect the client against lawyer error or enhance the client's ability to obtain a remedy. Regardless of whether a lawyer places his or her name on a court document, a client has remedies against a lawyer for errors or misconduct, through a professional liability action or disciplinary complaint. Finally, the administration of justice is not hampered in any way (and may be benefitted by lawyer involvement) by foregoing lawyer identification. In the event the

court has questions about the source of a self-represented litigants papers, the litigant remains responsible for disclosing a lawyer's involvement.

The proposed amendments concerning this issue are set out in Appendix 3A. The specific rejection of any identification requirement is addressed expressly in a proposed "Commentary" to S.Ct. Rule 137. As noted, treatment of this issue by states that have enacted limited scope representation rules is varied. At least two states, California and New Mexico, do not require lawyer identification on papers drafted for a self-represented litigant. The proposed treatment of this issue is inconsistent with the LTF's January 2011 revised proposal. The LTF's revised proposal would require lawyer identification.

(ii) Lawyer Identification Required Option

A lawyer is above all else an "officer of the court." This title carries with it important obligations. The identification of a lawyer who drafts, reviews, or revises papers which are subsequently filed with the court meets the fundamental obligations of candor to the court. Such candor fosters respect for the court and the administration of justice. Lawyer identification can also give some assurance to the court that a pleading is filed in good faith and likely in compliance with minimal pleading requirements. This can speed the accurate and timely consideration of an issue. Lastly, the courts are public forums, where disputes are generally to be resolved in the open. This transparency serves to legitimize the courts and build public confidence

in them. The idea that a lawyer's assistance to a litigant could be concealed is contrary to this fundamental aspect of the administration of justice.

The chief benefit of disclosure is that it fully informs the court. With full information, a judge is better able to manage a case and provide every party a fair hearing. A lawyer identification requirement amplifies the benefits of disclosure by providing the court with even more information about the source of the pleadings, motions and other papers presented by a self-represented party.

Important concepts of professionalism are also served by a lawyer identifying his or her own work even if the advice was brief or the work product limited. Failure to acknowledge a lawyer's involvement minimizes the value of the lawyer's skill and experience. The long term result may be a perception by legal consumers, and lawyers themselves, that legal services are nothing more than a fungible commodity. In addition, more than one roundtable commentator noted that not requiring a lawyer to identify himself or herself as the author of court papers might lead some lawyers to provide substandard work which serves to harm clients and may foster skepticism by the court and bar concerning the propriety of allowing lawyers to engage in limited scope representations where the lawyer's participation is limited to behind-the-scenes document preparation. Discouraging limited scope representation is the exact opposite of the intent of these proposed rule amendments.

The absence of lawyer identification on court papers also may encourage unscrupulous individuals to take advantage of those in need of legal services by engaging in the unauthorized practice of law. The absence of any lawyer identification will certainly make it more difficult to identify the unauthorized practice of law. While there is nothing inherent in limited scope representations that will foster the unauthorized practice of law, the absence of any lawyer identification on a pleading may cause a court to assume that a self-represented litigant's "professionally" prepared paper was prepared by a lawyer, and thus not inquire into the preparation of the papers. This inquiry may be a means by which unauthorized practice of law is identified and ultimately prosecuted.

Finally, as referenced in more detail above in 7.A., requiring lawyer identification appears consistent with existing obligations imposed by Illinois and other jurisdictions. These identification obligations serve a number of important policy goals such as: legitimizing the practice of document preparation for self-represented litigants; encouraging transparency in judicial proceedings; minimizing the potential for abuse by non-lawyers; and encouraging the drafting of quality documents.

The proposed amendments to S.Ct. Rule 137 requiring lawyer identification are identified in Appendix 3B. Appropriate Committee Comments are also included in this Appendix. These recommendations requiring lawyer identification are consistent with the LTF's January, 2011

revised proposal which would require lawyer identification. In addition, the majority of states that have enacted limited scope representation rules require lawyer identification (Colorado, Iowa, Nebraska, Washington, and Wyoming), or a generic (not requiring a lawyer's name) identification of assistance (Florida, Kansas, Massachusetts, and New Hampshire), on pleadings.

8. Communication with Represented Persons (Rule of Professional Conduct 4.2)

A. Concern

Generally, Illinois RPC 4.2 prohibits a lawyer from communicating about the subject of a representation with a person the lawyer knows to be represented by another lawyer in that matter. However, when a person is being represented on a limited scope basis, a lawyer wishing to communicate with that person may not always know about, or even suspect, the representation. Accordingly, the lawyer runs a risk of unintentionally violating RPC 4.2. In addition, because a lawyer properly may engage in communications with a represented person on matters outside the scope of the limited representation, there is a risk that the communicating lawyer may unknowingly or unintentionally stray onto prohibited subjects. To minimize these risks, and to provide greater clarity generally, RPC 4.2 should specifically address limited scope representations.

B. Recommendation

To address these communication concerns, the Joint Task Force recommends that a new subparagraph (b) be added to RPC 4.2. The new subparagraph provides that a person is to be considered unrepresented for the purposes of RPC 4.2 unless the lawyer communicating with that person has been provided with: (1) a Notice of Limited Appearance pursuant to S.Ct. Rule 13(c)(6); or (2) some other written communication identifying the proceeding or issue on which a person is being represented and the time period during which any and all communications should be directly with counsel.

Because of the potential that a limited scope representation might be undisclosed or ill-defined to an opposing lawyer, this new paragraph appropriately favors and protects the lawyer who unintentionally communicates with a person who may be represented on a limited basis. It first creates a presumption that a person is unrepresented unless that person (or his or her lawyer) has notified opposing counsel of the representation. It also puts the burden of notice on the person represented on a limited basis. Finally, it requires that the Notice or other writing specify the time period during which the person is represented.

As additional clarification and guidance, the Joint Task Force recommends a new Comment [9] be added to the “Comment” section of RPC 4.2. This Comment provides that the scope of the limited representation, and therefore the subject matter of prohibited communications, should be defined

very narrowly. It is designed to recognize and address the potential for confusion as to when lawyers are permitted to communicate directly with the opposing party as opposed to that party's counsel. It is not a lessening of professional obligations or client protection. It is a minimal "good faith" safe harbor for lawyers who may unknowingly engage in a prohibited communication. Client protections also remain in that the Comment specifically references an objective, time-based standard for determining when communications should be with counsel and not with the opposing party.

The proposed recommendations are identified in Appendix 4. The recommendations express the same concepts as those proposed by the LTF in its January 28, 2011 revised proposal but with the additional safeguard of the time component.

Finally, the Joint Task Force's recommendations are consistent with the practices of other states. While not all states that have adopted rules to address limited scope representation have amended their versions of RPC 4.2, a majority of the states that have done so generally provide that self-represented litigants are considered unrepresented *unless* written notice is provided to opposing counsel.³⁰ In a smaller number of states, actual

³⁰ As an example, Missouri provides 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]."

knowledge of the representation, with or without written notice, will trigger the obligations of the Rule.³¹

V. CONCLUSION

This Report represents a year of careful consideration of limited scope representation as it relates to litigation and the comments of the practicing bar about its practice. It recognizes that limited scope representation is ethically permissible and can provide a number of benefits to the legal consumers, the courts, and the bar. It also reflects a need to accommodate non-traditional methods of practice in a changing legal environment. Finally, the Report proposes a number of amendments to existing court rules in an effort to provide clarity to the courts and those lawyers wishing to engage in the practice. It is the hope of the Joint Task Force that its recommendations be reviewed and approved by the governing bodies of the CBA, IJA, and ISBA and that they be forwarded on to the Illinois Supreme Court for adoption.

³¹ 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.”

Appendix 1

Proposed Amendment to Illinois Supreme Court Rule 13

Rule 13. Appearances--Time to Plead--Withdrawal

(a) **Written Appearances.** If a written appearance, general or special, is filed, copies of the appearance shall be served in the manner required for the service of copies of pleadings.

(b) **Time to Plead.** A party who appears without having been served with summons is required to plead within the same time as if served with summons on the day he appears.

(c) **Appearance and Withdrawal of Attorneys.**

(1) *Addressing the Court.* An attorney shall file his written appearance or other pleading before he addresses the court unless he is presenting a motion for leave to appear by intervention or otherwise.

(2) *Notice of Withdrawal.* An attorney may not withdraw his appearance for a party without leave of court and notice to all parties of record, and, unless another attorney is substituted, he must give reasonable notice of the time and place of the presentation of the motion for leave to withdraw, by personal service, certified mail or third party carrier, directed to the party represented by him at his last known business or residence address. Such notice shall advise said party that to insure notice of any action in said cause, he should retain other counsel therein or file with the clerk of the court, within 21 days after entry of the order of withdrawal, his supplementary appearance stating therein an address at which service of notices or other papers may be had upon him.

(3) *Motion to Withdraw.* The motion for leave to withdraw shall be in writing and, unless another attorney is substituted shall state the last known address of the party represented. The motion may be denied by the court if the granting of it would delay the trial of the case, or would otherwise be inequitable.

(4) *Copy to be Served on Party.* If the party does not appear at the time the motion for withdrawal is granted, either in person or by substitute counsel, then, within three days of the entry of the order of withdrawal, a copy thereof shall be served upon the party by the withdrawing attorney in the manner provided in paragraph (c)(2) of this rule, and proof of service shall be made and filed.

(5) *Supplemental Appearance.* Unless another attorney is, at the time of such withdrawal, substituted for the one withdrawing, the party shall file in the case within 21 days after entry of the order of withdrawal a supplementary appearance, stating therein an address at which the service of notices or other papers may be had upon him. In case of his failure to file such supplementary appearance, notice, if by mail or third party carrier, shall be directed to him at his last known business or residence address.

(6) Limited Appearance. An attorney may make a limited appearance on behalf of a party in a civil proceeding pursuant to Rule of Professional Conduct 1.2(c) when the attorney has entered into a written agreement with that party to provide limited scope representation. The attorney shall file a Notice of Limited Appearance in the form attached to this rule, identifying the civil proceeding or proceedings to which the limited appearance pertains.

An attorney may file a Notice of Limited Appearance for more than one court proceeding in a case. An attorney must file a new Notice of Limited Appearance before any additional proceeding in which the attorney intends to appear. A party shall not be required to pay more than one appearance fee in a case.

On completing the representation specified in the Notice of Limited Appearance, an attorney shall withdraw by filing a Notice of Withdrawal of Limited Appearance in the form attached to this rule. The notice shall be served on the party the attorney is representing and on all counsel and parties not represented by counsel unless the court orders otherwise. Only on filing and serving the Notice of Withdrawal of Limited Appearance does the attorney's limited appearance in the case terminate. Unless seeking withdrawal in accordance with (c)(2) above before the completion of the limited scope representation, leave of court is not required and an attorney's withdrawal of a limited appearance shall not be denied by order of court or otherwise as long as the withdrawal is made in accordance with this rule.

Adopted June 15, 1982, effective July 1, 1982; amended February 16, 2011, effective immediately; amended _____, 20__, effective immediately.

Committee Comments

(Revised _____, __, 20__)

Paragraph (c)(6) addresses the provision of limited scope representation to clients under Illinois Rule of Professional Conduct 1.2(c). The paragraph is not intended to regulate or impede appearances made pursuant to other types of limited engagements by attorneys, who may appear and withdraw as otherwise provided by Rule 13.

As a precondition to filing an appearance under paragraph (c)(6) of this rule, an attorney making a limited appearance must enter into a written agreement with the party disclosing the limited nature of the representation. That paragraph requires the use of the form Notice of Limited Appearance appended to this rule. Utilizing this standardized form promotes consistency in the filing of limited appearances and makes the notices easily recognizable to judges and court personnel. The form notice requires the attorney to identify the scope of the representation with specificity.

The paragraph does not restrict the number of appearances an attorney may make in a case. Nor does it restrict the purposes for which an attorney may file a limited appearance. Notwithstanding the absence of numeric or subject matter restrictions on filing limited appearances, nothing in the Rule restricts the ability of a court to manage the cases before it, including taking appropriate action in response to client or lawyer abuse of the limited scope representation procedures.

Paragraph (c)(6) also prescribes the procedure and form for an attorney’s withdrawal from a matter when the services within the scope of the Notice of Limited Appearance have been completed. To assure both a lawyer and client that appearing on a limited scope basis can be made without fear of an open-ended commitment to represent a party, the filing of a written notice at the conclusion of a court event notifies everyone – the court, the client, and the opposing party – that the limited representation attorney’s role in the matter has ended. This withdrawal is automatic without leave of court. However, nothing in this rule is intended to prohibit a client from objecting to the withdrawal if a good faith basis exists for doing so, including a claim that the limited scope services contemplated under the Limited Appearance have not been completed. This procedure for withdrawal is not to be used by an attorney seeking to withdraw from a limited appearance before completing the services within the scope of Notice of Limited Appearance. Withdrawal in that circumstance should be by motion pursuant to this Rule.

A limited appearance under the rule is unrelated to “special and limited” appearances formerly used to object to the lack of personal jurisdiction. The use of such appearances ended with the adoption of Public Act 91-145, which amended Section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301) effective January 1, 2000.

Form Limited Appearance and Withdrawal

**IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS**

_____))
Plaintiff/Petitioner) **No.**
)
vs.)
)
)
_____))
Defendant/Respondent)

NOTICE OF LIMITED APPEARANCE

1. The attorney, _____, and the Party, _____, have entered into a written agreement dated _____ that the attorney will provide limited scope representation to the Party in the matter pertaining to this limited appearance.

2. The Party is the Plaintiff Petitioner Defendant Respondent in this matter. (Circle one)

3. The attorney appears pursuant to Supreme Court Rule 13. This appearance is limited in scope and the attorney will represent the Party (check and complete all that apply):

In the court proceeding (identify): _____ on (date): _____

In any continuance of that proceeding

At the trial on (date): _____

In any continuance of that trial

Until judgment

Other (specify the nature and limits of representation): _____

4. If this appearance does not extend to all matters to be considered at the proceeding(s) above, identify the discrete issues within the proceeding covered by this appearance: _____

5. The Party, _____, or any other attorney who has filed an appearance for the Party, remains responsible for all matters not specifically described in this notice.

6. On termination of the representation, the attorney will file a Notice of Withdrawal of Limited Representation Appearance and serve a copy on the Party or any other attorney who has filed an appearance for the Party, and on all counsel and parties not represented by counsel unless the court has ordered otherwise.

7. The attorney named above is "attorney of record" and available for service of documents only for those proceedings as described in paragraph 3. Service on the Party is also required for the matters described in paragraph 3. For all matters not

described in this notice, only the Party must be served. The Party shall be served at the Party's address of record.

CERTIFICATE OF SERVICE

I certify that I have this day served this Notice of Limited Appearance on all counsel and all parties not represented by counsel.

Signature of Attorney

Name of Attorney

Attorney's Address

Attorney's Telephone Number

Attorney Number

Date

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS

_____))
Plaintiff/Petitioner)) No.
vs.))
_____))
Defendant/Respondent))

NOTICE OF WITHDRAWAL OF LIMITED APPEARANCE

Enter my Withdrawal of Limited Appearance as attorney for (add name of Party) _____, the Plaintiff Petitioner Defendant Respondent pursuant to Supreme Court Rule 13. I certify that I have completed all services within the scope of the Notice of Limited Appearance, and that I have completed all acts ordered by the court.

On filing of the Notice of Withdrawal of Limited Appearance, service is no longer required on me but remains required on the Party at the Party's address of record.

I certify that I have this day served this Notice of Withdrawal of Limited Appearance on all counsel and parties not represented by counsel, including the Party I represented, who was served personally, via First Class mail, or third party carrier at the Party's address of record.

Signature of Attorney

Name of Attorney

Attorney's Address

Attorney's Telephone Number

Attorney Number

Date

APPENDIX 2

Proposed Amendment to Illinois Supreme Court Rule 11

Rule 11. Manner of Serving Papers Other Than Process and Complaint on Parties Not in Default in the Trial and Reviewing Courts

(a) On Whom Made. If a party is represented by an attorney of record, service shall be made upon the attorney. Otherwise service shall be made upon the party.

(b) Method. Papers shall be served as follows:

(1) by delivering them to the attorney or party personally;

(2) by leaving them in the office of the attorney with the attorney's clerk, or with a person in charge of the office; or if a party is not represented by counsel, by leaving them at the party's residence with a family member of the age of 13 years or upwards;

(3) by depositing them in a United States post office or post office box, enclosed in an envelope, plainly addressed to the attorney at the attorney's business address, or to the party at the party's business address or residence, with postage fully prepaid; or

(4) by delivering them to a third-party commercial carrier – including deposit in the carrier's pick-up box or drop off with the carrier's designated contractor – enclosed in a package, plainly addressed to the attorney at the attorney's business address, or to the party at the party's business address or residence, with delivery charge fully prepaid; or

(5) by transmitting them via facsimile machine to the office of the attorney or party, who has consented to receiving service by facsimile transmission. Briefs filed in reviewing courts shall not be served by facsimile transmission.

(i) A party or attorney electing to serve pleadings by facsimile must include on the certificate of service transmitted the telephone number of the sender's facsimile transmitting device. Use of service by facsimile shall be deemed consent by that party or attorney to receive service by facsimile transmission. Any party may rescind consent of service by facsimile transmission in a case by filing with the court and serving a notice on all parties or their attorneys who have filed appearances that facsimile service will not be accepted. A party or attorney who has rescinded consent to service by facsimile transmission in a case may not serve another party or attorney by facsimile transmission in that case.

(ii) Each page of notices and documents transmitted by facsimile pursuant to this rule should bear the circuit court number, the title of the document, and the page number.

(c) Multiple Parties or Attorneys. In cases in which there are two or more plaintiffs or defendants who appear by different attorneys, service of all papers shall be made on the

attorney for each of the parties. If one attorney appears for several parties, that attorney is entitled to only one copy of any paper served upon him by the opposite side. When more than one attorney appears for a party, service of a copy upon one of them is sufficient.

(d) Limited Appearance. When a Notice of Limited Appearance has been filed in accordance with Rule 13(c)(6), service shall be made on the attorney who has filed the notice, as well as on the party represented on a limited basis. For matters outside the scope of limited representation identified in the Notice of Limited Appearance, service on the attorney who filed the limited appearance is not required. When requested in writing, service on matters outside the scope of limited representation shall be made on the attorney who filed the limited appearance.

After the attorney files a Notice of Withdrawal of Limited Appearance in accordance with Rule 13(c)(6), service on the attorney is not required.

Amended April 8, 1980, effective May 15, 1980; amended April 10, 1987, effective August 1, 1987; amended October 30, 1992, effective November 15, 1992; amended December 29, 2009, effective immediately; amended _____, 20____, effective _____, 20____.

APPENDIX 3A
(Attorney Identification Not Required)

Proposed Amendment to Illinois Supreme Court Rule 137

Rule 137. Signing of Pleadings, Motions and Other Papers—Sanctions

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that 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, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

All proceedings under this rule shall be brought within the civil action in which the pleading, motion or other paper referred to has been filed, and no violation or alleged violation of this rule shall give rise to a separate civil suit, but shall be considered a claim within the same civil action. Motions brought pursuant to this rule must be filed within 30 days of the entry of final judgment, or if a timely post-judgment motion is filed, within 30 days of the ruling on the post-judgment motion.

This rule shall apply to the State of Illinois or any agency of the State in the same manner as any other party. Furthermore, where the litigation involves review of a determination of an administrative agency, the court may include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue.

Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

An attorney may assist a self-represented person in drafting or reviewing a pleading, motion, or other paper without making a limited or general appearance. Such assistance

does not constitute either a general or limited appearance by the attorney. The self-represented person shall sign the pleading, motion, or other paper. An attorney providing drafting or reviewing assistance may rely on the self-represented person's representation of facts without further investigation by the attorney, unless the attorney knows that such representations are false.

Adopted June 19, 1989, effective August 1, 1989; amended December 17, 1993, effective February 1, 1994; amended _____, 20__, effective immediately.

Committee Comments

(August 1, 1989)

The Supreme Court has adopted Rule 137, effective August 1, 1989. Rule 137 will require all pleadings and papers to be signed by an attorney of record or by a party, if the party is not represented by an attorney, and (treating such signature as a certification that the paper has been read, that after reasonable inquiry it is well-grounded in fact and law, and that it is not interposed for any improper purpose, etc.) the rule authorizes the trial courts to impose certain sanctions for violations of the rule. Rule 137 preempts all matters sought to be covered by section 2-611 of the Code of Civil Procedure. Unlike section 2—611, Rule 137 allows but does not require the imposition of sanctions. Unlike section 2—611, Rule 137 requires a trial judge who imposes sanctions to set forth with specificity the reasons and basis of any sanction in a separate written order. Unlike section 2—611, Rule 137 does not make special provisions concerning the potential exposure to sanctions of insurance companies that might employ attorneys.

Commentary

(December 17, 1993)

The rule is modified to clarify when motions for sanctions must be filed.

Commentary

(_____, 20__)

Under Illinois Rule of Professional Conduct 1.2(c), attorneys may limit the scope of a representation. Under RPC 1.2(c), this includes providing advice to a party regarding the drafting of a pleading, motion or paper, or reviewing a pleading, motion or paper drafted by a party without filing a general or limited appearance. In such circumstances, an attorney is not required to sign or otherwise note the attorney's involvement and the certification requirements in Rule 137 are inapplicable under these circumstances. Consistent with the limited scope of services envisioned under this drafting and reviewing function, attorneys may rely on the representation of facts provided by the self-represented person. This rule applies, for example, to an attorney who advises a caller to

a legal aid telephone hotline regarding the completion of a form pleading, motion or paper or an attorney providing information at a pro bono clinic.

All obligations under Rule 137 with respect to signing pleadings and certifications apply fully in those limited scope representations where an attorney has filed a general or limited appearance. Drafting a pleading, motion or paper, or reviewing a pleading, motion or paper drafted by a party does not establish any independent responsibility not already applicable under current law. Drafting a pleading, motion or paper, or reviewing a pleading, motion or paper drafted by a party also does not obviate the need for a written limited scope agreement as may be required by other applicable rules.

APPENDIX 3 B
(Attorney Identification Required)

Proposed Amendment to Illinois Supreme Court Rule 137

Rule 137. Signing of Pleadings, Motions and Other Papers—Sanctions

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that 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, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

All proceedings under this rule shall be brought within the civil action in which the pleading, motion or other paper referred to has been filed, and no violation or alleged violation of this rule shall give rise to a separate civil suit, but shall be considered a claim within the same civil action. Motions brought pursuant to this rule must be filed within 30 days of the entry of final judgment, or if a timely post-judgment motion is filed, within 30 days of the ruling on the post-judgment motion.

This rule shall apply to the State of Illinois or any agency of the State in the same manner as any other party. Furthermore, where the litigation involves review of a determination of an administrative agency, the court may include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue.

Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

An attorney may substantially prepare a pleading, motion, or other paper for a person who is not otherwise represented. The self-represented person shall sign the pleading.

motion, or other paper, and on the signature page the attorney shall insert the notation “Substantially prepared with assistance of counsel under Supreme Court Rule 137” followed by the attorney’s name, firm, or organization name (if any), business address, and phone number. This notation does not constitute either a general or limited appearance by the attorney. An attorney providing assistance may rely on the self-represented person’s representation of facts without further investigation by the attorney, unless the attorney knows that such representations are false.

Adopted June 19, 1989, effective August 1, 1989; amended December 17, 1993, effective February 1, 1994.

Committee Comments

(August 1, 1989)

The Supreme Court has adopted Rule 137, effective August 1, 1989. Rule 137 will require all pleadings and papers to be signed by an attorney of record or by a party, if the party is not represented by an attorney, and (treating such signature as a certification that the paper has been read, that after reasonable inquiry it is well-grounded in fact and law, and that it is not interposed for any improper purpose, etc.) the rule authorizes the trial courts to impose certain sanctions for violations of the rule. Rule 137 preempts all matters sought to be covered by section 2-611 of the Code of Civil Procedure. Unlike section 2—611, Rule 137 allows but does not require the imposition of sanctions. Unlike section 2—611, Rule 137 requires a trial judge who imposes sanctions to set forth with specificity the reasons and basis of any sanction in a separate written order. Unlike section 2—611, Rule 137 does not make special provisions concerning the potential exposure to sanctions of insurance companies that might employ attorneys.

Commentary

(December 17, 1993)

The rule is modified to clarify when motions for sanctions must be filed.

Commentary

(_____, 20__)

Under Illinois Rule of Professional Conduct 1.2(c), attorneys may limit the scope of a representation. Under RPC 1.2(c), this includes providing advice to a party regarding the drafting of a pleading, motion or paper, or reviewing a pleading, motion or paper drafted by a party. Where an attorney substantially prepares a pleading, motion, or other paper for another, the attorney is required to identify the attorney’s involvement. This informs the court that an attorney has provided the party with preparation assistance.

The notation requirement does not apply in circumstances where the attorney assistance is not substantial. For example, an attorney who advises a caller to a legal aid telephone hotline regarding the completion of a form pleading, motion or paper is not required to identify himself or herself or add the notation. Likewise, a volunteer attorney providing general information (but not individualized advice) to a group of pro se litigants at a pro bono clinic is not required to add the identifying information or notation to the pleadings, motions or papers completed during or following the clinic. Requiring the notation under such circumstances could cause burden and delay and runs counter to the intent of the rule.

Attorneys are not required to sign the documents they have helped prepare, and attorneys may rely on the representation of facts by the pro se litigant. The certification requirements in Rule 137 are inapplicable under these circumstances.

APPENDIX 4

Proposed Amendment to

Illinois Rules of Professional Conduct 4.2

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate about the subject 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 a court order.

(b) An otherwise unrepresented person to whom limited representation is provided under Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been served with a Notice of Limited Appearance pursuant to substantive procedural rules or provided with other written notice identifying a time period during which all communications must be with counsel.

Adopted July 1, 2009, effective January 1, 2010; amended _____, 20____, effective immediately.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer

is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] The prohibition on communicating with a represented party raises concerns when a person is being represented on a limited basis under RPC 1.2(c). In the absence of objective and clear guidelines, the potential for confusion may result in unintentional communications in violation of the Rule. Accordingly, "knowledge" of the limited scope representation is deemed to be triggered solely by the receipt of a proper Notice of Limited Appearance under Supreme Court Rule 13 or some other written instrument specifically identifying the court proceeding or issue on which the person is being

represented and a specific time frame during which all communications with the person are prohibited. Further, the scope of the written instrument is to be narrowly and strictly construed. Communications on any issue or matter during the time frame identified in the written instrument are prohibited. A person is not considered to be represented under this rule on the basis of a pleading, motion, or paper that contains the notation “Substantially prepared with assistance of counsel under Supreme Court Rule 137.”

[10] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer’s communications are subject to Rule 4.3.

Adopted July 1, 2009, effective January 1, 2010; amended _____,
20 _____, effective immediately.