

PPAC Subcommittee on Limited Scope Representation

Phase I: Feasibility Study and Recommendations August 2011

**Planning and Policy Advisory Committee (PPAC)
of the
Wisconsin Supreme Court**

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PPAC Limited Scope Representation Subcommittee 2010 - 2011

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I. Introduction

Self-represented litigants have been a priority of the Wisconsin Court System for nearly a decade. The court system has implemented several initiatives to provide self-represented litigants access to justice and effectively manage internal resources. Initiatives include the development of statewide pro se forms, judicial education and training programs, a partnership with the public library system, as well as other resources on the state courts Web site at <http://wicourts.gov/>. The number of self-represented litigants is rising and courts expect the trend to continue in the future years. The increasing population of self-represented litigants places an added burden on judges, court staff, and court processes beyond those resources that currently exist.

Limited scope representation allows clients and attorneys to enter into an agreement where the attorney does some work for a particular case but does not take on the entire case. This is also called “unbundling of legal services” and “discrete task representation.” Wisconsin Rules of Professional Conduct for Attorneys authorize limited scope representation. Wisconsin Supreme Court Rule (SCR) 20:1.2(c) provides “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Typically limited scope representation occurs in one of three forms:

- The attorney provides advice to the client in an office setting;
- The attorney conducts some form of document preparation for the client (a brief, motion or perhaps financial information for the Marital Settlement Agreement); or
- The attorney provides limited representation of the client in a court proceeding.

From a pro se point of view limited scope representation would allow otherwise self-represented litigants who cannot afford full legal representation to be afforded some representation possibly at the most important part of an individual case. Limited scope representation has the potential to improve court efficiency and effectiveness in that it is anticipated that a pro se litigant would come to court better prepared having benefitted from the services of the attorney and relying less upon court staff. Examining this issue would be a collaborative process of the court, state bar, private bar, the public and litigants to develop the best approach to support this process.

II. Background and Research

Self-represented litigants have been identified as a top priority in the Planning and Policy Advisory Committee’s (PPAC) biennial report entitled *Critical Issues: Planning Priorities for the Wisconsin Court System* for the past four planning cycles (2004-06, 2006-08, 2008-10, 2010-12). Critical issues are identified and prioritized through a survey of internal and external stakeholders including the general public. The Supreme Court and Director of State Courts use this information in the development of budget recommendations and setting priorities.

The topic of limited scope representation was introduced at the January 2010 PPAC meeting and further discussed at the March 2010 meeting. Ms. Ann Zimmerman, State Pro Se Coordinator, introduced a proposal to create a subcommittee to focus upon the practice of limited scope

representation. Based upon the proposal and by recommendation of PPAC, the Subcommittee on Limited Scope Representation was created in March 2010. Work of the subcommittee was split into two phases. In the first phase, the goal was to conduct a feasibility study to determine appropriate programming or initiatives for implementation in Wisconsin. Specific components of the feasibility study as outlined in the “Revised Proposal to Form PPAC Subcommittee on Limited Scope Representation” included:

- Identification of efforts currently underway both nationally and locally;
- Review of key elements in successful program models for potential replication in Wisconsin;
- Review of existing resources within Wisconsin to identify gaps or duplication of efforts; and
- Identification of potential collaborations with the State Bar of Wisconsin, Wisconsin Access to Justice Commission, Milwaukee County, and the Tenth Judicial District Self-Represented Litigant Committee and how their efforts fit into the statewide strategy.

PPAC authorized up to one year for the Subcommittee on Limited Scope Representation feasibility study. Upon the completion of the feasibility study, Phase II would include detailed recommendations for implementing limited scope representation programming in Wisconsin.

Subcommittee Activities

Subcommittee chairpersons and subcommittee members were appointed based upon recommendations from Chief Justice Abrahamson and the Statewide Pro Se Coordinator. Members represent stakeholders both internal and external to the court system and bring a significant amount of knowledge about both self-represented litigants and the court system. The subcommittee began meeting in September 2010 and held its last meeting in June 2011. As the subcommittee’s work was only expected to last one year, it conducted a lot of research outside of the meeting room. The subcommittee began its work reviewing research and publications from the American Bar Association (ABA) and the State Bar of Wisconsin, the ABA Model Rules of Professional Conduct and procedural and ethics rules adopted in other states, and reports and program materials from court systems around the country including Massachusetts and California. Early on it was determined that the exploration of limited scope representation in Wisconsin should include not only the review of programs and materials but also procedural and ethics rules, attorney practices and court forms from other states. Specifically the subcommittee reviewed rules related to topical areas such as informed consent, ghostwriting, communication between parties and the court and the effect limited scope representation may have upon malpractice insurance. This subcommittee did not include the areas of criminal, juvenile, and administrative law in the scope of this study of limited scope representation.

Subcommittee members Mr. Jeff Brown, Ms. Mary Wolverton, and Ms. Ann Zimmerman attended a meeting of State Bar Section Leaders in January 21, 2011 to communicate the Limited Scope Subcommittee’s goals and to summarize the work done to date. Each section was encouraged to consider where and if limited scope representation will impact their areas and encouraged to contact subcommittee members or staff should there be any questions or comments. Ms. Darcy McManus subsequently attended a meeting of the Family Law Section

Board in April 2011 to further discuss the work of the Limited Scope Subcommittee. Board members provided input about ghostwriting, ethical issues, malpractice concerns, and communication about when limited scope representation begins and ends.

Collaboration with the Judicial Council

Judge Daniel Anderson, Court of Appeals District II and Judge Rick Sankovitz, Milwaukee County Circuit Court requested that the Judicial Council study possible amendments to the Rules of Civil Procedure and Rules of Appellate Procedure to address ghostwriting. The Judicial Council accepted this project in January 2010 and the Appellate Procedure Committee began identifying and studying issues related to limited scope representation and ghostwriting at the appellate level. The committee began its work around the same time as the PPAC Subcommittee on Limited Scope Representation began its feasibility study. In an attempt to streamline and not duplicate efforts, the subcommittee invited Appellate Procedure Committee Co-Chair Beth Hanan and Judicial Council staff attorney April Southwick to give a presentation about the Appellate Procedure Committee's scope and discuss a potential coordination of efforts. The Limited Scope Subcommittee asked the Appellate Procedure Committee to specifically provide a recommendation about ghostwriting at the appellate level. Due to the timing of this report, the Judicial Council did not have adequate time to allow for a formal recommendation to be included in this report. At its June meeting the Judicial Council indicated an interest in revisiting the issue of ghostwriting, at both the trial and appellate court level, when it reconvenes in September 2011.

Judicial Surveys

The subcommittee determined that it was necessary to have information from circuit court judges, administrative law judges, and court commissioners about limited scope representation in order to better guide its work and to assist in developing recommendations. Input from these stakeholders would help guide the subcommittee towards additional resources, assist with the identification of barriers, gauge the frequency with which these judicial officers see pro se litigants, gauge the frequency with which they are seeing limited scope representation, and to further understand their perceptions of limited scope representation and its appropriate uses.

Judges were contacted electronically through the Director of State Courts Office and court commissioners were contacted electronically through the ten district court administrators. One hundred and fifty responses were received. Ninety-four were from judges and 56 were from court commissioners.

Limited Scope Representation Circuit Court Proceedings Survey Question #7

In each of the following case types, in approximately what percentage of cases have you seen limited scope representation in the past year? Please include in your estimate those who have submitted ghostwritten pleadings.

Type	No LSR Seen	1%-10% of cases	More than 10% of cases
Civil	31%	35%	9%
Family	18%	30%	30%
Small Claims	32%	34%	9%
Criminal	41%	30%	5%
Juvenile	57%	6%	4%
Probate	41%	17%	8%

Forty-one percent of court commissioners responded that they see at least one pro se party in 61%-80% of their cases. Only 10% of judges see at least one pro se litigant in that same percentage of cases. Seventy-one percent of all respondents said the number of pro se parties has increased since they took judicial office while 29% said the number has remained stable.

In cases in which limited scope representation was seen in the last year both judges and commissioners report ghostwriting was the most common form, with 68% of judges and 42% of commissioners indicating they had seen it. Select court appearances was next with 33% of judges and 34% of commissioners reporting having seen it. Judges reported seeing counseling about rules and strategy significantly more than did commissioners. The majority of respondents think ghostwriting is the form of limited scope representation that works best for civil, family, small claims, and probate cases.

Respondents were split as to whether limited scope representation produces a higher quality of written submissions or better-informed litigants. Just over one-third (34%) of judges and court commissioners think limited scope representation has improved case presentation at hearings while 50% are unsure. Overall 62% feel limited scope representation should be used more and 21% feel it should be used less. Of those who have seen limited scope representation in family cases, 69% feel it should be used more and nearly 20% feel it should be used less. Judges and commissioners agree that limited scope representation has not improved efficiency or fairness through a reduction of the number of motions for rehearing (75%), increased cooperation with GAL's (74%), or an increase in the facilitated issuance of orders or facilitated the initiation of appeals (88%). At the same time both judges and commissioners felt limited scope representation had improved the efficiency of hearings (41%) and a reduced need for help from court staff (46%).

Limited Scope Representation Circuit Court Proceedings Survey Question #12

<i>What procedural or ethical rules would you like to see enacted with respect to the following types of limited scope representation?</i>	<i>Response Percent</i>
Disclosure of attorney's involvement if ghostwriting?	71%
Disclosure of specific attorney's name if ghostwriting?	57%
Filing of notice of limited appearance?	77%
Filing of notice describing scope of attorney's limited representation?	78%
Filing of notice of termination of limited scope representation?	65%
Communication with represented parties?	42%
Service on limited scope representation attorney?	27%
Extent/nature of client consent?	58%

The survey provided an opportunity for judges and commissioners to submit additional comments and three general themes emerged. The first was that clients do not understand what is in their ghostwritten documents, which makes it difficult for court officials to ask questions or address problems that arise during a hearing. Second clients do not understand the true scope of the representation or there is a lack of clarity between the client and the attorney as to the scope. And finally, clients using limited scope representation are misleading themselves about their ability to represent themselves.

Administrative law judges were contacted electronically through the Department of Administration and the Wisconsin State Attorneys Association. There are between 100 and 115 administrative law judges in Wisconsin. Forty-one completed surveys were received resulting in a 36% response rate. Ninety-four percent of respondents reported having pro se litigants appear before them and 51% said that more than one-half of their proceedings had at least one pro se party. Even with this large number of pro se litigants, 82% of administrative law judges said the number of pro se litigants has remained the same since they started. Sixty-six percent of administrative law judges who responded have seen some form of limited scope representation including ghostwritten pleadings. At the same time, respondents reported seeing limited scope representation in less than 10% of their cases. These results contributed to the subcommittee's conclusion to remove administrative law from the scope of its study and recommendations.

The survey results confirm that limited scope representation is taking place in the Wisconsin court system in the forms of ghostwriting, appearance at select court appearances, and counseling about rules and strategies. Results also confirm that respondents would like there to be rules established to better communicate when limited scope representation occurs and to support an expanded use of ghostwriting particularly in family cases.

Related Court System Activities

Because the area of self-represented litigants has been a priority of the court system for an extended period of time, there are many ongoing and previous initiatives that have been undertaken. These initiatives served as a foundation to initiate research of other tools and programs, such as limited scope representation, to assist self-represented litigants. Below is a brief summary of some of the key initiatives focused upon self-represented litigants in the court system.

Chief Justice Abrahamson developed a task force to establish a statewide assistance program for self-represented family court litigants in 2004. As a result of this effort, 35 plain English forms with instructions were developed for family court actions. In March 2006, the court system launched a self-help family court Web site. This Web site guides self-represented litigants through a series of questions and fills in required forms based upon the answers provided. Another feature of the Web site allows for each of Wisconsin's 72 counties to tailor the basic guide to legal separation and divorce. In November 2007, a pro se small claims committee released a package of forms and instructional guides for self-represented litigants. Additional efforts in this area include name change and a basic guide to name change.

There are ongoing efforts to provide judges with educational opportunities on self-represented litigants. Multiple presentations on this topic have been made at Family Law Seminars, the annual Judicial Conference, and court commissioner conferences.

Internally resources are available to court staff teaching them how to present information about available pro se resources and about the differences between legal advice and procedural information. An interactive learning program was developed to train court staff how to provide appropriate assistance under Wisconsin Supreme Court Rule 70.61, Assistance to Court Users.

To foster communication between local courts and public libraries and in an effort to better meet the legal service needs of self-represented litigants, the court system launched a pilot project in 2007. There are two components to the partnership. The first is a one day training session aimed at educating the public library staff about self-represented litigants and current court related services and information available to provide assistance. The second is a follow up training where court and library staffs meet to foster relationship and provide any additional information on court resources.

III. Recommendations

In assessing the feasibility of developing a statewide limited scope representation program, the subcommittee reviewed the best practices and rules of other jurisdictions. The ABA Standing Committee on the Delivery of Legal Services compiled a list of the states that have adopted ABA Model Rule of Professional Conduct 1.2(c).¹ Forty one states have authorized limited scope representation through their attorney ethics rules. These states have adopted the ABA Model Rule of Professional Conduct 1.2(c) or a substantially similar rule that permits a lawyer to represent a client on a limited basis as long as the limitation is reasonable under the circumstances and the client gives informed consent to the representation.² In addition, at least nineteen states have adopted rules related to limited scope representation that address limited appearances and withdrawal, service, communication, and ghostwriting.³ In proposing these additional rule amendments, committees reported that existing procedural and ethics rules may not support limited scope representation and may discourage its practice.⁴

Several reports issued by statewide limited scope committees noted that the increase in self-representation in the courts has a significant impact on access to justice, case management, court efficiency, and public confidence in the courts. These committees viewed limited scope representation as an effective means of expanding access to legal representation for self-represented litigants and promoting the efficient administration of justice.⁵ The reports “express a common need to address the changes in the delivery of legal services, most often with rules that give a greater certainty to the process.”⁶

¹ See the spreadsheet of states that have adopted ABA Model Rule of Professional Conduct 1.2(c) at http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/aba_model_rule_1_2c_authcheckdam.authcheckdam.pdf (last updated April 15, 2011).

² ABA Model Rules of Prof'l Conduct R. 1.2(c) (2002).

³ See the list of states and court rules at http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html.

⁴ See Illinois Joint Task Force on Limited Scope Legal Representation, Limited Scope Legal Representation: Final Report, Findings & Recommendations 5 (May 19, 2011), available at <http://www.isba.org/committees/limitedscopelegalrepresentation> [hereinafter Illinois Report]; Supreme Court of Missouri & Missouri Bar, Pro Se Litigation Interim Feasibility Committee Report, 7,10, 15 (2004), available at <http://www.courts.mo.gov/file/FINALReportUSE%203.pdf> [hereinafter Missouri Report].

⁵ See Massachusetts Supreme Judicial Court Steering Committee on Self-Represented Litigants, Addressing the Needs of Self-Represented Litigants in our Courts, Final Report and Recommendations, 12 (Nov. 2008), available at <http://www.mass.gov/courts/sjc/report-self-rep-litigants.html> ("Limited assistance representation . . . is an extremely helpful innovation for several reasons: (1) it allows legal aid and pro bono lawyers to assist more people; (2) it allows people who cannot afford full service representation but who have some funds to pay a lawyer to obtain meaningful assistance with their legal problems; and (3) it has a positive impact on the operations of the courts."); Missouri Report, 4 (Commission "recommendations are not only intended to assist access for the pro se litigant, but they are also intended to reduce the inefficiencies and pressure that the existing unrepresented and uninformed pro se litigant places on the already thinly stretched court system and court staff resources."); Illinois Report, 14 ("[Limited scope representation] 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 individual assistance to litigants; and potentially contributing to the more efficient use of the courts' time via better prepared litigants.")

⁶ Standing Comm. on the Delivery of Legal Services, An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants, 7 (November 2009) [hereinafter ABA Analysis].

The subcommittee recommends that Phase II of this project be initiated to further study and draft proposed amendments to the Rules of Civil and Appellate Procedure and Rules of Professional Conduct for Attorneys to insure that limited scope representation services support the best interests of the client, both procedurally and ethically. The subcommittee emphasized that new rules and rule amendments must be consistent between the rules of civil and appellate procedure and rules of professional conduct for attorneys.

The subcommittee proposes that PPAC create a subcommittee to (1) draft proposed amendments to ethics and procedural rules addressing limited appearances and withdrawal, service, communication, and ghostwriting⁷ that will provide further guidance to lawyers who offer limited scope representation in our courts; (2) collaborate with justice system stakeholders to identify educational programs and training materials for judges, court staff, and lawyers; (3) develop forms, such as limited scope representation agreements, notice of limited appearance, and notice of withdrawal, to assist lawyers who provide limited scope representation; and (4) develop strategies for statewide implementation of limited scope representation.

Rules Governing Limited Scope Representation

A. Scope

1. Expanding Ethics Rule

In 2007, the Wisconsin Supreme Court amended and adopted several Rules of Professional Conduct for Attorneys under Supreme Court Rule Chapter 20.⁸ The new rules permit limited scope representation. Wisconsin SCR 20:1.2(c), which mirrors the ABA Model Rule of Professional Conduct 1.2(c), provides that limited representation is allowed if the limitation is reasonable and the client gives informed consent.

Two standards govern the limits on the scope of legal services: (1) the limitation must be reasonable, and (2) the client must give informed consent to the representation. Our supreme court rules governing professional conduct for attorneys define “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁹

An ABA Comment¹⁰ to SCR 20:1.2 discusses the reasonableness standard in the context of a limited representation:

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If,

⁷ These policy issues were set forth in a white paper issued by the ABA Standing Committee on the Delivery of Legal Services. *Id.*

⁸ Wisconsin Supreme Court Order in Rule Petition 04-07, In the Matter of the Petition for Amendment to Supreme Court Chapter 20 – Rules of Professional Conduct for Attorneys, 2007 WI 4 (Jan. 5, 2007).

⁹ SCR 20:1.0(f) (the rule is the same as ABA Model Rules of Prof'l Conduct R. 1.0(n) (2003)).

¹⁰ SCR 20:1.2 cmt. 7.

for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyers and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

Comments to our Supreme Court Rules are not binding but they may be used to determine the rule's application.¹¹

The lawyer must be able to provide competent representation within the limits on the representation.¹² Current rules and comments illustrate the relationship between competency and the reasonableness of the limitation on the representation. SCR 20:1.1 states "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably *necessary for the representation.*"¹³ A comment to the rule further explains that a lawyer must make "inquiry into the analysis of the factual and legal elements of the problem."¹⁴ An agreement on the scope of representation may limit the matters for which the lawyer is responsible;¹⁵ however, a lawyer must still possess the sufficient level of legal knowledge¹⁶ and understanding of the facts¹⁷ for a limitation on representation to be reasonable.¹⁸

The ABA Standing Committee on the Delivery of Legal Services noted the balancing that is necessary in determining whether a limited scope representation is appropriate and compliant with ethical obligations. In a white paper the standing committee suggested that "If, by definition, competent representation necessitates some degree of inquiry and analysis and a lawyer may not limit representation to the extent that the representation exempts the lawyer from competent representation, then the logical conclusion is that a lawyer may not limit representation to the extent that the lawyer is excused from the obligation to conduct inquiry and analysis."¹⁹ The standing committee cited a rule comment in which a court attempted to balance these rules. The Wyoming Supreme Court added the following in a comment to Rule of Professional Conduct for Attorneys at Law 1.1 to address competence in limited representation: "A lawyer and a client may agree to Rule 1.2(c) or Rule 6.5 to limit the scope of the

¹¹ Trinity Petroleum, Inc. v. Scott Oil Co., 296 Wis.2d 666, 678-79, 724 N.W.2d 259, 265, 2006 WI App 219.

¹² See ABA Sec. Litig., Handbook on LSR Legal Assistance: A Report of the Modest Means Task Force 93 (2003) [hereinafter ABA Handbook]; Timothy J. Pierce, *New Rules of Conduct for Limiting Representation*, 80 Wis. Law. 22, 23 (March 2007).

¹³ SCR 20:1.1 (emphasis added).

¹⁴ SCR 20:1.1 cmt. 7.

¹⁵ SCR 20:1.1 cmt. 5.

¹⁶ SCR 20:1.1.

¹⁷ SCR 20:1.1 cmt. 5 ("A sufficient understanding of the facts includes *inquiry into and analysis of the factual and legal elements of the problem.*") (Emphasis added).

¹⁸ SCR 20:1.1 and comments; Pierce, supra note 12, at 23.

¹⁹ ABA Analysis, supra note 6, at 11.

representation. In such circumstances, competence means the legal knowledge, skill, thoroughness and preparation reasonably necessary for the limited representation.”²⁰

This subcommittee encourages the expansion of limited scope representation services and the balancing of this growth with the need to insure lawyers and clients understand how this arrangement should operate. This recognition led this subcommittee to conclude that rule amendments and education programs are critical to the successful implementation of limited scope representation.

The subcommittee suggests building on the guidance provided in these comments and rules of other jurisdictions and recommends SCR 20:1.2(c) be amended as follows:

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(1) The client’s informed consent must be confirmed in writing unless:

- (i) the representation of the client consists solely of telephone consultation;
- (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer’s representation consists solely of providing information and advice or the preparation of court-approved legal forms; or
- (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

- (i) the representation is limited to the attorney and the services described in the writing; and
- (ii) the attorney does not represent the client generally or in matters other than those identified in the writing.

The proposed additions of (1) and (2) mirror Montana's Rule of Professional Conduct 1.2(c) (eff. Oct. 1, 2011) and Iowa's Rule of Professional Conduct 32:1.2(c).

The subcommittee also recommends that a rule of civil procedure should be proposed that is substantially similar to Montana's Rule of Civil Procedure 4.2. (See Appendix #13). The rule acknowledges limited scope representation and references the ethics rule authorizing limited scope representation.

2. Written agreement.

Although SCR 20:1.2(c) does not require that a client’s informed consent to limited scope representation be in writing, the subcommittee recommends that the scope of a limited representation should be defined in a written agreement with the client. In fact some limited scope representation will require written confirmation where it is reasonably foreseeable that the

²⁰ Wyo. R. of Prof'l Conduct 1.1 cmt. 5.

representation's total cost will exceed \$1,000.²¹ The amendment proposed to SCR 1.2(c) in section A.1.a. above, incorporates the requirement that the client's informed consent be in writing.

3. Agreement forms

The subcommittee proposes that agreement forms be developed as tools for lawyers providing limited scope representation. The subcommittee suggests that agreement forms similar to forms from Wyoming and Missouri be created. (See Appendix #4). In order to alert lawyers to the forms, the subcommittee recommends the addition of a comment to SCR 20:1.5(b)(1), Fees, that provides: An agreement in one of the following formats will be adequate to document limited representation pursuant to SCR 20:1.2(c).

B. Notice of Limited Appearance and Notice of Withdrawal from Limited Scope Representation

In order to advance limited scope representation, the subcommittee concluded that rules of civil procedure and professional conduct for attorneys should address limited appearances and withdrawal. The subcommittee recommends that lawyers be required to file a notice of limited appearance when providing limited assistance and be required to file a notice of withdrawal when they have completed the agreed upon representation. This recommendation is consistent with the recommendation set forth in the ABA Handbook on Limited Scope Legal Assistance Handbook.²²

The subcommittee's proposed change in procedure is not intended to imply that a lawyer is required to file a notice of general appearance where the lawyer is providing full representation. The filing of a notice of limited appearance would be required in limited scope representation situations only. The subcommittee's perspective is that the signing of a pleading constitutes an appearance but assisting in the drafting of a document filed with the court does not constitute an appearance. The notice should identify the court event(s) to which the limited appearance relates. Upon the completion of the representation within the scope of a limited appearance, a lawyer would withdraw by filing a notice of withdrawal of limited appearance.

With regard to the rules of professional conduct, the subcommittee acknowledged that any amendment regarding withdrawal should consider SCR 20:1.16, Declining or terminating representation. The rule, which mirrors Model Rule 1.16(c), provides that "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." ABA Comment [8] to this rule states "A lawyer may withdraw if the client refuses to abide by the terms of an agreement

²¹ SCR 20:1.5(b)(1) (See Appendix #6); see Pierce, *supra* note 12, at 24-25.

²² ABA Handbook, *supra* note 12, at 141-42 ("Allow lawyers to make limited appearances in courts, and administrative agencies when they provide limited representation to clients, and to withdraw from that representation when they have completed the promised representation, after giving the client notice and a chance to be heard if the client objects.").

relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation." The subcommittee noted further discussion may be necessary regarding the situation where a court may order a lawyer to continue representation where such representation is the subject of a limited scope representation agreement. The subcommittee acknowledged that education or training materials may provide further guidance.

With regard to the rules of civil procedure, the subcommittee proposes rules substantially similar to those adopted in Montana and Iowa for limited appearance and withdrawal. (See Appendices #7 and #8). The subcommittee also notes the Milwaukee County Circuit Court (First Judicial District) has adopted local rule 5.6 on appearances. (See Appendix #9). The subcommittee suggests that rules on a limited appearance and withdrawal be created in section 802.045 of the Wisconsin statutes. This new statutory section could be placed between section 802.04, which addresses the form of pleadings, and section 802.05, which addresses the signing of pleadings.

C. Filing and Service

The subcommittee recommends a rule amendment that would require notice to both the party and the lawyer during the period of limited scope representation. The subcommittee proposes language similar to Montana's Rule of Civil Procedure 4.2, (see Appendix #13), could be incorporated into Wis. Stat. § 801.14. (See Appendix #10). Montana's rule 4.2 states "Service on an attorney who has made a limited appearance for a party shall be valid only in connection with the specific proceedings for which the attorney appeared, including any hearing or trial at which the attorney appeared and any subsequent motions or presentation of orders." The subcommittee also notes New Hampshire's Rule of Civil Procedure 3(b) on service may provide guidance in drafting an amendment to the service statute. This rule, however, does not link the appearance to the rules of professional conduct. (See Appendix #11).

D. Communications between Counsel and Party

Wisconsin Supreme Court Rules 4.2 and 4.3 govern communications of parties and counsel. Rule 4.2 prohibits a lawyer from communicating directly with another party represented by a lawyer unless consent has been given from the opposing lawyer or a court has authorized the contact. Similar to the ABA Model Rule, SCR 20:4.2, Communication with person represented by counsel, provides "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." ABA Comment [8] to this supreme court rule provides, "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."²³

²³ SCR 20:4.2 cmt. 8.

SCR 20:4.3 addresses communications with an unrepresented person and provides “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”²⁴ The Wisconsin Committee Comment explains “This Wisconsin Supreme Court Rule differs from the Model Rule in requiring lawyers to inform unrepresented persons of the lawyer's role in the matter, whereas the Model Rule requires only that the lawyer not state or imply that the lawyer is disinterested.” In comparison, Model ABA Rule 4.3 states “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

In a limited scope representation situation, communications can be confusing and the application of other ethics rules may be ambiguous. Our rules do not appear to address communications with a self represented litigant who is receiving limited representation from a lawyer. It is unclear how SCR 20:4.2 applies to limited scope representation. The subcommittee agreed that it would be appropriate to revisit a rule amendment that requires a lawyer providing limited scope representation to inform opposing counsel whether the client should be deemed unrepresented for purposes of SCR 20:4.2.²⁵ On February 15, 2005, the State Bar of Wisconsin filed a response to rule petition 04-07, the Ethics 2000 petition seeking to amend SCR Chapter 20. The State Bar proposed the following amendment to SCR 20:1.2 that would have required notice to courts and other counsel of limited scope representations:

Proposed new section to SCR 20:1.2(d): A lawyer who appears in court on a limited basis for a client who is otherwise unrepresented must give notice in writing or on the record to the court and all other parties of the tasks for which the lawyer is engaged and must promptly notify the court and all other parties in writing or on the record of the termination of the lawyer's appearance in the case upon the completion of such tasks.

The supreme court did not adopt this proposed amendment.²⁶

The subcommittee advises that the ethical aspects of dealing with an unrepresented party or party represented by a lawyer under a limited scope representation agreement should be addressed through rule amendments. Rules should be proposed that provide guidance regarding whom the

²⁴ SCR 20:4.3 cmt.

²⁵ See Pierce, *supra* note 12, at 25.

²⁶ See the court file in Wisconsin Supreme Court Order in Rule Petition 04-07, *supra* note 8, available in the office of the clerk of the supreme court.

opposing lawyer should contact and serve in a limited scope representation situation. The lawyer providing limited scope assistance should also communicate with the court and the clerk's office regarding whom should receive court notices and orders. The subcommittee recommends that a communications rule should be proposed that is similar Maine's Rule of Professional Conduct 4.2 (subsections (a) and (b) only), (see Appendix #12), and Montana's Rules of Professional Conduct 4.2 and 4.3. (See Appendices #5 and #14).

E. Ghostwriting

Ghostwriting is a practice in which a lawyer assists in preparing pleadings, briefs, or other documents to be signed and filed with a court by a pro se party without disclosing the lawyer's involvement or identity. Courts have taken different approaches to ghostwriting. The common approaches taken by courts to ghostwriting are (1) no disclosure of the lawyer's assistance or identity, (2) disclosure without identifying the lawyer ("document prepared with assistance of an attorney"), (3) disclosure of the lawyer assisting with full contact information. The trend is to allow ghostwriting (no disclosure) or require disclosure without identifying the lawyer.²⁷ The report of the Modest Means Task Force recommended state rules that require no disclosure, or if disclosure is required, it should be anonymous.²⁸

In a formal opinion, *Undisclosed Legal Assistance to Pro Se Litigants*, the ABA Committee on Ethics and Professional Responsibility interpreted Model Rule 1.2(c) to permit ghostwriting by lawyers.²⁹ The committee concluded that "there is no prohibition in the Model Rules of Professional Conduct against *undisclosed* assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct."³⁰ The committee stated that "[l]itigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure."³¹ This opinion superseded a 1978 opinion in which the committee stated that "disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified."³²

Some jurisdictions have focused on the following ethical rules as barriers to ghostwriting.³³ The ABA Model Rule for each is set forth in Appendix 3 for reference.

3.3 Candor toward the tribunal

3.4 Fairness to opposing party and counsel

8.4 Misconduct (fraud and misrepresentation to a court)

²⁷ *ABA Handbook*, *supra* note 12, at 104.

²⁸ *Id.* at 144-45.

²⁹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 446 (2007).

³⁰ *Id.* (emphasis added).

³¹ *Id.*

³² ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978).

³³ Peter M. Cummins, *The Cat-O'-Ten-Tails – Pro Se Litigants Assisted by Ghostwriting Counsel*, For the Defense, Volume 53, Number 4, April 2011, 42 (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 446 (2007)). This article notes that Colorado, Connecticut, Kentucky, and West Virginia concluded their ethics rules do not permit ghostwriting and require disclosure of assistance if an attorney provides assistance to a self-represented litigant.

For example, one jurisdiction noted that its ethics rules allow for limited scope representation, but a lawyer could violate several other ethics rules by failing to disclose his drafting of documents for a client.³⁴

The subcommittee recognizes that ghostwriting may implicate several ethics rules but opined that Wisconsin's Rules of Professional Conduct for Attorneys do not prohibit ghostwriting. The subcommittee discussed the different positions taken by courts and state bar associations on the issue of ghostwriting. As a result, the subcommittee suggests that ghostwriting should be addressed in the Rules of Professional Conduct and Rules of Civil Procedure. The subcommittee recommends a ghostwriting rule that requires disclosure when a legal document is prepared with the assistance of a licensed lawyer but does not require identification of the lawyer who provided assistance.

The subcommittee prefers the Montana's Rule of Civil Procedure 11(b), which does not require the lawyer to assume certification responsibility. "There are different opinions about whether limited-service lawyers are subject to the 'certification' requirement [under Wis. Stat. § 802.05], and whether they must disclose their drafting roles, if all they do is draft a pleading for an otherwise pro se litigant who then files it."³⁵ Wis. Stat. § 802.05(2), Representations to court, states "By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, a lawyer or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following" The subcommittee recommends a modified version of Montana's rule:

An attorney may help to draft a pleading, motion or document filed by the otherwise self-represented person, and the attorney need not sign that pleading, motion or document. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false, or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts. Any such document must contain the statement 'This document was prepared with the assistance of a licensed attorney.'

The subcommittee recommends the inclusion of a ghostwriting rule in Wis. Stat. § 802.05.

The subcommittee noted that Wis. Stat. section 809.84 adopts the rules of civil procedure for appeals³⁶ but suggests that amendments to the rules of appellate procedure also are necessary to accommodate ghostwriting. The subcommittee sought the recommendations of the Wisconsin

³⁴ W. Va. State Bar Lawyer Disciplinary Board, Legal Ethics Op. 2010-01 (November 8, 2010); see Cummins, *supra* note 33, at 42-43.

³⁵ *ABA Handbook*, *supra* note 12, at 98.

³⁶ Wis. Stat. § 809.84 ("An appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result.").

Judicial Council. As noted in section II of this report, the Judicial Council may revisit the issue of ghostwriting when it reconvenes this fall.

The subcommittee proposes that limited scope representation, in the course of an appeal, could be addressed by amending, as follows, the rule governing the content of an appellant's brief:

Wis. Stat. § 809.19(h): The appellant shall file a brief within 40 days of the filing the court of the record on appeal. The brief must contain . . . The signature of the attorney who files the brief, or, if the party who files the brief is not represented by an attorney, the signature of the party. If the brief was prepared with the drafting assistance of an attorney who contracted with the party to limit the scope of representation pursuant to SCR 20:1.2(c), the attorney must advise the party that the brief must contain a statement that is was prepared with the assistance of a licensed attorney.

In addition, the rule governing the certification for an appendix, rule 809.19(2), could be amended to read: "An appellant's counsel, other than an attorney who contracted with the party to limit the scope representation pursuant to SCR 20:1.2(c), shall append to the appendix a signed certification that the appendix meets the content requirements of par. (a) in the following form" The subcommittee suggests other appellate rules governing petitions and motions may need to be amended in a similar manner to accommodate limited scope representation.

F. Other Rules

The subcommittee discussed the differing types of limited scope assistance that can be provided in the areas of family law, small claims, probate, and guardianships. A lawyer offering limited scope representation may provide counseling to a client on court procedures or legal issues, may appear in court on specific issues, or may prepare or review documents to be filed with the court. The subcommittee concluded that no further rule amendments were necessary in the areas of family and small claims law. The applicable statute chapters adopt the rules of civil procedure. The subcommittee proposes no further amendments are necessary in statutes governing guardianships. The subcommittee recommends limited scope representation should not be expanded into the areas of juvenile, criminal, probate, and administrative law at this time.

1. Family

The subcommittee proposed that no amendments are necessary under Chapter 767 of the Wisconsin Statutes. The rule adopts the rules of civil procedure. Section 767.201 of the Wisconsin Statutes states:

Civil procedure generally governs. Except as otherwise provided in the statutes, chs.801 to 847 govern procedure and practice in an action affecting the family. Except as provided in this chapter, chs. 801 and 802 apply to the content and form of the pleadings and summons in an action affecting the family.

2. Small Claims

Chapter 799 of the Wisconsin Statutes also adopts the rules of civil procedure. Section 799.04 states:

Relation of this chapter to other procedural rules. (1) General. Except as otherwise provided in this chapter, the general rules of practice and procedure in chs. 750 to 758 and 801 to 847 shall apply to actions and proceedings under this chapter.

3. Guardianship

Section 54.40 of the Wisconsin Statutes requires that the guardian ad litem shall be an attorney admitted to practice in Wisconsin. Wis. Stat. § 54.40(2). The subcommittee proposes that no further amendments are necessary to accommodate limited scope representation in this area of the law.

4. Criminal

Similarly, the criminal code adopts the rules of civil procedure under Chapter 972 of the Wisconsin Statutes. Section 972.11(1) of the Wisconsin Statutes states:

Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction.

5. Probate

The subcommittee does not recommend expanding limited scope representation into the areas of probate law. A lawyer is required to appear and represent the party in some probate proceedings. See State ex rel. Baker v. County Court, 29 Wis.2d 1, 138 N.W.2d 162 (1965), cited in Jadair, Inc. v. U.S. Fire Ins. Co., 209 Wis.2d 187, 562 N.W.2d 401, 408-09 (1997) (court refused presentation of certain papers by nonlawyer executor because constituted unauthorized practice of law). Section 879.15 of the Wisconsin Statutes states:

Appearance, how made. In any proceeding in the court, appearances shall be made as follows:

(1) A minor or individual adjudicated incompetent shall appear by a guardian ad litem or by the guardian or his or her estate, who may appear by an attorney, or by another person under the doctrine of virtual representation as provided in s. 879.23(5);

(2) A personal representative shall appear by attorney; and

(3) Every other person shall appear in person, by attorney or, if in the military service by an attorney-in-fact.

Education and Training Opportunities

Training and education are critical to the statewide implementation and expansion of limited scope representation. The topics and issues to be addressed through education and training will be dependent upon the work of the Phase II subcommittee. It is strongly suggested that any

educational programming be developed in collaboration with other justice system stakeholders including the State Bar of Wisconsin and the Access to Justice Commission. The subcommittee further suggests that no rule require a lawyer to complete training before providing limited scope representation as such a requirement may serve as a barrier to improving access to justice and may burden administrators monitoring educational compliance.

Form Development

The subcommittee proposes the development of forms to support limited scope representation. At a minimum, the subcommittee recommends forms should be created for the following documents:

1. Notice of Limited Appearance
2. Notice of Withdrawal of Limited Appearance
3. Limited Scope Representation Agreement between a lawyer and the client

IV. Listing of Appendix Items

1. PPAC Subcommittee on Limited Scope Representation Meeting Minutes
2. Judge Colas' memorandum and survey results of Circuit Court Judges and Commissioners; survey of Administrative Law Judges
3. ABA Model Rules of Prof'l Responsibility R. 3.3, Candor Toward the Tribunal
ABA Model Rules of Prof'l Responsibility R. 3.4, Fairness to Opposing Party and Counsel
ABA Model Rules of Prof'l Responsibility R. 8.4, Misconduct
4. Agreement forms from Wyoming and Missouri
5. Montana Rule of Professional Conduct 4.2, Communication with Person Represented by Counsel
6. Wisconsin Supreme Court Rule 20:1.5(b)(1)
7. Montana Rule of Civil Procedure 4.3, Notice of Limited Appearance and Withdrawal as Attorney
8. Iowa Rule of Civil Procedure 1.404(3), Limited appearance.
Iowa Rule of Civil Procedure 1.404(4), Termination of limited appearance.
9. Milwaukee County Local Rule 5.6, Appearance of Counsel
10. Wis. Stat. § 801.14, Service and Filing of Pleadings and Other Papers
11. New Hampshire Rule of Civil Procedure 3(b), Filing and Service
12. Maine Rule of Professional Conduct 4.2, Communication with Person Represented by Counsel and Limited Representations
13. Montana Rule of Civil Procedure 4.2, Limited Representation Permitted – Process
14. Montana Rule of Professional Conduct 4.3, Dealing with Unrepresented Person

V. Resources

ABA Standing Comm. on the Delivery of Legal Services, An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants (Nov. 2009) at

http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf.

ABA Sec. Litig., Handbook on LSR Legal Assistance: A Report of the Modest Means Task Force (2003) at <http://apps.americanbar.org/litigation/taskforces/modest/report.pdf>.

ABA Standing Committee on the Delivery of Legal Services at http://www.americanbar.org/groups/delivery_legal_services.html (Unbundling Resources).

ABA Coalition for Justice, Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary Report issued July 12, 2010).

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-466 (2007). (Ghostwriting)

ABA Standing Comm. on the Delivery of Legal Services, Perspectives on Finding Personal Legal Services: The Results of a Public Opinion Poll (Feb. 2011) at http://www.americanbar.org/content/dam/aba/migrated/2011_build/delivery_legal_services/2011_0228_aba_harris_survey_report.authcheckdam.pdf.

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California Commission on Access to Justice, Family Law Limited Scope Representation - Risk Management Materials, (Jan. 2004), available at <http://www.calbar.ca.gov/AboutUs/CenteronAccessToJustice.aspx>.

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J. Timothy Eaton & David Holtermann, Expanding Access to Justice: Limited Scope Representation is Here, 24 CBA Record 36 (April 2010).

Jona Goldschmidt, In Defense of Ghostwriting, 29 Fordham Urb. L.J. 1145 (2002).

Massachusetts Supreme Judicial Court Steering Committee on Self-Represented Litigants, Addressing the Needs of Self-Represented Litigants in our Courts, (Nov. 2008), available at <http://www.mass.gov/courts/sjc/report-self-rep-litigants.html>.

Supreme Court of Missouri & Missouri Bar, Report of the Special Committee on Limited Scope Representation, (2007), available at <http://www.courts.mo.gov/file/Report%20on%20Limited%20Scope%20Representation.pdf>.

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NCSC link to Unbundling Rules <http://www.ncsc.org/topics/access-and-fairness/self-representation/state-links.aspx?cat=unbundling%20rules>

Timothy J. Pierce, New Rules of Conduct for Limiting Representation, 80 Wis. Law. 22 (March 2007).

State Bar of Wisconsin, Unbundling in Wisconsin Report (2004).

State Bar of Wisconsin Access to Justice Committee, Bridging the Justice Gap: Wisconsin's Unmet Legal Needs Report, (March 2007), *available at* http://www.wisbar.org/am/template.cfm?section=bridging_the_justice_gap.

M. Sue Talia, Summit on the Future of Self-Represented Litigation, Engaging the Private Bar: A Path to Reducing the Need for Self-Represented Litigation Support, 97-104 (2005), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=24>.

Thomas J. Watson, 10 Tips to Unbundle Legal Services, 83 Wis. Law. 18 (March 2010).