

## **RULE AMENDMENTS FOR LIMITED SCOPE REPRESENTATION (LSR)**

### **Issue**

Should the Michigan Court Rules and Michigan Rules of Professional Conduct be revised to provide direction concerning limited scope representation?

RESOLVED, that the State Bar of Michigan recommend amendments to Michigan Court Rules 2.107, 2.117, and 6.001 and Michigan Rules of Professional Conduct 1.0, 1.2, 4.2 and 4.3 to provide direction concerning the advancement of limited scope representation in Michigan.

### **Synopsis**

In limited scope representation (LSR), also referred to as “unbundling,” an attorney provides discrete legal services agreed upon in advance rather than full representation. LSR often involves providing legal advice, coaching, and document preparation for clients who would otherwise proceed entirely without any attorney assistance. With the prior agreement of the party that the representation is limited to these activities only, LSR attorneys also mediate conflicts, negotiate settlements, or make limited appearances in court on behalf of people who would otherwise be proceeding entirely *pro se*. LSR is growing throughout the country. There is compelling evidence from several jurisdictions that limited scope representation can be effective in expanding access to justice to underserved populations. The experience of states with a more developed LSR system teaches that traditional court rules need to be amended to explicitly address aspects of LSR in order to protect clients and provide attorneys with assurance that they will not be held accountable beyond the scope of the limited contracted services. In the absence of court rule changes providing those assurances, enhanced by practice support, training opportunities, judicial education, and integrated referral mechanisms, private practice attorneys have been reluctant to offer LSR in sufficient numbers to meaningfully expand access to justice.

**The proposal asks the Representative Assembly to recommend a package consisting of revisions to three rules of the Michigan Court Rules and four rules of the Michigan Rules of Professional Conduct for adoption by the Michigan Supreme Court, for the purpose of providing better direction to the bench and bar concerning limited scope representation.**

Note: The 21<sup>st</sup> Century Practice Task Force report included a recommendation that the Bar “implement a high-quality, comprehensive limited scope representation system, including guidelines, attorney and client education, rules and commentary, and court forms focusing on civil cases.” Although limited scope representation could be available in some criminal as well as civil matters, this proposal does not extend to criminal representation. The 21st Century Practice Task Force work groups addressing LSR urged that civil matters be prioritized first. Any proposed expansion to criminal matters would be brought back to the Representative Assembly for consideration.

### **Background**

Because LSR requires a much lower level of attorney commitment than full-representation, it is less costly, putting legal assistance within the reach of many low and moderate income individuals. Clients benefit from legal representation in critical areas of a matter, attorneys benefit from having more paying clients, and courts benefit from increased efficiency due to an attorney’s expertise in an otherwise self-represented litigant’s case.

In the absence of a well-developed and accessible LSR system, many persons who cannot afford to hire a lawyer and must represent themselves have no access to legal help. In Michigan and nationally, nonprofit civil legal aid programs turn away more than half of those who seek their assistance due to lack of resources to represent them. Michigan has also seen a rapid and remarkable increase in use of the nonprofit statewide self-help program, Michigan Legal Help, on whose website over 200 sets of court forms are completed each day.

While most jurisdictions simply started with the adoption of the model rule allowing LSR, a version of which now exists in all 50 states, it has become clear that additional rules and supports are essential to provide vital procedural guidance and protections for both attorneys and clients.

Under current rules, some limited scope practices are already available in Michigan. Selected non-litigation practices are allowed under State Bar of Michigan Ethics Op.: RI-347 (April 23, 2010). However, Michigan is **not** among the over 30 states that have gone beyond the model rule to provide additional rules and resources that offer increased clarity and encourage the practice of limited scope representation. The additional guidance that has been developed addresses issues such as obtaining consent and documenting the limited scope agreement, entering limited appearances and withdrawing by notice, whether and how document preparation assistance must be disclosed, who should get service in an LSR context, how to determine whether communication should be directed toward the self-represented litigant (SRL) or the LSR attorney, and the provision of orientation and practical resources for all stakeholders. In addition, supportive components have been developed in many states, including practice support, educational resources, referral mechanisms and integration with self-help resources to help ensure that LSR programs are high quality and easily accessible. The national experience, and the supports and resources available, have assuaged initial fears that malpractice coverage for limited scope representation would not be available, would be too expensive, or that LSR would generate increased claims.

### **The Package Recommended for Adoption**

#### **I. Amendments to Michigan Court Rules 2.107, 2.117, and 6.001**

1. **MCR 2.107** *Proposed new section (B)(1)(e) explains that the LSR attorney who has appeared in the action is entitled to receive papers filed until the limited representation is terminated. The final sentence permits the LSR attorney to ask the Court that he or she not be served. This addresses the case where a client wishes an attorney to sign a court paper, but have no ongoing involvement following its filing.*

#### **Rule 2.107 Service and Filing of Pleadings and Other Papers**

##### **(A) Service; When Required.**

- (1) Unless otherwise stated in this rule, every party who has filed a pleading, an appearance, or a motion must be served with a copy of every paper later filed in the action. A nonparty who has filed a motion or appeared in response to a motion need only be served with papers that relate to that motion.
- (2) Except as provided in MCR 2.603, after a default is entered against a party, further service of papers need not be made on that party unless he or she has filed an appearance or

a written demand for service of papers. However, a pleading that states a new claim for relief against a party in default must be served in the manner provided by MCR 2.105.

(3) If an attorney appears on behalf of a person who has not received a copy of the complaint, a copy of the complaint must be delivered to the attorney on request.

(4) All papers filed on behalf of a defendant must be served on all other defendants not in default.

(B) Service on Attorney or Party.

(1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:

(a) The original service of the summons and complaint must be made on the party as provided by MCR 2.105;

(b) When a contempt proceeding for disobeying a court order is initiated, the notice or order must be personally delivered to the party, unless the court orders otherwise;

(c) After a final judgment or final order has been entered and the time for an appeal of right has passed, papers must be served on the party unless the rule governing the particular postjudgment procedure specifically allows service on the attorney;

(d) The court may order service on the party.

**(e) If an attorney files a notice of limited appearance under MCR 2.117 on behalf of a self-represented party, service of every paper later filed in the action must continue to be made on the party, and must also be made on the limited scope attorney for the duration of the limited appearance. At the request of the limited scope attorney, and if circumstances warrant, the court may order service to be made only on the party.**

(2) If two or more attorneys represent the same party, service of papers on one of the attorneys is sufficient. An attorney who represents more than one party is entitled to service of only one copy of a paper.

(3) If a party prosecutes or defends the action on his or her own behalf, service of papers must be made on the party in the manner provided by subrule (C).

(C) Manner of Service. Service of a copy of a paper on an attorney must be made by delivery or by mailing to the attorney at his or her last known business address or, if the attorney does not have a business address, then to his or her last known residence address. Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings.

(1) Delivery to Attorney. Delivery of a copy to an attorney within this rule means

(a) handing it to the attorney personally, or, if agreed to by the parties, e-mailing it to the attorney as allowed under MCR 2.107(C)(4);

(b) leaving it at the attorney's office with the person in charge or, if no one is in charge or present, by leaving it in a conspicuous place; or

(c) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there.

(2) Delivery to Party. Delivery of a copy to a party within this rule means

(a) handing it to the party personally, or, if agreed to by the parties, e-mailing it to the party as allowed under MCR 2.107(C)(4); or

(b) leaving it at the party's usual residence with some person of suitable age and discretion residing there.

(3) Mailing. Mailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing.

[Balance of rule omitted]

2. **MCR 2.117** *The proposed changes balance two competing interests. On the one hand, limited scope representation attorneys must be confident that their limited appearances will indeed be limited consistent with the identified scope of representation. On the other hand, attorneys must not use limited scope representation in a manner that is abusive or circumvents the established requirements of general representation. The proposed changes effectively create an affirmative obligation for counsel and court to ensure limited representation is properly limited.*

### **Rule 2.117 Appearances**

#### (A) Appearance by Party.

(1) A party may appear in an action by filing a notice to that effect or by physically appearing before the court for that purpose. In the latter event, the party must promptly file a written appearance and serve it on all persons entitled to service. The party's address and telephone number must be included in the appearance.

(2) Filing an appearance without taking any other action toward prosecution or defense of the action neither confers nor enlarges the jurisdiction of the court over the party. An appearance entitles a party to receive copies of all pleadings and papers as provided by MCR 2.107(A). In all other respects, the party is treated as if the appearance had not been filed.

#### (B) Appearance by Attorney.

(1) **In General.** An attorney may appear by an act indicating that the attorney represents a party in the action. An appearance by an attorney for a party is deemed an appearance by the party. Unless a particular rule indicates otherwise, any act required to be performed by a party may be performed by the attorney representing the party.

#### (2) Notice of Appearance.

(a) If an appearance is made in a manner not involving the filing of a paper with the court, the attorney must promptly file a written appearance and serve it on the parties entitled to service. The attorney's address and telephone number must be included in the appearance.

(b) If an attorney files an appearance, but takes no other action toward prosecution or defense of the action, the appearance entitles the attorney to service of pleadings and papers as provided by MCR 2.107(A).

**(c) Pursuant to MRPC 1.2(b), a party to a civil action may appear through an attorney for limited purposes during the course of an action, including, but not**

limited to, depositions, hearings, discovery, and motion practice, if the following conditions are satisfied:

(i) The attorney files and serves a notice of limited appearance with the court before or during the relevant action or proceeding, and all parties of record are served with the limited entry of appearance; and

(ii) The notice of limited appearance identifies the limitation of the scope by date, time period, and/or subject matter.

(d) An attorney who has filed a notice of limited appearance must restrict activities in accordance with the notice or any amended limited appearance. Should an attorney's representation exceed the scope of the limited appearance, opposing counsel (by motion), or the court (by order to show cause), may set a hearing to establish the actual scope of the representation.

(3) Appearance by Law Firm.

(a) A pleading, appearance, motion, or other paper filed by a law firm on behalf of a client is deemed the appearance of the individual attorney first filing a paper in the action. All notices required by these rules may be served on that individual. That attorney's appearance continues until an order of substitution or withdrawal is entered, or a conforming notice of withdrawal of a notice of limited appearance is filed as provided by subrule (C)(3). This subrule is not intended to prohibit other attorneys in the law firm from appearing in the action on behalf of the party.

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court ordered conference or trial.

(C) Duration of Appearance by Attorney.

(1) Unless otherwise stated or ordered by the court, an attorney's appearance applies only in the court in which it is made, or to which the action is transferred, until a final judgment or final order is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed. The appearance applies in an appeal taken before entry of final judgment or final order by the trial court.

(2) Unless otherwise stated in this rule, an ~~An~~ attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court.

(3) An attorney who has filed a notice of limited appearance pursuant to MCR 2.117(B)(2)(c) and MRPC 1.2(b) may withdraw by filing a notice of withdrawal from limited appearance with the court, served on all parties of record, stating that the attorney's limited representation has concluded; certifying that the attorney has taken all actions necessitated by the limited representation; and providing to the court a current service address and telephone number for the self-represented litigant. If the notice of withdrawal from limited appearance is signed by the client, it shall be effective immediately upon filing and service. If it is not signed by the client, it shall become effective 14 days after filing and service, unless the self-represented client files and serves a written objection to the withdrawal on the grounds that the attorney did not complete the agreed upon services.

**(D) Nonappearance of Attorney Assisting in Document Preparation. An attorney who assists in the preparation of pleadings or other papers without signing them, as authorized in MRPC 1.2 (b), has not filed an appearance and shall not be deemed to have done so. This provision shall not be construed to prevent the court from investigating issues concerning the preparation of such a paper.**

### 3. MCR 6.001

*Limited scope representation could be available in some criminal as well as civil matters, but this proposal excludes representation in accordance with direction from the 21<sup>st</sup> Century Practice Task Force that civil matters should be prioritized first.*

#### **Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes**

(A) Felony Cases. The rules in subchapters 6.000-6.500 govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction.

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.427, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C) Juvenile Cases. The rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juveniles against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.

(D) Civil Rules Applicable. The provisions of the rules of civil procedure apply to cases governed by this chapter, except

- (1) as otherwise provided by rule or statute,
- (2) when it clearly appears that they apply to civil actions only, or
- (3) when a statute or court rule provides a like or different procedure, ~~or~~
- (4) with regard to limited appearances and notices of limited appearance.**

Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter. The provisions of MCR 2.501(C) regarding the length of notice of trial assignment do not apply in cases governed by this chapter.

(E) Rules and Statutes Superseded. The rules in this chapter supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter.

## **II. Amendments to Michigan Rules of Professional Conduct 1.0, 1.2, 4.2 and 4.3**

### **Rule 1.0 Scope and Applicability of Rules and Commentary**

*[Amendments include proposed additions to terminology section only, to conform to changes proposed in MRPC 1.2, 4.2, and 4.3.]*

*Official commentary to a revised MRPC 1.2(b) should include a discussion of what it means for a limited representation to be “reasonable under the circumstances.” An assumption is that in almost all cases, parties are better off with limited representation than they are with no representation. Yet limited scope representation is not always reasonable. Factors to weigh in deciding whether the limitation is reasonable under the circumstances include but are not limited to: the apparent capacity of the person to proceed effectively given the complexity and type of matter, under the facts as communicated to the attorney, with the limited scope assistance and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney’s obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 2.114 [Signatures of Attorneys and Parties; Verification; Effect: Sanctions]. Attorneys must be reasonably diligent to ensure a limited scope representation does not advance improper objectives.*

#### TERMINOLOGY

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

“Informed consent” denotes 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.

#### Rule: 1.2 Scope of Representation

(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer **licensed to practice in the State of Michigan** may limit the **objectives scope** of a ~~the~~ representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the ~~client consents~~ limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

- (1) A lawyer licensed to practice in the State of Michigan may draft or partially draft pleadings, briefs, and other papers to be filed with the court. Such assistance does not require the signature or identification of the lawyer, but does require the following statement on the document: “This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b).”

**(2) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as “self-represented” and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assistance without entering a general appearance may rely on the client’s representation of facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer’s obligation under the Rules of Professional Conduct, or asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 2.114, or which are materially insufficient.**

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

*The official commentary to a revised MRPC 1.2(b) should address what it means for a limited representation to be “reasonable under the circumstances.” In almost all cases, parties are better off with limited representation than they are with no representation. Yet limited scope representation is not always reasonable. Parties seeking limited scope representation may be agitated, pressed for time, and disorganized, due to the stresses of litigation, or other reasons. Some parties may be illiterate, mentally or emotionally disabled, or have poor communication skills. A lawyer considering limited scope representation should decline such representation when the lawyer is unsure that the client understands or agrees to the objectives to be realized or the limits of the representation.*

*Factors to weigh in deciding whether the limitation is reasonable under the circumstances according to the facts communicated to the attorney include the apparent capacity of the person to proceed effectively with the limited scope assistance given the complexity and type of matter and other self-help resources available. For example, some self-represented persons may seek objectives that are inconsistent with an attorney’s obligation under the Rules of Professional Conduct, or assert claims or defenses pursuant to pleadings or motions that would, if signed by an attorney, violate MCR 2.114 [Signatures of Attorneys and Parties; Verification; Effect: Sanctions]. Attorneys must be reasonably diligent to ensure a limited scope representation does not advance improper objectives, and the commentary should help inform lawyers of these considerations.*

*It is seldom, if ever, reasonable for an attorney to attempt to divide up what the client wishes to be a general representation into a series of limited scope representations, with each ensuing representation conditioned on the replenishment of a retainer. In such cases, the attorney must file a general appearance in the action.*

#### **Rule: 4.2 Communication With a Person Represented by Counsel**

*[Amendments to this rule must conform to proposed changes to MCR 2.107 (Service), which requires service of court-filed documents on both the client and the limited scope representation attorney. It is prudent to require all written communication to be made in that fashion. Oral communication should be made first to the limited scope representation attorney, to permit discussion between that attorney and his or her client as to how to proceed.]*



In representing a client, a lawyer shall not communicate about the subject of the representation with a **party person** whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

**An otherwise self-represented person receiving limited representation in accordance with Rule 1.2(b) is considered to be self-represented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation. Oral communication shall be made first to the limited scope representation lawyer, who may, after consultation with the client, authorize oral communications directly with the client as agreed.**

**Until a notice of termination of limited scope representation comporting with MCR 2.117(B)(2)(c) is filed, or other written communication terminating the limited scope representation is provided, all written communication, both court filings and otherwise, shall be served upon both the client and the limited scope representation attorney.**

#### **Rule: 4.3 Dealing With an UnSelf-Represented Person**

*The proposed language, rather than repeat proposed additions to MRPC 4.2, simply points back to them.*

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 unself-represented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

**Clients receiving representation under a notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation are not self-represented persons for matters within the scope of the limited appearance, until a notice of termination of limited appearance representation comporting with MCR 2.117(B)(2)(c) is filed or other written communication terminating the limited scope representation is in effect. See Rule 4.2.**

#### **Opposition**

Concerns about limited scope representation have mainly centered on two areas: the possibility of potential harm to clients who do not understand the implications of a limited scope arrangements, and LSR lawyers' exposure to court sanctions or disciplinary actions. These concerns have been taken into consideration in, and to a large extent are the motivation for, the proposed rule changes.

#### **Prior Action by Representative Assembly**

None.

#### **Fiscal and Staff Impact on the State Bar of Michigan**

The 21st Century Practice Task Force recommendations envision a complete package of resources in support of the development of limited scope representation in Michigan, such as education, forms,

referral and evaluation, of which the proposed rule changes are a critical piece. The fiscal and staff impact of advancing legal scope representation, along with the related and connected reforms discussed in the work of the Task Force, is indeterminate. The staff work required, however, is consistent with the basic expertise and skills of existing staff and bar infrastructure.

**STATE BAR OF MICHIGAN POSITION**  
**By vote of the Representative Assembly on September 22, 2016**

Should the Michigan Court Rules and Michigan Rules of Professional Conduct be revised to provide direction concerning limited scope representation?

RESOLVED, that the State Bar of Michigan recommend amendments to Michigan Court Rules 2.107, 2.117, and 6.001 and Michigan Rules of Professional Conduct 1.0, 1.2, 4.2 and 4.3 to provide direction concerning the advancement of limited scope representation in Michigan.

The above Resolution should be adopted.

(a) Yes

or

(b) No