



New Limited Scope Rules Benefit Underemployed Attorneys and Overburdened Courts

By Darin Day

Attorneys looking to expand their practices, courts looking for improved efficiencies, and pro se civil litigants simply looking for help should look to the new limited scope representation (LSR) rules that became effective January 1, 2018.¹ Michigan lawyers have enjoyed success with LSR for decades: think of the commercial or real estate attorney hired to review a single contract with no expectation of further engagement in the transaction, or the traditional litigator who provides an initial case assessment and consultation for a flat fee to a potential civil plaintiff or an appellant in a criminal matter.²

Today, LSR usually involves an attorney providing a self-represented party with advice and coaching, mapping out an overall legal strategy to resolve the entire matter, and performing one or more discrete tasks. These often include preparing pleadings, conducting discovery, attending a hearing, or negotiating a settlement. Not every type of legal matter nor every client is a good fit. LSR, also known as unbundling, has proven most effective in settings such as landlord-tenant

disputes, simple divorces and other family law concerns, expungements, and noncomplex consumer or tax matters.³ In all cases, unbundling requires education and training—of lawyers, clients, and judges and court staff. It also requires quality control mechanisms and deliberate attention to ethical questions.

Fortunately, ethicists have carefully considered LSR and have been instrumental in developing Michigan's new rules and helping the State Bar of Michigan aid members who choose to engage in LSR. The American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion in 2015 endorsing LSR under appropriate circumstances and when it complies with all related laws and rules of professional conduct.⁴ Here in Michigan, Ethics Opinion RI-347 (April 23, 2010) explains that “a lawyer is permitted to provide unbundled legal services [including assistance drafting documents] to a properly informed client, but he or she retains all of the professional responsibility that would exist in the case of ordinary services.”

Michigan joins the more than 30 states that have formally adopted court and ethics rules specific to the provision of unbundled legal services.⁵ Experience in these jurisdictions is encouraging: courts benefit from better-prepared litigants, fewer delays, and a more efficient docket; parties benefit from attorney expertise and skill that can be supported by a limited budget; and lawyers benefit from gaining access to a previously untapped market of self-represented clients, increasing revenues and growing their practices.

History of LSR in Michigan

Michigan has been moving toward more formal LSR since at least 2010, with the creation of the Solutions on Self-help Task Force,⁶ and especially since the launch of Michigan Legal Help (MLH) in 2012. MLH's online portal and self-help centers provide access to information on a variety of law-related topics.

MLH also facilitates comprehensive triage procedures that help isolate and define legal problems and then identify the best starting point for resolving them. For example, MLH provides a much-used pipeline to the State Bar's new online legal services portal, the backbone of which is the enhanced profile directory and lawyer referral service, which now includes a modest means panel.⁷

Formalized LSR in Michigan advanced again in 2016 with the publication of the State Bar's *Twenty-First Century Practice Task Force Report*, which recommended:

- Implementing a high-quality, comprehensive, limited scope representation system, including guidelines, attorney and client education, rules and commentary, and court forms focusing on civil cases.
- Incorporating a certified limited scope representation referral component into both the SBM online directory and MLH, and ultimately into the unified online legal services platform.
- Continuous review of the rules of professional conduct and regulations to eliminate unnecessary barriers to innovation, consistent with the highest standards of ethical obligations to clients and the public.
- Educating State Bar members regarding new and proven innovative law practice business models...to improve economic viability of solo and small firm practices, while expanding service to underserved areas and populations.⁸

At a Glance

New ghostwriting rules offer clear guidance to attorneys seeking to help pro se parties draft better pleadings while providing greater transparency for courts.

Under the new rules, a limited appearance may be quickly and simply entered and withdrawn, as long as communication with the client is thorough and writing precise. The keys are clearly defining the scope of representation in the notice of limited appearance, then restricting activities to accord with the notice.

These recommendations are currently being implemented thanks to the collaborative efforts of the State Bar LSR Implementation Work Group, MLH, the State Court Administrative Office, the Institute for Continuing Legal Education, the Michigan Judicial Institute, and other partners.⁹ In September 2017, Michigan took a critical step when the State Bar Representative Assembly recommended a set of LSR-related rules revisions to the Michigan Supreme Court. The Court adopted the proposal and the new rules became effective January 1 of this year. The revised rules are MCR 2.107, 2.117, and 6.001 and MRPC 1.0, 1.2, 4.2, and 4.3.¹⁰

Essentially, the new rules facilitate the use of two tools in a lawyer's LSR toolbox: (1) ghostwriting without entering an appearance, or even necessarily disclosing the attorney's identity; and (2) the ability, with the client's informed consent, to define the scope of a limited appearance and both enter and withdraw that appearance by simply filing proper notice and serving all parties of record.

Ghostwriting

The revised rules provide attorneys with clear guidance on how to help a client draft pleadings without being forced into a more extensive representation. To start, MCR 2.117(D) sets forth that an "attorney who assists in the preparation of pleadings or other papers without signing them...has not filed an appearance and shall not be deemed to have done so." MRPC 1.2(b)(1) allows a lawyer to "draft or partially draft pleadings, briefs, and other papers to be filed with the court [and this] 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 MRPC 1.2(b).'

provides that the “filing of such documents is not and shall not be deemed an appearance by the lawyer in the case.”

From a court’s perspective, the new rules provide greater transparency by requiring the pleading to contain notice that it was drafted with the help of an attorney. In addition, MCR 2.117(D) confirms the court’s authority to “investigat[e] issues concerning the preparation of such a paper.” With these changes, courts can expect better-drafted documents and increased scrutiny over papers filed by some self-represented parties. MRPC 1.2(b)(2) provides attorneys with additional protections by allowing them to “rely on the client’s representation of the facts, unless the lawyer has reason to believe that such representation” is materially insufficient, false, seeks objectives that are inconsistent with the lawyer’s obligations under the MRPC, or asserts claims or defenses that, if signed by the lawyer, would violate MCR 2.114. In sum, the new ghostwriting rules open exciting new avenues for pro se parties to gain much-needed assistance drafting legal documents while providing clear guidance to attorneys and increased transparency for courts.

Making a limited appearance

In cases where ghostwriting may not provide adequate assistance, a “lawyer licensed to practice in the State of Michigan may...file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.”¹¹ In parallel, MCR 2.117(B)(2)(c) allows “a party to a civil action [to] appear through an attorney for limited purposes...including, but not limited to, depositions, hearings, discovery, and motion practice...”

Reasonable under the circumstances

MRPC 1.2(b) permits an attorney to enter a limited appearance under two conditions. The first is where “the limitation is reasonable under the circumstances...” In almost all cases, parties are better off with some representation rather than none. Nevertheless, LSR is not always a reasonable alternative. For example, a party seeking LSR may be agitated, pressed for time, or disorganized for myriad reasons, not least the stress of attempting to address legal issues pro se. Some parties may struggle with literacy, mental or emotional challenges, or poor communication skills. A lawyer considering LSR should explore other alternatives when it is not clear the client understands or agrees to the objectives or limits of the proposed representation or has the capacity for effective self-representation.¹² In addition, it is seldom, if ever, appropriate for an attorney to attempt to divide what the client wishes to be a general representation into a series of LSRs, with each ensuing representation conditioned on the replenishment of

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a retainer. Under these circumstances, the attorney should file a general appearance.

Informed consent

The second condition for entering a limited appearance under MRPC 1.2(b) is the client’s “informed consent, preferably in writing.” MRPC 1.0 defines informed consent as “agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of the proposed course of conduct, and reasonably available alternatives to the proposed course of conduct,” which points the way to the first step in any successful LSR engagement—the initial consultation. This introductory meeting should involve a wide-ranging and probing conversation that includes accurately diagnosing the legal issues presented; determining whether *any* LSR services are appropriate, including the ethical obligation to assess the client’s capacity for self-representation; identifying which tasks the client could perform and which should be performed by an attorney; discussing the client’s ability to pay; and sketching out a rough-draft budget.

Only after such a comprehensive consultation is it possible to determine with confidence whether to engage the client at all, and whether the client actually needs full representation by a lawyer, ongoing support via LSR as a self-represented litigant, or little more than some advice and a game plan to proceed with self-representation. A written letter of engagement is appropriate in all of these scenarios, outlining the specific tasks to be performed by the attorney, perhaps the specific tasks to be performed by the client, and clarifying costs and fee arrangements. The purpose is to engage the client up front in a deliberate discussion leading to informed consent, a clear definition of the scope of representation, and a written document that can evolve, if needed, into a notice of limited appearance in the event of litigation.

Notice of limited appearance

An entry of limited appearance must be accompanied by notice served on all parties of record.¹³ Such notice must identify the scope of the limited appearance by date, time period, or subject matter.¹⁴ In addition, the attorney's activities must be restricted to accord with the notice. If an attorney exceeds the scope of the notice, the court (by order to show cause) or opposing counsel (by motion) may set a hearing to establish the actual scope of the representation.¹⁵ Just as with the LSR engagement letter, care must be taken to thoughtfully consider and precisely draft any notice of limited appearance. Following this, additional care must be taken to act in accordance with the notice or, when changes in scope are anticipated, to make timely prospective amendments to the notice of appearance.

Withdrawal of limited appearance

Under MCR 2.117(C)(3), to terminate a limited appearance, a lawyer is required only to file a simple notice of withdrawal and serve it on all parties of record. With the client's signature, a notice of withdrawal takes immediate effect. Without the client's signature, it becomes effective after 14 days unless the client files and serves a written objection on the grounds that the attorney did not complete the agreed-upon services.¹⁶ Here is yet another reason to be careful and precise in obtaining informed consent and in drafting engagement letters and notices of limited appearance. When communication with the client is thorough, understanding clear, and writing precise, getting in and out of a limited appearance is a comparatively quick and simple task. When sufficient care is not taken, whether in obtaining informed consent, defining the scope of representation, or complying with the terms of the notice of limited appearance, complications may abound. Diligence is key.

Two more considerations regarding professional conduct in LSR

MCR 2.107(B)(1)(e)—Service in the Limited Scope Context

Once an attorney has made a limited appearance, every paper filed in the matter must continue to be served on the party and the LSR attorney for the duration of the limited appearance unless the LSR attorney requests, or the court orders, that service be made only on the party.

MRPC 4.2—Communication with a Person Represented by Counsel

Once notice of limited appearance is filed and served, and until written communication of withdrawal of that appearance is provided to the opposing party, all oral communication must begin with LSR counsel. However, after consultation with the client, counsel may authorize oral communication directly

with the client.¹⁷ For the duration of any limited appearance, all written communication—both court filings and otherwise—must be served on both the party and LSR counsel.¹⁸

Conclusion

The new LSR rules authorizing ghostwriting and streamlined limited appearances create tremendous opportunities for Michigan's self-represented civil litigants, lawyers, judges, and court administrators. They expand access to justice; open business opportunities, especially for solo practitioners and smaller firms; and help ease docket congestion. As with virtually every aspect of the law, not paying careful attention to what the new rules require creates risk. With the exercise of proper care and diligence, the new LSR rules offer Michigan a truly winning combination. ■

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ENDNOTES

1. Administrative Order 2016-41 (September 20, 2017) <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2016-41_2017-09-20_FormattedOrder_AmendiOfMRPC1.0-1.2-4.2-4.3-MCR2.107-2.117-6.001.pdf>. See also State Bar of Michigan, *Limited Scope Representation* <<https://www.michbar.org/news/newsdetail/nid/5507>>. All websites cited in this article were accessed May 5, 2018.
2. Vauter, *Unbundling: Filling the Gap*, 79 Mich B J 1688, 1689 (December 2000) <<https://www.michbar.org/journal/article?articleID=159&volumeID=14&viewType=archive>>.
3. *Limited scope representation helps lawyers expand practice* <<https://www.americanbar.org/publications/youraba/2015/april-2015/limited-scope-representation-helps-lawyers-expand-practice.html>>.
4. ABA Standing Comm on Ethics and Prof Responsibility, Formal Op 472 (November 30, 2015) (Communication with Person Receiving Limited-Scope Legal Services) <<https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion472FINAL.pdf>>.
5. Buiteweg, *Limited Scope Representation: A Possible Panacea for Reducing Pro Per Court Congestion, Attorney Underemployment, and a Frustrated Public*, 95 Mich B J 10 (2016) <<http://www.michbar.org/file/barjournal/article/documents/pdf4article2927.pdf>>.
6. Toy, *Justice for Whom?*, 89 Mich B J 18 (2010) <<https://www.michbar.org/file/barjournal/article/documents/pdf4article1680.pdf>>.
7. Michigan Legal Help <<https://michiganlegalhelp.org/news>>.
8. State Bar of Michigan 21st Century Practice Task Force, *Envisioning a New Future Today* (July 18, 2016) <https://www.michbar.org/file/future/21c_VWorkProduct.pdf>.
9. State Bar of Michigan, *Limited Scope Representation Rules Adopted by Michigan Supreme Court* <<https://www.michbar.org/News/NewsDetail/nid/5494>>.
10. Administrative Order 2016-41.
11. MRPC 1.2(b).
12. Michigan Ethics Opinion RI-347 (April 23, 2010).
13. MCR 2.117(B)(2)(c)(i).
14. MCR 2.117(B)(2)(c)(iii).
15. MCR 2.117(B)(2)(d).
16. MCR 2.117(C)(3).
17. MRPC 4.2(b).
18. MRPC 4.2(c).