

By David Holtermann

Rule Changes Permit Limited Representation in Litigation

# Increasing Access and Opportunity



## When the Illinois Supreme Court adopted rule changes expanding limited scope representation to litigation on July 1, it took an important step toward increasing access to legal representation and the justice system. It also opened a new realm of opportunity for lawyers.

**T**HE MOST SIGNIFICANT CHANGES ENABLE LAWYERS to appear in cases on a limited basis, and to provide drafting assistance to litigants without filing an appearance. The package of amendments includes changes to Supreme Court Rules 11, 13 and 137, and additional comments to Rules of Professional Conduct 1.2, 4.2 and 5.5. They build on Rule of Professional Conduct 1.2(c), which has explicitly permitted limited scope representation (also known as “unbundling”) in Illinois since 2010 (the changes to Rule 1.2(c) were described in “Limited Scope Representation is Here” in the April 2010 edition of the **CBA Record**).

### Limited Scope Appearances

The most notable change is the amendment to Supreme Court Rule 13(c) permitting limited scope appearances in civil cases. Under the procedures outlined in the rule, a lawyer may appear in a single proceeding by entering into a written limited representation agreement with a client and filing a “notice of limited scope appearance.” Rule 13(c)(6). The rule also prescribes the procedures for ending a limited scope appearance—either by order of the court on oral motion at a hearing attended by the client, or by written notice followed by a 21-day period for the client to object. Rule 13(c)(7). In either case, the limited scope appearance terminates unless the court expressly finds that the lawyer has *not* completed the representation specified in the notice of limited scope appearance.

### Document Preparation Assistance

The other major change is the addition of paragraph (e) to Supreme Court Rule 137, which explicitly permits lawyers to help a self-represented person in drafting or reviewing a document that will be filed *pro se*. A lawyer providing assistance under the rule is not required to file a general or limited appearance or to sign the document in question. The remaining rule changes align existing rules and commentary with the newly allowed practices. Supreme Court Rule 11, for example, establishes that when a lawyer files a limited scope appearance, service is required on the lawyer in addition to the party until the limited scope appearance terminates. The amendment to the comments in Rule 4.2 addresses lawyer communications with a party represented on a limited basis. The new commentary in Rule 1.2 and Rule 5.5 acknowledges that limited appearances and document preparation assistance are among the types of limited representation properly performed under the Rules of Professional Conduct.

### The Benefits of Accessible Representation

The basic logic of unbundling is that a lawyer provides representation in a narrow, specific aspect of a case and the client self-represents in the remainder. A lawyer and a client effectuate a limited scope engagement by entering into an agreement (which in the case of a court appearance must be in writing pursuant to Rule 13(c)(6)) that identifies the scope of the legal work the lawyer will perform. The scope is explicitly limited to a specific proceeding or task (e.g., representation in a hearing or drafting pleadings) or to a specific issue within a matter (e.g., the custody aspects of a marriage dissolution). If the client later decides to retain the lawyer to do more, the additional tasks are the subject of a new agreement that specifies the altered scope of representation.

Limiting the scope of representation enables lawyers to direct their time and expertise to the most critical aspects of a case. This is important for legal aid and pro bono programs, where limited resources create pressure to allocate legal help where it will have the most impact. In a fee-based context, it allows clients on a tight budget to pay for some services even if full representation is out of financial reach.

To many lawyers, the idea of participating in only a portion of a case is at odds with their legal training and practical experience. But the amendments to the professional responsibility and practice rules clearly indicate that limited representation should be considered an accepted practice that serves the important goal of broadening access to representation. Steve Pflaum, immediate-past chair of the Supreme Court Committee on Professional Responsibility, which reviewed and honed the limited scope rules ultimately adopted by the Court, explains that the rules are intended to enable litigants to get legal assistance they can afford: “Many lawyers contacted by prospective clients realize that they can’t cost-effectively handle the whole case for that client, but that they can help with a specific aspect. Limited representation enables a lawyer and client to work together in a way that is economically feasible.”

Hon. Keven O’Grady is a district court judge in Kansas who provided unbundled services to his family law clients under Kansas’ limited representation rules before joining the bench in late 2012. He argues that offering limited representation also works by attracting clients who assume that they are priced out of the legal market. “There are a lot of folks who believe they can’t afford a lawyer. They are scared by what they think it will cost and they

## When is Limited Scope Representation Appropriate?

What kinds of service can a lawyer provide in this brave new world? Immediate-past Chair of the Supreme Court Committee on Professional Responsibility Steve Pflaum emphasizes that in the civil arena, nothing is categorically out of bounds as long as the limited engagement meets the underlying requirements of Rule 1.2(c) (reasonable under the circumstances and with the informed consent of the client). To illustrate, Pflaum points to the following list of instances where a lawyer might provide limited representation under the amended rules. Please note that this list is not exhaustive, and a lawyer must determine on a case-by-case basis whether a representation would be reasonable.

- **Representing a client in a trial.** This is a simple example of limited assistance, where a client manages his or her case before trial, but retains a lawyer to handle the trial.
- **Represent a client in only the child custody aspects of a divorce.** In this scenario, the client handles property issues but retains counsel for child custody issues. Experience in other states shows that, in this and other ways, matrimonial controversies often lend themselves to limited scope representations.
- **Drafting a motion to dismiss or for summary judgment to be filed and argued by a client *pro se*.** An initial consultation with a lawyer may lead a client to understand there may be grounds for a dispositive motion, but retaining a lawyer to brief and argue the motion would be cost-prohibitive. The client and lawyer can agree that the lawyer will draft the motion to ensure it contains the key points. The client will be responsible for finalizing and arguing the motion. Unlike the other limited scope representations mentioned in this list, pursuant to Rule 137 no limited scope appearance by the lawyer under Rule 13(c)(6) is required for this kind of “ghostwriting” representation.
- **Arguing a motion.** A lawyer can be retained for the limited purpose of arguing a motion in court. The client would be responsible for briefing the motion. This type of limited scope representation may be a worthwhile option for important motions such as those involving TROs or dispositive motions. However, the lawyer’s ability to represent the client effectively—and possibly the reasonableness of such engagements—may depend on the client’s ability to provide the requisite factual foundation in a motion or brief for the arguments to be made by the lawyer.
- **Representations in connection with a deposition.** A lawyer can be retained either to take or defend a deposition—a proceeding that may be daunting to a layperson.
- **Representing a client in a hearing for the second time in a matter.** The foregoing list of limited scope representations is neither comprehensive nor mutually exclusive. Rule 13(c)(6) explicitly permits lawyers to make more than one limited scope appearance in a matter.

won’t even consider getting help. With limited scope, the lawyer can give them a really good ballpark figure of how much it will cost or agree to do the work for a flat fee. Then they get exactly what they want and at a price they know and can expect.” Pflaum agrees that limited representation may give clients confidence that seeking legal help won’t lead to financial ruin. “The shorter time frames and discrete tasks associated with limited scope representations will often lend themselves to fixed fee arrangements. Clients who retain a lawyer to handle a specific aspect of a case for a fixed fee can be assured that they won’t rack up unaffordable fees.” The piecemeal nature of limited scope representation also gives members of the private bar certainty

that their work will not go unpaid. “From a lawyer’s standpoint limited scope, fixed fee arrangements enable lawyers to represent prospective clients who would otherwise be turned away, while reducing the risk of being saddled with large, uncollectable accounts receivable,” explains Pflaum. O’Grady concurs, “With limited scope, you are going to do the work you’ve agreed to, not more. Additional work is the subject of a new representation agreement and fee.”

### Impact in the Courts

The ability of lawyers to make issue-specific, limited-duration court appearances under Rule 13 is a new development in Illinois courtrooms. Hon. Julie K. Katz, an associate circuit judge who presides over a

high-volume domestic relations docket in St. Clair County, believes that in spite of their novelty, limited scope appearances and other types of unbundled assistance will help—especially by improving the quality of justice experienced by litigants. “When *pro se* litigants represent themselves in contested hearings, they get extremely frustrated because they do not know how to lay the proper foundation for an exhibit or how to question a witness without introducing hearsay testimony. When an opponent makes an objection, the *pro se* parties expect me to help them, which I obviously cannot do. As a result, they feel that they can’t tell their entire story and they are very dissatisfied with the legal process. When attorneys can assist them with these basic tasks, even on a limited basis, *pro se* litigants are more likely to feel they are getting fair hearings.”

### Doing it right

Limited representation is not fundamentally different from traditional practice, and is subject to the same duties and standards. With knowledge of the applicable rules, attention to detail, and a degree of discipline about the limits established in representation agreements, limited scope practice should not be intimidating to most practitioners.

Lawyers should start by understanding the requirements of Rule 1.2(c) and the other Rules of Professional Conduct. Limiting the scope of representation is explicitly permitted under Rule 1.2(c), as long as “the limitation is reasonable under the circumstances and the client gives informed consent.” Comment 7 to Rule 1.2 explains that “this Rule affords the lawyer and client substantial latitude to limit the representation...” In practice, “reasonable under the circumstances” does not mean the client must be able to self-represent regarding the other aspects of the case as effectively as if he or she were represented by counsel. Comment 7 illustrates how circumstances such as the amount of time allotted for the limited scope representation—for example, if it is limited to a brief telephone conversation—can affect whether the representation “is sufficient to yield advice upon which the client can rely”

and, hence, is reasonable. The American Bar Association Section of Litigation, in writing on the topic of limited services, sums up the determination required by the rule: “The test... is whether, *at the time of the agreement*, a lawyer reasonably could have concluded that the service would be useful to the client” (emphasis in the original). Page 91, *Handbook on Limited Scope Legal Assistance*, ABA Section of Litigation, 2003.

Lawyers should also be aware that court decisions in several states have held that there is a duty to inform clients of issues that fall outside the scope of representation. In Illinois, a 2001 appellate decision held that the lawyers handling a worker’s compensation claim had a duty to advise their client of the possibility of third-party claims and applicable statutes of limitation. *Keef v. Widuch*, 254 Ill. Dec 580 (1<sup>st</sup> Dist. 2001)

Based on his experience in Kansas, O’Grady encourages lawyers to use interview checklists and questionnaires when selecting clients. This helps determine the complexity of a matter and a client’s capability, and can identify other issues such as tax liability or complicated pension plans that may be tied to the case. When circumstances warrant, “don’t be afraid to say ‘no, you are not a good candidate for limited scope,’” he explains.

A written representation agreement is required when a lawyer makes a limited scope appearance under Rule 13, but it is considered a best practice for lawyers providing any form of limited representation. Once a lawyer agrees to provide limited representation, it is important that he or she strictly adhere to the agreed scope of services. “Have a good agreement and follow it meticulously. Don’t do any additional work without a new agreement,” O’Grady explains. Failing to do so introduces ambiguity about what the lawyer has agreed to do—opening the door to potential liability—and also risks the possibility that the lawyer won’t get paid for the additional work.

The distinct possibility that a limited representation may lead to additional work underscores the need to ensure the scope is

### **Resources on Limited Scope Representation**

A collection of resources for practitioners interested in offering limited scope representation is available online at <http://lpmt.chicagobar.org/il-limited-scope>. This page has information including links to the rules relevant to limited scope representation, the limited appearance and withdrawal forms approved by the Supreme Court, other articles and background information about limited scope, and guidance regarding best practices for lawyers.

well documented. According to O’Grady, “When you provide limited scope services, you establish a relationship where clients trust you. And then they are more likely to say ‘why don’t you do this, too?’”

#### **“The happiest clients”**

The Supreme Court approved the rule changes enabling limited scope representation in the belief that they will help litigants obtain some degree of representation in the courts. In announcing the changes Chief Justice Thomas L. Kilbride said, “The nature of some cases requires full legal representation, but many do not. This will allow lawyers to offer their pro bono services more efficiently, and provide a person the possibility of hiring a lawyer to protect their interests without the burden of paying for complete representation.” Accordingly, lawyers willing to make the leap and add limited scope representation to the services they offer should recognize their role in making the court system more accessible to the public. But they should also keep in mind, says O’Grady, the simple satisfaction that limited representation can produce: “You have the happiest clients. They feel like they got what they paid for, and they understand how they were billed. They really recognize the value of the services they were receiving.” ■

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*David Holtermann is general counsel of the Lawyers Trust Fund of Illinois, where he was involved in drafting an early proposal for the limited scope rule changes ultimately approved by the Illinois Supreme Court.*



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