NEAL ▪ GERBER ▪ EISENBERG

Steven F. Pflaum
Attorney at Law

Tel 312.269.8038
Fax 312.980.0818
spflaum@ngelaw.com

December 4, 2012

Hon. John B. Simon
Chair, Illinois Supreme Court Rules Committee
c/o Illinois Appellate Court
160 North LaSalle Street
Chicago, IL 60601

Re: *Proposal No. 11-05*
Limited Scope Legal Representation

Dear Justice Simon:

I am pleased to report that the Supreme Court Committee on Professional Responsibility (the "CPR") unanimously and enthusiastically supports the above-referenced proposal by the Joint Task Force on Limited Scope Representation. As explained below, the CPR urges the Supreme Court Rules Committee to recommend adoption of the Joint Task Force proposal with largely non-substantive editorial revisions to the proposed court rules and forms, as well as some conforming amendments to related ethics rules.

The CPR carefully considered the Joint Task Force's proposal at a series of meetings spanning nearly a year. The CPR heard from leaders of the Joint Task Force as well as other interested and knowledgeable individuals, including representatives of the Lawyers Trust Fund of Illinois who had developed a proposal that provided a framework for the efforts of the Joint Task Force. The CPR also reached out to the ARDC, which in addition to providing valuable information regarding the Commission's own perspective, graciously canvassed the members of the National Organization of Bar Counsel for their experience regarding limited scope representation rules in other states. The CPR's review was also informed by the work of three CPR subcommittees that focused on issues concerning, respectively: (1) the language of the limited appearance form and related Supreme Court Rules; (2) whether litigation-related documents should disclose the identity of lawyers whose representation was limited to assisting with the drafting of such documents; and (3) the procedure for terminating limited scope representations in litigation matters.

The CPR's painstaking analysis of the Joint Task Force proposal ultimately produced a remarkable consensus among the Committee members regarding the merits of that proposal. With the cost of legal services beyond the means of many who need representation, as evidenced by the unprecedented numbers of self-represented litigants flooding our courts, limited scope representation is sometimes the most feasible way to make legal services available to those who would otherwise receive no assistance whatsoever from a lawyer. By facilitating, encouraging, and guiding the use of limited scope representation in civil litigation, the Joint Task Force proposal skillfully builds on the foundation that our Supreme Court created when it promulgated Rule 1.2(c) of the 2010 Illinois Rules of Professional Conduct. Rule 1.2(c) allows a lawyer to

"limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The Joint Task Force proposal will help make the promise of limited scope representation under Rule 1.2(c) into a much-needed reality.

The CPR tweaked the rules and forms proposed by the Joint Task Force in an effort to improve both their clarity and the efficient functioning of lawsuits involving limited scope representations. Clean and redlined versions of the CPR's recommendations regarding the Supreme Court Rules, court forms, and Rules of Professional Conduct affected by the Joint Task Force proposal are attached to this letter as Appendices A and B, respectively.

Many of the CPR's recommendations are editorial suggestions that require no explanation. The following discussion focuses, instead, on the nature of and rationale for the CPR's substantive revisions to the Joint Task Force proposal.

Comments regarding terminology. The CPR recommends that the relevant rules and forms use the term "limited *scope* appearance," rather than "limited appearance." The latter term could be confused with the "special and limited appearance" that was formerly used to challenge personal jurisdiction. The recommended use of "limited scope appearance" is reflected in the CPR's revision of: Supreme Court Rule 13(c)(6) and the accompanying Committee Comment and Notice of Limited Scope Appearance form; the provision in Supreme Court Rule 11(d) regarding service of papers in cases involving limited scope representations; the provisions in Supreme Court Rule 137(e) and the accompanying Committee Comment regarding limited scope representations entailing drafting or reviewing a pleading, motion, or other paper; and the references to limited scope representations contained in Comments [2] and [8] to Rule 4.2 of the Rules of Professional Conduct, as well as Comment [3] to Rule 5.5 of the Rules of Professional Conduct.

Comments regarding Supreme Court Rule 13 (Appearances—Time to Plead—Withdrawal). The CPR recommends that Rule 13(c)(6) be revised to require the filing of a Motion to Withdraw Limited Scope Appearance, rather than simply a Notice of Withdrawal of Limited Scope Appearance, upon the conclusion of the limited scope representation. The ARDC strongly urged the CPR to make this recommendation.

The CPR believes that the filing of a Motion to Withdraw is necessary to ensure that a judge presiding over a case in which a lawyer has entered a limited scope appearance will know when that representation has been concluded. Regrettably, especially in high volume jurisdictions where judges may not have ready access to complete and up-to-date court files, the mere filing of a Notice of Withdrawal will not necessarily come to the attention of or be available to a judge presiding over a case in which a lawyer has entered a limited scope appearance. The CPR believes that, as a practical matter, the filing of a Motion to Withdraw is required to ensure that such a judge is informed when a limited scope appearance is terminated—and to avoid the confusion and delay that could result if the judge is uncertain about whether a

litigant on whose behalf a Notice of Limited Scope Appearance was filed is represented by counsel with respect to the matter before the court.

The Joint Task Force proposal, on the other hand, would allow a lawyer who undertakes a limited scope representation to withdraw from the case by filing a Notice of Withdrawal upon the completion of the limited representation. By avoiding the need for leave of court to withdraw a limited scope appearance, this procedure was intended to encourage lawyers to accept limited scope representations by allaying any potential concern that a judge will not permit them to withdraw. The CPR recommendation is intended to inform judges about the termination of limited scope appearances, rather than confer authority to prevent lawyers from withdrawing. Accordingly, the revised rule recommended by the CPR makes it clear that the Motion to Withdraw must be granted unless (1) the client objects and (2) the Court finds that the activities described in the Notice of Limited Scope Appearance have not been completed. The CPR believes that this does not create a materially increased risk that the lawyer will be prevented from withdrawing, as even the Joint Task Force proposal would allow the court to block withdrawal if the lawyer had not completed the limited tasks that he or she had agreed to undertake.

Comments regarding Notice of Limited Scope Appearance form. As proposed by the Joint Task Force, Supreme Court Rule 13(c)(6) would require a written agreement between the lawyer and client regarding limited scope representation, but the Notice of Limited Scope Appearance form would not require the client's signature. The CPR recommends having both the lawyer and the client sign the Notice of Limited Scope Appearance form. This will help ensure that the client is aware of, and agrees to, the description of the scope of the limited representation that is provided to the court and opposing counsel (or opposing *pro se* parties).

The CPR's other revisions to the form are based on analogous forms that have been successfully employed in other jurisdictions, and are intended to make the form easier to understand and use. Because the experience in those jurisdictions teaches that family law matters often lend themselves to limited scope representations involving discrete issues (*e.g.*, child custody or visitation, property division, or post-decree modification of alimony or child support), a separate line in the form has been added for a description of the scope of such limited representations.

Comments regarding Supreme Court Rule 11 (Manner of Serving Papers Other Than Process and Complaint on Parties Not in Default in the Trial and Reviewing Courts). The Joint Task Force proposal adds paragraph (d) to Supreme Court Rule 11 to address service of pleadings, motions, and other documents in cases where an attorney has filed a limited scope appearance. Proposed Rule 11(d) states that service on the attorney is required only with respect to matters within the scope of the limited representation, except that service of all documents on the attorney shall be required upon a written request for such service. Proposed Rule 11(d) also

requires that the party represented by the attorney be served with respect to all matters within and outside the scope of the limited representation.[1]

The CPR believes that this procedure is unduly complicated and invites disputes regarding whether a given matter was within the scope of the limited representation and, therefore, should have been served on the attorney. Accordingly, the CPR has revised the new paragraph to require that, once an attorney has filed a Notice of Limited Scope Appearance, both the client and the attorney shall be served with all documents until an order is entered granting the attorney's motion to withdraw. Although this approach will result in the attorney being served with respect to matters outside the scope of the limited representation, the CPR believes that the benefit from ensuring that the attorney is aware of all court filings and discovery relevant to the representation outweighs the downside from the attorney receiving, and the adverse party being required to make one additional copy of, some materials that the attorney will not find to be useful.

Comments regarding Supreme Court Rule 137 (whether pleadings and other court documents drafted or revised by an attorney should disclose the attorney's identity). The Joint Task Force was unable to reach a consensus regarding whether, when an attorney undertakes a limited scope representation involving assistance with the drafting or revision of a pleading or other court document, the identity of the attorney should be disclosed in the document. Accordingly, the Joint Task Force submitted two versions of new Supreme Court Rule 137(e), one excusing and one requiring disclosure of the attorney's identity.

The CPR recommends against requiring disclosure of the identity of the lawyer. This recommendation, which is sometimes termed the "ghostwriting" alternative, is supported by four primary considerations:

1. The document ultimately filed with the court may bear little resemblance to whatever was produced by the lawyer. To the extent disclosure of a lawyer's identity constitutes an implicit "endorsement" by the lawyer of the allegations or legal arguments contained in the document, such an impression is unwarranted if the document was significantly revised by the client after the lawyer's input was obtained.

---

[1] Supreme Court Rule 11 will be revised, effective January 1, 2013, to address service by email and other issues that are unrelated to limited scope representations. The Joint Task Force proposal regarding Rule 11 was prepared before the impending revisions to that Rule were announced. Because those revisions add a paragraph (d) requiring parties and attorneys to provide an email address for service of documents, Rule 11(d) in the Joint Task Force proposal should become Rule 11(e). The non-redlined version of the CPR's recommendations (Appendix A) includes those revisions.

2. Proponents of disclosing the identity of the lawyer who assists with a court document cite the need for transparency and candor. Once again, however, because the document filed with the court may bear little resemblance to what the lawyer produced, disclosure of the lawyer's identity may mislead the court into believing that the document was largely produced by the lawyer. Disclosure would thereby undermine, rather than promote, transparency in those instances.

3. The CPR believes that, regardless whether a lawyer's identity is disclosed, judges can usually tell when a lawyer has helped a *pro se* litigant prepare a court document. (Several members of the CPR are trial court judges who are experienced in dealing with *pro se* litigants.)

4. Even proponents of disclosure recognize that all contributions by a lawyer to a court document do not warrant disclosure. The disclosure alternative developed by the Joint Task Force only required disclosure if the lawyer's involvement was "substantial." The CPR believes, however, that determining when a lawyer's involvement is "substantial" would be problematic, especially if the lawyer did not prepare the final version.

The CPR recognizes that, even if disclosure of a lawyer's identity is not required, some self-represented clients may nevertheless choose to disclose that they received a lawyer's assistance. The CPR therefore recommends adding a sentence to the end of the new paragraph in the Comments to Rule 137 making it clear that any such identification of the lawyer does not constitute a general or limited scope appearance by the lawyer in the case.

Finally, the CPR observed that, unlike virtually every other Supreme Court Rule with multiple paragraphs, Rule 137 does not identify each paragraph by letter. Although this issue is unrelated to limited scope representations, the CPR felt that the amendment of Rule 137 to address ghostwriting would provide an opportunity to correct this apparent oversight. The CPR's suggested revisions to Rule 137 add letters and titles to each paragraph in that Rule.

Comments regarding Rule 4.2 of the Rules of Professional Conduct. Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer from communicating about the subject of a representation with a person whom the lawyer knows to be represented by another lawyer in the matter. The CPR agrees with the Joint Task Force that Rule 4.2 or its Comments should address the applicability of that prohibition to limited scope representations. However, the CPR respectfully disagrees with how the Joint Task Force proposes to apply Rule 4.2 in that context.

The Joint Task Force proposes adding paragraph (b) to Rule 4.2 to provide, in substance, that during the period of time that a limited scope appearance is in effect, all communications regarding any subject relating to the lawsuit, include subjects outside the scope of the limited representation, must be with the lawyer (or with the client only with the lawyer's consent). This prohibition is reinforced by a sentence in new Comment [8A] stating that "[c]ommunications

[with the client on whose behalf a lawyer has entered a limited scope appearance] on any issue or matter during the time frame identified in the written instrument are prohibited." Thus, for example, if a lawyer has filed a Notice of Limited Scope Appearance confined to defending a client at his or her deposition, absent the lawyer's consent, the Joint Task Force's revision to Rule 4.2 would prevent opposing counsel from directly communicating with the client about anything at all until the deposition is concluded, including other depositions, discovery issues, or even settlement.

The CPR believes the Joint Task Force proposal applies Rule 4.2 too broadly. Rule 4.2 is intended to prevent a lawyer from taking advantage of an adverse party and interfering with opposing counsel's ability to effectively represent his or her client. That purpose is not served by interjecting a lawyer who has undertaken a limited scope representation into matters outside the scope of that representation.

The CPR believes that direct communications with an opposing party should only be prohibited with respect to the subject of the limited scope representation. Involving a lawyer who filed a Notice of Limited Scope Appearance in communications regarding other subjects, or even requiring that permission be obtained from the lawyer before communicating directly with the client regarding other subjects, would undermine the feasibility of limited scope representations by increasing the amount of time that lawyers are required to devote to such representations. This runs counter to the objective of making limited scope representations cost-effective.

No amendment to the body of Rule 4.2 is required to clarify the applicability of that Rule to cases with limited scope representations.[2] The issue raised by such representations is what is "the subject of the representation" about which opposing counsel may not communicate with the client on whose behalf a limited scope appearance has been entered. The answer, the CPR believes, is the activities described in the Notice of Limited Scope Appearance (or, for non-litigation matters, another writing describing the scope of that representation). This clarification can be provided by revising the new Comment [8A] proposed by the Joint Task Force. The attached edits to the Joint Task Force proposal include the CPR's recommended revision of that Comment.

Related Amendments to Rules of Professional Conduct. The CPR believes that it would be helpful to cross-reference new Supreme Court Rules 13(c)(6) (regulating limited scope appearances in lawsuits) and 137(e) (permitting assistance with drafting or editing of pleadings and other court documents without filing general or limited scope appearance) in the Comments

[2] Any such amendment would deviate from the ABA Model Rules of Professional Conduct and would undermine the objective, which animated the CPR's recommendations regarding development of the 2010 Illinois Rules of Professional Conduct, of avoiding differences between the ABA Model Rules and the Illinois Rules of Professional Conduct unless there is a compelling reason to deviate.

to Rules of Professional Conduct 1.2 and 5.5. Specifically, the CPR recommends revising Comment [8] to Rule of Professional Conduct 1.2 to add Supreme Court Rules 13(c)(6) and 137(e) to the list of rules cited in relation to the statement that "[a]ll agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law." The CPR also recommends revising Comment [3] to Rule of Professional Conduct 5.5 by citing Supreme Court Rules 13(c)(6) and 137(e) following the statement that "a lawyer may counsel nonlawyers who wish to proceed *pro se.*"

* * *

The preceding discussion of revisions recommended by the CPR to the Joint Task Force proposal should not obscure the fact that the CPR enthusiastically supports both the objective of that proposal and most of the verbiage developed to implement it. The members of the Joint Task Force, its sponsoring organizations, and the officials of the Lawyers Trust Fund who have worked so hard on this initiative all deserve kudos and gratitude for developing an historic proposal that is an integral part of a series of measures needed to reduce barriers to access to justice in our state.

The CPR appreciates the Rules Committee's consideration of recommendations intended to facilitate the increased utilization and smooth functioning of limited scope representations. To that end, the CPR urges the Rules Committee to recommend adoption of Proposal No. 11-05, as amended by the revised rules and forms contained in the enclosures to this letter.

Respectfully submitted,

Steven F. Pflaum
Chair, Illinois Supreme Court
Committee on Professional Responsibility

SFP:cf
Enclosures

cc: Hon. Anne M. Burke
Members, Supreme Court Committee on Professional Responsibility
Co-Chairs, Joint Task Force on Limited Scope Legal Representation
Charles J. Northrup, Esq.
Ruth Ann Schmitt, Esq.
Marcia M. Meis, Esq.

NGEDOCS: 2028871.1