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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ERs 1.5, 4.2, 4.3 AND 6.5, RULE 42, ARIZONA RULES OF THE SUPREME COURT, AND RULES 5.1 AND 11, ARIZONA RULES OF CIVIL PROCEDURE	Supreme Court No. _____ **Petition to Amend ERs 1.5, 4.2, 4.3 and 6.5, Rule 42, Arizona Rules of the Supreme Court, and Rules 5.1 and 11, Arizona Rules of Civil Procedure**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona petitions the Court to amend several ethical and procedural rules to facilitate the ability of lawyers to engage in limited-scope or short-term legal representation, thus providing more access to justice for people of limited or no means.

Access to justice for those of limited means would be increased if ethical and procedural rules were amended to clarify that lawyers may provide services short of a full representation, such as writing some documents to be filed by an otherwise self-represented litigant or performing certain discrete, agreed-upon tasks. Permitting such limited-scope engagements would provide access to clients who can afford some assistance but could not afford a full representation. Permitting limited scope pro bono representation would also provide additional opportunities for pro bono service and encourage such service by lawyers unable to commit to handling an entire case.

To that end, revising several Ethical Rules ("ERs") and their comments would encourage and facilitate limited-scope representation; and revising Rules 5.1 and 11, Ariz. R. Civ. P., would also be appropriate.

These recommendations generally arose out of the State Bar's Access to Justice Task Force. Recognizing the Bar's unique obligation to improve access to justice, particularly in the current economic circumstances, the Board of Governors charged the Task Force with developing specific proposals to increase access to civil justice for Arizona's indigent and working poor. The Task Force was specifically directed to examine proposals for adoption by the Bar, as well as proposals that would require partnership with the legislative, executive, or judicial branches.

I. Rule Proposals to Encourage Limited-Scope Representation in General.

A 2008 State Bar ethics opinion summarized the reasons why limited-scope representation (also known as "unbundling," "discrete task representation," and "limited scope legal assistance") is so important to citizens:

> Parties in both divorce and non-divorce actions are representing themselves more frequently on issues that will have long-term consequences in their lives. Private practitioners and public interest attorneys have responded to the needs of these clients by limiting their representation to certain identifiable and discrete tasks. Though long a practice in the representation of clients in transactional matters, limited scope representation has only more recently become commonplace and studied within the litigation context.
>
> Supporters of limited scope representation justify it as a point of entry for clients who may not be able to afford the full services of a lawyer. Under such an arrangement, a client and a lawyer agree prior to any work being done that the lawyer will limit the lawyer's efforts to the completion of one or more particular tasks. Usually this entails representation of the client's interests only through a portion of a lawsuit or transaction. The lawyer thus satisfies their agreement when the tasks are completed. By limiting the representation, a lawyer and

> client can agree that the client will pay less than if the lawyer were retained for full representation. If the client requires additional services after the completion of the tasks, the lawyer and client can continue the representation under the auspices of a separate agreement.
>
> In addition to addressing the costs of retaining a lawyer, limiting representation is also of value to public interest and *pro bono* attorneys looking to maximize the number of low- and moderate-income clients they are able to serve. Public interest resources and a *pro bono* attorney's time may preclude the long-term representation of a client in a large transaction or complex lawsuit. An attorney faced with representing a client under such circumstances may choose to forsake the representation given the demands that would be placed on the attorney. By limiting the scope of representation, clients expected to require a significant amount of attorney time may get the representation they need at a certain stage in their transaction or proceedings without committing the attorney to a long-term representation. Similarly, these attorneys can address the issues of more low- and moderate-income clients by containing the work they do for a particular client before proceeding to address the issues of another client.

Ariz. Ethics Op. 05-06 (July 2005) (footnotes omitted). An American Bar Association handbook on limited-scope assistance describes the specific types of services:

> Legal services and pro bono lawyers provide limited scope assistance to clients as well. The lawyer, for example, may advise a client about an uncontested divorce and draft the complaint, which the client then files *pro se*.
>
> Or, the lawyer may represent the client in a critical stage of a case, for example, at the creditors' meeting of a Chapter 7 bankruptcy case, with the client (the debtor in this example), representing him or herself thereafter.
>
> Solo and small firm lawyers also regularly provide limited representation to clients. For example, the lawyer may "coach" a client through mediation, a hearing or a trial by advising the client throughout the process without entering an appearance in the case. Or, the lawyer may briefly consult with and advise a client without

> thereafter representing the person, provide a legal opinion to a client (an individual or organization), or prepare or review a legal document.

ABA SECTION OF LITIGATION MODEST MEANS TASK FORCE, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 6 (2003). That report also documented the proliferation of lawyers who provide limited-scope representation. One reason is that the cost of full-service representation may be prohibitive because:

> [m]any *pro se* litigants have enough disposable income to pay for the *limited* representation they need. The market failure that we alluded to earlier is that the great majority of lawyers do not offer these potential clients the services they need *and* can afford. Instead, they present them with an all (full-service) or nothing (wholly self-represented) Hobson's "choice." The result is more *pro se* litigants.

Id. at 9 (emphasis in original). To provide greater access to justice for low- and moderate-income clients, ethical and court rules should be tailored to make limited-scope representation easier for clients, lawyers and the courts.

In 2002 the ABA modified Rule 1.2(c) of the Model Rules of Professional Conduct specifically to:

> more clearly permit, but also more specifically to regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client. Although lawyers enter into such agreements in a variety of practice settings, this proposal in part is intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel.

A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 55 (American Bar Ass'n 2006). As a result, MR 1.2(c) was amended to state that: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Arizona adopted this change effective December 1, 2003.

Further amendments will encourage lawyers to use limited-scope representation or clarify their current ability to do so. Specifically, ERs 4.2 and 4.3 and Rule 11 should be amended to accommodate limit-scope representation. In addition, Rule 5.1, Ariz. R. Civ. P., should be amended to allow for limited appearances in all civil actions.

A. ER 4.2 and ER 4.3

ER 4.2 prohibits a lawyer from communicating with a person who is represented by counsel in a matter about that matter. When one lawyer is handling a limited-scope representation, the opposing counsel may not know or understand the extent to which he or she may have contact with the limited-scope lawyer's client. This can occur outside of or within litigation.

ER 4.3 governs a lawyer's conduct in dealing with an unrepresented person. As with ER 4.2, when a person is obtaining limited-scope legal services, such as consulting with a lawyer or hiring a lawyer to ghostwrite pleadings, it may be confusing as to whether the person is nonetheless "unrepresented" in that the client is handling the matter *pro se*.

For ER 4.2 purposes, even if the opposing counsel directly asks, the limited-scope lawyer may not be able to disclose the scope of representation. Ariz. Ethics Op. 06-03 (July 2006) addressed this question:

> Unlike disclosure to a court, ER 4.1(a) does not place an affirmative duty on the attorney to advise opposing counsel of the limited-scope representation unless it is to avoid assisting the client with a criminal or fraudulent act and then only if permitted by ER 1.6. In fact, unless required to do so by the rules, e.g., E.R. 1.6., an attorney may not disclose information pertaining to the limited representation unless authorized to do so by the client. Disclosure of the limited scope may indeed adversely affect the client's situation. Also, ER 1.6(a) allows disclosure when disclosure is impliedly authorized in order to carry out the representation.

Ethics Op. 06-03 advised that after consulting with the client, the limited-scope lawyer should:

> provide opposing counsel with explicit instructions . . . as to when opposing counsel may communicate about the subject of the representation with the client. The ground rules could include directions about whom the opposing counsel should contact and on what matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the attorney is authorized to accept service for the client.

Several states have adopted rule changes codifying the general idea that opposing counsel should consider the party receiving limited-scope representation to be unrepresented unless that opposing counsel is provided with written notice of the limited representation. Florida, Iowa, Maine, New Hampshire, Utah, and Washington – and just this spring, Montana – have done so with "nearly identical language." ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO PER LITIGANTS 14 (2009); Rule 4.2, Montana Rules of Professional Conduct. For example, Montana added the following language to its Rule 4.2:

> An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

While laudable, this language is on one hand too narrow and on the other, too broad. The term "notice of appearance" implies that the change is intended only to extend to limited-scope representation in the context of litigation, while the clause "or a written notice of time period during which" introduces an ambiguity.

This language also suggests that the lawyer must disclose the specific limitations on the scope of the representation. Such a communication may be detrimental to a client and, in addition, implicates ER 1.6 confidentiality concerns.

Finally, this language may modify the existing rule to create an unintended exception that might be detrimental to clients. ER 4.2 currently requires a lawyer to refrain from communicating with a person once the lawyer "knows" of the representation. That knowledge may be communicated by means other than a formal written notice and may also be "inferred from circumstances." *See* ER 1.0(f) (defining "knows" and "knowingly"). Adding this language to Arizona's rule arguably would allow a lawyer who in fact "knows" of a representation within the meaning of ER 1.0(f) to nonetheless communicate with the represented client, unless and until the formal written notice of the limited-scope representation is received.

For these reasons, the State Bar believes that the goal of increasing limited-scope representation and clarifying the Ethical Rules can be achieved in Arizona without changing the text of ERs 4.2 and 4.3 and by adding language to their comments. The proposed comments would essentially confirm the direction given in Ethics Op. 06-03:

> A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer

performing limited-scope services is authorized to accept service on the client's behalf.

B. Rule 11, Ariz. R. Civ. P.

Limited-scope representation impacts rules other than the Ethical Rules. One significant issue is with Rule 11, Ariz. R. Civ. P.,[1] which prohibits lawyers and clients from filing frivolous litigation. When applied to undisclosed ghostwriting of court documents, this obligation "is not consistent with the limited nature of document preparation. The state rules of civil procedure generally work toward preserving the dichotomy of full representation versus self-representation when placing the burden on the lawyer to make reasonable inquiry pursuant to this segmented service." AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO PER LITIGANTS, *supra*, at 15.

Some courts have taken the position that ghostwriting court documents is unethical because "by failing to sign documents that the attorney has drafted for the nominal pro se litigant, the attorney improperly avoids his or her duty to certify that a reasonable basis exists for both the facts and legal arguments presented in the

[1] The relevant language in Rule 11, Ariz. R. Civ. P., is as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

document," leaving a court without anyone to sanction for filing legally frivolous claims should it find that the document violates the rule. Michael W. Loudenslager, *Giving Up the Ghost: A Proposal for Dealing with Attorney "Ghostwriting" of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearances for Such Attorneys*, 92 MARQ. L. REV. 103, 120-22 (2008) (footnotes omitted).

In *In re Fengling Liu*, 664 F.3d 367 (2d Cir. 2011), the Second Circuit overturned a discipline committee's finding that a lawyer had engaged in sanctionable misconduct by ghostwriting petitions for review. The court described how "a number of other federal courts" had concluded that lawyers who ghostwrote briefs or other pleadings had engaged in misconduct, including violating Rule 11, Fed. R. Civ. P., while "a number of bar association ethics committees have been more accepting of ghostwriting," and ABA Op. 07-446 explicitly construes the Model Rules to allow it. *Id.* at 369. The court concluded that because of its "lack of any rule or precedent governing attorney ghostwriting, and the various authorities that permit that practice," the lawyer could not have been aware that she had to disclose the ghostwriter in preparing petitions. *Id.* at 373.

One of those "bar association ethics committees [that] have been more accepting of ghostwriting" to which the Second Circuit referred is the State Bar of Arizona's Committee on the Rules of Professional Conduct. That committee's Op. 05-06, *supra*, concluded that no ethical rule bars ghostwriting, and noted that no Arizona court had published a decision concluding that Rule 11 requires a lawyer to inform the court when the lawyer is providing limited-scope representation to a pro per client. It concluded, however, that:

> [w]ith this opinion, we do not approve of attorneys ghostwriting documents that are filed with courts and tribunals without providing some form of disclosure. Instead, we only confirm that the practice is

> not prohibited by Arizona's Ethical Rules and do not revisit our conclusion in Opinion 91-03 that it may be prohibited by Rule 11, as other courts have agreed. But as before, we believe it best to leave the legal boundaries of this issue for definition by those with requisite authority.

Arizona appellate courts still have not addressed whether ghostwriting violates Rule 11. No lawyer, particularly one working for an indigent pro per client, would want to be a test case.

To encourage ghostwriting as a way of providing access to justice, Rule 11 should be amended to specifically clarify that ghostwriting without disclosure is not a violation of the rule. Colorado, Iowa, Missouri, Washington, and Montana have addressed the issue by permitting a lawyer to rely on the pro se party's representation of facts. AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO PER LITIGANTS, *supra,* at 15; Rule 11, Montana Rules of Civil Procedure. Arizona could add similar language to its Rule 11(a):

> Rule 11(a). Signing of pleadings, motions and other papers; sanctions
>
> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost

> of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee. An attorney may help to draft a pleading, motion or document filed by an 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.

C. Limited appearance

Limited-scope representation is particularly difficult in the litigation context. The petition that asked the Montana Supreme Court to change its ethical and civil rules to encourage limited-scope representation noted that limited appearance is necessary to "[e]nsure that a lawyer's limited representation[] *remains in fact limited*." (Emphasis added.)

Regardless of how the lawyer and client have limited representation, Arizona (except in two contexts) generally does not allow limited appearance. Rule 5.1(a)(1), Ariz. R. Civ. P., provides that a lawyer cannot appear in any action or file any document without first appearing as counsel of record. The lawyer then is "deemed responsible as attorney of record in all matters before and after judgment until the time for appeal from a judgment has expired or a judgment has become final after appeal or until there has been a formal withdrawal from or substitution in the case."

Without a mechanism allowing for limited appearance and automatic withdrawals, lawyers cannot be certain that their limited-scope representation will in

fact be limited. Withdrawal is contingent on the court. ER 1.16(c) requires that a lawyer, "[w]hen ordered to do so by a tribunal, . . . continue representation notwithstanding good cause for terminating the representation."

As a result, if a client who is otherwise representing himself in litigation hires a lawyer solely to handle a deposition for the client, the lawyer must file a notice of appearance as if the lawyer were going to assume full representation and be the client's lawyer for all matters within that case. Or, viewed from the lawyer's perspective, the lawyer may be paid only for a specific litigation task but must risk being ordered to continue the representation.

This traditional model of legal representation is:

> a convenient arrangement that facilitates court administration and case management. The lawyer receives all notices, is responsible for progressing the case and can only withdraw with leave of the court after motion and hearing. While there is no doubt this system is beneficial to the court and to opposing parties, it also perpetuates the dichotomy where litigants are assumed either to have representation or to be proceeding *pro se*. As with limits on document preparation, a system that contributes to this dichotomy is likely to result in more *pro se* litigants who are less prepared to efficiently advance their legal matter. If we presume that *pro se* litigation administratively encumbers the courts, it seems reasonable that a system clarifying limited appearances, and expediting withdrawals, would contribute to the smooth functioning of the courts.

AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO PER LITIGANTS, *supra,* at 18-19.

Adopting rules allowing for limited appearance, and even automatic withdrawal upon completing limited-scope representation, would resolve the dichotomy and encourage limited-scope representation in litigation matters. Other states have done this, perhaps most recently Montana, which adopted two civil procedural rules:

Rule 4.2 Limited Representation Permitted – Process.

(a) In accordance with Rule 1.2(c) of the Montana Rules of Professional Conduct an attorney may undertake to provide limited representation to a person involved in a court proceeding.

(b) Providing limited representation of a person under these rules shall not constitute an entry of appearance by the attorney for purposes of Rule 5(b) and does not authorize or require the service or delivery of pleadings, papers, or other documents upon the attorney under Rule 5(b).

(c) Representation of the person by the attorney at any proceeding before a judge or other judicial officer on behalf of the person constitutes an entry of appearance, except to the extent that a limited notice of appearance as provided for under Rule 4.3 is filed and served prior to or simultaneous with the actual appearance. 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.

(d) An attorney's violation of this Rule may subject the attorney to sanctions provided in Rule 11.

Rule 4.3. Notice of Limited Appearance and Withdrawal as Attorney.

(a) Notice of limited appearance. If specifically so stated in a notice of limited appearance filed and served prior to or simultaneous with the proceeding, an attorney's role may be limited to one or more individual proceedings in the action.

(b) At the conclusion of such proceedings the attorney's role terminates without the necessity of leave of court upon the attorney filing notice of completion of limited appearance.

Montana's solution appears efficient and streamlined and, if written on a blank slate, might be the tack to pursue. Arizona, however, already has taken steps toward limited appearance by allowing it in Family Court as well as in vulnerable adult exploitation actions. *See* Rule 9(B), Ariz. R. Fam. Law P.; Rule 5.2, Ariz. R. Civ. P.

As a result, Arizona should expand the limited-appearance mechanism existing in its rules by revising Rule 5.1, Ariz. R. Civ. P., to incorporate similar provisions as follows:

(a) [no change]

(b) [no change]

(c) Limited Appearance. In accordance with ER 1.2, Arizona Rules of Professional Conduct, an attorney may undertake limited representation of a person involved in a court proceeding.

(1) An attorney may make a limited appearance by filing and serving a Notice of Limited Scope Representation in the form prescribed in Rule ___, Form __. The notice shall:

a. state that the attorney and the party have a written agreement that the attorney will provide limited scope representation to the party for the purpose of representing the party in such an action; and

b. specify the matters, hearings or issues with regard to which the attorney will represent the party.

(2) Service on an attorney making a limited appearance on behalf of a party shall constitute effective service on that party under Rule 5(c) with respect to all matters in the action, but shall not extend the attorney's responsibility for representing the party beyond the specific matters, hearings or issues for which the attorney has appeared.

(3) Upon an attorney's completion of the representation specified in the Notice of Limited Scope Representation, the attorney may withdraw from the action as follows:

a. *With Consent.* If the client consents to withdrawal, the attorney may withdraw from the action by filing a Notice of Withdrawal with Consent, signed by both the attorney and the client, stating: (i) the attorney has completed the representation specified in the Notice of Limited Scope Representation and will no longer be representing the party; and (ii) the last known address and telephone number of the party who will no longer be represented. The attorney shall serve a copy of the notice on

the party who will no longer be represented and on all other parties. The attorney's withdrawal from the action shall be effective upon the filing and service of the Notice of Withdrawal with Consent.

b. *Without Consent.* If the client does not consent to withdrawal or to sign a Notice of Withdrawal with Consent, the attorney may file a motion to withdraw, which shall be served upon the client and all other parties, along with a proposed form of order.

i. If no objection is filed within ten (10) days from the date the motion is served on the client, the court shall sign the order unless it determines that good cause exists to hold a hearing on whether the attorney has completed the limited scope representation for which the attorney has appeared. If the court signs the order, the withdrawing attorney shall serve a copy of the order on the client. The withdrawing attorney also shall promptly serve a written notice of the entry of such order, together with the name, last known address and telephone number of the client, on all other parties.

ii. If an objection is filed within ten (10) days of the service of the motion, the court shall conduct a hearing to determine whether the attorney has completed the limited scope representation for which the attorney appeared.

Comments to various Ethical Rules lend support for explicitly allowing limited appearance in court. Comment 1 to ER 1.16 notes that "[o]rdinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded." It then refers to ER 1.2(c), addressing the scope of limited representation, and ER 6.5, establishing procedures for a lawyer's participation in a limited legal services program. It also references comment 4 to ER 1.3, which explains that "[i]f a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved."

II. Resolving Tension Between ERs 1.5 and 6.5.

The intersection between ER 1.5 (fees) and ER 6.5 (nonprofit and court-annexed limited-legal-services programs) results in an anomaly for lawyers who participate in programs intended to provide short-term limited legal services. As currently written and interpreted, ER 1.5 would require lawyers who create even limited attorney-client relationships by participating in legal-advice hotlines and similar events to ensure that they confirm the terms of representation in writing, even though ER 6.5 recognizes that the same types of situations do not lend themselves to checking for conflicts.

ER 6.5 was a new rule adopted as part of the major Ethical Rules revision that took effect December 1, 2003. It is identical to ABA Model Rule ("MR") 6.5, which relaxes traditional conflict-of-interest rules under circumstances – such as legal-advice hotlines, advice-only clinics or pro se counseling programs -- in which a lawyer-client relationship is established but it is not feasible for the lawyer to check systematically for conflicts. Although relaxing conflict rules, the comment to ER 6.5 points out that all other Ethical Rules apply: "Except as provided in this Rule, the Rules of Professional Conduct, including ERs 1.6 and 1.9(c), are applicable to the limited representation."

The current version of ER 1.5 also was adopted as part of that 2003 major overhaul. ER 1.5(b) requires a lawyer to confirm the scope and rate and basis of the fee to a client "in writing," before or within a reasonable time after commencing representation. In contrast to Arizona's rule, the ABA's MR 1.5(b) requires only that the scope and terms of representation be communicated "preferably in writing" to a client. Arizona's change to MR 1.5(b) resulted in an awkward – but perhaps not obvious – intersection between ER 1.5(b) and ER 6.5.

ER 1.5(b) itself does not provide an exemption to resolve the anomaly. The rule does not exempt pro bono or limited-scope representation from the writing requirement.[2] In fact, in discussing limited-scope representation, Arizona Ethics Op. 05-06 noted that those agreements are subject to ER 1.5(b)'s requirements, "regardless of whether fees are to be paid by a client or *the legal services are provided without charge*." (Emphasis added.) At least one Arizona lawyer recently was found to have violated ER 1.5(b) by failing to memorialize his representation of a pro bono client.

To solve this anomaly, an exception should be added to ER 1.5(b) for the circumscribed universe – aimed at providing legal services to the poor – that qualifies for special treatment under ER 6.5, as well as to ER 6.5 itself:

The proposed amendments are:

ER 1.5. Fees

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing before the fees or expenses to be billed at higher rates are actually incurred. The requirements of this subsection shall not apply to:

(1) court-appointed lawyers who are paid by a court or other governmental entity; or

(2) lawyers who provide pro bono, short-term limited legal services to a client pursuant to ER 6.5.

[2] Until recent amendments took effect on January 1, 2012, ER 1.5(b) did not exempt even court-appointed lawyers paid by the court or a governmental entity from the writing requirement.

ER 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to ERs 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to ER 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by ERs 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), ER 1.10 is inapplicable to a representation governed by this Rule.

(c) ER 1.5 does not apply to a representation governed by this Rule and for which the lawyer does not charge a fee.

Comment

* * *

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, ERs 1.5, 1.7, 1.9(a) and 1.10 become applicable.

CONCLUSION

For the above reasons, the State Bar respectfully requests that the Court amend the rules themselves or the comments to ERs 1.5, 4.2, 4.3 and 6.5, Rule 42, Ariz. R. Sup. Ct., and Rules 5.1 and 11, Ariz. R. Civ. P. Appendix A contains the complete text of the proposed amendments.

RESPECTFULLY SUBMITTED this 14th day of May, 2012.

John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 14th day of May, 2012.

by: Kathleen A. Lundgren

APPENDIX A

Proposed Rule Changes
(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~"strike-through"~~).

Rule 42, Ariz .R. S. Ct.

ER 1.5. Fees

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing before the fees or expenses to be billed at higher rates are actually incurred. The requirements of this subsection shall not apply to:

(1) court-appointed lawyers who are paid by a court or other governmental entity.

(2) lawyers who provide pro bono short-term limited legal services to a client pursuant to ER 6.5.

ER 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

Comment

* * *

[4] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel

should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client's behalf.

ER 4.3. Dealing with Unrepresented Person

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.

Comment

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[3] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client's behalf.

ER 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to ERs 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to ER 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by ERs 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), ER 1.10 is inapplicable to a representation governed by this Rule.

(c) ER 1.5 does not apply to a representation governed by this Rule and for which the lawyer does not charge a fee.

Comment

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[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, ERs 1.5, 1.7, 1.9(a) and 1.10 become applicable.

Rule 5.1, Ariz. R. Civ. P.

(a) [no change]

(b) [no change]

(c) Limited Appearance. In accordance with ER 1.2, Arizona Rules of Professional Conduct, an attorney may undertake limited representation of a person involved in a court proceeding.

(1) An attorney may make a limited appearance by filing and serving a Notice of Limited Scope Representation in the form prescribed in Rule ___, Form __.The notice shall:

a. state that the attorney and the party have a written agreement that the attorney will provide limited scope representation to the party for the purpose of representing the party in such an action; and

b. specify the matters, hearings or issues with regard to which the attorney will represent the party.

(2) Service on an attorney making a limited appearance on behalf of a party shall constitute effective service on that party under Rule 5(c) with respect to all matters in the action, but shall not extend the attorney's

responsibility for representing the party beyond the specific matters, hearings or issues for which the attorney has appeared.

(3) Upon an attorney's completion of the representation specified in the Notice of Limited Scope Representation, the attorney may withdraw from the action as follows:

a. *With Consent.* If the client consents to withdrawal, the attorney may withdraw from the action by filing a Notice of Withdrawal with Consent, signed by both the attorney and the client, stating: (i) the attorney has completed the representation specified in the Notice of Limited Scope Representation and will no longer be representing the party; and (ii) the last known address and telephone number of the party who will no longer be represented. The attorney shall serve a copy of the notice on the party who will no longer be represented and on all other parties. The attorney's withdrawal from the action shall be effective upon the filing and service of the Notice of Withdrawal with Consent.

b. *Without Consent.* If the client does not consent to withdrawal or to sign a Notice of Withdrawal with Consent, the attorney may file a motion to withdraw, which shall be served upon the client and all other parties, along with a proposed form of order.

i. If no objection is filed within ten (10) days from the date the motion is served on the client, the court shall sign the order unless it determines that good cause exists to hold a hearing on whether the attorney has completed the limited scope representation for which the attorney has appeared. If the court signs the order, the withdrawing attorney shall serve a copy of the order on the client. The withdrawing attorney also shall promptly serve a written notice of the entry of such order, together with the name, last known address and telephone number of the client, on all other parties.

ii. If an objection is filed within ten (10) days of the service of the motion, the court shall conduct a hearing to determine whether the attorney has completed the limited scope representation for which the attorney appeared.

Rule 11, Ariz.R.Civ.P.

Rule 11(a). Signing of pleadings, motions and other papers; sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee. An attorney may help to draft a pleading, motion or document filed by an 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.