

MONTANA LEGAL SERVICES ASSOCIATION

Limited Scope Representation - Rules and Best Practices

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LIMITED SCOPE REPRESENTATION (LSR)

- What is it?
- When can I do it?
- What do the RPCs require when I engage in LSR?
- How do I anticipate, recognize and address potential issues?

LIMITED SCOPE REPRESENTATION (LSR)

- Goal of Montana LSR?

Increase access to justice for low and moderate income Montanans

- Goal of this presentation?

Encourage and support Montana lawyers in providing pro or low bono limited scope representation . . .

. . . when appropriate and consistent with your professional obligations

LSR – WHAT IS IT?

- Also called “unbundling”
- Less than full service representation authorized if client’s interests can be adequately protected
- 2011 Montana Supreme Court revised Rules of Professional Conduct and Rules of Civil Procedure to permit and facilitate LSR
- Rules amended:
 - Rule of Professional Conduct 1.2, 4.2, 4.3
 - Rule of Civil Procedure 4.2, 4.3, 11
- Specifically intended to help address unmet legal needs of low and moderate-income Montanans

Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

Former

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Current

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent **in writing.**

Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

Former

No subpart (1)

Current

(1) Client's informed consent must be confirmed in writing UNLESS:
(i) Limited to telephone consultation;
(ii) Lawyer employed by a nonprofit legal services program or participating in nonprofit court-annexed legal services program

AND

solely providing information and advice OR preparing court approved legal forms

OR

(iii) Court-appointed for limited purpose set forth appointment order

Rule 1.2 -*TRANSLATION*

Threshold inquiry = limited services must be reasonable under the circumstances

Default rule = client's informed consent must be documented

Reasonable + written informed consent = authorized LSR

Exceptions to writing requirement

1. Phone consult
2. Limited assistance provided through non-profit program
3. Court says so

Rule 1.2 - Scope of Representation and Allocation of Authority Between Client and Lawyer

Former

Current

No subpart (2)

(2) If the client gives informed consent in writing signed by the client, presumption that:

(i) Representation is limited to attorney and services described in the writing; and

(ii) Attorney does not represent client generally or in matters other than those identified in the writing

Rule 1.2 (b)

Writing signed by Client

- If client gives informed consent in writing signed by client, presumption arises that:
 - Representation is limited to services described and
 - Attorney does not represent client generally or in matters other than those identified

What is the LSR Written Consent Requirement?

- Rule 1.2(c) requires “informed consent in writing”
- Rule 1.2(c)(1) requires “informed consent . . . confirmed in writing” unless one of three exceptions apply
- Rule 1.2(c)(2) triggers presumptions with “informed consent in writing signed by client”

What is the LSR Written Consent Requirement?

Rule potentially describes three types of documentation:

1. Informed consent in writing
2. Informed consent confirmed in writing
3. Informed consent in writing signed by client

Rule 1.2 (b) - Best Practices

- Confirm all LSR in writing signed by client (not just confirmed in writing)
 - Signature triggers presumptions and limits misunderstandings
- Detail informed consent factors, facts and circumstances as understood by attorney
- Require client to inform you of any change in circumstances that might affect reasonableness analysis
- List circumstances that might affect reasonableness

Rule 1.2 (b) - Limited Scope Representation

All core obligations remain the same within the limited representation

- Communication
- Competence
- Confidentiality
- Control
- Identifying Conflicts

Rule 1.1 – Competence

A lawyer shall provide competent representation to a client.

Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.1 - Comment 5 to Model Rules

- Competent handling of a particular matter includes:
 - inquiry into and analysis of factual and legal elements of problem
 - use of methods and procedures meeting standards of competent practitioners
 - adequate preparation
- Attention and preparation required determined in part by what is at stake

Engagement Letters

- Part of Communication
- Especially important in LSR
- Best practices:
 - Address nature and scope of representation
 - In family law, include post-dissolution litigation? Appeals?
 - Disposition of documents/files

Rule 4.2 – Communication with Person Represented by Counsel

FORMER

CURRENT

No subpart (b)

(b) 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 the purpose of this Rule unless the opposing party or lawyer has been provided with 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.

Rule 4.3 – Dealing with Unrepresented Person

FORMER

No subpart (b)

CURRENT

(b) An otherwise unrepresented person to whom limited representation is being provided or has been in accordance with Rule 1.2(c) ***is considered to be unrepresented for the purposes of this Rule unless the opposing party or lawyer has been provided with written notice of appearance*** under which, or 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.

Suggestions for the LSR Attorney-Client Agreement

- State that the client is responsible for all remaining obligations in the case including but not limited to:
 - Meeting all court ordered deadlines
 - Filing all the necessary pleadings
 - Fully complying with all discovery requests
 - Obeying all court orders
 - Communicating with the court and opposing counsel

Suggestions for the Attorney-Client Agreement

- State that you are relying on their version of the facts and status of the case and that you have not undertaken an independent investigation to verify the information that they have related to you
- Specifically describe the services that you agree to provide

Suggestions for the Attorney-Client Agreement

- When services provided, describe your fees
- State the services that you will not provide
 - E.g. appearing in court, speaking to opposing counsel

SUMMARY OF MAJOR ISSUES

- Limitations on scope must be informed and in writing
- Must be served prior to or simultaneously with the proceeding
- Changes in scope must be documented
- Limitations must be reasonable under the circumstances
- An attorney as affirmative duty to advise the client on related matters even if not asked
 - *Nichols v. Keller*, 15 Cal. App.4th 1672 (1993)