



# THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

## IN LANDMARK OPINION KENTUCKY SUPREME COURT PROVIDES LIMITED SCOPE REPRESENTATION GUIDANCE

*Persels & Associates, LLC v. Capital One Bank, (USA), N.A., 2014-SC-000131-DG*

Kentucky Supreme Court Rule (“SCR”) 3.130 (Rule 1.2) governs the scope of representation and allocation of authority between client and lawyer. It provides in part: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” SCR 3.130 (1.2)(c).

### WHY PERSELS IS IMPORTANT

*Persels* could not have come at a better time for Kentucky lawyers. We practice in a time when the delivery of legal services is fragmenting. At the 2016 Legal Malpractice and Risk Management Conference it was stressed that traditional law firms are rapidly being overtaken in a way that cannot be stopped. The observation was made that “anything that can be done by a computer will be done by a computer and not a lawyer.” Investment is exploding in novel legal service providers – lawyer and nonlawyer – that threaten the business of all firms, but especially in Kentucky solo and smaller firms.

An example of this trend is that Legal Zoom recently settled an unauthorized practice of lawsuit with the North Carolina State Bar that allows Legal Zoom, which is not a law firm, to offer online document services and prepaid legal service plans. The signal here is that unauthorized practice of law prohibitions are on their way out.

Another example is that Thomson Reuters has transformed its business from a legal research company to a legal services and solutions company focused on in-house counsel. Reuters wants to be known as “The Answer Company” and now competes with all law firms for corporate business.

Many more examples could be given, but the point is that more and more potential clients will avail themselves of these nontraditional legal services to save money. They will look to lawyers much more frequently for limited scope representation. Kentucky lawyers must recognize this trend and prepare to handle an increasing number of limited representations. This article highlights the key guidance of *Persels* on limited scope

representation and offers risk management considerations to avoid malpractice claims and ethics complaints when representing clients on a limited basis.

### *Persels & Assoc., LLC v. Capital One Bank (USA), N.A.*

Two defendants in Owensboro individually retained *Persels & Associates*, a national law firm specializing in unsecured debt collection cases, to defend them in debt collection cases pending before the Daviess Circuit Court. *Persels* retained two Kentucky lawyers as local counsel to provide limited representation. Local counsel representation was limited to drafting and consultation services. There was no requirement that they sign pleadings, enter an appearance, or attend court proceedings. As a result the two defendants signed documents prepared by local counsel and were thus nominally pro se. The documents contained this unsigned notation:

This document was prepared by, or with the assistance of, an attorney licensed in Kentucky and employed by *Persels & Associates* ....

CONTINUED ON PAGE 2

**SPECIAL INSERT INSIDE THIS ISSUE:  
SAMPLE ENGAGEMENT LETTER:  
LIMITED SCOPE**



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# LIMITED SCOPE REPRESENTATION



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The Daviess Circuit Court took exception to this procedure and ordered the two local counsels to show cause why they should not be held in contempt for their failure to enter appearances and sign documents filed with the court.

The upshot of this order was that the trial court determined that Persels and the two Kentucky local counsels had violated Kentucky Rules of Civil Procedure 11. They were each fined \$1.00 probated upon the condition that there were no further violations of CR 11. The Court of Appeals affirmed the trial court's judgment and the Supreme Court granted discretionary review. At the time of discretionary review the underlying case was settled leaving the CR 11 sanctions as the only remaining issue.

In reaching its findings the Court considered the Kentucky Rules of Professional Conduct, KBA Ethics Opinion 343(1991), and various other authorities on limited representation, "ghostwriting," and "unbundling," but concluded that it alone is the final arbiter of Kentucky rules and procedure for the practicing bar. The Court then proceeded to describe the limited scope representation rules for Kentucky lawyers with great specificity as follows:

- ◆ [W]e authorize agreements that limit the scope of legal assistance or that limit representation to discrete legal tasks, so long as they are reasonable under the circumstances and the client gives informed consent. .... This includes limitations on services provided in furtherance of traditional litigation as well as alternative dispute resolution methods.

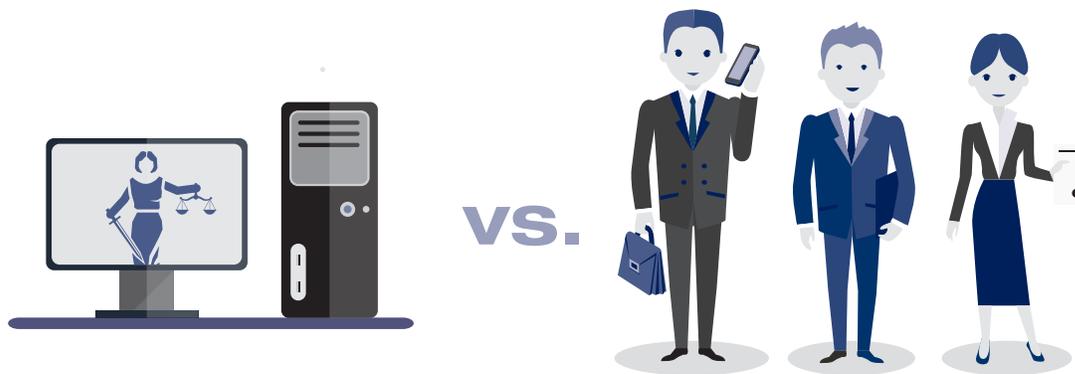
- ◆ Agreements that limit representation to distinct *stages* of litigation may also be reasonable under the circumstances. .... For instance, family law practitioners may provide comprehensive representation during property division proceedings but not provide representation in any form during child custody proceedings, or vice versa. However, these types of agreements must be carefully tailored to avoid abuse and confusion from the perspective of the client and the court.
- ◆ [In] addition to being reasonable under the circumstances, all agreements which limit representation must be in writing, require the informed consent of the client(s), and must comport with our rules, including the rules of professional conduct.
- ◆ [W]e do not adopt a strict rule requiring drafting attorneys to sign the documents they prepare pursuant to limited-representation agreements. An attorney involved in the preparation of initial pleadings (complaint, answer, cross-claims and counter-claims), must indicate that the document has been prepared by or with the assistance of counsel by providing "Prepared By or With Assistance of Counsel" on the document concerned.
- ◆ [A]ctive assistance by counsel must be disclosed to the presiding tribunal and adversaries. Active assistance includes drafting documents in furtherance of litigation that extend beyond initial pleadings.
- ◆ Notice of active assistance shall include the name, address, and telephone number of the attorney(s) working on the case, *and the nature of the limited representation agreement at issue*. However, such disclosures do not constitute an appearance by counsel, nor do they require the drafting attorney to appear in court on behalf of the litigant receiving limited representation unless the court or the surrounding circumstances dictate otherwise. For example, cases involving expedited or emergency relief may justify comprehensive representation, or at least a limited appearance of counsel, for the purpose of resolving the expedited matter.
- ◆ In all cases, attorneys providing limited-representation are required to adequately investigate the facts to ensure that the pleadings or other documents drafted in furtherance of litigation are tendered in good faith.

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“WHERE THERE IS A WILL THERE IS A WAY  
TO MAKE A MISTAKE.”

2016 Legal Malpractice  
Risk Management  
Conference

# LIMITED SCOPE REPRESENTATION



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- ◆ [A]ttorneys providing limited-representation of any kind may not deceptively engage in a more complete role.
- ◆ [L]imited representation does not require proof of indigence. Although the financial means of litigants pursuing limited-representation may be considered by courts as relevant to the overall reasonableness of the agreement, a litigant's financial status is not a dispositive factor. On this issue, deference should be afforded in favor of the litigant seeking limited representation.

The Supreme Court concluded by reversing the Court of Appeals and the Daviess Circuit Court's order imposing CR 11 sanctions, and remanded for the trial court to determine the reasonableness of the agreements.

## RISK MANAGING LIMITED SCOPE REPRESENTATIONS

### TYPES OF LIMITED SCOPE REPRESENTATIONS

Limited scope representations should be considered in two contexts for risk management purposes – areas of law and functional services. The areas of law that frequently involve limited scope representations are:

- ◆ Real Estate,
- ◆ Personal Bankruptcy,
- ◆ Estate Planning,
- ◆ Family Law:
  - Divorce,
  - Child Support,
- ◆ Uncomplicated Personnel Injury Claims and Small Court Claims,
- ◆ Consumer Claims,
- ◆ Housing Law, and
- ◆ Immigration.

On a functional basis some of the legal services that are typically unbundled are:

- ◆ Consultation and Advice Including Information about Court Procedures, Courtroom Protocol, and Strategy,
- ◆ Correspondence and Document Review,
- ◆ Document Preparation Such as Contracts and Agreements
- ◆ Legal Research,
- ◆ Investigation and Discovery,
- ◆ Negotiation,
- ◆ Limited Court Appearance, and
- ◆ Appeal.

### RECOGNIZE THE RISKS ASSOCIATED WITH A LIMITED SCOPE REPRESENTATION

Regardless of the context in which a limited scope representation is cast the professional responsibility duties and risks remain the same as for any other representation plus some that are unique to limited scope. The following provides a description of some of these risks.

- ◆ **Matter screening:** As a general rule you should be competent to practice all of the client's matter even if you will handle only a part. If you cannot, there is a risk of not meeting your duty to advise on the totality of the circumstances.
- ◆ **Client screening:** In unbundled services representations, in addition to the usual client screening considerations, it is essential to evaluate whether the client is competent to "practice" any part of the matter that will be the client's responsibility. What are the client's communications skills etc.? If you have reservations about a client's competence, don't accept the limited scope representation.

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“STRIVING TO BE **BETTER**, OFT WE  
MAR WHAT'S WELL.” *King Lear*

# LIMITED SCOPE REPRESENTATION

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- ◆ **Scrivener:** Lawyers frequently reduce contracts to writing with the understanding that they are only recording the terms and conditions as determined by the parties, owe no other duties to the parties, and are not responsible for underlying deficiencies in the transaction. The role of the scrivener is easily misunderstood and should be carefully explained to the parties to avoid an allegation of a conflict of interest or that other duties were owed. Always use a letter of engagement and document the file with the advice given about the limitations of your representation and duties.
- ◆ **Research:** If retained to do research only, clearly delineate who is responsible for the facts on which the research is based. If the client places time limitations on the research as a cost control, do not take the representation unless you are sure the time allowed is adequate for a competent effort. Identify any issues not covered by the research if time precludes their consideration.
- ◆ **Independent legal advice:** Be especially careful when asked to provide outside independent legal advice for an ongoing matter. In addition to all the other limited scope risk concerns, the client usually is in a hurry and the matter is often complex. If you do not have the immediate competence and time to adequately consider the issues, do not take the representation. Do not give business advice – do not express an opinion whether a transaction is a good deal or an appraisal is fair. Warn of the dangers of not investigating an issue further to include what could happen if that is not done. Make sure the client understands your limited scope of representation is advising on the legal consequences of the proposed transaction so the client can make an informed decision whether to continue. Document the file as thoroughly as possible.
- ◆ **Opinion letters:** Spell out scope limitations of an opinion letter by specifying its purpose, authorized uses, and restrictions in the letter. Set out the facts and assumptions on which the opinion is based. Be specific about facts based on your own knowledge and those provided by others who bear responsibility for their accuracy. If others are preparing evaluations on other aspects of the transaction, clearly exclude those parts from your opinion. If you are relying on an expert opinion as part of your analysis (e.g., an environmental assessment), spell it out in your opinion. Be complete –

include the pro's and con's of the matter. Do not expose yourself to the accusation that you misled by omission. Material limitations must be disclosed.

- ◆ **Strictly adhere to scope limitations:** Resist the temptation to go beyond the agreed scope limitations. If you do, the door is opened to show you assumed full responsibility for the matter.<sup>1</sup>

## ALL AGREEMENTS THAT LIMIT REPRESENTATION REQUIRE THE INFORMED CONSENT OF THE CLIENT

*Persels* permits limiting scope if the client gives informed consent. Kentucky Rules of Professional Conduct SCR 3.130(1.0) (e) Terminology defines informed consent as follows:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

A lawyer's fiduciary obligations in limited scope representations are not qualitatively altered. The fiduciary duty of loyalty and confidentiality is the same as in an unlimited representation. The client must receive a thorough consultation on the significance of limitations on representation. This consultation is similar in nature to the full disclosure and informed consent required when resolving a conflict of interest. The following is a gloss of ideas from various commentators that show a lawyer's limited scope duties in the context of an adequate client consultation:

- ◆ Develop the **full** factual circumstances of the representation – not just those facts pertaining to the limited representation.
- ◆ Explain **all** the legal implications of the client's situation to include rights, remedies, and courses of action – not just those that are pertinent to the limited representation. A lawyer has a duty not to ignore circumstances surrounding a representation indicating legal issues for the client because they are outside the scope of representation. A typical example of a violation of this duty is when a lawyer fails to advise on a potential third-party claim while representing a client on a workers' compensation claim. This duty applies equally to limited scope representations. Make sure the client has the big picture.

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“YOU SHOULD **ALWAYS BELIEVE** ALL YOU READ IN NEWSPAPERS, AS THIS MAKES THEM **MORE INTERESTING.**”

Rose  
Macaulay

# LIMITED SCOPE REPRESENTATION

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- ◆ Explain the implications of a limited representation in terms easily understood by the client. Stress what the lawyer will do and not do – and the risk and opportunities of proceeding on that basis. Carefully document the client’s file. Include specific advice given and instructions, checklists, and other self-help publications provided to the client. Keep a chronology of each meeting with the client.
- ◆ Explain to the client your billing procedures and when payment is required.
- ◆ When appropriate, advise the client to see another lawyer on legal issues outside the scope of the limited representation stressing time limitations considerations.
- ◆ Suggest that the client consider seeking a second opinion on the adequacy of the proposed limited representation for the client’s needs.<sup>ii</sup>



## ALL AGREEMENTS THAT LIMIT REPRESENTATION MUST BE IN WRITING

*Persels* requires that limited scope representations be put in writing. Kentucky Rules of Professional Conduct SCR 3.130(1.0)

(b) Terminology defines confirmed in writing as follows:

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of an informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

To comply with the writing requirement lawyers should use a limited scope representation letter of engagement. While *Persels* does not require that the client sign the writing, best practice is

to always get the client’s signature on the letter of engagement. In general the letter of engagement should cover the following matters:

- ◆ The client’s situation and goals.
- ◆ The tasks the lawyer will accomplish.
- ◆ The available options and opportunities.
- ◆ The anticipated costs of various tasks necessary to achieve the client’s goals.
- ◆ Tasks not assigned the lawyer.
- ◆ The benefits and risks of the tasks that the lawyer will undertake.
- ◆ Tasks the client has agreed to perform.
- ◆ The way the lawyer will communicate with the client -- in-person meeting, phone conference, or email.<sup>iii</sup>

Accompanying this article is a sample limited scope letter of engagement. It is printed here by courtesy of Lawyers Mutual Liability Insurance Company of North Carolina. It is comprehensive and intended to assist lawyers in tailoring their own letter of engagement to their particular circumstances. 

## ENDNOTES

- i. Updated extract from the May 2000 *Bench & Bar* article *Limited Scope Representation*.
- ii. Updated extract from the May 2000 *Bench & Bar* article *Limited Scope Representation*.
- iii. *Avoiding Malpractice In Unbundled Services*, Katja Kunze, President/CEO, Wisconsin Lawyers Mutual Ins. Co.

**THE RISK MANAGER**  
PUBLISHED BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

DEL O’ROARK  
 Newsletter Editor

This newsletter is a periodic publication of Lawyers Mutual Insurance Co. of Kentucky. The contents are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish an attorney’s standard of due care for a particular situation. Rather, it is our intent to advise our insureds to act in a manner which may be well above the standard of due care in order to avoid claims having merit as well as those without merit.

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*William Hazlitt*



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**ANNOUNCEMENT**

**2016 ANNUAL POLICYHOLDERS' MEETING**

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 8:00 a.m., Wednesday, May 11 in the Skybox room (2nd level), Louisville Marriott Downtown, 280 W. Jefferson St, Louisville, KY. Included in the items of business are the election of a class of the Board of Directors and a report on Company operations. Proxy materials will be mailed to policyholders prior to the meeting. The Annual Report can be downloaded from the website, [lmick.com](http://lmick.com). We urge all policyholders to return their proxies and to attend the meeting.

**WEDNESDAY, MAY 11, 2016**

**8:00 A.M.**

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