

## 2013 DRAFTING REQUEST

### Bill

Received: **10/30/2013** Received By: **tdodge**  
Wanted: **Soon** Same as LRB:  
For: **John Jagler (608) 266-9650** By/Representing: **Rep. Jagler / Mark Florian**  
May Contact: **Andrew Hanus (Speaker's Office)** Drafter: **tdodge**  
**Adam Plotkin (SPD)** Addl. Drafters:  
**Cameron (Majority Leader)** Extra Copies:  
Subject: **Mental Health - detent/commit**

Submit via email: **YES**  
Requester's email: **Rep.Jagler@legis.wisconsin.gov**  
Carbon copy (CC) to: **tamara.dodge@legis.wisconsin.gov**

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### Pre Topic:

No specific pre topic given

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### Topic:

Corporation counsel representation in petitions for involuntary commitment

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### Instructions:

See attached

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### Drafting History:

| <u>Vers.</u> | <u>Drafted</u>       | <u>Reviewed</u>    | <u>Typed</u>          | <u>Proofed</u> | <u>Submitted</u>       | <u>Jacketed</u> | <u>Required</u> |
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| /?           | tdodge<br>10/31/2013 |                    |                       | _____          |                        |                 |                 |
| /P1          | tdodge<br>11/1/2013  | evinz<br>11/1/2013 | jmurphy<br>10/31/2013 | _____          | sbasford<br>10/31/2013 |                 | State<br>S&L    |
| /1           |                      |                    | jmurphy               | _____          | srose                  | mbarman         | State           |

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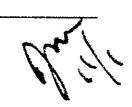
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**Instructions:**

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| /P1          |                      | evinz<br>10/31/2013 | jmurphy<br>10/31/2013 | _____   | sbasford<br>10/31/2013 |                 | State<br>S&L    |
| FE Sent For: |                      | 11/1/13<br>eev      | 11/1/13<br>eev        |  |                        |                 |                 |

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Almost nothing remains from AB 451  
- create new draft not substitute

Add provision on s. 51.15(10) treatment  
directors using same procedure



# Wisconsin State Public Defender

315 N. Henry St. - 2<sup>nd</sup> Floor  
PO Box 7923 Madison, WI 53707-7923  
Office Number: 608-266-0087 / Fax Number: 608-267-0584  
www.wisspd.org

Kelli S. Thompson  
State Public Defender

Michael Tobin  
Deputy State  
Public Defender

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TO: Cameron Sholty, Rep. Kramer's office  
FROM: Adam Plotkin, Office of the State Public Defender  
DATE: Tuesday, October 29, 2013  
RE: Assembly Bill 451

Cameron,

Here are comments and suggestions from the State Public Defender's office regarding Assembly Bill 451 in advance of our meeting on Wednesday.

An easier solution to address the stated concerns with the current system would be to make two small, but meaningful changes to s. 51.20.

1. Provide that corporation counsel file a three-party petition under s. 51.20(1)(b).

This change would achieve the goal of providing a court hearing initiated by a party with personal knowledge of the individual, but retain corporation counsel as the representative of the public.

2. Insert a requirement within s. 51.20 that a petition filed under sub. (1) be heard by a judge or court commissioner within 24-48 hours after the three-party petition is filed.

While in current practice these petitions are almost always heard the same day they are filed, adding a time requirement will ensure that the petition will be heard in a timely manner.

These changes would address many of the concerns expressed at the public hearing with AB 451 as drafted, such as:

1. Use a current law process with minor tweaks is easier to implement and just as effective as AB 451.
2. Require that one of the petitioners must have personal knowledge of the individual's conduct and condition.
3. Ensure that judicial review of the petition continues to involve both a judge (or court commissioner) and corporation counsel.
4. Avoid shifting the cost burden concerns.
5. Retain current court responsibilities of judge, corporation counsel, and public defender.

One significant concern that would need to be addressed will be the ethical implications of requiring corporation counsel to file a petition that he or she does not deem appropriate. Asking Corporation Counsel to identify and work on these concerns will be vital, and there may be a process whereby Corporation Counsel can notify the court that the office's involvement in the case is limited to the statutory drafting of the petition. A "hold harmless" provision for corporation counsel could be inserted in statute using language guided by a pending Supreme Court rule related to limited scope



representation.

I am including our testimony to the Assembly Committee on Health, which highlights two concerns we mentioned at the public hearing. An additional concern would be the undefined timeline after the petition is granted. There are additional concerns with the bill that would qualify as collateral to SPD concerns, but were better articulated by others such as corporation counsel.

**In re amendment of Supreme Court  
Rule Chapter 20 and  
Wisconsin Statute Chapters 800, 801, 802, and 809  
relating to Limited Scope Representation**

**MEMORANDUM  
IN SUPPORT  
13-\_\_\_**

The Director of State Courts, on the recommendation of the Planning and Policy Advisory Committee (PPAC), hereby petitions the court to amend Rules of Professional Conduct for Attorneys, Rules of Civil Procedure, and Rules of Appellate Procedure to support and expand limited scope representation.

Limited scope representation is allowed under the Wisconsin Supreme Court Chapter 20, Rules of Professional Conduct for Attorneys. Supreme Court Rule 20:1.2(c) requires lawyers who limit the scope of their representation to do so only in those cases where the limitation is reasonable under the circumstances and the client gives informed consent to the limitation.<sup>1</sup> This rule mirrors the American Bar Association's (ABA) Model Rule of Professional Conduct 1.2(c).<sup>2</sup>

PPAC proposes procedures on how a lawyer can provide limited legal services. The proposed rules provide guidance on how limited scope representation should take place including the service of court documents, communications from opposing counsel, and drafting of court documents. The rules are intended to provide guidance and help to ensure that limited scope representation supports and protects the interests of the client and the lawyer, both procedurally and ethically.

Limited scope representation is a relationship between a lawyer and a person seeking legal services in which it is agreed that the scope of the legal services will be limited to specific tasks that the person asks the lawyer to perform. This form of representation allows clients and lawyers to enter into an agreement where the lawyer does some work for a particular case but does not take on the entire case. This is also called "unbundling of legal services" and "discrete task representation."

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<sup>1</sup> Wisconsin Supreme Court Rule 20:1.2(c) states "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

<sup>2</sup> ABA Model Rules of Professional Conduct R. 1.2(c) (2002). The court amended rule 1.2(c) in 2007. Wisconsin Supreme Court Order in Rule Petition 04-07, In the matter of the Petition for Amendment to Supreme Court Chapter 20, Rules of Professional Conduct for Attorneys, 2007 WI 4 (Jan. 5, 2007, effective July 1, 2007).

Typically limited scope representation occurs in one or more forms:

- Consultation and advice - the lawyer provides advice to the client in an office setting;
- Document preparation - the lawyer conducts some form of document preparation for the client (a brief, motion or perhaps financial information for the Marital Settlement Agreement); or
- Limited representation in court - the lawyer provides limited representation of the client in a court proceeding.

The subcommittee also recognizes that limited scope representation occurs in collaborative family law practice.

Limited scope representation is seen by many as a means to assist with the challenges of an ever-increasing self-represented population in the courts, and the need to improve access to legal services and the courts. In a position paper published in 2000 the Conference of State Court Administrators noted self-represented litigants have an impact on access to justice, staffing and resources, case management, court efficiency and the administration of justice, and public confidence in the courts.<sup>3</sup> A State Bar of Wisconsin comprehensive study examined unmet legal needs in our state and concluded more than 500,000 residents face serious civil legal problems without legal assistance.<sup>4</sup> In the 2007 study the State Bar of Wisconsin Access to Justice Committee supported the expansion of limited scope representation. The committee stated that "Limited representation is a key aspect of an efficient program of improving access to justice for the poor by enabling clients with some ability to pay to purchase only those services they need or can afford." PPAC has identified self-represented litigants or access to justice as a top priority in each of its biennial report for the past five planning cycles (2004-06, 2006-08, 2008-10, 2010-12, and 2012-14). The Wisconsin Judicial Conference in 2009 included a panel presentation on limited scope representation and the State Bar of Wisconsin publications have featured several articles on the topic.<sup>5</sup> At the 2013 ABA Midyear Meeting in February the ABA House of Delegates passed a resolution calling for the

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<sup>3</sup> Conference of State Court Administrators, Position Paper on Self-Represented Litigation, 1 (Gov't Rel. Office ed. 2000).

<sup>4</sup> State Bar of Wisconsin Access to Justice Committee, Bridging the Justice Gap: Wisconsin's Unmet Legal Needs (March 2007), available at <http://www.wisbar.org/formembers/probono/documents/bridgingthegap11.pdf>.

<sup>5</sup> 2009 Annual Meeting of the Wisconsin Judicial Conference; Timothy J. Pierce & Dean Dietrich, Wisconsin's New Rules of Professional Conduct for Attorneys, 80 Wis. Law. 13 (Feb. 2007); Timothy J. Pierce, New Rules of Conduct Limiting Representation, 80 Wis. Law. 22 (March 2007); Thomas J. Watson, 10 Tips to Unbundle Legal Services, 83 Wis. Law. 41 (March 2010).

expanded use of limited scope legal services and encouraging lawyers to limit the scope of their representation as a means of increasing access to justice.<sup>6</sup> The Wisconsin Access to Justice Commission endorsed the resolution and views limited scope representation as an access to justice tool.<sup>7</sup>

In response to these developments and the need to address access to legal services and the court system, PPAC created in 2010 a subcommittee to focus on a limited scope representation initiative. In the first phase, the subcommittee conducted a feasibility study to identify initiatives for implementation in Wisconsin. The subcommittee researched publications from the ABA and the State Bar of Wisconsin, the ABA Model Rules of Professional Conduct and procedural and ethics rules adopted by other courts, ethics opinions issued in other states, and reports<sup>8</sup> and program materials from courts from a number of states. The subcommittee collaborated with the Appellate Procedure Committee of the Wisconsin Judicial Council, discussed the limited scope representation initiative with several sections and committees of the State Bar, and conducted surveys of circuit court judges, administrative law judges, and court commissioners about limited scope representation.

The ABA Standing Committee on the Delivery of Legal Services compiled a list of the states that have adopted ABA Model Rule of Professional Conduct 1.2(c).<sup>9</sup> At least forty-two states have authorized limited scope representation through their attorney ethics rules by adopting the ABA Model Rule 1.2(c) or a version substantially similar.<sup>10</sup> Most of those states that have varied from the model rule require the client's consent to be in writing.<sup>11</sup> Similarly, PPAC proposes modifying Wisconsin SCR 20:1.2(c) to require the client's consent in writing.

In addition, at least twenty-four states have adopted rules related to limited scope representation that address issues of limited appearances and withdrawal, service,

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<sup>6</sup> American Bar Association Standing Committee on the Delivery of Legal Services Report to the House of Delegates, Resolution, available at [http://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/unbundling\\_policy\\_resolution\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/unbundling_policy_resolution_report.authcheckdam.pdf).

<sup>7</sup> Wisconsin Access to Justice Commission. Meeting of the Wisconsin Access to Justice Commission (Nov. 15, 2012).

<sup>8</sup> California, Illinois, Florida, New Hampshire, Massachusetts, and Missouri.

<sup>9</sup> See the spreadsheet of states that have adopted ABA Model Rule of Professional Conduct 1.2(c) at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/aba\\_model\\_rule\\_1\\_2c\\_authcheckdam.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/aba_model_rule_1_2c_authcheckdam.authcheckdam.pdf) (last updated April 15, 2011), and Alabama (3/26/12).

<sup>10</sup> ABA Model Rules of Prof'l Conduct R. 1.2(c) (2002).

<sup>11</sup> Alabama, Iowa, Florida, Missouri, Montana, and Tennessee ("informed consent, preferably in writing").

communication, and ghostwriting.<sup>12</sup> These issues are discussed in a white paper published by the ABA's Standing Committee on the Delivery of Legal Services and updated in a version issued in 2009 entitled An Analysis of Rules that enable Lawyers to Serve Pro Se Litigants.<sup>13</sup> The white paper provides information on how various states have addressed policy considerations and the necessary rule changes relating to limited scope representation. Following reviews of limited scope representation, several state task forces and commissions reported that existing procedural and ethics rules do not support limited scope representation and may discourage its practice.<sup>14</sup> The task forces and commissions recognized the value of limited scope representation and emphasized the need to amend procedural and ethics rules to govern and guide the conduct of lawyers who agree with clients to provide limited scope representation. The reports "express a common need to address the changes in the delivery of legal services, most often with rules that give a greater certainty to the process."<sup>15</sup>

In a survey of Wisconsin circuit court judges and court commissioners, the subcommittee discovered a similar need for rules. The following list reflects the judges' and court commissioners' responses:

| <i>What procedural or ethical rules would you like to see enacted with respect to the following types of limited scope representation?</i> | <i>Response Percent</i> |
|--|-------------------------|
| Disclosure of attorney's involvement if ghostwriting   | 71%                     |
| Disclosure of specific attorney's name if ghostwriting   | 57%                     |
| Filing of notice describing scope of attorney's limited representation   | 78%                     |
| Filing of notice of limited appearance   | 77%                     |
| Filing of notice of termination of limited scope representation  | 65%                     |

<sup>12</sup> Alabama, Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Louisiana (notice of limited appearance and withdrawal), Maine, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Tennessee, Utah, Vermont, Washington, Wyoming.

See court rules at

[http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/court\\_rules.html](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html). In December 2012 the Arizona Supreme Court adopted on an emergency basis amendments to rules of professional conduct, rules of the supreme court, and rules of civil procedure to facilitate limited scope representation. Ariz. R-12-0027 (12/05/12), available at <http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/7/postid/1797/view/topic/Default.aspx>.

<sup>13</sup> Standing Comm. on the Delivery of Legal Services, An Analysis of Rules that Enable Lawyers to Serve Pro se Litigants, (Nov. 2009), available at [http://apps.americanbar.org/legalservices/delivery/downloads/prose\\_white\\_paper.pdf](http://apps.americanbar.org/legalservices/delivery/downloads/prose_white_paper.pdf) [hereinafter ABA Analysis].

<sup>14</sup> See Illinois Joint Task Force on Limited Scope Legal Representation, Limited Scope Legal Representation: Final Report, Findings & Recommendations 5 (May 19, 2011), available at <http://www.isba.org/committees/limitedscopelegalrepresentation> [hereinafter Illinois Report]; Supreme Court of Missouri & Missouri Bar, Pro Se Litigation Interim Feasibility Committee Report, 7, 10, 15 (2004), available at [http://www.courts.mo.gov/file/FINALReportUSE%203\\_.pdf](http://www.courts.mo.gov/file/FINALReportUSE%203_.pdf) [hereinafter Missouri Report].

<sup>15</sup> ABA Analysis, *supra* note 13, at 7.

|  |     |
|--|-----|
| Communication with represented parties           | 42% |
| Service on limited scope representation attorney | 27% |
| Extent/nature of client consent                  | 58% |

The subcommittee received one hundred and fifty responses. Ninety-four were received from judges and 56 were from court commissioners.

In August 2011 the subcommittee submitted its report recommending that PPAC convene a subcommittee to draft a rule petition proposing rules that support limited scope representation. The subcommittee's study is available on the court system's web site.<sup>16</sup> PPAC approved moving forward with phase II of the project. In November 2012 the subcommittee submitted to PPAC for its consideration a proposed rule petition and memorandum in support. PPAC reviewed and requested additional information. In April 2013 the subcommittee submitted to PPAC a revised rule petition and memorandum in support. [REDACTED]

PPAC proposes creating and amending supreme court rules and statutes to provide more guidance and support for limited scope representation. The proposed amendments establish procedures on how to limit legal services. The guidance can benefit clients, lawyers, and judges. PPAC also proposes several comments to provide guidance regarding limited scope representation. PPAC recognizes the supreme court does not typically adopt comments but PPAC requests the comments be published as informational. PPAC's proposed amendments may be summarized as follows:

**Informed consent in writing.** The proposed amendment requires a client's informed consent to limited scope representation be in writing. The petition sets forth several proposed exceptions to the writing requirement.

**Limited appearances and withdrawals.** Proposed amendments would allow lawyers to make limited appearances and provide procedures for lawyers to withdraw upon completion of the representation.

**Service guidelines.** The proposed amendment provides for service upon both the lawyer and the client during the period of limited scope representation.

**Communications guidelines.** Proposed amendments to supreme court rules clarify communications with a party represented under a limited scope representation.

<sup>16</sup> PPAC Subcommittee on Limited Scope Representation, Feasibility Study and Recommendations (August 2011), available at <http://wicourts.gov/courts/committees/docs/ppaclimitedscopereport.pdf>.

**Document preparation.** Proposed amendments allow a lawyer to prepare court papers to be filed by self-represented litigants and set parameters for the lawyer's role in document preparation. The rules require disclosure when a document is prepared with the assistance of a lawyer but does not require identification of the lawyer who provided assistance.

**I. Limited Scope Representation – Informed Consent in Writing**

SCR 20:1.2(c) already provides that a lawyer may limit the scope of legal representation, provided that the limitation is reasonable under the circumstances and the client gives informed consent to the limitations. PPAC proposes amending SCR 20:1.2(c) to require that a client's informed consent to limited scope representation be given in writing with certain exceptions. Other states have modified their version of ABA Model Rule 1.2(c) to do this. Exceptions adopted by other states include representation that consists solely of telephone consultation; representation provided by a lawyer employed by or participating in a nonprofit or court-annexed legal services program that consists solely of information, advice or the preparation of court forms; and representation that occurs as the result of court appointment for a limited purpose.

The proposed amendments in this rule petition are substantively similar to Iowa Rule of Professional Conduct 32.1(c) and Montana. Rule of Professional Conduct 1.2(c). The subcommittee drafted exception (iv) in collaboration with staff of the state public defender's office.

**II. Limited Representation – Process**

The subcommittee's proposed statute 802.045(1) reflects the fact that the ethics rules allow limited scope representation. The subsection notes that a lawyer may provide limited scope representation whether in a courtroom setting or not. The additional procedures in subsections (2) through (4) are intended to serve as a how-to guide for lawyer who is going to appear and provide assistance to an otherwise self-represented litigant in a proceeding.

**A. Limited appearances.**

Proposed statute 802.045 sets forth a process for limited scope representation by detailing procedures governing a notice of limited appearance, service, and notice of termination of limited appearance. Most courts that require informed consent in writing have adopted similar rules requiring notices of appearance and withdrawal.<sup>17</sup>

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<sup>17</sup> See ABA Analysis, *supra* note 13, at 19-21.]

Proposed Wisconsin Statute section 802.045 requires lawyers to file a notice of limited appearance when providing limited assistance and a notice of withdrawal upon completion of the representation. The filing of a notice of limited appearance would be required in limited scope situations only. The proposal is not intended to imply that a lawyer is required to file a notice of general appearance where a lawyer is providing full representation. Under the proposed amendment, a limited appearance must specify the scope of services the lawyer will provide to the client as defined by proceeding or issue, provide a statement that the attorney providing limited representation shall be served with all matters while providing limited representation, confirm the attorney will file a notice of termination upon completion of services, and include the name, party designation and contact information for the client.

When the lawyer fulfills the extent of the limited representation the lawyer files a notice of termination. The notice of termination must contain the name and current address and phone number of the former client. Under PPAC's proposed amendments, a lawyer's withdrawal from a limited scope representation would be automatic upon the filing of a notice if the conditions of Wis. Stat. § 802.045(4) are met. PPAC recognizes that SCR 20:1.16(c), Declining or terminating representation, provides the court may order a lawyer to continue representation. There is significant concern that a judge may not permit a lawyer to withdraw from a matter after completing a limited scope representation. A lawyer's inability to withdraw could be a significant barrier to lawyers engaging in limited scope representation. The subcommittee did not propose an amendment to SCR 20:1.16 similar to Maine's Rule of Professional Conduct, which provides in relevant part "This subsection (c) does not apply to the automatic withdrawal of a lawyer upon completion of a limited representation made pursuant to Rule 1.2." Rather the recommendation is that the automatic withdrawal procedure for limited scope representations be addressed in continuing legal education and judicial education sessions.

**B. Service guidelines.**

Proposed statute 801.14(2m) provides specifics about the service of pleadings and other papers in a limited scope representation. The section requires documents be served upon the attorney who has filed a notice of limited appearance and his client during the period of limited scope representation. By requiring service on both the party and the limited scope representation attorney, the service obligations are clear and the proper person receives notice of papers filed with the court. The requirement of service upon the attorney ceases when the attorney files a



notice of termination of limited scope representation.

### **C. Communications guidelines.**

Supreme Court Rule 20:4.2, Communication with a person represented by counsel, and Supreme Court Rule 20:4.3, Dealing with unrepresented person, govern communications of parties and counsel. Our rules do not appear to effectively address communications with a self-represented litigant who is receiving limited legal services from a lawyer. An addition to each of these rules clarifying obligations related to communications in a limited scope representation is necessary to avoid confusion. The proposed addition to both rules states "An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 20:1.2(c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise." This amendment mirrors rules of professional conduct adopted in Maine and Montana.

### **III. Document Preparation**

Ghostwriting is a practice in which a lawyer assists in preparing pleadings, briefs, or other documents to be signed and filed with a court by a pro se party without disclosing the lawyer's involvement or identity. Courts have taken different approaches to ghostwriting: (1) no disclosure of the lawyer's assistance or identity, (2) disclosure without identifying the lawyer ("document prepared with assistance of an attorney"), (3) disclosure of the lawyer assisting with full contact information. The trend is to allow ghostwriting without disclosure or require disclosure without identifying the lawyer.<sup>18</sup> The report of the Modest Means Task Force of the ABA's Litigation Section recommended state rules that require no disclosure, or if disclosure is required, it should be anonymous.<sup>19</sup>

In a formal opinion, *Undisclosed Legal Assistance to Pro Se Litigants*, the ABA Committee on Ethics and Professional Responsibility interpreted Model Rule 1.2(c) to permit ghostwriting by lawyers.<sup>20</sup> The committee concluded that "there is no prohibition in the Model

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<sup>18</sup> See ABA Sec. Litig., *Handbook on LSR Legal Assistance: A Report of the Modest Means Task Force 93*, at 104 (2003) [hereinafter ABA Handbook].

<sup>19</sup> *Id.* at 144-45.

<sup>20</sup> ABA Comm. on Ethics & Prof'l Responsibility, *Formal Op. 446* (2007).

Rules of Professional Conduct against *undisclosed* assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct."<sup>21</sup> The committee stated that "[l]itigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure."<sup>22</sup> This opinion superseded a 1978 opinion in which the committee stated that "disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified."<sup>23</sup>

Several state courts have adopted document preparation rules that require disclosure without identifying the lawyer.<sup>24</sup> Other states have adopted provisions that require the court to be notified of a lawyer's role in drafting and identify the lawyer providing assistance.<sup>25</sup> Several federal courts have prohibited ghostwriting because the judges concluded that the practice violates ethics rules and Federal Rule of Civil Procedure 11.

Opponents of ghostwriting are concerned that anonymous assistance to a self-represented litigant misleads the court into believing that the party has had no assistance and this may lead to special latitude for the party. In contrast, the 2007 ABA ethics opinion concluded lawyer-prepared papers would be evident to the court, therefore it is likely no special treatment will be afforded the self-represented party.<sup>26</sup> In addition, if the lawyer-prepared filing is not persuasive, no unfair advantage would be gained.<sup>27</sup> Supporters of a disclosure rule that does not require the identity of the assisting lawyer argue that a rule requiring disclosure of the assistance and the lawyer is likely to discourage lawyers from ghostwriting, leave more litigants without attorney assistance in drafting, require courts to decipher pleadings by unassisted self-represented litigants and cause delays to allow time to complete filings.<sup>28</sup> Some clients may not be able to afford to hire a lawyer to represent them fully throughout the course of a case but might be able to afford to hire a lawyer to represent them in discrete parts of the case. The preparation of pleadings,

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<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978).

<sup>24</sup> California, Florida, Kansas, Massachusetts, Missouri, Montana, New Hampshire.

<sup>25</sup> Colorado, Iowa, Nebraska, Maine, Washington, Wyoming.

<sup>26</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 446 (2007).

<sup>27</sup> *Id.*

<sup>28</sup> Limited Representation Committee of the California Commission on Access to Justice, Report on Limited Scope Legal Assistance with Initial Recommendations, 2 (October 2001).

motions, or other documents is one of those parts most amenable to limited scope representation. This limited legal assistance can benefit parties and the court by focusing the legal issues and more clearly stating the facts.

There is no specific supreme court rule or Wisconsin statute that prohibits an attorney from assisting a self-represented litigant in the preparation of pleadings or documents to be filed with the court, without disclosing the attorney's role. PPAC proposes that document preparation should be addressed in the rules of professional conduct and rules of civil procedure. Surveys of judges and lawyers confirm that ghostwriting is taking place in the legal community. The PPAC subcommittee reported that its survey indicated that ghostwriting was the most prevalent form of limited scope representation.<sup>29</sup>

The proposed rules require disclosure when a document is prepared with the assistance of a lawyer but does not require identification of the lawyer who provided assistance. Specifically, PPAC adds a new section to Supreme Court Rule 20:1.2 that requires that a pleading, brief or other document filed with the court includes a statement "This document was prepared with the assistance of a lawyer" where a lawyer has assisted in the preparation of the document. The proposed comment to this new section states this action shall not be deemed an appearance by the lawyer in the case.

In addition, a lawyer providing drafting assistance should be given guidance as to the lawyer's responsibilities, yet, in recognition of the lawyer's limited role, should be allowed to rely on the client's representations. To protect against abuse to the system, a lawyer must be obligated to make independent inquiry where the lawyer has reason to believe the client's representations are false. The proposed amendments to SCR 20:1.2(cm), Wis. Stat. § 802.05(2m), and SCR 20:3.1(am) provide the guidance needed by a lawyer providing drafting assistance. The proposed revision to SCR 20:3.1 allows a lawyer who provides "drafting assistance" to "rely on the client's representation of facts, unless the lawyer has reason to believe the representations are false, or materially insufficient, in which case the lawyer shall make an independent reasonable inquiry into the facts."<sup>30</sup> The proposed rule is the same as the rule adopted in Montana and substantially similar to the rule adopted in Missouri.<sup>31</sup> Both jurisdictions have also adopted rules

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<sup>29</sup> PPAC Subcommittee on Limited Scope Representation, Feasibility Study and Recommendations (August 2011), available at <http://wicourts.gov/courts/committees/docs/ppaclimitedscopereport.pdf>.

<sup>30</sup> Proposed Wisconsin SCR 20:3.1(am).

<sup>31</sup> Montana R. Civ. P. 11(e); Missouri R. Civ. P. 55.03(c).

that permit a lawyer to draft documents for a self-represented person by disclosing the assistance but not their identity. The Modest Means Task Force of the litigation section of the ABA recommended adoption of a rule that allows a lawyer who provides drafting assistance to an otherwise pro se litigant to rely on that 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 should make an independent reasonable inquiry into the facts.<sup>32</sup>

SCR 20:3.1 does not reduce a lawyer's obligation to provide competent representation, but makes clear the preparation for the legal matter is limited along with the scope of the representation. The new provision recognizes the lawyer's limited role, and, therefore, allows the lawyer to rely on the client's representations, and on the other hand, protects against persons seeking to abuse the system. When a lawyer has reason to believe the client's representations are false, the lawyer then must make independent inquiry. A lawyer has an ethical responsibility to "provide competent representation to a client."<sup>33</sup> This mandate applies to all forms of representation, including limited scope representation. A limited scope representation agreement does not exempt a lawyer's duty to comply with ethical responsibilities. An agreement on the scope of representation may limit the matters for which the lawyer is responsible;<sup>34</sup> however, a lawyer must still possess the sufficient level of legal knowledge<sup>35</sup> and understanding of the facts<sup>36</sup> for a limitation on representation to be reasonable,<sup>37</sup> and must provide competent representation within the limits on the representation.<sup>38</sup>

PPAC recommends that a lawyer should be able to rely upon the factual representation of the client unless the lawyer knows those facts are false. Colorado, Iowa, Missouri, Maine, and Washington adopted similar rules that permit the lawyer to rely on the party's representation of facts in most situations.<sup>39</sup> Limited scope representation would be supported by this elimination for a comprehensive factual investigation of factual claims. In addition, the court has recourse where non-meritorious claims are pursued because the self-represented litigant who files the

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<sup>32</sup> ABA Handbook, *supra* note 18, at 145.

<sup>33</sup> Wis. SCR 20:1.1.

<sup>34</sup> ABA Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2002).

<sup>35</sup> ABA Model Rules of Prof'l Conduct R. 1.1 (2002).

<sup>36</sup> ABA Model Rules of Prof'l Conduct R. 1.1 cmt. 5 ("Competent handling of a particular matter includes *inquiry into and analysis of the factual and legal elements of the problem.*") (emphasis added).

<sup>37</sup> ABA Model Rules of Prof'l Conduct R. 1.1 and comments (2002); Timothy J. Pierce, *New Rules of Conduct for Limiting Representation*, 80 Wis. Law. 22, 23 (March 2007).

<sup>38</sup> See ABA Handbook, *supra* note 18, at 93; Pierce, *supra* note 5, at 23 (March 2007).

<sup>39</sup> ABA Analysis, *supra* note 13, at 15-16.

lawyer drafted papers must certify their factual legitimacy and may be held accountable by the court.

#### **IV. Forms**

Proposed amendment to SCR 20:1.2(c)(5) states the Office of the Director of State Courts shall provide forms for the use in filing a notice of limited appearances and notice of termination of limited appearance. The proposed rule amendments governing the process of conducting limited scope representations set forth the necessary contents of the two forms. If the supreme court adopts these rule amendments, these criteria would assist the Wisconsin Court Records Management Committee in its development of the court forms.

PPAC has developed a sample form regarding consent to a limited scope representation. This is not intended to be included in a supreme court rule or serve as a court form but may be further developed or distributed by the State Bar of Wisconsin at continuing legal education sessions on limited scope representation. The form is a modified version of similar consent forms developed in Wyoming and Missouri and is attached in Appendix A of this memorandum.

#### **V. Education**

PPAC recommends training and educational seminars be developed and presented by the Wisconsin Court System Office of Judicial Education and the State Bar of Wisconsin regarding limited scope representation. Annual conferences or regular meetings of judges, commissioners, circuit court clerks, and state bar sections provide an opportunity to disseminate information about this form of representation and any rule amendments adopted by the supreme court. Educational resources including State Bar practice books and desk reference, judicial benchbooks, and other manuals or guides could be updated to include procedural guidelines and ethical rules governing limited scope representation. Informational brochures and materials could help heighten the public's awareness of limited scope representation. Other states have made these materials available online as well as in print.

PPAC proposes an effective date of January 1, 2015 for these amendments in order to allow adequate time for the Wisconsin Court Records Management Committee<sup>40</sup> to develop the forms, for the State Bar and Wisconsin Courts Office of Judicial Education to organize continuing education and judicial training sessions, and for staffs of the State Bar and courts to

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<sup>40</sup> This committee recommends guidelines for the retention of court records and necessary statutory or rule changes relating to records management. It devises new forms, reviews new and existing forms for their legal sufficiency, and establishes standards and guidelines for effective management of court records.

compile and distribute additional information materials on limited scope representation.

## **VI. Conclusion**

Limited scope representation is an effective means of expanding access to legal representation for self-represented litigants and promoting the effective administration of justice. The proposed rules support limited scope legal assistance, establish ground rules for appearances and withdrawals in limited representation, provide guidance to lawyers who appear in court for discrete proceedings, clarify obligations for service and communication between partially-represented litigants and opposing lawyers, allow lawyers to prepare pleadings for otherwise self-represented litigants without disclosing their identity, and authorize those lawyers to rely on the client's representations, unless the attorney has reason to believe the representations are false or materially insufficient.

**Notice and Consent to Limited Scope Representation**

To help you with your legal matters, you, the client, and \_\_\_\_\_, the lawyer, agree that the lawyer will limit the representation to helping you with a certain legal matter for a short time or for a particular purpose.

The lawyer must act in your best interest and give you competent help. When a lawyer and you agree that the lawyer will provide limited help:

- the lawyer does not have to give more help than the lawyer and you agreed; and
- the lawyer does not have to help with any other part of your legal matter.

While performing the limited legal services, the lawyer:

- is not promising any particular outcome; and
- is relying entirely on your disclosure of facts and will not make any independent investigation unless expressly agreed to in writing in this document.

If short-term limited representation is not reasonable, a lawyer may give advice, but will also tell you of the need to get more or other legal counsel.

I, the lawyer, agree to help you by performing the following limited services listed below and no other service, unless we revise this agreement in writing.

[INSTRUCTIONS: Check every item either Yes or No - do not leave any item blank. Delete all text that does not apply.]:

YES NO

- a)   Give legal advice through office visits, telephone calls, facsimile (fax), mail or e-mail
- b)   Advise about alternate means of resolving the matter including mediation and arbitration
- c)   Evaluate the client's self-diagnosis of the case and advise about legal rights and responsibilities.
- d)   Review pleadings and other documents prepared by you, the client
- e)   Provide guidance and procedural information regarding filing and serving documents
- f)   Suggest documents to be prepared
- g)   Draft pleadings, motions and other documents
- h)   Perform factual investigation including contacting witnesses, public record searches,

in-depth interview of you, the client

- i)   Perform legal research and analysis
  - j)   Evaluate settlement options
  - k)   Perform discovery by interrogatories, deposition and requests for admissions and requests for production of documents
  - l)   Plan for negotiations
  - m)   Plan for court appearances
  - n)   Provide standby telephone assistance during negotiations or settlement conferences
  - o)   Refer you, the client, to expert witnesses, special masters or other attorneys
  - p)   Provide Counseling about an appeal
  - q)   Provide procedural assistance with an appeal
  - r)   Provide substantive legal arguments in an appeal
  - s)   Appear in court for the limited purpose of \_\_\_\_\_
- 
- t)   Provide preventative planning and/or schedule legal check-ups
  - u)   Other: \_\_\_\_\_



I will charge to the Client the following costs: \_\_\_\_\_

\_\_\_\_\_

I will charge to the Client the following fee for my limited legal representation:

\_\_\_\_\_

\_\_\_\_\_ Date: \_\_\_\_\_  
(Type Lawyer's name)

\_\_\_\_\_  
(Lawyer's Signature)

#### CLIENT'S CONSENT

I have read this Notice and Consent form and I understand it. I agree that the legal services listed above are the only legal services to be provided by the lawyer. I understand and agree that the lawyer who is helping me with these services is not my lawyer for any other purpose and does not have to give me more legal help. If the lawyer is giving me advice or is helping me with legal or other documents, I understand the lawyer will stop helping me when the services listed above have been completed. The address I give below is my permanent address where I can be reached. I understand that it is important that the court handling my case and other parties to the case be able to reach me at the address after the lawyer ends the limited representation. I therefore agree that I will inform the Court and other parties of any change in my permanent address.

In exchange for the lawyer's limited representation, I agree to pay the attorney's fee and costs described above.

Sign your name: \_\_\_\_\_

Print your name: \_\_\_\_\_

Print your address: \_\_\_\_\_

Phone number: \_\_\_\_\_ FAX: \_\_\_\_\_

Message Phone: \_\_\_\_\_ Name: \_\_\_\_\_

Email address: \_\_\_\_\_

## Dodge, Tamara

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**From:** Hanus, Andrew  
**Sent:** Wednesday, October 30, 2013 11:33 AM  
**To:** Dodge, Tamara  
**Cc:** Florian, Mark; Jagler, John; kobrien@wha.org; Plotkin, Adam - OSPD; Sholty, Cameron; Scholz, AJ  
**Subject:** Small Addition

Tami,

We have a slight modification to our bill draft discussed this morning. We would like the bill to provide that the corp counsel must file the petition "in a timely manner" or "expeditiously" (or something to that effect).

Thank you, once again, for your help on this.

Andrew

Andrew Hanus

Office of Assembly Speaker Vos

211 West, State Capitol

Phone: (608) 266-9171



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-35410-01 P1  
TJD:l:....  
Leev  
RMR

In: 10/31

Due Today  
ASAP

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

SAJ  
xref]

gen proceedings and limited appearance  
by corporation counsel.

1 AN ACT <sup>gen</sup>; relating to: involuntary commitment

**Analysis by the Legislative Reference Bureau**

✓ This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

2 SECTION 1. 51.20 (2) (a) of the statutes is amended to read:

3 51.20 (2) (a) Upon the filing of a petition for examination, the court shall review  
4 the petition within 24 hours after the petition is filed, excluding Saturdays, Sundays,  
5 and legal holidays, to determine whether an order of detention should be issued. The  
6 subject individual shall be detained only if there is cause to believe that the  
7 individual is mentally ill, drug dependent or developmentally disabled and the  
8 individual is eligible for commitment under sub. (1) (a) or (am) based upon specific

SEC# AMT; 51.20(4) (title) Public representation; limited appearance

(CS)

1 recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions  
2 made by the individual.

History: 1975 c. 430; 1977 c. 26, 29; 1977 c. 187 ss. 42, 43, 134, 135; 1977 c. 428 ss. 29 to 65, 115; 1977 c. 447, 449; Sup. Ct. Order, 83 Wis. 2d xiii; 1979 c. 32, 89; Sup. Ct. Order, eff. 1-1-80; 1979 c. 110 s. 60 (1); 1979 c. 175 s. 53; 1979 c. 300, 336, 356; 1981 c. 20, 367; 1981 c. 390 s. 252; 1983 a. 27, 219; 1983 a. 474 ss. 2 to 9m, 14; 1985 a. 29 ss. 1067 to 1071, 3200 (56), 3202 (56); 1985 a. 139, 176, 321, 332; 1987 a. 27; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 366, 394, 403; 1989 a. 31, 334; 1993 a. 98, 196, 227, 316, 451, 474; 1995 a. 77, 201, 268, 292, 440; Sup. Ct. Order No. 96-08, 207 Wis. 2d xv (1997); 1997 a. 35, 130, 237, 283; 1999 a. 83, 89, 162; 2001 a. 16 ss. 1966i to 1966n, 4034ze to 4034zh; 2001 a. 38, 61, 109; 2003 a. 33, 50, 326; 2005 a. 22, 264, 277, 387; 2007 a. 20, 45, 116; 2009 a. 137, 258, 260; 2013 a. 20.

3 SECTION 2. 51.20 (4) of the statutes is renumbered 51.20 (4) (a) and amended  
4 to read:

5 51.20 (4) (a) PUBLIC REPRESENTATION; LIMITED APPEARANCE. Except as provided  
6 in ss. 51.42 (3) (ar) 1. and 51.437 (4m) (f) and subject to par. (b), the corporation  
7 counsel shall represent the interests of the public in the conduct of all proceedings  
8 under this chapter, including the drafting of all necessary papers related to the  
9 action.

History: 1975 c. 430; 1977 c. 26, 29; 1977 c. 187 ss. 42, 43, 134, 135; 1977 c. 428 ss. 29 to 65, 115; 1977 c. 447, 449; Sup. Ct. Order, 83 Wis. 2d xiii; 1979 c. 32, 89; Sup. Ct. Order, eff. 1-1-80; 1979 c. 110 s. 60 (1); 1979 c. 175 s. 53; 1979 c. 300, 336, 356; 1981 c. 20, 367; 1981 c. 390 s. 252; 1983 a. 27, 219; 1983 a. 474 ss. 2 to 9m, 14; 1985 a. 29 ss. 1067 to 1071, 3200 (56), 3202 (56); 1985 a. 139, 176, 321, 332; 1987 a. 27; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 366, 394, 403; 1989 a. 31, 334; 1993 a. 98, 196, 227, 316, 451, 474; 1995 a. 77, 201, 268, 292, 440; Sup. Ct. Order No. 96-08, 207 Wis. 2d xv (1997); 1997 a. 35, 130, 237, 283; 1999 a. 83, 89, 162; 2001 a. 16 ss. 1966i to 1966n, 4034ze to 4034zh; 2001 a. 38, 61, 109; 2003 a. 33, 50, 326; 2005 a. 22, 264, 277, 387; 2007 a. 20, 45, 116; 2009 a. 137, 258, 260; 2013 a. 20.

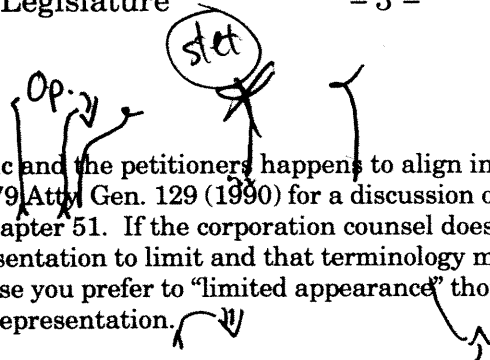
10 SECTION 3. 51.20 (4) (b) and (c) of the statutes are created to read:

11 51.20 (4) (b) If corporation counsel does not believe that involuntary  
12 commitment under this section is appropriate for the subject individual, corporation  
13 counsel shall inform the person seeking the petition under sub. (1) that the person  
14 may discontinue pursuing the involuntary commitment or may request that  
15 corporation counsel file the petition under sub. (1) under a limited appearance. If the  
16 person seeking the petition requests a limited appearance by corporation counsel for  
17 the purpose of filing a petition under sub. (1), corporation counsel shall do all of the  
18 following:

\*\*\*NOTE: This provision is drafted using the non merit report procedure of appellate practice under s. 809.32, stats as a rough model. Please advise if the language is too restrictive on corporation counsel.

\*\*\*NOTE: From the language on the proposed rule change regarding limited scope representation, I believed that "limited appearance" was a more appropriate term than "limited representation." As I understand, corporation counsel does not represent the individuals seeking to file a petition even when corporation counsel agrees a petition should be filed. Corporation counsel instead represents the public, and the interests of

the public and the petitioners happens to align in that situation. See attorney general's opinion 79 Atty Gen. 129 (1990) for a discussion of the obligations of corporation counsel under chapter 51. If the corporation counsel doesn't represent the petition then there is no representation to limit and that terminology may be confusing. Please advise if there is a phrase you prefer to "limited appearance" though I would suggest staying away from limited representation.



1            1. Notify the person seeking the petition of the scope of what corporation  
2 counsel will do under the limited appearance.

\*\*\*\*NOTE: This is drafted vaguely to allow some flexibility for corporation counsel to have a slightly different scope of appearance in different situations. Please advise if you would like to describe the scope of limited appearance by stating, for example, that corporation counsel must notify the person that he or she will present the petition but will not support a conclusion that the facts presented constitute probable cause for involuntary commitment.

3            2. File, in a timely manner, the petition as described in sub. (1), except that the  
4 corporation counsel does not need to affirm that the facts in the petition constitute  
5 probable cause but may state that the person seeking the petition believes those facts  
6 constitute probable cause.

\*\*\*\*NOTE: Section 51.20 (1) (c) requires that the petition include facts that constitute probable cause. In this limited appearance, the corporation counsel does not believe the facts constitute probable cause.

7            3. Include with the petition, at the time of filing, a certification to the court that  
8 corporation counsel is not supporting the petition but is making a limited appearance  
9 and that he or she has notified the person seeking the petition of the scope of this  
10 limited appearance.

\*\*\*\*NOTE: This draft does not contain any further "hold harmless" provisions for corporation counsel's actions under limited appearance. Please advise if you want additional protections for corporation counsel included in the draft.

11            (c) If corporation counsel does not believe that involuntary commitment under  
12 this section is appropriate for a subject individual for whom a statement of detention  
13 was filed by a treatment director or his or her designee under s. 51.15 (10),  
14 corporation counsel shall inform the treatment director or his or her designee  
15 seeking the petition under this section that the person may discontinue pursuing the

1 involuntary commitment or may request that corporation counsel file the petition  
2 under a limited appearance under par. (b). If the treatment director or his or her  
3 designee requests a limited appearance by corporation counsel for the purpose of  
4 filing the petition under this section, corporation counsel shall do all of the actions  
5 required under par. (b).

\*\*\*\*NOTE: Please review this language to ensure it complies with the intent of the  
discussion at the meeting about the individuals detained under s. 51.15 (10) by the  
treatment director.

6

**(END)**

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3541/P1dn

TJD:..j:....

Leev

Date

Representative Jagler:

Please review this preliminary draft to ensure it complies with your intent. Please do not be alarmed at the number and length of embedded notes. The notes contain explanations, suggestions, and questions, but the completion of the draft is not contingent on responses to the notes.

Should you have any questions or redraft instructions, please contact me.

Tamara J. Dodge  
Legislative Attorney  
Phone: (608) 267-7380  
E-mail: tamara.dodge@legis.wisconsin.gov

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3541/P1dn  
TJD:eev:jm

October 31, 2013

Representative Jagler:

Please review this preliminary draft to ensure it complies with your intent. Please do not be alarmed at the number and length of embedded notes. The notes contain explanations, suggestions, and questions, but the completion of the draft is not contingent on responses to the notes.

Should you have any questions or redraft instructions, please contact me.

Tamara J. Dodge  
Legislative Attorney  
Phone: (608) 267-7380  
E-mail: [tamara.dodge@legis.wisconsin.gov](mailto:tamara.dodge@legis.wisconsin.gov)



## **Dodge, Tamara**

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**From:** Florian, Mark  
**Sent:** Friday, November 01, 2013 12:36 PM  
**To:** Dodge, Tamara  
**Subject:** RE: Requested Change to LRB-3541

Tami,

Let's go with your suggestion to add a new (4) (c) to say that "Paragraph (b) does not apply to a petition originating under s. 51.15 (4), (5), or (10)." In addition, if there is any possibility of receiving an electronic copy for a /1 today it would be very helpful, though I realize that there may not be enough time.

Thanks and best,

Mark

Mark Florian  
Office of Representative John Jagler  
37th Assembly District  
(608) 266-9650

---

**From:** Dodge, Tamara  
**Sent:** Friday, November 01, 2013 11:45 AM  
**To:** Florian, Mark  
**Subject:** RE: Requested Change to LRB-3541

Mark,

We can make sure that you have it first thing Monday morning. I'll try to get it done today, but I cannot make any guarantees. (And, we may be able to get the electronic copy to you but not paper until Monday.)

If you want to make sure that new (4) (b) doesn't apply to s. 51.15 (10) or any other petition in s. 51.15, I could add a new (4) (c) to say that "Paragraph (b) does not apply to a petition originating under s. 51.15 (4), (5), or (10)."

This would also eliminate any concern from your previous question too.

As I said, I'm leaving for a bit but will be back around 2:30pm.

Tami

**Tamara J. Dodge**  
Attorney  
Wisconsin Legislative Reference Bureau  
P.O. Box 2037  
Madison, WI 53701-2037

(608) 267 - 7380  
[tamara.dodge@legis.wisconsin.gov](mailto:tamara.dodge@legis.wisconsin.gov)

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**From:** Florian, Mark  
**Sent:** Friday, November 01, 2013 11:00 AM  
**To:** Dodge, Tamara  
**Subject:** RE: Requested Change to LRB-3541

Please excuse my typo on the last email: meant to say \*\*9:45AM

-Mark

---

**From:** Florian, Mark  
**Sent:** Friday, November 01, 2013 10:56 AM  
**To:** Dodge, Tamara  
**Subject:** RE: Requested Change to LRB-3541

Hello Tami,

I don't believe that we are expecting any more changes, I think we should be ready for a /1. We are still expecting to have this taken up in committee next week. We'd need to have the bill submitted and ready to go by Monday morning (9:45PM) at the very latest. Would this be a possibility?

In addition I'd like to make sure the (4)(b) process does not apply to statements filed under 51.15(10). Please let me know your thoughts.

Thanks and best,

Mark

Mark Florian  
Office of Representative John Jagler  
37th Assembly District  
(608) 266-9650

---

**From:** Dodge, Tamara  
**Sent:** Friday, November 01, 2013 10:45 AM  
**To:** Florian, Mark  
**Subject:** RE: Requested Change to LRB-3541

Mark,

That looks fine to me.

Do you expect any additional changes or should I run another version of this draft?

Are you still expecting (or hoping) that this bill will be taken up in committee next week? If so, do you know when this bill is needed? I am out of the office a few hours today so I don't know whether I could complete the draft and get it out yet today.

**Tamara J. Dodge**

Attorney  
Wisconsin Legislative Reference Bureau  
P.O. Box 2037  
Madison, WI 53701-2037  
(608) 267 - 7380  
[tamara.dodge@legis.wisconsin.gov](mailto:tamara.dodge@legis.wisconsin.gov)

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**From:** Florian, Mark  
**Sent:** Friday, November 01, 2013 10:22 AM  
**To:** Dodge, Tamara  
**Subject:** Requested Change to LRB-3541

Tami,

Thank you for getting back to me so quickly with your response to our question. The clarification was very helpful. We have a request for a change to the draft: please let us know if you see any issues with it.

\*\*\*Would you please remove 51.20(4)(c) and instead replace it with a new section that amends 51.20(7)(a) as follows (amendment is highlighted): “After the filing of the petition under sub. (1), if the subject individual is detained under s. 51.15 or this section the court shall schedule and hold a hearing to determine whether there is probable cause...” As written, 51.20(4)(c) addresses a request by a treatment director to file a petition pursuant to 51.15(10), but under current law the 51.15(10) statement/petition is filed directly with the court by the treatment director. The suggested change addresses that problem we intended to address and in Adam Plotkin’s opinion doesn’t change what most already believe is current law.

Thanks and best,

Mark

Mark Florian  
Office of Representative John Jagler  
37th Assembly District  
(608) 266-9650



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-3541/PI  
TJD:eev:jm

1

In: 1111

Due today

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

regen

1 AN ACT *to renumber and amend* 51.20 (4); *to amend* 51.20 (2) (a) and 51.20  
2 (4) (title); and *to create* 51.20 (4) (b) and (c) of the statutes; **relating to:**  
3 involuntary commitment proceedings and limited appearance by corporation  
4 counsel.

Insert Analysis

*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

5 SECTION 1. 51.20 (2) (a) of the statutes is amended to read:  
6 51.20 (2) (a) Upon the filing of a petition for examination, the court shall review  
7 the petition within 24 hours after the petition is filed, excluding Saturdays, Sundays,  
8 and legal holidays, to determine whether an order of detention should be issued. The

1 subject individual shall be detained only if there is cause to believe that the  
2 individual is mentally ill, drug dependent or developmentally disabled and the  
3 individual is eligible for commitment under sub. (1) (a) or (am) based upon specific  
4 recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions  
5 made by the individual.

6 **SECTION 2.** 51.20 (4) (title) of the statutes is amended to read:

7 51.20 (4) (title) PUBLIC REPRESENTATION; LIMITED APPEARANCE.

8 **SECTION 3.** 51.20 (4) of the statutes is renumbered 51.20 (4) (a) and amended  
9 to read:

10 51.20 (4) (a) Except as provided in ss. 51.42 (3) (ar) 1. and 51.437 (4m) (f) and  
11 subject to par. (b), the corporation counsel shall represent the interests of the public  
12 in the conduct of all proceedings under this chapter, including the drafting of all  
13 necessary papers related to the action.

14 **SECTION 4.** 51.20 (4) (b) and (c) of the statutes are created to read:

15 51.20 (4) (b) If corporation counsel does not believe that involuntary  
16 commitment under this section is appropriate for the subject individual, corporation  
17 counsel shall inform the person seeking the petition under sub. (1) that the person  
18 may discontinue pursuing the involuntary commitment or may request that  
19 corporation counsel file the petition under sub. (1) under a limited appearance. If the  
20 person seeking the petition requests a limited appearance by corporation counsel for  
21 the purpose of filing a petition under sub. (1), corporation counsel shall do all of the  
22 following:

\*\*\*\*NOTE: This provision is drafted using the no-merit report procedure of appellate practice under s. 809.32, stats., as a rough model. Please advise if the language is too restrictive on corporation counsel.

\*\*\*\*NOTE: From the language on the proposed rule change regarding limited scope representation, I believed that "limited appearance" was a more appropriate term than

"limited representation." As I understand, corporation counsel does not represent the individuals seeking to file a petition even when corporation counsel agrees a petition should be filed. Corporation counsel instead represents the public, and the interests of the public and the petitioners happen to align in that situation. See attorney general's opinion 79 Op. Atty Gen. 129 (1990) for a discussion of the obligations of corporation counsel under chapter 51. If the corporation counsel doesn't represent the petitioner then there is no representation to limit and that terminology may be confusing. Please advise if there is a phrase you prefer to "limited appearance," though I would suggest staying away from "limited representation."

- 1           1. Notify the person seeking the petition of the scope of what corporation  
2 counsel will do under the limited appearance.

\*\*\*NOTE: This is drafted vaguely to allow some flexibility for corporation counsel to have a slightly different scope of appearance in different situations. Please advise if you would like to describe the scope of limited appearance by stating, for example, that corporation counsel must notify the person that he or she will present the petition but will not support a conclusion that the facts presented constitute probable cause for involuntary commitment.

- 3           2. File, in a timely manner, the petition as described in sub. (1), except that the  
4 corporation counsel does not need to affirm that the facts in the petition constitute  
5 probable cause but may state that the person seeking the petition believes those facts  
6 constitute probable cause.

\*\*\*NOTE: Section 51.20 (1) (c) requires that the petition include facts that constitute probable cause. In this limited appearance, the corporation counsel does not believe the facts constitute probable cause.

- 7           3. Include with the petition, at the time of filing, a certification to the court that  
8 corporation counsel is not supporting the petition but is making a limited appearance  
9 and that he or she has notified the person seeking the petition of the scope of this  
10 limited appearance.

\*\*\*NOTE: This draft does not contain any further "hold harmless" provisions for corporation counsel's actions under limited appearance. Please advise if you want additional protections for corporation counsel included in the draft.

- 11           (c) If corporation counsel does not believe that involuntary commitment under  
12 this section is appropriate for a subject individual for whom a statement of detention  
13 was filed by a treatment director or his or her designee under s. 51.15 (10),  
14 corporation counsel shall inform the treatment director or his or her designee

1 seeking the petition under this section that the person may discontinue pursuing the  
2 involuntary commitment or may request that corporation counsel file the petition  
3 under a limited appearance under par. (b). If the treatment director or his or her  
4 designee requests a limited appearance by corporation counsel for the purpose of  
5 filing the petition under this section, corporation counsel shall do all of the actions  
6 required under par. (b).

\*\*\*\*NOTE: Please review this language to ensure it complies with the intent of the  
discussion at the meeting about the individuals detained under s. 51.15 (10) by the  
treatment director.

7

(END)

Insert 4-7

1

INSERT ANALYSIS

Under current law, a person may petition for involuntary commitment of an individual if the petition for examination (three-person petition) is signed by three adult persons, at least one of whom has personal knowledge of the conduct of the individual, except in certain situations where a court finds a juvenile not responsible for an offense by reason of mental disease or defect or not competent to proceed with the criminal proceedings. The three-person petition must allege that the individual is mentally ill, drug dependent, or developmentally disabled, is a proper subject for treatment, and is dangerous. For purposes of involuntary commitment, an individual is dangerous, under current law, because the individual evidences any of the following: 1) a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm; 2) a substantial probability of physical harm to other individual as manifested by evidence of recent homicidal or other violent behavior or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to themselves; 3) impaired judgment manifested by evidence of a pattern of recent acts or omissions such that there is a substantial probability of physical impairment or injury to himself or herself; 4) inability to satisfy certain basic needs, due to mental illness, so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue without prompt and adequate treatment for mental illness; or 5) for an individual who is not alleged to be drug dependent or developmentally disabled, incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness and a substantial probability that the individual needs care or treatment to prevent further disability or deterioration and that he or she will, if left untreated, lack services necessary for health and safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently or the loss of cognitive or volitional control over thoughts and actions (grounds for involuntary commitment). Current law provides an additional procedure if a three-person petition is filed based on the fifth ground for involuntary commitment. Current law also sets certain exceptions and requirements if the subject of the three-person petition is an inmate of a prison, jail, or other criminal detention facility or if the subject has been in inpatient treatment for mental illness, developmental disability, or drug dependency immediately before commencement of involuntary commitment proceedings. Current law also provides alternate grounds for commitment. one of S

In addition to the ground for involuntary commitment, the three-person petition must contain the names and addresses of the petitioners and their relationship to the subject individual and the names and addresses of individuals with a certain relationship to that individual. Current law requires that the petition contain a clear and concise statement of the facts which constitute probable cause to

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believe the allegations of the three-person petition. Current law requires the petition to be sworn to be true. Under current law, if the petitioner does not have personal knowledge of the conduct of the subject individual, the petition must contain a statement providing the basis for the petitioner's belief.

Under current law, upon filing of the three-person petition, the court must review the petition to determine whether to issue an order of detention. The individual who is the subject of the petition must be detained only if there is cause to believe that the individual is mentally ill, drug dependent, or developmentally disabled and that the individual demonstrates a ground of involuntary commitment or an alternate ground for commitment based on specific recent overt acts, attempts or threats to act, or an a pattern of recent act or omissions made by the individual. *one of grounds*

Under current law, if an individual is detained based on the three-person petition or if the person had been detained on an emergency detention, the court must hold a hearing to determine whether there is probable cause to believe the allegations made in the three-person petition or in the petition originating from the emergency detention within 72 hours after the individual arrives at the facility, excluding Saturdays, Sundays, and legal holidays, unless the subject individual or his or her counsel request a postponement. If, at the probable cause hearing, the court determines there is probable cause to believe the allegations in the petition, the court must schedule a final hearing on involuntary commitment within 14 days of the time of detention at the facility, with certain exceptions. Under current law, the corporation counsel must represent the interests of the public in the conduct of these hearings and all other mental health proceedings in the statutes, with certain exceptions, including the drafting of all necessary papers related to the action.

This bill provides a procedure for the corporation counsel to make a limited appearance in certain involuntary commitment proceedings. If corporation counsel does not believe that involuntary commitment is appropriate for the subject individual, he or she shall inform the person seeking the three-person petition that the person may discontinue pursuing the involuntary commitment or request corporation counsel file the petition under a limited appearance. If the person seeking the three-person petition requests a limited appearance by corporation counsel, corporation counsel shall notify the person of the scope of what he or she will do as corporation counsel under the limited appearance and file the three-person petition in a timely manner except that corporation counsel may state that the person seeking the three-person petition believes the facts constitute probable cause instead of affirming that himself or herself. Under a limited appearance under the bill, corporation counsel must also include with the petition a certification to the court that he or she is not supporting the petition but is making a limited appearance and that he or she has notified the person seeking the three-person petition of the scope of this limited appearance. The limited appearance procedure under the bill does not apply to petitions that originate from an emergency detention. *tha*

The bill also requires that the court review the three-person petition for examination within 24 hours after the petition is filed, excluding Saturdays, Sundays, and legal holidays, to determine whether an order of detention should be issued. The bill also requires that if an individual is detained based on the



**Barman, Mike**

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**From:** Florian, Mark  
**Sent:** Monday, November 04, 2013 8:23 AM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB -3541/1 Topic: Corporation counsel representation in petitions for involuntary commitment

**Importance:** High

Please rush, as we are on a very short timeline. Thank you!

Please Jacket LRB -3541/1 for the ASSEMBLY.