

AMERICAN BAR ASSOCIATION

**STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES
SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION
LAW PRACTICE MANAGEMENT SECTION**

**STANDING COMMITTEE ON ETHICS AND PROFESSIONAL
RESPONSIBILITY**

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE

**STANDING COMMITTEE ON LEGAL ASSISTANCE TO MILITARY
PERSONNEL**

STANDING COMMITTEE ON GROUP AND PREPAID LEGAL SERVICES

COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association encourage practitioners, when appropriate, to consider limiting the scope of their representation as a means of increasing access to legal services.

FURTHER RESOLVED, That the American Bar Association encourage and support the efforts of national, state, local and territorial bar associations, the judiciary and court administrations, and CLE providers to take measures to assure that practitioners who limit the scope of their representation do so with full understanding and recognition of their professional obligations.

FURTHER RESOLVED, That the American Bar Association encourage and support the efforts of national, state, local and territorial bar associations, the judiciary and court administrations, and those providing legal services to increase public awareness of the availability of limited scope representation as an option to help meet the legal needs of the public.

REPORT

I. Overview

Research clearly indicates that a growing number of people are foregoing the assistance of lawyers when confronted with a civil legal issue and are addressing their matters through self-representation. In many instances, people are turning to self-help alternatives, such as document preparation services available over the Internet.

Lawyers who provide some of their services in a limited scope manner facilitate greater access to competent legal services. Limited scope representation has taken on several names, including “discrete task representation,” “limited assistance representation,” and “unbundled legal services.” According to the New York Civil Courts, the provision of “unbundled legal services” involves “a practice in which the lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation. Simply put, the lawyers provide only the agreed upon tasks, rather than the whole “bundle,” and the clients perform the remaining tasks on their own.”

To be clear, limited scope representation is used in pro bono and legal aid settings, but is not limited to free legal services. Lawyers who unbundle their services in the marketplace are able to serve a broader range of clients because the cost per case is more affordable.

The American Bar Association has set out the circumstances under which lawyers may limit the scope of their representation in Rule 1.2(c) of the Model Rules of Professional Conduct. This Rule 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.

Although Rule 1.2(c) was adopted in 2002 and has been broadly embraced by the states since then, public opinion research demonstrates that a substantial portion of the public is unaware of the option to limit the scope of representation.

Access to competent legal services for those with personal, civil legal problems can be advanced through the ABA’s support of limited scope representation, advancement of the professional obligations of lawyers that provide limited scope representation and encouragement of justice system stakeholders to inform the public about opportunities for limited scope representation.

II. The Growth of Self-Representation

The ABA’s seminal legal needs study from 1994 documented the ways in which those of moderate and low incomes approach the justice system for their legal needs. The survey indicated that 40 percent of low-income households and 46 percent of moderate-income households had at least one new legal problem in the prior year. Less than four out of ten of those in moderate-income households with a new legal problem turned to the civil

justice system to deal with their problems. The clear majority of both low and moderate-income household members handled the problem on their own, took no action or consulted a third party other than a lawyer.

Since this survey was conducted, other research shows that the number of litigants who self-represent has increased in many areas. National data indicates that in family law matters, between 60 and 90 percent of the cases involve at least one self-represented party. In New York, nearly two million litigants self-represent each year. California has over 150,000 divorce cases per year. At least one party is unrepresented in 70 percent of them. A New Hampshire report indicates that in 70 percent of the domestic relations matters there at least one party is self-represented. In Oregon, about seven out of ten litigants in family law matters self-represent. According to a Utah study conducted in 2005, both sides in debts collection cases were represented in only three percent of the cases. In addition, 81 percent of respondents in divorce cases in Utah self-represent, and in evictions, 97 percent of respondents self-represented.

In 2009, the ABA Coalition for Justice surveyed judges to measure the impact of the economic downturn on the courts. Six out of ten judges who participated in the survey reported that the number of self-represented litigant had increased. Just over a third indicated it had stayed the same, but only 3 percent of the judges reported that more litigants were coming to court with representation. In addition, the study found the self-represented litigants were unprepared, with many having an unsatisfactory outcome. High percentages of judges reported that self-represented litigants failed to include important evidence, committed procedural errors and were ineffective in raising objections, examining witnesses and crafting arguments. Nearly two-thirds of the judges reported that the outcomes of self-represented parties were worse than if they had been represented.

The Internet has fueled alternative resources for those who self-represent. The issues are not limited to litigation, but also include the most common transactional matters. Simple search engine probes will lead consumers to scores, if not hundreds, of companies that provide services to the do-it-yourself estate planners or those who seek to incorporate their businesses. Online legal service providers are sometimes backed with millions of dollars in venture capital. One company advertises that over 15 million individuals and businesses have used their services. Another touts that it has over 2 million satisfied customers.

III. Improving Access to Legal Services through Limited Scope Representation

In 2010, then New Hampshire Chief Justice Broderick and then California Chief Justice George joined to publish an Op-Ed in the New York Times entitled “A Nation of Do-It-Yourself Lawyers.” While supporting the goal of a right to counsel in some civil cases, the Chief Justices wrote that it is essential to close the “justice gap” and that “unbundling” is one of the tools to do so. They indicated that lawyers who provide limited scope representation are being responsive to new realities. They stated “... that for those whose only option is to go it alone, at least some limited, affordable time with a

lawyer is a valuable option we should all encourage. In fact, we believe that limited scope representation rules will allow lawyers – especially sole practitioners – to serve people who might otherwise have never sought legal assistance.”

Over the past decade, several states have examined aspects of self-representation and concluded that limited scope representation is a model of delivering legal services that is responsive to problems that arise with self-represented litigants. For example, in 2008, the Massachusetts Supreme Judicial Court Steering Committee on Self-Representation issued a report entitled, “Addressing the Needs of Self-Represented Litigants in Our Court.”

The report states:

Experience has shown that LAR [Limited Assistance Representation] is appropriate for use in many categories typically involving self-represented parties and that it is an extremely helpful innovation for several reasons: (1) it allows legal aid and pro bono attorneys to assist more people; (2) it allows people who cannot afford full service representation but who have some funds to pay a lawyer to obtain meaningful assistance with their legal problem; and (3) it has positive impact on the operations of the court. In states where this method of representation has been widely used (California and Maine being notable examples) it has also shown itself to be of great benefit to the private bar; attorneys find that providing limited scope representation connects them with litigants who would otherwise not hire an attorney and that representing clients on a limited assistance basis is professionally satisfying and profitable.

The Joint Iowa Judges Association and Iowa State Bar Association Task Force on Pro Se Litigation has advanced a similar position. In its 2005 report, the Task Force states:

We believe we must shift from thinking of legal services as a dichotomy of represented/unrepresented, or “all or nothing,” to conceptualizing and facilitating legal services delivery along a continuum... We believe that more prospective clients would seek lawyers’ services if they were free to contract with lawyers for the completion of limited and designated tasks... Limited representation by the private bar offers a way to expand legal services to people of limited financial means. This will leave these litigants better prepared and should relieve judges and other court staff from the pressures of giving advice or advocacy. It can also offer lawyers an opportunity to adapt a law practice that offers “all or nothing” services into one in which they may enter agreements with litigants to limit the scope of their representation to discrete legal tasks, as they often do with their transactional clients.

The 2006 Report and Recommendations of the Supreme Court of Ohio Task Force on Pro Se and Indigent Litigants came to the same conclusions as Massachusetts, Iowa and other states that have addressed this issue. The Task Force took a system-wide look at the needs created by self-represented litigants and concluded that practitioners are uniquely situated to provide a portion of the necessary assistance.

The Report states:

Many, if not most, unrepresented litigants need more than procedural assistance (e.g. what form to use, how to docket their case, what time to appear in court). They also need assistance with decision-making and judgment; they need to know their options, possible outcomes and strategies to pursue their objectives... The task force believes that pro se litigants can, in appropriate cases, optimize their outcomes if they can obtain assistance from a lawyer with discrete limited phases or aspects of their respective cases. The opportunity for limited representation is especially valuable to the otherwise unrepresented individual when that individual cannot afford or otherwise obtain representation with respect to all aspects of a case. Counsel's limited appearance may not only advantage that attorney's client but also may help the justice system operate more smoothly.

While the reports from the state task forces and commissions, along with the Op-Ed from the California and New Hampshire chief justices, all stress the value of limited scope representation as one of the methods of addressing the justice gap and expanding access to legal services, they also all stress the need for sound policies and rules to govern the conduct of lawyers who agree with clients to limit the scope of their representation.

IV. Policies Governing Limited Scope Representation

As a result of the work of the ABA Commission on Ethics 2000, the House of Delegates amended the Model Rules of Professional Conduct to revise Rule 1.2(c). The Rule addresses the conditions under which a lawyer may agree with a client to limit the representation. The Rule states, "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."

The reporter's notes on the amendment to this rule indicate that the change is designed to clarify the lawyer's obligations and to expand access to the services of a lawyer. The notes state, in part:

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

Forty-one states have now adopted Rule 1.2(c) or a substantially similar rule. Most of those states that have varied from the Model Rule require the client's consent to be in writing. A few have set out a checklist of tasks to be assumed when the lawyer provides a limited scope of representation.

On the one hand, the standards to provide limited scope representation set out in Rule 1.2(c) are easily articulated. On the other hand, those provisions may be challenging to implement in practice.

Rightly so, the Rule places the burden on the lawyer to determine if and when limited scope representation is appropriate. The lawyer must measure the capacity of the potential client to assume the responsibility of the segmented tasks. These tasks may be as simple as filing documents at the courthouse or as complex as negotiating an agreement or bringing a contested matter before a tribunal. The lawyer must both measure the capability of the potential client and the complexity of the legal issue to meet this standard. Consequently, the lawyer must be every bit as competent in the subject matter as a lawyer who exclusively provides full services in that field.

Several states have closely examined the emergence of self-representation in their jurisdiction through task forces or special committees, such as those noted above. Ultimately, these entities have called for changes in rules of professional conduct, rules of procedure and rules of the courts to clarify the obligations of lawyers providing limited scope representation to otherwise self-represented litigants. The issues that have emerged are set out in a white paper published by the Standing Committee on the Delivery of Legal Services in 2002 and updated in 2009, entitled “An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants.” The issues include the communications with opposing counsel, certification of pleadings when providing document preparation, duties to the court when providing document preparation, entry of appearances and limited appearances, and conditions and circumstances governing withdrawal of a matter before a tribunal. Alaska, Arizona, California, Colorado, Florida, Iowa, Maine, Missouri, New Hampshire, New Mexico, Utah, Washington and Wyoming are among the states that have provided clarification of the lawyer’s duties through changes to their rules. Other states are in the process of making these considerations and several more have provided clarification through their interpretations of existing rules by way of ethics opinions.

The ABA has opined about limited scope representation in different settings. ABA Formal Ethics Opinion 07-446 clarifies the lawyer’s responsibilities when limiting the scope of representation to the drafting of pleadings. The opinion indicates that the Model Rules of Professional Conduct permit a lawyer to prepare pleadings without signing them. In addition, ABA Formal Ethics Opinion 08-451 discusses outsourcing legal work. Drawing a parallel between limited scope representation and outsourcing, the opinion indicates that limited scope representation affords the same opportunities to clients as are available to lawyers – the ability to determine which services the attorney will complete in an effort to reduce costs while maximizing attorney capital. Scores of state ethics opinions addressing aspects of limited scope representation have been collected at the ABA Pro Se/Unbundling Resource Center, at http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/ethics_opinions.html.

V. Public Awareness of Limited Scope Representation

Even though substantial changes have been implemented in the policies governing lawyers who provide limited scope representation and the ABA and states have begun to clarify the lawyer's responsibilities when providing limited scope representation, the public remains largely unaware of the unbundling option.

Anecdotal information and some research suggest that there are wide variations from state to state about the usage of limited scope representation. A 2009 California survey of primarily domestic relations lawyers found that half prepared documents without appearing as counsel on the case. Half reviewed documents prepared by the clients. Forty percent coached clients to prepare for hearings and the same percentage made limited scope appearances. Only a quarter of the respondents did not unbundle their services. On the other hand, a former president of the Montana State Bar reported that limiting the scope of representation by drafting pleadings has not caught on in Washington and he doubts that it would in Montana.

Until recently, even less was known about the public's view of limited scope representation. However, in 2010, the Standing Committee on the Delivery of Legal Services commissioned Harris Interactive to conduct a national public opinion survey examining aspects of how people find legal services. One set of questions focused on limited scope representation, which in the survey was referred to as "unbundling."

The Committee assumed that some percentage of people would be unfamiliar with the concept of limited scope representation, or unbundling, and therefore began the series of questions with a statement. Since there was no universal definition of limited scope representation or unbundling, the Committee structured the following statement for the purpose of this survey:

Some lawyers are unbundling their services. "Unbundling" means that the lawyer and the client team up to divide the work between them. Instead of the lawyer doing everything, the lawyer does some of the work and the client does some of the work. For example, a lawyer may give the client instructions on how to fill out the paperwork necessary for court and the client then completes the forms. This would save money on attorneys' fees, but may take a lot of your time.

Survey respondents were then asked how familiar they were with unbundling. The choices were "very familiar," "familiar," "somewhat familiar," and "not at all familiar."

Six percent – just over one out of 20 – of the survey respondents reported they were very familiar with unbundled legal services. An additional five percent reported they were familiar with it. Eighteen percent reported they were somewhat familiar and 70% indicated they were not at all familiar with unbundled legal services. Seven out of ten people across the county reported they are not at all familiar with limited scope representation.

The level of familiarity with unbundling was uniform across the age and economic cohorts, with one exception. Those with household annual incomes less than \$15,000 per

year reported that they were somewhat familiar with unbundling at a rate substantially higher than the respondents as a whole (32% compared to 18%).

The survey then probed the extent to which people were interested in the concept of limited scope representation for their legal matters. Respondents were asked: “If you had a personal legal matter to deal with, how likely would you be to talk to a lawyer about the possibility of unbundled legal services?” About a third of the respondents reported they were very likely to do so and another third reported they were somewhat likely to explore this option. Those of moderate incomes, with family household incomes between \$35,000 and \$50,000 per year, said they were more likely to do so. Half of those surveyed with moderate incomes reported they were very likely to talk to a lawyer about unbundling.

Finally, the survey asked people whether it was important to them if a lawyer they were considering using offered an unbundling option. Sixty-two percent of the respondents indicated it was somewhat or very important that their potential lawyer offer this option. This percentage scaled up as income groups lowered. About half of those with incomes over \$100,000 per year believed it was somewhat or very important that their perspective lawyer offer unbundled services. However, four out of five respondents with incomes of less than \$15,000 per year believed it was somewhat or very important for their lawyer to offer unbundling as an option.

VI. Moving Forward with Limited Scope Representation

We have every reason to believe self-representation will continue at high, if not increasing, levels. Document preparation providers are a well-capitalized alternative to the services provided by practitioners and show signs of becoming high volume, institutionalized entities. For many, the costs of traditional services make the use of a lawyer out of reach. The organized bar has an obligation to use all reasonable resources to assure people have access to the benefits that can only be provided by lawyers. The ABA and several states have made rule changes to better enable lawyers to provide limited scope representation and to clarify the lawyer’s obligations when doing so. Nevertheless, people are unfamiliar with the concept of limited scope representation. When that concept is presented to them, a high percentage of people find this option a possibility they want to explore.

Consequently, it is imperative for the ABA to provide support for the concept of limited scope representation. This support should go beyond accommodation and stimulate discussion, debate and interest among all stakeholders in our system of justice. Likewise, it should employ greater measures to broaden the public’s awareness of this option for legal services. At the same time, the ABA should be the leader in providing clarity to practitioners on the propriety of limited scope representation and assure that lawyers provide these services with obligations no less than those that apply in full representation.

Respectfully submitted,

H. Ritchey Hollenbaugh, Chair

Standing Committee on the Delivery of Legal Services
February 2013