



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: None, as the report is informational at this meeting.

Attached is a report from the President's Committee on Access to Justice recommending Association support for the concept and utilization of limited scope representation for low and moderate income persons. The report notes that each year 1.8 million persons appear without counsel in family court, housing court, consumer debt matters, foreclosures and other matters in New York. The state court system has supported limited scope representation on the basis that such representation gives greater access to justice and relieves burdens on the court system created by unrepresented litigants. Rule 1.2(c) of the New York Rules of Professional Conduct provides that "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

In 2003 the Association's Executive Committee considered a report from the Commission on Providing Access to Legal Services for Middle Income Consumers and adopted a resolution authorizing the Association officers to explore and, where appropriate implements, the report's recommendations. However, the Association has not specifically supported limited scope representation.

The committee's materials also include a proposed resolution to support and encourage the use of limited scope representation.

This report was submitted in June 2016 and posted in the Reports Community. It is being presented to you on an informational basis at this meeting and will be scheduled for debate and vote at the November 5, 2016 meeting. Comments on the report may be posted in the Community or e-mailed to reportsgroup@nysba.org.

The report will be presented at the June 18 meeting by Michael Miller, a member of the President's Committee on Access to Justice.

Report of NYSBA President's Committee on Access to Justice

DRAFT REPORT

The New York State Bar Association (NYSBA) has long supported and encouraged access to justice for all, including for those of limited means who are not able to pay for conventional legal services. Access to justice is in the association's very DNA and *raison d'être*. The use of what has been referred to as "segmented," "unbundled," "limited assistance" and "limited scope" legal services as an effective means to enhance access to justice has been studied for many years by numerous bar associations, including the New York State Bar Association and the American Bar Association, as well as by many judicial groups, including the NYS Office of Court Administration.¹ As the late former NYS Chief Judge Judith S. Kaye eloquently stated in 1999: "Access to the legal system is an inherent right of citizenship, yet far too many New Yorkers are currently denied this right because they lack economic resources."²

The concept of limited scope representation is based upon the belief that securing the assistance of legal counsel should not be an all-or-nothing proposition. Over the past several years, the organized bar, academic institutions and courts throughout the United States have

¹ *E.g.*, *Handbook on Limited Scope Legal Assistance*, ABA Section of Litigation (2003); *NYSBA Commission on Providing Access to Legal Services for Middle Income Consumers* (2002); Report to the Chief Judge and Chief Administrative Judge, *NYS Courts – Access to Justice Program - Delivering Cost Effective Legal Services and Information in Challenging Economic Times* (2015); *Making Limited Scope Representation Work*, California Bar Journal, May 2015; Massachusetts Court System, Programs – Legal representation – Limited Assistance Representation, <http://www.mass.gov/courts/programs/legal-assistance/lar-gen.html>

² Press Release, New York State Unified Court System, Judge Juanita Bing Newton Appointed Deputy Chief Administrative Judge for Justice Initiatives (June 29, 1999)

been experimenting with models of legal practice that permit attorneys to provide *a la carte* services to clients who need legal assistance but want or need to limit their expenses. Some may be able to effectively handle the other aspects of their cases on their own; for others, limited scope representation helps level the playing field, even though some of their legal needs remain unmet. The terms “unbundling,” “discrete task representation,” and “limited scope representation” have been used to describe these practice models. As has been noted:

Unbundling has become institutionalized within the legal landscape. In the current legal and economic environments, the availability of unbundled legal services is more important than ever. Unbundling enables lawyers who serve those of modest means to expand their outreach to a broader base of potential clients, providing greater access to affordable legal services across the country.³

The concept of limited scope representation has been adopted, supported and encouraged by many bar associations and judicial groups throughout the United States, including the New York State Courts’ Access to Justice Program. However, the New York State Bar Association has never taken an affirmative position specifically supporting limited scope representation of low and moderate income people. In 2002, the NYSBA Commission on Providing Access to Legal Services for Middle Income Consumers affirmatively stated that:

We should make clear that a lawyer may ethically limit the scope of the representation of a client if the client consents.⁴

In 2003, NYSBA’s Executive Committee adopted a resolution proffered by its Commission on Providing Access to Legal Services for Middle Income Consumers authorizing the NYSBA officers

³ Unbundling Legal Services in 2014 - Recommendations for the Courts, Forrest Mosten (The Judges’ Journal (ABA), Volume 53, Number 1, Winter 2014), p. 10.

⁴ NYSBA Commission on Providing Access to Legal Services for Middle Income Consumers (2002), p. 10

to take such actions as may be necessary to further explore, and where appropriate, implement the recommendations contained in the Commission’s 2002 report.⁵ Among those recommendations was support for a new Ethical Consideration to Canon 6 of the Code of Professional Responsibility to make clear that an attorney may ethically limit the scope of representation of a client if the limitation is reasonable under the circumstances and the client, following consultation, gives informed consent. This concept was codified and appears in the current NYS Rules of Professional Conduct in Rule 1.2(c) which states: “(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.”⁶

Criminal defendants who cannot afford an attorney have a constitutional right to counsel. However, there is no such right in most civil matters. It is estimated that each year 1.8 million New Yorkers, mostly low income, appear without counsel in family court, housing court, consumer debt matters, foreclosures and other civil matters in New York State Courts.⁷ The lack of assistance of counsel puts those litigants at significant disadvantage and puts enormous

⁵ “RESOLVED, that the New York State Bar Association approves, in principle, the report of the Commission on Providing Access to Legal Services for Middle Income Consumers and authorizes the officers to take such actions as may be necessary to further explore, and where appropriate, implement the recommendations contained in the report, including referral to appropriate sections and committees.”

Resolution of NYSBA Executive Committee adopted January 2003

⁶ See also: Rule 6.5(d), NYS Rules of Professional Conduct, which discusses some special rules for participation in limited pro bono legal services programs which are “sponsored by a court, government agency, bar association or not-for-profit legal services organization.”

⁷ Report to the Chief Judge and Chief Administrative Judge, *NYS Courts – Access to Justice Program - Delivering Cost Effective Legal Services and Information in Challenging Economic Times* (2015), pp. v, 3.

additional strain upon the already overburdened court system. Additionally, it has been noted that the impact of self-representation is often severe and multifaceted, including emotional trauma, health issues and financial consequences (personal debt, employment difficulties, etc.).⁸

Providing keen observations regarding the problems of self-representation, the Committee on Professional Responsibility and Conduct of the State Bar of California has noted:

Self-represented litigants are frequently unaware of the issues or procedures necessary to adequately represent their own interests, and repeatedly clog the courts with inaccurately prepared or inappropriately filed documents. As such, the courts and the legal profession have been challenged to find solutions to promote access to justice while at the same time limiting the burdens self-represented litigants place on the administration of justice.

One approach that has been increasingly utilized to bring down the costs of legal services is for lawyers and clients to allocate the duties and responsibilities for handling a legal matter between themselves, thereby limiting the scope of the lawyer's representation to specific services or discrete tasks. Such 'limited scope' or 'discrete task' representation can provide the layperson with much-needed legal expertise and advice and limit the burdens placed on the courts by self-represented litigants, while keeping the cost of legal representation at an affordable level.⁹

Courts nationwide have been confronted with a very difficult economy, significant budgetary challenges and an influx of self-represented individuals into the judicial system –

⁸ See, *UNBUNDLING LEGAL SERVICES: Options for CLIENTS, COURTS & COUNSEL*, the Institute for the Advancement of the American Legal System at the University of Denver (2015); see also, The National [Canadian] Self-Represented Project <http://representingyourselfcanada.com/2015/09/08/srl-experience-the-same-both-sides-of-the-border-preliminary-results-from-the-us-srl-study/>

⁹ *An Ethics Primer on Limited Scope Representation*, The State Bar of California, Committee on Professional Responsibility and Conduct http://apps.americanbar.org/legalservices/delivery/downloads/ethics_primer_on_limited_scope_representation.pdf

none more so than in New York. In response, many courts have actively encouraged the unbundling of legal services. The New York Court system has embraced the concept of limited scope representation, arguing that the legal community's use of limited scope representation is an important option that gives greater access to justice and relieves some of the burden on the administration of justice that results from unrepresented litigants.¹⁰ The access to justice gap has widened in recent years to include those who live pay check to pay check, and described as the "working poor" or those with "modest means". These individuals may fall just outside the income guidelines of many civil legal assistance programs, but still have no capacity to access traditional private attorney assistance. Unfortunately, it can take only one dire civil legal problem to push those living on the financial edge into desperate poverty and many end up unrepresented in our court system. Limited scope representation can be of particular help to these New Yorkers who cannot find free legal help, but who may be able to pay on a sliding scale or for segmented services, thus helping many avoid further disruption in their lives.

The New York State Bar Association has already taken steps to effectively support and encourage limited scope representation for low and moderate income New Yorkers. NYSBA recently co-sponsored, with the New York Courts Access to Justice Program of the New York State Office of Court Administration, a comprehensive 6 MCLE credit program, "Law a la Carte: Limited Scope Practice for Low and Moderate Income Clients." The program, which was conducted live in New York City, was simulcast at the New York State Bar Center in Albany,

¹⁰ See, Report to the Chief Judge and Chief Administrative Judge, *NYS Courts – Access to Justice Program - Delivering Cost Effective Legal Services and Information in Challenging Economic Times* (2015), pp. 5-21

NY.¹¹ Justice Fern Fisher, Deputy Chief Administrative Judge, NYC Courts, and Director of the New York State Courts Access to Justice Program, noted: “I am most proud of the ‘Law a la Carte’ conference that my office and the New York State Bar Association held in October 2015 in an effort to further the use of limited scope practice for low and moderate income New Yorkers.”¹² The Co-Chairs of NYSBA’s President’s Committee on Access to Justice, William Russell and NYSBA’s President-Elect, Claire Gutekunst, welcomed the participants on behalf of NYSBA. This innovative program brought together leading legal thinkers, judges, legal service providers and others “to explore this legal service delivery method [limited scope representation] as a means to increase legal assistance to the public.”¹³ The focus was on methods for delivery of limited legal services for specific, finite tasks, such as document preparation.

In addition, numerous Courts and Pro Bono Programs around the state are operating highly successful limited scope pro bono programs at which NYSBA members are volunteering. These include several limited scope representation pro bono programs operated by the New York State Court’s Access to Justice Program.¹⁴

In these difficult times, limited scope representation is being utilized in a number of jurisdictions as an effective way to help increase access to justice by increasing the legal resources available to those in greatest need and reducing some of the strain on our overburdened justice system. The public and the courts of New York have similar needs. To

¹¹ <http://www.nysba.org/limitedscope2015/>; <http://www.nysba.org/lawalacarteflyer/>

¹² Report to the Chief Judge and Chief Administrative Judge, p. v, *Supra*

¹³ Report to the Chief Judge and Chief Administrative Judge, p. 5, *Supra*

¹⁴ <http://www.nycourts.gov/ip/nya2j/>

help meet these needs and increase access to justice in our state, the President's Committee on Access to Justice respectfully urges the New York State Bar Association to support and encourage the utilization of limited scope representation for low and moderate income persons in civil matters.

NYSBA President's Committee on Access to Justice

DRAFT RESOLUTION

WHEREAS, the New York State Bar Association has long supported and encouraged access to justice for all, including for low and moderate income persons who are not able to pay for conventional legal services; and

WHEREAS, as the late New York State Chief Judge Judith S. Kaye noted in 1999: "Access to the legal system is an inherent right of citizenship, yet far too many New Yorkers are currently denied this right because they lack economic resources;" and

WHEREAS, over the past several years, the organized bar, academic institutions and courts have been experimenting with models of legal practice that permit attorneys to provide limited scope representation to clients who want or need to limit their expenses, and may be able to effectively handle the other aspects of their cases on their own; and

WHEREAS, although criminal defendants who cannot afford an attorney have a constitutional right to counsel, there is no such right in most civil matters; and

WHEREAS, it is estimated that 1.8 million New Yorkers, including mostly low income persons, appear unrepresented by counsel in family court, housing court, consumer debt matters, foreclosures and other civil matters in New York State Courts;

WHEREAS, a growing number of New Yorkers are falling into the category of the "working poor" or "modest means" and are living from pay check to pay check and cannot afford traditional legal assistance, and

WHEREAS, this lack of counsel can often mean an outcome that is less favorable for the litigants than it might be were there affordable counsel available and can result in greater strains on both our judicial system and social welfare programs; and

WHEREAS, in recent years, the New York State Court system has been confronted with significant budgetary challenges and an influx of self-represented individuals into the judicial system; and

WHEREAS, the President's Committee on Access to Justice of the New York State Bar Association has submitted a report calling upon the Association to support the concept and encourage the utilization of limited scope representation for low and moderate income persons in civil matters,

NOW THEREFORE, IT IS

RESOLVED, that the New York State Bar Association adopts the report of the President's Committee on Access to Justice and supports the concept and encourages the utilization of limited scope representation for low and moderate income persons in civil matters; and it is further

RESOLVED, that the officers of the association are authorized to take such actions as may be necessary to further explore, and where appropriate, implement and expand programs of limited scope representation for low and moderate income persons in civil matters.