

By J. Timothy Eaton and David Holtermann

Expanding Access to **Justice**

Limited Scope Representation is Here



The ability of Illinois' IOLTA program, the Lawyers Trust Fund (LTF), to support legal aid has been severely hampered by record low interest rates. In light of its funding cuts to legal aid programs, LTF is doing all it can to encourage representation by lawyers to meet the legal needs of people with limited resources. Accordingly, LTF has advanced a proposal that would make it easier for lawyers to provide limited representation to pro se litigants in the courts. This article describes limited representation, and explores how it can help meet the needs of people struggling to handle their legal problems on their own.

LIMITED SCOPE REPRESENTATION IS HERE. AMONG the changes in the Illinois Rules of Professional Conduct of 2010 are revisions to Rule 1.2(c) that explicitly allow lawyers to limit the scope of their representation:

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

With this revision, Illinois joined 40 other states with ethics rules that substantially follow ABA Model Rule 1.2(c) and permit limited scope representation (often referred to as “unbundling”). This change provides lawyers with a new tool to address Illinois' growing population of *pro se* litigants—people who are handling their legal problems on their own by choice or, more often, out of economic necessity. This change also gives lawyers the opportunity to expand their businesses by creating an “on ramp” to legal representation for people who can and will pay for some legal assistance, if it is affordable.

Definitions of unbundling abound, but the core concept is simple: lawyers provide representation in only specific parts of a legal matter, while the client self-represents in the remaining parts. Under this arrangement, the lawyer agrees with the client (preferably in writing) to perform one or more tasks—such as legal research or document drafting—with the understanding that the client is responsible for the remaining tasks, as well as the overall case.

In some respects, limited representation is old news. Business lawyers traditionally have provided their clients with discrete services such as reviewing contracts or tax advice. Legal aid lawyers often parcel out assistance to clients in order to ration their limited time. And any lawyer whose relationship with a client is confined to providing legal advice during an initial consultation has practiced a form of unbundling.

Indeed, there were no prohibitions on limited representation in Illinois under the former Rule 1.2. Lawyers could limit the objectives of their representation with the client's consent. Several advisory opinions issued by the Illinois State Bar Association also concluded that within certain parameters, it was permissible for lawyers to limit the scope of their representation. Most notably, ISBA Advisory Opinion of Professional Conduct 849 found that an attorney could limit representation in a divorce proceeding to the preparation of pleadings, so long as the client was fully informed of the consequences and the attorney took steps to avoid any fore-

seeable prejudice to the client. (Opinion 849 was initially issued in 1983, and affirmed in 1991 following the adoption of the 1990 Illinois Rules of Professional Conduct.)

What is new about the revision of Rule 1.2(c) is its clarity. The rule sanctions the limited representation of individual clients, affording both the lawyer and client “substantial latitude to limit the representation,” according to Comment 7. The comments elaborate: The scope of a lawyer's services may be limited by agreement or by the terms under which the services are made available. (Comment 6) The representation “may exclude specific means” to accomplish the client's objectives—such as actions the client “thinks are too costly.” (Comment 6)

This reference to cost is no accident. The explanation of changes to ABA Model Rule 1.2(c) (which the Illinois rule follows) states that the revision was intended in part to provide a “framework” for expanding access to legal assistance “by providing limited but nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel.” (ABA Model Rule 1.2, Reporter's Explanation of Changes)

Litigation: A Regulatory Gap

The good news is that Illinois lawyers can provide limited representation with confidence that the practice is sanctioned by the rules, and with firm ethical guidelines to follow. The shortcoming of the revised rule—and of Illinois' current procedural rules—is that they do not define how lawyers should provide limited representation in the context of litigation.

This raises some obvious questions for lawyers who consider providing limited representation in court. For example, can I represent a client in only one hearing in a case? How do I inform the court that I am appearing on a limited basis? Can I draft a pleading for a *pro se* litigant? Do I need to tell the court if I do?

Neither the Rules of Professional Conduct nor the Supreme Court Rules provide answers to these questions. If the underlying intent of the revised Rule 1.2(c) is to provide a framework for expanding access to affordable representation, then further guidance is needed to extend it into the courts, where affordable representation is most needed.

Make no mistake. The courts are at the epicenter of the need for expanding access to legal help. The chief justices of New Hampshire and California, John T. Broderick Jr. and Ronald M. George,

took note of this in an op-ed in support of limited representation published in *The New York Times* earlier this year. They cited a study that showed many judges have reported an increase of pro se litigants due to the economic crisis. Significantly, Broderick and George wrote, this includes “many in the middle class and small-business owners who unexpectedly find themselves in distress and without sufficient resources to pay for the legal assistance they need.”

Even before the recession began in 2008, studies of legal needs found that low-income Illinoisans obtain representation for only one of every six legal problems they encounter. For this population, the most common response to a legal problem is self-help. Anecdotal reports point to a dramatic increase in the number of pro se litigants in courts throughout Illinois in the past two years. For example, in some court rooms in Cook County, 90 percent of the cases involve at least one pro se litigant. Legal aid providers who operate court-based desks that help pro se litigants report that they are serving more people than ever.

This state of affairs imposes high costs on everyone involved. Courts are overburdened by pro se litigants who are not prepared. Judges struggle to balance their obligation to impartiality with the practical need to engage pro se litigants regarding their cases. Similarly, lawyers struggle to reconcile their obligations to their clients with the need to resolve cases with unrepresented parties

who don't understand the process. The pro se litigants don't know their legal rights and options. As a result, the efficiency of the courts suffers and self-represented people can't obtain a meaningful hearing of their issues. And as Chief Justices Broderick and George wrote, “an inaccessible, overburdened justice system serves none of us well.”

How can limited representation improve this situation? Procedural rules that say how lawyers can provide limited representation in court would allow them to offer discrete services like document preparation to low and moderate-income clients. Many of these people can afford to pay some fees for assistance, but not a sizeable retainer. Unbundling in litigation would let legal aid lawyers appear before a judge on a motion, for example, without making lengthy commitments to ongoing representation. Pro bono programs could expand court-based “lawyer of the day” programs in which volunteer lawyers represent clients without the obligation to return for subsequent proceedings.

In an interview, Judge Michael B. Hyman, a circuit judge in Cook County and a member of the Lawyers Trust Fund board, said, “Enabling lawyers to represent people in court on a limited basis will help pro se litigants present their cases clearly and quickly. This will be of tremendous assistance to everybody: the pro se litigants, anyone opposing them, and the judges.” He added “Limited representation will make

proceedings smoother and more predictable.”

But the absence of a regulatory framework that spells out how a lawyer can step into a case on a limited basis—and then step back out—means it is unlikely that practitioners will venture into representing litigants on a limited basis. Writing in the March 2010 newsletter of the Illinois State Bar Association General Practice, Solo & Small Firm Section, Champaign lawyer John T. Phipps noted, “One major possible problem with ‘unbundling’ is how the courts will interpret unbundled or limited representation agreements in court matters.” Hyman said that uncertainty about how a judge might respond will keep most practitioners from trying to appear on a limited basis. He explained, “It would benefit lawyers as well as judges to have uniform procedures for limited appearances and document preparation assistance in courts around the state.” For these reasons, the Lawyers Trust Fund has proposed a set of rule changes that would build on the revision of Rule 1.2(c) and extend limited representation to the courts. [See the sidebar “Proposed Rule Changes” on page 39 to learn more about the proposal.]

A “win-win” for the bar and the public

Seventeen states, including Illinois’ neighbors Iowa and Missouri, have adopted procedural rules that enable lawyers to provide limited assistance in court. What would be the impact of similar changes in Illinois? In preparing this article, we gathered information and talked to judges and lawyers in several states where limited representation is well established or supported through court-affiliated projects. The information shows that limited representation has yielded positive outcomes for the courts, lawyers, and pro se parties in states as disparate as California and New Hampshire. Some lawyers in these states practice on an entirely unbundled basis, eschewing the pitfalls of getting involved in protracted litigation.

A closer look at some states that have adopted limited representation rules may be instructive for Illinois. Massachusetts first experimented with such rules in 2006, when it established a “limited assistance

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representation” pilot project in several probate and family courtrooms around the state. The state’s high court created rules and procedures for lawyers to make limited appearances and prepare documents. The 300 lawyers who participated received in-depth training, and accepted client referrals on a rotating basis.

The foremost benefits of the project were the assistance provided to *pro se* litigants and its impact on the courts, according to Judge Cynthia J. Cohen of the Massachusetts Appeals Court. Cohen oversaw the development of the pilot as chair of the Supreme Judicial Court’s Steering Committee on Self-Represented Litigants. “Limited assistance representation has proved to be an effective response to the challenges created by the growing numbers of self-represented litigants,” Cohen explained in an interview. Citing a formal evaluation of the project, Cohen said, “Judges reported that as a result of limited assistance representation, they saw better pleadings from self-represented litigants, the litigants were more realistic about their cases, the filing of frivolous motions was reduced, and the litigants understood the process better.”

The positive impression was not confined to judges. Court staff also viewed limited representation favorably. “They discovered that they didn’t have to spend as much counter time with self-represented parties,” according to Cohen. Seventy-five percent of the lawyers who responded to a survey reported a high level of satisfaction with representing clients on a limited basis. Many cited the value of providing assistance to clients who otherwise would go without representation.

In an interview, John Dugan, co-chair of Massachusetts Bar Association Probate Law Section and co-chair of the committee that studied the feasibility of limited representation, agreed that limited representation fills an important gap. “Limited representation is a glass-half-full scenario, in that it gives some clients some representation, rather than nothing.”

Dugan cautioned that limited representation is not suitable for everyone. It is important for the lawyer to exercise professional judgment regarding whether the individual client and the circumstances

PROPOSED RULE CHANGES

Earlier this year, the Lawyers Trust Fund proposed a set of amendments to sections of the Rules of Professional Conduct and the Supreme Court Rules. The proposed rule changes would establish a framework for how lawyers may provide limited representation in the courts. The Chicago Bar Association, the Illinois Judges Association, and the Illinois State Bar Association have established a joint committee to review the proposed changes. The proposal recommends amendments to four rules:

Supreme Court Rule 13 would be amended to allow lawyers to make limited appearances in court proceedings in civil court and withdraw after completing the representation. The proposed amendment includes limited appearance and withdrawal forms to be used by lawyers. Under the rule, before making a limited appearance a lawyer would be required to enter into a written agreement with the client that specifies the scope of representation.

Supreme Court Rule 137 would be amended to allow lawyers to help *pro se* litigants prepare pleadings, motions and other documents. The rule would require a lawyer to make a notation to that effect on the signature page of the document filed with the court.

Supreme Court Rule 11 would be amended to clarify when a lawyer providing limited representation to a client must be served by the other party or counsel.

Rule of Professional Conduct 4.2 would be amended to clarify when a lawyer may communicate with a person represented by counsel on a limited basis.

The full proposal—including the text of the proposed amendments and explanatory notes—is available in the **CBA Record** online section of www.chicagobar.org.

of the case are appropriate for limited representation. This includes assessing the likelihood that the client can follow up on the work done by the lawyer and finish up on their own, according to Dugan. “Limited representation is best where the client can competently watch out for his or her own interests,” Dugan explained. [See the sidebar on “Providing Limited Scope Representation” on page 40.]

In his experience, limited assistance works particularly well in cases like post-decree domestic relations matters (such as modification or contempt proceedings) where the client has some understanding of the system and the legal issues are narrowly defined. But Dugan said he knows lawyers who initiate relatively simple divorce cases by gathering information, organizing the file, preparing and filing the complaint, and then appearing at the initial hearing where the key property distribution issues are addressed in a temporary order. Then the limited assistance lawyer gets out.

This points to one of the best parts of limited assistance for lawyers and clients, according to Dugan. “Clients don’t have to pay \$10,000 when they need \$5,000 worth of work. And lawyers are protected from situations where they get a retainer and file

a general appearance in a case, only to see the client’s retainer become depleted and monthly fee payments stop.” Many limited assistance clients pay their fees up front. In a worst-case scenario, where fees are unpaid, a limited assistance lawyer doesn’t have an open-ended commitment to the case, Dugan said.

Massachusetts’ experiment with limited representation was so successful that the high court has permitted each of the state’s trial court departments to allow limited representation. Cohen summed up the Massachusetts’ experience with limited representation: “We’ve discovered that this is really a win-win for the bar and for self-represented litigants. It is a terrific way to reconnect self-represented litigants with lawyers.” She reiterated that limited representation is a win for the efficient operation of the courts. “Our experience has shown that even limited assistance from a lawyer can significantly reduce missteps that otherwise would consume the time and energy of court staff and judges.”

Another state that recently opened the door to limited representation in the courts is Kansas, which established a limited representation pilot project in July 2009. That project has not been formally evaluated,

PROVIDING LIMITED REPRESENTATION

Limited scope representation is governed by the same ethics rules and professional standards that apply to full representation. But lawyers interested in limited representation should do some homework before jumping in. Careful reading of Rule 1.2 and its comments is a must. Other parts of the Rules of Professional Conduct of 2010 should be read in conjunction with Rule 1.2 to fully understand the meaning of the rule. For example, “informed consent” is defined in Rule 1.0, and Rule 1.1, regarding competence, is cross-referenced in the comments to Rule 1.2. Lawyers also need to be aware of their duties to inform clients of issues that fall outside the scope of representation, based on a 2001 appellate decision that held that the lawyers handling a worker’s compensation claim had a duty to advise their client of the possibility of third-party claims and applicable statutes of limitation. *Keef v. Widuch*, 254 Ill. Dec 580 (1st Dist. 2001)

Additionally, many lawyers providing limited representation typically follow a set of best practices when entering a relationship with a client. A minimum best practice is using a written representation agreement that apportions responsibility for parts of the case between the lawyer and client, and memorializes the client’s informed consent to the limits on the lawyer’s role. Other suggested best practices include using client questionnaires and checklists, and creating a new representation agreement to document any revisions to the scope of representation. Examples of best practice materials and training resources are online at www.abanet.org/legalservices/delivery/downloads/training.html.

but the early results are encouraging. Judge Allen R. Slater hears domestic relations cases in the Johnson County Judicial District near Kansas City, which is among five districts participating in the project. In an interview, he said he regards limited representation as a good idea. “I am convinced it is working. Lawyers are getting cases they never would have gotten before.”

Slater said he encourages parties appearing in his courtroom *pro se* to contact an attorney who can provide limited representation. He gives them a layperson’s explanation of limited representation, and then provides a list of attorneys. Slater believes this is especially useful when complicated documents like parenting plans or child support worksheets are required in the case. He explained that these documents are particularly difficult for *pro se* parties to complete properly, yet he cannot offer detailed guidance from the bench. In this instance, the assistance of an attorney can make a significant difference. Slater said he sees limited representation as “a big service to the court and *pro se* parties.” In his experience, most *pro se* parties indicate that they like limited representation for economic reasons. “These parties know up front what it will cost. Without limited representation, lawyers would never see these clients, who cannot afford to pay a \$5000 to \$10,000 retainer.”

“A great marketing tool”

If the track record in states like Kansas and Massachusetts shows that limited scope representation is increasing access to representation for people of limited means and eating into some of the overload of *pro se* litigants on the courts, what is the pay-off for lawyers? The reduced accounts receivable and limited financial risk for lawyers are one type of benefit. But the more profound impact of limited representation may be that it establishes a way to bring self-represented parties, wary of the costs and process of hiring a lawyer, back into the fold.

In an interview, Wisconsin lawyer Michelle Fitzgerald explained how offering limited representation opens the door to new clients. She has made limited representation a part of her practice for nearly a decade and her office in suburban Milwaukee offers a number of self-help legal resources for use by the public on a walk-in basis. Many end up arranging for a paid consultation with Fitzgerald, and even retain her to coach them through a court proceeding or negotiation. Although approximately 10 percent of her revenue comes from limited representation, Fitzgerald said she believes limited representation plays a more important role in generating business. Quite frequently, according to

Fitzgerald, clients who initially come in to use the self-help resources or have a consultation end up hiring Fitzgerald to provide full representation. “Many people find it is still above their heads,” according to Fitzgerald. But the more significant factor is trust. “When you have all these options for limited or partial representation, it immediately creates a comfort level with the clients. When people have the option to help prepare their own documents for review by an attorney, it helps them trust us.” In this sense, offering limited representation is, in Fitzgerald’s words, “a great marketing tool,” but she cautioned that a lawyer’s commitment to offering limited assistance must be sincere.

Fitzgerald’s observations were echoed by Dugan, the probate lawyer from Massachusetts, who agreed that for many clients, limited representation can be an entrée to full representation: “That’s absolutely true, you establish a relationship with clients where they trust you.”

Judge Slater and Art Thompson, of the Kansas Office of Judicial Administration, both said that despite some initial skepticism, members of the Kansas bar agree they are picking up new business. Connecting *pro se* litigants with lawyers is an important objective of the Kansas pilot projects, according to Thompson. He said many *pro se* parties resist the idea of using a lawyer due to the perceived expense. In contrast, “Clients like limited assistance because it removes the element of not knowing how much they are going to be charged. This is a way to get lawyers involved with *pro se* litigants. If you can get a *pro se* party into a lawyer’s office, the party often may buy more service than they initially had planned to.”

The next step in Illinois

Under Rule 1.2, Illinois lawyers may represent clients on a limited basis. But the effectiveness of limited scope representation is hindered by the unanswered questions regarding litigation. That’s a shame. Litigation is where the greatest need for help exists, and where new business opportunities for lawyers may be found.

In Illinois, objections to permitting limited representation in litigation have been raised out of concern that clients who would

pay for full representation will instead opt for limited, task-based representation. As a result, the argument continues, the bottom line for many lawyers will suffer. This concern seems misplaced. It is possible that some clients accustomed to full representation may choose to handle more matters on their own. But, as Chief Justices Broderick and George explained in *The New York Times*, "Litigants who can afford the services of a lawyer will continue to use one until a case or problem is resolved. Lawyers make a difference and clients know that. But 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." The chief justices' last point is the key one. Limited scope representation gives lawyers a tool to serve clients who currently are receiving no legal representation at all. As California practitioner M. Sue Talia pointed out to us, "The people who are drawn to unbundling are *nobody's* clients. There always will be people who want and can afford full service." John Phipps wrote in his column for the ISBA

General Practice, Solo & Small Firm Section newsletter: "Many clients will of course continue to have a lawyer represent them for the whole case, but there are clearly a large number of matters that do not require full representation and people who cannot afford to pay a full fee but want and need to hire lawyers to protect their interests in a court case. Court rules or procedures that allow lawyers to appear on a limited basis and effectively represent the client at the critical points in the court process benefit both the courts and the public." We agree with Phipps' observation that for the bar, "[l]imited engagements present a great opportunity."

No one wants to push full legal representation aside as the predominant method for providing legal assistance. But we must recognize that economic realities mean full representation is a viable option for only a portion of the public. Limited representation gives lawyers the flexibility to adapt to changes in the world that have produced an ever-increasing population of people handling legal problems on their own. The legal

profession should not overlook the opportunity—and the responsibility—to use limited representation to serve this population.

Illinois can create its own version of Massachusetts' "win-win" scenario. As in Kansas, we can make connecting lawyers with pro se litigants the overriding goal of limited representation rules in Illinois. The foundation for helping the public through limited appearances and document drafting already exists. Why not take the next step and adopt rules that establish a framework for limited representation in the courts? ■

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