



The Chief Judge's 2016 Hearing on Civil Legal Services in New York

**September 27, 2016
Court of Appeals
20 Eagle Street
Albany, N.Y.**

**Oral Testimony of the New York City Bar Association
By: John S. Kiernan, President**

Thank you for this opportunity to testify on behalf of the New York City Bar Association in support of civil legal services. My previously submitted written testimony includes expressions of gratitude for the tremendous leadership of Chief Judge Lippman, Chief Judge DiFiore, this Commission and the Task Force that preceded it in prioritizing allocation of limited resources in the Judiciary budget to provision of legal services for people who face potential deprivation of essentials of life, often as a result of court orders. Rather than repeat the written testimony on the value and importance of that funding, with your permission my oral testimony today will focus on issues associated with the delivery of unbundled or limited legal services.

Provision of limited or unbundled legal services is at the heart of the pragmatic determination of how best to serve clients who need legal representation in circumstances where there simply aren't enough available sources of free legal service to meet the demand of people who cannot afford a lawyer. The City Bar considers itself a leader in providing several forms of such unbundled legal services, through many of the City Bar Justice Center's existing projects. We believe these services reflect a highly valuable form of legal service that enables the Justice Center and other providers to increase substantially the number of people they are able to assist, and to place in far better positions than if they had no legal assistance at all. My testimony is informed, in part, by the work of the Justice Center, but is meant to address the broader provision of limited or unbundled legal services as well.

From our perspective, unbundled legal services fall into three broad categories, each of which presents its own issues of resource allocation and judgment: (i) brief advice, where an experienced intake attorney answering a hotline call or through other contact determines that the Justice Center cannot represent the client for all aspects of his or her problem but can provide substantial assistance by talking with the client, pointing the client to available social services or other alternative sources of assistance, directing the client to do-it-yourself forms, or explaining processes and sensible possible courses of action to the client; (ii) representations where the intake attorney decides that more than brief advice is needed but it should be possible to help the client and possibly resolve the entire matter through forms of advocacy or other service that do

not require involvement to full adjudication or even necessarily require a court appearance (including letter-writing, phone calls to the adversary's counsel, research into disputed factual or legal points, completion of needed applications, navigation through agencies, early settlement negotiations or preparation of ghost-written submissions; and (iii) representations where the lawyer and the client agree in advance that the lawyer will enter an appearance in court but will represent the client only up to a particular point.

The brief advice category of unbundled representations is, in terms of numbers of matters handled, the biggest category by far of the services the Justice Center provides. Last year, the Justice Center and about 1,150 voluntary attorneys working with it helped about 25,000 New Yorkers, including almost 10,000 callers to its Legal Hotline, and closed about 13,000 cases. In the vast majority of those contacts, the attorneys believed, with good reason, that the assistance they were providing was highly valuable to the client even though limited in scope.

We cannot claim that all recipients of brief advice from the Justice Center or other providers achieve the same outcomes they would have received with full representation. But the experiences of the lawyers who work for the Justice Center and the results of client surveys indicate that clients believe (with good reason) they are far better off with these limited scope representations than with no help. Last year, a survey of callers to the Legal Hotline (albeit with a small return rate of 6%) indicated that those callers generally felt helped by and better informed as a result of their hotline communications. Specific survey results are included in my submitted written testimony.

The recently released NYC Office of Civil Justice Report similarly contains descriptions of some relatively small and limited studies regarding the effects of unbundled representations on ultimate outcomes, on clients' experiences and on clients' perceptions about the process. Those studies seem equally to support conclusions that these representations probably do not collectively achieve as many favorable results for clients as full representation would achieve, but they still often alter the outcome from what the client would have experienced with no assistance at all, consistently provide significant assistance and self-empowerment to the client, and overwhelmingly are viewed by clients as preferable to no assistance.

Our intake lawyers at the Justice Center relatively frequently conclude after talking with a client that the client needs additional services beyond brief advice that may resolve the matter entirely. Last year, about 3,000 contacts were escalated to this higher level of service, based on identification of specific steps that could be taken for the clients. My written testimony provides a number of examples of these limited but ultimately dispositive representations, including ghostwriting successful motions to dismiss, drafting petitions to correct birth certificates to clear the way for the receipt of previously denied benefits, coordinating the demand and accomplishment of needed repairs with landlords, assisting clients who are unable to navigate do-it-yourself forms, successfully negotiating repayment plans with creditors whose original deals were unworkably harsh, and drafting bankruptcy or uncontested divorce petitions.

In each of these contexts, the Justice Center obtains the client's agreement regarding the limited scope of the representation. We believe that proceeding this way is ethically proper, consistently with New York Rule of Professional Conduct 1.2(c) (which permits limited scope representations "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," and Rule 6.5, which in the context of provision of pro bono legal services permits "short term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter" after an identified point, so long as the lawyer has secured the client's informed consent to this limitation

The judgment of the Justice Center lawyers making decisions about how to handle communications from clients is sufficiently good that the great majority of these increased but still limited scope representations end up being effectively complete representations, in that the services provided end up leading to a resolution of the matter as was expected when the limited scope representation was taken on. These services are by their nature largely invisible to courts, because the representation ends before the lawyer ever gets engaged in court proceedings (with the exception of drafted pleadings, which disclose in a footnote that they were written by the City Bar Justice Center).

Sometimes, though, limited scope representation involves court proceedings. In these cases, even where a lawyer's withdrawal pursuant to prior agreements with a client may be entirely consistent with ethical rules, it may still cause concern to judges. We have talked with judges who have expressed concern about implications for the operation of proceedings before them of lawyer withdrawals at these points.

Courts in some other states, most of which have ethical rules similar to the New York rules permitting limited scope representations, have addressed through court rules what they view as the separate judicial administration questions of how and when opposing counsel or courts should be notified of limited representations or the existence of ghostwritten pleadings, how service of papers should be handled, and how and when limited representations that have featured lawyers' entry of an appearance are terminated. Some courts require notification to the court and opposing counsel in the attorney's first filings of the limited nature of the representation, even though revealing that limitation may convey information to the opposition that adversely affects the client's interests. Others require the filing of a notice of withdrawal when the limited representation ends, and at least one state, Massachusetts, has taken the hybrid approach of requiring that attorneys either file a notice of limited representation specifying the agreed-upon limit up front or a notice of withdrawal later. I will submit with today's materials the address of an ABA website that identifies the rules different states have promulgated in this area¹ and a copy of California's rules² in case that might be helpful to you.

The City Bar has not yet processed through its usual committee review process a set of points of view about what court rules might be appropriate in New York in these circumstances. We recognize the potential tension between legal service providers' need to be able to triage

¹http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html

² http://www.courts.ca.gov/cams/rules/index.cfm?title=three&linked=rule3_36

allocations of limited resources in the face of overwhelming demands for assistance by defining the limits of their legal representations (even including when attorneys have entered court appearances), and all the reasons why courts would prefer not to have legal services lawyers end representations before the matter has been completed. We would hope that any court rules on this subject would recognize, in the spirit of the ethical rules that the courts have approved, that the ability to limit the scope of representations can be crucial for legal services providers seeking to optimize their overall effectiveness for clients who cannot afford lawyers. We would be happy to engage further on details of potential rules going forward, if you thought that might be helpful.

Overall, we believe the full spectrum of limited or unbundled representations seems likely to remain a core feature of the provision of free legal services going forward, just as agreed-upon limits on the scope of service are often a feature of paid representations for clients of modest means who may be able to afford a lawyer but can't necessarily afford a trial. The evidence suggests that these representations provide enormous value compared to the alternative of providing no assistance at all, and often lead to transformative results for clients.