

# **LIMITED REPRESENTATION**

## **Working Group**

### **FINAL Report**

**June, 2008**

Members: Judge Tom Kistler (Chair), Judge Anne Lazarus, Judge Karin Platt, Ken Horoho, Joe Sullivan, Sam Milkes, Michelle Christian, Tom Wilkinson and Dave Trevaskis.

The Limited Representation Working Group was assembled by President Andy Susko as an adjunct to the Access to Justice proposals adopted in 2007 to encourage pro bono participation and increased funding for legal aid. The goal is to develop recommendations to expand access to counsel in limited scope engagements and to examine ways to take greater advantage of the recent amendments to the Rules of Professional Conduct that facilitate and encourage short term, limited scope retentions through nonprofit legal aid organizations. Rule 1.2(c) was amended to expressly permit lawyers to limit the scope of their retentions, and new Rule 6.5 grants lawyers the ability to provide short term legal services without being subject to discipline for potentially violating the conflict of interest rules.

This effort also builds on recommendations made by the Task Force on Self-represented Litigation of the Commission on Justice Initiatives in Pennsylvania. That Task Force report (Dec. 22, 2006) addressed and encouraged the so-called “unbundling of legal services” (p. 23), which is another term for providing discrete assistance to

clients, either on a pro bono or a paid basis, where those clients might not otherwise be in a position to afford counsel during the duration of the controversy.

The group has reviewed pilot programs in Allegheny County, Chester County, in the California state courts (through its Commission on Justice Initiatives) and a proposed model from Philadelphia County which has not yet been implemented. The programs under review address a range of problems relating to the efforts of self-represented persons to gain adequate access to the courts and to effectively present their claims, and defend against claims by others. The reports also address the problems faced by courts that must handle matters presented by self-represented persons, including ethical issues that arise when one party to a dispute is represented by counsel and the other is not.

It should be noted that there is more than one model – a lawyer can be a mediator or conciliator, or provide limited scope representation. As a practical matter, limiting the scope breaks down matters into smaller units that are easier for lawyers to handle on a pro bono basis.

The overall objective is to broaden access to counsel to parties that generally would be self-represented at points in the process where the assistance and guidance of counsel is particularly helpful and where that assistance can be limited in scope and performed in a discrete timeframe. This delivers legal aid for the critical event, aids the trial judge by focusing the issues and conserving judicial resources, and helps to generate better, more fair outcomes. The advantage for lawyers would be that the investment of time would be limited to a few hours, a half day or perhaps a full day, and the quid pro

quo would be that they would be permitted to withdraw (or terminate the limited representation) without having to file a formal motion to withdraw.

Limited representation is currently available in family court in Allegheny County and in Chester County, in custody conciliation matters, custody hearings and trials and no asset divorces. A study of those two programs has yielded a “Best Practices” model which has been developed by this group, for delivery to other counties for adoption and implementation.

### **Limited Representation in Custody Cases**

#### **The Need**

There exists a great demand for pro bono referral in the family law area, most particularly for custody cases. Although these cases are not necessarily complicated or legally sophisticated, volunteer attorneys often shy away from them. The perception, which can be well founded, is that custody cases are “black holes”—cases which are emotionally charged and never really conclude. As long as someone is unhappy, the cases can be litigated continually throughout the child’s minority.

Under traditional circumstances, once an attorney has entered his/her appearance for a custody client, he/she is legally obligated to appear or act in each successive proceeding, whether or not there is any merit to the matter at hand. There are only 2 ways to extricate yourself from a custody case: 1) another attorney enters an appearance (which simply does not happen in pro bono cases); or 2) the volunteer attorney petitions the court for leave to withdraw. This is an effective method, but cumbersome. It requires more of the volunteer attorney’s valuable (uncompensated) time to procure, and may not be ripe

for disposition prior to a hearing scheduled on short notice. In addition, the client may object, and if a new volunteer attorney could not be secured in time for a particular hearing, the court may not allow the withdrawal.

It is for these reasons that many experienced attorneys are wary of giving their services in custody matters; and these challenges serve as obstacles to recruiting attorneys who do not practice primarily in the family court area, but who are otherwise willing to perform pro bono service.

### **A Solution**

One means of addressing this problem is to allow attorneys volunteering for custody matters to enter their appearance for a finite proceeding, such as one conciliation or one hearing. Once that finite service has been performed, the attorney may withdraw unilaterally. It is essential that the client understands and agrees to the limited scope of the representation from the inception of the referral or representation.

Allegheny County and Chester County have successfully institutionalized procedures for limited representation in pro bono custody cases. The juxtaposition of the urban and suburban models shows striking similarities in both procedure and results. The predominant difference is in the way each county administers its program. It seems safe to say, however, that if a procedure can prove effective in a county as large as Allegheny and as suburban as Chester, it should be adaptable to any county in the Commonwealth.

Another means of addressing needs in the custody arena, is to encourage pro bono lawyers to serve as short-term conciliators in custody cases. The expertise and legal knowledge from these trained conciliators is likely to facilitate the early and prompt resolution of a large number of custody disputes, without the necessity for further

litigation and delay. (This model is not outlined further in this Report, but warrants exploration.)

The following discussion will focus on what we believe to be the essential and preferred elements of a successful limited representation program . We have made no recommendation as to how a program is administered or what entity should perform the administration , i.e., the local Bar Association, the Court or the local Legal Services organization. The focus here is on **what** needs to be done, not **who** needs to do it.

We have identified 5 key elements which form the core of an appropriate limited representation program:

1. An Administrative Order authorizing the process
2. Standardized forms
3. Training
4. Mentors
5. Centralized coordination

## **I. Administrative Order**

Unless a new attorney is entering an appearance, the Pennsylvania Rules of Civil Procedure require leave of Court to withdraw, P.A.R.C.P. 1012(b)(1) and (2).

Accordingly, an Administrative Order of the President Judge or Administrative Family Court Judge authorizing limited representation in custody matters is necessary.

The Administrative Order should clearly identify the types of matters and source of volunteer referrals which qualify for limited representation.

## **II. Forms**

The forms to be used in connection with limited representation must be standardized and uniform. To ensure uniformity, the forms should be generated by the referring office or agency, not by individual attorneys. It is desirable that the forms be filled in to the maximum extent possible and signed off on by the referring agency or office to prevent the misuse of blank forms. Each form should be in plain language, comprehensible to the average client eligible for *pro bono* representation. The essential forms are:

- Praecepte for Limited Appearance
- Limited Representation Engagement Agreement
- Praecepte for Withdrawal (Limited Appearance)

If income qualification is limited to that permitted for legal services representation, a Praecepte to Proceed *in forma pauperis* will also be required.

### **III Training**

Allowing limited representation is a successful tool only if it encourages competent *pro bono* representation. Rule of Professional Conduct 1.1 provides that a lawyer shall provide competent representation to a client. The Rule also more fully particularizes the elements of competence as “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”. Its mirror image from the Code of Professional Responsibility, DR6-101(A)(1) provides that a lawyer shall not handle a matter “which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it”.

Many, if not most, lawyers who limit their practices to family law do take *pro bono* cases. However, the demand for services far outstrips the supply of willing

experienced attorneys. Recently-admitted attorneys, corporate counsel and civil litigators are resources which can be successfully recruited and utilized, so long as their competence can be assured.

Education and training are essential to create and maintain competence in participating attorneys. This truism is at the heart of the Pennsylvania Supreme Court's mandate for continuing legal education. Where a thorough family law training program, eligible for CLE accreditation is offered, it creates an incentive to attorneys who might otherwise hesitate to volunteer. The support and participation of the Bench reinforces that incentive. In Chester County the training program for custody representation earns the participant four substantive and one ethics CLE credits, at no cost to the participant. The *quid pro quo* for the "free" credits is the commitment to take at least one *pro bono* custody conciliation or hearing in the ensuing 12 months. Additional training and credits are available for *pro bono* representation in the areas of Protection From Abuse and no asset divorces.

In both the Allegheny County and Chester County models, the Bench and experienced attorneys lead the programs and prepare thorough "hand outs" to be used as guides after the training.

#### **IV. Mentors**

Obtaining a solid educational grounding in family law concepts is fundamental for competent representation. However, until an attorney develops practical experience and skill in the area, "book learning" may not be enough to pass ethical muster. The admonition to associate with a lawyer who is competent is met by assigning each unseasoned attorney a mentor. The mentor is an attorney with significant family law

experience who has agreed to provide guidance and serve as a sounding board to a less experienced attorney. The mentoring attorney need not enter an appearance on behalf of the *pro bono* client, but rather provides their services to the attorney.

Careful selection of mentor attorneys is important. They must not only be knowledgeable, but willing to be responsive to the needs and concerns of their assigned pupil. Although service as a mentor does not, in itself, earn CLE credits for an attorney, if the experienced attorney serves as faculty in the formal training program, the mentor would earn “double” CLE credits.

#### **V. Centralized Administration**

Coordination of services between those seeking them and those offering them is crucial to most organized *pro bono* programs. This is generally administered through a committee of, or staff of, the local Bar Association, or through a designated Court Administrator.

In the limited representation model, administration requires more than match-making between client and attorney. The client needs to be informed about what limited representation means and must sign a consent. The attorney must be provided the appropriate forms to effectuate the limited appearance. Volunteer attorneys need to be recruited as mentors. Training programs must be held; materials prepared and disseminated to participants. Someone needs to periodically follow up on referral and service completion, and to maintain statistical data. It is recommended that the same entity or individual coordinate and execute all of the administrative functions so that the efficacy of the program can be readily ascertained.

## **Limited Representation in Landlord-Tenant Cases**

Another example involves landlord-tenant appeals from municipal court in Philadelphia County. Self representation in this arena runs very high. This bogs down the system, slows proceedings and frequently leads parties to go into court with misapprehensions as to the law and with completely unrealistic expectations.

Without the assistance of lawyers, appeals in this area often amount to a second trial in which self-represented landlords and tenants present the same facts and evidence and achieve the same results. Both sides are disappointed, because of ignorance of the applicable law and highly unrealistic expectations.

A proposed pilot project, developed by a committee of landlord attorneys, legal services attorneys representing tenants, private bar attorneys and a Philadelphia County judge, would provide that appealing landlords and tenants participate in a mandatory mediation session before the de novo trial. Mediators would be pro bono attorneys with at least five years' practice experience who have been trained by judges and lawyers who regularly practice in landlord-tenant court. Mediators would attempt to settle the cases, using separate meetings with landlords and with tenants, followed by a meeting with both parties to resolve the dispute. Where a settlement is reached, the mediator would participate in drafting a settlement at the end of the mediation session, using forms approved by the court. The draft settlement would then be submitted to the court for approval. Cases that do not settle would proceed to a de novo trial.

Experienced landlord and tenant lawyers estimate that as many as 80 to 85% of cases would settle through this process, because the mediation would serve to educate

self-represented landlords and tenants as to their legal rights and responsibilities, and the likely outcome if they decide not to settle and instead proceed to a trial on appeal. These lawyers also estimate that most settlements will require compromise by both sides, but that educated litigants are much more likely to settle than those who are largely ignorant of landlord-tenant law and their rights and responsibilities.

The education of the participating lawyers, and assignment of mentors to those participants, and the oversight and organization of this Mediation model, would be identical to that laid out above while discussing family court. The incentives to lawyers would be largely the same, with pro bono participants being assured that their involvement would be on a limited basis, and for a limited term. The program would be designed to attract the greatest number of volunteer lawyers to assist the Court and litigants in this area.

### **Implementation**

The intent of the Working Group assembled on this subject was to explore the viability of Limited Representation models for use across the Commonwealth. It is recommended that models be developed on a local basis, rather than as a statewide, or “central” program. This will allow for individual counties and individual courts to adjust models to their specific needs, while being handed a sample model for their adaptation. New and unanticipated innovations and derivations from the model will enrich and expand the applications of the Limited Representation concept.

The Working Group has not explored any necessary Rule changes, or any legislation needed to implement these models. The willingness of the PBA, or another group to publicize and promote the models, and to distribute model “forms” and orders,

together with well-planned education for volunteer lawyers through the PBI or a similar organization, will greatly assist participating counties. The assistance and cooperation of those groups will expedite the adoption of successful Limited Representation models.

Once packaged properly, so as to allow lawyers to understand the opportunities of a Limited Representation model, it is anticipated that a significant increase of pro bono volunteerism will occur. Current perceptions and expectations from the Courts, the lawyers and the clients are inhibiting the full participation that will benefit all three groups, and improve the delivery of legal services to the needy in Pennsylvania. We urge full development and implementation of these models.

Respectfully submitted,

Thomas King Kistler, Chair

Limited Representation “Working Group”