

# **INNOVATIVE LAWYERING**

Utah State Bar CLE

Fall Forum-November 18, 2011

Presenters:

Commissioner Thomas N. Arnett, Third District Court

Judge John Baxter, Salt Lake City Justice Court

Mary Jane Ciccarello, Self-Help Center Director, Utah State Courts

Virginia Sudbury, Law Office of Virginia Sudbury, LOVS

## **1. Mary Jane Ciccarello**

- **Legal services delivery systems: What's new?**
- **Modest means panels**
- **Limited legal help**
- **Electronic solutions**

## **2. Commissioner Thomas N. Arnett**

- **The view from the bench:**  
**The judiciary's approach to access to justice for pro se litigants**

## **3. Judge John Baxter**

- **Specialized courts, access to justice, and how lawyers can help**

## **3. Virginia Sudbury**

- **Private lawyer approaches**
- **Family Dispute Resolution Day and the LOVS/DFRD Attorney Program**
- **Limited Scope Representation from the practitioner's point of view**

## **4. Open dialogue between audience and panelists**

- **Other innovations in the delivery of legal services**
- **Practitioner needs**

## 1.

### LEGAL SERVICES DELIVERY SYSTEMS: WHAT'S NEW?

- **ABA Standing Committee on the Delivery of Legal Services:**  
[http://www.americanbar.org/groups/delivery\\_legal\\_services.html](http://www.americanbar.org/groups/delivery_legal_services.html)
- **Pinellas County, Florida program:**  
<http://www.pinellasclerk.org/asplInclude2/ASPInclude.asp?pageName=selfhelp.htm>

### MODEST MEANS PROGRAMS

- [http://www.americanbar.org/groups/lawyer\\_referral/resources/clearinghouse/modest.html](http://www.americanbar.org/groups/lawyer_referral/resources/clearinghouse/modest.html)
- [http://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/blueprints\\_for\\_better\\_access/lawyer\\_referral\\_and\\_information\\_service\\_modest\\_means\\_panels.html](http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/blueprints_for_better_access/lawyer_referral_and_information_service_modest_means_panels.html)

### LIMITED LEGAL HELP

Limited Legal Help (sometimes called Unbundled Legal Services, Limited Scope Representation, Limited Assistance Representation, and Discrete Task Representation) is an agreement between a lawyer and client that the lawyer will complete or help with identified tasks or parts of a legal matter, and the client will self-represent in the rest of the matter. For example, the lawyer and client may agree to limit the lawyer's services to appearing in court for a specific hearing, counseling the client on legal rights and claims, advising the client about court procedures, or helping to write documents. Depending on the nature of the legal matter and the nature of the limitations, the lawyer may or may not enter an appearance with the court.

A lawyer providing limited legal help should follow governing rules and best practices, including:

- 1) The client is informed of the limitations and agrees in writing;
  - 2) The limitations are reasonable under the circumstances;
  - 3) Changes are documented;
  - 4) The lawyer advises the client on related matters, even if not asked;
  - 5) The lawyer receives initial and ongoing training about rules, ethics opinions, laws, and best practices relevant to limited legal help.
- **National Resources, Risk Management and Training Materials**

ABA Standing Committee on the Delivery of Legal Services, Pro Se/Unbundling Resource Center (regularly updated information and materials for lawyers practicing limited legal help):

- [http://www.americanbar.org/groups/lawyer\\_referral/resources/clearinghouse/discrete.html](http://www.americanbar.org/groups/lawyer_referral/resources/clearinghouse/discrete.html)
- <http://www.abanet.org/legalservices/delivery/delunbund.html>

- **Utah State Courts and Utah State Law Library Resources and Forms**

Finding legal help, local bar association lists of lawyers offering limited legal help, free legal clinics, Notice of Appearance and Withdrawal forms:

- <http://www.utcourts.gov/howto/legalassist/>
- [http://www.utcourts.gov/howto/changing\\_lawyers/](http://www.utcourts.gov/howto/changing_lawyers/)

Limited scope volunteer lawyer program to help military service members:

- <http://www.utcourts.gov/resources/forms/military/scra/>

Self-Help Resources: [www.utcourts.gov/howto](http://www.utcourts.gov/howto)

Utah State Law Library: <http://www.utcourts.gov/lawlibrary/>

- **Utah Rules of Professional Conduct -- excerpts**

**Preamble: A Lawyer's Responsibilities.**

6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and therefore, all lawyers should devote professional time and resources and use civic influence in their behalf to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal

profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

**Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. . . .

**(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. . . .**

Comment

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

**Rule 2.4. Lawyer Serving as Third-Party Neutral.**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

(c) A lawyer serving as a mediator in a mediation in which the parties have fully resolved all issues:

(c)(1) may prepare formal documents that memorialize and implement the agreement reached in mediation;

(c)(2) shall recommend that each party seek independent legal advice before executing the documents; and

(c)(3) with the informed consent of all parties confirmed in writing, may record or may file the documents in court, informing the court of the mediator's limited representation of the parties for the sole purpose of obtaining such legal approval as may be necessary.

**Comment**

[5a] Rule 2.4(c) is intended to permit a lawyer-mediator for parties who have successfully resolved all issues between them to draft a legally binding agreement and, to the extent necessary or appropriate, record or file related papers or pleadings with an appropriate tribunal. In so doing, the lawyer will be jointly representing the parties in their common goal of effecting proper legal filings or obtaining judicial approval of their fully resolved issues. Because the parties in this situation have fully resolved their issues, they are not considered "adverse" under Rule 1.7(a)(1). ABA Model Rule 2.4 does not address the lawyer's drafting of documents to implement the parties' agreement.

**Rule 4.2. Communication with Persons Represented by Counsel.**

(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

**Rule 4.3. Dealing with Unrepresented Person.**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) A lawyer may consider a person, whose representation by counsel in a matter does not encompass all aspects of the matter, to be unrepresented for purposes of this Rule and Rule 4.2, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

**Comment**

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] This Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that this Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the

person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[3] Paragraph (b) recognizes that the scope of representation of a person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a lawyer for another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who undertakes a limited representation must assume the responsibility for informing another party's lawyer of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary's lawyer to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel. Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party's lawyer to make certain ex parte contacts without violating Rule 4.2.

[3a] Utah Rule of Professional Conduct 4.3(b) and related Comment [3] are Utah additions to the ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2.

#### **Rule 6.5. Nonprofit and Court-Annexed Limited Legal Services Programs.**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides 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:

(a)(1) is subject to Rule 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(a)(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

#### **Comment**

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services such as advice or the completion of legal forms that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically

screen for conflicts of interest as is generally required before undertaking a representation. See, e.g. Rules 1.7, 1.9 and 1.10.

- **Standards of Professionalism and Civility**

Rule 14-301:

<http://www.utcourts.gov/resources/rules/ucja/ch14/03%20Civility/USB14-301.html>

- **Utah State Bar Ethics Opinion--excerpts**

**OPINION NO. 08-01 MAIN OPINION: Issued April 8, 2008**

***NOTE: THIS IS NOT THE ENTIRE OPINION. To see the entire opinion and the dissent opinion, see:***

[http://www.utahbar.org/rules\\_ops\\_pols/ethics\\_opinions/op\\_08\\_01.html](http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_08_01.html)

*Note that the dissent cites to a 10<sup>th</sup> Circuit opinion, Duran v. Carris, 238 F.3d 1268 (10<sup>th</sup> Cir. 2001).*

1. **Issue:** May an attorney provide legal assistance to litigants appearing before a tribunal *pro se* and prepare written submissions for them without disclosing the nature or extent of such assistance? If so, what are the attorney's obligations when full representation is not undertaken?

2. **Opinion:** Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals *pro se* and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although providing limited legal help does not alter the attorney's professional responsibilities, some aspects of the representation require special attention.

37. **Conclusion:** It is not dishonest conduct to provide extensive undisclosed legal help to a *pro se* party, including the preparation of various pleadings for the client, unless a court rule or ethical rule explicitly requires disclosure. Undertaking to provide limited legal help does not generally alter any other aspect of the attorney's professional responsibilities to the client.

38. To the extent that our previous Opinions 47, 53 and 74 are inconsistent with this opinion, they are superseded.

- **Utah Rules of Civil Procedure--excerpts**

**Rule 5. Service and filing of pleadings and other papers.**

. . . . (b) Service: How made and by whom.

(b)(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court. . . . .

**Rule 74. Withdrawal of counsel.**

(a) An attorney may withdraw . . . .

(b) An attorney who has entered a limited appearance under Rule 75 shall withdraw from the case by filing and serving a notice of withdrawal upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance. An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a).

**Rule 75. Limited appearance.**

(a) An attorney acting pursuant to an agreement with a party for limited representation that complies with the Utah Rules of Professional Conduct may enter an appearance limited to one or more of the following purposes:

(a)(1) filing a pleading or other paper;

(a)(2) acting as counsel for a specific motion;

(a)(3) acting as counsel for a specific discovery procedure;

(a)(4) acting as counsel for a specific hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding; or

(a)(5) any other purpose with leave of the court.

(b) Before commencement of the limited appearance the attorney shall file a Notice of Limited Appearance signed by the attorney and the party. The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice. The clerk shall enter

on the docket the attorney's name and a brief statement of the limited appearance. The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

(c) Any party may move to clarify the description of the purpose and scope of the limited appearance.

(d) A party on whose behalf an attorney enters a limited appearance remains responsible for all matters not specifically described in the Notice.

#### **ELECTRONIC SOLUTIONS**

- [www.techno.la](http://www.techno.la)
- <http://virtuallawpractice.org/>
- Illinois Legal Aid phone app: <http://itunes.apple.com/us/app/illinois-legal-aid-app/id466092937?mt=8&ign-mpt=uo%3D4>