



PERMANENT COMMISSION ON ACCESS TO JUSTICE

HELAINÉ M. BARNETT, CHAIR

September 27, 2018

John W. McConnell, Counsel
NYS Unified Court System, Office of Court Administration
25 Beaver Street
New York, New York 10004

Dear Mr. McConnell:

On behalf of the NYS Permanent Commission on Access to Justice, thank you for the opportunity to comment on the proposed Guidelines for Attorneys Providing Limited-Scope Legal Assistance to Clients in Civil Matters.

Background:

As you are aware, in its 2014 annual report, the Permanent Commission recommended that the Administrative Board of the Courts adopt an administrative policy expressing support of limited-scope representation in appropriate cases, as a means to help address the access-to-justice issue for low- and moderate-income individuals faced with a legal challenge to the essentials of life, such as housing, family matters and other related issues.

While full representation is always preferable, it has been recognized that limited-scope representation, wherein a litigant has a relationship with an attorney for at least some discrete portion of a legal matter, makes it more likely that the litigant will realize a successful outcome than in the absence of any representation at all. In its 2015 annual report, the Permanent Commission reiterated its 2014 recommendation and encouraged the issuance of guidelines in order to enable judges to facilitate limited-scope practice to expand access to justice.

The Permanent Commission was pleased when Chief Administrative Judge Lawrence K. Marks, with the consent of the Administrative Board, issued an administrative order, in December 2016, stating that the expanded use of limited-scope legal assistance by properly trained attorneys constitutes an appropriate method to broaden access to civil legal assistance for unrepresented litigants. And now, in accordance with that order, the proposed guidelines have been issued.

Recommendations:

- The Permanent Commission expresses its strong support for the Proposed Guidelines and wishes to point out the following concern. Since the purpose of encouraging limited-scope representation, as expressed in Judge Marks's administrative order, is to assist in addressing the justice gap by providing some representation to those litigants who otherwise would be unrepresented, the Guidelines should be addressed to those attorneys who will now be providing legal assistance to those individuals.

Accordingly, we recommend that the Guidelines draw a distinction between those attorneys whose clients do not fall in the category of being low- or moderate-income and those attorneys, such as those working for law firms representing corporations,

rather than individuals, who are engaged for representation for a portion of a major lawsuit (probably not of a short-term duration), but whose clients would be represented by other counsel for the remainder of the pending matter. Clearly, the administrative order was not designed to cover those types of clients.

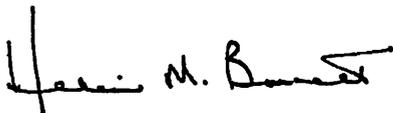
- The Permanent Commission, while taking no position on the following, wishes to draw attention to an additional concern. While the Court certainly needs to know and consent to an attorney's limited appearance in a case, does providing knowledge of that limited appearance, at its start, to an adversary, create a risk that the adversary might seek to take advantage of that information in the preparation and timing of the presentation of that attorney's client's case. As a result, might it be more appropriate to provide notice to the adversary only at the end of the limited-scope representation, rather than at the start.

Additional Suggestions:

In addition, although, perhaps, outside the scope of the Guidelines, we do want to make reference to the Permanent Commission's recommendations that a list of attorneys who have taken the certified training be created and made available to the public on the web, and that a web page on nycourts.gov be established for unrepresented litigants, with explanatory information, written in Plain Language, as to what Limited Scope-Representation is and how it can impact them. The explanatory page is particularly important because the information provided by the Guidelines, although it may impact an unrepresented litigant, was written for attorneys and not the lay person, who may find understanding the information a challenge.

Please do not hesitate to contact me if you have any questions, or if the Permanent Commission can be of any additional assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Helaine M. Barnett". The signature is written in a cursive style with a prominent vertical stroke at the beginning.

Helaine M. Barnett

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street
New York, New York 10004

September 24, 2018

Response of the Matrimonial Practice Advisory and Rules Committee to Public
Comment Request re Proposed Guidelines for Attorneys Providing Limited
Scope Legal Assistance to Clients in Civil Matters

The Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee ("the Committee") is requesting clarification that the proposed guidelines are not intended to apply to certain limited scope representation programs already in existence which provide much needed legal representation to indigent litigants in matrimonial actions. In many of those programs, counsel make limited appearances when cases are bifurcated. Without such clarification, we fear that the guidelines will discourage such representation.

By enacting Judiciary Law §35(8) in 2006, the Legislature implicitly authorized attorneys to provide unbundled or limited scope legal services to indigent spouses in matrimonial actions. Judiciary Law 35(8) requires Supreme Court Justices to appoint counsel to represent an indigent party in a divorce action on issues such as custody and visitation or orders of protection over which the Family Court could have exercised jurisdiction. This important legislation ensured that non-monied spouses would have the same right to paid representation in Supreme Court that they would have had pursuant to FCA 262 in Family Court with respect to those issues. However, there is no statutory authority to appoint counsel for indigent litigants on financial issues in matrimonial cases. Divorce litigation involves not only issues over which the Family Court could have exercised jurisdiction, but also financial issues over which the Family Court is divested of authority once a Supreme Court action is instituted (see *Poliandro v. Poliandro*, 119 AD2d 577, 500 NYS2d 744 [2 Dept., 1986]), and over which the Family Court has no statutory authority such as issues of distribution of marital property or maintenance. To fill the gap, private matrimonial attorneys have been accepting limited scope representation on the ancillary issues in divorce actions with bifurcated representation of indigent litigants pursuant to Judiciary 35(8). In addition, successful limited scope pro bono programs have been developed by bar associations such as the Women's Bar Association of the State of New York and pro bono projects in Brooklyn and New York County with the assistance and encouragement of the New York State Judicial Committee on Women in the Courts chaired by the Hon. Betty Weinberg Ellerin. Our Committee applauds these efforts and wants them to continue.

The Committee is concerned that the proposed guidelines will discourage attorneys from taking assignments pursuant to Judiciary Law 35(8). Attorneys taking Judiciary Law 35(8) assignments should not have to obtain judicial consent to the assignments or complete certified training courses, since it is the court making the assignment from a panel of attorneys who have already been certified as qualified. Moreover, the case by case analysis of whether the proposed

representation is reasonable should not be required since the Legislature has already mandated that such representation on limited issues in a matrimonial proceeding over which Family Court would have had jurisdiction such as custody is reasonable. Thus, we submit there should be an exception to the requirements in the proposed guidelines.

Similarly, when a private attorney takes on responsibility for the remaining limited financial issues in the case, judicial consent should also be unnecessary. Attorneys who agree to represent indigent litigants on just the financial issues in a divorce action should not fall under the umbrella of limited scope representation. To impose new certification requirements now on those attorneys would severely limit access to justice for many indigent matrimonial litigants.

The Committee is also concerned that the requirements in the proposed guidelines will discourage pro bono attorneys from participating in existing pro bono programs successfully supervised by courts, government agencies, bar associations, or not for profit legal service organizations to fill the gap in legal representation as to financial issues arising in divorce litigation. The guidelines acknowledge that competency for pro bono attorneys participating in such programs can be built through training at a legal services agency and through mentoring and co-counseling, but the guidelines nevertheless seem to require such pro bono attorneys to complete the certified training program required for private attorneys.

We submit that there should be a second exception to the requirements in the proposed guidelines for legal representation of indigent litigants in matrimonial cases by private or pro bono counsel as to financial issues which supplements or bifurcates representation by assigned counsel pursuant to Judiciary Law 35(8) in such cases. Such types of limited scope representation have proven successful since 2006 when Judiciary Law 35(8) was first enacted. The protections of the New York Rules of Professional Conduct combined with the requirements of 22 NYCRR 1400 have proven adequate protection against incompetent representation. We note that Part 1400 specifically applies to divorce actions and requires a written retainer and Statement of Client's Rights and Responsibilities in all such actions. Where compensation is not paid by the client, as in the case of State paid assigned counsel and pro bono counsel, only the Statement of Client's Rights and Responsibilities is required by Part 1400 because adequate protections already exist. For private attorneys handling limited scope financial issues in matrimonial litigation, both the retainer agreement and Statement of Client's Rights and Responsibilities are required.

The Committee does welcome the availability of limited scope representation for attorneys who desire to and are eligible to participate in limited parts of a divorce action with prior court approval, regardless of the client's indigency. In matrimonial actions, that would be consistent with a privately paid attorney or an attorney serving pro bono for a limited part of a financial matter such as an examination before trial or preparation of an Affidavit of Net Worth. In these limited situations, especially in a matrimonial action, a written agreement should be required and would be consistent with Part 1400. We also suggest that Part A VI be clarified as to how notice and consent of the court is obtained, and if consent is not granted by the court, whether there should be a provision that a stay would be granted in order to give the litigant an opportunity to hire counsel.

Finally, we have concerns that the guidelines appear to dispense with the verification requirement pursuant to Rule 130 and certification would be avoided even though the attorney was making an appearance in the action. In our view, only if attorneys do not make an appearance in the action should they be exempt from sanctions pursuant to Rule 130. Otherwise certain litigants could simply hire limited scope attorneys to avoid certification. We suggest that the form Model Limited Representation Agreement be modified accordingly.

For the Committee:

Hon. Jeffrey S. Sunshine, Chair, and
Statewide Coordinating Judge for
Matrimonial Cases

Susan W. Kaufman
Counsel to the Committee

From: Myleah Misenhimer <mmisenhimer@lasnny.org>
Sent: Monday, August 20, 2018 9:04 AM
To: rulecomments
Subject: Comments on proposed guidelines for providing limited scope legal assistance
Attachments: response to court guidelines.docx

Good morning-

Attached please find the Legal Aid Society of Northeastern New York's comments on the proposed guidelines. Thank you.

Best,
Myleah Misenhimer
Private Attorney Involvement Director

Myleah Misenhimer

(she/her/hers pronouns)
PAI Director



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A. Comments on the proposed Guidelines for Limited Scope Representation under Rule 1.2 of the New York Rules of Professional Conduct

II. Informed Consent Model Form

For instances of limited scope representation, independent and apart from limited scope programs specifically designed by legal services providers, the proposed model forms are thorough enough to dispel the fears of attorneys who may be interested in engaging in limited scope representation, but are leery of its practice.

IV. Completion of a certified training course is a prerequisite for Limited Scope Representation for Court Appearances

A certified training course should not be required for attorneys who engage in limited scope representation under “the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization” if the program provides its own training course as discussed in A.III. Legal service providers often sponsor their own trainings, and it is through these trainings that many volunteers are secured. The trainings we sponsor for our limited scope programs always have ethics elements. Requiring additional Office of Court Administration training could decrease the number of volunteers for such sponsored programs. If the volunteers must attend the Legal Service Provider training and an additional OCA training before they are able to volunteer for specific programs, they might decide the work is not worth the reward. It is difficult enough to get attorneys to do pro bono work; additional hurdles for volunteer attorneys are not the appropriate answer. We suggest the Office of Court Administration consult with those who have their own trainings for limited scope representation for court appearance programs to ensure consistent training is being offered. If necessary, legal service providers could incorporate the Office of Court Administration training into their training.

VII. Limited Scope Representation by preparing pleadings for pro se litigants

We are in favor of this provision. Allowing for/making “ghost writing” ethically permissible has allowed us to assist many more clients and recruit many more volunteer attorneys. We have one program, Closing the Gap, which is entirely dedicated to this type of limited scope representation. Through Closing the Gap a volunteer attorney can meet with a client through a chat feature on our Closing the Gap website, interview the client with pre-formulated questions and enter the client’s answer into the program. Once the interview is complete, a pro se pleading will be automatically generated and ready for review. Once the volunteer has reviewed the pleading, the pro se client can print and submit it. On the bottom of each of these pleadings is a statement similar to the options in Appendix 4. It names the volunteer attorney and the Legal Service provider and states both that the assistance is limited to preparing the pleading, and that the client is not represented by either the volunteer or the Legal Service provider. Through Closing the Gap we have gained over 20 volunteer attorneys and assisted 195 low income individuals.

An attorney’s most valuable commodity is time. Having volunteer options available to attorneys who may not be able to appear in court, or meet with our clients during regular business hours is imperative. Since pleadings can be drafted at any time, subject to the particular case’s time restraints, this allows

many more attorneys to be able to assist on cases. These attorneys include government attorneys, Emeritus Attorneys and out-of-state attorneys who are licensed in New York.

B. Comments on Guidelines for Programs Operated Under Rule 6.5 of the Rules of Professional Conduct (Participation in Limited Pro Bono Legal Services Programs)

II.3: The participating attorney “must secure the client’s informed consent on the limited scope of the representation.” *This may be done by the program staff. However, it should be clearly communicated to the client in plain language so that the client is truly giving informed consent[. . .]*

We are in favor of this provision. Allowing program staff to secure informed consent and explain the limited scope of the representation gives the volunteer attorney one less thing to worry about. As previously stated, recruiting attorney volunteers becomes easier when a limited scope program exists, and it is made still easier if the program staff handles the administrative tasks. We currently have an Attorney for the Day program at the Albany City court for landlord/tenant matters. In order to ensure we have enough volunteer attorneys on any given day, we have attorneys sign up for time slots for the entire year at our annual Attorney for the Day training. On average, we have 1-2 volunteer attorneys per program appearance. Typically our volunteer attorneys handle multiple cases at the same time. The program staff does an initial eligibility interview, and the client fills out a Limited Scope retainer Agreement and an Application allowing Legal Aid to “refer” the case to one of the private attorney volunteers in attendance. The volunteer conducts client interviews, meets with opposing counsel to discuss settlements, and represents the client in his or her first appearance. Attorney for the Day is incredibly fast-paced; therefore, adding any additional paperwork for the client and any additional steps for the volunteer (such as the proposed model form for informed consent) would result in less time being spent on discussing case and negotiating settlements. It could result in our having to place a cap on the number of people we assist each program appearance and have a chilling effect on the volunteer attorneys.

III. Conflict of Interest Rules

III.1 If the requirements under Guideline B II are met, the normal conflict of interest rules do not apply to the participating lawyer unless:

(a) The Participating Lawyer has actual knowledge of a conflict[. . .]

We favor the special conflict of interest rules in Rule 6.5. These rules allow us to carry on with the previously mentioned Attorney for the Day program. Since our volunteer attorneys are meeting clients, learning their identities and representing them in the same hour, the traditional conflict check is simply not feasible. Since January of 2018, our Attorney for the Day program has allowed us to assist over 20 individuals at their first appearance. We recently increased the program from two to three days a month. As our volunteer base grows, we will continue increasing the number of days the program appears and the number of individuals our program helps. The special conflict of interest rule has been vital for this type of limited scope program.