

Limited Scope Representation

A Possible Panacea for Reducing Pro Per Court Congestion, Attorney Underemployment, and a Frustrated Public



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As in my February and May 2016 columns, I look to the future. This time, my focus is on limited scope representation (LSR) and what it could do for the courts, practitioners, and the public in Michigan in the coming years.

LSR, also called unbundling, is the practice of breaking legal representation into distinct tasks as opposed to representing a client from the alpha to the omega. It was the subject of the State Bar's June 2016 Justice Initiatives Summit. I was amazed to hear it anecdotally credited by a director of the California courts' self-help program with changing the landscape from 85 percent of litigants being pro se to 85 percent of litigants being represented for some part of their case. Another impressive statistic: 80 percent of contested cases in Alaska in which both parties are pro se are getting unbundled representation.¹

I often hear judges lamenting the "pro per problem," young lawyers panicking over how to pay student debt with insufficient income, and people complaining about the challenge of self-representation. Even with more than a dozen self-help centers and an effective network of nonprofit civil legal aid programs throughout Michigan,² access

to justice remains an elephantine problem. Studies estimate no more than 20 percent of the civil legal needs of the poor are met,³ and many middle-income persons are unable to hire an attorney. The expansion of self-help centers in Michigan is an important development, but self-help assistance can take litigants only so far before an attorney is needed. Michigan does not yet have a system to facilitate enough limited scope pro and low bono attorneys who can or will help litigants complete legal tasks.

Is LSR a panacea for the complaints from judges, attorneys, and the public? We will never know unless we take measures to normalize LSR as a mainstream option for dispute resolution. I remember when we made arbitration and case evaluations mainstream, then facilitative mediation, and now collaborative law, peacekeeping, and specialty courts. We need to think of LSR as another tool in the legal-service-delivery toolbox. And we need to do it as soon as feasibly possible. I have appointed a work group to recommend rules and tools to implement a comprehensive, effective LSR/unbundling system in Michigan. The work group's recommendations will be presented to and voted on during the Representative Assembly meeting at the State Bar Annual Meeting in Grand Rapids on September 22. That will be my last day as your State Bar president, and I hope the day ends on a good note with Assembly support of LSR.

What is likely to come up during the debate? The Michigan Rules of Professional Conduct and Court Rules are in a tug-of-war when it comes to LSR. Under MRPC 1.2(b), "A lawyer may limit the objectives of the representation if the client consents after consultation." If that were the only authority on the issue, launching LSR into the mainstream would be a simple matter of education and promotion. However, MCR 2.117(C)(1) states, "Unless otherwise stated or ordered by the court, an attorney's appearance applies only

in the court in which it is made...until a final judgment or final order is entered disposing of all claims by or against the party whom the attorney represents and the time for appeal of right has passed." And MCR 2.117(C)(2) states, "An attorney who has entered an appearance may withdraw from the action or be substituted for *only on order of the court.*" Along those same lines, MRPC 1.16(c) allows a court to order a lawyer to continue representation notwithstanding good cause for terminating the representation, including being fired or not paid by the client.⁴

Hence, when LSR comes up in conversation, you may hear people say, "But judges won't allow it." Although that is not true of all judges, the concern over not being allowed to withdraw from a case or the difficulty of doing so under an LSR contract is enough to impede some attorneys from offering it as an option to their clients. They may be concerned about becoming like an indentured servant of the court—being required to work beyond the scope of their retainer contract without pay.

We could address this concern. More than 30 other states have gone beyond ABA Model Rule 1.2(c)⁵ and created special rules, education, and forms to facilitate the ethical practice of unbundling by attorneys and effectively help persons who need limited assistance.⁶ Recently, entire sets of comprehensive rules and related standardized court and practice forms have emerged in several states addressing key practical issues. But the regulatory questions surrounding LSR become particularly concerning in the context of modern-day "Uber-for-lawyer" services that are increasingly available on the Internet. Some for-profit, online lawyer referral services not owned exclusively by lawyers are referring limited scope work to Michigan attorneys for a "marketing fee" they say does not constitute fee sharing with a nonlawyer. We do not know whether their

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definition of fee sharing passes muster with Michigan's attorney discipline authorities.

Regardless, under MRPC 6.3(b), a lawyer may only participate in and pay the usual charges of a not-for-profit lawyer referral service that recommends legal services to the public if that service meets five specific criteria, including operating in the public interest to refer prospective clients to pro bono and public service legal programs that can best provide assistance to clients in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problems. Those of you who are good at reading between the lines probably understood this to suggest (1) you proceed at your own risk by signing up for these services and (2) it is necessary for state regulators to soon clarify whether these services are ethically permissible for Michigan attorneys.⁷

Meanwhile, the State Bar is working to create a way for individuals whose legal problems can be solved with a quick answer to a question or who wish to consult an attorney for a limited scope issue to find attorneys qualified, willing, and able to take on that work. The vision is to work with the Michigan Legal Help program⁸ to build a coordinated triage system to direct appropriate cases to legal aid (and inform people when they do not qualify for legal aid, saving the legal aid agencies time); give visitors useful, tailored referrals to attorneys and agencies based on their individual circumstances; help visitors find information and services they need in an overwhelming sea of resources; and respond to the changing needs of users and the legal system in Michigan.⁹

If you have visited the Michigan Legal Help website, you know that users may receive a warning in bold print informing them of the benefits of finding a lawyer for help on matters generally too complex for self-representation and providing a link to lawyer referral services and the SBM online member directory. Now you know why I constantly ask our members to complete their profiles on the SBM directory. Increasingly, your profile should translate directly into clients and income.

It's no wonder people imagine they can adequately prepare their own estate plans, create their own business entities, prepare their own contracts, and do their own divorces. In the U.S., approximately \$338.6

billion was spent in 2015 on do-it-yourself retail sales at home centers, lumberyards, and hardware stores.¹⁰ As a profession, we must objectively help members of the public figure out what they can do on their own and avoid the potential unintended consequences of their efforts. A lawyer's duty to determine this is a key part of every effective LSR program in the country. Once an individual decides LSR may be appropriate, we must establish a way to help him or her obtain attorney assistance. LSR, through a bar-approved triage center and referral system, helps fulfill that duty.

For more resources on LSR, check out the American Bar Association's *Handbook on Limited Scope Legal Assistance* and please consider following the efforts of the State Bar's unbundling work group to develop a comprehensive system and helpful tools. ■

ENDNOTES

1. These statistics were cited by the keynote speaker, attorney Katherine Alteneider.
2. Michigan Legal Help Self-help Centers are located in Alcona, Allegan, Calhoun, Macomb, Marquette, Monroe, Muskegon, Oakland, Oscoda, Southwest Detroit, and Wayne. Three more centers are coming in 2016 in Arenac, Howell, and Saginaw. And

Berrien, Kent, Ottawa, and Washtenaw counties all have partnering legal resource centers.

3. See SBM, *Documenting the Justice Gap in Michigan* (Spring 2015) <<http://www.michbar.org/file/programs/atj/pdfs/justicegap.pdf>>. And federal funding is insufficient to fill the gap. According to Legal Services Corporation, Michigan fell approximately \$3.5 million below its requested need for funding in 2015. Legal Services Corporation, *FY 2016 Budget Request* <<http://www.lsc.gov/media-center/publications/fy-2016-budget-request>>. All websites cited in this article were accessed July 15, 2016.
4. MRPC 1.16(a) and (b).
5. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. MRPC 1.2.
6. Perez-Olin, Summary LSR Recommendations to the Access and Affordability Committee of the SBM 21st Century Practice Task Force (2015).
7. Although the State Bar may make recommendations and can offer nondispositive ethics opinions, it does not have the authority to amend the Michigan Rules of Professional Conduct to change or clarify them.
8. The Michigan Legal Help program provides information for self-represented persons in two ways: (1) an interactive website at <<http://www.MichiganLegalHelp.org>> and (2) MLH-affiliated local self-help centers.
9. Courtesy of Angela Tripp, JD, of Michigan Poverty Law program.
10. Statista, *DIY Sales in the US for 2015* <<http://www.statista.com/statistics/239775/predicted-diy-sales-in-the-us-by-store-type>>.

2016 Annual Meeting Members of the Michigan State Bar Foundation

The 2016 Annual Meeting of the Members of the Michigan State Bar Foundation will be held at 2:00 p.m. on Wednesday, September 21 at the Amway Grand Plaza Hotel, 187 Monroe Avenue NW, Grand Rapids, Michigan 49503.

At the meeting, Foundation members will elect trustees, receive a report on Foundation activities, and conduct other business consistent with the bylaws of the Foundation.

2016 Annual Business Meeting and Reception Fellows of the Michigan State Bar Foundation

The Annual Business Meeting for the Fellows of the Michigan State Bar Foundation will be held at 4:15 p.m. on Wednesday, September 21 in the Pantlind Ballroom at the Amway Grand Plaza Hotel, 187 Monroe Avenue NW, Grand Rapids, Michigan 49503.

At the meeting, Fellows members will elect officers and receive a report on Fellows and Foundation activities.

The Annual Reception of the Fellows of the Michigan State Bar Foundation (invitation only) will be held from 4:30 p.m. to 6:00 p.m. in the Pantlind Ballroom at the Amway Grand Plaza Hotel, 187 Monroe Avenue NW, Grand Rapids, Michigan 49503.