

Caught in the Middle

2003 Report and Recommendations of the
North Carolina Bar Association Pro Se Task Force to the
Board of Governors for the
North Carolina Bar Association

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NCBA Pro Se Task Force

Judge Anne Salisbury, co-chair
Victor Boone, co-chair
Michelle Cofield, staff liaison

March 2004 update

The Pro Se Task Force Report, “Caught in the Middle,” was presented to the North Carolina Bar Association Foundation’s Board, on January 15, 2004, seeking approval of the recommendations found within this report. The Board did not take any official action to approve the recommendations within this report, however the board unanimously voted to support the President’s decision to create a standing committee to deal with the report’s recommendations.

July 2004 update

The Modest Means Access Committee will take up where the Pro Se Task Force left off. Paul Shepard, former Pro Se Task Force member, chairs this committee.

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History of the Task Force

It is impossible to ignore the large number of people who are either unable or unwilling to retain counsel to represent them in court proceedings. “The number of pro se litigants is increasing as people seek to represent themselves in a variety of legal matters.” (“Discussions on Pro Se in North Carolina” North Carolina Bar Foundation, November 16, 2001).

In a survey of Clerks of Circuit Court in Wisconsin, results showed an overall increase in self-represented litigants over the five years preceding the survey. A large majority of Clerks reported an increase in pro se litigation in the most common areas of family law—divorce, child support and domestic abuse, as well as landlord/tenant issues. Most of them desired forms and instructions for self-represented litigants, yet only three of the responding circuits had any type of pro se assistance program in place. (“Pro Se Litigation” The Wisconsin Pro Se Working Group, December 2000).

This situation seems to be the rule rather than the exception. Most pro se litigants are low to middle income individuals. Experience has shown that the greatest area of need is in the family law arena. Pro se litigants create a dilemma for opposing counsel, judges, and the court system as they muddle through court proceedings or wander through the courthouse seeking legal advice. Worse yet, pro se litigants are often unable to adequately file pleadings, present their cases in court or generally seek redress through the courts.

Nationwide, the status of pro se litigation varies widely from state-to-state as some states have taken more aggressive measures to address the needs of pro se litigants while others have done practically nothing. In North Carolina, the information and assistance available to pro se litigants varies from county to county.

In response to the growing need to provide access to the court system for pro se litigants, the North Carolina Bar Association organized and presented the North Carolina Equal Justice Conference on November 16, 2001. The conference, entitled “Discussion on Pro Se in North Carolina—Laying the Foundation for Equal Access to Justice”, provided general information on pro se and unbundled legal services and the effect on the legal system. In addition, the conference focused on various models used nationwide to build a Pro Se System, the concept of unbundled legal services, and accompanying ethical considerations, as well as the competing interests and concerns of the private bar.

In the spring of 2002, then North Carolina Bar Association President Henry Van Hoy established the Pro Se Task Force to address the status of Pro Se litigation in North Carolina. President Van Hoy asked Mr. Victor J. Boone of Legal Aid of North Carolina, Inc. in Raleigh and Wake County District Court Judge Anne B. Salisbury to co-chair the task force. President Van Hoy issued the following charge to the task force.

1. Study and report on pro se programs from across the nation.

2. Develop collaborative efforts with national and statewide entities, including North Carolina Bar Association entities.
3. Study ways and means to assist pro se litigants to include, but not be limited to:
 - a. Limited scope legal services (sometimes called unbundled legal services)
 - b. Methods of bringing prospective clients and lawyers together on an affordable basis
 - c. Develop a state-wide system to assist pro se litigants
 - d. Consider calendaring systems to reduce the log-jam in courts and the burden on lawyers providing assistance in pro se cases

The initial Pro Se Task Force consisted of members from various backgrounds within the Bar. They included Mark Adams (Litigation attorney, Jacksonville); Megan Anderson (Mecklenburg County SelfServe Center, Charlotte); Cheryl Howell (Institute of Government, Chapel Hill); John Austin (Francis & Austin, Raleigh); Ernest Lee Conner, Jr. (Dixon, Doub, Conner & Foster, Greenville); J. Donald Cowan, Jr. (Smith Moore, LLP, Raleigh); Bradford Scott Hancox (Russ, Worth, Cheatwood & Hancox, Fayetteville), Gary Jackson (Lewis & Roberts, PLLC, Charlotte); Richard M. Klein (Legal Aid of North Carolina, Inc., Wilmington); Larry McDevitt (Van Winkle, Buck, Wall, Starnes & Davis, P.A., Asheville); U.S. Magistrate Judge Harold McKnight; Ralph Meekins (Teddy & Meekins, PLLC); Jaye P. Meyer (Tharrington Smith, Raleigh); District Court Judge Jimmy Myers (Davie County); District Court Judge Nancy Norelli (Charlotte); Todd Nuccio (26th Judicial District Trial Court Administrator, Charlotte); John L. Sarratt (Kennedy, Covington, Lobdell & Hickman, Raleigh); Paul C. Shepard (solo practitioner, Winston-Salem) and Robin Stinson (Bell, Davis & Pitt, PA; Winston-Salem) and Rona Karacaova (Legal Aid of North Carolina, Inc., Charlotte) who joined the task force this year.

Throughout 2002-2003, other individuals who had special knowledge, interest or backgrounds were invited to attend or participate in the work of the task force. Mark Van der Puy, Director of North Carolina Custody Mediation; the Honorable Gerald Arnold, Senior Vice President of Claims for Lawyers' Mutual Insurance; Mark Springfield, Wake County Collaborative Family Law Group; Diann Seigle, North Carolina Dispute Resolution Center; Dock Kornegay, Communications Director for Legal Aid of North Carolina, Inc. North Carolina Bar Association staff liaison is Michelle Cofield and former NCBA staff member, DJ Anderson, without whom this task force could not have functioned.

The goal of the task force was to publish and present a report of its findings and recommendations at the North Carolina Bar Association Board of Governors October 2003 meeting. The task force met at various locations in the state in order to maximize participation by members. In addition, subcommittees researched websites nationwide and met by conference

calls in order to complete and report on their work to the full task force. The first organizational meeting was held on September 26, 2002 at the Bar Center. Subsequent meetings were held on December 11, 2002 in Charlotte to tour and study the Mecklenburg County SelfServe Center; February 26, 2003 at the NC Bar Center; April 15, 2003 at the Bar Center; June 6, 2003 at the offices of Rountree, Losee & Baldwin in Wilmington; August 15, 2003 at the offices of Kennedy Covington Lobdell & Hickman in Raleigh. An overview of the task force's work was presented at the North Carolina District Court Judges' Conference in June 2003. Legislation sponsored by Representative Joe Hackney of Orange County establishing Collaborative Law Procedures under Chapter 50 was ratified by the General Assembly on July 18, 2003 prior to recessing and presented to the Governor. It became effective October 1, 2003.

Early in the process, the task force decided to focus on the area of greatest need, that of family law, specifically issues of divorce, custody/visitation, child support and name change; an additional goal was assistance for pro se defendants seeking limited driving privileges.

The task force was divided into the following subcommittees and delivered a "mini-charge" outlining the focus of their work:

1. Forms and Models. Megan Anderson, Chair. The Forms Subcommittee was to study the available forms which have proven successful.
 - To draft or adapt forms which are legally sufficient under North Carolina law for use by pro se litigants.
 - To determine which placements of forms make them most accessible to pro se litigants and to develop a support system to make them successful.
2. Ethics and Unbundled: John Sarratt, Chair. The Ethics/Unbundled Subcommittee was to examine systems across the nation currently providing and funding unbundled legal services to pro se litigants.
 - To report on the most successful and efficient systems to the task force.
 - To study, discuss and report for larger discussion ethical and liability issues inherent in providing quality legal services to pro se litigants.
 - To draft ethical guidelines for those providing legal services to pro se litigants and designate the legal scope and limitations for services to pro se litigants themselves.
 - To devise a system to bring affordable attorneys and litigants together to make such a system self-supporting.
3. Funding and Access: Scott Hancox, Chair. This subcommittee was to study methods used nationwide to provide funding in order to ensure access to the courts for pro se litigants.
 - To draft a comprehensive budget and plan for obtaining funding to this end.

Each subcommittee was given the opportunity to report at task force meetings, but each meeting was intended to focus on the work of a designated subcommittee. This report will be divided according to the assignment of each subcommittee.

The Task Force has made presentations to the Public Service Advisory Committee, the Family Law Section and the AOC Family Court Advisory Committee. Additionally, the Task

Force has worked with the American Bar Association and other entities, including the American Judicature Society and Maryland Legal Assistance Network, involved with pro se and limited scope legal services to provide assistance and support to this Task Force.

Summary of Recommendations

After spending nearly 18 months studying pro se litigants in North Carolina, the Task Force presents what it believes to be modest recommendations for North Carolina. The substance of the recommendations, in many instances is not new in North Carolina, but it is an attempt to permit equal access to the courts to litigants regardless of where they live.

In summary, the Task Force recommends the following:

1. That the North Carolina Rules of Conduct, and the rules of state and federal court permit unbundling legal services in civil litigation. A series of steps for review are articulated in the Unbundled/Ethics recommendations of this report.
2. That North Carolina adopt the accompanying pro-se friendly forms as models for use throughout the state and that these forms be submitted to the AOC for adoption.
3. That easy to read instructions accompany these forms.
4. That an infrastructure be developed through self-serve centers to provide forms and to support pro se litigants.
5. That the NCBA appoint a Modest Means Access Committee to continue further review of this growing need.
6. That the NCBA's Lawyer Referral Service create a special panel of attorneys willing to provide assistance to potential modest means clients through reduced fee or limited scope legal services.

The Administration of Justice in the Pro Se Environment

In an interview with Daniel Cox, Massachusetts Supreme Court Chief Justice Margaret Marshall stated that “[w]e are all responsible for the delivery of justice, whether it’s legal or social organizations, court personnel, legislatures that fund us, or judges applying the law.” (“The Pro Se Puzzle”, LSC Equal Justice, Fall 2002, page 30). This statement resounds loudly with delivery of justice and the participation in the justice system for people who are unable to afford an attorney to handle their legal affairs.

There is no right to an attorney in civil matters, except under McBride v. McBride, 334 N.C. 124 (1993). In criminal matters, an indigent defendant has the right to an attorney via Gideon v. Wainwright, 372 U.S. 335 (1963). The Supreme Court held that criminal defendants have the right to self-represent. Faretta v. California, 422 U.S. 806 (1975). Therefore, if one has no right to counsel, one simply must have a right to be self-represented.

Organizations and agencies from around the nation will affirm that more and more people are seeking to represent themselves as a last resort. Legal services providers are unable to provide services for every eligible person; program resources are already stretched thin. Some

litigants who do not qualify for free legal assistance through an LSC federally funded provider may not be able to afford an attorney. Since the justice system is for the people and equal justice under law is what we seek within the justice system, advocates across the country are working to develop models that work within their communities to help the people who are caught in the middle.

A Survey of States and Modest Means

In 2001, the Public Service subcommittee of the NCBA's Long Range Committee considered, among other things, how those who are of modest means are able obtain counsel if they do not meet legal aid financial guidelines. The subcommittee, chaired by John Sarratt, also considered how people who do not meet legal aid's case acceptance guidelines are able to obtain counsel if they have insufficient funds with which to do so. At the 2001 Annual Meeting in Asheville, the NCBA Board of Governors adopted the Long Range Committee's recommendations, which included the creation of a pro se program in North Carolina.

The American Bar Association's Division for Bar Services' 2003 Survey to all local and statewide bar associations surveyed, among other things, how bar associations addressed issues of the moderate income or modest means client. Modest means litigants typically do not fall within the financial eligibility of the legal aid community or for other free legal assistance and they also are unable to afford to hire an attorney at the attorney's standard rate. In the spring of 2003, the ABA's Standing Committee on the Delivery of Legal Services specifically addressed the modest means questions and contacted each of the responding bar associations to determine how the bar associations are addressing this issue. The vast majority of the bar associations responding that they offer modest means programs, do so through their lawyer referral service programs. A copy of the Delivery Committee's report, 2001 Bar Services Inventory, is attached in the appendix.

A Survey of States and Pro Se

California

California, in comparison to many other states, has a well-developed system of addressing pro-se litigation (in California, referred to as "pro-per" or self-represented litigants) and has taken steps to train the litigants, the judges before whom they appear and attorneys.

At a recent workshop for family court judges developed by California Superior Court personnel and the Center for Families, Children and the Courts, family court judges received training in dealing with pro-per litigants. Recommendations for the judges included getting to know "attorneys", converting "legalese" to plain English, understanding that pro-per litigants often have unrealistic expectations and addressing the same and letting them know what is expected from them in terms of courtroom decorum, attire, body language, etc.

In addition, California has taken strides to address and promote the concept of unbundled legal services for pro-per litigants. The California Commission on Access to Justice established

the Limited Representation Committee in March 2001 to study ways to develop and put into practice the concept of Unbundled Legal Services. Input was received from a variety of sources including, but not limited to, ethics experts, the insurance industry, judges, family law attorneys, family law facilitators, legal aid attorneys, and bar leaders.

In October 2001 the committee submitted its report and the California State Bar Board of Governors adopted its recommendations. The concept has received a generally positive response from both the bar and the courts. The Judicial Council has authority to develop forms noticing the court of limited representation. There was no need to reform any of the California ethical rules to allow for unbundled legal services because the current rules allow for unbundled legal services. Attorneys can withdraw from a case once they have performed the terms of the limited representation agreement entered into with their client.

In the family law area, Rule 5.170, effective July 2003, explicitly allows ghostwriting, a practice that had apparently been allowed and encouraged for a number of years. The Committee had recommended to the Judicial Council that the rule be adopted because disclosure of the attorney's identity would discourage access to the courts and leave more pro-per litigants in the position of drafting legally insufficient, inartfully drawn and confusing pleadings. This committee recognized that unbundling could be applied to all case types although some individual cases should not be subject to unbundling.

Concerns about malpractice insurance were eased by the fact that in California the liability insurers apparently have made no distinction between limited representation and full representation. However, both the attorneys providing unbundled legal services and the companies insuring them wanted liability limited to the scope of the attorney's agreed-upon representation of the client and so long as the work agreed upon is competently performed. A panel of attorneys providing unbundled legal services is maintained in at least one county by the County Bar. The Bar then provides a website to the public describing the panel. The Committee also recommended self-help centers, incorporation of unbundling into law school curricula, training for lawyers, and educational brochures and orientation programs for consumers.

The Volunteer Legal Services Program of the San Francisco Bar Association, with a grant from the William and Flora Hewlitt Foundation, formulated a plan to blend the social and legal services communities to provide a holistic approach to the myriad of issues facing unrepresented clients. Existing resources in the offices of the Family Law Facilitators and the Family Law Assisted Self Help project (FLASH) were used to assist low-income self-represented clients pursue family law-related issues through custody workshops, assistance with legal information and completing paperwork, securing interpreters, and on-site child care during court hours. The Equal Access Project of the California Administrative Office of the Courts has also sponsored a Spanish self-help website which provides more than 900 pages of information about court procedures, forms, referrals to legal assistance and other services for a variety of legal issues. There is also information available in other languages such as Chinese, Korean and Vietnamese.

Connecticut

The Connecticut Bar Association and the Judicial Branch of Connecticut have worked together to study pro se litigation in depth and create services to assist pro se litigants. The Judicial Branch has an extremely informative and user-friendly website for pro se litigants. This website (<http://www.jud.state.ct.us/selfhelp.htm>) contains easily understood and well-presented information about hiring an attorney and looking up case information. The website also contains information about child support, traffic violations, and crime victim services. Additionally, the website contains links to pro se forms (such as answers to eviction actions and custody complaints) and questions and answers about a variety of legal issues.

The Connecticut Judicial Branch, with assistance from the Connecticut Bar Association, has created alternative dispute resolution systems designed to assist pro se litigants in housing court and family court.

Housing Court

In Connecticut's housing courts, all landlord-tenant disputes are first referred to "housing specialists" who are court officers and mediators. On the day of trial, both parties in the case must first meet with a housing specialist before proceeding to trial. The majority of landlord/tenant cases are resolved with the assistance of a housing specialist who helps the parties create an agreement that is then incorporated into a court order. This system helps prevent unnecessary evictions and resolves many repair issues that tenants have.

Family Court

Connecticut family courts are supported by Family Relations Units located in each judicial district. Connecticut's Family Relations Units evolved from a few courts having an informal system of assisting pro se litigants. Judges in these experimental courts hired social workers from the Connecticut Child Welfare unit to help pro se litigants gather facts related to the child's best interest. These same social workers were also present for a motions calendar scheduled to hear a variety of family law motions before trial. The number of cases which settled with the assistance of these social workers was dramatic.

The utilization of social workers in family law cases evolved into the creation of a Family Relations Unit in every judicial district funded by the judicial branch budget. Family Relations Units are staffed by family relations officers who have advanced degrees in mental health, child development, social work and psychology. Today, Connecticut's Family Relations Units offer alternative dispute resolution, mediation and custody evaluations, at no cost to the litigants.

Connecticut's Family Relations Units have been most successful in assisting pro se litigants with custody and visitation issues. Every contested custody case must go through the Family Relations Office for mediation. If a case is not appropriate for mediation due to domestic violence or if mediation is not successful, the Family Relations Unit will conduct a custody evaluation. The custody evaluation, approximately a six month process, entails individual interviews with each of the parties, home visits to each of the parties' homes, interviews with the children, and contacts with collateral sources of information such as schools, therapists, doctors, and agencies involved with family life. Finally, the family relations officer meets with both

parties to make a recommendation regarding custody and visitation. About 63% of all custody cases are resolved by this process.

Cases that are not resolved after the family relations officer makes a recommendation are scheduled for trial. To prepare for trial, the family relations officer prepares a written custody study and recommendation. About 25% of the remaining cases are resolved after the family relations officer makes written recommendations to the court. The few remaining cases then proceed to trial with the family relations officer as an expert witness. Judges rely heavily on the recommendations of the family relations officers.

Maine

The Maine Bar Rules have been changed to allow limitation of representation with written consent of the client. Opposing counsel may speak directly with a pro se client unless notified otherwise.

The Rules of Civil Procedure were amended to enable limited representation. In particular, the adverse party does not have to serve papers on an attorney who has made a limited appearance; Rule 11 applies to the attorney who makes a limited appearance only to the extent he or she signs a pleading; and an attorney making a limited appearance may withdraw simply by giving notice (without consent of the court) unless there is a pending motion or trial date and provided there is the appearance of substitute counsel.

In addition, the judicial branch in Maine has produced packets, with forms and instructions for several case types and videos on starting a divorce action, mediation and post-judgment motions in family cases. They have also printed pamphlets on various court processes including protection from abuse and small claims. All of these materials are available in courthouses throughout the state.

To date, bar participating has been limited; but is hoped that will increase as the word gets out.

North Carolina

North Carolina legal aid offices have to turn people away on a regular basis who need assistance with family law matters. Many programs do not handle custody matters unless they are connected to a domestic violence issue. Some programs will handle custody matters, but those matters are handled on a limited basis. Legal services family law practitioners report that it is harder to find a private practitioner who will handle a custody matter *pro bono*. Many of the people are referred to the North Carolina Bar Association's Lawyer Referral Service. In 2002, the Lawyer Referral Service provided 4,645 referrals, which is nearly 10% of the 49,446 referrals provided in 2002, to callers to private attorneys who handle custody and visitation matters, the most requested areas of assistance. The lawyer referral service panel members will charge no more than \$30 for up to a 30 minute consultation. While some can afford the \$30, securing funds for the retainer fees, which range from \$1500 to \$5000 or more depending upon region and complexity of the matter, hinders their ability to proceed with the assistance of counsel.

In North Carolina, pro se litigants currently receive assistance primarily through legal services offices statewide. In Mecklenburg County, pro se litigants may seek assistance from the Mecklenburg County SelfServe Center through forms, videotaped information and community education clinics. Legal Aid of North Carolina in Charlotte, Legal Services of the Southern Piedmont and the McDowell Street Family Law Center provide some assistance to pro se litigants in a variety of substantive areas including domestic violence, landlord/tenant and consumer matters. This assistance generally consists of the providing of legal advice, community education clinics and brochures.

Legal Aid of North Carolina in Asheville operates a “Pro Se Plus Clinic” for absolute divorces that provides litigants with the information necessary to proceed with an absolute divorce. Attorneys in the Asheville office watched a huge number of people fail at obtaining an absolute divorce pro se because they used forms downloaded from the internet that did not meet North Carolina statutory requirements. Two attorneys from that office met with Judge Fowler to discuss plans for this Clinic. After they agreed upon forms and discussed ethical issues, the clinic held its first clinic in 2002.

In the past 18 months, they have held 10 clinics, helping 38 people obtain divorces. Due to understaffing at this legal aid office, clients are on a waiting list to seek assistance with their pro se divorces.

The clinic brochure states four serious reasons not to participate in the clinic; domestic violence, custody, marital property and alimony or post separation support are issues that need to be resolved by the Court. Clinic participants, who have been qualified as legal aid eligible, learn how to obtain an absolute divorce in two sessions led by attorneys and paralegals. Once the participants complete the sessions, file the necessary forms and obtain service of the complaint for divorce upon the spouse, the Clinic coordinator schedules a court date for the hearing. The senior managing attorney in the Asheville office said they have not received any complaints from the private bar regarding the clinic. A copy of the Clinic brochure is included in the appendix.

Judge Gary Cash, Chief District Court Judge for the 28th Judicial District, and the Buncombe County Bar Association have recently impaneled a pro se committee to look at ways to deal with the ever-growing numbers of pro se litigants in Buncombe County. Judge Cash hopes to be able to have resource information available in the courthouse to assist these litigants.

Legal Aid of North Carolina in Ahoskie received funds through the North Carolina Bar Association Foundation’s Endowment to create a pro se domestic clinic which currently focuses on visitation. This clinic is held bi-weekly to assist persons in Halifax, Hertford, Northampton and Bertie counties with visitation related matters. Clients from Halifax County are referred to the clinic by the Access and Visitation Coordinator in Halifax County.

In Wake County, pro se litigants may obtain assistance with absolute divorces in the office of the Clerk of Superior Court. While the Clerk may not offer legal advice, pro se litigants may purchase a divorce packet for a nominal sum (currently \$3.00). The packet contains sample forms for summons and complaint, affidavit of service of process by certified mail, Divorce Judgment and directions for filing. In addition, Wake County has a comprehensive set of Local

Domestic Court Rules and forms (both local and AOC) located through links on the AOC website (www.nccourts.org). Victims of domestic violence may seek 50-B Domestic Violence Protective Orders in a private location within the Clerk's office with the assistance of victim advocates who direct them to a courtroom designated solely for civil domestic violence issues.

The North Carolina Bar Association's Pro Bono Project receives a number of calls daily requesting referral to a pro bono attorney to assist them with a custody or visitation matter. The Pro Bono Project's referral base is limited by the available referral resources, i.e. agencies or organizations providing free legal assistance, and therefore is generally unable to help callers locate an appropriate agency or organization that may be able to help.

Further, the Pro Bono Project does not have the resources to provide direct referrals to *pro bono* attorneys. The Project is now staffed solely by the Director of Public Service and Pro Bono Activities. The Pro Bono Project primarily provides referrals to legal services organizations, where appropriate, and to other resources that exist within a certain area, e.g. the SelfServe Center in Mecklenburg County or the McDowell Street Family Law Center in Charlotte.

Unbundled Legal Services/Legal and Ethical Issues

A. Unbundled Legal Services

The North Carolina Bar Foundation Equal Justice Conference on November 16, 2001, noted the explosion of pro se litigation in North Carolina, with litigants entering the courtroom unprepared and ill-advised. The primary consequence of this trend is that these litigants are unlikely to achieve equal access to justice when compared to those litigants who are represented by competent counsel. A secondary consequence is the burden which these pro se litigants place on the presiding judge, the clerk's office, opposing parties and their counsel, and the entire judicial system. The first response to this crisis has been an assortment of self-help devices. These include sample forms, access to court law libraries, divorce packets — including procedural instructions, information on fees, a complaint form and summons. Family law clinics conducted by North Carolina Central University, and Mecklenburg County's SelfServe Center provide an extensive array of self-help packets, forms and instructional videos.

All such solutions, while helpful, fail to address fully the fundamental problem: litigants appearing in open court who lack the familiarity with either the procedural or substantive law necessary either to represent themselves adequately or to insure the smooth operation of the judicial process.

The principal barrier to pro se litigants retaining counsel is cost (though there doubtless are some who are looking for their 15 minutes of fame in a "Judge-Judy" type environment). The principal issue with respect to cost is the inability to predict the course the litigation will take and, therefore, what the ultimate cost will be. The obvious solution to this dilemma is unbundled legal services.

What are unbundled legal services, sometimes called limited scope legal services? This term is used to describe the wide range of discreet tasks that an attorney might provide short of full representation. It might include advice only, coaching a pro se litigant for a hearing or negotiation, “ghost writing” pleadings without making an appearance, or an actual limited appearance in court, for instance, in connection with a preliminary injunction hearing only or even for conduct of the trial itself without having actively participated or made an appearance in the pre-trial phase of the litigation.

Obviously, limited scope legal services can be comprised of a combination of tasks. A lawyer might, for instance, have a brief conference with a client to determine the nature of the claim being asserted, “ghost write” a simple complaint, be available to answer questions by phone as the client responds to discovery, coach the client prior to a mediation or settlement conference, and then appear on the record only if the case were to go to trial. By picking and choosing from this laundry list of options, several objectives are achieved.

First and foremost, the client is able to control costs as the matter proceeds, electing whether to use counsel at each phase of litigation. Second, counsel also has the flexibility of providing limited services without making an appearance of record which would bind the attorney to continue representation of the client until the conclusion of the matter unless officially allowed to withdraw by the court. Even for the “Judge Judy” litigant, limited scope legal service would permit the litigant to keep a lawyer on “standby” if (and probably when) the litigant ends up over his or her head and decides to call for help, potentially to the benefit of both sides to the litigation as well as to the court.

While the solution of limited scope legal services will, to the unpracticed eye, appear obvious and convenient, the experienced lawyer will immediately spot profound and complex ethical and legal issues which surround this solution.

Before delving into those, however, it should be noted that in most areas of the law, other than civil litigation, limited scope legal services are both commonplace and non-controversial. Most real estate lawyers would not hesitate to draft a simple deed without involving themselves in or even inquiring about the entire real estate transaction of which that deed might be only a small part. Most estate planning lawyers would gladly draft a simple will following the instruction of a client, without inquiring into or having the slightest idea what the complexities of that client’s estate and personal situation might be. Most corporate lawyers would, with complete nonchalance, agree to draft articles of incorporation, bylaws, minutes, buy-sell agreements or a whole host of other corporate documents on the simple directive of their clients, without it ever occurring to them that they should become entirely familiar with the business and its workings before preparing such documentation.

Even criminal court appearances leave some room for limited scope legal services. It is not unusual, for instance, for counsel to appear at an arraignment or show cause hearing without a commitment to follow the entire criminal process to its conclusion.

The real brunt of the current system of rules limiting limited scope legal services falls on litigants and lawyers in the realm of civil litigation. In that realm, there is a whole network of

rules which prohibit, or at least discourage, the unbundling of legal services. While under the Rules of Professional Conduct “a lawyer may limit the objectives of a representation if the client consents after consultation” [Rule 1.2(c)], in the litigation context, a lawyer may not withdraw from representation in a proceeding before a tribunal where withdrawal requires permission of that tribunal. [Rule 1.16(2)] In turn, the General Rules of Practice for the Superior and District Courts of North Carolina state “no attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney, who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court.” [Rule 16]¹

Moreover, it is generally presumed that by the Rules of Civil Procedure [e.g. Rule 11], the Rules of Professional Conduct [Rule 1.3 and official commentary], and the Rules of Court in both the state and federal courts in North Carolina, that once an appearance is made in a civil action, that counsel has committed not only to his client but also to the Court to remain involved in every aspect of the litigation.

The ABA Litigation Section Modest Means Task Force’s publication, “The Handbook on Limited Scope Legal Assistance” provides information and direction to both practitioners and policy-makers regarding limited scope legal assistance. The case studies, ethics issues and client services addressed in this publication provide guidance to North Carolina. A number of forms and checklists are also included in this publication, which is available, at no cost, at <http://www.abanet.org/litigation/taskforces/modest/home.html>.

Nationally, this facet of practice is seen by many as an opportunity to increase one’s practice to provide personal legal services to clients who otherwise would not have been able to afford the full cost of an attorney.

B. Ethical and Liability Considerations

From the foregoing discussion, it is apparent that there are certain ethical limitations under the current rules of the State Bar and the courts of our state to providing unbundled legal services in civil litigation. Primary among these concerns is the issue of professional liability and obtaining insurance with respect thereto.

The issues of possible liability are perhaps obvious. If there is any confusion between the lawyer and the client as to the scope of representation, the consequences could be dire. Failure to file answer, to respond to request for admissions, to appear at a hearing or to prepare for a trial could have disastrous consequences. Even if the scope of the representation is made clear, an issue arises as to the duty of the attorney to adequately advise a prospective client as to exactly what services might be needed and what the consequences of foregoing such services might be. It is a bit of a catch-22 that in order to properly advise a client as to the scope of representation, it might at least in theory be necessary for the lawyer to become fully acquainted with all the facts

¹ The federal district courts in North Carolina have similar rules. Local Rules of Practice Eastern District of North Carolina, Rule 2.07; Rules of Practice and Procedure Middle District of Carolina, Rule 83.1(e); Rules of Practice and Procedures Western District of North Carolina, Rule 3.1(c).

and circumstances underlying the prospective litigation: exactly the kind of in-depth study with its attendant costs that the unbundling of legal services is designed to avoid.

One initial inquiry is whether malpractice insurance would even be available for unbundled civil litigation services. While insurance companies, such as Lawyers Mutual, have expressed grave misgivings about unbundled legal services because of potential for malpractice liability, they have stopped short of saying that insurance coverage would be unavailable.

The next inquiry is what the experience of other states has been. While there has not been a long period in any state to evaluate the consequences of unbundled legal services, the preliminary reports are that there has not been an increase in malpractice claims.

Presuming the ethical rules can be revised to permit unbundled legal services in civil litigation, the most important guard against liability is a well-written, well-explained and well-understood engagement letter limiting the scope of representation.

Maryland Legal Assistance Network, MLAN, maintains a national clearinghouse of information related to pro se and unbundled legal services. Recently, they updated their survey of states and ethics rules related to supporting pro se and unbundled legal services. A copy of this information is attached in the appendix.

C. Recommendations

The subcommittee on Unbundled Legal Services recommends that the necessary changes be made to the Professional Rules of Conduct and the rules of state and federal courts to permit providing unbundled legal services in civil litigation. To accomplish this result several steps need to be taken, all simple to enunciate but probably difficult to implement:

1. The Rules of Civil Procedure should be reviewed to determine whether they should be revised specifically to permit limited services in civil litigation. These rules do not obviously bar unbundled services, but some jurisdictions have felt it advisable to specifically allow such services.
2. The Rules of Professional Conduct would have to be revised specifically to permit limited services in civil litigation.
3. The rules of the state and federal courts in North Carolina would have to be revised specifically to permit limited appearances in civil litigation.
4. Presuming that steps 1 through 3 are in place, discussions would be required with malpractice insurers to be certain the appropriate insurance coverage would be in place.

Forms, Centralization and Models

The main focus of this subcommittee's discussion centered on the following four items:

- A. Best areas of law for which to pursue forms

- A. How to streamline pro se packets
- B. Best placement of materials within the pro se packets
- C. Continued study of successes in other jurisdictions

A. The Case for Family Law

At the 2001 North Carolina Equal Justice Conference, Kate Sampson, Senior Program Associate with the American Judicature Society, stated that the greatest surge in pro se litigation is in family law. She said that courts are realizing the impact of pro se litigation and are responding accordingly. Ayn Crawley, Director of the Maryland Legal Assistance Network, also agreed that family law assistance was the greatest need for pro se litigants.

Although the SelfServe Center provides a significant number of its family law forms to people, the trial court administrator in Mecklenburg County reports that the courts have not seen a substantial rise in the percentage of pro se family law matters that have been filed since the establishment of the Center. In Mecklenburg County, the number of Domestic Relations cases where at least one side is pro se is 7% higher in 2003 (through mid-November) than it was in 1998, the year prior to the opening of the SelfServe Center. During the 2002-2003 fiscal year, civil case filings in Mecklenburg were up 13%. In 2003 (through early December), SelfServe Center staff distributed 2132 custody, visitation and support packets, 1528 modification packets, 1350 divorce packets and 1033 domestic violence packets, representing the top four requested packets. Some statistics for the SelfServe Center are included in the appendix. The statistics, complete through November, are included in the appendix.

Statewide and national statistical and anecdotal information provided to this subcommittee led the committee to focus on family law. The North Carolina Bar Association's Lawyer Referral Service continues to refer custody and visitation matters more often than any other individual area of law. The Lawyer Referral Service produced more than 50,000 referrals in 2002.

While matters in the area of family law constitute a substantial portion of the cases handled by Legal Aid of North Carolina, most involve domestic violence. It is only through special grant funds provided specifically for legal assistance to victims of domestic violence that LANC offices can provide representation to the extent they do. Family law matters are very taxing on their resources, which must be allocated such as to deliver services across as broad a spectrum as possible. Because the nature of requests for assistance in civil matters is so varied and the number so great, only a few offices handle family law matters in addition to domestic violence.

Some District Court judges in North Carolina report seeing more pro se custody and visitation matters in proceedings before them. In the judicial districts with Family Courts, such matters are handled in a variety of ways.

There are eight (8) family court districts in North Carolina. They are located in the following judicial districts:

- 5th—New Hanover and Pender counties
- 6A—Halifax County
- 8th—Wayne, Greene and Lenoir counties
- 12th—Cumberland County
- 14th—Durham County
- 20th—Anson, Richmond, Stanly and Union counties
- 25th—Burke, Caldwell and Catawba counties
- 26th—Mecklenburg County

According to information found on www.nccourts.org, the Family Courts were established to provide more efficient court services to families in distress. These services include custody mediation, parent education classes, divorce education or drug counseling for families facing these issues. Additionally, if the matters cannot be resolved through mediation, then a special family court judge will hear the case. Family court judges hear matters involving custody, visitation and support, divorce, juvenile issues, termination of parental rights, adoption, divorce and family financial matters and involuntary commitment.

All eight Family Court districts have pro se packets for absolute divorce. The packets contain all necessary forms for filing for divorce and scheduling the matter for hearing, as well as detailed instructions. In addition, most but not all of the family court districts have grant-funded Access and Visitation Coordinators on staff. These are state employees who assist pro se defendants in child support cases who need the court to address visitation issues. In addition, all family court staff have received extensive training on interacting appropriately with pro se litigants, and many have developed legal glossaries and other informational pamphlets to assist unrepresented litigants in family law cases.

After studying a variety of pro se or self-help programs across the country, the subcommittee found that the majority of the programs, including statewide and local programs, focus on family law related matters, according to a 1999 survey of the American Judicature Society [hereinafter, AJS] (www.ajs.org).² The AJS surveyed all states, including the District of Columbia, territories and commonwealths throughout the United States.³ Twenty states responded to the survey. Ten of the twenty states responded that they have instituted some form of pro se assistance for family law litigants. Seven reported their pro se efforts are general in nature, including pro se forms, helping litigants understand the judicial process, etc.

The AJS reports in Table 2 that 40 states reported at least one local pro se program operates in their state.⁴ A local program garnering a much national attention is the Self-Help Center in Phoenix, Maricopa County, Arizona. This program is a court-sponsored program operated by the Superior Court of Maricopa County begun in the mid-1990s as the result of the

² Tables Showing Significant Features of Pro Se Assistance Programs, 1999 AJS Survey. http://www.ajs.org/prose/pro_tables.asp Information used with permission of the American Judicature Society.

³ *Id.*, Table 1: *Statewide Pro Se Assistance Programs*.

⁴ *Id.*, Table 2: *Local Program Organizational Characteristics*

increasing numbers of pro se litigants seeking redress through the court system.⁵ The Center has more than 430 forms, including family law related forms. The Center maintains an “unbundled legal services panel” of attorneys to whom they refer people for further assistance in their matters. The Center does not provide assistance in filling out the forms.

In addition to the unbundled panel, the Center houses the Family Lawyers Assistance Project, which is a coordinated effort supported by the Maricopa Bar Association and the local legal services community. This service provides reduced fee, or free, consultation and assistance to those with family law matters. In 1997, this program received the ABA’s Louis M. Brown Award for Legal Access. The Mecklenburg County SelfServe Center was based upon this model. It, too, maintains an “unbundled legal services” panel of attorneys. This Center has worked with attorneys and judges in Mecklenburg County to develop local rules relevant to pro se litigants. A copy of those rules is attached in the appendix.

B. Forms

The subcommittee decided to create forms packets in the following areas of law. These forms have been reviewed by the attorney members of the task force, Legal Aid of North Carolina’s Family Law Task Force, the Public Service Advisory Committee’s Modest Means subcommittee and the Family Law Section Council of the North Carolina Bar Association. Since it was the experience of the Mecklenburg County SelfServe Center, the legal aid community and the Pro Bono Project, it was important to create easy to follow forms and instructions within the packets.

**Candidates for AOC forms
(included in the appendix)**

| Document name/title |
|---|
| custody/visitation/child support complaint |
| custody/visitation/child support counterclaim |
| custody answer |
| motion for modification of custody/visitation |
| motion for show cause order |
| show cause order |
| divorce complaint |
| divorce judgment |

⁵ For more information about what this program offers, go to www.superiorcourt.maricopa.gov/ssc/sschome.html.

Candidates for Custody Process Forms
(included in the appendix)

| Document name/title |
|--|
| custody and child support booklet |
| financial affidavit |
| affidavit of return of service by certified mail |
| affidavit of return of service by publication |
| letter to newspaper for publication |
| notice of hearing for publication |
| notice of service by publication |
| Affidavit of necessity of service by publication |

The Task Force also agreed to include a model form, Motion for Appropriate Relief (driving privileges).

The legal services community across North Carolina regularly engages in community education programs to assist people with handling their legal matters. These programs include professionally developed videotaped programs, cable access programs, neighborhood legal clinics and collaborations with other non-profit organizations in North Carolina, utilizing legal service staff attorneys and members of the private bar. One such collaboration is with the Family Law Clinical Program from North Carolina Central University and Legal Aid of North Carolina in Durham. Members of the public attending the clinic receive a packet of information, including forms relevant to custody, visitation and divorce. Clinic students review filling out the forms in a group setting, being very careful not to provide any legal advice. The supervising attorney provides legal information about the areas of law. North Carolina Central's Family Law Clinical Program also provides a similar service in coordination with the Wake County Courts.

The Pro Se Plus Clinic coordinated by Legal Aid of North Carolina in Asheville currently assists clients with filing for uncontested divorces. After discussing this clinic with Chief District Court Judge Fowler, the Pro Se Plus Clinic began helping pro se divorce litigants. Clients attend sessions led by Legal Aid staff members, learn how to complete the appropriate forms and attend one on one sessions to review their forms. Finally, the Legal Aid office assists the clients with calendaring the hearing for divorce in Buncombe County.

The Wilson office of Legal Aid of North Carolina created the video series, “Knowledge is Key,” which provides information on a variety of issues including family law matters. These tapes are available throughout the geographic area served by that office and are viewed by clients at many community agencies, churches and in their homes. Currently, that office sends a copy of the video to clients along with a follow-up letter to the advice provided by Legal Aid attorneys when the office is unable to represent the client in a family law matter. Clients return the videotapes in a postage-paid envelope provided by the legal aid office. The North Carolina Bar Association Foundation Endowment provided funding for this project.

Other legal aid offices provide community education, forms, including the small claims form booklet, and clinics to help people help themselves. With relevant forms, specific and easy to follow instructions and a referral network for follow up assistance, litigants will be more prepared when they arrive in court.

The subcommittee also explored using these forms through pilot projects. Chief District Court Judge Joseph Buckner (15B Judicial District) suggested that Judy Redwine, custody mediator in his judicial district, become involved with the Pro Se Task Force. Redwine became a regular invited guest and a frequent contributor to the task force’s work. The subcommittee believes that Judge Buckner and the judges of the Family Court districts would be natural alliances to initiate a pilot pro se project which should include model forms and instructions for implementation.

C. Recommendations

The subcommittee, therefore, recommends the following.

1. The model forms developed by the Forms Subcommittee or similar forms should be adopted by the Administrative Office of the Courts (AOC). The North Carolina Bar Association (NCBA), through its president or other designee, should contact the Chief Justice of the NC Supreme Court to determine his support for this proposal.
2. The model forms should be accompanied by easily understood instructions which will assist pro se litigants as they complete the forms.
3. Pending adoption of the model forms by the AOC, the NCBA should select pilot sites for the distribution of the model forms and recommend that the AOC distribute the model forms to these pilot sites.
4. Once the forms are distributed to the pilot sites, the NCBA should study the impact of the model forms and adjust the model forms and/or instructions accordingly.
5. An infrastructure should be developed through self-serve centers, staffing, or other means to make the model forms accessible to pro se litigants and to support pro se litigants.

Funding

Based upon the afore-mentioned recommendations regarding forms, it appears that costs will not be significant. The task force suggests implementing a small fee to cover the cost of the forms and instructions packets.

The Task Force recognizes the budget crisis that currently exists in our courts. In order to do a better job of assisting pro se litigants by providing packets, instructions and legal information, significant budget increases from the General Assembly are necessary in order to create the type of access envisioned by these proposals.

Technology and Reaching Pro Se Litigants

Across the country there are a number of ways that Bar Associations, state and county courts, legal services offices and private practitioners are using technology to increase their practices and to expand their ability to provide personal legal services. More and more legal information and legal advice websites are appearing on the internet. The ABA House of Delegates approved “Best Practice Guidelines for Legal Information Web Site Providers” at its February 2003 mid-year meeting in Seattle. These guidelines were created by the eLawyering Task Force of the ABA’s Law Practice Management Section and the ABA Committee on the Delivery of Legal Services in an effort to promote consumer confidence in the information they receive through the internet. While these guidelines are voluntary, they help set the tone for the future of legal practice. <http://www.elawyering.org/tools/practices.shtml>

Legal Aid of North Carolina, through a technology assistance grant from the Legal Services Corporation, is working with probono.net, a national non-profit organization whose mission is to increase access to justice through innovative uses of technology and increased volunteer participation.⁶ Legal Aid of North Carolina is working to establish a single web portal of informational access for low-income persons to the full range of civil legal assistance providers in the state, referral links to courts, government and social service agencies and interactive links to self-help materials. This is a project that involves the legal services community and the North Carolina Bar Association through its Public Service and Pro Bono Activities department.

Interactive kiosks are emerging around the country as ways to reach low to moderate income people who may find themselves as pro se litigants. I-CAN! is a web-based kiosk system created by Legal Aid Society of Orange County (California) to help low income people through self-help.⁷ One does not have to be computer-savvy because the I-CAN! System leads the user through it via a video that describes the process. The I-CAN! system can be customized to the particular forms for the jurisdiction. I-CAN! can also be made available in a variety of

⁶ According to the probono.net website, they are working with pro bono groups in nearly 30 regions in the United States. Although probono.net on first glance appears to be geared towards pro bono opportunities for attorneys, in fact, there is a component of probono.net that opens the doors for low to moderate income people to access legal assistance online through lawhelp.org. Currently, North Carolina is not listed as an active state in that database.

⁷ <http://www.icandocs.org/newweb/index.html>.

languages to accommodate the growing need to assist people for whom English is not the first language.

Task Force Conclusion and Recommendations

Many who enter our courts daily are unable to afford an attorney and are ineligible for free legal assistance for one reason or another. They are ill-prepared to present even the basis of their legal matter to the judge. There are also those who are unwilling to hire an attorney; they are not the subject of this report though they can benefit from the implementation of the recommendations in it. It is those who have the inability to retain counsel that we have focused on. There are few systems in place in North Carolina that help these litigants access the necessary forms and information needed to help themselves.

There are fewer formal programs established that provide low cost legal assistance within this state. These litigants are *caught in the middle* and do not have anywhere to turn.

Therefore, this Task Force offers the following recommendations for consideration and approval by the North Carolina Bar Association:

1. The necessary changes be made to the Professional Rules of Conduct and the rules of state and federal courts to permit providing unbundled legal services in civil litigation.
2. The model forms developed by the Forms Subcommittee or similar forms should be recommendation for adoption by the Administrative Office of the Courts (AOC). The North Carolina Bar Association (NCBA), through its president or other designee, should contact the Chief Justice of the NC Supreme Court to encourage his support for this proposal.
3. The model forms should be accompanied by easily understood instructions that will assist pro se litigants as they complete the forms.
4. Pending adoption of the model forms by the AOC, the NCBA should select pilot sites for the distribution of the model forms and recommend that the AOC distribute the model forms to these pilot sites.
5. Once the forms are distributed to the pilot sites, the NCBA should study the impact of the model forms and adjust the model forms and/or instructions accordingly.
6. An infrastructure should be developed through self-serve centers, staffing, or other means to make the model forms accessible to pro se litigants and to support pro se litigants.
7. The North Carolina Bar Association should appoint a standing committee, Modest Means Access Committee to continue to review this growing need. This committee should work closely with and include members from, the Public Service Advisory Committee, Lawyer Referral Service Committee, Administration of Justice Task Force,

Family Law Section, Litigation Section and the General Practice Section of the North Carolina Bar Association.

8. The Lawyer Referral Service should create a modest means, reduced fee and/or unbundled legal assistance panel for referrals.

Appendix

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| 2001 Bar Services Inventory | A-1 |
| Pro Se Plus Clinic Brochure | A-2 |
| Family Court Division Local Rules for Domestic Cases (26 th Jud. District) | A-3 |
| Pro Se Utilization in North Carolina | A-4 |
| NC Rule 6.5: Limited Legal Services Programs | A-5 |
| Proposed Limited Legal Services Retainer Agreement | A-6 |
| Amendments to the Maine Rules of Civil Procedure | A-7 |
| Amendments to the Maine Bar Rules | A-8 |
| Maine Bar Rules Attachment Limited Presentation Agreement | A-9 |
| California - Notice of Limited Representation | A-10 |
| MLAN Memorandum | A-11 |
| Mecklenburg County Report | A-12 |
| Pro Se Form: Custody/Visitation/Child Support complaint | A-13 |
| Pro Se Form: Custody/Visitation/Child Support counterclaim | A-14 |
| Pro Se Form: Custody Answer | A-15 |
| AOC Form: Motion for modification of Custody/Visitation | A-16 |
| AOC Form: Motion for show cause order | A-17 |
| AOC Form: Show cause order | A-18 |
| Pro Se Form: Divorce Complaint | A-19 |
| Pro Se Form: Divorce Judgment | A-20 |
| Pro Se Form: Do it yourself custody packet | A-21 |
| Pro Se Form: Financial affidavit | A-22 |
| Pro Se Form: Affidavit of return of service by certified mail | A-23 |
| Pro Se Form: Affidavit of return service by publication | A-24 |
| Pro Se Form: Letter to newspaper for publication | A-25 |
| Pro Se Form: Notice of hearing | A-26 |
| Pro Se Form: Notice of service by publication | A-27 |
| Affidavit of necessity of service by publication | A-28 |
| Motion and order for appropriate relief | A-29 |

