# Unbundling: The American Experience: Reflections on Fifteen Years of Innovation

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## Introduction

Many years ago, as a new legal services lawyer, I watched colleagues conduct quick interviews with family law clients, prepare documents for them while the clients waited in the lobby, and then send the clients off with papers to file on their own. I knew then, now almost twenty years ago, that I did not want to do that, but I could not have told you why.

Since that time, I have given this question much thought. As I have attempted to discern whether my hesitation was based in ethical, professional, personal, or client-oriented values, my ideas and feelings about that practice have evolved. Simultaneously, such unbundled legal services have proliferated throughout the United States. Today, Legal Services Corporation-funded ("LSC") programs in nearly every state have websites. LSC grantees compete for technology-specific funding, designed to award innovative uses of technology and pilot projects that can be replicated around the country. Pro se assistance programs are growing exponentially and lawyers appear to feel increasingly comfortable limiting the scope of their representation. Lawyers draft documents for clients to file pro se, agree to represent clients on limited aspects of litigation, and provide counselling and access to client libraries for clients interested in representing themselves.

The ethical provisions, which some viewed as impediments to encouraging limited legal assistance, have been evolving. Revisions to the American Bar Association's (ABA) Model Rules were designed to encourage unbundled legal services. Many of those changes are being adopted throughout the country.

The debate has shifted dramatically since the early nineties when these ideas first caught my attention. Few are asking "Should we be doing this?" or addressing broader policy concerns, most significantly the "loosening" of ethical rules for low income clients. Today's questions are, more likely, "How should my retainer agreement read to assure that I do not have liability for full service representation? How should I document that this limited service is reasonable and that the client has given informed consent?"

This essay will step back from the day-to-day discussions about limited delivery models such as pro se assistance, hotlines, webpages, advice and referral, and ghostwriting, and consider the implications of where we have come in the last fifteen years and what this means for the next fifteen years. It will outline briefly the factors that I believe have motivated this "movement," summarize the pivotal issues that have arisen, and speculate about potential challenges for the future.

## What is Unbundling?

Unbundling is the division of client assistance into discrete tasks and an agreement, implicit or explicit, that the lawyer, or other legal assistance provider, will perform some, but not all, of the tasks necessary to resolve the

client's legal problems. Typically, the client handles the remainder of the tasks herself. Examples of unbundled legal services, also called limited legal assistance and discrete task representation, include hotlines, webpages, pro se clinics, "ghostwriting," and other circumstances where the lawyer and client explicitly agree to limit the scope of the lawyer's assistance.

Unbundled legal services are often offered to low income clients by legal services programs that lack sufficient resources to provide full service representation for even a fraction of those who request their assistance. In this context, the clients may not have any other options for addressing their legal problems. In contrast, paying clients may also utilize unbundled legal services. They may choose this route because it is less expensive and they are unable to pay, or not interested in paying, for full service representation. Among both low income and paying clients are those who are eager to address their legal problems themselves and are empowered by this experience.

**Why the Emphasis on Unbundling?**

Upon first learning of unbundling in the early nineties, I pondered why litigators and zealous advocates of low income clients would be interested in promoting limited legal assistance. An obvious incentive was the chronic lack of resources for meeting the legal needs of the poor. The optimism that accompanied President Clinton's first term had receded, and the hope for adequately funded legal services vanished with the midterm congressional elections. Many veteran advocates of federally funded legal services grew weary of the struggle, and believed an alternative approach was necessary.

Second, these delivery models expanded as the types of activities in which the federally funded programs could engage in class actions, performing direct or grassroots lobbying, collecting court-awarded attorneys fees, representing noncitizens and prisoners, handling redistricting and public housing eviction cases involving allegations of drug use, and challenging welfare reform (a restriction subsequently loosened following litigation.) These efforts to limit the systematic work of the federally funded programs may have resulted in more emphasis on increasing access to the legal system, a goal for which limited legal assistance models are well-suited.

Additionally, in the mid-nineties there was growing attention to the needs of moderate income clients, few of whom can afford full service representation. Focusing on the moderate income had the advantage of forging new alliances and potentially expanding the advocacy base for legal services to the poor. Additionally, solutions to the legal needs of moderate income clients may be easier to secure. These clients, although not rich, are not burdened with the many social problems that typically beset low income families. As Stephen Wexler noted in a seminal article in 1970, poor people are always "bumping into sharp legal things."[1] That may be slightly less true for moderate income people. Additionally, moderate income clients may be a more appealing group when advocating for public funds. They are less likely to be unemployed or homeless, and most pay taxes. This population presented more promise for a solution, and was a welcome respite for battle-weary advocates of legal services to the poor.

This effort to promote alternative delivery models for assisting moderate income clients also capitalized on an important buzzword: client empowerment. Clients who complete some of the tasks involved in their representation can achieve a sense of accomplishment and self confidence, benefits that linger beyond the resolution of the immediate legal problem. This is true regardless of the clients' income level.

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[1] Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 149 (1970).

It is in this context that the unbundling movement took off, promoting alternative mechanisms to provide legal assistance without providing "traditional, full service" representation. This occurred in the context of dwindling resources, not only for legal services activities but also for cash assistance and basic services.

## The Facts: What Has Happened in the Last Fifteen Years?

### A. Ethical Issues at the ABA Level

As the unbundling of legal services began to proliferate in the nineties, there was much uncertainty about the ethical issues surrounding the practice. Among the issues that arose were what level of service renders someone a client, client consent to limited legal assistance, the application of traditional confidentiality and conflicts of interest rules, whether performing unbundled legal services constitutes "competent representation" under the rules, defining a limited role for lawyers in drafting documents, and communications with opposing clients and counsel.

In 1997, the American Bar Association ("ABA") began a comprehensive review of the Model Rules of Professional Conduct, an effort known as "Ethics 2000." Coincidentally, unbundling was beginning to garner the attention of the legal services community and segments of the private bar at this time. There was considerable debate in the late 1990s about the ethical issues surrounding unbundled legal assistance,[2] just as ABA Ethics 2000 was seriously engaged with its examination of the Model Rules.

Some of the Recommendations of Ethics 2000, many of which were ultimately adopted by the ABA House of Delegates, address the ethical issues that arise in an unbundled practice setting. There was one major rule addition, and relevant minor revisions. Model Rule 6.5, a new rule, addresses conflicts of interest that arise in the context of a nonprofit or court-sponsored program providing limited duration assistance.[3] Rule 6.5 provides that the conflict check requirements of the rules do not apply in this context unless the attorney is aware of an actual conflict of interest or is aware that another lawyer from her firm would have a conflict. Another issue that arose in early discussions was whether the recipient of these short term services is in fact a client. Comment 1 to Rule 6.5 addresses this issue, providing that "a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation."

A second Model Rule change relevant for this discussion is Model Rule 1.2. The amended Rule provides that "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."[4] The comment to the Rule provides that the assistance provided must be competent. The Reporter's Explanation indicates that this change was designed to "more clearly permit but also more specifically regulate agreements by which a lawyer limits the scope of the representation to be provided to a client" and is "intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel."[5] Rule 1.2(c) should be cross-referenced with the new definition of informed consent found in Rule 1.0.

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[2] Conference on the Ethical and Professionalism Issues in the Delivery of Legal Services to Low Income Clients, Report of Working Group on Limited Legal Assistance, 67 FORDHAM LAW REV. (1999).

[3] Model Rule of Prof'l Conduct R. 6.5, *at* http://www.abanet.org/cpr/e2k-rule65.html.

[4] Model Rule of Prof'l Conduct R. 1.2(c).

[5] Model Rule of Prof'l Conduct R. 1.2, *at* http://www.abanet.org/cpr/e2k-rule12rem.html.

**B. Ethical Issues at the State Level**

Once the ABA made its modifications to the Model Rules, individual states were free to adopt those changes, reject them, or make changes of their own. States have begun to consider the relevant changes to the Model Rules implicating unbundling. As of April, 2005, fifteen states have made revisions to their ethics rules in light of Ethics 2000.[6] Nineteen states and the District of Columbia have formed study commissions that have issued reports, and sixteen additional states have study commissions underway. Nine states have already adopted Model Rule 6.5, with two additional states having adopted substantially similar rules.[7]

Some states have, as separate initiatives, begun to examine how their ethics rules impact pro se litigants.[8] These states are addressing issues such as limited appearances, local rules applicable to ghostwritten documents, and communications between attorneys and clients receiving limited legal assistance. And the solutions offered vary.

Beginning with defining the scope of representation, some states addressing this issue have adopted the ABA recommendation, including that informed consent need not be in writing.[9] Florida, however, requires written consent after consultation and Maine requires the use of an attached form.[10] Wyoming requires written consent, unless the consultation is by telephone.

Rule 1.2 (c) appears to permit ghostwriting, the preparation of documents by an attorney that the client files pro se. However, state rules of procedure may mandate that lawyers do more than simply just draft documents. Two issues tend to arise in this context. The first concerns the typical requirement that the lawyer certify that the documents are based in fact and supported by a viable legal theory. Revised rules in Colorado and Washington provide that a lawyer performing document preparation can rely on the litigant's representations regarding the facts, unless the lawyer has reason to believe otherwise.[11]

The second ghostwriting issue concerns whether or not the court and opposing party should be alerted that the litigant had drafting assistance. The purpose of the disclosure is to avoid unfairness by permitting the pro se litigant latitude due to her pro se status when, in fact, she had assistance of counsel. To address this issue, Colorado requires the lawyer be identified. Florida requires that the document indicate it was prepared by counsel, but the lawyer need not be identified. And in California, the lawyer need not disclose any involvement in drafting the documents.[12]

A related issue that arises at the state level is the entry of appearance. Typically, attorneys have effectively entered their appearance for an entire case by either appearing in court or filing a document on behalf of a client. To encourage limited assistance for otherwise pro se litigants, some states are modifying their rules to permit limited

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[6] Model Rule of Prof'l Conduct R. 1.2, *at* http://www.abanet.org/cpr/e2k-rule12rem.html.

[7] ABA Standing Committee on the Delivery of Legal Services, An Analysis of Rules That Enable Lawyers to Serve Pro Se Litigants: A White Paper (April 2005), available at http://www.abalegalservices.org/delivery [hereinafter "White Paper"].

[8] *Id*. *See also* Handbook on Limited Scope Legal Assistance, ABA Section on Litigation (2003), *available at* http://www.abanet.org/legalservices/download/delivery/proseresourcesbyissue.html#limited [hereinafter "Handbook"].

[9] White Paper, *supra* n. 7, at 8-9.

[10] *Id*.

[11] *Id*. However, this does not address the dilemma posed by the competency component of Rule 1.1, which requires the lawyer to inquire into the legal and factual issues.

[12] *Id*. at 12-15.

appearances. Six states have now created mechanisms for lawyers to appear for limited purposes, and usually require a form of written notice to the court. They have also adopted procedures for those lawyers to formally withdraw from the proceedings, some providing an opportunity for the client to object.[13]

State bar ethics committees also have also addressed the permissibility of limited legal assistance, and generally find it is ethical. Ethics opinions in Colorado, New Hampshire and Delaware explicitly permit it.[14] Additionally, local bar opinions further support the practice.[15]

States have also addressed issues relating to communications between parties when one litigant has secured limited legal assistance, since current ethics rules provide no clarity on this issue. Four states have addressed this void. One, Colorado, considers the litigants who received limited assistance to be considered pro se unless the opposing attorney knows the pro se litigant had assistance. In the three other states, the litigant is considered pro se unless she provides written notice to opposing counsel of the limited representation.

Although many ethical issues remain to be addressed, there is substantially more clarity on the ethical issues related to unbundling than there was fifteen years ago. Experience and time will ultimately determine the final resolutions. Those states that have yet to act will draw from the experience of the innovators as we reconcile the rules with the evolving practice models.

### C. Proliferation of Pro Se Assistance and Technology-Based Programs

Pro se assistance programs have expanded dramatically in the last fifteen years. As indicated elsewhere, legal services programs have placed increasing emphasis on these access-based models and court systems are increasingly participating in providing services in this area, too. Models range from pro se assistance clinics, designed to teach clients how to represent themselves, to court-based facilitators who assist all parties appearing pro se. Unbundled legal services are further enhanced by the growing expansion and sophistication of technology. Clients can utilize webpages to secure basic legal information, a service that did not exist fifteen years ago. Clients can also secure form pleadings from the web. An unusually sophisticated model is California's ICAN! system that offers a kiosk with video assistance that instructs clients in completing pleadings, saves the information electronically for later use, and prints out copies for the court and the client.

### D. Evaluation

Most would agree that the limited legal assistance models can be very useful for some clients in certain situations. As limited legal assistance models become more sophisticated, data is being collected and analyzed to determine the best uses of unbundled legal services.

An early evaluation of a pro se clinic was conducted by the University of Maryland School of Law of its pro se family law clinic in which law students, offered legal advice at selected county courthouses.[16] The study concluded that the pro se clinic was helpful for those clients seeking "largely mechanical justice," and became less helpful as the clients needs required more judgment and discretion. The more complex the problem, the less useful the service. The study also analyzed those clients who could successfully use the information provided by the clinic.

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[13] *Id*. at 15-18.
[14] Handbook, *supra* n. 8.
[15] *Id*.

[16] Michael Millemann, Natalie Gilfrich and Richard Granat, *Rethinking the Full-Service Representation Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178 (1997)

Predictably, those with limited reading and writing skills, mental or emotional problems, or little self-motivation had less success than others in accomplishing their goals with the limited legal assistance provided.[17]

A second study of unbundled services was an analysis of hotlines by the Project for the Futures of Equal Justice.[18] This three-phased study concluded that in over fifty percent of the cases where the client had not achieved a favorable result, it was because the client had not understood the advice or information or, the client had not followed through due to fear, discouragement or lack of time or initiative. Clients were more likely to achieve favorable results when they received follow-up calls from the hotline and when they received "brief service" in addition to advice. Some clients and some legal matters did not lend themselves to positive resolutions, however. Non-English speaking clients, those with no income, those with less than an eighth grade education, and those facing personal challenges were less likely to have successful outcomes. Additionally, clients needing advice about representing themselves in court or in dealing with a government agency had less favorable results.[19]

As limited legal assistance models expand, so, too, do evaluations of their efficacy.[20] New evaluation projects have been launched in recent years, and advocates and scholars are analyzing the most beneficial questions to ask and the successful evaluation methodologies. As data begins to accumulate, eventually there will be sufficient information to draw conclusions about which clients are best assisted by unbundled services, and which kinds of legal problems are can be addressed through these delivery models.

**The Facts: What Has Not Happened in the Last Fifteen Years**

As the limited legal assistance models have proliferated, the focus has been on new and efficient mechanisms to provide services to as many clients as possible. During the course of these innovations and the attendant discussions, other, critical issues have received far less attention. Those issues, which I believe are foundational to the success of these efforts, are diagnosis, positive changes in substantive law, unauthorized practice issues and the roles of nonlawyers, the role of the courts in addressing access to justice issues, and justice itself. Additionally, continued yet different evaluation is essential to assure that the limited delivery models are serving clients effectively.

**A. Diagnosis**

For limited legal assistance models to be successful there must be careful and effective diagnosis of the client and her legal problem.[21] As more data is generated regarding the effectiveness of these models, it will become easier to engage in meaningful diagnosis. Over time, the profession will learn what factors enhance or limit the effectiveness of the unbundled models. However, we must remain cognizant of the challenges presented in effective diagnosis. Frequently, it will occur on the telephone, limiting the information available for making the diagnosis.

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[17] *Id*.

[18] Robert Echols and Julia Gordon, Recommendations and Thoughts From the Managers of the Hotline Outcomes Assessment Study Project, *at* http://clasp.org/publications/Hotline_MIE.pdf

[19] *Id*.

[20] For a comprehensive list of resources on evaluation, see http://www.selfhelpsupport.org/library.cfm?fa=detail&id=32143&appView=folderselfhelpsupport.org

[21] *See*, *e.g.*, Symposium on The Delivery of Legal Services to Low Income People: Ethical and Professional Issues, Report of Working Group on Limited Legal Assistance , 67 FORDHAM L. REV. (1999) (recommending a diagnostic interview before providing most limited legal assistance).

Additionally, those handling the initial calls will be busy. The effectiveness of their diagnosis will also depend on the quality of the training they have received, particularly in ferreting out the relevant factors for assessing the appropriateness of limited legal assistance. The intake workers' level of sophistication in understanding legal problems will also be a factor in successful diagnosis. In those states with centralized centralized intake systems, intake workers will need to be adept at triaging clients' requests for assistance and funneling them to the most appropriate entity.

**B. Positive Changes in Substantive Law**

The limited legal assistance debate and proliferation of pro se programs may be hindering the development of substantive law that furthers the needs of low income clients. Today, considerable energy is expended developing and, increasingly, evaluating limited legal assistance delivery models, all good things. However, this focus comes with some costs. There is far less discussion today about advancing legal positions that further our clients' interests. Getting low income people access to the court system should be one objective of poverty advocates. But a second and equally important objective, albeit challenging objective, is enabling them to be "heard" in that forum. A final objective is assuring that the law is applied fairly. Unbundled delivery models work far less well in accomplishing these other important objectives of poverty practice.

In a similar vein, many have argued that our systemic legal work should evolve from our service cases.[22] It is the volume of service cases, and the attendant ability to observe patterns, that provides the substantive issues for the legal work. In the rush to enhance access, the ability to identify repetitive problems may be lost, resulting in a lack of data to develop a systemic reform agenda. Although LSC-funded programs are limited in their ability to do systemic work, even the alternative, non-LSC funded entities need data to assess, strategize, and address systemic problems. Limited legal assistance models are very adept at helping us identify access problems, but are less successful in identifying other systemic issues. Even in "assisted pro se" programs, opportunities to identify broader problems are limited by the staff's finite role. This is one of the real challenges the proliferation of unbundled legal services presents.

More broadly, similar issues arise in the debate about the role of technology. One veteran legal services advocate, in an article entitled "Accessing McJustice," highlights some negative implications of focusing on the use of technology.[23] While LSC has made available special monies for this purpose and therefore arguably is not diverting money from other worthwhile projects, program talent and leadership are focused on these new initiatives at the expense of other programmatic goals. The human element of the lawyer-client relationship is lost, and connections to client communities are lost.[24] While the volume of clients served and arguably access to the legal system is enhanced, is there any more justice?

**C. Unauthorized Practice Issues and the Roles of Nonlawyers**

There has been little explicit discussion of unauthorized practice issues and the role of paralegals in light of the U.S.'s unbundling trend. Depending on how services are "unbundled," there are profound implications in this arena. Lawyers'

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[22] *See, e.g.*, Gary Bellow, Turning Solutions into Problems: The Legal Aid Experience, NLADA Briefcase, Vol. XXXIV, no. 5 (1977). *See also* Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO L. J. 1529 (1995)

[23] Victor Geminiani, *Accessing McJustice*, MGT. INFO. EXCH. J. (Summer 2003), *available at* http://www.m-i-e.org/journal/journal.htm.

[24] *Id*.

work has historically been an amalgamation of judgment, skill, training, and experience. To the extent the practice of law is divided into smaller, discrete tasks, the lawyer has less opportunity to exercise judgment. When dividing these lawyering duties into smaller discrete tasks, we should ask, "Does the client really need a lawyer to perform this particular task?" If we think that she does not, then we should explicitly determine that a nonlawyer can perform that function and "loosen" the unauthorized practice rules to permit nonlawyers to provide this assistance. We must concede that paralegal assistance or other nonlawyer assistance is sufficient for many of the unbundled tasks.

The ramifications of this acknowledgment would be more profound in the private sector than in the legal services context. Today, many legal services clients receiving limited legal assistance already do not have access to lawyers. The roles of those assisting are often carefully defined to *avoid* providing legal advice. In the private sector, however, the lawyers often are providing the unbundled services. They may be assisted by their office staff, by legal assistants or paralegals operating under their supervision and management. To the extent we permit nonlawyers to perform at least some of the unbundled services currently provided by lawyers, this will have a negative economic impact on lawyers. Many in the profession will object. However, the profession cannot have it both ways: either these are simple tasks that can be divided into their discrete parts, some of which can adequately be performed by nonlawyers, whether they are pro se litigants or other professionals, or they cannot, in which case unbundling is inappropriate.

Assuming the profession acknowledges the ability of nonlawyers to perform some of these functions, we should then examine the level of education and training required of those who perform these services. Should their work be regulated? How do we assure that they are performing their work competently? Does their work need to be overseen by an attorney? If the task can be unbundled and if it can be performed by someone other than a lawyer, why must there be attorney oversight? Many are already appropriately critical of the profession's tendency toward regulation, and argue that it is detrimental to the public.[25] Enhanced regulation of nonlawyer legal assistance would further perpetuate that problem, and would ultimately defeat the purposes of unbundling: a reduction in the costs of legal services. The profession must confront the unauthorized practice issues and roles of nonlawyers in the unbundling context.

### D. The Role of the Courts in Addressing Access to Justice

Another dimension to the unbundling experience is the role of the judicial system in assuring access to justice. There is increasing pressure from the judiciary to provide additional pro se assistance. Judges, overburdened by uninformed pro se litigants who slow down their dockets, ask questions, and lack sufficient information to present their cases, want the profession to address this problem. The profession is responding to this pressure, as it should, and the overburdened court systems have done much to stimulate debate and creativity in promoting pro se programs.

As advocates seek new ways to provide more services with less, courts systems should partner in developing solutions. Providing form pleadings is a function that courts have improved upon.[26] Increasingly, some state court systems have court facilitators, whose responsibility is to assist all pro se

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[25] *See, e.g.*, Deborah Rhode, *Access to Justice: Connecting the Principle to Practice*, 17 GEO. J. LEGAL ETHICS 369 (2004).

[26] We have come a long way since I practiced in Maryland's "rent courts," where the clerks provided various form pleadings for landlords but few, if any, form pleadings for tenants.

litigants.[27] The American Judicature Society, in a series of comprehensive recommendations on pro se policy, suggests that courts should provide information and services to self-represented litigants, secure the necessary resources for this purpose, study the needs of self-represented litigants and design services to meet those needs, train court staff on assisting those litigants, assure that litigants have an opportunity to be heard in the courtroom, and work collaboratively with the bar, legal aid providers, and relevant government agencies.[28]

Creative analysts of the courts' role in this access debate suggest that courts could be doing even more.[29] Among other things, courts could clarify what is contemplated by the unauthorized practice of law. Courts could and should face the challenge of conclusively determining what is legal advice, and work with state Supreme Courts and others to permit courts to provide such assistance to pro se litigants. And, as suggested by Professor Engler, courts should reconsider the roles of court personnel to expand their ability to assist pro se litigants.

In most states, the courts are charged with the administration of justice.[30] Courts are charged with assuring that all citizens have not just access to the courts, but meaningful access, and justice. As suggested above, the proliferation of unbundled services focuses almost exclusively on access, not on justice. Today, when the Legal Services Corporation also is focused on access, as evidenced by its emphasis on the use of technology and reporting high case numbers, the courts should direct their attention to administering justice. The state, local and federal court systems should be encouraged to participate in this debate and assume additional responsibility for this role.

### E. The Ethics Debates

In the early discussions of limited legal assistance, there was much debate about lawyers' ability to provide limited legal assistance under the current ethical provisions.[31] There was discussion about changing the rules to permit, rather than discourage, these new delivery mechanisms. Many of those changes have been implemented at the ABA level. States are now considering these potential changes, and some have already adopted them. There was limited discussion during these debates about the underlying policy issue of modifying the rules to encourage unbundled legal services on behalf of low income clients. Rule 6.5, for example, creates a separate rule to address court, bar or legal services-sponsored programs where there is no expectation of continued representation, and provides that the conflict of interest provisions do not apply.

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[27] *See, e.g.*, Bonnie Rose Hough, Description of California Court's Programs for Self-Represented Litigants, *at* http://www.ilagnet.org/conference/general 2003

[28] Revised Policy Recommendations from the American Judicature Society, Approved by the AJS Executive Committee March 2002, *available at* http://www.ajs.org/prose/pro_resources.asp.

[29] *See* Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Role of the Judges, Mediators, and Clerks*, 67 FORDHAM LAW REV. 2047 (1999). *See also* Nancy Biro, Meeting the Challenge of Pro Se Litigation: An Update on Legal and Ethical Issues (1999), updated by Kerry Hill (2000), *at* http://www.ajs.org/prose/pro_legal_ethical.asp.

[30] *See, e.g.*, Mont. Const., Art. II, § 16. Many states have similar provisions providing that courts should be open to all and "justice shall be provided without sale, denial or delay."

[31] This was the focus of some of the debate in the Working Group on Limited Legal Assistance at the Fordham Conference on the Delivery of Legal Services to Low-Income Clients.

As we look ahead, many issues remain regarding the application of ethical provisions to limited legal assistance. The overarching issue of modifying the rules for serving low income clients has already been addressed. However, the profession should consider the bigger policy questions of whether we ought to have different ethical standards for different practice settings or categories of clients.

Another lingering ethics issue is defining competent representation. The ABA Model Rules have been amended to encourage limited legal assistance and Rule 1.2(c) now explicitly permits the lawyer to limit the scope of representation "if the limitation is reasonable under the circumstances and the client gives informed consent." However, the lawyer must still exercise competence, defined in the Comment to Rule 1.1 as including "inquiry into and analysis of the factual and legal elements of the problem."[32] What remains unclear is what that competency requirement means in the context of unbundled services. The ABA Standing Committee on the Delivery of Legal Services, in a recent "white paper" on ethics and pro se litigants, interprets these provisions to mean that a lawyer providing limited legal assistance cannot offer mere legal information, for that would be devoid of competence under the comment to Rule 1.1.[33] The Committee is concerned about lawyers' ability to compete with nonlawyers providing legal information. If the goal is to enhance the public's ability to access the legal system, an alternative solution is to maintain the competency requirement for lawyers, regardless of the form of assistance provided. If that assistance does not require inquiry into "the legal and analysis of the factual and legal elements of the problem," why should a client hire a lawyer to perform that service? Access is best enhanced by having a less expensive but competent professional provide that information, not a lawyer.

[32] For a discussion of competence and limited legal assistance, see Mary Helen McNeal, *Redefined Attorney-Client Relationships: Discrete Task Representation and Moderate Income Elderly Clients*, 32 Wake Forest L. Rev. 295 (1997).

[33] White Paper, *supra* n. 7.

## Challenges for the Next Fifteen Years

It is impossible to meaningfully predict the impact of the unbundling trend on the delivery of legal services to the poor. However, I would like to offer several hypotheses for consideration. Obviously, more clients will get services as limited legal assistance models proliferate. That is undeniable. Courts are becoming more accustomed to working with pro se litigants, and as pro se assistance programs expand, courts should be even more accommodating of pro se litigants.

However, the shift toward limited legal assistance models will have other consequences, particularly in the legal services context. Below is a brief outline of what those issues may be.

### A. Shifts the Focus of the Debate and the Work

As unbundled models have proliferated, the goal has become access. One cannot dispute that limited legal assistance models enhance access. While access to the legal system is a good thing, many legal aid advocates promote a much broader agenda, ranging from meaningful access to justice to the amelioration or even elimination of poverty. While even the suggestion of these ideas has vestiges of what some consider a bygone era, one must consider the effect on these broader goals when the debate is focused almost exclusively on access.

A related consequence of an access-focused agenda concerns securing factual information about systemic issues. If legal services programs expend substantial resources, energy and leadership on implementing unbundled legal services, by definition they must limit the extent of their direct representation. Absent the information gleaned from direct representation, programs will have difficulty assessing

issues for more systemic advocacy, be that targeted litigation, legislative work, community and economic development work, or other types of advocacy efforts. Perhaps, in limited legal assistance models where there is considerable staff support and a conscious effort to monitor issues, substantial data can be collected on the bigger issues. However, most programs have yet to reach this level of sophistication.

### B. Impact on Funding Levels

For those funders that focus on caseload numbers, programs that serve a larger quantity of low-income clients through unbundled legal services may see an increase in funding. Additionally, a small number of funders are interested in supporting innovative and creative projects, which may result in additional resources being available for those programs. However, absent a dramatic infusion of funding from unknown sources, the emphasis on unbundled delivery models leaves fewer resources for other kinds of legal assistance, particularly for advocacy efforts that assure the law is accurately implemented, that the law itself is just, and that systemic needs are addressed. In focusing resources on the limited legal assistance models, advocates run the risk of appearing to concede their superiority to other models, and succumb to pressures limiting the goals of legal services work.

### C. Impact on Legal Aid Lawyers

Assuming the United States continues with its staff model of providing legal services, the trend toward unbundled legal services may have important ramifications for the lawyers themselves, for who is attracted to this work, and ultimately, for clients. Over time, I have concluded that some of my reservations about unbundled practice reflect its lack of appeal to me personally. The most rewarding aspects of practicing law, particularly in a poverty context, are getting to know the clients, the interrelationship between the facts and the law, and using the legal system as a tool to address clients' problems. Additionally, many are drawn to the law's capacity to make systemic changes on behalf of clients. Practicing unbundled legal services parses these challenges into tiny pieces, pieces that in and of themselves may have less personal and intellectual satisfaction. Additionally, many of the rewards in doing legal aid work - and there are many - come from working with people to use the law to address their very personal problems. In an unbundled practice, the lawyer does not share in the clients' joy in returning home instead of being evicted, or in the client's satisfaction when a case is successfully mediated or a merchant is forced to pay for providing a faulty product.

One can only speculate on the impact of the unbundling trend on those who might choose legal aid practice as a career. It will most likely depend upon an individual's reasons for choosing this work. For some, particularly those interested in developing close relationships with clients and using the law to effectuate social change, the growing prevalence of limited legal assistance models will be a deterrent. For others, particularly those focused on access issues, these developments may be encouraging.

There *are* two potential personal benefits to lawyers providing unbundled practice. One is enabling clients to resolve legal problems on their own. This is significant, and certainly has advantages beyond the individual solution the client secures on her own behalf. To the extent the lawyer learns of the client's success or observes her new-found power, the lawyer may take satisfaction in that. However, by the very nature of the practice, it is unlikely the lawyer will observe these changes in the client.

A second advantage for some lawyers is the potential speed with which the unbundled service is provided, and the lack of continued involvement in the client's case. Lawyers, including pro bono lawyers, often complain about the emotional complexity of certain cases,

particularly family law matters. The lawyer providing an unbundled service is, by definition, distanced from the client. The lawyer often provides the service - for example, assisting with the completion of form pleadings - and never sees the client again.[34] This quick turn around and limited involvement will be perceived by some lawyers as advantageous.

### D. Impact on Pro Bono Efforts

It is in the area of pro bono legal assistance that unbundled legal services may have the most dramatic affect on the profession. Recent changes in the ethical rules have been designed to encourage limited legal assistance. For example, the creation of American Bar Association Model Rule 6.5, which eliminates the need for conflict checks when limited services are offered through a legal aid or court-sponsored legal assistance program, enables the private bar to offer limited services without concern for unknown conflicts of interest. Thus, lawyers can perform "lawyer for a day" services, or assist at information and advice clinics, without having to perform a conflicts check.

Additionally, modifications in some state rules are designed to encourage "ghostwriting," and to clarify that such limited assistance is permissible. These changes also may encourage pro bono lawyers to provide additional assistance. For example, it is more feasible for a pro bono lawyer to draft divorce documents, assisting on discrete tasks for a limited time, than for that same lawyer to provide full service representation to that same client. Hopefully, pro bono contributions will increase as a result of these changes, benefiting additional low income clients.

[34] An exception to this would be programs offering "assisted pro se" clinics, where clients may return for assistance if problems arise.

### E. Additional and Different Evaluation

While data on the success of unbundled delivery models is beginning to accumulate, the profession should also seek to establish some comparative data. First, there is no baseline. There is limited, if any, information about "success rates" for clients receiving full service representation. Second, currently there is no data that compares different models of limited legal services delivery. For example, it would be interesting to know whether tenants achieve better results from attending landlord-tenant clinics on how to raise habitability defenses, from receiving similar information via a hotline, or by utilizing form pleadings provided by a court clerk. Additional empirical studies should be conducted that provide this comparative data, as well as additional information about which clients successfully utilize limited legal services models in which types of cases. Furthermore, current evaluation projects focus on pro se assistance, hotlines, and technology-based initiatives.[35] Other forms of unbundled services, in particular ghostwriting and community education models, should be evaluated. Additionally, implementing limited legal assistance models in other substantive areas of law should be explored and evaluated.

### E. Lawyer Training

The expansion of unbundled legal services will result in fewer traditional roles for lawyer and additional alternative models. It is important to consider the implications of this for law schools. Students will obviously continue to need to know the basic skills of thinking like a lawyer and the many substantive subjects now required in most law schools. However, upper level curricula should include offerings that will assist those who may engage primarily in providing limited legal

[35] *See* http://www.selfhelpsupport.org/library.cfm?fa=detail&id=32143&appView=folderselfhelpsupport.org.

assistance. This training should include segments on teaching legal concepts, procedures, and preventative lawyering to nonlawyers, counseling clients about a wider range of options for addressing their legal problems, and how to facilitate client empowerment among pro se litigants. Given that many limited services may eventually be performed by nonlawyers, students should also be exposed to effective supervision and management techniques. And finally, given the need for additional empirical data, law schools might include opportunities for students to assist and gain experience in collecting and evaluating empirical data.

## Conclusions

In a short fifteen years, we have gone from having no concrete models for providing limited legal assistance to a plethora of pro se projects, technology-based assistance programs, and courthouse-based pro se facilitators. We have moved from asking whether unbundled services are permissible under existing ethical rules to making substantial revisions to the Model Rules, to the development of specific rules to encourage these practices, to state ethics opinions defining how lawyers can effectively unbundled their practices.

Much work remains to be done, and many questions remain unanswered. Those questions include how to engage in effective diagnosis over the telephone, how to screen for clients who will not likely succeed with limited legal assistance, and how to better train lawyers for these new models. Most important of all is how to continue to increase access to our legal system without loosing the true objective of securing justice. We cannot allow ourselves to be distracted from the justice mission of providing legal services to the poor.