

## UNBUNDLING LEGAL SERVICES IN 2014

# Recommendations for the Courts

By Forrest Mosten

In my 2001 article in this prestigious journal,<sup>1</sup> I set forth the fundamental concepts of unbundling (limited-scope representation) and the reasons why this method of rendering legal services benefits litigants, the practicing bar, and the courts.

Over the past 12 years, to my great personal satisfaction, unbundling has become institutionalized within the legal landscape. In the current legal and economic environments, the availability of unbundled legal services is more important than ever. Unbundling enables lawyers who serve those of modest means to expand their outreach to a broader base of potential clients, providing greater access to affordable legal services across the country.

The purpose of this updated article is to give a brief overview of these developments and showcase the leadership of judges and court staff in making unbundling a reality in so many jurisdictions and to recommend ways to further expand unbundling's contribution to increased legal access.

### What Is Unbundling and How Does It Work?

Unbundling is not a new concept. Essentially, unbundling is an *agreement* between the client and the lawyer to limit the scope of services that the lawyer renders. There are numerous replicable models of lawyers successfully unbundling their services to increase legal access.

Examples of unbundling include the following:

- **Advice:** If a client wants advice only, advice can be purchased at an initial

consultation or throughout the case as determined by the client with input from the lawyer. The lawyer and client collaborate in helping the client decide if and when further consultations may be needed.

- **Research:** Based on the lawyer's advice, if the client wants legal research, a personal or telephonic/web unbundled service provides this legal information. Research may take as little as 15 minutes or as much as 10

hours. The client is in charge of determining the scope of the job and who will do the work: the lawyer, the client, or a negotiated collaborative effort between the two.

- **Drafting:** Lawyers can ghostwrite letters or court pleadings for the client to transmit or review and comment on documents the client has prepared, or be engaged only to send a letter on behalf of the client on law firm letterhead.



- **Negotiation:** The lawyer can teach the client how to negotiate with his or her spouse or the spouse's lawyer directly, in preparation for mediation or a settlement meeting. Or the lawyer can be engaged to conduct negotiations on behalf of the client.
- **Court appearances:** If a client desires, an unbundled lawyer can convert to full representation for court appearances, hearings, and mediation. At the other end of the spectrum, lawyers can provide collaborative-law representation in which the lawyer provides all services related to the case, *except* representation in court, from which the lawyer would be disqualified under the terms of a collaborative law agreement.

A lawyer may be engaged for a single issue of spousal support only, and the client will either represent himself and/or engage another representative to handle all other issues. In the same way, a lawyer might represent a client in a single hearing on temporary child custody, but the client will represent herself at subsequent hearings on child custody or at trial on all issues. Lawyer and client are in charge of determining the scope of representation and unbundling; in friendly jurisdictions, the court and other party are required to honor that lawyer-client decision.

The limitation of legal services based on informed consent and a written agreement is permitted in every state and in many Western countries.<sup>2</sup> "Second opinions" are classic unbundled services. Every time a lawyer writes a single letter, instead of three possible letters, or makes several phone calls, the services are limited and thus unbundled.

## Overview of Unbundling Developments

In 2001, the concept of unbundling was barely a decade in existence. While a few states had pioneering programs and there had been one national conference on the issue (October 12–14, 2000, in Baltimore<sup>3</sup>), unbundling was still in its infancy. The following are only the highlights of activity in the past several years:

### 2013 ABA Resolution Supporting Unbundling

The watershed moment in the acceptance of unbundling is Resolution No. 108, adopted by the ABA House of Delegates on February 11, 2013. The key points of this resolution follow:

RESOLVED, That the American Bar Association encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.

FURTHER RESOLVED, That the American Bar Association encourages and supports the efforts of national, state, tribal, local and territorial bar associations, the judiciary and court administrations, and CLE providers to take measures to assure that practitioners who limit the scope of their representation do so with full understanding and recognition of their professional obligations.

FURTHER RESOLVED, That the American Bar Association encourages and supports the efforts of national, state, tribal, local and territorial bar associations, the judiciary and court administrations, and those providing legal services to increase public awareness of the availability of limited scope representation as an option to help meet the legal needs of the public.<sup>4</sup>

As the House of Delegates is the policymaking body for the ABA (the largest professional membership group in the world), its endorsement and accompanying report should make local efforts easier in the years to come.

### State Court Rules, Ethical Opinions, Judicial Cases, and Policy Reports

Across the country, most states and their court systems have embraced unbundling during the past decade for a number of reasons, which include increased numbers

of self-representing litigants, major reductions in court budgets, the increased demand for legal access including calls for a "Civil Gideon,"<sup>5</sup> and the proliferation of proven replicable unbundling models that motivate judges to adapt unbundling to their courts.

A review of the explosion of unbundling action on the state level demonstrates the breadth of unbundling's overall acceptance. The ABA Standing Committee on the Delivery of Legal Services, in its online Pro Se/Unbundling Resource Center,<sup>6</sup> offers information about unbundling (including articles, reports, cases, court rules, and ethics opinions) on a state-by-state basis.

The ABA Report (submitted with its 2013 unbundling resolution) specifically referenced the efforts of state courts, highlighting the work in Massachusetts, Iowa, Ohio, California, and Maine.<sup>7</sup> Florida and Colorado are also early pioneering states in this field.<sup>8</sup>

Courts should be aware of the different ways that states handle key unbundling issues. For example, some states require disclosure of attorney involvement in ghostwriting court pleadings (e.g., Colorado, Florida, Nebraska), while California expressly provides for confidentiality of lawyer ghostwriting.



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affordable and understandable legal services to families. He is a certified family law specialist, collaborative lawyer, and mediator in Los Angeles for which unbundling and other nonlitigation activities are the foundation of his family law practice. He is also an adjunct professor of law at the UCLA School of Law. He can be reached at <http://www.mostenmediation.com>.

### **Recognition of Replicable Unbundling Models**

Since 1995, the ABA has recognized individuals and organizations that have demonstrated replicable models of unbundling through its Louis M. Brown Legal Access Award.<sup>9</sup> These models are profiled and serve as working models for others interested in unbundling. Two of the court models honored by this prestigious award are:

#### **2011: Pinellas County Clerk of the Circuit Court Legal Self Help Center.**

The Pinellas County Clerk of the Circuit Court Legal Self Help Center was established in October 2007 to

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provide affordable legal services to the citizens of Pinellas County, Florida, and to assist them with filing small claims, tenant evictions, and family cases.

#### **1997: Superior Court of Arizona in Maricopa County Self-Service Center.**

The Self-Service Center is the result of a progressive series of steps (court forms, a consumer service center, unbundling attorney list) that the court system took to meet the legal needs of those who could not afford full and traditional legal representation. This model represents acceptance of unbundling and of the consumer approach to expansion of legal access at their core.<sup>10</sup>

### **Legal Scholarship in Unbundling**

In the past decade, many published academic articles have discussed and studied the problems of unrepresented litigants and analyzed the benefits and risks of various unbundling models. These articles can be surveyed at [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/articles.html](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/articles.html). Recent key articles on unbundling and self-represented litigants published since the survey was updated in November 2011 include those by D. James Greiner and Molly Jennings of Harvard University,<sup>11</sup> Kristen Blankley of the University of Nebraska,<sup>12</sup> and Julie Macfarlane of the University of Windsor.<sup>13</sup>

### **Malpractice Insurance Carriers' Support for Unbundling**

Due to client satisfaction and the small number of malpractice claims against lawyers who unbundle,<sup>14</sup> malpractice carriers increasingly have promoted the use of unbundled services by their policy holders and provide training to their policy holders to increase competent use of this form of practice. Starting in 1997, the Oregon State Bar's malpractice program has encouraged lawyers to unbundle. Attorney Protective, a malpractice carrier, has just published an article, "Delivering Competent and Ethical Unbundling Services," and the Indiana State Bar included an insurance representative in its unbundling program shown throughout the state in 2005. Lawyers Mutual Insurance Company, which insures more California lawyers than any other legal malpractice insurance carrier, has been supporting unbundling for many years and has provided lawyer education including experts on legal ethics and access to justice.

### **Professional Training in Unbundling**

When I served on the ABA Interest on Lawyers Trust Accounts (IOLTA) Commission in 1997–98, some legal services lawyers and organizations resisted the expansion of limited-scope legal coaching. Due to budget cuts and to more exposure to quality limited-scope help, there has been a movement to train both public interest and private practitioners

in the step-by-step delivery of unbundled services. As an illustration only, in October 2013, I was a student in a sold-out unbundling seminar at the Los Angeles Public Law Library taught by legal services legend Toby Rothschild and employment and legal malpractice litigator Wendy Chang. Courts, nonprofits, and bar associations are sponsoring similar training programs throughout the country.

### **Growth of Unbundling in the Courts**

When I began my writing and teaching of unbundling, I focused on the role of the lawyer in helping pro se litigants outside of court. My main concern was to provide people with a third choice beyond engaging a full-service lawyer or having no legal help at all.

The goal was to provide limited-scope services for clients that would help them resolve their problems without adding to the court workload. Because the lawyer is doing only part of the necessary work, limited-scope clients are generally not required to pay the large up-front deposit that prevents, or at least discourages, many people from hiring a lawyer. Also, because the overall lawyer bill is less, clients with limited incomes especially benefit from the limited help that lawyers provide.

My initial model called for lawyer coaching to prepare litigants to represent themselves in court by helping them to organize their documentary evidence (to eliminate fishing for receipts piled in shoe boxes while the judge waits), prepare more persuasive written court pleadings, and arrange for witnesses to support their case.

However, due to the judicial disdain for so-called special appearances and hostility toward perceived efforts by lawyers to limit their own responsibilities toward clients without informed consent, my initial model did not include as a limited-scope role that lawyers personally appear in court for unbundling clients. This added feature of unbundling should be credited to courageous judges in many jurisdictions. Having learned about the concept of unbundling, these bench officers innovatively applied unbundling

thinking to recruit lawyers to represent litigants in a single hearing (“vertical unbundling”) or for a single issue throughout the litigation (“horizontal unbundling”). In an effort to provide some courtroom advocacy representation where there had been none, these forward-thinking judges improved the efficiency of their courtrooms and at the same time helped preserve the rights of the otherwise unrepresented litigants.

The key to this breakthrough was judicial support for permitting the limited scope lawyer to easily withdraw as counsel of record after the limited job was done. For example, if a lawyer made a limited-scope appearance for an emergency hearing on restraining orders, the lawyer could withdraw once the judge made orders in that hearing.

## Judicial Contributions to Unbundling

Even though the genesis of unbundling came from the private sector, judicial leadership and support have institutionalized unbundling in a variety of contexts and jurisdictions. Here are just a few of the judges to whom society owes a debt of gratitude.

### 1. Judge Rebecca Albrecht, Maricopa Superior Court, Phoenix, Arizona

Judge Albrecht used inspiring leadership and humility to involve other key people and institutions in the Arizona legal community to make unbundling a reality. She supported a major ABA study on unrepresented litigants in her court.<sup>15</sup> The court maintained a list of unbundled lawyers in the Phoenix area that were trained to offer limited-scope services—Judge Albrecht forged an alliance with the local bar association to make this happen.<sup>16</sup>

### 2. Justice Wallace Carson, Chief Justice, Oregon Supreme Court

In the late 1990s, Chief Justice Carson partnered with the Oregon Task Force on Family Law, which was chaired by family law lawyer and legal reformer William J. Howe III, to revolutionize the Oregon family law system. The Oregon court system, Oregon State Bar, and both houses of the legislature worked together to accomplish these reforms. Indeed, most

reforms passed the legislature *unanimously* and all with heavy bipartisan support. Chief Justice Carson’s “Justice 2020 Initiative” (we are now only six years away) laid out an unbundling-friendly legal environment. The 2013 Informal Domestic Relations Trial in Deschutes County, Oregon, in which unbundled lawyers help litigants prepare for and try their cases, embodies a low-cost, efficient alternative to the traditional court processes.<sup>17</sup>

### 3. Lord Harry Woolf, Lord Chief Justice of England and Wales

Lord Woolf was the keynote speaker at the 1994 Legal Action Group Conference in London, England, titled “Shaping the Future: New Directions for Legal Services,” and personally endorsed unbundling in his follow up report.<sup>18</sup> Lord Woolf’s commitment to legal access and his recognition of the partnership between bench and bar have propelled the use of innovative models of unbundling and encouraged other judges to support unbundling in their courtrooms.

### 4. Chief Justice Ronald M. George, California Supreme Court, and Chief Justice John T. Broderick, New Hampshire Supreme Court

These two esteemed jurists coauthored an op-ed piece in the *New York Times* on January 1, 2010, that constituted a crucial judicial endorsement of unbundling.<sup>19</sup> The following excerpt was adopted by the 2013 ABA Report passed with its unbundling resolution:

While supporting the goal of a right to counsel in some civil cases, the Chief Justices wrote that it is essential to close the “justice gap” and that “unbundling” is one of the tools to do so. They indicated that lawyers who provide limited scope representation are being responsive to new realities.<sup>20</sup>

Both of these judges have also worked for unbundling reforms and acceptance in their respective states and throughout the country.

### 5. Judge Judith L. Kreeger, Miami, Florida

Judge Kreeger’s long and sustained support

of unbundling led to a groundbreaking “Report of the Unbundled Legal Services Monitoring Committee”<sup>21</sup> authored by a consortium of judicial officers, private practitioners, and legal services lawyers. This report along with Florida’s pioneering court rules and ethical opinions have led to increased use of limited-scope services, particularly ghostwriting of legal documents by lawyers for pro se litigants.

### 6. Justice Laurie Zelon, California Court of Appeals

As chair of a California State Bar Task Force in 2001, Justice Zelon’s efforts resulted in the groundbreaking Unbundling Report that led to promulgation of court rules and standard court forms endorsing unbundling. Justice Zelon led the efforts to add subsection (c) to ABA Model Rule of Professional Conduct 1.2, which legitimized unbundling:

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

As unbundling pioneer M. Sue Talia, 2008 recipient of the ABA Louis M. Brown Award for Legal Access, stated, “Section 1.2(c) is the gold standard of unbundling.” As recently as 2012, Justice Zelon chaired the ABA Access to Justice Expansion Project, which has provided grants for innovative and replicable projects in unbundling and other models of legal access.

### 7. Judge James Williams, Nova Scotia Supreme Court (Family Div.), Halifax, Nova Scotia, Canada

As conference organizer of the Canadian Federation of Law Societies (previously host chair of World Congress on Family Law and Children’s Rights), Judge Williams included unbundling in its 2000 National Conference in St. Johns, Newfoundland. Judge Williams has promoted unbundled services and training in his court and throughout Canada.

### 8. Ventura California Superior Court: Judge Sheila Gonzalez, Judge John R. Smiley, Judge Charles W. Campbell, and



### Michael Plant, Court Executive

In addition to founding the court's Ventura Self Help Legal Access Center,<sup>22</sup> the court has institutionalized a letter to all litigants encouraging the use of unbundled services and has led the movement for limited-scope attorney representation for hearings involving low-income litigants.

### Recommendations for Courts to Increase Use of Unbundling

The following recommendations developed in 2000 remain applicable today:<sup>23</sup>

1. Courts should offer information and services to pro se litigants. Courts should provide self-represented litigants with information (including information to indicate when the court can order one party to pay litigation expenses and attorney's fees).
2. Courts should study the needs and composition of the self-represented litigants they serve and design services to effectively meet those needs.
3. Courts should train judges and staff to assist pro se litigants.
4. Courts should allocate increased resources to assist self-represented litigants.
5. Courts should establish guidelines prohibiting bias in the courts against self-represented litigants.

The following additional recommendations should be considered by courts in every jurisdiction:

6. Courts should proactively encourage the use of limited-scope representation in a variety of ways, including a letter to litigants at the commencement of a court action.<sup>24</sup>
7. In addition to training current judges and court staff, training in unbundling should be highly considered for judicial appointments and court staff hiring.
8. Court personnel (including judges and clerks) should be trained to help court users identify and take advantage of unbundling resources in the community.
9. Unbundling-friendly court rules should

be enacted. All court rules should pass an unbundling impact test.

10. Courts should develop user-friendly court forms to facilitate lawyers making and withdrawing from limited-scope appearances.<sup>25</sup>
11. Courts should publish and make prominently available consumer-friendly brochures, video loops, and other material describing the benefits and risks of unbundling.
12. Lawyers who represent clients via limited-scope representation should receive priority in scheduling and calling their limited-scope matters.

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13. Courts should fund and promote mandatory education for litigants that will include how to use unbundling services offered inside and outside the courthouse.
14. Courts should encourage mediators within their jurisdiction to recommend unbundled legal assistance to parties as part of their customary mediation protocol.
15. Courts should partner with local bar associations to offer unbundling training and education to lawyers within their jurisdiction.
16. In considering fee and cost requests, judges should favor parties who have opted for limited-scope representation and should disfavor parties who do not demonstrate that their lawyers

offered limited-scope representation as an option prior to commencing litigation.

17. Courts should establish panels for attorneys willing to offer limited-scope representation based on quality standards. Every attorney on that list should be required to offer pro bono limited-scope services to the poor and underserved populations at a level determined by each court.
18. Courts should monitor the effects of unbundling initiatives and assess their effectiveness.

### Conclusion

The impact of unbundling on the provision of legal services has increased exponentially over the past 10 years. Courts have played a leadership role, not just within the courthouse, but also in spurring the private sector into action. The combined efforts of jurists, practitioners, legislators, academic scholars, and ancillary private sector efforts have legitimized unbundling and rendered it a firmly established way of meeting the needs of underserved litigants. The evolution of unbundling continues, and I hope the above recommendations will be considered in court policy, programs, and training in the years ahead. ■

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## Endnotes

1. Forrest S. Mosten, *Unbundling Legal Services: Servicing Clients Within Their Ability to Pay*, JUDGES' J., Winter 2001.

2. See ABA MODEL RULE 1.2(c).

3. For details of speakers and materials, see <http://www.unbundledlaw.org/old/index.htm>. See also 40 FAM. CT. REV. (Jan. 2002) (this special issue was devoted to papers from that conference, organized by Maryland Legal Services).

4. ABA Res. No. 108, at 44 (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/ls\\_del\\_unbundling\\_resolution\\_108.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf) [hereinafter *Unbundling Resolution 108*].

5. See Robert W. Sweet, *Civil "Gideon" and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503.

6. Resources, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N (Dec. 14, 2011), [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html).

7. *Unbundling Resolution 108*, *supra* note 4, at 47–48. The report finds: "Over the past decade, several states have examined aspects of self-representation and concluded that limited scope representation is a model of delivering legal services that is responsive to problems that arise with self-represented litigants."

8. See Mosten, *supra* note 1, at 32–33, 96–100.

9. *Louis M. Brown Award for Legal Access*, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AM. BAR ASS'N (Jan. 23, 2013), [http://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/louis\\_m\\_brown\\_award\\_for\\_legal\\_access.html](http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/louis_m_brown_award_for_legal_access.html).

10. *Self-Service Center*, JUDICIAL BRANCH OF ARIZ.: MARICOPA CNTY. (2012), <http://www.superiorcourt.maricopa.gov/superiorcourt/self-servicecenter>.

11. D. James Greiner & Molly M. Jennings, *The Evolution of Unbundling in Litigation: Three Case Studies and Literature Review*, 89 DENVER U. L. REV. 825 (2012).

12. Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 3 (2013).

13. Julie Macfarlane, *National (Canada) Self-Represented Litigants Final Report: Identifying and Meeting Needs of Self-Represented Litigants*, NAT'L SELF-REPRESENTED LITIGANTS PROJECT (2013), <http://www.representing-yourself.com>.

14. See *Lerner v. Laufer*, 819 A.2d 471, 482 (N.J.

Super. App. Div. 2003) (in which the New Jersey court immunized a lawyer from malpractice exposure for work outside the written limited-scope agreement in a major family law action).

15. See description, *supra* note 9, of Maricopa's innovations leading to receipt of the 1997 ABA Louis M. Brown Legal Access Award.

16. See FORREST S. MOSTEN, *COMPLETE GUIDE TO MEDIATION* 376–79 (ABA 1997).

17. See OREGON ELEVENTH JUDICIAL DISTRICT, CIRCUIT COURT, DESCHUTES COUNTY, 2013 LOCAL SUPPLEMENTARY RULES, REVISED AND EFFECTIVE: MAY 29, 2013, Rules 7:045–8:105 (2013), <http://courts.oregon.gov/Deschutes>.

18. RIGHT HONOURABLE THE LORD WOOLF, *ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* 129–35 (1995).

19. John T. Broderick Jr. & Ronald M. George, Op-ed, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 1, 2010.

20. *Unbundling Resolution 108*, *supra* note 4, at 47.

21. MERRIE-ROXIE CROWELL ET AL., *REPORT OF THE UNBUNDLED LEGAL SERVICES MONITORING COMMITTEE* (Mar. 3, 2005), [http://www.floridabar.org/TFB/TFBResources.nsf/0/B591E315F65F20FC85256FE1007766E3/\\$FILE/SpecialUnbundLegalServMonitorRpt..pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/0/B591E315F65F20FC85256FE1007766E3/$FILE/SpecialUnbundLegalServMonitorRpt..pdf?OpenElement).

22. Tina Rasnow, former director of this Access Center, was honored in 2008 for her efforts with the ABA Lawyer as Problem Solver Award. See Tina L. Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 FORDHAM URB. L.J. 1281 (2001).

23. *Changing the Face of Legal Practice; "Unbundled" Legal Services*, UNBUNDLEDLAW.ORG, <http://www.unbundledlaw.org>. See also Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation* 61 DRAKE LAW REVIEW 845 (2013).

24. Ventura County's use of a letter to all litigants from the presiding judge promoting unbundling (and other ADR options) should be standard practice in all jurisdictions. The Los Angeles Superior Court sends out a similar letter with support of Collaborative Law, another limited scope model. See <http://www.collaborativepractice.com>.

25. See insert of California Court Form FL-190.