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## Unbundled Legal Services: Untying the Bundle in New York State

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# Unbundled Legal Services: Untying the Bundle in New York State

Justice Fern Fisher-Brandveen and Rochelle Klempner

## **Abstract**

This Article addresses the practice of unbundled legal services as a solution to lack of access to legal aid by the poor. Unbundled legal services is a process by which the client and lawyer agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation. The Article discusses and evaluates the pros, such as increasing access to justice and efficiency in the courtroom with cons, such as malpractice and ethical concerns.

# UNBUNDLED LEGAL SERVICES: UNTYING THE BUNDLE IN NEW YORK STATE

*Justice Fern Fisher-Brandveen and Rochelle Klempner\**

Access to the legal system is an inherent right of citizenship, yet far too many New Yorkers are currently denied this right because they lack economic resources.

—Chief Judge Judith S. Kaye<sup>1</sup>

## INTRODUCTION

The unmet legal needs of the poor and middle-class in New York State and throughout the country are well documented.<sup>2</sup> Nearly three-fourths of low-income Americans and two-thirds of moderate-income Americans with identified legal needs either ignore their problem or try to resolve it without assistance.<sup>3</sup> For many of these individuals, timely legal help could prevent unemployment, eviction, or the failure of a small business. Despite this fact, legal services budgets continue to be cut and thousands of potential cli-

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\* Justice Fern Fisher-Brandveen is the Administrative Judge of the Civil Court of the City of New York. Rochelle Klempner is the court attorney to Justice Fern Fisher-Brandveen.

1. Press Release, New York State Unified Court System, Judge Juanita Bing Newton Appointed Deputy Chief Administrative Judge for Justice Initiatives (June 29, 1999) (on file with authors).

2. Susan R. Martyn, *Justice and Lawyers: Revising the Model Rules of Professional Conduct*, 12 *PROF. LAW.* 20, 21 (2000) (stating that studies for the past thirty years have consistently found that only about one in five low-income persons with legal problems receives legal assistance); ROY W. REESE & CAROLYN A. ELDRED, ABA, *LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 22* (1994) (surveying low and moderate income households in 1992 to assess their legal needs); Russel Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987 (1999) (discussing barriers faced by unrepresented litigants inside and outside the courthouse); William Hornsby, *Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm*, *TECH. & LEGAL PRAC.* 1, 2 (Nov. 1999), available at <http://www.unbundledlaw.org/program/11%20-%20Lawyer%20over%20web%20-%20Hornsby.pdf> (“The unmet legal needs of consumers are well documented and dramatic.”).

3. REESE & ELDRED, *supra* note 2, (citing the reasons given for not consulting an attorney when needed including the beliefs that legal assistance would not help, the cost, that the problem was not serious enough or legal, the desire to avoid confrontation, and the desire to handle the problem on one’s own).

ents are turned away each year.<sup>4</sup> This occurs in New York State, which has the seventh highest poverty rate in the United States.<sup>5</sup> Legal services offices cannot meet the need of the indigent, and a sizable middle-income population cannot afford private attorneys.<sup>6</sup>

A legal right is meaningless without access to the judicial system. Civil justice leaders, therefore, have looked for new ways to deliver legal services including “unbundling.”

Unbundled legal services is a practice in which the lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation. Clients choose the legal assistance according to their needs and perform the remaining tasks on their own. Unbundling has been described as ordering “a la carte,” rather than from the “full-service menu.”<sup>7</sup> A client might hire a lawyer for trial representation, but not for court filings, discovery, and negotiations. Unbundled services can take many forms, including telephone, Internet, or in-person advice; assisting clients in negotiations and litigation; assistance with discovery; or limited court appearances.<sup>8</sup> For many clients, these limited engagements make a lawyer’s services affordable.

Unbundled legal services is touted as a new concept, although lawyers have been providing it for years in estate planning and mediation.<sup>9</sup> Outside the courtroom, unbundled legal services are commonplace. Clients often seek a lawyer’s advice before negotiating agreements, or ask a lawyer to draft a document based on an agreement reached without the lawyer’s assistance, or bring an

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4. See Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 297-98 (1997); see also Legal Servs. Corp., LSC Statistics: Annual LSC Appropriations 1980-2001, at <http://www.lsc.gov> (last visited Jan. 18, 2001). In 1981, the annual Legal Services Corporation budget was around \$320,000,000. In 2001, the annual LSC budget was at most \$330,000,000. *Id.* The budget, inadequate at inception, has not kept current with inflation and the cost of living. *Id.*

5. U.S. CENSUS BUREAU, PERCENT OF PEOPLE IN POVERTY BY STATE: 1997, 1998, AND 1999, at 8, available at <http://www.census.gov/prod/2000pubs/p60-210.pdf> (stating that between 1997 and 1999, the poverty rate in New York state was 15.7%).

6. John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2688-89 (1999).

7. Dianne Molvig, *Unbundling Legal Services Similar to Ordering a la Carte, Unbundling Allows Clients To Choose From a Menu the Services Attorneys Provide*, WIS. LAW., Sept. 1997, at 10.

8. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422-23 (1994).

9. James M. McCauley, *The Ethics of Making Legal Services Affordable and Making the Legal System More Accessible to the Public*, at <http://members.aol.com/jmccauesq/ethics/articles/probono.htm>.

agreement prepared by an opposing counsel to a lawyer for review. In each of these scenarios, the lawyer is asked to perform a discrete legal task, rather than handle the entire matter. Business lawyers have provided unbundled services to sophisticated clients for decades. These clients are often either repeat players with some knowledge of the law<sup>10</sup> or in-house lawyers who require the specialized expertise of outside counsel. The concept is more recent in the litigation context.<sup>11</sup> A variety of players provide unbundled services, including pro se clinics, community education programs, and some courthouses.<sup>12</sup>

Unbundling has received a great deal of attention. Everyone concerned with access to justice is looking at it, talking about it, holding a conference about it, or implementing it. In October 2000, the Maryland Legal Assistance Network convened a national conference on unbundled legal services, with attendees from thirty-four states, the District of Columbia, Canada, and Russia.<sup>13</sup> The American Bar Association's Standing Committee on the Delivery of Legal Services has an "unbundled" website to educate lawyers, court administrators, and the media.<sup>14</sup> In Arizona, at the Maricopa Self-Service Center, litigants can consult a list of attorneys who provide unbundled legal services.<sup>15</sup> In May 2001, the American Bar Association's Ethics 2000 Commission submitted its proposed changes to the Model Rules of Professional Conduct, which will clarify and encourage the use of unbundled legal services.<sup>16</sup> Although changes to the rules will not become binding until they are

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10. McNeal, *supra* note 4, at 334.

11. Mary Helen McNeal, *Unbundling and Law School Clinics: Where's the Pedagogy?*, 7 CLINICAL L. REV. 341, 353 (2001).

12. Alan W. Houseman, Testimony of Alan W. Houseman on Behalf of Center for Law and Social Policy and the National Legal Aid and Defender Association on Limited Legal Assistance, ABA Network, Center For Professional Responsibility (testimony from the Ethics 2000 Commission Public Hearing in Dallas February 1, 2000), at <http://www.abanet.org/cpr/houseman1.html> (last visited Jan. 18, 2002).

13. The Maryland Legal Assistance Network's October 2000 Conference, entitled *The Changing Face of Legal Practice: "Unbundled" Legal Services*, has a website at <http://www.unbundledlaw.org>.

14. A list of articles, books, and other materials related to unbundled legal services can be found at <http://www.abanet.org/legalservices/delunbund.html>.

15. Bradley A. Vauter, *Unbundling: Filling the Gap*, 79 MICH. B.J. 1688, 1689 (2000); See <http://www.superiorcourt.maricopa.gov/ssc/sschome.html> for information about the Maricopa Self-Service Center.

16. Margaret Colgate Love, *Update on Ethics 2000 Project and Summary of Recommendations to Date*, PROF. LAW., Winter 2000, at 2. The Commission on Evaluation of the Rules of Professional Conduct conducted a four year comprehensive study before submitting its final report. *Id.* at 2. Any changes to the rules will not become effective until adopted by the ABA House of Delegates. *Id.*

adopted by the individual states, many states are looking into changing their rules.<sup>17</sup> In fact, Maine and Colorado have already adopted such changes.<sup>18</sup>

Unbundled legal services are still relatively unknown in New York. In a statewide survey of New York judges, conducted in 2001, approximately seventy-five percent of the responding judges were unfamiliar with unbundled legal services.<sup>19</sup> New York, usually a forerunner in access to justice circles,<sup>20</sup> has only recently begun to examine the issue. In 1996, a New York State Bar Association commission recommended that the Bar Association explore segmented legal services.<sup>21</sup> Although the House of Delegates approved the commission's report and authorized further ex-

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17. See, e.g., Howard J. Berlin, et al., *Pro: Facing the Inevitability, Rapidity, and Dynamics of Change*, FLA. B.J., Mar. 2000, at 35-36 (advising that Florida change its rules to facilitate unbundling).

18. See amendments to the Maine Bar Rules 3.4(i), 3.5(a)(4), 3.6(a)(2), 3.6(f), & 3.4(j) (effective July 1, 2001) (Docket No. SJC-51) and amendments to the Maine Rules of Civil Procedure Rule 5(b) & Rule 11 (effective July 1, 2001) (Docket No. SJC-11); changes to the Colo. RPC and C.R.C.P, effective July 1, 1999; see also Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, 29 COLO. LAW. 5, 11 (2000). The Colorado Supreme Court rules permitting unbundled legal services in litigation matters are not applicable in the United States District Court for the District of Colorado. The district court issued Administrative Order 1999-6 on June 30, 1999, stating that the changes are not consistent with their views concerning the ethical responsibilities of members of the federal bar. Amended Administrative Order 1999-6 was issued on April 10, 2000. *Id.*

19. Judicial Survey: Unbundled Legal Services (July-Aug. 2001) [hereinafter Judicial Survey] (on file with the authors in the Civil Court of the City of New York) (compiling results from an anonymous survey conducted by Justice Fern Fisher-Brandveen of 150 judges within New York State from all courts).

20. Chief Judge Judith S. Kaye has endeavored to increase equal access to the justice system. For example, in May 1997, the Administrative Board of the Unified Court System adopted a resolution urging every attorney to provide at least twenty hours of pro bono legal services annually and to contribute financially to organizations that provide legal services to the poor. In October 1997, Chief Judge Kaye established a Legal Services Project to identify funding sources for civil legal services programs. After months of investigation, the Project recommended that the legislature establish an access to justice fund and transfer \$40 million each year to that fund from the abandoned property fund. In June 1999, Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman announced the appointment of the Honorable Juanita Bing Newton to the newly created position of deputy chief administrative judge for justice initiatives in an effort to bring statewide leadership to the task of ensuring access to justice for all New Yorkers.

21. N.Y. STATE BAR ASS'N, THE REPORT OF THE NEW YORK STATE BAR ASSOCIATION COMMISSION ON PROVIDING ACCESS TO LEGAL SERVICES FOR MIDDLE INCOME CONSUMERS 25 (1996), available at <http://www.nysba.org/downloadables/report.pdf>.

ploration,<sup>22</sup> the commission has not revisited the issue.<sup>23</sup> The New York State Bar Association Legal Aid Committee has, however, recently formed a subcommittee to look into unbundled legal services.<sup>24</sup> In addition, the New York City Bar Association is starting to look into the topic.<sup>25</sup> In September 2001, the New York State Unified Court System sponsored its first Access To Justice Conference, which included an unbundling workshop.<sup>26</sup> Many of New York State's judges, court administrators, bar leaders, academicians and advocates joined together to exchange ideas and develop partnerships.

The bench and bar in New York can expect to hear a lot more about unbundled legal services in the future. The debate surrounding its widespread use focuses on several issues. Advocates believe that unbundling increases access to justice, promotes efficiency in the courtroom, and furthers business opportunities for attorneys.<sup>27</sup> Critics contend that unbundling does not extol any of these virtues, but rather raises malpractice and ethical concerns.<sup>28</sup> Untying the bundle in New York State requires a cautious and considerate balancing of the pros and cons.

### I. INCREASED ACCESS TO JUSTICE

Proponents of unbundling view it as a sound mechanism to provide poor clients greater access to the justice system.<sup>29</sup> Advocates of unbundling recognized that providing legal assistance through a neighborhood law office is not adequate.<sup>30</sup> Segmented legal assistance would allow these legal services offices to assist more clients by bypassing slow legal tasks and time intensive administrative

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22. House of Delegates Agenda item #10, Proposed Resolution re: Report of Commission on Providing Access to Legal Services for Middle-Income Consumers (approved June 29, 1996), <http://www.nysba.org/downloadables/commiss.html>.

23. Telephone Interview with Frank M. Headley, Jr., Esq., chair, Commission on Providing Access to Legal Services for Middle Income Consumers (Oct. 5, 2001).

24. Telephone Interview with Alan S. Harris, Esq., president and chief executive officer of the Legal Aid Society of Rochester (Aug. 2, 2001).

25. Telephone Interview with James H.R. Windels, Esq., chair, Pro Bono and Legal Services Committee of the Association of the Bar of the City of New York (Oct. 11, 2001).

26. The workshop was entitled Unbundled Legal Services: Protecting Rights for Low and Middle Income Consumers. The workshop was moderated by Hon. Stephen Crane, along with Ayn Crawley, Esq., Frank M. Headley, Jr., Esq., and William Hornsby, Esq. on the panel.

27. See *infra* notes 29-53 and accompanying text.

28. See *infra* notes 54-71 and accompanying text.

29. Rothermich, *supra* note 6, at 2689.

30. Houseman, *supra* note 12.

functions, such as multiple intake interviews and considering whether the client fits within financial parameters.<sup>31</sup>

Segmented legal assistance would also allow moderate-income clients to afford various services provided by private attorneys. Unbundling would improve the client's ability to obtain legal advice, help with drafting legal documents, limited representation, or other legal services.<sup>32</sup> Access to affordable legal assistance may encourage those who would otherwise forego an opportunity to present their claims in court and exercise their right to be heard.

## II. EFFICIENT JUSTICE

Some advocates contend that a litigant is more likely to successfully complete a matter with limited help than with none at all.<sup>33</sup> The unbundled services of an attorney may be just the boost a self-help litigant needs. The availability of segmented legal services may help pro se litigants overcome their unfamiliarity with procedural and evidentiary litigation rules.<sup>34</sup> Unbundled legal services benefit the court system because educating and assisting more pro se litigants about civil procedure and evidentiary rules reduce demands on court personnel.<sup>35</sup>

This view is not shared by all members of the judiciary. A number of New York State judges have expressed concern that unbundled legal services in the courtroom would place an unfair burden on the court and cause greater delay.<sup>36</sup>

Some judges assert that pro se litigants will not follow through properly and will miss deadlines due to misunderstandings or poor communication.<sup>37</sup> Other judges feel that litigants will be confused over the lawyer's limited role.<sup>38</sup> A number of judges believe pro se litigants will not be able to understand or articulate claims and defenses prepared by an attorney not present at trial.<sup>39</sup>

United States senior district court judge John L. Kane, Jr., one of the more outspoken opponents of unbundling, believes that the

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31. *Id.*

32. Vauter, *supra* note 15, at 1689.

33. *Id.*

34. Micklewright, *supra* note 18, at 6. Pro se litigants save attorney fees, but often give away valuable legal rights without ever knowing it. *Id.* at 5.

35. Vauter, *supra* note 15, at 1689.

36. Judicial Survey, *supra* note 19.

37. *Id.*

38. *Id.*

39. *Id.* (according to one judge, "[F]ew people are capable of adequately representing themselves in a truly contested matter.").

“insurmountable problem” for a pro se trial litigant is the “lack of competence in understanding and using the rules of evidence.”<sup>40</sup> “It is ludicrous,” Kane writes, “to suggest that in the present system, a layperson armed with a few discrete sticks from the advocate’s bundle can emerge from the trial thicket unscathed or that others will not be put to unnecessary expense.”<sup>41</sup> While most commentators are more reserved than Judge Kane, there are many who question the effectiveness of segmented legal assistance. The concern is that clients may be left partially prepared, confused, and without enough assistance to make informed choices.<sup>42</sup>

### III. CLIENT EMPOWERMENT

Forrest S. Mosten, the California attorney credited with coining the term “unbundled legal services,” believes that clients often feel empowered by the unbundled process.<sup>43</sup> “They feel that they can control their own destiny with the comfort of knowing that the lawyer can be brought in for future full-service representation if the client so chooses.”<sup>44</sup> Through their enhanced role in resolving their own legal problems, clients may be better able to avoid future problems and address issues in their lives more independently.

Opponents of unbundling see the empowerment theory as a justification for providing limited legal assistance.<sup>45</sup> Self-representation is foisted on poor people, “who have more than enough demands on their time and energy without being told that their denial of legal service is really an opportunity for empowerment.”<sup>46</sup>

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40. Judge John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15.

41. *Id.* at 16.

42. See Engler, *supra* note 2, at 2005-06; McNeal, *supra* note 4, at 333; McNeal, *supra* note 11, at 356.

43. Forrest S. Mosten, a Los Angeles attorney, is also the author of *Unbundling Legal Services: A Guide to Delivering Legal Service a la Carte*, published by the ABA Law Practice Management Section, and the president of Mosten Mediation Centers. Widely regarded as a trailblazer in unbundled legal services, Mosten is sometimes called the “father of unbundling.” In addition to writing books and articles on the topic, he is one of the first attorneys to put unbundling into practice, and to run centers across the country that implement unbundling. See <http://www.mostenmediation.com> for a description of these centers.

44. Mosten, *supra* note 8, at 430.

45. Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?* 67 FORDHAM L. REV. 1879, 1881 (1999).

46. *Id.* (citing Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481, 491 (1996)).

#### IV. LAWYER OPPORTUNITY

Some proponents of unbundled legal services stress the business opportunities such services provide members of the bar. As clients increasingly represent themselves, turn to non-lawyer providers, or just live with their legal problems,<sup>47</sup> unbundled legal services provide a tremendous opportunity to reach this otherwise unrepresented market.<sup>48</sup> Some argue that rapid developments in technology, particularly the Internet, make unbundled legal services a practical alternative to traditional representation.<sup>49</sup> Telephone hotlines, web pages, and brief e-mail advice reduce geographical barriers that otherwise limit access to legal assistance.<sup>50</sup> Unbundled legal services may also appeal to lawyers who find it intellectually rewarding to concentrate on resolving selected areas of a legal problem.<sup>51</sup>

Lawyers who are resistant to unbundling may fear it would require them to expand their pool of clients and convert to a high-volume practice.<sup>52</sup> For example, a lawyer who usually provides one hundred litigants with full service representation each year may need to represent several hundred litigants each year in unbundled cases to generate an equivalent amount of revenue.<sup>53</sup>

#### V. TRADITIONAL LAWYERING: MALPRACTICE AND ETHICS

Lawyers tend to resist providing piecemeal legal services to their clients. They are concerned about how such representation fits within the traditional role of the lawyer.<sup>54</sup> Attorneys may hesitate to relinquish control of their cases. They may worry about boosting their malpractice risks when they perform only those parts of a job that the client asks them to. If the client makes a bad decision and something goes wrong, attorneys are fearful that they will end

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47. Mark Hansen, *A Shunned Justice System: Most Families Don't Turn To Lawyers or Judges to Solve Legal Problems, Survey Says*, A.B.A. J., Apr. 1994, at 18 (1994).

48. Hornsby, *supra* note 2, at 4.

49. Richard Zorza, *Re-conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 FORDHAM L. REV. 2659, 2686 (1999).

50. Hornsby, *supra* note 2, at 15.

51. McNeal, *supra* note 11, at 352.

52. Hornsby, *supra* note 2, at 4.

53. *Id.*

54. See Micklewright, *supra* note 18, at 6; Sylvia Stevens, *Understanding 'Unbundling' Creating a Menu of Legal Services May Improve Accessibility*, OR. ST. B. BULL., Nov. 1998, at 25.

up being scapegoats in a lawsuit.<sup>55</sup> Forrest S. Mosten, Esq., who has managed a thriving “unbundled” practice for many years, argues that there is a lower risk of malpractice for lawyers who perform discrete tasks because fee disputes are minimized where lawyer and client have less opportunity for disagreement.<sup>56</sup>

According to Mosten, “Malpractice exposure exists for lawyers who render incomplete advice or who fail to give needed advice in areas ancillary to the client’s presenting a problem.”<sup>57</sup> In *Nichols v. Keller*,<sup>58</sup> the California Court of Appeals held that the plaintiff had a cause of action for malpractice. Despite the plaintiff’s limited contract with his lawyer in pursuing his workman’s compensation claim, the court found malpractice where the attorney did not advise the plaintiff of the availability of third-party claims.<sup>59</sup> In finding a duty of care, the court stated that “A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is a reason a party seeks out and retains an attorney to represent and advise him or her in legal matters.”<sup>60</sup>

Substantial ambiguity exists regarding the ethical issues pertinent to providing unbundled legal services that may lead to increased exposure to malpractice.<sup>61</sup> Unbundled legal services raise questions concerning the existence and adequacy of client autonomy, confidentiality, competence, continuity of representation, communication with represented parties, and candor to the court.<sup>62</sup> An attorney engaging in unbundled legal representation is treading on uncertain ethical territory and may be committing malpractice,<sup>63</sup> especially where the scope of the representation is not clear and the client and lawyer share different expectations about the lawyer’s responsibilities.<sup>64</sup>

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55. Molvig, *supra* note 7, at 13.

56. *Id.*

57. Forrest S. Mosten, *Unbundling Legal Services Servicing Clients Within Their Ability to Pay*, JUDGES’ J., Winter 2001, at 17.

58. *Nichols v. Keller*, 19 Cal. Rptr. 2d. 601 (Ct. App. 1993).

59. *See id.*

60. *Id.* at 609.

61. Hornsby, *supra* note 2, at 4.

62. Stevens, *supra* note 54, at 25.

63. McNeal, *supra* note 11, at 354; *see also* McNeal, *supra* note 4, at 307 (arguing that technically no formal relationship exists between malpractice and violation of the ethical provisions, but noting that courts are increasingly willing to recognize that violations of ethics codes are relevant in malpractice cases).

64. Stevens, *supra* note 62, at 25.

Unbundling advocates contend that the malpractice risk can be minimized if the client signs a limited representation agreement.<sup>65</sup> Attorneys can prepare a carefully worded engagement letter outlining exactly what the lawyer has been hired to do, what services will be performed, and what issues the lawyer will address.<sup>66</sup> Such an engagement letter should clearly identify what the client should handle and disclose how difficult the client's portion of the work will be.<sup>67</sup> When the unbundled service is concluded, the attorney should send the client a disengagement letter stating that the representation is over, identifying any remaining work that the client must do, including any deadlines and explaining the consequences if the client fails to follow through.<sup>68</sup> As contractual parties, the lawyer and client should be able to determine the scope of their relationship.

Advocates further stress that proper case and client screening minimize malpractice exposure.<sup>69</sup> When faced with ethical dilemmas, the lawyer must use his or her best judgment to determine whether to offer unbundled services. The lawyer should question whether the conduct is legally permissible and if so what he or she ought to do.<sup>70</sup> If the lawyer reasonably believes that the client can adequately represent himself or herself in the balance of the matter and understands the limited scope of the representation, then ethical issues should not be a problem.<sup>71</sup>

## VI. GHOSTWRITING

The ethics of unbundled legal services is most often questioned when attorneys draft court documents for clients who represent themselves in court, and the court papers do not reveal that an attorney assisted in their preparation.<sup>72</sup> This practice is known as

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65. See Beverly Michaelis, *Unbundling, Part II, How to Reduce Malpractice Exposure While Meeting Client Needs*, OR. ST. B. BULL., Apr. 1999, at 36; Mosten, *supra* note 8, at 434.

66. Stevens, *supra* note 62, at 27.

67. *Id.*

68. Michaelis, *supra* note 65, at 36.

69. See McNeal, *supra* note 4, at 336; Michaelis, *supra* note 65, at 35; Stevens, *supra* note 54, at 27. These authors provide lists of questions to ask when deciding whether unbundling is appropriate in a particular case.

70. McNeal, *supra* note 4, at 303; Mickelwright, *supra* note 18, at 7.

71. Stevens, *supra* note 54, at 27; Vauter, *supra* note 15, at 1688.

72. See Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as we Know it?*, 84 Minn. L. Rev. 1315, 1334-35 (2000) (stating that ghostwriting can be an ethical problem associated with the unbundling of legal services); Rothermich, *supra* note 6, at 2689.

ghostwriting. Ghostwriting assistance can differ greatly by degree of attorney involvement: it can range from drafting a single complaint to behind-the-scenes writing throughout the proceeding. Nonetheless, the attorney never technically enters an appearance. Attorneys who have ghostwritten pleadings for pro se litigants have been chastised or reprimanded by courts that have labeled such conduct as unethical and improper.<sup>73</sup>

One of the chief arguments raised by opponents of ghostwriting is that it is unfair in light of the special leniency afforded pro se pleadings in court.<sup>74</sup> Pro se pleadings are generally held to a less stringent standard than formal pleadings drafted by lawyers.<sup>75</sup> This preferential treatment is meant to compensate for the pro se litigant's lack of counsel. A litigant filing an apparent pro se pleading receives the unwarranted advantage of a liberal standard, while the represented adversary's submissions are held to more demanding scrutiny.<sup>76</sup> Indeed, in a recent survey of New York State judges, approximately forty percent said that they would treat self-represented litigants differently if they knew that an attorney drafted their documents.<sup>77</sup> On a motion to dismiss for failure to state a claim, for example, pro se complaints are often construed to give the facts their maximum effect and to even find causes of action that may not have been specifically delineated. Pro se litigants are

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73. See *In re Merriam*, 250 B.R. 724, 732 (D. Colo. 2000) (requiring a ghostwriting attorney to sign a bankruptcy petition); *Ricotta v. California*, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) (condemning, but not charging with contempt, attorneys who helped pro se litigants with materials they knew would be used in court); *Clarke v. United States*, 955 F. Supp. 593, 598 (E.D. Va. 1997) (finding that ghostwritten pleadings are a deliberate evasion by the attorney of Rule 11 of the Federal Rules of Civil Procedure); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079-80 (E.D. Va. 1997) (finding ghostwritten pleadings inconsistent with procedural, ethical, and substantive rules of the court); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 887 (D. Kan. 1997) (granting a motion to compel disclosure of whether the ostensibly pro se party was receiving "behind the scenes" lawyering); *Somerset Pharm., Inc. v. Kimball*, 168 F.R.D. 69, 72 (M.D. Fla. 1996) (finding that ghostwriting taints the legal process); *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) (holding that ghostwriting may subject lawyers to contempt charges), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996); *Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702-03 (S.D.N.Y. 1971) (condemning a pro se litigant's surreptitious enjoyment of the benefits of an attorney); *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342-43 (S.D.N.Y. 1970) (stating that ghostwriting "smacks of . . . gross unfairness").

74. Charles F. Luce, Jr., *Unbundled Legal Services: Can the Unseen Hand be Sanctioned?* (1998), at <http://www.mgovg.com/ethics/ghostwr1.htm>.

75. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

76. *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997).

77. Judicial Survey, *supra* note 19.

often granted wide leeway to amend deficient complaints. Courts are frequently more tolerant of substantial procedural errors, more likely to grant adjournments, and less likely to impose monetary sanctions for frivolous complaints with respect to self-represented litigants.<sup>78</sup> As one district court judge stated, ghostwriting "causes the court to apply the wrong tests in its decisional process," leaving the opposing party at a distinct disadvantage.<sup>79</sup>

Another argument against unbundled ghostwriting is that it violates various rules of professional conduct, such as the duty of candor toward the court, the duty of fairness to the opposing party, and the duty to avoid bringing non-meritorious claims.<sup>80</sup> According to one commentator, "Agreeing to author, but not sign, pleadings undoubtedly creates an attorney-client relationship and requires that the attorney fulfill all the duties normally owed to a client, even though the scope of representation is limited."<sup>81</sup> One court has said that ghostwriting is "ipso facto lacking in candor."<sup>82</sup> The American Bar Association Standing Committee on Ethics and Professional Responsibility has stated that whether or not the lawyer's actions are appropriate depends on the extent of the ghostwriter's participation. An undisclosed lawyer who renders extensive assistance to a pro se litigant is involved in the litigant's misrepresentation contrary to the Model Code of Professional Responsibility DR 1-102(A) (4), which provides that a lawyer shall not, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>83</sup>

Ghostwriting has been addressed by two ethics opinions in New York. The first, issued by the New York City Bar Ethics Committee in 1987 found that ghostwriting inappropriately affords a party the "deferential or preferential treatment" customarily given other pro se litigants.<sup>84</sup> As a solution, the opinion suggests that the ghostwriting attorney endorse the pleading with the words, "Prepared by Counsel."<sup>85</sup> The opinion does not require the disclosure of the attorney's identity and requires no disclosure if the attorney

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78. *Laremont-Lopez*, 968 F. Supp. at 1078; *Rothermich*, *supra* note 6, at 2699.

79. *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

80. *Rothermich*, *supra* note 6, at 2697.

81. *Luce, Jr.*, *supra* note 74.

82. *Johnson*, 868 F. Supp. at 1232.

83. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978).

84. Committee on Prof'l and Judicial Ethics, Ass'n of the Bar of the City of N.Y., Formal Op. 1987-2 (1987) [hereinafter *City Bar Opinion*].

85. *Id.*

provided only some legal advice and did not draft any court papers.<sup>86</sup> The opinion requires disclosure of legal assistance only if the attorney rendered "active and substantial assistance."<sup>87</sup>

The New York State Bar Association Committee on Professional Ethics issued an opinion on ghostwriting in 1990.<sup>88</sup> In accord with the New York City Bar, the opinion holds that the "preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation."<sup>89</sup> However, unlike the City Bar, the New York State Bar opinion requires the disclosure of the ghostwriting attorney's identity.<sup>90</sup>

The New York State Bar opinion also recognizes that the provision of advice and counsel, including the preparation of pleadings to pro se litigants can be an ethically acceptable practice if the attorney complies with the Code of Professional Responsibility.<sup>91</sup> Disclosing legal assistance prevents misrepresentation and ensures fairness to opposing counsel and candor to the court.<sup>92</sup> Ghostwriting creates an attorney-client relationship and requires that the attorney act competently, diligently and zealously, even though the scope of the representation is limited.<sup>93</sup> Most importantly, no pleading should be drafted for a pro se litigant where there is no merit to the claim and the pleading cannot be prepared in good faith.<sup>94</sup>

Courts have also found that it is unlawful for an attorney not to sign a pleading the attorney has substantially prepared, as it violates Rule 11 of the Federal Rules of Civil Procedure<sup>95</sup> and New York State's equivalent statute, section 130-1.1(a) of the Rules of the Chief Administrator, which provide that an attorney's signature constitutes a certification that the submitted court papers are not frivolous.<sup>96</sup> Opponents of ghostwriting contend that an attor-

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86. *Id.*

87. *Id.*

88. Committee on Prof'l Ethics, N.Y. State Bar Ass'n, Opinion 613 (1990) [hereinafter State Bar Opinion].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See *In re Merriam*, 250 B.R. 724 (D. Colo. 2000); *Clarke v. United States*, 955 F. Supp. 593, 598 (E.D. Va. 1997); *Laremont-Lopez*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997); *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1231-32 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

96. FED. R. CIV. P. 11; N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2001).

ney's failure to sign pleadings and other court documents undermines the purpose of signature certification requirements, because attorneys bypass their obligations to represent to the court that every document prepared is well grounded in fact and law.<sup>97</sup> Who should the court sanction when the complaint proves to be legally or factually frivolous? Ghostwriting pleadings for a pro se litigant has been condemned by one court as "both unethical and contemptuous, a deliberate evasion of the responsibilities imposed on attorneys by Federal Rule of Civil Procedure 11."<sup>98</sup>

Advocates of unbundling argue that ghostwriting does not violate Rule 11<sup>99</sup> and New York State's equivalent statute.<sup>100</sup> The language of these rules provide that an attorney's signature is a certification that the submitted court papers are not frivolous, not that an attorney must sign every pleading he or she has had a hand in preparing.<sup>101</sup> In addition, certification is meant to ensure that every court document is well grounded in fact and law.<sup>102</sup> If a document turns out to be frivolous and the court wishes to sanction a party, it can require that the identity of the ghostwriting attorney be revealed.<sup>103</sup>

A final argument against ghostwriting is that it circumvents civil practice laws and rules regarding attorney withdrawal.<sup>104</sup> In New York State, pursuant to CPLR section 321(b), an attorney must first seek leave of court by order to show cause for permission to withdraw as counsel.<sup>105</sup> The purpose of this and similar rules is to "provide for communication between the litigants and the court, as well as [to] ensur[e] that the court is able to fairly and efficiently administer the litigation."<sup>106</sup> When an attorney never formally enters an appearance, the attorney need not seek leave to withdraw, thus evading the court's rules concerning withdrawal with leave of court.<sup>107</sup>

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97. Luce, Jr., *supra* note 74.

98. *Clarke*, 955 F. Supp. at 598.

99. Luce, Jr., *supra* note 74.

100. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2001).

101. Luce, Jr., *supra* note 74.

102. *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989).

103. Luce, Jr., *supra* note 74.

104. *See Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (E.D. Va. 1997).

105. N.Y. C.P.L.R. § 321(b) (McKinney 2001).

106. *Laremont-Lopez*, 968 F. Supp. At 1079 (citing *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676 (3d Cir. 1986)).

107. *Id.*

Attorneys are understandably wary of unbundled ghostwriting. A judge may demand that the attorney come to court, if the judge learns that the attorney drafted the pro se litigant's court papers.<sup>108</sup>

### CONCLUSION: UNTYING THE BUNDLE IN NEW YORK STATE

The concerns that unbundled legal services cannot be ethically implemented and can lead to malpractice are valid. The practical reality, however, is that traditional lawyering is not giving low and middle-income people access to justice. Lawyers are also increasingly vulnerable in the marketplace as legal consumers look elsewhere for their needs. Both lawyers and clients need alternative delivery methods for legal assistance. "Untying the bundle" can be beneficial for New York, if certain ethical and malpractice barriers are removed, and changes to New York State's ethical code, court rules, and civil practice laws are implemented.

To lower the risk of malpractice exposure, the New York State legislature can approve a model retainer agreement for the use of unbundled legal services.<sup>109</sup> Insurance companies can rewrite malpractice policies to specifically cover the practice of unbundled law.<sup>110</sup> Forrest S. Mosten,<sup>111</sup> suggests granting civil immunity to lawyers who are sued for not performing tasks outside the scope of a legislatively approved discrete task engagement letter agreement signed by the client.<sup>112</sup> Since statutory immunity may be extreme, courts can give greater weight to a limited engagement letter signed by the client when considering a claim for malpractice.

None of the ethical concerns are insurmountable if the lawyer conducts the unbundled representation properly. To work well, the courts, lawyers, and clients should understand from the outset that attorney involvement is limited. Providers of unbundled legal services must then determine if unbundling is appropriate in relation to the complexity of the matter. They must assess each client's experience and sophistication on a case-by-case basis. The mere fact that legal assistance is limited cannot justify disregarding ethical standards of attorney conduct. At the same time, the Code of Professional Responsibility needs to clarify the ethical requirements when a client and lawyer contract for representation limited in

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108. McNeal, *supra* note 4, at 301.

109. See, e.g., MAINE BAR ASS'N., MAINE BAR R. 3.4(i) Attachment A, Limited Representation Agreement form.

110. Molvig, *supra* note 7, at 49.

111. See *supra* note 8, 43, and accompanying text.

112. Mosten, *supra* note 57, at 17.

scope. It must be made clear that a lawyer's duties of competence and diligence are still required, though limited to the small piece of the representation and not extending to every ancillary issue.

In addition, New York State's ethical requirement of candor to the court should be made clear with respect to disclosing legal assistance when ghostwriting. The ethical concerns surrounding the ghostwriting of litigation papers should not preclude unbundled representation. Both the New York City Bar and New York State Bar ethics opinions recognize that ghostwriting furthers the lawyer's duty to meet the legal need of the public.<sup>113</sup> Once ghostwriting assistance is revealed to the court and opposing counsel, whether or not the identity of the ghostwriting attorney is revealed, the court can moderate any possible lenient reading of the pro se's documents to avoid unfairness.<sup>114</sup> As the New York State Bar Committee stated, "the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession."<sup>115</sup>

Accordingly, the bar must be encouraged to offer unbundled legal services to litigants by addressing justified concerns. The legislature and the chief administrative judge of New York State should consider enacting a number of changes to the CPLR and court rules. Disclosure that an attorney has drafted a court document whenever the attorney has rendered "active and substantial assistance," seems to be necessary.<sup>116</sup> However, the New York State legislature should make it clear that disclosing that counsel has prepared a pleading does not constitute an entry of an appearance. Section 321(b) of the CPLR<sup>117</sup> should be amended to clarify that attorneys do not enter an appearance when they help prepare documents submitted to court. Therefore, they need not seek leave for permission to withdraw as counsel when the limited representation is concluded.<sup>118</sup> The rules of withdrawal also need to be clear that

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113. See City Bar Opinion, *supra* note 84; State Bar Opinion, *supra* note 88, at 5.

114. Luce, Jr., *supra* note 74; Rothermich, *supra* note 6, at 2711.

115. State Bar Opinion, *supra* note 88, at 5.

116. See *id.*

117. N.Y. C.P.L.R. § 321(b) (McKinney 2001).

118. C.P.L.R. Section 321 presently does not contemplate a limited appearance. The section requires an attorney to either file a consent to change attorney, or seek leave to withdraw by motion if the client does not consent. N.Y. C.P.L.R. § 321(b) provides as follows:

Change or withdrawal of attorney. (1) Unless the party is a person specified in section 1201, an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to

when an attorney appears in court to perform limited tasks pursuant to an agreement with the client, the attorney may withdraw from the case when the limited tasks have been completed. In addition, the rules should be amended to permit an attorney to enter a limited appearance pursuant to a written agreement with the client. Finally, Rule 130 of the NYCRR<sup>119</sup> should be modified to allow for a limited representation signature certification by the attorney.<sup>120</sup>

“If justice is to be practically available for all, if the litigation is not to become literally ‘the sport of kings,’ unbundling legal services must apply to [sic] litigation services, too.”<sup>121</sup> Judges must be restricted from commanding the revelation of a ghostwriting attorney’s identity in order to require the appearance and representation of a pro se litigant because it may assist the court or speed proceedings along. Similarly, judges must be precluded from keeping an attorney in the case, once his or her limited role has been completed. More importantly, the court system cannot view the self-represented litigant who has had limited legal assistance in the same light as a fully represented litigant. Limited assistance is less than full representation. Once the unbundled legal service is completed, there is no guarantee that the self-represented litigant understood the advice or is capable of following it through.<sup>122</sup>

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the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

(2) An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

119. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2001).

120. Rule 130 currently does not provide for limited representation or ghostwriting. It states as follows:

(a) Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

(b) Certification. By signing a paper, an attorney or party certifies that, to the best of that person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined section 130-1.1(c) of this Subpart.

121. Luce, Jr., *supra* note 74 (citing Colo Bar Ass’n, Op. 101 (1998)).

122. Engler, *supra* note 2, at 2006-07.

Some access to justice advocates are concerned that clients who receive unbundled services may not be getting the help they need to get the best results. Whether the recipients of unbundled legal services are able to accomplish their goals is difficult to assess, given the limited data available.<sup>123</sup> Unbundling may indeed establish lower standards of representation for low-income individuals.<sup>124</sup> However, the practical reality is that as funding for traditional legal services continues to dwindle and fall short of demand, clients must assume the inevitable risks entailed in not being fully represented, particularly in court. "A better-educated pro se litigant may still fare better if she were represented by counsel, but the alternative—leaving the litigant in total ignorance—is clearly much worse, for both the litigant and the court."<sup>125</sup>

To encourage ethical and effective unbundling in New York State, model retainer agreements must be approved for discrete task representation. Changes should be made to our ethical code, disciplinary rules, and court rules to permit unfettered unbundling. The New York State Bar Association should list unbundled law as a practice area and provide an attorney referral service for lawyers who perform unbundled legal services. Ethical training should be provided for attorneys who wish to provide unbundled legal services. Though not a complete cure-all for lack of access to our justice system, unbundling certainly has medicinal possibilities.

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123. McNeal, *supra* note 11, at 356 (citing to the limited data available, an evaluation of the University of Maryland School of Law's Pro Se Family Law Clinic and a study in housing court by Professor Gary Blasi).

124. *Id.* at 344-45 (stating that unbundling may encourage a natural evolution toward dual standards of ethics and justice for the poor and the rich).

125. Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to be Heard*, 96 YALE L.J. 1641, 1651 (1987).