

“Unbundled” Legal Services: Looking at issues of liability and good practices

Defining "Unbundled" Legal Services The term refers to discrete task representation, i.e. situations in which a client hires an attorney to assist with specific elements of a matter such as legal advice, document preparation (or review) and/or limited appearances. The client and attorney agree on discrete tasks to be performed for a particular fee or pro bono. Depending on the nature of the attorney's involvement, the attorney may or may not enter an appearance with the court. The client represents him/herself in other aspects of the case.

Why should attorneys consider offering unbundled services? There are many reasons why attorneys are expanding their practices to respond to increasing demand for discrete task representation in appropriate cases. The **Appendix** summarizes some of the national trends and factors that have lead to the rise in pro se litigation and thus to the increased need for discrete task representation as an option for new clients.

So the question is asked: How can I offer these services safely, without running undue risk of exposure? How can I weed out the cases and clients who are not suitable for limited service? How should I document my file on the limitations of my involvement? How do I get out at the end of my agreed services? The following piece is designed to assist attorneys in flagging and addressing areas of concern.

Unbundling is not substantially different from the rest of your practice, however there are some specialized issues which require consideration. In some instances, full representation may serve the client better.

Deciding on whether to take the case

1. **Work within your expertise** - Strongly consider rejecting an "unbundled" case in areas of law in which you or your firm have little or no experience. Taking a case for the "learning experience" is a red flag for limited representation. It takes significant expertise in an area to be able to anticipate what issues will come up in any given case and that is what is necessary to give good counsel and to avoid liability. You have a duty to warn the client about related issues, and you cannot warn your them about possibilities you do not anticipate. Have a referral list handy for cases outside your expertise.
2. **Don't be pressured by emergencies** -Pay particular attention to prospective clients who have last-minute emergencies and seek "unbundled" representation. Limited representation does not mean that you do not have to provide competent assistance or zealous advocacy. A rush for a "quick document review" is much riskier if you will only be involved in that brief transaction than if you enter your appearance to stave off some pending disaster that you can sort out later. Consider advice on ways to move the deadline, if possible, to allow adequate time for review or representation. Refer out if appropriate.
3. **A good diagnostic interview is critical** - Unlike a full representation case, if you miss a critical issue in the initial interview you will generally not get another chance to pick up the pieces later in the case. Both experienced and inexperienced attorneys will find a checklist of issues in the relevant practice area to be extremely helpful in conducting a good diagnostic interview. [Model checklists are available online at www.unbundledlaw.org].
4. **Be wary of clients who take a "musical chairs" approach to finding legal help** - Consider carefully the requests from prospective "unbundled" clients who have involved multiple attorneys in the same case. Bouncing around may be an indicator that the client is searching for the "right" answer after being given what they believe are unsatisfactory responses to previous analyses of their situation. You should avoid helping to facilitate situations in which a client may blame you for his/her discontent with the outcome. *On the other hand*, you may find that previous attorneys were uncomfortable with taking a "piece" of the case and that your prospective client simply had trouble finding an attorney like yourself

who was willing to work effectively with them in an "unbundled" fashion. The client may have been misperceived as "difficult" because s/he was seeking more of a partnership relationship than the traditional full representation model envisions.

5. **Be careful of clients who have unrealistic expectations or limited capacity** - A prospective client may be unrealistic about what s/he can achieve alone or about the nature of your limited representation. Part of your obligation in offering "unbundled" services is to teach or coach the client about the legal system and the available remedies. Few non-attorneys will arrive on your doorstep with totally "realistic" expectations. Their beliefs are likely to have been shaped by what they have seen on TV, what they believe is fair, or what they have been told by neighbors or friends. You bring the experience and expertise with the legal system. If you believe that you will not be successful at reining in unrealistic expectations, be careful. It may be difficult for the pro se litigant to carry out their plan with your guidance if they have trouble "hearing" your advice. Not every client is temperamentally suited to representing him/herself.
6. **Identify those with hidden motives** - Be wary if the prospective clients have trouble focussing on the legal outcome even after you have carefully explained the possible remedies available to them. Emotional needs may be driving the request for assistance. While many cases involve an emotional component, pro se litigants who seek revenge are unlikely to be happy with the limited results that the legal system provides and even unhappier with "unbundled" services. Their disappointment may lead to a resentment, which (in turn) may lead to difficulties collecting your fee or complaints about your services.
7. **Identify those with a history of domestic violence seeking "unbundled" help in cases involving the batterer** - Survivors of domestic violence face special issues when considering self-representation. The power inequities and intimidation present in an abusive situation must be considered. They may raise serious questions about her/his ability to maintain balance necessary to pursue an action against the batterer. On the other hand, coaching the domestic violence survivor to successfully confront the batterer for the first time may be the best service you can render. The client may not be seeking unbundled services solely for financial reasons; they may be looking specifically for someone who can give them the tools to successfully enforce their own rights. Discuss these issues openly with the client. Work with the prospective client to identify possible free sources of legal assistance or ways in which your full representation fees might be met, if pro bono is not an option.
8. **Be wary of glossing over the fee structure and its relation to services** - If during your initial interview, you find that the prospective client is reluctant to discuss or agree on fees, be cautious. It is critical that the client understands that "unbundled" services not only limit your fees but that it also limits the services. If anything, your fee arrangement must be clearer in unbundled relationships than in full service, since there is a greater likelihood of a misunderstanding about what services you have agreed to perform and the client has agreed to pay for. In the event of a dispute, your efforts to collect unpaid legal fees can be a catalyst for malpractice claims.

After you take the case

9. **Develop and use an intake form** that lists the key issues and allows room to insert unusual ones and give a completed copy to the client. It is a contemporaneous record which documents your file, reminds you to ask about related issues, memorializes the limitations on scope, and educates the client.
10. **Use checklists** to note who is going to do what before the next meeting and give a copy to the client.
11. **Use a clear retainer agreement detailing the scope of representation** - good limited services retainer agreement will spell out exactly what you are doing for the client and what responsibilities the client will take on. There should be no confusion about the scope of the representation. It is equally or more important to document what you are not doing as to document what you are. Look at the www.unbundledlaw.org website for sample retainer agreements.

12. **Inexperienced practitioners may wish to review their initial analysis with more experienced colleagues** - As noted earlier, limited experience handling cases such as the one presented by an "unbundled" client poses special challenges for newer attorneys or those new to a particular practice area. An experienced practitioner can validate your analysis, suggest additional issues to explore or offer warnings about a particular proposed course of action.
13. **Practice defensively – document all decisions** – This is good advice in any type of legal work, but in "unbundled" cases, good file documentation and communication with the client are even more important. In an "unbundled" case, it is particularly essential to document instances in which you offer advice on a particular path for the pro se litigant to take, especially if you suspect (or know) that the client may not take your advice.
14. **Be sure to memorialize any changes** in the scope of your representation as it changes. Checklists that attach to the retainer agreement are a simple and reliable way to do this. Be sure that you and the client both sign off on any changes in scope.
15. **Use prepared handouts** to describe unbundling and to provide generalized information on issues that recur, such as division of personal property, severing joint tenancies, or any other commonly occurring event. [They are available online at www.unbundledlaw.org]. Note on your intake sheet which ones you gave to the client and on what date.
16. **Explain the "why"** - Unbundled cases are pursued in partnership with the client. A client who understands the "big picture" and the tradeoffs will not only be more successful in self-representation but also less likely to blame you for perceived inadequate assistance or unwanted outcomes. An explanation of the various forms which unbundled representation may take is available online at www.unbundledlaw.org.
17. **Don't make non-client laypersons part of your "team."** "Unbundling" may create an informal feeling to the attorney-client relationship. But remember this is between you and your client, not you, your client, Aunt Mary, and others the client may want to get involved. Further, allowing third parties to participate may destroy the attorney-client privilege.
18. **Refrain from providing forms with no assistance/review.** Some of the forms which will be required are simply too complicated for a pro se litigant to complete without assistance. Your expert assistance in the completion of these forms is not only a "best practice" but will also reduce any liability.
19. **Do not encourage a pro se client to attempt to handle a matter that is too technical or difficult,** such as preparation of a QDRO. Part of your responsibility as an attorney is to counsel a person *against* such an attempt pro se and to help them understand the cost/benefit analysis of using their litigation budget wisely. Also, do not encourage a pro se litigant who may not be able to handle the issue because of language barriers, mental illness and the like. It may be the simplest issue in the world, but if the litigant doesn't speak English and there is no interpreter, it won't be successful. This is an individualized assessment. Be creative in your fees or look for other ways to assist the client with the needed representation.
20. **Do not expose a client to possible Rule 11 sanctions** (or the state equivalent). A best practice is to satisfy yourself that the pleading would withstand Rule 11 scrutiny if your name were on it; or if not, at least advise the client about Rule 11.
21. **Be aware of risky advice** such as sending a client to file a domestic violence complaint to get the advantage in a custody or equitable distribution case. While there is no rule against this, it is not encouraged in many jurisdictions. And, while you as an attorney may be able to placate an irate judge, your pro se client is extremely unlikely to be able to do so.

Ending the relationship

- 22. Let the client know when your involvement has ended.** There should be no surprises either to you or the client, and no unstated expectations of continued participation on your part. Send out a notice at the end of your involvement in a matter that involves a series of steps. Notify the client that you believe you have completed your part and advise him/her to get in touch with you immediately if s/he disagrees.

- 23. If you have entered an appearance, let the court know about ending the relationship as well** - Use a substitution of attorney or notice of withdrawal, if available. If it is not available, create one – perhaps attaching your limited retainer agreement. Give notice to the other side. A sample for is available at www.unbundledlaw.org.

Source: This was a joint work product of Ayn Crawley, Maryland Legal Assistance Network, M. **Sue Talia**, private attorney in California, **the Honorable Jane Harper**, Family Court Judge, Mecklenburg, NC.

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Why *should* attorneys consider offering unbundled services?

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The consumer movement is meeting the law in a big way. Just as people are seeking solutions to their problems through the Internet and using other self-help remedies, more and more litigants are looking to lawyers to help them resolve their own legal problems. This can take the form of coaching, ghostwriting, researching on behalf of the client, or, occasionally, even going to court for a limited purpose. Demand is growing, and many lawyers are recognizing the existence of a huge and untapped source of clients.

Contrary to popular assumption, these potential clients are not limited to the indigent. There is a growing middle class market that insists on more control over their legal processes, who see no reason to pay attorneys to serve as gatekeepers to a system which they perceive they can navigate themselves, and who are willing to pay someone to coach them on how to resolve their problems themselves.

There are other market factors at work. Many members of the middle class simply cannot afford to pay for traditional full service representation. In the field of family law, the situation is becoming critical with upwards of eighty percent of domestic relations litigants unrepresented in some jurisdictions. These are not full service clients electing to cut corners: rather, they are an untapped market of potential clients who are currently outside the scope of represented litigants. People with houses, pensions and other property either don't want or can't afford to pay lawyers to handle their entire case in the old ways. They need help, have issues worthy of an attorney's attention, and can afford to pay for necessary legal assistance. They are grateful for the assistance they receive, because they believe the attorneys are not forcing them to accept and pay for services, which they perceive to be unnecessary. There is another factor also at work: they frequently evolve into full service representation. A client who believed the legal system to be as portrayed on television may be dismayed to find, after attending a hearing in pro se, that there is a reason attorneys go to law school, and they really do know something the client doesn't. These people return with a new appreciation for the services that attorneys render.

These cases are not a substitute for traditional full service clients. By definition, since they are not currently represented at all, they are not taking full service business away from attorneys. Forward-thinking attorneys recognize them as an untapped market, and are looking for ways to meet their evolving needs. Courts are likewise looking to attorneys to assist the pro se litigants who need guidance through a foreign and frequently baffling process.

The preceding guidance is designed to assist attorneys in flagging and addressing areas of concern, such as:

- How can I offer these services safely, without running undue risk of exposure?
- How can I weed out the cases and clients who are not suitable for limited service?
- How should I document my file on the limitations of my involvement?
- How do I get out at the end of my agreed services?