State Bar of Michigan
Access to Justice for All Task Force
Service Delivery Subcommittee Work Group B -- Unbundling
Report
April, 2000

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I. EXECUTIVE SUMMARY

The Unbundling Work Group began its assessment process by forming a working definition of unbundling. As used by this group, unbundling is the "provision of discrete legal services or individual legal tasks by an attorney, on behalf of and at the request of a client." This model differs from traditional legal representation, in that an attorney providing unbundled services is *not* ethically bound to handle all matters presented in the course of litigation or other ongoing client representation. Such an arrangement offers clients the ability to control costs and to guide the course and methodology of the case, and offers attorneys protection from uncompensated services and imposed provision of services that they are unable or unwilling to provide for a client. Closely aligned with this concept is self-help litigation, which Work Group F (Self-Help) has studied.

The Work Group gathered and analyzed written materials and oral commentary on unbundling theory and experience, both within and beyond Michigan. The group quickly recognized that the benefits of unbundling are significant for low and moderate-income clients, their attorneys, and the legal system. In addition, the group determined that the benefits of unbundling strongly support the Core Capacities of an Effective Statewide System for Delivering Civil Legal Services to Low-Income Clients in Michigan (hereafter, Core Capacities).

The most obvious benefit of unbundling is enhanced access to the legal system for low and moderate-income clients, both in terms of affordability and the opportunity to obtain limited representation where either the client or attorney chooses not to contract for full representation. Clients also benefit by gaining increased control over the direction of their case, achieving personal empowerment, and realizing heightened *pro se* (also known as pro per and self-help, but called self-help throughout this report except when the term appears in an opinion or rule) successes where an attorney offers ongoing guidance or behind the scenes coaching throughout self-help litigation.

Benefits to the legal system include widening access to those the system is intended to serve, as well as facilitating greater preparation and precision by self-help litigants, which results directly in a reduction of errors in documents and procedures, reduced demands on court personnel, and decreased docket congestion.

Barriers to unbundling include current ethical constraints and potential resistance by bench and bar. To assess whether these barriers were fatal to unbundling in Michigan, the Work Group analyzed Michigan's Court Rules and Rules of Professional Conduct. They then identified court rule changes that would alleviate the most prevalent concerns; namely that unbundling violates the rules of ethics, and commits an attorney to full and continuing representation despite an agreement between the attorney and client that limits representation. The Work Group also noted that not every individual would benefit from unbundling, as unbundling may be inappropriate where client skills are limited or the legal matter is highly complex.

After completing its assessment, the Work Group determined that the benefits of allowing a client to contract for limited representation transcended the potential barriers. The Work Group also concluded that unbundling is an essential element in the effort to expand the availability and access of legal services to low and moderate-income individuals. As such, the Work Group unanimously recommended that the unbundling of legal services be expressly authorized and strongly endorsed in Michigan.

Specifically, the Work Group acknowledged that advice and counsel are currently accepted unbundled services, but observed that limited appearances and representation should be formalized. To formally support the unbundling of legal services in Michigan, the Work Group recommends that:

A. unbundling be promoted to the general public and the bar;

B. Michigan Court Rules 2.114 and 2.117 be modified to allow an attorney and client to enter into an agreement limiting the scope of the attorney's representation to the objectives stated in the agreement;

C. ethical education be provided to attorneys desiring to provide unbundled services; and

D. existing and future lawyer referral and information services (LRIS's) maintain and distribute lists of trained attorneys willing to deliver unbundling services.

II. INTRODUCTION

A. The Charge of the Work Group

The charge of Work Group B is to assure that "subsidized (free or reduced fee) civil legal services are provided to those in greatest need in a quality, comprehensive, and integrated delivery system." Two of the ways Work Group B intends to meet this charge are by promoting the development of innovative methods to deliver quality legal services at affordable prices to more citizens (thus benefiting all groups) and by promoting the availability of the full range of legal services for indigent clients.

The specific charge of Work Group B -- Unbundling is to evaluate whether unbundling, also known as discrete task representation, enhances access to the legal system for those of low or moderate-incomes and, if so, to develop strategies for effectively using unbundling in the delivery system.

B. Types of Unbundling

Unbundling takes many forms and traverses a wide spectrum of services, from telephone advice to litigation coaching, document review, pleading preparation, discovery assistance to limited court appearances. Forrest Mosten, the California attorney who coined the phrase "unbundled legal services," illustrates this vast range in a 17-item, *a la carte* menu of services available to clients. These available services include:

1. legal advice, office visits, telephone calls, fax, writing correspondence, and email;

2. advice about the availability and feasibility of alternative dispute resolution;

3. evaluation of the client's self diagnosis of his/her case, together with advice about the client's legal rights;

4. procedural and other information to guide the filing or serving of documents;

5. review of previously prepared correspondence and court documents;

6. preparation of and/or suggestions on documents to be prepared;

7. factual investigation, including witness contacting, public record searches, and the like;

8. legal research and analysis;

9. discovery--including interrogatories, requests for records, and depositions;

10. planning for negotiations and role playing to prepare the client;

11. planning for client court appearances, including role playing;

12. backup and trouble shooting during trial (if the attorney and client reasonably believe that the client can adequately handle his or her own trial);

13. referrals to other counsel, as well as non-legal experts;

14. counseling the client about an appeal;

15. procedural assistance with an appeal and assistance with substantive legal argumentation in an appeal (if the attorney

reasonably believes that the client can adequately handle the argumentation in his or her own appeal);

16. providing preventative planning or scheduling "legal checkups;"

17. other.[1]

As considered by this Work Group, unbundled legal assistance comprises a similarly wide range of discrete services, specifically including office consultations, drafting assistance, and limited court appearances (where court, counsel and clients are informed of the client's choice of limited representation, and the attorney reasonably believes that the client can adequately represent his or herself in the balance of the case).

C. Statement of the Problem Addressed by Unbundling

As explored more thoroughly by SDS Work Groups B, C, and F, a large segment of the low and moderate-income population needs legal assistance on a yearly basis, yet is unable to access affordable legal services. A 1994 American Bar Association (ABA) study found that 47 percent of low-income households experience at least one civil legal problem per year,[2] and that they average 2.3 legal problems each.[3] Yet, between 61 and 75 percent of these legal needs go unmet.[4] A 1991 ABA study further found that individuals with incomes under $50,000 were much more likely to represent themselves than those with higher incomes.[5] Thus, low and moderate-income individuals with legal needs are likely to either have their needs unmet or attempt to meet them without professional assistance.

Yet, in many ways, this group is the least equipped to muddle unassisted through the justice system. Many do not understand even the most basic workings of the court, and many do not have the communication skills required to present an organized and appropriate recitation of facts to the court.

In addition, illiteracy raises substantial barriers to successful self-representation. In one large adult literacy survey, for example, it was confirmed that a large proportion of individuals then eligible for means tested public assistance (e.g.

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[1] Dianne Molvig, "Unbundling Legal Services," Wisconsin Lawyer, , p. 12, September 1997.

[2] "Report on the Legal Needs of the Low-Income Public," ABA Consortium for Legal Services and the Public, ABA Publication No. 4290018, January 1994.

[3] ABA Legal Needs Study, table 4-1, at 19.

[4] Ibid., table 4-2, at 10.

[5] "1991 ABA Study of Domestic Relations Litigants in the Superior Court of Arizona in Maricopa County" referenced by Gordon Griller, "For the Superior Court of Arizona in Maricopa County Self-Service Center: Policies and Procedures Service Providers Rosters," November 15, 1994.

welfare) were functionally illiterate.[6] Unbundled legal services may provide an affordable way for these individuals to access the system and maximize their successes. Specifically, limited attorney assistance with pleading interpretation, drafting and/or preparation for courtroom presentations may ensure that such clients can adequately present their point of view to the court.

According to Bob James,[7] administrator of the Maricopa Self-Service Center in Phoenix, Arizona, unbundled legal services, coupled with free and easily accessible information explaining court procedures, greatly enhanced *pro se* litigants' ability to maneuver through the system, and also reduced the burden on court employees by approximately 25%. Thus, it made access to the justice system more meaningful, simply by ensuring that litigants knew what procedures were necessary to present their case, and having assistance in determining how to present it clearly.

The same 1991 ABA Study referenced above also found that a substantial percentage of individuals of varying incomes choose to represent themselves, primarily because they wished to maintain greater control over their case than is allowed within the traditional full service model of representation.[8] Unbundling can allow these litigants to safely handle many aspects of their case, while using an attorney, as necessary, for general guidance about legal options, drafting of difficult documents, or handling of complex discovery issues. Consequently, self-help litigants feel empowered. In fact, according the 1991 ABA Study, self-represented people are more likely to be satisfied with the judicial system than those who are represented by attorneys, and almost 75% of those who represented themselves in court said they would do so again.[9]

III. METHODOLOGY

The Unbundling Work Group began by forming a working definition of unbundling as the "provision of discrete legal services or individual legal tasks by an attorney, on behalf of and at the request of a client." The Work Group then researched and analyzed a myriad of written materials, including ABA and various state bars' ethics rules and opinions, state and federal case law, law review commentary, legal news articles, project reports, conference materials and web-site materials.[10]

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[6] "Literacy and Dependency: The Literacy Skills of Welfare Recipients in the United States" was a study mandated by Congress, funded by the National Center for Education Statistics and executed by the Educational Testing Service. Paul E. Barton and Lynn Jenkins, Educational Testing Service, 1995.

[7] Telephone Interview with Bob James, Maricopa County, Arizona, October, 1999.

[8] "1991 ABA Study of Domestic Relations Litigants in the Superior Court of Arizona in Maricopa County" referenced by Gordon Griller, "For the Superior Court of Arizona in Maricopa County Self-Service Center: Policies and Procedures Service Providers Rosters," November 15, 1994.

[9] Ibid.

[10] Literature consistently revealed that one-time and ongoing counsel and advice for clients choosing to

In addition to surveying literature in the field (see bibliography), the Work Group conducted telephonic and/or personal meetings with Will Hornsby of the American Bar Association (ABA), Thomas Byerley, the State Bar of Michigan's Regulation Counsel, Bob James and others from the Maricopa Self-Service Center, Michigan court staff, United Auto Workers' Legal Services Plan staff, and a number of public interest and private bar attorneys.

The Work Group also addressed the legal and ethical questions that have or might arise with unbundling arrangements, and explored the malpractice insurance concerns that might arise in this area. Examination of Michigan's Court Rules and Rules of Professional Conduct, and consultation with State Bar Regulation Counsel Tom Byerley, led the group to propose modification of two court rules to support an attorney's ability to ethically provide unbundled services and to provide for withdrawal after those services are completed.

While gathering and sifting through the above information, this Work Group also conferred with other Work Groups with similar or overlapping interests in unbundling issues, notably Work Group F (Self-Help), Work Group B (Moderate-income) and Work Group G (Information and Referral). All of the above research was done to identify whether unbundling would assure greater access to justice for persons of low and moderate-income needs.

IV. FINDINGS

A. Benefits

This Work Group determined that unbundling was worthy of a favorable recommendation, as the benefits to be derived by low and middle income clients are significant. These benefits include:

1. ability to obtain advice, drafting, limited representation, and other limited assistance from an attorney;

2. affordability;

3. enhanced, meaningful access to the legal system;

4. heightened possibility of success for self-help litigants; and

5. empowerment of clients beyond that which passive recipients of

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represent themselves, drafting assistance with documents and pleadings, and limited appearances of counsel were common methods of unbundling.

legal services may experience.

In addition, the Work Group noted that benefits to the legal system, as a whole, include greater preparation and precision by self-help litigants, resulting directly in a reduction of errors in documents and procedures, reduced demands on court personnel, and decreased docket congestion.

B. Barriers

Barriers noted by the Work Group include:

1. bench and bar concern about the ethics of assisting self-help litigants with pleadings and legal filings, specifically where an attorney "ghost writes" a pleading without disclosing his/her assistance to the court;

2. bench resistance due to concern that self-help litigants would gain an unfair advantage if receiving both behind-the-scenes attorney assistance and greater judicial latitude due to an apparent unrepresented status;

3. private bar resistance if unbundling is perceived as reducing services provided to existing clients, rather than a way to reach new clients who cannot or choose not to hire an attorney for full representation, but who may hire one for discrete services;

4. private bar concern that behind-the-scenes preparation of self-help pleadings would be considered an appearance, thus requiring full-service representation;

5. private bar concern that limited representation may force full representation (i.e. that the court might expect the behind-the-scenes, limited representation lawyer to engage in full-service representation, despite a retainer agreement that expressly limits representation); and

6. quality control issues.

C. Review of Court Rules/Case Law/Ethical Rules and Other Research

The Unbundling Work Group meticulously researched and carefully evaluated all available materials on this topic. The group was particularly interested in ABA and state ethics rules and opinions, state court rules, state and federal case law, and other materials evaluating the experiences of states that have piloted or

institutionalized unbundled legal services.[11] From those writings, it became apparent that there are three basic forms of unbundled services: 1) advice and counsel, 2) limited appearances, and 3) pleading and document preparation.

The following discussion summarizes the research as it relates to each category.

1. Advice and Counsel

The research consistently demonstrated that limiting legal services to advice and counsel is generally non-controversial and does not expressly violate the rules of law or ethics in any jurisdiction. Model Rule of Professional Conduct 1.2(b) specifically provides that "a lawyer may limit the objectives of the representation if the client consents after consultation." As noted in The Law of Lawyering, this rule is premised on the fact that attorney-client relationships are ordinarily based on contract, and that parties may thus mutually agree to limit the scope of representation.[12]

Ethics opinions in several states further clarify this concept as applied to unbundled services. The Arizona Bar Association, for example, held in Opinion No. 91-03 (January 15, 1991) that "an attorney may ethically represent a client on a limited basis, as long as: (1) the client consents after consultation; (2) the scope of the representation is not so limited as to cause the attorney to violate the Ethical Rules or other law; and (3) the attorney does not advise the client to do something that the attorney would be prohibited from doing personally." The Arizona Bar's "Frequently Asked Questions" summarizes this and other ethical rules by noting that "a client is a client; even if the lawyer only meets with the client once. Lawyers still must adhere to the three C's when representing a *pro per* client, just as the lawyer must for a full-service client. Those three C's are: conflicts, confidentiality, and competence." Ethics opinions from Massachusetts,[13] Colorado,[14] and California[15] similarly reinforce this

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[11] These materials were of importance because, while understanding that each jurisdiction has unique circumstances and slightly varying ethical codes, the Work Group wished to benefit as much as possible from the experiences of other states.

[12] Geoffrey C. Hazard, Jr. and W. Willia Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, 2nd ed., Aspen Law & Business.

[13] Mass Bar Ethics Opinion 98-1 specifically provides that "An attorney may provide limited background advice and counseling to pre se litigants."

[14] CBA Ethics Committee Formal Opinion No. 101: Unbundled Legal Services, adopted January 17, 1998, states "The Colorado Rules of Professional Conduct, and especially Rule 1.2, allow unbundled legal services in both litigation and non-litigation matters. A lawyer who provides limited representation must nonetheless make a sufficient inquiry into and analysis of the factual and legal elements of the problem to provide the competent representation required by Rule 1.1."

[15] "Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 483: Limited Representation of In *Pro Per* Litigants," March 1995, states, in summary, that an attorney may limit the

position.

The practice of providing limited advice and counsel is widespread in the practice of law. In the transactional areas of commercial and corporate law, for example, it is common for a corporate client to hire counsel exclusively to review a contract. In such cases, there is no expectation that the lawyer will handle any further aspect of the matter, and further representation would require a new agreement between the client and attorney. Similarly, many criminal appellate and civil law attorneys offer initial case consultations and assessments for a flat fee. Should the client wish to proceed with that attorney, the terms of further representation are negotiated and a new retainer agreement executed.

For these reasons, the Work Group makes a recommendation favoring the expanded use of unbundled services in the area of advice and counsel, without further examination or debate.

2. Limited Court Appearances

Limited court appearances are technically ethical under MRPC 1.2(b), which, as noted above, allows a lawyer to limit the objectives of representation if the client consents after consultation. In practice, however, there exists a *de facto* prohibition against attorney withdrawal after entry of an appearance. In Michigan, this prohibition is found in MCR 2.117(C)(2), which provides that "an attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court." In the opinion of the State Bar of Michigan's Regulation Counsel Thomas Byerley, "this court rule negates the right of a lawyer to file a limited appearance."[16]

Despite the current practical prohibition, the Work Group felt that allowing clients to contract for limited appearances would greatly benefit clients. Appropriate changes to MCR 2.117(C)(2) would be required to avoid any actual or perceived prohibitions.

3. Pleading and Document Preparation

Limiting the scope of legal representation to the preparation of pleadings and other legal documents is widespread, yet somewhat contentious. In Michigan, for example, attorneys commonly limit their assistance to the preparation of documents such as deeds and wills, while organizations such as the UAW Legal Services Plan offer complete pleading preparation in areas conducive to *pro per* litigation, such as family and

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attorney's services by agreement with a *pro per* litigant to consultation on procedures.

[16] Thomas Byerley Memorandum regarding Unbundling of Legal Services, January 12, 1999.

consumer law. Controversy arises, however, when it is perceived that purportedly self-help parties are receiving unfair advantage due to behind-the-scenes pleading and document preparation by an attorney. This dispute is particularly strong where the drafting assistance is undisclosed, a practice sometimes described as “ghost writing,” because many courts offer judicial leniency to truly self-help litigants. As a result, three primary views have evolved regarding pleading and document preparation.

The Work Group thoroughly explored each of these positions through the literature and in discussion. A summary of this analysis follows.

Position One: Drafting assistance, whether reported or undisclosed, is currently ethical and acceptable. Specifically:

a. drafting assistance is not prohibited under the Michigan Rules of Ethics, and no legal precedent addresses the issue;

b. drafting assistance currently occurs on a widespread basis;

c. state practice, most notably in California, has institutionalized unbundling, and has not specifically excluded drafting assistance (See, generally, materials by Forrest Mosten.);

d. state ethics opinions support drafting assistance.

1. Arizona Bar Association Opinion No. 91-03, January 15, 1991: "...we hold that an attorney may ethically represent a client on a limited basis, as long as: 1) the client consents after consultation; 2) the scope of the representation is not so limited as to cause the attorney to violate the Ethical Rules or other law; and 3) the attorney does not advise the client to do something that the attorney would be prohibited from doing personally.” Note, however, that the opinion warns, "Rule 11 may impose a legal requirement on an attorney to disclose his limited representation to the court and to counsel of record for other parties in the action.”

2. Illinois Ethics Opinion 849, December 1983: "It is not improper for an attorney, pursuant to prior agreement with the client, to limit the scope of his representation in a proceeding...to the preparation of pleadings, without appearing or taking any part in the proceeding itself, provided the client is fully informed of the consequences of such agreement, and the attorney takes whatever steps may be necessary to avoid foreseeable prejudice

to the client's rights."

3. Maine Ethics Commission No. 89 (August 31, 1988). Disclosure of attorney assistance with *pro per* pleadings is not required.

4. Alaska Bar Association Ethic Committee No. 93-1 (March 19, 1993). Disclosure of attorney assistance with *pro per* pleadings is not required.

Position Two: Drafting assistance is unethical and/or unacceptable in practice. Further, it is of sufficient significance to the bar and judiciary that a recommendation favoring undisclosed drafting assistance might derail the entire unbundling process. Specifically:

a. federal and state case law (though not precedent) prohibits drafting assistance;

1. Drafting assistance results in a misrepresentation on the court. Johnson v Fremont, 868 F. Supp 1226 (1st Cir 1971): "Having a litigant appear to be *pro se* when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar."

2. Drafting assistance results in an unfair advantage to the *pro se* litigant. Johnson v Fremont, supra.: "...ghost-writing is far more serious than might appear at first blush. It necessarily causes the court to apply the wrong tests in its decisional process and can very well produce unjust results. ... pleadings seemingly drafted *pro se* but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant professional assistance would permeate the proceedings. The *pro se* litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the non-offending party." See also: Laremont-Lopez v Southeastern Tidewater Opportunity Center, 968 F. Supp 1075 (E.D. Va.1977): "However unartfully drafted, *pro se* pleadings are held to less stringent standards than formal pleadings drafted by lawyers.... When, however,

complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se, the indulgence extended to the *pro se* party has the perverse effect of skewing the playing field rather than leveling it. The *pro se* plaintiff enjoys the benefit of legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation on the court."

3. Drafting assistance avoids the strictures of Fed. R. Civ. P. 11(b) (certification of pleadings). Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884 (D. Kan. 1997). Motion to compel disclosure of attorney assistance to ostensibly *pro per* litigant was proper, "where the plaintiff has sought to invoke the leniency of the court when she may not have a right to assert her *pro se* status for that purpose." In addition, "[b]oth the court and the parties... have a legitimate concern that an attorney who substantially participates in a case at least be identified and recognize the possibility that he or she may be required to enter appearance as counsel of record and thereby accept accountability for his or her participation, pursuant to Rule 11 and the rules of professional conduct applicable to attorneys."

b. state ethics opinions prohibit drafting assistance.

1. Mass Bar Ethics Opinion 98-1, January 9, 1998. "An attorney may provide limited background advice and counseling to *pro se* litigants. However, providing more extensive services, such as drafting ("ghostwriting") litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited."

2. ABA Informal Opinion 1414, June 6, 1978: Where a lawyer "assisted a 'pro se' litigant in preparing jury instructions, memoranda of authorities and other documents submitted to the court," the litigant "engaged in a misrepresentation ... by professing to be without representation ... when, in truth, he was receiving active and rather extensive assistance of undisclosed counsel." The opinion further stated: "A lawyer who engages in

such conduct is, in our view, involved in the litigant's misrepresentation contrary to DR 1-102(A)(4) which provides: 'A lawyer shall not: ... (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.'" But note that the opinion also stated: "We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding pro se, or that a lawyer could not, for example, prepare or assist in the preparation of a pleading for a litigant who is otherwise acting pro se."

3. See also opinions infra.

Position Three: Drafting assistance is acceptable if disclosure is made that a document or form was "Prepared by Counsel" or "Prepared by (attorney's name)." Drafting assistance is also acceptable, and no "prepared by" statement is required, where the unbundled services provided are limited to assistance with prepared self-help forms and/or review of client prepared self-help pleadings. Support for this position is found in the following.

a. Kansas Ethics Opinion KBA E-363: "...opinions from other states hold that the preparation of a pleading, other than a previously prepared form devised specifically for use by *pro se* litigants, constitutes substantial assistance that must be disclosed to the Court and adversary. Some opinions suggest that it is sufficient that the pleading bear the designation 'Prepared by Counsel.' However, the better and majority view appears to be that counsel's name should appear somewhere on the pleading, although counsel is limiting his or her assistance to the preparation of the pleadings." The opinion further specifies that "...the inclusion of forms for use by *pro se* litigants in a handbook intended for distribution to laymen has not been viewed as the practice of law or as active and substantial assistance implicating any of the above considerations."

b. Kentucky Bar Association Opinion E-353 (January, 1991), requires inclusion of lawyer's name, but not their signature, on pleadings prepared by an attorney but filed *pro se*.

c. Iowa State Bar Association Opinion 96-31 (1997), allows attorney preparation of *pro per* pleadings, if the court is informed of the attorney's name.

d. N.Y. City Bar Association Opinion 1987-2 (1987), requires

attorney drafted pleadings to state that they were "Prepared by Counsel," but does not require that the attorneys name be listed.

e. New York State Ethics Opinion 613 (1990), allows attorney preparation of *pro per* pleadings, provided that court is informed of the name of the attorney.

f. Finally, Tom Byerley reported during to the Work Group at its January 11, 1999, meeting that the ABA is looking at ethics rules, and will be proposing a new set to become effective in the year 2000 (called Ethics 2000). One of the rules to be proposed addresses *pro se* litigants assisted by an attorney, and will apparently require disclosure of that fact to the court.

In sum, all of the arguments against drafting assistance could be eliminated by stating on the bottom of a self-help pleading that it was "prepared by" a named attorney. This practice is already common in Michigan, as practitioners routinely record that estate planning and bankruptcy documents were "prepared by [attorney name]." In the alternative, a statement that a pleading was "prepared with assistance of counsel" would alert the court to the assistance of an attorney while avoiding the need to name a specific attorney.

In addition, court rule changes could protect attorneys from the dangers of "signature certification" for documents drafted in a self-help case,[17] as well as from court ordered representation in a case, where their representation was limited to drafting assistance.

Drafting Assistance Conclusion: With the above positions before them, the Unbundling Work Group determined that low and moderate-income clients in Michigan would be best served by authorizing a system where full disclosure of attorney preparation is required. The group also agreed that it is preferable to require a statement in the form of "Prepared by (attorney's name)," rather than simply stating that the form was "Prepared by an attorney." Finally, the group agreed that attorney assistance with previously prepared self-help forms and/or review of client prepared *pro per* pleadings should be excluded from the "prepared by" disclosure statement on the document.

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[17] MCR 2.114(D) provides that "the signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

V. IMPLEMENTATION STEPS

While an argument can be made that certain forms of unbundling are already ethical and acceptable, legitimate concerns of the bench and bar effectively preclude widespread provision of discrete task representation under Michigan's current court rules. Thus, to legitimize and encourage unbundled services, the following steps should be taken in an effort to encourage a court rule change and promote unbundling.

A. Promote Unbundling

The ATJ staff should work to promote unbundling, and should specifically disseminate this Work Group report to:

1. ATJ Task Force members and Bar leadership throughout the state including all section officers;

2. the Michigan Supreme Court, the Judicial Association, and the State Court Administrative Office (SCAO);

3. every legal services program in the state -- regardless of the program's funding source; and

4. the Representative Assembly and the Board of Commissioners, with proper notification to State Bar sections and committees as appropriate.

B. Modify Michigan Court Rules 2.114(C) and 2.117

After appropriate approvals have been received (from the Representative Assembly, the Board of Commissioners, or other appropriate bodies), the State Bar should submit a formal request for Michigan Court Rules changes to the State Court Administrative Office. The State Bar's Executive Director and ATJ staff should follow up and monitor the status the requested rules changes. Specifically:

1. MCR 2.114(C) should be modified by adding a new subsection (subsection (C)(3)), which would read as follows:

"If a pleading, including a form, has been prepared by an attorney, law firm, or legal services agency which has not appeared formally in the case, the pleading shall indicate the name of the attorney, law firm, or legal services agency that prepared the pleading or form. Such full disclosure does <u>not</u> constitute an appearance by the attorney in the proceedings."

2. MCR 2.117 should be modified by adding a new subsection (subsection (D)), which would read as follows:

"An attorney may, upon written agreement with the attorney's client, enter an appearance limited in objectives and means. The attorney who has filed a limited appearance may withdraw from the action when the client's limited objectives, as set forth in the appearance, have been reached."

This recommendation would not permit an attorney to "withdraw at will" from a court case. Rather, it would require that the attorney: 1) execute a retainer agreement limiting the scope of representation by establishing specific objectives and the means to be employed in achieving those objectives, and 2) withdraw only after achieving the named objectives.

C. Support Unbundling

To encourage widespread public acceptance and support of unbundling, and to support the responsible provision of unbundled services, the Work Group recommends that the State Bar of Michigan:

1. provide free ethical training to attorneys who wish to provide unbundled legal services;

2. provide model retainer agreements to attorneys who wish to provide unbundled legal services;

3. promote in legal (and later general) media how unbundling has been accepted and resulted in benefit to attorneys and individuals in other states; and

4. work with the State Bar of Michigan Lawyer Referral Services' Prepaid Committee and all LRIS's to establish unbundled panels.

VI. RELATIONSHIP OF THIS REPORT TO THE GOAL GROUP REPORT AND MICHIGAN PLAN

In 1995, a Comprehensive Plan for Legal Services in Michigan (the Michigan Plan), was developed. This Plan contained specific recommendations concerning delivery of legal services to low-income legal consumers in Michigan.

In 1996, the State Bar Board of Commissioners undertook a long range planning process for the Bar. The State Bar's Long-Range Planning Committee formed ten "goal groups" to set substantive goals for the State Bar and to prioritize its work areas. One

of the Goal Groups focused exclusively on "Access to Justice for All." The report of that Goal Group was incorporated into the State Bar's final long-range plan and was adopted by its Board of Commissioners in July of 1997. The State Bar Goal Group Report (GGR) contains seven objectives and numerous strategies across a wide range of access to justice issues.

The Unbundling Work Group Report follows the charge of Work Group B by looking at one potential tool to use as part of a range of legal services that might be made available to low and moderate-income people. The promotion and development of unbundled legal services would likely help meet Objective F under Goal Group V, the access to justice for all goal, since Objective F says “Legal self-help and law-related assistance by non-lawyers is maximized within the bounds of the concerns of the profession and the public.“ With unbundled legal services, more people will be able to attend to their own matters after getting the sort of boost or direction they need through meetings with attorneys. Since unbundling of legal services could apply to legal aid programs and *pro bono* as well as private attorney/client relationships, objective B: “Subsidized (free or reduced fee) civil legal services are provided to those in greatest need in a quality, comprehensive, and integrated delivery system” is touched upon as is objective C: “The profession maximizes the amount of civil legal services provided *pro bono* to those in need.”

VII. RELATIONSHIP TO THE CORE CAPACITIES

SDS Work Group A created a document entitled "Core Capacities of an Effective Statewide System for Delivering Civil Legal Services to low-income clients in Michigan" (Core Capacities). The purpose of this document is to provide the hallmarks of a truly comprehensive system of service delivery that will meet the needs of all low and moderate-income legal consumers. The intent and purposes of the Core Capacities, as encapsulated below, are reflected in the recommendations of this workgroup.

A. Client Access to Information and Services

Unbundling will efficiently and effectively expand meaningful access to low and moderate-income legal consumers. Specifically:

1. unbundling expands access to the legal system by establishing a non-traditional forum in which clients may seek services to address specific legal problems and needs. Information and referrals related to this new option will be readily available to clients via unbundled services attorney panels, established by the State Bar of Michigan Lawyer Referral Services’ Prepaid Committee and all LRIS’s (see Implementation Steps);

2. unbundling encourages clients who could not afford or would not choose traditional representation to seek out and obtain legal services to address specific legal needs;

3. unbundling will not erect barriers to any unique group within the general population of low and moderate-income legal consumers, and will offer expanded options to clients facing barriers from other forms of legal assistance; and

4. unbundling, by providing expanded client options and offering greater flexibility, allows clients to seek and receive services in community appropriate ways.

B. A Full Range of Client-Centered Services

Unbundling is especially consistent with the second of the core capacities.

1. Unbundling directly increases client access to legal and non-legal information and services. Specifically, provision of appropriate unbundled legal services is dependent on full disclosure of options and outcomes, thus ensuring that clients receive the full range of information necessary to make wise case management and/or litigation decisions before plotting their course of action.

2. Unbundling makes a full range of client-centered services accessible to low and moderate-income clients, by offering an economically viable and personally empowering means of effectuating strategic decisions.

3. Unbundling allows clients of limited means to minimize costs by handling portions of their own legal matters, thus allowing them maximize resources to obtain high quality, effective legal assistance on matters beyond their comfort or capacity. This, in turn, heightens the possibility of success for pro se litigants.

C. Coordinated and Integrated Services

Unbundling enhances coordinated and integrated services by contributing to the provision of the full continuum of legal service options. In addition, modification of the Michigan Court Rules will require the coordination and support of the extended legal community, and widespread recognition and promotion of unbundling will work to highlight the particular needs of low and moderate-income individuals in the legal system. Finally, the ethical training and materials offered to unbundled service providers will work to ensure that clients receive

high quality and effective services.

VIII. RELATIONSHIP OF THIS REPORT TO OTHER SDS WORK GROUPS

This Work Group recognized that unbundling was simply one of many mechanisms that would strengthen or broaden service delivery to those of low or moderate-incomes. Other Work Groups closely akin to this are the Moderate-income and Hotline Work Groups (Sub Groups of Work Group B), the *Pro Bono* Work Group (Work Group C), the Self-Help Work Group (Work Group F), and to some extent, the Information and Referral Work Group (Work Group G).

The work of the Unbundling Work Group relates to Work Group C in that if legal work were unbundled, *pro bono* attorneys would be able to provide limited representation. This is consistent with Work Group C's recommendation to have a range of *pro bono* opportunities available to attract as many volunteers as possible. Also, low and moderate-income litigants might be able to represent themselves for much of the legal issue, requiring the assistance of a *pro bono* attorneys unbundled services for only a small portion of the legal issue, thereby allowing the *pro bono* attorney to assist more individuals in need of help.

The work of the Unbundling Work Group relates to work of the Moderate-income Work Group and Work Group F, in that it specifically addresses ways that self-help litigants can more effectively represent themselves. Statistics have shown that many self-help litigants are moderate-income legal consumers (see above discussion of the 1991 ABA Study).

Work Group F recommends that:

> The Access to Justice Department of the State Bar of Michigan, in cooperation with the State Court Administrative Office, Legal Services Association of Michigan, and Michigan Judicial Institute should convene a state level task force that includes key stake holders to … consider, and if appropriate, recommend changes in the Rules of Professional Conduct that would support an attorney's ability to provide discrete or so-called "unbundled" services to self-help litigants in a manner that does not violate the rules of ethics, or commit the lawyer to on going representation, e.g. to help the clients draft a complaint or answer or motion. If such assistance is currently prohibited by any rules, there should be an investigation and recommendation as to whether rules should be modified to permit such assistance under specified circumstances.

In fact, the Unbundling Work Group's recommendations provide wording to implement the changes Work Group F recommends.

The charge of Work Group G is to address ways that legal consumers can find out

about legal rights and options long before they actually make a choice to litigate. It addresses the great need that low and moderate-income individuals, indeed all individuals, have for legal information in their day to day lives. The ability of a legal consumer to discuss legal rights and options with an attorney on an unbundled basis is one element of the elaborate web of informational services required to address the needs of low and moderate-income legal consumers.

Finally, the Unbundling Work Group's Report correlates with the charge of the Hotline Work Group in that advice, assistance, and referral to an attorney that provides unbundled services would increase the efficient and effective delivery of services.

In anticipation of continued state planning and coordination, the Unbundling Sub Work Group asserts that:

A. the state survey results are consistent with the needs addressed by this Work Group, and therefore do not necessitate changes to this report;

B. this report addresses the issues identified in the regional planning meetings, and thus does not require modification in light of those issues;

C. additional research on this topic does not need to continue past the SDS process, as an exhaustive survey of materials and experts was completed to assess the benefits and detriments of unbundled services; and

D. implementation of the recommendations in this report should be managed by the State Bar of Michigan and State Bar Access to Justice staff. (Please see the Implementation section, above, for details.)

IX. CONCLUSION

Greater bar and judicial acceptance of the concept of the delivery of unbundled services, while at the same time assuring appropriate disclosure of the attorney's role, is in the interest client’s of limited means and in the interests of the legal profession.

The delivery of unbundled legal services, including the preparation of forms and pleadings, is a legitimate and worthwhile objective in assisting the low and moderate-income client in seeking legal redress. Several states allow attorneys to ethically limit representation in a manner similar to what the Work Group proposes -- including Arizona, Iowa, Kentucky, New York, California, and Kansas. MPRC Rule 1.2 (b) presently permits the client and the lawyer to enter an agreement limiting the objectives and means of representation. Modification of MCR 2.114 and 2.117 will provide support for attorneys seeking to provide unbundled services and guidance in how to provide those services to the low and moderate-income client.

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