

UNBUNDLED LEGAL SERVICES IN LITIGATED MATTERS IN NEW YORK STATE:
A Proposal To Test the Efficacy through Law School Clinics

Rochelle Klempner

“It is a sad reality that the poor are often left to fend for themselves in New York’s challenging legal arena because they cannot afford to hire a lawyer.”

–Chief Judge Judith S. Kaye¹

The lack of legal representation for New York’s poor in civil matters is reaching epidemic proportions.² A study by the New York State Bar Association reported that each of New York’s poor households experiences an average of 2.37 unmet civil legal needs annually, a total of approximately 2.5 million legal problems for which no lawyer is available.³ For many New Yorkers, timely legal help could help save their marriages, their children, their homes, and their jobs. Sadly, this urgent need for representation simply is not being met by our legal services programs or the private bar.

¹Press Release, New York State Unified Court System, Creation of Statewide System Called For to Boost Numbers of New York Attorneys Providing Free Legal Services for the Poor (January 15, 2004), <http://nycourts.gov/press/index.shtml>.

²Chief Judge Judith S. Kaye, Press Release, New York State Unified Court System, Creation of Statewide System Called For to Boost Numbers of New York Attorneys Providing Free Legal Services for the Poor (January 15, 2004), <http://nycourts.gov/press/index.shtml>.

³Unified Court System, The Future of Pro Bono in New York Volume II: Report and Recommendations from the New York State Unified Court System’s Pro Bono Convocations, iii (2004), http://nycourts.gov/reports/probono/proBono_Vol2_report.pdf. The middle class does not fare much better. The unmet legal needs of our poor and middle class is a nationwide problem with estimates that fewer than three in ten of the legal problems of low-income households are brought to the justice system and only four in ten for moderate income households. See Roy W. Reese & Carolyn A. Eldred, American Bar Ass’n, Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study 22 (1994).

As a solution, civil justice leaders continually call for more free legal aid and more *pro bono* full representation by lawyers. However, it is unrealistic to expect any substantial change in the ability of our already overburdened legal service programs and lawyer volunteers to provide full-service legal representation to the many New Yorkers who cannot afford the fees typically charged by lawyers for a full-service representation. Government budgets for legal services will never be increased enough to meet the ever rising need. It is this reality that calls for examination of non-traditional models of legal representation that might make the justice system available to those who cannot now effectively use it. One such alternative model is known as “unbundled legal services.”

This paper examines the use of “unbundled legal services” as a means to alleviate the unmet legal needs of poor New Yorkers and specifically, its value and application in a law school clinical setting. Part I provides a brief overview of unbundling initiatives around the country, and analyzes the controversy surrounding implementation of unbundling in New York State, primarily the use of unbundled legal services in litigated matters. Part II of this paper examines the value and potential of unbundling in a law school clinical setting as a means to test the efficacy of this alternative representation, and suggests two projects in family and landlord-tenant law.

PART I. Unbundled Representation in New York

Unbundled legal services, also described as “discrete task representation” or “limited scope legal assistance,” 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. Simply put, the lawyer performs only the agreed upon tasks, rather than the whole “bundle,” and the client performs the remaining tasks on his or her own. Unbundled services can take countless

forms, including providing advice and information, “coaching,” drafting court papers, and making limited court appearances.⁴

Some observers note that this type of service has always been part of the practice of law, although usually in the context of a relationship with an existing client.⁵ Outside the courtroom, unbundled legal services are commonplace, as a client may seek a lawyer’s advice before negotiating an agreement, or ask a lawyer to draft a document based upon an agreement reached without the lawyer’s assistance, or bring an agreement prepared by an opposing counsel to the lawyer for review. In each of these scenarios the lawyer performs a discrete legal task instead of handling the entire matter. The concept is far less established and common in the litigation context.⁶

Over the past five years, limited task representation has flourished across the nation with the expansion of all types of unbundled legal services through vehicles such as *pro se* clinics, community education programs, telephone advice and referral services, Internet education and

⁴Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 Fam. L.Q. 421, 422-23 (1994). 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. Mr. Mosten is credited with coining the term “unbundled legal services.” 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.

⁵Mary Helen McNeal, *Unbundling and Law School Clinics: Where’s the Pedagogy?*, 7 Clinical L. Rev. 341, 353 (2001).

⁶Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, 29 COLO. Law 5, 6 (2000).

self-help materials, and *pro se* assistance at courthouses.⁷ In access to justice circles, unbundled legal services has received a significant amount of national attention. The recommendations resulting from the Maryland Legal Assistance Network's (MLAN) October 2000 national conference on unbundled legal services have served as a roadmap for reforms and the expansion of unbundling across the country.⁸ The MLAN conference entitled, "The Changing Face of Legal Practice: A National Conference on 'Unbundled Legal Services,'" was designed as a beginning step in the nationalization of unbundling policy considerations.⁹ The conference was attended by representatives from 34 states, the District of Columbia, Canada and Russia, as well as 67 presenters.¹⁰ The recommendations can be found on the MLAN's impressive website, which serves as a national forum for ongoing discussion of unbundled legal services.¹¹

In February 2002, the American Bar Association (ABA) adopted amendments to the Model Rules of Professional Conduct providing for limited scope representation if the limitation is reasonable and the client gives informed consent.¹² The model rules also contain provisions for special treatment of conflict of interest rules for unbundled representation by nonprofit and court-

⁷For example, you can talk to a lawyer for a fee of \$34.95 with no time limit on the call. See http://legaladvice.com/question_phone.htm (last visited March 23, 2005). No formal studies document the frequency, prevalence, distribution and growth of unbundled legal services.

⁸<http://www.unbundledlaw.org/background.htm>.

⁹Forrest S. Mosten, *Guest Editorial Notes*, 40 *Fam. Ct. Rev.* 10, 11 (2002).

¹⁰<http://www.unbundledlaw.org>.

¹¹<http://www.unbundledlaw.org/Recommendations/confrecs.htm>. The recommendations are grouped into four categories: (a) the legal services delivery system, (b) the courts, (c) organized private bar, and, (d) the state legislatures.

¹²ABA Model Rules of Professional Conduct, Rule 1.2(c).

annexed limited legal service programs.¹³ That same year, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA)'s Joint Task Force on Pro Se Litigation passed Resolution 31, advocating for increased use of unbundled legal services.¹⁴

In October 2003, the American Bar Association's Litigation Section Modest Means Task Force published "The Handbook on Limited Scope Legal Assistance."¹⁵ The 155 page report provides direction for both policy-makers and practitioners. It includes case studies of lawyers providing limited assistance as part of their practices, methods to maximize client services and an analysis of the applicable ethics issues. An extensive appendix includes state rules, checklists and sample client agreement forms.¹⁶

Individual states throughout the country have adopted rules to encourage unbundling by resolving issues that arise under ethical and procedural rules which were drafted with only the traditional full service representation model in mind. At present, at least 13 states have adopted unbundling rules,¹⁷ and proposals to adopt unbundling rules are pending in several additional states. Numerous states are studying the issues.¹⁸

¹³ABA Model Rules of Professional Conduct, Rule 6.5.

¹⁴Resolution 31, CCJ/COSCA Joint Task Force on Pro Se Litigation, Rockport, Maine, August 1, 2002.

¹⁵American Bar Association, Section on Litigation, *Handbook on Limited Scope Legal Assistance*, available at <http://www.abanet.org/litigation/taskforces/modest/home.html> [hereinafter Handbook].

¹⁶*Id.*

¹⁷California, Colorado, Delaware, Florida, Maine, Nevada, New Mexico, North Carolina, Tennessee, Utah, Vermont, Washington, and Wyoming.

¹⁸See <http://www.unbundledlaw.org/States/states.htm>.

To date, New York has neither adopted nor proposed any changes to its Disciplinary Rules or Civil Practice Laws and Rules. However, New York has given unbundling a much closer look.¹⁹ In September 2001, Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton, hosted the first New York State Access to Justice Conference focusing on how to increase *pro bono* in New York, which included an unbundling workshop.²⁰ Building on the progress made at the Access to Justice Conference, the Unified Court System once again examined unbundling when it hosted four *Pro Bono* Convocations around the State in 2002.²¹ The Convocations were designed to bring together the judiciary, bar associations, private attorneys and law schools to brainstorm issues and develop tangible, feasible ideas and strategies for expanding *pro bono* service in New York.

In January 2004, the Unified Court System issued a two-volume report on the “Future of Pro Bono in New York.”²² Volume II summarizes the Convocations and their findings.²³ The

¹⁹Five years ago, unbundling was in a relatively early stage of development in New York State, despite nationwide attention in access to justice circles. In a statewide survey of New York judges, approximately seventy-five percent of those responding were unfamiliar with unbundled legal services. See *Judicial Survey: Unbundled Legal Services* (July-Aug. 2001) (on file with the author in the Civil Court of the City of New York); Fern Fisher-Brandveen, Rochelle Klempner, *Unbundled Legal Services in New York State: Untying the Bundle*, 29 *Fordham Urb. L.J.* 1107, 1110-11 (2002).

²⁰See <http://www.atjsupport.org/DMS/Documents/1001012428.49/AccessToJustice.pdf> (last visited March 31, 2005).

²¹The Convocations took place in Albany, Buffalo, Geneva and New York City.

²²Unified Court System, *The Future of Pro Bono in New York Volumes I & II* (2004) <http://www.nycourts.gov/reports/probono/>. The two-volume report was compiled by the Office of the Deputy Chief Administrative Judge for Justice Initiatives, and consists of a survey of 2002 *pro bono* activity in New York and recommendations for increasing *pro bono* that emerged from four *Pro Bono* Convocations.

²³The Future of Pro Bono in New York Volume II, *supra* note 3.

report states that many participants exploring the role of unbundled legal services were concerned that the negatives of unbundling outweighed the positives.²⁴ There was greater concern as to whether unbundling was appropriate in litigated matters.²⁵ Overall, the report finds that unbundled legal services can be beneficial in promoting *pro bono* service by attorneys. However, since there were so many unreconciled viewpoints throughout the state, the report does not recommend implementation of rule changes allowing for limited appearances by attorneys in court proceedings without further analysis.²⁶ One recommendation of the Convocations was that pilot projects should test the efficacy of unbundling as a way to increase *pro bono* service.²⁷

In its response to the Unified Court System report, the New York County Lawyers' Association (NYCLA) referred to the implementation of unbundled legal services in litigated matters as "highly controversial."²⁸ NYCLA agreed that pilot projects would be a useful approach and urged the Unified Court System to proceed with caution in developing programs.

In February 2003, the New York State Bar Association Commission on Providing Access to Legal Services for Middle Income Consumers published its Final Report and Recommendations on "Unbundled" Legal Services. As to non-litigated matters, the report found that unbundled legal services already occurs regularly and is already permitted by the Code of Professional

²⁴*Id.* at 20-22.

²⁵*Id.* at 21.

²⁶*Id.* at 29. The report recommends that a statewide Standing Committee be formed which should look into whether new rules or rule changes should be adopted.

²⁷*Id.*

²⁸N.Y. Co. Lawyers' Ass'n, Statement in Response to the New York State Unified Court System Report: "The Future of Pro Bono in New York State," adopted by the Executive Committee on March 29, 2004.

Responsibility.²⁹ However, as to litigated matters, the report recommended that limited appearances not be permitted, despite acknowledging that this would in effect bar the practice in a large amount of cases where such unbundling would be helpful.³⁰ Mindful of the Unified Court System’s interest in unbundled legal services, the Commission recommended that the NYSBA support use of a limited appearance by specific court-annexed or non-profit legal services programs that are structured to accommodate an appearance limited in tasks and objectives.³¹ The report further recommended that lawyers be permitted to draft court documents to assist a self-represented litigants, provided that there is full disclosure of the identity of the attorney.³²

Thus, many in New York agree that unbundled legal services is a sound mechanism to provide poor clients with greater access to the justice system. However, there is concern that unbundled legal services may not be appropriate in litigated matters. The debate surrounding widespread use of unbundled legal services in litigated matters focuses primarily on whether or not attorneys should be permitted to make limited court appearances, and under what conditions attorneys may draft court documents, on behalf of otherwise self-represented litigants. There are

²⁹N.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 Final Report and Recommendations on “Unbundled” Legal Services (2003), 9-12 [hereinafter State Bar Final Report]. The Committee recommended that a new ethical consideration be added to the Code to make this clear.

³⁰*Id.*

³¹*Id.* at 8. The Commission also considered, but rejected, recommending a pilot program under a Uniform Rule that might authorize a limited appearance in certain kinds of cases, including landlord-tenant and domestic relations. *Id.* at 7.

³²*Id.* The report also recommended that special conflict of interest rules should apply in non-profit or court annexed legal services programs, and that a clear limited engagement agreement should protect a lawyer from malpractice under a standard professional liability policy.

significant procedural, ethical and administrative issues to consider.

Anonymous Drafting of Court Documents

The practice whereby attorneys draft court documents for clients who represent themselves in court, where the court papers do not reveal that an attorney assisted in their preparation, is known as “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. Critics of ghostwriting argue that it violates ethical responsibilities, constitutes fraud upon the court, and breaches various rule requirements.

Perhaps the largest concern surrounding ghostwriting is the potential for breaches of rules of professional and ethical conduct; including, the duty of candor toward the court, the duty of fairness to the opposing party, the duty of competent representation, and the duty to avoid bringing non-meritorious claims.³³ 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.³⁴ An attorney is thus held to ethical prohibitions against dishonesty, fraud, deceit and misrepresentation. In a 1978 informal opinion, The American Bar Association Standing Committee on Ethics and Professional Responsibility found that an undisclosed lawyer who gives advice to, or prepares a pleading for a *pro se* litigant does not violate any of the former

³³See Jona Goldschmidt, *In Defense of Ghostwriting*, 29 Fordham Urb. J.J. 1145, 1159-69 (2002); John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 Fordham L. Rev. 2687, 2689 (1999).

³⁴Committee on Prof'l Ethics, N.Y. State Bar Ass'n, Opinion 613 (1990) [hereinafter State Bar Opinion]; Charles F. Luce, Jr., *Unbundled Legal Services: Can the Unseen hand be Sanctioned?* (1988), at <http://www.mgovg.com/ethics/ghostwr1.htm>.

Canons of Ethics.³⁵ However, an undisclosed lawyer who renders active and extensive assistance to a *pro se* litigant is effectively becoming a participant in the litigant's misrepresentation contrary to the former Model Code of Professional Responsibility DR 1-102(A) (4).³⁶ The determination of the propriety of the undisclosed lawyer's actions depends on the facts and the extent of the lawyer's participation. Regardless, undisclosed "substantial professional assistance is improper."³⁷

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.³⁸ *Pro se* pleadings are generally held to a less stringent standard than formal pleadings drafted by lawyers.³⁹ 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.⁴⁰ Indeed, in a 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.⁴¹ *Pro se* litigants are often

³⁵ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978). *See also* State Bar Opinion, *supra* note 34, which 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.

³⁶*Id.* DR 1-102(A) (4) provides that a lawyer shall not, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

³⁷*Id.* This opinion involved an attorney who not only drafted a client's pleading, but also sat in during the trial and rendered advice throughout the litigation.

³⁸Luce, Jr., *supra* note 34.

³⁹*Haines v. Kerner*, 404 U.S. 519, 520 (1972).

⁴⁰*Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997).

⁴¹Judicial Survey, *supra* note 19.

granted wide leeway to state a cause of action or 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.⁴² As one Colorado district court judge found, ghostwriting is “ipso facto lacking in candor,”⁴³ and it “causes the court to apply the wrong tests in its decisional process,” leaving the opposing party at a distinct disadvantage.⁴⁴

New York has addressed the issue of ghostwriting in two ethics opinions. 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.⁴⁵ As a solution, the opinion suggests that the ghostwriting attorney endorse the pleading with the words, “Prepared by Counsel, but the attorney need not disclose his or her identity.”⁴⁶ No disclosure is required if the attorney only provided some legal advice and did not draft any court papers.⁴⁷ The New York State Bar Association Committee on Professional Ethics issued an opinion on ghostwriting in 1990, which also holds that the preparation of a pleading, even a simple one, for a *pro se* litigant requires disclosure of the lawyer's participation.⁴⁸

⁴²*Laremont-Lopez*, 968 F. Supp. at 1078; Rothermich, *supra* note , at 2699.

⁴³*Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

⁴⁴*Johnson*, 868 F. Supp. at 1231.

⁴⁵Committee 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].

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸State Bar Opinion, *supra* note 34.

However, unlike the City Bar, the New York State Bar opinion requires the disclosure of the ghostwriting attorney's identity.⁴⁹ Disclosing legal assistance prevents misrepresentation and ensures fairness to opposing counsel and candor to the court.⁵⁰

Not all jurisdictions agree with New York's concerns that anonymous assistance defrauds the court and leads to special treatment for the litigant.⁵¹ For example, in an Alaska Bar Association Ethics Opinion, the Ethics Committee reflected that arguments concerning preferential treatment may not be well-founded since judges are usually able to discern when a *pro se* litigant received assistance in preparing court documents.⁵² Similarly, in July 2003, California adopted a rule specifically allowing an attorney providing ghostwriting services in family law to not disclose his or her involvement in the production of court papers.⁵³ This decision was based on a report by the State Bar of California which stated that California's family law facilitators, domestic violence advocates, family law clinics, law school clinics, and other programs and private attorneys serving low-income persons regularly draft pleadings on behalf of litigants. The report stated that family law courts have allowed ghostwriting for many years and found that judges reported that it is generally possible to determine from the appearance of a pleading

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*See e.g.* Judicial Council of California, Report on Limited Legal Assistance With Recommendations for California, *at* http://www.unbundledlaw.org/States/Limited_scope_report.htm [hereinafter California Report].

⁵²Alaska Bar Association Ethics Opinion 93-1, "Preparation of a Client's Legal Pleadings in a Civil Action Without Filing An entry of Appearance," (May 25, 1993) <http://www.alaskabar.org/index.cfm?ID=4828>.

⁵³California Rules of Court Rule 5.70, eff. July 1, 2003.

whether an attorney was involved in drafting it.⁵⁴ They also reported that the benefits of having documents prepared by an attorney are substantial.⁵⁵

Another set of arguments against ghostwriting contends that it violates court rules that regulate papers filed with the court. Section 2101(d) of the CPLR, provides that each paper served or filed shall be endorsed with the name, address, and telephone number of the attorney for the party, or if the party does not appear by attorney, the name, address and telephone number of the party. The New York State Bar Association has asserted that this section requires an attorney to fully disclose his or her unbundled assistance if the attorney prepares a pleading and delivers it to a self-represented litigant in a form intended to be submitted directly to the court.⁵⁶

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.⁵⁷ Rule 11 and New York State's equivalent statute, section 130-1.1(a) of the Rules of the Chief Administrator,⁵⁸ provide that an attorney's signature constitutes a certification that the

⁵⁴California Report, *supra* note 51. The report was based upon legal research and discussion as well as by a series of focus groups that included private attorneys, judicial officers, legal services representatives, insurance company representatives, lawyer referral service representatives, litigants, family law facilitators, and legal ethics specialists.

⁵⁵*Id.*

⁵⁶N.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 Report and Recommendations on "Unbundled" Legal Services, (2002).

⁵⁷*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).

⁵⁸N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1(a) (2001).

submitted court papers are not frivolous.⁵⁹ Opponents of ghostwriting contend that an attorney'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.⁶⁰ Who should the court sanction when the complaint proves to be legally or factually frivolous?

Advocates of unbundling argue that ghostwriting does not violate Rule 11.⁶¹ Some contend 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.⁶² Some argue that lawyers should not be subject to certification requirements because it is the self-represented litigant who actually files the pleading.⁶³ What happens when the litigant changes the pleading after leaving the attorney's office? Others assert if a court believes a document is frivolous and wishes to sanction a party, the court can make an inquiry and may compel disclosure of the identity of the ghostwriting attorney.⁶⁴

Another argument against ghostwriting is that it circumvents court rules that regulate entries and withdrawals of appearances.⁶⁵ The question arises whether representation is

⁵⁹Fed. R. Civ. P. 11; N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1(a) (2001); *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989).

⁶⁰Luce, Jr., *supra* note 34.

⁶¹*Id.*; Goldschmidt, *supra* note 33, at 1169-75.

⁶²Luce, Jr., *supra* note 34.

⁶³Handbook, *supra* note 15, at 98.

⁶⁴Luce, Jr., *supra* note 34; Goldschmidt, *supra* note 33, at 1169-75.

⁶⁵See *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (E.D. Va. 1997).

equivalent to an appearance. Most courts require an entry of appearance form be filed when an attorney appears in an action, and most courts prevent an attorney who has entered an appearance from withdrawing from a pending matter without the client's permission or leave of court. 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.⁶⁶ 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."⁶⁷ If 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.⁶⁸

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.⁶⁹ Many courts have not reacted favorably to ghostwriting and have chastised or reprimanded attorneys who have ghostwritten pleadings for *pro se* litigants.⁷⁰ Additionally,

⁶⁶N.Y. C.P.L.R. § 321(b) (McKinney 2001).

⁶⁷*Laremont-Lopez*, 968 F. Supp. at 1079 (citing *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676 (3d Cir. 1986)).

⁶⁸*Id.*

⁶⁹McNeal, *supra* note 5, at 301.

⁷⁰See *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

attorneys may fear that the client might change the pleading between leaving the attorney's office and filing the pleading in court, or worry that they may not be able to verify the accuracy of all the statements in the pleading given the short time available with the client. One author lists eight valid scenarios where an attorney and client may choose to keep their relationship confidential.⁷¹

Lawmakers need to seriously consider these concerns which may discourage attorneys from drafting legal documents for otherwise self-represented litigants.

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").

⁷¹Goldschmidt, *supra* note 33, at 1197-99. "(1) where an attorney is a friend of both the pro se litigant and his divorcing spouse or other adversary in a civil dispute; (2) where the attorney may not want the adverse publicity from public knowledge that he represents a particularly unpopular pro se client; (3) where the pro se client knows that the judge in the case and his ghostwriting attorney do not have a good relationship, and he does not want the disclosure to adversely affect his case; (4) where the attorney who provides ghostwriting services because he is sympathetic to pro se litigants seeks to avoid ostracism for that service by members of his bar association or judges with anti-pro se attitudes; (5) where the attorney wants to assist the pro se client, but does not want to get involved in the matter because opposing counsel is particularly uncivil or a user of hardball tactics that he fears will lengthen the litigation needlessly; (6) where the attorney knows his client will not have the funds to litigate the case fully and he wants to avoid being forced to stay in the case by a judge who may decide that, once he appears, his withdrawal motion should be denied; (7) where the attorney is employed by a private company or non-profit organization and wants to assist a pro se friend in a legal matter, but does not want his employer to know that he is representing the pro se litigant on his own time; or (8) where the attorney may not desire to appear before the assigned judge because of a problem with him in the past, he knows that if he appears and files a notice of substitution of judge the other side will do the same thing, and the third judge may be worse than the first, so--given the client's ability to pay-- ghostwriting and coaching the litigant may be in the client's best interest." The author asserts that the litigant's right of confidentiality may be invoked to object to disclosure, absent cause to reveal the attorney's identity.

Limited Court Appearances

Equally as controversial as ghostwriting are limited court appearances. Critics believe that the ethical concerns regarding competence are greater for unbundled limited appearances in litigated matters.⁷² The attorney agreeing to this type of unbundled representation, has greater difficulty assessing whether his or her representation will be “reasonable under the circumstances” and whether the client has given “informed consent” to the limited representation.⁷³ The competence of the attorney’s participation in the case rests in large part upon the legal work performed by the client, such as, where the attorney argues a motion or serves as trial counsel, and the client has written the motion papers, or conducted the discovery, or investigated the facts. Critics contend that the attorney who consents to this type of arrangement “has made his/her job dependent upon the outcome of the client’s work, with all its baggage.”⁷⁴

In addition to the ethical considerations, there are procedural impediments in New York to limited representation in court. Under CPLR 321(a), “[i]f a party appears by an attorney such party may not act in person in the action except with the consent of the court.” This rule prevents the client from handling parts of the case *pro se*, unless the attorney withdraws or the court issues an order permitting the client to act *pro se* despite being represented by counsel. It is a beneficial rule because the court and opposing counsel know who is in charge of the case and with whom to

⁷²State Bar Final Report *supra* note 29 at Exhibit #2, Letter, Steven M. Critelli, Chair, New York State Bar Association Committee on Civil Practice Law and Rules, January 2, 2002 [hereinafter Critelli letter]; Exhibit #3, Letter, Steven C. Krane, Chair, New York State Bar Association Committee on Standards of Attorney Conduct, December 10, 2001 [hereinafter Krane letter].

⁷³As required by the Model Rules of Conduct. *See supra* note 12.

⁷⁴Citelli Letter *supra* note 72 at 2-3.

deal at any given point in the litigation. Critics are concerned that permitting limited representation court appearances may lead to confusion over communication when both the client and the lawyer are each performing tasks in the litigation. Issues may arise, such as, whom the opposing lawyer should contact and on what matters; to whom and where opposing counsel should send pleadings, correspondence and other notices; and whether the lawyer is authorized to accept service or discuss settlement on behalf of the client. Ethical rules that prohibit communicating with a represented party may be breached.

The New York State Bar Association Committee on Civil Practice Law and Rules found “the prospect of having both counsel and client fading in and out at various stages and for various purposes” to be disconcerting.⁷⁵ The Committee urged that if New York permitted unbundled courtroom representation, “the orderly processing of cases would be extremely difficult, if not impossible.”⁷⁶

On the flip side, proponents of limited court representation contend that unbundled court appearances can lead to more efficient justice. Advocates contend that unbundled court appearances are generally in the best interest of the judiciary, since attorneys are aware of local rules and procedures, rules of evidence, and the scope of legally relevant issues. Counsel can give judges a clear presentation of the case, saving significant court resources, while at the same time providing the key attorney services, such as argument of a motion or trial representation, which are desired by self-represented litigants.

Like ghostwriting, attorneys are often cautious about providing limited court appearances.

⁷⁵Critelli letter *supra* note 72.

⁷⁶*Id.* at 4.

Lawyers fear that the court will not abide by the limitations contained in the retainer agreement. In general, while the court may prefer that an attorney represent a litigant for the entire case, the court's desire for more litigants to be represented in court proceedings can effectively be fulfilled by allowing unbundled legal services.

Clearly, there are serious concerns as to whether and how unbundling should proceed in litigated matters in New York. If New York is to evaluate and resolve the issues regarding the use of unbundled legal services in litigated matters, it must create programs that will evaluate the practice and its impact on case outcomes and client satisfaction, and reveal more about the types of cases in which this kind of assistance might be most useful. Part II of this paper suggests testing the efficacy of unbundled legal services in litigated matters through the use of law school clinics. The focus primarily on New York exploring two court annexed laws school clinical projects which assist otherwise self-represented poor people in domestic relations and landlord-tenant matters, by providing counseling, drafting pleadings, negotiating stipulations and making limited court appearances, where appropriate.

PART II. Unbundled Representation in Law School Clinics

Law school clinical programs enable students to gain practical experience with clients and cases under the supervision of law school professors. Most clinical programs consist of both practice and classroom components. Some clinics offer community legal services for the poor, while others may be structured around a specific substantive area, such as health law or bankruptcy law. For their participation, students receive academic credit and are not compensated for their work. Law schools are an ideal setting to test unbundling for several reasons.

First of all, solely from the perspective of gathering and reporting helpful data on the topic, law schools clinics are a good laboratory to test new ideas and observe results. In the clinical environment, the unbundled assistance can be monitored to identify common problems, issues and outcomes, and to assess the reactions and perception of litigants, attorneys and judges. From this contained environment, protocols can be established to evaluate the results.

Law schools are also an ideal setting because the professors and students already see the segment of the population with the greatest need for unbundled legal services. Many clinics serve the same clients as legal services programs. When clinical legal education took off in the 1960s, it was a response to the social and political movements of the time and the perceived irrelevance of traditional legal education. Clinics offered services to poor clients and appeal to lay advocates interested in attacking poverty and racism. Clinical education is rooted first and foremost in a commitment to social justice and the law.⁷⁷ Unbundled legal services is an opportunity to further these underlying social justice goals.

In addition, a fundamental value of the legal profession is to promote and encourage attorneys to render *pro bono* services. The use of clinical programs is a means of developing the *pro bono* ideal among law students and thereby creating future resources in response to the unmet civil legal service needs of the poor. Law Schools may indeed be the untapped answer to unmet legal needs. One author estimates that increasing law student *pro bono* activities would generate in excess of seven million volunteer hours over a three year period if every student met an aspired

⁷⁷Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. Rev. 1461, 1462 and 1477-78 (1998).

goal of fifty hours of service during their law school enrollment.⁷⁸ Certainly, if law students are involved in *pro bono* activities early in their professional development, it is more likely that they will come to appreciate the rewards offered by public service and continue to render legal services *pro bono* throughout their careers.⁷⁹ Involving law students in trying to solve access to justice issues through unbundled clinical experience, will nurture a student's commitment to perform public service in the future.⁸⁰

Finally, testing unbundled legal services through a law school clinic is an opportunity for students to develop a wide range of lawyering skills.⁸¹ Depending on how the unbundled clinic is set-up, if students participate in drafting legal documents and limited court appearances, students may obtain oral advocacy, litigation and persuasive legal writing skills. In addition, students will practice interviewing and counseling, and hone their problem solving skills. Developing high quality and ethical unbundled representational models will also introduce students to the small, low-overhead, high-technology, community-based law offices in which many of them may practice in the future.⁸²

Law schools can experiment with unbundled legal services in any number of ways. There

⁷⁸Larry R. Spain, *The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students*, 72 UMKC L Rev. 477, 486 (2003).

⁷⁹*Id.* at 480, 487.

⁸⁰Margaret Martin Barry, *Access to Justice: On Dialogues with the Judiciary*, 29 Fordham Urb. L.J. 1089, 1092 (2002).

⁸¹*But see* McNeal, *supra* note 5 at 362-68. “Unbundled clinics have limited pedagogical value,” and “offer no opportunity for students to develop a full range of lawyering skills.” McNeal’s unbundled clinics do not contemplate students providing limited litigation assistance.

⁸²Michael Millemann et al., *Limited Service Representation and Access to Justice: An Experiment*, 11 Amer. J. Fam. L. 1, 8 (1997).

are numerous areas of the law to address and as many methods for delivery of services. A clinic can take several forms, including *pro se* clinics, community education programs, and hotlines.⁸³ Clinicians can see clients with cases that cover broad subject matter areas, such as elderly law, or cases limited to a specialized area, such as immigration law. The Unified Court System's Report on Pro Bono recommends that New York select one type of proceeding – housing, custody and visitation, child support or matrimonial proceedings – and establish unbundled pilot projects.⁸⁴ It is these areas of the law that seem to be overwhelming the New York court system.⁸⁵ It is also the family law and housing matters where the largest numbers of litigants are representing themselves.

Nationally, indigent legal aid programs have substantially reduced or largely abandoned their traditional family law practices, except when clients, usually women and children, are at risk of harm.⁸⁶ In New York, there were roughly 800,000 new domestic relations filings in 2004.⁸⁷ Studies report that divorce kits do not help the majority of self-represented litigants effectively represent themselves.⁸⁸ Housing court studies evaluating the success of self-represented litigants also found tenants have a very low likelihood of success. One study concluded that landlords

⁸³McNeal *supra* note 5 at 359.

⁸⁴The Future of Pro Bono in New York Volume I, 29 (January 2004) *available at* <http://www.nycourts.gov/reports/probono/>.

⁸⁵State Bar Final Report *supra* note 29 at 7.

⁸⁶Millemann, *supra* note 82 at 3.

⁸⁷Family issues account for about one-fifth of the New York's court docket. See Chief Judge Judith S. Kaye, The State of the Judiciary 2005, Unified Court System, *available at* <http://www.nycourts.gov/admin/stateofjudiciary/index.shtml>.

⁸⁸Millemann *supra* note 82.

won in 84% of cases that went to trial, but only the tenants with lawyers won at trial.⁸⁹

Family law and housing litigants receiving unbundled legal services have obtained successful results in the past. In one study, known as the Maryland Experiment, during a 17-month period in 1995-1996, law students provided basic legal information and advice to people of low or moderate income levels, who were otherwise representing themselves in domestic cases.⁹⁰ At first, lawyers supervised the students in the courthouses where they met and assisted the pro se litigants. Later, the lawyers provided supervision by telephone. Most of the Maryland Family Law Assisted Pro Se Project clients had a subjective sense of being treated more fairly and concluded that the students helped them obtain a fairer result in their case.⁹¹

Another type of successful unbundling are “Lawyer of the Day” programs. This is where the lawyer covers the cases in a particular courtroom on a specified day. The lawyer interviews and advises the litigants and then sometimes represents them in court. In one pilot project in Washington, lawyers represented tenants in eviction proceedings in housing court.⁹² With the court’s cooperation, periodic “duty” days were established where the lawyers, with the help of law and paralegal students, interviewed and advised eligible tenants and represented some of them in court. The legal representation helped the tenants to recognize and assert valid defenses, and to avoid illegal and unwarranted evictions. With legal assistance in the courtroom, many of the tenants were able to negotiate settlements with their landlords, and others were successful in the

⁸⁹McNeal *supra* note 5 at 357.

⁹⁰Millemann, *supra* note 82 at 3.

⁹¹Michael Millemann et al., *Rethinking the Full-Service Legal Representational Experiment: A Maryland Experiment*, 30 Clearinghouse Rev. 1178, 1190 (1997).

⁹²Handbook *supra* note 15 at 37

litigation.

Since unbundled family law and housing programs have met with a fair degree of success in pilot programs in other jurisdictions and since there is a significant need for legal services in these areas, it is posited here that New York set up law school clinics in these substantive areas to examine its reservations associated with unbundled representation. The students would address simple legal problems which are not likely to generate a multitude of other legal issues. This paper suggests two types of clinical projects whereby this may be accomplished.

Landlord-Tenant Clinic

One proposal is that New York establish a clinic similar to the “lawyer of the day” programs, where students would represent tenants faced with eviction proceedings in New York City’s Housing Court. This clinic would explore New York’s reservations regarding unbundled court appearances. Currently, a nonpayment or holdover proceeding initiated in the Civil Court of the City of New York is randomly assigned to one of the Housing Court’s Resolution Parts. In the Resolution Part, the landlord and tenant discuss their differences before a judge or court attorney to see if an agreement can be reached to settle the dispute. The majority of cases are settled by a stipulation between a represented landlord and a self-represented tenant. Although the stipulation is reviewed by the judge, it is often written by the landlord’s attorney and negotiated out of the presence of court personnel. Even when a court attorney is present for the settlement negotiations, the court attorney is not permitted to give legal advice to the self-represented tenant. Motions are also heard in the Resolution Part, many without written opposition papers from the tenant, or based on vague affidavits in support of tenant initiated

orders to show cause. No trials are conducted in the Resolution Parts.⁹³

In a court-annexed clinical program, law students trained in class by teaching staff in landlord-tenant law can make limited appearances, on established “duty” days in various Resolution Parts, on behalf of tenants for the purposes of negotiating settlements and arguing motions. Each student representation would begin with a careful interview and assessment.⁹⁴ Once the student and client have reached an understanding about the scope of the representation, a retainer agreement should be signed. The student lawyer would then be available to advise the litigant, make appropriate referrals to social agencies, assist the litigant in preparation of an answer, and represent the litigant in the Resolution Part, as needed. At the end of the day, the representation would come to an end.

Special rules and provisions would need to be implemented for the students’ appearances. Many states that have changed their rules to permit unbundled courtroom representation have required the filing of a “limited notice of appearance,” which would inform the court of the scope of the attorney’s role in the litigation.⁹⁵ Similar limited notices of appearance can be filed by the students. It is recommended that at the conclusion of the student’s appearance, the limited role terminates without the necessity of leave of court, upon the student serving and filing a “notice of completion of limited appearance” or a “substitution of attorney” form. The form should state that the student lawyer is withdrawing from the case because the limited service which the student

⁹³If after discussing the case, the parties cannot reach an agreement to resolve the case, they are referred to a Trial Part.

⁹⁴*See infra* notes 113-15 and accompanying text.

⁹⁵*See e.g.*, Nevada Rule 5.28. Withdrawal of attorney in limited services ("unbundled services") contract.; Washington CR 70.1 Appearance By Attorney

lawyer agreed to perform has been completed.⁹⁶

By involving the court system in the implementation of the pilot project, the judges would be prepared for the student limited appearances and ready to honor the scope of the representation. This would serve to accustom the judiciary to the nature of limited representation and pave the road for increased limited courtroom appearances. The court's involvement with the project would also likely encourage judges to be more patient with the less experienced law students.

By limiting the students' representation to the "duty" day in the Resolution Part, some of the limited court appearance concerns about communication and service are addressed. If the unbundled representation begins and ends the same day, opposing counsel and the court are not confused over whom to communicate with or serve in future litigation.⁹⁷ Since many landlord-tenant proceedings are resolved in one court appearance, the nature of the "summary" proceeding lends itself to this type of unbundled representation.

Additionally, should this student pilot project prove beneficial to its recipients and call for the expansion of unbundled lawyer of the day programs to the private bar, this type of representation is an attractive *pro bono* opportunity to solo practitioners and large law firms alike. According to a 2003 survey of attorneys throughout New York State, the main reason for non-participation in *pro bono* activities is concern over the time and resources the *pro bono* work

⁹⁶If the program contemplated the students appearing on behalf of the tenants beyond the "duty" day period, say to appear on a motion to enforce the stipulation, the retainer agreement and notice of limited appearance, would have to so specify. This could otherwise lead to confusion over service and communication issues.

⁹⁷If copies of future papers are to be served on the student lawyers, it can be indicated in the limited notice of appearance.

might demand.⁹⁸ The Civil Court of the City of New York already offers a free 9-hour Volunteer Lawyer Training Program, where attorneys can receive Continuing Legal Education (CLE) credit and gain an introductory background in landlord-tenant law. Once trained, the volunteer attorney's commitment representing tenants in an unbundled lawyer of the day program can be "capped." In addition, attorneys can obtain up to six hours of CLE credits for performing uncompensated legal services for clients unable to afford counsel, making this type of limited representation attractive.⁹⁹

Domestic Relations Clinic

A second suggestion is law school clinics to test New York's reservations regarding ghostwriting, concentrating on the high volume, routine, civil legal services, often provided by legal aid and *pro bono* offices in domestic relations cases. Clinics operating within the courthouse could be established where the students, under the supervision of trained clinical professors, would assist in the drafting of court documents on behalf of the self-represented litigants.

Under such a program, the students would first have to assess the level of complexity required to resolve the client's problems. The Maryland Experiment found that the effectiveness of the law students' help and the clients' satisfaction with the students were inversely related to the degree of decisional discretion required.¹⁰⁰ Professor Michael Millemann, the Project's Director, separated the legal problems into three distinct "discretion" categories, 1) problems that

⁹⁸See Unified Court System, *The Future of Pro Bono in New York Volume II: Report and Recommendations from the New York State Unified Court System's Pro Bono Convocations* *supra* note 3.

⁹⁹In Spring 2000, the CLE Board amended its rules.

¹⁰⁰Millemann *supra* note 82 at 5.

could be resolved in largely mechanical, non-discretionary ways; 2) problems that required the exercise of limited legal judgment and discretion; and 3) problems that required substantial legal judgment and discretion.¹⁰¹ Ideally, the students would assist litigants with the drafting of legal documents necessary for problems that fall into the first two categories.

It is suggested that one domestic relations clinic could operate out of one of New York's Supreme Courts. In this clinic the law students could assist clients with uncontested divorces, and divorces that are uncontested with the exception of child support. Since child support is governed by guidelines in New York that greatly limit the amount of discretion a party or a judge can exercise, the students explanation of the law to the client may work to resolve these matters. Another domestic relations clinic could operate out of one of New York's Family Courts. Students could assist litigants with less complex custody issues, including where the matter is uncontested, or where the non-custodial parent has disappeared. Students could also help with simpler motions seeking modification of visitation schedules, or child support orders, due to changes in circumstances.

In these clinics, the law students might draft pleadings on behalf of the litigants, but not appear in court. The drafted pleadings would bear an anonymous disclosure that they were prepared by the clinical pilot project students, but would not disclose the student's identity. Operating within the courthouse, with disclosure of the student's limited role, judges can be fully aware that the clinic students are helping otherwise self-represented clients prepare pleadings. Moreover, if the judges, and adversaries are fully aware of the assistance, many of the

¹⁰¹*Id.*

ghostwriting criticisms concerning lack of candor and misrepresentation can be pre-empted.¹⁰²

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.¹⁰³

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.¹⁰⁴ If New York is to encourage unbundled drafting of legal documents, it must clarify the requirements regarding the level of disclosure of the identity of the attorney assisting the self-represented litigant. Most studies have indicated that requiring disclosure of the name and address of the attorney is a deterrent to lawyers offering unbundled legal services. In this clinical environment, it will be possible to gauge reactions from the judiciary and opposing counsel to the “anonymous disclosure.” Judges can be polled to see if they feel that more or less disclosure is appropriate or necessary. It can be ascertained whether they felt they would have known of the legal assistance even if it had not been disclosed, since similar studies have shown that ghostwriting is obvious from the face of the legal papers filed.¹⁰⁵

Special rules would need to be put in place before the students could participate in ghostwriting. It must also be made clear that disclosing that counsel has prepared a pleading does not constitute an entry of an appearance, and no notice of appearance or motion for withdrawal is necessary when the limited representation is concluded. The self-represented party's certification

¹⁰²Millemann, *supra* note 91 at 1188.

¹⁰³Luce, Jr., *supra* note 34; Rothermich, *supra* note 33, at 2711.

¹⁰⁴See City Bar Opinion, *supra* note 45; State Bar Opinion, *supra* note 34, at 5.

¹⁰⁵Goldschmidt *supra* note 33 at 1157.

on the pleading should satisfy the Rule 130 requirements, leaving room for the court to conduct further inquiry, if warranted. As the New York State Bar Committee on Professional Ethics 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."¹⁰⁶

In addition, the students in the suggested domestic relations clinics would work with courthouse staff to develop simplified pleading forms that can be filed by the self-represented litigants. The Maryland project found the development and use of simpler forms with check-off boxes led to greater success of the project.¹⁰⁷ This type of clinic would present a testing ground for the development of new forms.

Certain protocols should be established for both the landlord-tenant and domestic relations clinical projects. One of the main objections to unbundled legal services is that attorneys will fail to identify the real issues in the case and will render incomplete advice or will fail to give needed advice in areas ancillary to the client's presented problem.¹⁰⁸ In narrowly defined subject matter clinics, such as landlord-tenant and domestic relations, there is a risk of pigeon-holing clients into discrete case or service categories, while the client's problems may need to be addressed in a broader context.¹⁰⁹ As one court stated, "when a retention is expressly limited, the attorney may

¹⁰⁶State Bar Opinion, *supra* note 34, at 5

¹⁰⁷Millemann, *supra* note 91 at 1182

¹⁰⁸Dianne Molvig, *Unbundling Legal Services Similar to Ordering a la Carte, Unbundling Allows Clients To Choose From a Menu the Services Attorneys Provide*, 70 Wis. Law. 10 at 50, Sept. 1997.

¹⁰⁹David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 Clinical L. Rev. 245, 269-69 (2003).

still have a duty to alert the client to legal problems which are reasonably apparent.”¹¹⁰ Thus, although the areas of law are narrowly defined, concerns outside the title of the clinic still need to be explored with the client to avoid malpractice and possible ethical breaches for lack of competency and diligence.¹¹¹

The Maryland experiment found that a careful diagnostic intake interview was critically important in avoiding the real dangers of unbundled representation.¹¹² The clinic experience should begin with the students conducting a thorough intake interview, preferably with the litigant furnishing as much information as possible about his or her legal problems.¹¹³ The student interviewer would make an initial judgment identifying the client’s legal problem, the frequently accompanying social problems, and the level and type of legal services that the client needs. The law student must make a determination as to whether the clinic’s unbundling is appropriate in relation to the complexity of the matter.

Choosing unbundled assistance instead of full representation represents a profound shift of responsibility from the lawyer to the client.¹¹⁴ The student must be certain that the client understands the risks and consequences of unbundled representation and gives informed consent. The student must assess each client’s experience and sophistication on a case-by-case basis and

¹¹⁰*Nichols v. Keller*, 19 Cal. Rptr. 2d. 601 (Ct. App. 1993) (despite 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).

¹¹¹Chavkin *supra* note 110 at 268.

¹¹²Millemann, *supra* note 91 at 1182.

¹¹³See Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 Wake Forest L. Rev. 295, 336-38 (1997).

¹¹⁴Thomas F. Garrett, *Unbundling Legal Services*, Legal Services Law Line of Vermont, Inc.

make sure that the unbundled assistance is reasonable under the circumstances. The students can then prepare a carefully worded retainer agreement, outlining exactly what services the clinic will perform and what issues the clinic will address. The agreement might also outline the client's responsibilities.

Once these clinics are in place, they can collect data to assist New York in evaluating whether unbundled legal services enhances access to the justice system and realizes successful outcomes for litigants. More specifically, these pilot clinical projects can help New York determine whether unbundled legal services in litigated matters is appropriate in these selected substantive areas for these types of legal tasks. Judges and court staff would be asked whether they found the limited courtroom representation and assisted preparation of pleadings helpful to the orderly processing of the case, whether they felt that greater or lesser disclosure of the identity of the pleadings was necessary, whether they believe they would have known of the legal assistance with the papers regardless of the disclosure, and whether and where they believe limited litigation assistance should be expanded. Clients would be asked to evaluate the information and advice they received, their ability to complete the subsequent legal tasks independently, how the problems were resolved, and whether they were satisfied with the results. The clinic project might also ask the clients to work with the clinic over the course of the litigation and beyond, to gain a better measure of the success of the program.¹¹⁵ To assure reliability, analysis should be

¹¹⁵McNeal, *supra* note 5, at 399. The author suggests an unbundled clinical project should approach the clients at the following times: “1) When they are requesting legal assistance, to identify the goals they seek to achieve and the services they are requesting; 2) following receipt of the legal assistance, to determine the clients’ view of the viability of the assistance, and the likelihood the clients will go forward to resolve the problem with the information they secured; 3) after the clients have taken steps to resolve the legal problems on their own; and 4) at various predetermined points after the legal problems have been formally addressed.”

conducted with the assistance of sociologists and statisticians.¹¹⁶

Finally, it is important to clarify that unbundled legal services is less than full representation, and is by no means ideal. While this paper recognizes that limited assistance is preferable to no assistance, these clinics run the risk that students, and in turn, members of the bar and judiciary, will come to accept dual standards of representation for rich and poor clients.¹¹⁷ To guard against this danger, the clinical curriculum should be carefully constructed to expose students to the problems facing New York's poor and middle-class litigants, the lack of access to the legal system and the challenges of self-representation.¹¹⁸ Addressing and solving the legal needs problems in New York should be an integral part of class discussion. Students should have an opportunity to debate and evaluate legal services delivery models. Unbundled clinics should serve as an opportunity for students to understand the realities of the law's impact on the lives of the poor.

Conclusion

This paper proposes the exploration of unbundled legal services in litigated matters as a means to alleviate New York's legal needs crisis. New York has legitimate concerns about the practicality of unbundled legal representation in the courtroom and the anonymous drafting of court papers. As suggested herein, by testing the efficacy of this alternative representation through law school clinical programs that are specially limited in tasks and objectives, New York can examine and resolve its reservations. At the same time, New York can utilize its law students

¹¹⁶*Id.* at 398-99.

¹¹⁷Barry *supra* note 80 at 1097.

¹¹⁸*See* McNeal *supra* note 5 at 395.

to supply greatly needed legal services to self-represented litigants in landlord-tenant and family law cases. If properly structured, the ethical, procedural and administrative challenges of unbundled legal services can be met, paving the road for legislative and judicial changes that will lead to widespread use of unbundled legal services in litigated matters.