

## RELUCTANT BEDFELLOWS: Integrating Unbundled Practice with Courts and Bar Associations

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Workshop overview:

The reality is that this is happening whether the established institutions accept it or not. It is the fact. The key is to be sensitive to the major areas of conflict and tailor creative solutions to promote cooperation as the climate changes. The alternative is that a new system evolves entirely outside the traditional one. My focus is to find ways to integrate the two, addressing the legitimate concerns of courts and bar associations, while integrating new attitudes and practices.

1. What are the major areas of friction between unbundling and
  - a. The courts?
  - b. Traditional bar associations?
2. How do we integrate the changing legal climate into the existing institutions? What solutions can reduce friction and encourage cooperation?
3. The courts:
  - a. Ghostwriting
    - i. Local rules requiring disclosure of non-party ghostwriter
  - b. Special or general appearance?
    - i. In effect, we're redefining the terms. Rather than the strict either/or, we are evolving a third alternative, much like a "limited general appearance"
  - c. Attorneys of record for part of the case
    - i. Who gets to decide which part?
      - (1) as long as it doesn't adversely affect the courts, shouldn't this be between the coach and the client?
    - ii. How is it controlled? What about the court's legitimate desire to keep procedural control of the case and assure accountability?
    - iii. Bifurcation of issues
      - (1) if custody is the key, try it first, then relieve the attorney
  - d. Preventing tactical games
    - i. Limited to single issue
      - (1) bifurcate the issue and try it first
    - ii. Appearance required for certain events, e.g. trial
  - e. Settlement conference delays while *pro se* consults with coach
    - i. How about a *pro se* handbook, which states clearly that parties are expected to be ready to settle at the settlement conference, and if they have a coach, it is their responsibility to have the coach on telephone standby?

## RELUCTANT BEDFELLOWS: Integrating Unbundled Practice with Courts and Bar Associations – page 2

- f. Fee orders for coach who doesn't go of record
    - i. In my county, the standard is the same as a fee order for an attorney of record. With proper disclosure of the identity of the coach, fees incurred and services rendered, fees can be ordered.
    - ii. Gray area; paralegal fees. Few court grant them. Should they be doing so?
  - g. Who gets notice of motions/other court actions?
    - i. The court administrator shouldn't have to keep track of several addresses and serve both the attorney and party with notices of hearings/trials.
  - h. Who needs to be served with pleadings?
    - i. There's a legitimate concern that parties can't hide behind the fact that they are unbundling and avoid service.
    - ii. Equally legitimate concern that opposing counsel should be able to know that service on attorney of record, even on a subject that the party is handling himself, is still good service. Otherwise, it can be abused for tactical reasons.
  - i. Working with the reluctant judge
    - i. The issue isn't about forcing everyone to have an attorney; that makes it easier on the courts, but it unenforceable.
    - ii. An educated *pro se* is better than an ignorant one.
    - iii. An attorney for part of the case is better than none at all.
    - iv. If the court can get an attorney in for the difficult issues, calendars will run more smoothly.
    - v. Forcing an attorney to stay in for the whole case, with the attorney and party have contracted otherwise, ensures that the next party seeking that attorney's unbundled services will not obtain them. Burning an attorney in this way may solve a problem in a single case, but the ripple effect will ultimately be negative.
4. Bar Associations
- a. One of the most conservative and traditional of our institutions
  - b. Frequently hostile to any change in the practice, especially one which potentially reduces their influence.
  - c. As with courts, this thing is happening, whether or not the powers that be kiss it's ring.
  - d. The key is to work with the bar associations, answer their legitimate concerns, and bring them into the 21<sup>st</sup> century as painlessly as possible.
  - e. The fact is, the practice of law is changing, and whether the traditional bar likes it or not is going to have little effect in stopping it.
    - i. What it will do is determine whether the new system, which is inevitable, includes the traditional bar or excludes it.
    - ii. If the bar doesn't opt in and find a way to be part of the new system, it will be left behind.

## **RELUCTANT BEDFELLOWS**

**Judge Edward Lynch**

In order to address unbundling, the court, bar, professional responsibility board, malpractice insurers and other stakeholders must come together to discuss issues and suggest solutions. How can they be persuaded to participate in the discussion? How can they be induced to cooperate in the solutions? What are the obstacles and how can the obstacles be overcome?

The compelling need must be communicated. The reason it is important must be stressed.

### Why are we sharing a bed?

More people representing themselves.

Maricopa County Study:

60% of all dissolution cases had no lawyer.

Only 8% had lawyers on both sides.

75% of pro se litigants would represent themselves again.

Hennepin County ( Minneapolis)

Self help center served 6000 people in 1998.

NCSC Study - Both parties had counsel in only 28% of all domestic relations cases.

Florida

500,000 family law cases each year.

65% of the cases start with at least one pro se party.

85% of the cases end with at least one pro se party.

Legal Aid Clinics are overwhelmed.

Legislation promoting self-representation.

Domestic abuse legislation.

Harassment legislation.

Expedited child support process.

General dissatisfaction of public with courts.

National Center for State Courts survey.

Too complicated - Too slow - Too expensive.

General dissatisfaction of public with attorneys.

Lawyer jokes.

Consumer Reports survey.

27 % of people who hired lawyer for contested matter unhappy.

Only diet programs received worse score of services surveyed.

Cottage industry of paralegals, ghostwriters and coaches.

Divorce kits.

Unlicensed "advocates".

Real and perceived problems related to pro se litigants.

Judge becomes pro se litigant's advocate/adversary.

Increased staff and court time.

Unrealistic expectations of pro se litigant.

Frivolous litigation.

Inability to identify, analyze and present issues.

Failure to provide necessary information.

Ignorance of court protocol, procedure and practice.

How do we get "reluctant" stakeholders together to address pro se issues.

How can we share a bed and keep our virtue?

Courts must play a leadership role in convening stakeholders.  
Make sure all important stakeholders are involved.

Judges

Court managers/staff

Bar leaders

Professional Responsibility Board representative

Malpractice insurer representative

Diversity of race, gender and opinion

Judges must participate.

Need not be primary leaders, but must be supportive.

Must overcome concern that neutrality will be compromised.

Make it easy.

Make it convenient.

Make it beneficial.

Similar efforts taking place in many jurisdictions.

How can we be successful in our efforts?

How can we share a bed and increase our comfort?

Guard against encouraging pro se representation.

Recognize obstacles to change.

Institutional obstacles.

Tradition and ritual.

Focus on status quo.

Precedence orientation to problem solving.

Fragmented authority.

Personal obstacles – Apathy – Inertia - Industry – Incentives - Paranoia.

Make goals reasonable.

Keep expectations realistic.

Be flexible.

Adopt other jurisdictions' solutions carefully in light of legal culture and rules.

Stress opportunities.

Better prepared litigants.

Better informed judges.

Better decisions.

Expanded client base for bar.

Unbundling is just part of comprehensive efforts to address pro se issues.

User friendly forms in "plain English".

Instructional videos.

Pro se coordinators.

Special court rules.

Self help/Self service centers.

Legal Clinics.

Pro bono and reduced cost services.

Staff attorneys to assist pro se litigants.

Identify rules, procedures and practices that impede unbundled services.

Should they be modified?

Should new rules be created?

Are restrictions or controls on unbundled services necessary?

Guard against encouraging pro se representation.

## RELUCTANT BEDFELLOWS: Integrating Unbundled Practice with Courts and Bar Associations – page 3

- f. Perceived threats to “full service” lawyers
    - i. “You’re taking away the cases young lawyers learn on”
      - (1) Isn’t this really an argument that poor people should get less competent legal services so that neophytes can learn at their expense?
    - ii. “You’re taking away our full service clients”
      - (1) There will always be a demand for full service litigation.
      - (2) Most of the people who unbundle are currently unrepresented; in fact, this *increases* the pool of potential clients, not the reverse.
      - (3) Exception: the tecchie who is used to getting info for free off the Internet, and sees no reason why he should pay an attorney to be a gatekeeper
    - iii. Dispelling the myth
  - g. Training the lawyers
    - i. This isn’t always as simple as they think
    - ii. The bar can perform a real service by educating its members on the practicalities of unbundling, to ensure that the public is being well served.
    - iii. Encouraging attorneys to develop systems which facilitate the practice, while protecting both the attorney and the client from unreasonable risk.
    - iv. The bar can assist by interfacing with malpractice carriers to develop systems which respond to their concerns and reduce the risk of malpractice.
  - h. Protecting the consumer
    - i. A blanket prohibition by the bar is inevitably perceived by the suspicious consumer as a smokescreen to maintain it’s sinecure.
    - ii. Arguments that the purpose is to protect the client from less than perfect legal representation ring false. At some point, the bar must recognize that consumers have the right to make their own decisions about the nature and extent of the services they want, so long as they also assume the risk that the result will be less comprehensive or satisfactory than full service representation would be.
  - i. Protecting the lawyer
    - i. The bar can really assist here in providing continuing education designed to address the specific problems attendant to unbundled legal services.
    - ii. This is an opportunity for the bar to take a leadership role, if it is forward thinking enough.
    - iii. If it does not, it will be left behind
  - j. Adjusting to an evolving legal culture
5. What about malpractice carriers?
- a. Analogy to the mediation model - 20 years ago, they said, “no way, no how.”
  - b. The practical result was higher client satisfaction rather than the reverse
  - c. Now, mediators carry lower malpractice rates than full service
  - d. As with mediation, the early polls indicate higher client satisfaction with unbundled services I predict the same result here in a few years.