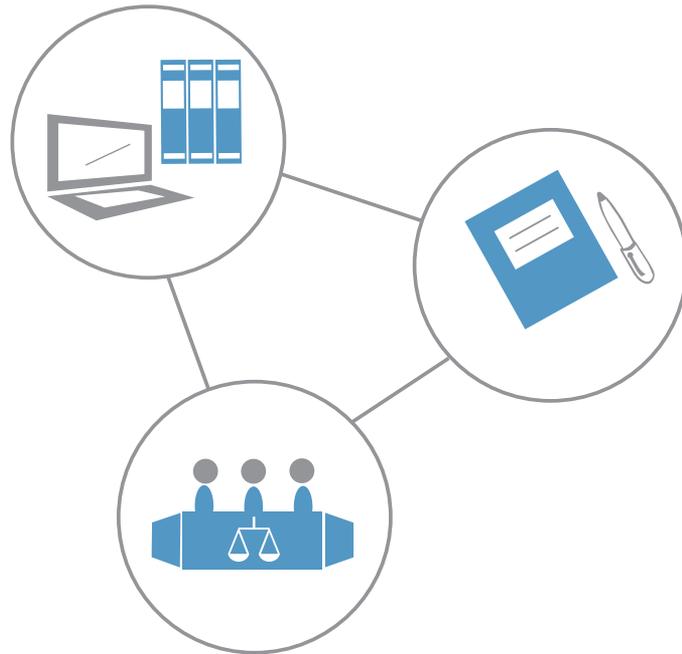


The Next Step in “Unbundling”: The Case for Limited Scope Representation

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The broad concept of “unbundling” the provision of legal services has been under discussion in Virginia and across the country for more than two decades. The concept is promoted as a means of allowing greater access to legal services to a public that increasingly cannot afford counsel. This is a pressing need in our courts, one that threatens to undermine the very legitimacy of our system of civil justice. A recent study by the National Center for State Courts revealed that in non-family law civil cases across America, both litigants are represented by counsel in only 24 percent of the cases. In 68 percent of the cases, only the plaintiff has representation, to the likely detriment of the unrepresented defendant. This represents a dramatic increase in the number of unrepresented litigants over the last twenty-five years.¹

The concept of “unbundling” can be broken down into three primary components:

- providing advice (including legal research) to a client on how she can represent herself in court;
- assisting a client in preparing pleadings, discovery responses, and other documents for litigation without becoming counsel of record, sometimes called “ghost writing”; and
- making limited appearances for purposes of addressing one particular issue or one stage of litigation without the need to seek the court’s leave to withdraw at the conclusion of that limited appearance.

The first component, providing unbundled advice to a client on how to proceed in court without a lawyer, is now commonplace in Virginia. The language of Rule 1.2 is broad enough to allow for this degree of unbundling when it provides that “the attorney and client can agree to limit representation as long as there is full and adequate disclosure.” In the legal aid world where I have practiced for thirty-five years, this approach has been an integral part of our delivery of services to clients. Our pro bono hotlines are built around this model.

The second component of unbundling, “ghost writing,” is now similarly permitted in state courts. With the promulgation of LEO 1874 in 2014, the ethical constraints on ghost writing have been removed, allowing attorneys to assist clients in preparing pleadings, discovery responses, and other court documents so that they can more effectively present their cases to the court. The Virginia Access to Justice Commission has gone on record opposing the adoption of any new procedural rule to regulate ghost writing because of the important access to justice implications in any such proposal.

That still leaves the third and final prong of unbundling to consider: “limited scope representation.” The current inability to make a limited appearance poses dilemmas for legal aid and pro bono attorneys. Particularly in the context of family law and divorces, we are in a predicament where our priorities might suggest we should take a case involving support, but suggest that we avoid equitable distribution cases because of the major commitment of resources these entail. If we could make a limited appearance to obtain *pendente lite* spousal support, for example, we might be able to stabilize our client financially, allowing her to then retain private counsel to litigate the equitable distribution issues. Under the current court rules, the choice is all or nothing, a difficult dilemma for legal aid societies and their clients. It is virtually impossible to refer a contested divorce with issues of custody, support, and equitable distribution of a modest home and retirement accounts, along with the family’s debts, to a pro bono attorney. It’s very difficult to refer a hotly contested custody case to a pro bono attorney, for fear the attorney will be involved in litigation until the child turns 18. But if we could refer a single hearing, or a single issue, to a pro bono attorney — that would be a very different story. While the court might prefer an attorney to be involved throughout the litigation, wouldn’t it be better to at least have an attorney there for one important hearing or issue, rather than not at all? Providing full representation of low-income parties who can’t afford to hire an attorney would be ideal. But when we are faced with overwhelming demand and limited resources, the choice of all or nothing — all in, or not in at all — is very difficult. Take this case and turn down the next ten clients? Or turn down this case with the near certain knowledge that the client will lose, not on the merits, but for lack of a lawyer.

The ability to make limited scope appearances, under rules that clarify all the roles and notice issues, as has been done in twenty-nine other states so far, would allow legal aid and pro bono programs a much needed flexibility to provide services on the discrete issues that most critically affect our clients. By doing so, it would encourage greater pro bono participation in such cases.

In 2002, The Supreme Court of Virginia’s Pro Se Litigation Planning Committee, chaired by Justice Elizabeth Lacy, studied the rise of unrepresented litigants in Virginia courts. In its report, “Self-Represented Litigants in the Virginia Court System, Enhancing Access to Justice,” the committee recommended, among other things, that the Virginia State Bar explore the feasibility of delivering legal services through limited scope representation. At the time of the Lacy report, only four states allowed such limited appearances. In the intervening fourteen years, another twenty-five states and the District of Columbia have done so. The Virginia Access to Justice Commission has recently endorsed the concept of allowing limited scope representation and is working with the Virginia State Bar’s Access to Legal Services Committee to develop a proposed rule change explicitly allowing such representation, with a goal of providing The Supreme Court of Virginia an opportunity to review and ultimately allow limited scope representation as a means of allowing greater access to Justice. It is an idea whose time has come.

Endnote:

- 1 Hannaford-Agor, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, National Center for State Courts, 2015, pp. 31-32, available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/133>.



John E. Whitfield has served as the executive director and general counsel of Blue Ridge Legal Services since 1989. Prior to becoming the executive director, he served as law clerk, staff attorney, and supervising attorney since joining the organization in 1980. He is co-chair of the Virginia Access to Justice Commission. He was the 1998 recipient of the Virginia State Bar’s Legal Aid Award and he was inducted as a Fellow of the Virginia Law Foundation in 2009.