UNBUNDLED LEGAL SERVICES IN NEW YORK STATE LITIGATED MATTERS: A PROPOSAL TO TEST THE EFFICACY THROUGH LAW SCHOOL CLINICS

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

—Chief Judge Judith S. Kaye[1]

INTRODUCTION

The lack of legal representation for New York's poor in civil matters has reached reaching epidemic proportions.[2] A 2004 study by the New York State Bar Association reported that each of New York's poor households experienced an annual average of 2.37 unmet civil legal needs, which, statewide, totaled approximately 2.5 million legal problems for which no lawyer is available.[3] For many New Yorkers, timely legal assistance could help them save, among other things, their marriages, their children, their homes, and their jobs. Sadly, this urgent need for representation is simply not being met either by our legal services, through State programs, or by the private bar.

To solve this dilemma, civil justice leaders frequently call for more free legal aid and for more full *pro bono* representation by lawyers. However, it is unrealistic to expect any substantial changes in the abilities 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 typical fees lawyers charge for a full-service representation. Indeed, the

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* Principal Court Attorney to Justice Fern. A. Fisher, Administrative Judge of the Civil Court of the City of New York. I would like to thank Justice Fisher, whose dedication to access to justice inspired me to write this Article. [Eds.: Portions of this article, as revised by the author, were originally published in the *Fordham Urban Law Journal* as Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services in New York State: Untying the Bundle,* 29 FORDHAM URB. L.J. 1107 (2002). The editors of the *N.Y.U. Review of Law & Social Change* have specifically noted these passages and have made few edits to them.]

1. 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 (Jan. 5, 2004), http://nycourts.gov/press/index.shtml.

2. *See* id.

3. *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). The middle class does not fare much better. The unmet legal needs of our poor and middle class is a nationwide problem, for the justice system sees fewer than three-out-of-ten legal problems of low-income households and four-out-of-ten for moderate income households. *Id.*

government will not likely increase its budget to meet the ever-increasing demand for legal services. Faced with this reality, many advocates agree that examining nontraditional models of legal representation might make the justice system available to those who cannot effectively use it now. One such alternative model to which advocates point is known as "unbundled legal services."

This article 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. In part I, I provide a brief overview of unbundling initiatives around the country, and I analyze the controversy surrounding the implementation—primarily in litigated matters—of unbundling in New York. In part II, I examine the value and potential of unbundling in a law school clinical setting as a means to test the efficacy of this alternative representation; and to suggest the viability of two projects in the areas of family and landlord-tenant law.

I.[4]

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 lawyers performs only the agreed upon tasks, rather than the whole "bundle," and the clients perform the remaining tasks on their own. Unbundled services can take countless forms, including providing advice and information, "coaching," drafting court papers, and making limited court appearances.[5]

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. 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]

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4. [Eds.: Part I of this article, as revised by the author, is based, in part, on the author's previously published article. Fisher-Brandveen & Klempner, supra note *. The editors of the N.Y.U. Review of Law & Social Change have kept all edits to this section to a minimum.]

5. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L. Q. 421, 422–23 (1994). Mosten is credited with coining the term "unbundled legal services," and he runs centers that implement unbundling across the country. *See generally* http://www.mostenmediation.com (last visited Apr. 25, 2006) (describing these centers).

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

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 self-help materials, and *pro se* assistance at courthouses.[7] Unbundled legal services has received a significant amount of national attention from those debating access to justice. For example, the Maryland Legal Assistance Network[8] hosted a widely-attended[9] national conference in 2000, entitled: "The Changing Face of Legal Practice: A National Conference on 'Unbundled Legal Services,'"[10] which was designed to serve as a beginning step in the movement to nationalize unbundling policies.[11] In February 2002, the American Bar Association ("ABA") adopted amendments to the Model Rules of Professional Conduct ("MRPC"), providing for limited-scope representation if the limitation is reasonable and if the client gives informed consent.[12] Added provisions also include a rule regarding conflicts of interest in unbundled representation when used by nonprofit and court-annexed limited legal service programs.[13] The same year the ABA promulgated these new rules, the Conference of Chief Justices and the Conference of State Court Administrators' Joint Task Force on *Pro Se* Litigation encouraged the practicing bar to increase its use of unbundled legal service when it passed Resolution 31.[14]

In October 2003, the ABA's Litigation Section Modest Means Task Force published "The Handbook on Limited Scope Legal Assistance."[15] This in-depth handbook:

provides direction for both policy-makers and practitioners. It includes

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7. No formal studies document the frequency, prevalence, distribution, and growth of unbundled legal services. However, anecdotal evidence abounds. For example, one may talk to a lawyer on an unlimited-time call for a fee of nearly forty dollars. *See* http://www.legaladviceline.com/question_phone.htm (last visited Apr. 25, 2006).

8. MLAN's impressive website serves as a national forum for ongoing discussion of unbundled legal services. *See* Maryland Legal Assistance Network, *Unbundled Legal Services*, http://www.unbundledlaw.org/Recommendations/confrecs.htm (last visited Apr. 25, 2006) [hereinafter UNBUNDLED ON-LINE]. The recommendations resulting from the conference are grouped into four categories: (a) the legal services delivery system; (b) the courts; (c) organized private bar; and, (d) the state legislatures. *Id.*

9. Conference attendees included representatives from 34 states, the District of Columbia, Canada and Russia. There were 67 presenters. *See id.*

10. *Id.*

11. Forrest S. Mosten, *Guest Editorial Notes*, 40 FAM. CT. REV. 10, 11 (2002).

12. ABA MODEL RULES OF PROF'L CONDUCT R.1.2(c)(2002).

13. ABA MODEL RULES OF PROF'L CONDUCT R.6.5(c)(2002).

14. RESOLUTION 31, CCJ/COSCA JOINT TASK FORCE ON PRO SE LITIGATION, Rockport, Me. (Aug. 1, 2002).

15. Susan M. Hoffman, Thomas A. Marrinson, Michael A. Millemann, Steven O. Rosen, David J. Van Susteren, Christina M. Tchen & Hon. Laurie D. Zelon, *Handbook on Limited Scope Legal Assistance: A Report on the Modest Means Task Force*, 2003 A.B.A. SEC. ON LIT., http://www.abanet.org/litigation/taskforces/modest/home.html (last visited Apr. 25, 2006) [hereinafter HANDBOOK]. The Handbook includes an extensive appendix of state rules, checklists, and sample client agreement forms. *Id.*

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.[17] At present, at least thirteen states have adopted unbundling rules,[18] and proposals to adopt unbundling rules are pending in several additional states. Numerous states are studying the issues.[19]

To date, the New York legislature has neither adopted nor proposed any changes to its Disciplinary Rules or Civil Practice Laws and Rules. However, New York has considered unbundling in other ways.[20] In September 2001, The Honorable Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, pioneered a New York justice conference, which focused on how to increase *pro bono* representation in New York. The conference included an unbundling workshop.[21] 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.[22] The convocations were designed to bring together the judiciary, bar associations, private attorneys, and law schools to brainstorm issues and to develop tangible, feasible ideas and strategies for expanding *pro bono* services in New York.

In January 2004, the Unified Court System issued a two-volume report.[23]

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16. *Id.*

17. To my knowledge, at the time of publication, California, Colorado, Delaware, Florida, Maine, Nevada, New Mexico, North Carolina, Tennessee, Utah, Vermont, Washington, and Wyoming have adopted unbundling rules, and several state legislatures have proposed adopting unbundling rules or are studying the issues.

18. These states are, to my knowledge, California, Colorado, Delaware, Florida, Maine, Nevada, New Mexico, North Carolina, Tennessee, Utah, Vermont, Washington, and Wyoming.

19. *See* UNBUNDLED ON-LINE, *supra* note 8, at http://www.unbundledlaw.org/States/states.htm (last visited Apr. 25, 2006).

20. Five years ago, unbundling in New York was in the relatively early stages of development, despite nationwide attention. In a statewide survey of New York judges, approximately seventy-five percent of those responding were unfamiliar with unbundled legal services. *See Unbundled Legal Services*, JUDICIAL SURVEY (Fern Fisher-Brandveen & Rochelle Klempner, N.Y.) (July-Aug. 2001) (on file with the Civ. Ct. of the City of N.Y.) [hereinafter JUDICIAL SURVEY]; Fisher-Brandveen & Klempner, *supra* note *, at 1110–11 (2002).

21. *See* NEW YORK STATE UNIF. CT. SYS., NEW YORK STATE UNIFIED COURT SYSTEM ACCESS TO JUSTICE CONFERENCE (2001), http://www.atjsupport.org/DMS/Documents/1001012428.49/AccessToJustice.pdf (last visited Apr. 25, 2006).

22. The Convocations took place in Albany, Buffalo, Geneva, and New York City. *Id.*

23. N.Y. STATE UNIF. CT. SYS., THE FUTURE OF PRO BONO IN NEW YORK: REPORT ON THE 2002 PRO BONO ACTIVITIES OF THE NEW YORK STATE BAR (2004) (survey of 2002 *pro bono* activity in New York) [hereinafter SURVEY]; 2 N.Y. STATE UNIFIED CT. SYS, REPORT AND RECOMMENDATIONS FROM THE NEW YORK STATE UNIFIED COURT SYSTEM'S PRO BONO CONVOCATIONS (2004) (recommendations for increasing pro bono) [hereinafter

Volume Two summarizes the Convocations and their findings.[24] The report found that: (1) many participants exploring the role of unbundled legal services were concerned that the negatives of unbundling outweighed the positives;[25] and, (2) there was greater concern as to whether unbundling was appropriate in litigated matters.[26] Overall, the report found 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 recommended further analysis before implementing any rule changes allowing for limited appearances by attorneys in court proceedings.[27] The report suggested that pilot projects be established to test the efficacy of unbundling as a way to increase *pro bono* service.[28]

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."[29] 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 ("NYSBA") on Providing Access to Legal Services for Middle Income Consumers also published a report. As to nonlitigated matters; the report found that unbundled legal services is already implemented regularly and is already permitted by the Code of Professional Responsibility.[30] 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.[31] 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

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RECOMMENDATIONS]. Both reports are available at http://www.nycourts.gov/reports/probono/ (last visited Apr. 6, 2006). This two-volume report, compiled by the Office of the Deputy Chief Administrative Judge for Justice Initiatives, contained both a 2002 survey of New York *pro bono* activity and recommendations for increasing *pro bono* that were developed during four *Pro Bono* Convocations.

24. RECOMMENDATIONS, *supra* note 23.

25. *Id.* at 20–22.

26. *Id.* at 21.

27. *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.

28. *Id.*

29. Press Release, New York City Lawyers' Association, Statement in Response to the New York State Unified Court System Report: *The Future of Pro Bono in New York State*, http://www.nycla.org/siteFiles/Publications/Publications60_0.pdf (last visited Apr. 6, 2006).

30. N.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.

31. *Id.*

court-annexed or nonprofit legal services programs that are structured to accommodate an appearance limited in tasks and objectives.[32] The report further recommended that lawyers be permitted to draft court documents to assist self-represented litigants, provided that there is full disclosure of the identity of the attorney.[33]

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 significant procedural, ethical, and administrative issues to consider.

A. 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.[34] 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.[35] An attorney is thus held to ethical prohibitions against dishonesty, fraud, deceit and misrepresentation. In a 1978 informal

32. *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.

33. *Id.* The report also recommended that special conflict of interest rules should apply in nonprofit 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.

34. *See* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L. 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).

35. Committee 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), http://www.mgovg.com/ethics/ghostwr1.htm (last visited Apr. 25, 2006).

opinion, the ABA 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 Canons of Ethics.[36] 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).[37] 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.[38]

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.[39] *Pro se* pleadings are generally held to a less stringent standard than formal pleadings drafted by lawyers.[40] 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.[41] 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.[42] *Pro se* litigants are often 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.[43] As one Colorado district court judge found, ghostwriting is "ipso facto lacking in candor,"[44] and it "causes the court to apply the wrong tests in its decisional process," leaving the opposing party at a distinct disadvantage.[45]

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

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

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

38. *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.

39. Luce, Jr., *supra* note 35.

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

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

42. JUDICIAL SURVEY, *supra* note 20.

43. *Laremont-Lopez*, 968 F. Supp. at 1078; Rothermich, *supra* note 34, at 2699).

44. 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).

45. *Johnson*, 868 F. Supp. at 1231.

that ghostwriting inappropriately affords a party the "deferential or preferential treatment" customarily given other *pro se* litigants.[46] As a solution, the opinion suggests that the ghostwriting attorney should endorse the pleading with the words, "Prepared by Counsel, but the attorney need not disclose his or her identity."[47] No disclosure is required if the attorney only provided some legal advice and did not draft any court papers.[48] The NYSBA 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."[49] However, unlike the City Bar, the NYSBA opinion requires the disclosure of the ghostwriting attorney's identity.[50] Disclosing legal assistance prevents misrepresentation and ensures fairness to opposing counsel and candor to the court.[51]

Not all jurisdictions share the concerns of New York advocates that anonymous assistance defrauds the court and leads to special treatment for the litigant.[52] For example, in an Alaska Bar Association Ethics Opinion, the Ethics Committee averred that arguments concerning preferential treatment may not be well-founded, for judges are usually able to discern when a *pro se* litigant received assistance in preparing court documents.[53] Similarly, in July 2003, California adopted a rule specifically allowing attorneys who provide ghostwriting services in family law to *not* disclose their involvement in the production of court papers.[54] 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. Further, the report found that judges noted that it is generally possible to determine from the appearance of a pleading whether an attorney was involved in the drafting.[55] They also reported that the benefits of

46. Committee 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].

47. *Id.*

48. *Id.*

49. State Bar Opinion, *supra* note 35.

50. *Id.*

51. *Id.*

52. *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA, REPORT ON LIMITED LEGAL ASSISTANCE WITH RECOMMENDATIONS FOR CALIFORNIA (2003), *at* http://www.unbundledlaw.org/States/Limited_scope_report.htm (last visited Apr. 25, 2006) [hereinafter CALIFORNIA REPORT].

53. Alaska 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 (last visited Apr. 25, 2006).

54. California Rules of Court R. 5.70, *eff.* July 1, 2003.

55. CALIFORNIA REPORT, *supra* note 52. The report was based upon "legal research and discussion as well as ... 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." *Id.*

having documents prepared by an attorney are substantial.[56]

Another set of arguments against ghostwriting is this: ghostwriting is a violation of court rules regulating papers filed with the court. Section 2101(d) of the New York C.P.L.R., provides that each paper served or filed must 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 NYSBA 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.[57]

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.[58] Rule 11 and New York State's equivalent statute, Section 130-1.1(a) of the Rules of the Chief Administrator,[59] provide that an attorney's signature constitutes a certification that the submitted court papers are not frivolous.[60] 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.[61] 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.[62] 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.[63] Some argue that lawyers should not be subject to certification requirements because it is the self-represented litigant who actually files the pleading.[64] 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

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56. *Id.*

57. N.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).

58. *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. at 1078 (E.D. Va. 1997); *Johnson*, 868 F. Supp. at 1231–32 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

59. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2001).

60. FED. R. CIV. P. 11; N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a); Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989).

61. Luce, Jr., *supra* note 35

62. Goldschmidt, *supra* note 34, at 1169–75.

63. Luce, Jr., *supra* note 35.

64. HANDBOOK, *supra* note 15, at 98.

of the ghostwriting attorney.[65]

Another argument against ghostwriting is that it circumvents court rules that regulate entries and withdrawals of appearances.[66] The question arises whether representation is 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 New York Civil Practice Rules ("CPLR") Section 321(b), an attorney must first seek leave of court by order to show cause for permission to withdraw as counsel.[67] 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."[68] 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.[69]

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.[70] Many courts have not reacted favorably to ghostwriting and have chastised or reprimanded attorneys who have ghostwritten pleadings for *pro se* litigants.[71] Additionally, 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

65. Luce, Jr., *supra* note 35; Goldschmidt, *supra* note 34, at 1169–75.

66. *See Laremont-Lopez*, 968 F. Supp. at 1079.

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

68. *Laremont-Lopez*, 968 F. Supp. at 1079).

69. Ohntrup v. Firearms Ctr., Inc., 802 F.2d 676 (3d Cir. 1986).

70. Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 Wake Forest L. Rev. 295, 301 (1997) [hereinafter REDEFINING ATTORNEY-CLIENT ROLES].

71. *In re Merriam*, 250 B.R. at 732 (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*, 955 F. Supp. at 598 (finding that ghostwritten pleadings are a deliberate evasion by the attorney of Rule 11 of the Federal Rules of Civil Procedure); *Laremont-Lopez*, 968 F. Supp. at 1079-80 (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 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*, 868 F. Supp. at 1232 (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").

may choose to keep their relationship confidential.[72] Lawmakers need to seriously consider these concerns which may discourage attorneys from drafting legal documents for otherwise self-represented litigants.

B. Limited Court Appearances

Equally as controversial as ghostwriting is the issue of limited court appearances. Critics believe that the ethical concerns regarding competence are greater for unbundled limited appearances in litigated matters than for non-litigated matters.[73] Attorneys agreeing to this type of unbundled representation have greater difficulty assessing whether their representation will be "reasonable under the circumstances" and whether clients have given "informed consent" to the limited representation.[74] 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 whether 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."[75]

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72. Goldschmidt, *supra* note 34, at 1197–99. Goldschmidt posits:

> (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.

Id. 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. *Id.*

73. STATE BAR FINAL REPORT *supra* note 30 at Exhibit #2, Letter, Steven M. Critelli, Chair, New York State Bar Association Committee on Civil Practice Law and Rules, January 2, 2002 [hereinafter Citrelli 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].

74. As required by the Model Rules of Professional Conduct. *See supra* notes 12, 13.

75. Citrelli Letter *supra* note 73 at 2–3.

In addition to the ethical considerations, there are procedural impediments to limited representation in New York courts. Under Section C.P.L.R. 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 since the court and opposing counsel know who is in charge of the case and with whom to deal at any given point in the litigation. Yet, critics are concerned that permitting limited representation court appearances may lead to miscommunications when both the client and the lawyer are each performing separate tasks in the litigation. To be sure, issues may arise: 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.

Indeed, ethical rules that prohibit communicating with a represented party may be breached. The NYSBA 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.'"[76] The Committee urged that if New York permitted unbundled courtroom representation, "the orderly processing of cases would be extremely difficult, if not impossible."[77] On the flip side, proponents of limited court representation contend that unbundled court appearances can lead to more efficient justice. These 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.[78] Also, akin to the area of ghostwriting, attorneys are often cautious about providing limited court appearances. For many 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.[79]

Clearly, there are serious concerns as to whether and how unbundling should proceed in litigated matters in New York. If New York lawmakers are to

76. Critelli Letter *supra* note 73.

77. *Id.* at 4.

78. CAL. COMM'N ON ACCESS TO JUSTICE, FAMILY LAW LIMITED SCOPE REPRESENTATION RISK MANAGEMENT MATERIALS (2004), *available at* http://www.calbar.ca.gov/calbar/pdfs/ accessjustice/Risk-Management-Packet_2004-01-12.pdf.

79. *Id.*

resolve this issue, court administrators, policy makers, and judges must encourage and assist the bar in creating programs to evaluate unbundling in litigated matters and its impact on case outcomes and client satisfaction. In so doing, such programs will reveal more about the types of cases in which this kind of assistance might be most useful. Part II of this article suggests that advocates should test the efficacy of unbundled litigated legal services with law school clinical programs. In this section, I focus primarily on two New York court-annexed law school clinical projects, which assist otherwise self-represented poor people. These programs provide the indigent with services integral to domestic relations and landlord-tenant matters. As I will discuss, students are given a wide range of responsibilities, from the opportunity to counsel clients, to drafting pleadings, from negotiating stipulations, to making limited court appearances when appropriate.

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. As a reward for their dedicated participation, students are not compensated in money; rather, they receive academic credit.

Law schools are an ideal setting to test unbundling for several reasons. First, from an empirical perspective, law schools clinics are a useful laboratory to test new ideas and to observe results. In the clinical environment, professionals may monitor a student's unbundled assistance to help identify common problems, issues, and outcomes. Moreover, the data-gatherer may assess the reactions and perception of litigants, attorneys, and judges in a controlled environment. From this "control group," of sorts, evaluators may establish protocols with which they may more accurately generate results.

Second, law schools are also an ideal setting because the professors and students in clinical programs 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, and have done so for a long time. Indeed, when clinical legal education took off in the 1960s, it was a response to the social and political movements of the decade and the budding belief that law could be used as an instrument for social change. Clinics offered services to poor clients and appealed to lay advocates interested in attacking poverty and racism. Thus, clinical legal education is rooted, first and foremost, in a commitment to social justice.[80] Unbundled legal services is an opportunity to further these underlying

80. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461,

social justice goals.

Third, 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 of thereby creating future resources who will respond 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 could and would meet an aspired goal of fifty hours of service during their law school enrollment.[81] Certainly, if law students are exposed to public service during their professional development, it will fortify their commitment to future *pro bono* activities.[82] Involving law students in a collaborative effort to solve access to justice issues through unbundled clinical experience will ultimately nurture a student's commitment to and appreciation for *pro bono* services.[83]

Finally, testing unbundled legal services in law school clinics will have other indirect effects on students. Clinicians that integrate these tests provide students with a unique opportunity to develop a wide range of lawyering skills.[84] Depending on how the unbundled clinic is designed, 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.[85]

How may law schools test unbundled legal services? Law schools can experiment in any number of ways. There are numerous areas of the law to address and just as many methods to deliver services. A clinic can take several forms. For example, it may take the form of a *pro se* clinic, of a community education program, or even that of a hotline.[86] Clinicians can see clients with cases that cover broad subject matter areas—such as elder law—or cases limited

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1462 and 1477–78 (1998).

81. Larry R. Spain, *The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students*, 72 U.MO.KAN. CITY. L. REV. 477, 486 (2003).

82. *Id.* at 480, 487.

83. Margaret Martin Barry, *Access to Justice: On Dialogues with the Judiciary*, 29 FORDHAM URB. L.J. 1089, 1092 (2002).

84. *But see* Mary Helen McNeal, *Unbundling in Law School Clinics: Where's the Pedagogy?*, 7 CLINICAL L. REV. 341, 362–68 (2001) [hereinafter WHERE'S THE PEDAGOGY?]. 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.

85. Michael Millemann, Nathalie Gilfrich, & Richard Granat, *Limited Service Representation and Access to Justice: An Experiment*, 11 AMER. J. FAM. L. 1, 8 (1997). [hereinafter EXPERIMENT].

86. WHERE'S THE PEDAGOGY?, *supra* note 84, at 359.

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."[87] After all, it is the areas of housing and family law that seem to be overwhelming the New York court system.[88] Moreover, it is also these 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 in those areas where clients, usually women and children, are at risk of harm.[89] In New York, there were roughly 800,000 new domestic relations filings in 2004.[90] Studies report that "divorce kits" do not help the majority of self-represented litigants effectively represent themselves.[91] 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 won in 84% of cases that went to trial, but only the tenants with lawyers won at trial.[92]

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 seventeen month period in 1995 to 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.[93] At first, lawyers supervised the students in courthouses and assisted *pro se* litigants. Later, the lawyers provided supervision by telephone. As a result, most of the Maryland Family Law Assisted *Pro Se* Project clients felt they had been treated more fairly. And not surprisingly, the study concluded that the students had helped the litigants obtain fairer results in their cases.[94]

Another type of successful unbundling are "Lawyer of the Day" programs. In such a program, a lawyer covers all of the cases held in a particular courtroom on a specified day. The lawyer interviews and advises the litigants and sometimes represents them in court. In one pilot project in Washington, lawyers represented tenants in eviction proceedings in housing court.[95] With the court's cooperation, the organizers established periodic "duty" days on which the

87. REPORT, *supra* note 23, at 29.

88. STATE BAR FINAL REPORT, *supra* note 30, at 7.

89. EXPERIMENT, *supra* note 85, at 3.

90. Family 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 (last visited Apr. 16, 2006).

91. EXPERIMENT, *supra* note 85.

92. WHERE'S THE PEDAGOGY?, *supra* note 84, at 367.

93. EXPERIMENT, *supra* note 85, at 3.

94. Michael Millemann, Nathalie Gilfrich, and Richard Granat, *Rethinking the Full-Service Legal Representational Experiment: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1190 (1997) [hereinafter RETHINKING].

95. HANDBOOK, *supra* note 15, at 37.

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 their litigation.

Since unbundled family law and housing programs have been fairly successful in pilot programs in other jurisdictions, and since there is a significant need for legal services in these areas, I posit that New York should set up law school clinics in these substantive areas to examine its current reservations with integrating the concept of unbundled representation. Overall, students would address simple legal problems that are not likely to generate a multitude of other legal issues. The following two types of clinical projects may accomplish this.

A. Landlord-Tenant Clinic

One proposal for testing unbundling in New York is to establish a clinic similar to a "lawyer of the day" program, where students would represent tenants faced with eviction proceedings in New York City's Housing Court. This clinic would explore reservations of law practitioners and court personnel 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. As the court attorney for the Administrative Judge of the Civil Court of the City of New York, I am aware that the majority of housing 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.[96]

In a court-annexed clinical program, law students trained in class by staff versed 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

96. If after discussing the case, the parties cannot reach an agreement to resolve the case, they are referred to a Trial Part. *See* New York State Unif. Court System, New York City Civ. Ct. Housing Part, Resolution Part, http://www.nycourts.gov/courts/nyc/housing//resolutionpart.shtml (last visited Apr. 25, 2006).

begin with a careful interview and assessment.[97] 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." This would inform the court of the scope of the attorney's role in the litigation.[98] Similar limited notices of appearance can be filed by students. At the conclusion of the student's appearance, the limited role would terminate 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 would state that the student lawyer is withdrawing from the case because the limited level of service to which the student lawyer agreed to perform has been completed.[99]

By involving the court system in the implementation of this pilot project, judges would be prepared for student limited appearances and would be ready to honor the scope of the representation. This would allow the judiciary to become accustomed to the nature of limited representation and, further, to pave the road for an increase in limited courtroom appearances. The judiciary's involvement with the project would also likely encourage judges to be more patient with 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 an unbundled representation begins and ends the same day, opposing counsel and the court will not be confused over with whom to communicate or over to whom they should serve in future litigation.[100] 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 serve as a call to expand unbundled "lawyer of the day" programs to the private bar, this type of representation would be an attractive *pro bono*

97. *See infra* notes 118–20 and accompanying text.

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

99. If 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.

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

opportunity for both solo practitioners and large law firms. 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 attorney time and firm resources required of *pro bono* work.[101] The Civil Court of the City of New York already offers a free nine-hour Volunteer Lawyer Training Program, in which attorneys can receive Continuing Legal Education ("CLE") credit and gain an introductory background in landlord-tenant law. Once trained, a volunteer attorney's commitment to representing tenants in an unbundled lawyer of the day program could be "capped." In addition, attorneys could obtain up to six hours of CLE credits for performing uncompensated legal services for clients unable to afford counsel. This would make this type of limited representation even more attractive.[102]

B. Domestic Relations Clinic

A second suggestion is this: law school clinics should test the reservations concerning ghostwriting outlined in part I, through concentration on day-to-day, routine legal services provided regularly by legal aid and *pro bono* offices in domestic relations cases. Clinics could operate within courthouses, so students, under the supervision of trained clinical professors, could assist counsel in the drafting of court documents on behalf of the self-represented litigants.

Under such a program, students would first have to assess the level of complexity of a client's problem(s). The Maryland Experiment found the simpler the legal task required, the more satisfied the clients were with the law student's assistance.[103] Professor Michael Millemann, the project's director, separated the legal problems into three distinct "discretion" categories: (1) problems that 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.[104] Ideally, students would assist litigants suffering from problems that fell into the first two categories.

Perhaps one domestic relations clinic could operate out of one of New York's Supreme Courts. In this clinic, law students could assist clients with uncontested divorces, and divorces where child support is the only outstanding issue. In New York, since child support falls under guidelines 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.

101. *See* REPORT, *supra* note 23.

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

103. EXPERIMENT, *supra* note 85, at 5.

104. *Id.*

Students could also help with simpler motions for clients seeking modification of visitation schedules or child support orders due to changed circumstances.

In these clinics, law students might draft pleadings on behalf of the litigants, but they would not appear in court. The drafted pleadings would bear an anonymous disclosure, to which the parties would somewhat anonymously attest, that they were prepared by the clinical pilot project students. Having learned of the limited role of a student through the student's disclosure, judges can be fully aware that clinic students are helping otherwise-self-represented clients prepare pleadings. Moreover, when judges and adversaries are fully aware of the assistance, they will likely eschew their ghostwriting criticisms qualms concerning lack of candor and misrepresentation.[105] 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 litigant's documents to avoid unfairness.[106]

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 needs of the public.[107] In order to encourage attorneys to perform unbundled drafting of legal documents, the requirements regarding the level of disclosure of assistance must be clarified. Most studies have indicated that requiring disclosure of the name and address of the attorney serves as a deterrent to lawyers offering unbundled legal services. In this clinical environment, it would be possible to gauge the judiciary's and opposing counsel's reactions to the "anonymous disclosure." Judges can be questioned to see if they feel the level of disclosure is appropriate or necessary. They can be polled as to 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."[108]

Special rules would need to be put in place before the students could participate in ghostwriting. The presiding judge must agree that a disclosure 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. A self-represented party's certification on the pleading should satisfy the Rule 130 requirements, leaving room for the court to conduct further inquiry, if warranted. As the NYSBA 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."[109]

In addition, students in the suggested domestic relations clinics could work

105. RETHINKING, *supra* note 94, at 1188.
106. Luce, Jr., *supra* note 35; Rothermich, *supra* note 34, at 2711.
107. City Bar Opinion, *supra* note 46; State Bar Opinion, *supra* note 35, at 5.
108. Goldschmidt *supra* note 34, at 1157.
109. State Bar Opinion, *supra* note 35, at 5.

with courthouse staff to develop simplified pleading forms that could be filed by self-represented litigants. Indeed, the Maryland project found the development and use of simpler forms with check-off boxes led to greater success of the project.[110] This type of clinic would present a wonderful 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.[111] In narrowly-defined subject-matter clinics, such as those dealing with landlord-tenant and domestic relations matters, there is a risk that providers will pigeon-hole clients into discrete case or service categories, while the client would benefit from services addressed over a broader area.[112] As one court stated, "when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent."[113] Thus, although the areas of law which the clinic addresses are narrowly defined, ancillary concerns still deserve exploration with the client both to avoid malpractice and to avert any possible ethical breaches.[114]

The Maryland experiment found that a careful diagnostic intake interview was critically important for the student and client to avoid the real dangers of unbundled representation.[115] Specifically, the clinic experience should begin with the student conducting a thorough intake interview, preferably with the litigant furnishing as much information as possible about the legal problem.[116] 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 would have to then make a determination as to whether the clinic's unbundling is appropriate given the relative complexity of the matter.

Choosing unbundled "assistance instead of . . . full representation represents a profound shift of responsibility from the lawyer to the client."[117] A student must be certain that the client understands the risks and consequences of unbundled representation and that the client understands and gives informed

110. RETHINKING, *supra* note 94, at 1182.

111. Dianne 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. REV. 10, 50 (Sept. 1997).

112. David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 269–69 (2003).

113. 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).

114. Chavkin *supra* note 112, at 268.

115. RETHINKING, *supra* note 94, at 1182.

116. REDEFINING ATTORNEY-CLIENT ROLES, *supra* note 70, at 336–38.

117. Garrett, *supra* note 78.

consent. The student must assess each client's experience and sophistication on a case-by-case basis and 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 could collect data to assist New York's policy makers in evaluating whether unbundled legal services enhance access to the justice system and, ultimately, help litigants realize successful case outcomes. More specifically, these pilot clinical projects could help New York's legislators determine whether unbundled legal services in litigated matters are 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. Clinic projects might also ask clients to work with the clinic over the course of the litigation and beyond, to gain a better measure of program success.[118] To assure reliability, the clinic should team up with a sociologist and statistician to analyze the data collected.[119]

Finally, it is important to clarify that unbundled legal services is less than full representation, and is by no means ideal. While I recognize in this article 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 both rich and poor clients.[120] 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.[121] Addressing and solving the legal needs problems in New

118. WHERE'S THE PEDAGOGY?, *supra* note 84, 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.

119. *Id.* at 398–99.

120. Barry, *supra* note 83, at 1097.

121. WHERE'S THE PEDAGOGY?, *supra* note 84, at 395.

York should be an integral part of class discussion. After all, students should have an opportunity to debate and evaluate legal service delivery models. Unbundled clinics would be an opportunity for students to understand and experience the realities of the law's impacts on the lives of the poor.

CONCLUSION

This article proposes that we explore unbundling legal services in litigated matters as a means to alleviate New York's legal-needs crisis. Yes, those New York advocates with concerns have legitimate ones—about the practicality of unbundled legal representation as it relates to both courtroom procedure and to the anonymous drafting of court documents. As I suggested, by testing the efficacy of this alternative representation through those law school clinical programs that are especially limited in scope, New York advocates may examine and resolve deep reservations. At the same time, New York advocates can utilize the state's cache of law students to help supply greatly needed legal services to otherwise self-represented litigants in landlord-tenant and family law disputes. If organizers can properly structure such programs, they will give us a better look at how we might overcome certain ethical, procedural, and administrative challenges that unbundled legal services unfurls. And this glimpse with which law schools provide us will, in turn, help us realize legislative and judicial change. If I am correct, this chain of events will lead to widespread use of unbundled legal services in litigated matters in New York—and beyond.