Ghostwriting and the Invisible Lawyer

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The argument over whether it is ethical for lawyers to provide limited representation to clients, called unbundling, and its corollary—ghostwriting—is pretty well over.

The norm used to be full-service lawyering, in which a lawyer provides the client with all the available options, exploring all the alternatives and using a panoply of bells and whistles. Limited representation is a growing alternative. It means what it sounds like: The lawyer provides, by mutual agreement with the client, a stripped-down product with fewer options and alternatives and no bells or whistles. The full panoply is unbundled into discrete pieces and sold à la carte. Ghostwriting consists of a lawyer preparing a court pleading for filing under the client's signature—pro se. Full and complete service to the client by his or her lawyer is no longer the only ethical option and no longer an option available to the average consumer.

The reasons for unbundling and its acceptance by the disciplinary high priests is easy to understand. The flood of pro se litigants in our courts, in cases ranging from civil disputes to juvenile relinquishments to criminal misdemeanors and divorces, exceeds 50 percent of civil case filings. Our fellow citizens cannot afford to pay for full-service lawyering. Court staff and judges are burdened trying to maintain fairness in a land of rules that only lawyers can navigate. People in need of lawyering are grateful for whatever help they can get and are willing to pay what their budgets can afford. Lawyers are able to make money and pay their overhead providing unbundled services. Despite exhortations to attorneys to provide pro bono services, the demand for legal services far exceeds the eleemosynary instincts of the best of our profession. The battle is over in the state courts. A majority of the jurisdictions and the ABA Model Rules now explicitly authorize both ghostwriting and unbundling. The only holdouts now are many of the federal district and appellate courts.

Nevertheless, the morality of limited representation, the inconsistency with professional aspirations, the ethics (with a small *e*) of the practice remain problematical. My intent in writing this article is to ask the right questions. I hope it will provoke some discussion and lead to some answers or, at least, some tentative answers. What then are the parameters of the issues?

The Tradition of Unbundling

Limited representation has traditionally existed for transactional lawyers. For generations, clients seeking tax advice or estate planning often limited their attorneys to preparing a memorandum outlining pros and cons. The same was traditionally true of clients seeking advice on how to organize their company, whether easements exist that restrict the use of the client's land, or how to avoid liability for violations of employees' civil rights. The client asks for a discrete package of services, à la carte, and

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the lawyer responds with what is asked. The rules of professional conduct always allowed clients to define how much or how little their transactional attorneys did for them. This limitation on the scope of the engagement allows the lawyer to draft a contract or prepare a business form and never see the client again.

There is a tradition of unbundling in the litigation context as well. Insurance company lawyers can tell the company to defend the insured on some claims but not others. The company then hires defense counsel to represent its client for only some claims, requiring separate counsel for the others. Local counsel in many jurisdictions undertakes only those tasks the pro hac vice lawyer requests. In criminal cases, defendants long have had an absolute right to represent themselves after being warned they were making a mistake. Often in such cases, the trial judge appoints a lawyer to act as advisory counsel, which means providing limited service as dictated by the client. Advisory counsel sits at the table with the defendant but does not argue motions to the judge, examine witnesses, or address the jury. He or she may or may not rewrite pretrial motions and supporting briefs. Advisory counsel is a long-accepted example of the unbundling of legal services.

More recently with the rising use of paralegals, low-income clients have asked lawyers to fill out immigration papers. These lawyers, in turn, assign the work to a staff person to make the project cost-efficient for the client. The same cost considerations have permeated personal bankruptcies in which staff members fill out the schedules of assets and liabilities as well as the basic petition. Thereafter, the client may take over and finish his or her bankruptcy without further assistance. In both of these areas of practice, the attorney is not asked to engage in a full-service takeover of the project but is asked simply to fill out government forms. Both are practices that allow lower-income people access to the legal system without hiring a full-service lawyer, and both have worked without significant criticism.

The next big area of limited service representation is family law. Divorce, child custody, restraining orders, and support represent the only contact with the legal/justice system the average American ever has. Far too many cannot afford a full-service lawyer to represent them. " Do it yourself" is the name of the game. Citizens go to the Internet for advice, attend do-it-yourself seminars at the courthouse, and download forms provided by for-profit and nonprofit companies. These may be their only options. If they seek out a lawyer, they too often learn that costs exceed the benefits of proceeding with the attorney. They then elect to proceed unrepresented. Thus, the potential client is reduced to asking the lawyer, "Can you help me just a little bit?" The Internet has forms for wills, forms for powers of attorney, home rental leases, and lots of advice and access to others needing the same answers to the same questions. The more educated may take their Internet results to a lawyer for a second opinion.

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A Judge Comments

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Roscoe Pound defined the legal profession as an organized body of people pursuing a learned art in a spirit of public service. When did we replace the commitment to advise clients with the selling of inventory? Ghostwriting is anathema to the justification of the lawyer's right to be heard, of the privilege curtained by oath and discipline to speak for another in a court of law. It destroys the very basis for the attorney-client privilege; and its stepsister, unbundling, obliterates the attorney-client relationship. As Robert Frost said of free verse, "It is like playing tennis with the net down."

The elephant on the conference room floor is the evasion of responsibility and the discipline of professional ethics. Just as accountability is the foundation of every profession, a signature warrants that the author stands behind what he or she says. The lawyer's name on the document or pleading attests to the accuracy of its contents by one certified for moral fitness and competence in law. For failure to meet the standards of a profession, there is a means of expelling the incompetent and the morally unfit: Offending military officers are cashiered, miscreant clerics are defrocked, and lawyers are disbarred. Admission standards and removal processes are the hallmarks of professions, not of contracts for itemized services rendered.

A lawyer is not an apparition. Ghostwriting creates an inference that the pro se litigant is more intelligent, more legally sophisticated, and hence more accountable than is truthfully the case. This false impression causes the judge to give the pro se litigant less deference. A ghostwritten complaint, motion, answer, or brief may direct the judge to an arguably correct legal conclusion, but it also moves the jurist further from a just decision based on evenhanded consideration—unless, of course, one is foolish enough to believe that a legally correct decision is necessarily a just one.

As for the piety that the lawyer who unbundles services merely intends to help the person who cannot afford complete representation, one must ask what sort of help that is. It is the moral equivalent of putting someone adrift in a stormy sea without oars, rudder, or compass. It reflects the congressional vice of "kicking the can down the road." Better by far to leave the can alone or pick it up and carry it. Indeed, does the "unbundled" complaint enable the hapless plaintiff to respond to a motion to dismiss based on *Ashcroft v. Iqbal* or wander

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Finally, more and more consumers seek to have a lawyer help them in a civil court case, as plaintiff or defendant, but only on a limited basis. This sometimes involves doing the basic legal research for the case, identifying claims, or drafting a complaint. Sometimes it includes drafting the motion to dismiss or for summary judgment, or the opposing brief, especially when the pro se plaintiff is up against a company-hired lawyer. Lawyers also educate people on how to be effective in small claims court. Limited representation thus involves five types of lawyering: giving advice, filling out government forms, drafting documents for court filings, researching the law, and representing the consumer in a court proceeding. These are all examples from what is actually happening in the real world of costly legal services.

Arguments Against Unbundling

Those who argue against the unbundling of legal services and its corollary, ghostwriting, posit four basic arguments against the practice. The first argument is that it is deceptive and a breach of the duty of candor toward the tribunal. This argument primarily relates to failure to sign one's name to pleadings. Judges can tell that a pro se litigant didn't write the brief or pleading, yet they don't know who did write it. The lawyer who wrote the pleading hides his or her identity and pretends that the nonlawyer wrote it. Thus, the lawyer is engaging in a deceptive practice that may be egregious if it hides a further deception by the pro se litigant.

The second argument involves Rule 11, which requires that

Illustration by Lisa Haney

the lawyer make certain representations to the court in signing a pleading. These representations include that the facts and the law have been adequately investigated, and the certification that the claim or defense is made in good faith and there is reasonable support for the factual allegations. If the lawyer does not sign the pleading, he or she cannot be held to the stringencies of the rule.

The third contention is that ghostwriting unfairly tilts the playing field in favor of the pro se litigant and against the party represented by a lawyer. Because judges are required to give liberal readings to pro se parties in order to offset their legal deficiencies, the argument goes, the pro se litigant gets an unfair benefit when a lawyer is really acting as the unseen hand.

The fourth contention is that a truncated level of work equals a truncated level of commitment and violates the lawyer's duty to provide competent legal services that advance the client's interests.

These arguments, for the most part, have been resolved in favor of allowing both limited representation in all arenas of the law and ghostwriting. Some jurisdictions keep the identity of the ghostwriter unknown, and some require the author's signature or identity to be on the pleading. Regardless, the practice is sanctioned. But the moral and professional questions for both lawyers and clients remain. These questions shape the way justice is rendered, and will shape the contours of justice for the next generation.

Hypotheticals

Consider this hypothetical: A small business owner comes to you as her lawyer. She is the sole member and manager of a limited liability company (LLC) that owns a spa building. The LLC rents out space to tenants who are massage therapists, nurses who inject Botox, hairstylists, pedicure providers, and other personal services providers. Economic times are tough and the mortgage on the building and expenses eat up the rents. To survive, she has cut back expenses. One of the tenants gets sued for personal injuries to a client, and the lawsuit names the spa as a responsible party. The owner learns that her insurance does not cover injuries occurring in the rental spaces. She comes to you with the summons and complaint, which needs to be answered or she will suffer a default. You tell her the costs to defend a personal injury case, including the costs of hiring a defense doctor, discovery, depositions, paying a settlement, and, heaven forbid, a trial. Neither she nor her LLC can pay for the defense. She doesn't have the money, but she can pay you to talk to the plaintiff's lawyer to try to convince him to drop the LLC from the suit, and she can pay for you to file an answer to avoid a default. Do you take on this limited representation?

Consider another hypothetical: A young woman with two

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unmolested through the semantic wilderness of *Twombly* and *Tellabs*? Can the self-represented defendant in a simple collection case argue the nuances of adhesion contracts? Does an unbundled answer enable the unrepresented defendant to move for summary judgment and test the waters of *Matsushita*? Of course not, so let a judge pick up the load and in the process become a surrogate advocate. But isn't that, perish the thought, judicial activism? Perhaps only on those rare occasions when the pro se litigant, not a client, wins.

Most of the arguments favoring unbundling focus on the plaintiff who, it is insisted, has a right to be heard. But what about the defendant who is dragged into court? Once served with process, the untutored and unwary fall into the discovery vortex. If answering interrogatories, drafting them, and responding to requests for admission is easy enough for the unlettered, why is it so expensive when undertaken by lawyers? Is it seriously suggested that one inexperienced in answering Socratic questions can even conduct a deposition? Of course, the pro se litigant can elect not to engage in discovery, but in most cases a lawyer would be guilty of malpractice for failing to do so. This constitutes a double standard: one for those who can afford representation and a lower standard for those who cannot. Goodbye to equal justice under law.

These lamentations aside, what practical chance does the ghosted or unbundled litigant have of achieving a successful result? Only the rare pro se complaint survives a motion to dismiss and, if it does, is almost always finished off by a cryptic summary judgment order followed by an unpublished order and judgment from the appellate court. Legions of staff counsel exist to find ways to recommend closure of these cases with a minimum of fuss. Perhaps more to the point, any case has a better chance of success when the litigant is represented by counsel and not shunted off to the pro se docket.

Is half or less a representation truly better than none? Acceptance of unbundling by courts and bar associations harnesses a learned art to a balance sheet and measures public service by adherence to a utilitarian calculus. Isn't that shooting our profession in the foot? ■

minor children and a low-wage job comes to you for help. She is in the middle of a pro se divorce and has just learned that her soon to be ex-husband is now the beneficiary of a trust set up by his wealthy grandfather, who is the trustee. The husband refuses to reveal the size or terms of the trust. For a smallish fee, you agree to ghostwrite discovery requests aimed at learning the details of the trust and the impact it may have on child support and property division. The husband responds by saying that the trustee refuses to give him any information or a copy of the trust instrument. Now what does she do? What do you do? Can you morally abandon her if she can't pay you to take the next step? Is she any better off for your assistance?

Consider a third hypothetical: A client comes to you with a problem. He loaned his brother-in-law $85,000 to help him start a new business. Now the brother-in-law won't pay the money back, and your client thinks that he has transferred and hidden assets to defraud creditors, including himself. You ghostwrite a pro se complaint for him asserting alternative theories for relief, including one that the money was an investment procured by fraud and deceit, and also asserting a claim for fraudulent transfers of assets. You charge him $1,500 for five hours of work. A few months later the client telephones you saying that the brother-in-law has declared bankruptcy. What does he do now? You refer him to your firm's bankruptcy partner, who says he isn't interested in the case because he has to make his numbers for the year-end compensation committee. The client says the work you did was worthless, and he isn't happy with you or your firm. Is the client any better off for the work you did? Could the client have pursued those theories for relief on his own had there been no bankruptcy? Did you really provide a service that had a value to the client? Should you return his fee, limited as it was?

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These hypothetical situations are examples of a lawyer being asked to unbundle legal services and doing just that. In each case, the lawyer and the client adhered to the state rules for lawyer conduct. The lawyer carefully explained the difference between full-service lawyering and à la carte service. The lawyer explained the fee structure—hourly, flat fee, or contingency. The limited scope of the work was adequately defined and reduced to writing. The client gave informed consent to the lawyer. The lawyer may then ghostwrite one or more pleadings for the client, or the lawyer may help the client be a better pro se litigant. Yet, each case leaves an unease, a feeling that the client bought a car that soon broke down.

In the first hypothetical, if the lawyer convinces the plaintiff's counsel to drop the suit, then all is well; but if the attempt fails, then the filing of an answer may merely postpone the inevitable debacle. The client has her answer filed, but now what? She will probably fail to marshal her documents for disclosure or determine potential witnesses. She will most likely be lost in the sea of discovery procedures and discovery rules; and when faced with a motion for summary judgment, the game is surely up. One can say, "Well, that's her problem and not her lawyer's. Lawsuits are a cost of doing business, and if she can't pay the cost, she shouldn't be in business." The lawyer, however, filed an answer. What if further discussion reveals that the answer should be amended or an affirmative defense—like the statute of limitations—should be pled when it wasn't. The lawyer might want to stick around to see if the one piece of work he or she did produce for the client is the best possible or even sufficient. Sticking around is a moral question, not a Rule 11 question about signing off on a pleading.

Some advocates for the increased use of unbundling and ghostwriting also ask that the lawyer conduct an initial diagnostic interview to assess the nature of the problem or the issue; the facts surrounding the matter; the alternative avenues or strategies; the client's needs, wants, and desires; the costs; and myriad other related information. The lawyer, according to these commentators, must then assess whether ghostwriting is appropriate or will be cost-effective. The diagnostic interview, however, is costly and time-consuming. Is there always a need for an in-depth client interview, the interview of potential witnesses, the extra effort before giving advice? The better question is when is a diagnostic interview necessary and when is it not? If one is necessary and the lawyer fails to do it, is that a professional failure, a lawyering failure, or, most assuredly, a moral failure?

Finally, consider what happens if the client lacks the capacity to proceed pro se. The client may be unsuited by virtue of language, brain power, or temperament to handle his or her case alone. What should the consulted lawyer do with such a person and what is the moral course of action? In the second hypothetical, the moral question is whether drafting discovery requests alone is sufficient help in accomplishing the limited purpose of learning the terms of the trust and getting a copy of the trust instrument so a lawyer can analyze it. The client asks for help in learning facts. The lawyer prepares a discovery request and says, "That's all we agreed I would do." If that's the agreement, hasn't the client been misled into believing the lawyer agreed to provide the help, limited as it might be, that the client sought? The client doesn't know that sending out discovery may only be the first step in a longer process. The client may not grasp the

process when the lawyer made that disclosure. The client may not know what the lawyer means when told that discovery is a process and not an event.

Ethical Quicksand

The third hypothetical illustrates the ethical quicksand in which a lawyer may find himself or herself for failing to anticipate a later turn of events. The lawyer's name does not appear on the pleading. It was written by a ghost, but it is a ghost that didn't consider the possibility of a bankruptcy. Who among us can divine every potential outcome or every countermeasure our opponent will make on the chessboard of litigation? If the lawyer is in the game for the duration, one bad move can be made up for with two good ones. An unanticipated outcome can be dealt with when it happens. The illustration, however, may lead to an angry client who will not be assuaged by the written agreement to limit the lawyer's engagement to drafting a complaint when the later bankruptcy issue that turned out to be a game changer was unanticipated and not discussed up front.

Ghostwriting has been justified as a way the young solo lawyer can provide a needed service and make some income in a difficult economic climate. But it is precisely that young solo lawyer who does not have the experience to anticipate and prepare the client for the unexpected. The least experienced have the highest rate of mistakes and malpractice claims. In this third example, the young lawyer is more exposed to the angry client who knows the lawyer is both young and inexperienced. The road to a malpractice claim may be paved with good intentions and the desire to provide services to those who can't afford full service. Some tort claims have special land mines like those involving governmental immunity, statutes of limitations, and the requirement of expert witness testimony to establish causation. Failure to meet legal requirements can lead to a dismissal of the case and a sanction of attorney's fees. If the client is forced to pay the fees of the opposing side, that client may well not only blame the ghostwriter but may sue the ghostwriter as well. The lawyer's good-faith belief that, after investigation, the claim is legally and factually supported may save him or her from the disciplinary office but not the unhappy role of a malpractice defendant.

Criminal cases are also the subject of work that could be done by lawyers on a limited basis or as a ghostwriter. The majority of such cases are prisoner litigation for post-conviction relief and complaints over prison conditions or prison restrictions. Often, state and federal prisoners who have lost their appeals seek post-conviction relief in the form of a habeas corpus petition or a statutory variation of such a petition. These prisoners have few choices. They are mostly poor and without personal or family resources. There are jailhouse lawyers, fellow prisoners who will prepare their petition papers for a fee. Unless the prisoner is awaiting execution, a pro bono lawyer is a rarity. They are not eligible for a court-appointed lawyer. That leaves the family to try to hire a lawyer, usually on a reduced fee basis or on a limited, unbundled basis. Here a ghostwritten petition is far better than one prepared pro se. Courts are burdened with petitions handwritten by barely literate individuals or typed on pre-computer typewriters by self-taught hustlers preying on those who need a sliver of hope. Could limited-service lawyers help the overload? Probably yes. Should they? That is an open question.

The difference between "could" and "should" is a wide chasm. A lawyer can do the ethical minimum by finding out what the prisoner-client says is the constitutional deprivation that led to his conviction, by reading the appellate decisions and the supporting documentation provided by the client to the lawyer. From these sources, it is possible to draft a pleading seeking post-trial relief that meets the minimum requirements of criminal rules governing the signing of pleadings. It doesn't matter whether or not the lawyer is revealed as the author; the lawyer must meet the rules regarding the submission of pleadings. This is the floor, and the question must be asked: Is this floor professional and is it morally defensible on the basis that it is far better than a pro se alternative? A truly professional assistance to the prisoner-client requires a trip to the prison; it requires reading the transcript from the trial; and it often requires hiring an investigator to interview the original defense counsel and to re-interview witnesses, some of whom may not have been called to testify at the trial. A truly professional assistance requires far more time and effort. Even at reduced billing rates, it requires more than many friends and families are willing to contribute. Thus, there is a great incentive to opt for the minimal rather than the optimal. That dichotomy is the professional, moral, and ethical issue left unanswered as unbundling merely papers it over.

How do we as a profession find answers to the questions posed in this article? By shining a light on the problems and issues and by debating the alternatives. Maybe it is a question of the ends justifying the means. Maybe full-funded legal services for all types of legal needs is a better route. Is there a cost-benefit analysis that dictates one answer or the other? It is not for this writer to spoon out conclusions. Rather, it is for lawyers, acting in the spirit of professionalism, to admit that unmet needs created the consequence of unbundled legal services. So, I ask you, what do we do about it? ■