

Unbundled Legal Services: A Revolution Whose Time Has Come

BY AMY DUNN JOHNSON

The legal profession is in a state of unprecedented change. Experts predict that in the next 20 years, we will see the emergence of a legal industry that is radically different than the current establishment.¹ A variety of factors are at play, including ones that threaten to disrupt legal business models that rely on the billable hour and the “all-or-nothing” approach to legal representation. Among these forces are: (1) the widespread availability of technology; (2) the inability of average Americans to afford prevailing fees for legal representation; (3) inadequate supply and distribution of attorneys who work in locations and practice areas where demand for low-cost legal services is high; and (4) a growing do-it-yourself (DIY) movement among the general public.

A Changed Landscape

Information Technology

During the last decade, we have seen an explosion of information technology and its capacity not only to automate previously inefficient processes, but also to allow lawyers to practice in ways that simply were not possible in the past.² One clear example is the near-extinction of book-based legal research in favor of computer-assisted research. This particular development has proven to be helpful to the profession, allowing for access to legal resources—anywhere, anytime—that are updated almost instantly.³ Other technologies have the potential to fundamentally alter the way that law is practiced.⁴ For example, automated document assembly technology allows for the generation of polished, customized first drafts of legal documents with user-provided

answers to a set of questions; what once took hours to do can now be completed in a matter of minutes.⁵

Average Citizens Who Cannot Afford Legal Fees

The growth in the number of low- to moderate-income Americans means that standard, full-service representation for routine matters is increasingly beyond what average citizens can afford. One in four Arkansans now lives at or below 125% of the federal poverty level, which is generally considered the financial eligibility standard for civil legal aid.⁶ An additional 17% of our state’s population lives between 125% and 200% of the federal poverty level, meaning that nearly half of Arkansans, if faced with a civil legal problem, would likely have to choose between paying for a basic necessity and paying an attorney.⁷

Our current legal market’s primary source of help for poor and near-poor individuals in non-fee-generating civil matters is legal aid and pro bono volunteers. These delivery systems are essential for Arkansas’s most vulnerable citizens; however, they are meeting only a fraction of the current need. Our state’s two legal aid providers—the Center for Arkansas Legal Services (CALs) and Legal Aid of Arkansas (LAA)—provide high-quality representation and assistance to as many as 15,000 Arkansans a year, despite having only 64 attorneys and paralegals statewide.⁸ In addition, 71% of Arkansas-licensed attorneys reported having performed some pro bono services in 2013, whether through legal aid or on their own.⁹ Still, CALs and LAA turn away half of all qualified clients who call for help

due to resource limitations.¹⁰ No organized source of support is available to moderate-income families who do not qualify for legal aid. It is therefore unrealistic, given current demand and resource limitations, to expect that we can provide a lawyer for every poor person, much less every person of modest means, who needs one.

Inadequate Access to Lawyers

One might think that a 431% increase in the number of new attorneys who have entered the workforce in the last 50 years¹¹ would have resulted in the public having better access to legal representation. That is not the case—particularly among poor, rural communities, which face acute shortages in the number of practicing lawyers. For example, Arkansas’s 25 most rural counties average fewer than one practicing attorney per 1000 residents.¹² The numbers are even more stark for the poor: for every legal aid attorney, there are approximately 17,568 income-eligible Arkansans.¹³

Meanwhile, recent law graduates are finding themselves unemployed or underemployed



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and law schools are seeing significant declines in enrollment.¹⁴

Growing DIY Movement

Recent research from the Arkansas Access to Justice Commission suggests that Arkansans who cannot afford legal services are resorting to self-help in growing numbers. A 2011 study conducted in partnership with the Clinton School of Public Service suggests that unrepresented litigants initiate between four and 10 domestic relations cases, while nine in 10 do not have an attorney appearing for the respondent.¹⁵ Financial and housing cases are almost universally initiated by an attorney, with nine in 10 having no lawyer to defend the matter.¹⁶ Not surprisingly, litigants left to flounder without representation in these life-altering predicaments lose confidence in the justice system as a whole, making them less likely to comply with court orders or even rely on courts to resolve legal problems.¹⁷

This problem is not unique to Arkansas. The Cardozo Law School-based “Justice Index” indicates that more than 80% of litigants nationally appear without a lawyer in such important civil matters as debt collection, child custody and support, foreclosures, and evictions.¹⁸ The American Bar Association’s 2014 World Justice Project Rule of Law Index shows the United States ranking 65th out of 100 countries for access to and affordability of civil legal services and the lowest among all industrialized nations surveyed.¹⁹ The trend toward self-representation is not only indicative of the growing inability of average Arkansans to afford legal representation, but it is also the result of a flourishing DIY movement among the lay public occasioned by the widespread availability of information on the Internet.²⁰

Consumers now feel empowered to handle their own personal and professional transactions, from selling real estate to purchasing airline tickets. They understand that if they handle some of the legwork involved in these transactions, they can procure products and services at more affordable prices. They can research their options and gather information about the cost and quality of what they are purchasing. The legal profession is now finding itself subject to these same forces.²¹

Regrettably, lawyers have done little to respond to these trends. Instead, non-lawyer document service companies such as LegalZoom, Nolo, and Rocket Lawyer have stepped in to fill the void. LegalZoom alone

boasts two million users over the past 12 years, earning it hundreds of millions of dollars.²² These companies are responding to a clear and significant demand from the public for affordable legal help. They are, however, no substitute for the skilled counsel of a trusted attorney. Until we as lawyers offer a viable alternative, we run the risk of becoming irrelevant.²³

A Private Market Solution

The most realistic solution for attorneys desiring to adapt to these trends is to consider incorporating unbundled legal services into their practice. Often referred to as “limited scope representation,” or “a la carte legal services,” this model of delivering legal services has been implemented in other states—Alabama, Alaska, Mississippi, and Montana, for example²⁴—but few, if any, Arkansas attorneys have actively developed this business model.

Unbundling is the delivery of legal services where various tasks associated with a legal matter are broken down so that the attorney represents the client only for a clearly defined part of the client’s needs, and the client accepts responsibility for handling the remainder until its conclusion.²⁵ Arkansas Rule of Professional Conduct 1.2(c) authorizes Arkansas attorneys to provide this form of representation. That rule provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Common examples include document drafting for non-litigation matters, “ghostwriting” pleadings for a specific case, limited court appearances, organizing discovery materials, drafting contracts, and legal coaching.²⁶

Unbundling allows clients—who would likely avoid consulting a lawyer at all—to obtain the services they want and need for aspects of the case that require legal expertise, and otherwise handle the more routine aspects themselves. It also opens up to lawyers a market that has previously been nonexistent or unprofitable. Many clients who are unable or unwilling to pay \$1,000 for an uncontested guardianship would be willing to pay \$200 to consult with an attorney to prepare for the hearing and, as a result, be equipped to effectively complete the matter. The attorney will have been able to provide a valuable service at the equivalent of her hourly rate without acquiring an account receivable.

Unbundling is not appropriate for all cases; complex child custody cases and criminal cases

do not lend themselves to this form of representation.²⁷ Furthermore, unbundling cannot be a substitute for full representation in cases where the legal issue is simply too complex or the client is incapable of understanding or participating in the representation. Such matters—if they involve a person of limited means—will be most appropriate for handling by a legal aid or pro bono attorney.

Attorneys who deliver unbundled legal services are subject to the same ethical obligations as attorneys who handle legal matters from start to finish. Unbundled legal work should be performed diligently and competently; it is not second-rate service, nor is it limited liability.²⁸ Many attorneys express concern over whether unbundling increases malpractice exposure. Provided that an attorney who offers limited scope representation follows recommended best practices—such as a good client intake process, conflicts screening, written engagement agreement, written confirmation of completion of a matter, and good customer service—insurers generally consider unbundling to present no additional risk.²⁹

Other concerns about unbundling include how to handle communications with a pro se litigant who is represented by counsel for part, but not all, of a case; the extent to which ghostwriting is permitted and whether it should be disclosed to the court; and whether judges will honor limitations on the scope of representation and allow withdrawal. A number of other states have addressed these concerns by adopting modifications to their rules of professional conduct and civil procedure to provide clear guidance on these matters.³⁰

The Arkansas Access to Justice Commission approved a plan in 2013 to address the legal needs of self-represented litigants, and unbundling was a key recommendation to come out of that report.³¹ Since that time, the Commission has created a Task Force on Self-Represented Litigants to implement the report’s recommendations, including the promotion of unbundling in Arkansas. The Task Force is developing proposed amendments to existing rules of professional conduct and rules of procedure to provide clearer guidance on limited appearance, ghostwriting, and communications between attorneys and pro se litigants. The Task Force will seek input from the bench and bar regarding these recommendations in the coming months.

Unbundling is not a cure-all for everything that ails the present-day legal market. But it is

a substantial step in the right direction.

Endnotes:

1. See, e.g., RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).
2. *Id.* at 13.
3. See Sanford N. Greenberg, *Legal Research Training: Preparing Students for a Rapidly Changing Research Environment*, 13 *LEGAL WRITING* 241, 261 (2007).
4. In management theory, distinctions are drawn between “sustaining” and “disruptive” technologies. See, e.g., SUSSKIND, *supra* note 1, at 39. “Sustaining” technologies, such as computer-assisted legal research, sustain and enhance the research that lawyers once did using books. “Disruptive” technologies, much like digital camera technology that replaced chemical photo processing, fundamentally challenge prevailing business models. Automated document technology is generally considered to fall in the latter category. *Id.* at 40.
5. SUSSKIND, *supra* note 1, at 41.
6. According to the U.S. Census Bureau's 2012 American Community Survey, 737,852 Arkansans live at or below this threshold. U.S. Census Bureau, *Poverty Status in the Past 12 Months*, 2012 American Community Survey 1-Year Estimates, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_S1701&prodType=table (last visited May 23, 2014) (hereinafter “American Community Survey”). For a family of four, 125% of the

7. See American Community Survey, *supra* note 6.
8. 2013 Annual Justice Partners Report, <http://www.arkansasjustice.org/annualreports> (last visited May 23, 2014).
9. These numbers are based on the most recent aggregate data compiled from self-reports submitted by attorneys who were returning their Annual IOLTA Compliance Statements to the Clerk of the Arkansas Supreme Court. Results are on file with the author.
10. 2013 Annual Justice Partners Report, *supra* note 8.
11. ABA, *Be the Change*, http://www.americanbar.org/groups/leadership/office_of_the_president/legal_access_jobs_corps/video1.html (last visited May 20, 2014).
12. See Lisa Hammersley, *More People Acting as Own Lawyers, Losing*, *ARK. DEMOCRAT-GAZETTE*, at A1 (Mar. 16, 2014).
13. This calculation is based on a total of 737,852 Arkansans whose income is within 125% of the federal poverty level, according to the 2012 American Community Survey cited in note 6, divided by 42 full-time equivalent attorneys who work for CALS or LAA.
14. See Hammersley, *supra* note 12. Employment Summary Reports generated for the 2013 graduates of the UALR Bowen School of Law and the University of Arkansas

- School of Law for 2013 indicate that about 62% of 2013 Arkansas law school graduates are employed in jobs that require a juris doctor. See ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, *EMPLOYMENT SUMMARY*, <http://employmentsummary.aba-questionnaire.org/> (last visited June 2, 2014).
15. See Chanley Painter, *Exploring the Problem of Self-Represented Litigants in Arkansas Civil Courts*, at 16 (2011), www.arkansasjustice.org/research (last visited May 19, 2014). A total of 50,899 domestic relations cases were filed in Arkansas in 2011. 2011 *Arkansas Judiciary Annual Report* at 27, <https://courts.arkansas.gov/sites/default/files/2011%20Annual%20Report.pdf> (last visited May 19, 2014).
 16. Painter, *supra* note 15, at 16.
 17. See Christina Llop, *Addressing the Needs of Self-Represented Litigants in Alabama Courts* 13 (May 2009), <http://alabamaatj.org/wp-content/uploads/2013/08/Alabama-Final-Report-SRL-Services.pdf> (last visited May 19, 2014).
 18. National Center for Access to Justice at the Cardozo Law School, *The Justice Index*, <http://www.justiceindex.org/findings/self-represented-litigants/> (last visited May 19, 2014). The study's composite index ranks Arkansas 37th in the nation on indicators related to the degree to which state courts have adopted best practices for dealing with self-represented litigants, Arkansas ranks 48th.
 19. World Justice Project Rule of Law Index, <http://worldjusticeproject.org/rule-of-law-index> (last visited July 21, 2014).
 20. See STEPHANIE KIMBRO, *LIMITED SCOPE LEGAL SERVICES* 1 (2012).
 21. *Id.* at 14-17.
 22. See LegalZoom, www.legalzoom.com (last visited May 19, 2014).
 23. See Jordan Furlong, *Foreword* to KIMBRO, *supra* note 20.
 24. See, e.g., MONT. R. CIV. P. 4.2, 4.3, 11(b); MONT. R. PROF'L CONDUCT 1.2(c), 4.2(b), 4.3(b).
 25. KIMBRO, *supra* note 20, at 4.
 26. KIMBRO, *supra* note 20, at 4-5.
 27. KIMBRO, *supra* note 20, at 6.
 28. M. Sue Talia, *Roadmap for Implementing a Successful Unbundling Program*, <http://www.courts.ca.gov/partners/documents/Roadmap.pdf> (last visited May 21, 2014).
 29. See, e.g., KIMBRO, *supra* note 20, at 34-35.
 30. See, e.g., MONT. R. CIV. P. 4.2, 4.3, 11(b); MONT. R. PROF'L CONDUCT 1.2(c), 4.2(b), 4.3(b).
 31. John M. Greacen, *Services for Self-Represented Litigants in Arkansas: A Report to the Arkansas Access to Justice Commission* (July 26, 2013), www.arkansasjustice.org/research (last visited May 21, 2014). ■