

STATE BAR OF MICHIGAN

7TH ANNUAL JUSTICE INITIATIVES SUMMIT

**Creating an Effective Unbundling System
in Michigan**

MONDAY JUNE 20, 2016



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Executive Summary

Limited-scope representation (LSR)/unbundled legal services have been an informal part of the practice of law in non-litigation settings in Michigan for decades. Michigan is now poised to join the majority of states that have adopted a more formal unbundling system. Led by widely recognized innovator, expert, and long-time LSR practitioner, Katherine Altenecker, participants in the SBM's 7th Annual Justice Initiative Summit engaged in a wide-ranging discussion of the powerful impacts unbundling has made in other jurisdictions and how concerns have been overcome. The group reviewed practical nuts-and-bolts considerations for courts, clients and lawyers in providing unbundled legal services. Other topics included Michigan's history and experience with unbundling, Michigan's state of the art legal self-help infrastructure, and other related innovations highlighted by the work of Michigan's 21st Century Practice Task Force. The summit concluded with break-out sessions where participants contributed dozens of ideas consolidated and summarized in this report into nine concrete suggestions to apply to general civil cases at first and to consider for criminal and business matters later.

Introduction and Welcoming Remarks

On June 20, 2016, over 50 judges, court staff, legal services providers, private attorneys, access to justice advocates, and community partners gathered at the State Bar of Michigan to participate in the Seventh Annual Justice Initiatives (JI) Summit to address "Creating an Effective Unbundling System in Michigan." The group was convened by State Bar President Lori Buiteweg who explained that success in unbundling, also known as limited-scope representation (LSR), requires a systemic approach and must include input from all stakeholders.

Limited-Scope Representation: Background and History in Michigan

Linda Rexer, executive director of the Michigan State Bar Foundation, and eliza qualls perez-ollin, director of the Detroit Equity Action Lab at Wayne State University, explained that unbundling most often involves an attorney providing a self-represented party with advice and coaching, mapping out an overall legal strategy to resolve the entire matter, and usually performing one or more discrete tasks, such as preparing pleadings, conducting discovery, limited court appearances or negotiating settlement. Experience in the over 30 states that have formally adopted LSR demonstrates that unbundling focuses primarily on private civil matters, rather than criminal or commercial matters, and that all stakeholders tend to benefit: courts benefit from better prepared pro se civil litigants, fewer delays, and a more efficient docket; clients benefit from attorney expertise, and from paying for legal services only where a lawyer is truly needed; and attorneys benefit from gaining access to a previously untapped market of self-represented clients, increasing revenues and growing their practices. In these jurisdictions, LSR has been a boon not only for legal aid consumers and lower-income clients, but for clients of all income levels in matters where self-help and self-representation make sense and a lawyer can assist by providing unbundled services. LSR has been an informal, if unacknowledged, aspect of the practice of law in non-litigation settings in Michigan for decades. Michigan has been moving toward a more formalized unbundling system since at least 2010, when the SBM's Self-Help Task Force was convened, and especially with the launch of Michigan Legal Help ("MLH") in 2012.

MLH is an online resource that provides information for self-education, legal triage, access to non-legal resources, SCAO-approved forms for self-represented parties, and directories to help clients find attorneys. Earlier this year, MLH evaluated its online user metrics and discovered that “how to find an attorney” was one of its most popular features.

Also in 2016, after its 11-month exhaustive review of the full scope of legal practice in Michigan, the SBM’s 21st Century Practice Task Force, a highly diverse body of private attorneys, judges, court administrators, regulators, advocates, and academics, published its recommendations, including a call for the implementation of a comprehensive high-quality LSR system in Michigan, which would include rule and policy changes; education for attorneys, courts and the public; a system for clients to locate qualified unbundled attorneys; forms templates and other best practices resources. Summit participants noted that evaluation should be built into any unbundling system to learn from experience and improve future practices.

Unbundling and the 21st Century Practice Task Force

Janet Welch, SBM executive director, presented a brief general overview of the 21st Century Practice Task Force, and considerable detail concerning task force recommendations that directly impact unbundling. Ms. Welch began by noting two critical points. First, in the U.S., there is a 45 billion dollar latent market of unmet legal need, some of which could be captured by adopting LSR. Second, in today’s world, the status quo changes so quickly that “holding on” is no longer an option. Change is here, change continues to move and move swiftly, and the only question is whether we will participate in harnessing the future, or stand by and let the future harness us. Ms. Welch also averred that, of all 21st Century Task Force recommendations, those addressing unbundling may be the most urgent, for two reasons. First, LSR is one of the few areas of state bar innovation and leadership where Michigan lags behind other states; second, proceeding with a formal LSR system would impact so many other critical areas of the 21st Century agenda, including: modernizing regulation, court rules and rules of professional conduct; innovating business models, driving a more client-centered and market-savvy profession; modernizing legal education, admissions and attorney training; moving toward more specialty certification; simplifying complex civil procedures, improving efficiencies in the court system; creating a unified online legal services platform that includes triage, self-help, and credible trustworthy lawyer referrals, among other things.

With respect to LSR/unbundling, the 21st Century Practice report specifically recommends:

- Continuous review of the rules of professional conduct and regulations to eliminate unnecessary barriers to innovation, consistent with the highest standards of ethical obligations to clients and the public.
- Educate State Bar members regarding new and proven innovative law practice business models...to improve economic viability of solo and small firm practices, while expanding service to undeserved areas and populations.
- Implement a high-quality, comprehensive limited scope representation system, including guidelines, attorney and client education, rules and commentary, and court forms focusing on civil cases.
- Incorporate certified limited scope representation (LSR) referral component into both the SBM online directory and MLH, and ultimately into the unified online legal services platform.
- Create an efficient, responsive SBM system for advisory, prospective review of model fee arrangements, in collaboration with the attorney discipline system; enhance education of members regarding existing ethics opinions about fee arrangements and options.
- Draft amendments to MRPC 1.5 to include a definitional section on alternative fee arrangements and to clarify obligations for fee explanations in engagement letters, for consideration by the Representative Assembly.

Ethical Considerations in Unbundling

Ms. Perez-Ollin, of the Detroit Equity Action Lab, addressed ethical considerations raised by unbundling. Generally, she explained that a 2015 ABA Standing Committee on Ethics and Professional Responsibility formal opinion and a 2010 SBM informal ethics opinion both endorse LSR/unbundling, under the appropriate circumstances and where it complies with all other laws, ethical rules and rules of professional conduct. Specifically, ABA Formal Opinion 472 (Nov. 30, 2015) states that Model Rule 1.2(c) “requires informed consent of a client when providing limited-scope services,” and cites Model Rule 1.0(e) for the proposition that informed consent arises where the lawyer communicates “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Further, Rule 4.2 compels communication with counsel “when the communication concerns an issue, decision, or action for which the person is represented,” but Rule 4.3 permits communication “directly with the person on aspects of the matter for which no representation exists.” Specific to Michigan, Ethics Op. RI-347 (April 23, 2010) explains that “a lawyer is permitted to provide unbundled legal services [including assistance drafting documents] to a properly informed client, but he or she retains all of the professional responsibility that would exist in the case of ordinary services.”

Clearly, ethicists have considered unbundling carefully and have found few hurdles in its path. However, Michigan’s court rules remain silent concerning certain fundamental LSR issues. Such silence creates a gray area into which some Michigan attorneys are reluctant to tread, for fear of running afoul of the courts. Perhaps the most critical and urgent task, with respect to implementing a high-quality LSR system in Michigan, is closing this gap between the expressly favorable ethics opinions provided by both the ABA and SBM and the echoing silence in Michigan’s court rules.

Keynote Remarks: Attorney Engagement and Unbundled Services

Keynote speaker Katherine Alteneder, coordinator of the Self-Represented Litigation Network (SRLN), widely recognized expert and long-time practitioner of LSR, explained that unbundling is not an effort to replace something, but rather an effort to enhance something. More and more, litigants in private civil matters are representing themselves, often to their own detriment and the detriment of opposing parties, courts, and the legal profession. LSR is one way of reversing this trend. However, a healthy environment for unbundling must be built around a solid infrastructure for legal self-help. To be successful and sustainable, a system that permits and encourages attorneys to provide limited-scope representation must also provide resources for litigants to manage the areas in which they will continue to represent themselves. Michigan Legal Help (MLH), thriving since 2012, provides exactly this sort of infrastructure.

Not every type of legal matter, nor every client, is a good fit for unbundling. LSR tends to work best with matters such as landlord-tenant disputes, expungements, non-complex consumer or tax matters, simple divorces and other domestic and family law issues. In all cases, unbundling requires education and training—of lawyers, clients, judges and court staff. It also requires informed judicial engagement, rules that provide clear guidance, quality control mechanisms, deliberate attention to ethical questions by a community of mutually helpful practitioners, and integration into the entire legal services delivery system.

The types of discrete legal services most commonly delivered by an attorney providing LSR include:

- Diagnosis of Legal Issues and Options Counseling
- Legal Advice
- Ghostwriting
- Negotiation and Settlement
- Limited Court Appearances

The bulk of the keynote address focused on engagement letters, representation agreements, and filing notices of limited appearances and withdrawals with courts—essentially, how to enter and exit an LSR matter, both with the client and with the court, how to effectively and unambiguously limit the scope of representation, and how to ensure a rational and mutually agreeable relationship between fees and services rendered. Ms. Alteneder calls this a means to “right-size” legal services, a way to provide affordable, effective support for what would otherwise be independent (and often ineffective) self-representation.

The first step in crafting an effective limited-scope representation agreement is the initial consultation, which includes considerably more than the traditional intake and a conflicts check. In LSR, a successful initial consultation includes: accurately diagnosing the legal issues presented, assessing the suitability of the matter for self-representation at all, including the ethical obligation to accurately assess the client’s capacity for self-representation; determining whether any LSR services are appropriate; determining which tasks the client could perform and which tasks should be performed by an attorney; assessing the client’s ability to pay, determining a rough-draft budget; and, where appropriate, empowering the client to move forward with self-representation, in some cases supported by LSR, in some cases not. Only after such a comprehensive initial consultation is it possible to determine whether to engage the client at all, and whether the client actually needs (a) full representation by a lawyer, (b) ongoing support via LSR as a self-represented litigant, or (c) little more than some advice and a “game plan” to proceed independently with self-representation.

For each of these scenarios, an appropriate LSR agreement may be drafted, clearly defining the scope of representation, setting forth specific tasks to be performed by the lawyer, perhaps also setting forth specific tasks to be performed by the client, and addressing costs and fee arrangements.

Lunch Presentation: Self-Help, Triage, Online Intake and Unbundling

Angela Tripp, director of Michigan Legal Help (MLH), placed the concept of unbundling in the context of Michigan’s larger system for self-help, legal triage, and online intake. In brief, MLH oversees 11 self-help centers in Michigan, and hosts a website that covers 10 subject areas including 56 tool kits, 146 articles, and 44 automated “interviews” that allow users to complete 122 SCAO-approved forms (think TurboTax and the Form 1040). On average, MLH welcomes 18,000 visitors per week who complete 214 sets of forms every day. Ms. Tripp broke down the legal self-help process, within the unbundling context, into five major steps.

(1) Identify, diagnose and triage the legal issues, including an assessment of whether the party is capable of self-representation, and whether the party is eligible for legal aid services.

(2) Place the client’s matter on the continuum of legal services, which is the following:

- a. Self-representation with no support
- b. Self-representation with information and resources from MLH
- c. Self-representation with coaching from a lay navigator, plus resources from MLH
- d. Self-representation with advice and coaching from an attorney, plus resources from MLH*
- e. Self-representation with unbundled services from an attorney, plus resources from MLH*
- f. Full representation by an attorney*

*The attorney could be private-paid, private-pro bono, or legal aid

(3) Where unbundled services are appropriate, the client and attorney then define the scope of LSR, create the action plan needed to fully resolve the matter, define which tasks are for the client, and which are for the lawyer, and execute a representation agreement.

(4) As appropriate, the LSR attorney informs the court, and/or opposing counsel, and/or prior counsel.

(5) Once unbundled services are completed, the LSR attorney withdraws from the matter.

Ms. Tripp was careful to explain that triage and intake are entirely separate and distinct processes. Triage properly diagnoses the client's needs, legal issues, capacity for self-representation, and eligibility for legal aid services—all for the sole and discrete purpose of locating where on the legal services continuum the client's matter belongs. Intake, by contrast, is the process performed by an attorney (private, pro bono, or legal aid), to determine whether and how client and attorney might proceed together, either with unbundled services or full representation. Triage is critical for matching clients with the appropriate services, thereby making the intake, and the entire legal process, more effective and efficient. For example, it is of enormous value to the entire justice system when we direct only appropriate cases to legal aid and pro bono providers, and direct other cases to other resources. Similarly, it is of enormous value to sort out, at the triage stage, which matters are appropriate for self-representation, which would benefit from unbundled services, and which require full representation by an attorney.

Break-out Sessions

After lunch, summit participants were divided into the following four break-out groups for further discussion: Private Practice, Forms & Resources, Judicial Education, and Referral Systems & Certification. Each break-out group was asked to consider and address the same three questions: What are the most important things needed to implement a quality LSR program in Michigan? What obstacles will need to be overcome? What specific tools will help implement a quality LSR program in Michigan?

Below is a summary of key recommendations from the summit break-out sessions:

- Clear approval and support from the Supreme Court and SCAO; judicial engagement is critical.
- Amendments to Court Rules 2.117 and 5.117. Clear appearance and withdrawal filings to indicate where a party is and is not represented in any LSR matter.
- Clear ethical rules and rules of professional conduct, including how to manage LSR by successive attorneys in the same legal matter, and/or with the same client. Requirements for client's informed consent to LSR. Protection of confidential and privileged information.
- Forms approved by SCAO, and universal use of approved forms. For example, standard templates for informed consent, engagement letters, representation agreements, limited-scope appearances, disclosures, and limited-scope withdrawals.
- Training for attorneys—how to determine whether LSR is appropriate, how to limit and how to end representation, how to manage LSR by successive attorneys in the same matter and/or with the same client. Include business model information in attorney education. Training for the judiciary and court staff. Training for law firm staff. Ensure uniformity of understanding with judges, clerks, attorneys, and clients.
- LSR quality control and assurance mechanisms. Publish best practices resources and offer training. Create either an LSR section of the SBM, or LSR committees within existing SBM practice area sections.
- Marketing and referral mechanisms—statewide LSR qualification criteria for attorneys. In order to market unbundled services, attorneys should self-certify that they have completed LSR trainings and thoroughly reviewed the LSR best practices document and all relevant rules, and will use SCAO-approved forms. Build on Zeekbeek, educate the public, clearly identify qualified LSR-certified attorneys on the SBM directory.
- Creation of a specific LSR/unbundled services ethics hotline.
- Public education to inform potential LSR clients. Clarify the difference between fixed-price services and LSR/unbundled services.



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