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## In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services

Jessica K. Steinberg\*

### I. INTRODUCTION

In the United States today, an estimated eighty percent of the legal needs of the poor go unmet.<sup>1</sup> The Supreme Court has repeatedly identified access to the courts as a fundamental constitutional right,<sup>2</sup> but a lack of affordable legal counsel has shattered the promise of this right for low-income individuals. While litigants of means can afford competent counsel to shepherd them through complex legal proceedings, litigants without such resources must typically navigate the court system alone. There is widespread consensus that this “justice gap” between rich and poor litigants threatens the credibility of the justice system, undermines public confidence in the law, and distorts the accuracy of judicial decision-making.<sup>3</sup>

The provision of “unbundled” legal aid has been this decade’s response to the

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1. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 13-14 (2007), available at <http://www.lsc.gov/justicegap.pdf> [hereinafter DOCUMENTING THE JUSTICE GAP].

2. It is a major tenet of the American justice system that “the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien.” *NAACP v. Meese* (D.D.C.) 615 F. Supp. 200, 205-06, 1985. In fact, recognition of the right to represent oneself in legal proceedings predates even the ratification of the Constitution. As the Supreme Court stated: “[i]n the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that ‘in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of counsel.’” *Faretta v. California*, 422 U.S. 806, 812-13 (1975). The constitutional right of access to the courts is further discussed in *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 147-48 (1907); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971).

3. See Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009); JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) [hereinafter MEETING THE CHALLENGE].

severe shortage of lawyers available to represent poor litigants.<sup>4</sup> Hailed as an innovation in the delivery of legal services, “unbundling” is a piecemeal lawyering model in which a lawyer provides assistance with a discrete legal task *only* and does not perform the full range of services expected from traditional legal representation.<sup>5</sup> That is, while attorneys engaged in traditional representation commit to carry out a full “bundle” of acts<sup>6</sup> that take a client through the resolution of his legal problem, the term “unbundled” refers to the disaggregation of those acts, with the attorney and client agreeing that only one, or a few, legal tasks will be undertaken.<sup>7</sup> A recipient of unbundled aid does not typically enjoy the benefits of a lawyer’s advocacy before a tribunal or with an adversary.<sup>8</sup> Rather, a limited form of help—an advice session or document preparation, for example—constitutes the entire lawyering relationship, and the recipient goes on to handle all remaining aspects of the litigation *pro se*.

While legal services agencies have long been providing limited forms of help to their clients, the drive to organize the delivery of a limited form of legal assistance as a conscious and deliberate access to justice strategy is a recent development. Many courts, government agencies, and lawyers for the poor have championed unbundling as a solution to the chronic under-enforcement of rights faced by those who cannot afford counsel.<sup>9</sup> This support is based on a belief that granting some legal aid to a broad swath of the indigent population will create greater access to justice than a model that provides full representation to a small fraction of low-income litigants and zero representation to the remainder.<sup>10</sup> The

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4. Forrest Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994) (Mosten coined the term “unbundling”).

5. Unbundled legal aid is also referred to as “limited legal assistance” and “discrete task representation.” These terms are used interchangeably with little, if any, difference in meaning.

6. Mosten, *supra* note 4, at 422-23 (describing the full bundle of legal services as: “(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court.”).

7. In the context of lawyering for the poor, that “agreement” may be technically voluntary, but the litigant often has no alternative legal representation available to him or her.

8. Although most attorneys providing unbundled legal aid do not represent a litigant in court and do not negotiate on a litigant’s behalf with an opponent or opposing counsel, there are some lawyers who do provide such services in limited fashion. The unbundled legal services program studied herein, for example, offers one-time negotiation assistance to clients at a pre-trial settlement conference. Others might agree to make a limited appearance in court on behalf of a client, although such programs are certainly in the minority.

9. See Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC L. Rev. 35 (2007); Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107 (2002); CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AMERICAN BAR ASS’N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1996); AMERICAN BAR ASS’N, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF THE RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS (2005) [hereinafter ANALYSIS OF THE RULES]. For a long list of publications about various aspects of unbundling, see the website maintained by the American Bar Association’s Pro Se and Unbundling Resource Center, <http://www.abanet.org/legalservices/delivery/delunbund.html>.

10. Practitioners and scholars routinely cite the provision of unbundled legal services as expanding access to justice. AMERICAN BAR ASS’N, SEC. LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE,

working assumption, as expressed by a group of the nation's most prominent access to justice scholars at a summit on the delivery of legal services is that, given the tremendous scarcity of resources for civil legal aid, half a lawyer is better than none at all.<sup>11</sup> Unbundling allows legal aid providers to host organized clinics<sup>12</sup> at which scores of clients can receive at least a modicum of legal assistance, often with crucially important matters that impact their civil and economic rights. Without this help, litigants grappling with the many issues plaguing the low-income community, such as evictions, child-custody issues, and bankruptcy would almost certainly face the court system alone.

With its rise in prominence over the past decade, the ethical viability of unbundled legal services has been the subject of much public deliberation.<sup>13</sup> Scholars, lawyers, and other critics have questioned whether the types of activities undertaken as part of the delivery of unbundled aid run afoul of rules of professional conduct and other canons governing law practice.<sup>14</sup> In an example of ethical attack, judges have branded the ghostwriting<sup>15</sup> of documents—a hallmark of the unbundled model—a flagrant violation of a lawyer's duties to the court and

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REPORT OF THE MODEST MEANS TASK FORCE 12 (2003) [hereinafter HANDBOOK] (stating “We believe that in the great majority of situations some legal help is better than none . . . . A partially-represented litigant is more effective than a wholly unrepresented litigant.”); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 372 (2004) [hereinafter *Connecting Principles*] (noting that, in discussions of access to justice, it is assumed that “more is better and the trick is how to achieve it”); John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2691 (1999); Bradley A. Vauter, *Unbundling: Filling the Gap*, 79 MICH. B. J. 1688, 1689 (2000) (contending that a litigant is more likely to successfully complete a matter with limited help than with none at all).

11. In 1999, Fordham Law School held a conference entitled “Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues.” The conference produced writings that became the subject of a volume of the Fordham Law Review. A working group on “Limited Legal Assistance” convened at the conference to discuss ethical and practice issues related to the provision of unbundled legal services. See Mary Helen McNeal, *Having One Oar or Being Without a Boat*, 67 FORDHAM L. REV. 2617, 2618 (1999) [hereinafter McNeal, *Having One Oar*] (reporting that the working group concluded that, despite an aspirational goal of “equal justice” and a preference for full representation, “half [a lawyer] is better than none,” and limited services should be provided as long as clients receive sufficient benefit and protection).

12. In this context, a “clinic” is an open session where any number of eligible people can appear to receive the services offered. Typically, an organization will host a “clinic” on a certain day of the week or month, and publicize the event through local media, flyers, etc.

13. See *infra* Part II(C).

14. See *Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues, Report of the Working Group on Limited Legal Assistance*, 67 FORDHAM L. REV. 1819 (1999) [hereinafter *Working Group Report*] (in which access to justice experts offered guidance on how we might interpret rules regarding conflicts, informed consent, and competence to allow for unbundled legal services); see also TESTIMONY OF ALAN W. HOUSEMAN ON BEHALF OF THE CENTER FOR LAW AND SOCIAL POLICY TO THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (2000), available at [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/houseman1.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/houseman1.html).

15. Ghostwriting refers to a practice where an attorney prepares documents for a client but does not reveal on the face of the document that he had a hand in drafting them. Instead, the document is signed by the client who proceeds to represent himself in all future aspects of the litigation. See *infra* Part II(C) for an expanded discussion of the ethical challenges behind ghostwriting.

opposing parties.<sup>16</sup> Proponents of unbundled services have defended all aspects of the model, decrying an interpretation of ethical canons that erects barriers to the expansion of access to justice for the poor. The literature on unbundling abounds with proposals for crafting new ethical norms as well as analyses of how the practice is authorized by current ones.<sup>17</sup> This debate over reform of ethical rules is critical; yet, the debate itself presupposes that unbundling *actually helps poor litigants* and is worth the reform of centuries-old notions about the role a lawyer should—and must—play in advancing a client’s interests.

In fact, the threshold question of the efficacy of unbundled legal aid has not been the focus of significant attention by scholars and practitioners. Very little is known about how unbundled aid affects clients and cases, and whether it advances justice—however one might define it—for low-income litigants. Despite rapid proliferation of unbundled legal services programs in every state across the nation, unbundling has rarely been subject to empirical analysis to test whether it is effective in producing outcomes that are more just or favorable than its recipients could otherwise have achieved on their own. To be sure, unbundling permits legal aid providers to provide assistance to thousands of additional low-income individuals. Yet, is the mere delivery of aid a success in and of itself?<sup>18</sup> Even delivery of simple advice or brief services requires an enormous output of scarce attorney resources. Before states and the federal government standardize unbundled aid as the primary mechanism for meeting the vast legal needs of the indigent, it is critical to carefully assess how litigants armed with just “a little lawyering” fare in court.

This Article takes a small step towards remedying the dearth of evidence-based research available about the impact of unbundled legal services in improving access to justice. In doing so, it builds upon thirty years of research demonstrating that litigants who receive traditional, full-service representation fare better than those who represent themselves. Part II charts the rise of the unbundled legal services movement, describes the type of services typically provided, and

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16. *Id.*; see *infra* Part II(C)(1)(b) (discusses the key court cases that have considered the issue of unbundled legal services).

17. The ethical debate is not just scholarly in nature. Federal and local bar associations have taken up the issue of ethical implementation of unbundled legal services. Some state ethics commissions have cautiously endorsed certain controversial types of unbundling, such as ghostwriting. But the states differ in how compatible they see the delivery of limited assistance with governing ethics rules and some are more permissive than others. In addition, the American Bar Association, as part of its Ethics 2000 project, adopted new Model Rules in 2002 specifically designed to abet the delivery of unbundled legal services and issued the HANDBOOK, *supra* note 10, to help guide legal services advocates on how to deliver unbundled legal aid ethically.

18. The mere provision of advice and brief services to low-income litigants who cannot afford counsel is often touted as expanding access to justice in civil courts. This implies that the goal is simply to make sure a litigant can take the first basic action in advancing her rights—for example, filing a divorce petition or suing an unconscionable lender. But, if the litigant cannot successfully complete the case after the initial pleading is entered, the effect of unbundled legal aid in improving access to justice must be reassessed.

summarizes the important features of the ethical debate surrounding unbundling, including how judges, state ethics commissions, and local and national bar associations have responded to ethical critiques of the model. This section argues that significant investment in ethical reforms is premature pending further assessment of the efficacy of unbundling in expanding access to justice.

Part III reports on the results of an empirical study designed and implemented to test the impact of two specific forms of unbundled legal aid provided by the Legal Aid Society of San Mateo County (“Legal Aid”) on the case outcomes of indigent litigants.<sup>19</sup> The purpose of the study was not to reach incontrovertible or generalizable conclusions about the provision of unbundled legal services, but instead to use the resources available, and an ethically-feasible methodological design given the jurisdiction in which the author was located, to make a preliminary assessment of the efficacy of *one iteration* of the unbundled model, and thus to generate hypotheses for future research and offer at least some evidence-backed information about its impact on procedural and substantive justice for litigants. The study tracks outcomes for nearly 100 tenants facing eviction in a single California trial court, all of whom received “unbundled” help drafting a responsive pleading, and half of whom also received one-time assistance negotiating with their landlords at pre-trial settlement conferences. Case results achieved by the tenants who received unbundled legal aid are then compared to those obtained by two other groups: (1) more than 300 tenants who received no legal assistance at all, and (2) twenty tenants who received full representation through Stanford’s Community Law Clinic.

The outcomes assessed in this Article are both procedural and substantive in nature. The findings indicate that Legal Aid’s unbundled legal services program was successful in furthering procedural justice, but that its impact on substantive case outcomes was quite limited. While the unbundled aid provided did afford initial access to the justice system for low-income litigants, both by preventing default judgment and helping the unrepresented formulate valid defenses, the findings of this study suggest that unbundling did not secure more actual relief for its client population than unassisted *pro se* tenants in the same jurisdiction achieved without ever consulting a lawyer. These findings support a hypothesis that the unbundled services model might not provide benefit to all assisted clients in all circumstances, as has been presumed, and they illuminate the need for rigorous evaluation of the model, in its various forms and in numerous contexts, if we aim to understand where—if at all—rendering less than the “full bundle” of assistance can maximize favorable outcomes for indigent litigants.

Part IV evaluates the limitations of the study and highlights that the study design did not include a randomization scheme, meaning that tenants were not

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19. The study, which reviews 100% of the eviction filings in a single California county in the summer of 2009, was conducted by the author and designed with the contribution of Rebecca Sandefur, Assistant Professor of Sociology and of Law, Stanford University.

randomly assigned to receive a certain level of legal aid, but rather self-selected into the treatment and control groups by either seeking out assistance or choosing to represent themselves. Because the study was observational in nature, it is impossible to determine definitively whether the case outcomes achieved by litigants were a product of the type of lawyering assistance provided or, instead, a product of case or client characteristics that may have been present in one group of tenants but not another. For example, perhaps a higher-than-average number of litigants who sought unbundled aid did so because they could not, on their own, identify an obvious defense to their eviction. If that is the case, then lawyers providing unbundled services may have been assisting a group of tenants with fewer, or more complicated, defenses than tenants who got no assistance or full representation, and this relative lack of merit—rather than any lawyering services provided—may, at least in part, explain the outcomes achieved by that group of litigants. The study contains a significant methodological limitation in that it was unable to measure the impact of unbundled legal services independent of the merit of the cases or the personal attributes of the clients who sought assistance. Other limitations include the small sample size of the study and the uneven distribution of foreclosure cases across groups of litigants. Nonetheless, the findings are evocative and should encourage further investigation.

Part V identifies future research needs, and, in light of the findings, proposes potential models for assisting the rising tide of pro se litigants struggling to advance their cases without lawyer representation. The data culled from this study provide additional insight into the provision of unbundled aid as a policy solution and contribute some of the factual information needed in order to begin thinking, based on actual outcomes, about how to best fashion an effective system of distributive justice that uncouples financial status from the ability to protect one's basic rights.

## II. UNBUNDLED LEGAL SERVICES AND ACCESS TO JUSTICE

### A. *Origins of Unbundling*

The Legal Services Corporation (LSC) was founded by Congress in 1974 to address the lack of affordable legal assistance for the poor.<sup>20</sup> At its height, in 1981, the LSC was able to finance two lawyers for every 10,000 low-income persons.<sup>21</sup> Today, Congressional appropriations have dropped by almost half

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20. In the past 10 to 15 years, there has been an increase in non-LSC funded legal services providers; however, the majority of attorneys who serve the poor are still funded by the LSC. Of all legal aid attorneys nationwide, 3,845 work in LSC-funded programs and 2,736 work in programs funded by other sources. DOCUMENTING THE JUSTICE GAP, *supra* note 1, at 15.

21. DOCUMENTING THE JUSTICE GAP, *supra* note 1, at 1-2. There is one Legal Aid lawyer for every 6,861 individuals eligible for federally-funded legal assistance; by contrast, there is one private sector attorney providing civil legal assistance for every 525 citizens in the general population. *Id.* at 15. Put another way: "Less than one percent of the nation's legal expenditures, and fewer than one percent of its

from that high-water mark.<sup>22</sup> As a result, the agency has been woefully underfunded and unable to fulfill its mission of creating equal access to justice for those who face economic barriers.<sup>23</sup> Compounding the problem, other funding sources for free legal help have also sharply declined.<sup>24</sup>

The result of the underfunding of lawyers to provide civil legal assistance to low-income communities has been a meteoric rise in the number of pro se litigants appearing in the nation's courts. States report that in matters that typically affect the poor—divorce, landlord/tenant, and bankruptcy—at least one party appears unrepresented in 67% to 92% of cases.<sup>25</sup> This figure has climbed dramatically since the 1970s, when pro se representation rates ranged from the single digits to 20%.<sup>26</sup> Numerous studies have followed litigants who proceed pro se in a variety of forums and the vast majority have concluded that, regardless of the substance of the case, unrepresented litigants face far less favorable

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lawyers assist the seventh of the population that is poor enough to qualify for aid.” *Connecting Principles*, *supra* note 10, at 371.

22. In 1981, Congress appropriated \$321,300,000 to the Legal Services Corporation. In 2009 dollars, the 1981 level would be \$758,313,950.50. The 2009 appropriation was \$390,000,000. Thus, the value of the 2009 appropriation is nearly 50% less than the 1981 appropriation. *Id.* at 2.

23. Legal Services Corporation Act, 42 U.S.C. § 2996 (1974). In creating the Act, Congress expressly recognized a “need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances . . . [and] a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel.” *Id.*

24. Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid*, N.Y. TIMES, Jan. 9, 2009 (noting that low interest rates now in effect reduce returns from interest on lawyer trust accounts and gravely impact another crucial source of funding for legal aid offices); Mary Pat Flaherty, *Need is Up, but Funding Plummets for Legal Aid*, WASH. POST, Dec. 7, 2009.

25. See MADELYNN HERMAN, SELF-REPRESENTATION PRO SE STATISTICS MEMORANDUM (Sept. 25, 2006), available at <http://www.ncsconline.org/wc/publications/memos/prosestatmemo.htm#statecourt>. For example, according to the report, in California, in 2004, 67%-80% of petitioners in dissolution cases appeared unrepresented and 90% of tenants in eviction actions appeared pro se; in Florida, a 2001 survey revealed that 73% of all domestic relations cases involved at least one pro se litigant; and in Boston, in certain courts, over 75% of family and probate cases had one unrepresented party, and 92% of tenants facing eviction appeared unrepresented. *Id.* In addition, the American Bar Association (ABA) conducted a survey of 1200 judges in which state trial court judges around the country reported an increase in the number of litigants representing themselves in domestic relations, consumer issues, foreclosures, and eviction matters. ABA COALITION FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN COURTS (2010), available at [http://www.abajournal.com/files/Coalition\\_for\\_Justice\\_Report\\_on\\_Survey.pdf](http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf); see also Dhyana Levey, *As Foreclosures Rise, Pro Pers Clog the Courts*, DAILY JOURNAL, May 22, 2009 (noting the Chief Justice of the California Supreme Court cited a 35% rise in the number of pro se litigants in 2009); Amanda Ripley, *Who Needs Lawyers?*, TIME MAGAZINE, June 12, 2000 (reporting that in some jurisdictions, the number of pro se litigants increased by as much as 50% from 1990 to 2000); HANDBOOK, *supra* note 10 (noting that 60% percent of cases nationally have at least one unrepresented party).

26. MEETING THE CHALLENGE, *supra* note 3, at 8-10; Deborah Rhode, *The Unauthorized Practice of Law and Pro Se Divorce*, 86 YALE L.J. 104, 109, 160 n. 25 (1976) (indicating that, in a review of 2,500 divorce cases in two Connecticut trial courts, only 2.7% involved a self-represented litigant, and also reporting on the finding of an unpublished survey conducted in San Mateo County, California in the 1970s that 20% of divorce petitioners were proceeding pro se, which Rhode characterized as an “unprecedented surge” in self-representation at that time).



outcomes than their represented counterparts.<sup>27</sup> Particularly in family and housing law cases, represented litigants are anywhere from two to ten times more likely to procure the relief they seek when they enjoy the benefit of full representation by counsel.<sup>28</sup> Thus, it is clear that meaningful access to legal systems and institutions—and, especially, access to desired results—is highly dependent on a litigant’s ability to retain a lawyer.<sup>29</sup>

Despite the efforts of a group of committed advocates and well-documented evidence of the plight of self-represented litigants, there has been no mass public outcry for Civil *Gideon*-type legislation guaranteeing counsel for indigent litigants, even in cases where essential human needs, like shelter, are at stake.<sup>30</sup> Many courts and legal aid providers accept (often grudgingly) that we do not

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27. In the housing realm, multiple studies have looked at how represented and unrepresented tenants fare comparatively in court proceedings: LAWYER’S COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 18 (2003) (citing a 1996 study finding that represented tenants were six times more likely to win in court); REBECCA HALL, EAST BAY COMMUNITY LAW CLINIC, EVICTION PREVENTION AS HOMELESSNESS PREVENTION: THE NEED FOR ACCESS TO LEGAL REPRESENTATION FOR LOW-INCOME TENANTS (finding that tenants who had representation were 10 times more likely to prevail in court than unrepresented ones); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 419 (2001) (reporting that 22% of represented tenants had final judgments entered against them, as opposed to 51% of unrepresented tenants). In family law matters, studies have tracked the effect of counsel on retention of custody and likelihood of obtaining a protective order in cases of domestic violence. THE WOMEN’S LAW CTR. OF MD., INC, FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND 48 (2006) (finding that sole custody was awarded to the mother in 54.8% of cases where only the mother had legal counsel but only in 13.4% of cases where the mother was unrepresented but the father had representation); Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL’Y & L. 499, 511-12 (2003) (reporting that women with lawyers had an 83% rate of success in obtaining a protective order as compared with 32% of women who did not have a lawyer).

28. Judges also acknowledge that pro se litigants are likely to fare worse in court than those represented by counsel but are unable to offer guidance due to the need to remain impartial. Andria Simmons, *More People Forgo Lawyers, Represent Themselves*, ATLANTA JOURNAL-CONSTITUTION, Sept. 5, 2010; Terry Carter, *Judges Say Litigants are Increasingly Going Pro Se—at Their Own Peril*, ABA JOURNAL, July 12, 2010.

29. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (discussing the systemic silencing of tenants in Baltimore housing court who appear without counsel, and noting that unrepresented litigants lack even the basic opportunity to tell their story, let alone prevail on the merits of their case).

30. See Rhode, *supra* note 3, at 869 (noting the “almost complete silence surrounding access to justice” in recent American political campaigns and the striking lack of public concern about the inadequacy of legal services for the poor). It is worth noting, however, that some progress toward “Civil *Gideon*” has been made. In 2006, the ABA’s House of Delegates adopted Principles of a State System for the Delivery of Civil Legal Aid, promoting a goal of “a full range of high quality, coordinated uniformly available civil law-related services to the state’s low income and other vulnerable populations who cannot afford counsel, insufficient quantity to meet their civil legal needs.” AM. BAR ASS’N, ABA PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID 1 (2006), available at <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/tencivilprinciples.pdf>. In addition, in California, the first state-sponsored “Civil *Gideon*” legislation was passed in October 2009, launching a pilot project to provide some (undefined) amount of legal representation to every low-income litigant facing a housing or family law problem in court. The project will be implemented in a select few jurisdictions in January 2011 with legal aid providers making recommendations to the state as to what form of unbundled legal

have the resources or public commitment to fund a lawyer for everyone who needs one. Instead, they have coalesced around unbundling as one way to allocate the lawyering resources that we *do* have. The provision of unbundled legal services has now become a primary focus of state and federal commissions charged with improving access to justice.<sup>31</sup>

There is no shared vision as to what, precisely, constitutes unbundled legal aid and how it should be administered. Loosely, it is a single attorney service or collection of specific services that fall short of full-service representation (the full “bundle”). Conceived broadly, unbundling takes many forms: providing telephone, internet, or in-person advice; counseling a client through the litigation process; performing a brief negotiation as a client’s representative; conducting legal research; drafting documents; or representing a client in a specific court proceeding. For example, a client might hire a lawyer for trial representation, but not for document preparation. Or the client might decide he is able to handle court appearances on his own, but would like to hire an attorney for negotiations with opposing counsel. Practitioners often speak about unbundled legal aid as a system in which a client can choose from an “a la carte” menu of attorney services and can hire an attorney to assist with particular elements of a case when full representation is either undesired or unaffordable.

### *B. Unbundling for the Middle Class Versus the Poor*

Unbundling first came into vogue formally as a way of providing affordable legal services to the middle class—those that might need assistance with one particular aspect of their legal case, but could competently handle the rest of their matter *pro se*.<sup>32</sup> Proponents of unbundling often speak of the model as a way to

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services litigants should receive. The Sargent Shriver Civil Counsel Act, 2009 Cal. Legis. Serv. 457 (West).

31. States have focused attention on the delivery of unbundled legal services in numerous ways, primarily through access to justice commissions that are established by Supreme Court rule or order, and are charged with investigating and implementing comprehensive legal services delivery systems. Access to justice commissions now exist in at least 25 states. For an example of a representative “unbundling” pilot project initiated by an access to justice commission, see the final report of the Massachusetts’ Judicial Court Steering Committee on Self-Represented Litigants, ADDRESSING THE NEEDS OF SELF-REPRESENTED LITIGANTS IN OUR COURTS: FINAL REPORT AND RECOMMENDATIONS (2008). The project was designed to experiment with unbundling by allowing certain attorneys to provide unbundled and ghostwriting services in family and probate courts in a number of counties. The judges who spearheaded the unbundling pilot project wholeheartedly endorsed the model, touting unbundling as “an extremely helpful innovation” in serving the needs of the unrepresented and reporting that judges and attorneys who participated in the pilot project were “satisfied” or “very satisfied” with the program. *See also* Karla M. Gray & Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, 47 No. 3 JUDGES’ J. 33 (2008).

32. Although unbundling is generally recognized as a new and creative access to justice strategy, some argue that there is nothing new about unbundling. The term came into usage relatively recently, but lawyers who provide transactional and estate planning services have been providing discrete task representation for a long time. The notion of limited scope services is a new innovation only in the

expand choice and empower litigants of limited means. Whereas traditionally, a litigant had to choose between hiring a cost-prohibitive attorney and handling his own legal matter without any representation or attorney guidance, unbundling provides a third option: a litigant can hire an attorney, at a set price, for a discrete task, within his means, and where he believes it might be most beneficial.<sup>33</sup>

Unbundling has particularly caught fire nationally as a way to provide increased legal services to the poor and to stretch the scarce attorney resources provided by federal and local governments to improve access to justice.<sup>34</sup> In fact, unbundling is now the dominant mode of practice in many legal aid offices throughout the country.<sup>35</sup> Although no formal distinction has been drawn between the unbundled services paid for by the middle class, and those delivered to the indigent, the theoretical underpinnings of the model are quite different for the two sets of litigants.

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litigation arena, where representation has traditionally been of the full-service variety. Fisher-Brandveen & Klempner, *supra* note 9, at 1108-09.

33. Mosten, *supra* note 4, at 423 (discussing unbundling as providing clients with the opportunity to “select from lawyers’ services only a portion of the full package.”).

34. In speaking about unbundling for the poor, it is important to note that two main providers assist indigent pro se litigants: legal aid offices and courts. In the literature, there is a tendency to conflate the unbundled assistance provided by legal aid lawyers with the “self-help” assistance provided by court-based centers and to lump them both under the broad definitional umbrella of “unbundled legal services.” The two must be distinguished. Court-based programs are often staffed by non-lawyer court personnel and concentrate on disseminating information about legal processes. These centers are quite popular and growing more so. A directory of 130 court-based self-help programs providing pro se assistance to litigants can be found at <http://www.ncsconline.org/WC/Publications/ProSe/contents.htm>. By contrast, legal aid programs provide actual lawyer assistance, albeit of a limited variety, to indigent clients. This may involve lengthy interviews, advice sessions, limited appearances in court, and preparation of documents, none of which court personnel provide. Although both providers serve a similar purpose—that is, the delivery of much-needed aid to unrepresented litigants—the difference is crucial, as the definition of unbundled legal aid employed by this paper, and studied herein, is limited strictly to the form administered by lawyers. It is difficult to evaluate the two types of assistance jointly, as each has a distinct mission and raises unique ethical issues. For example, the target client population of each provider is different. Legal aid offices have financial eligibility restrictions that require them to represent only the poorest individuals and, moreover, typically elect to provide representation to the individual who has lesser social and economic power in the relationship giving rise to the litigation (i.e. tenants but not landlords, and domestic violence survivors but not alleged abusers, can access a lawyer). By contrast, court programs provide assistance to all individuals who seek it. Aid is rendered irrespective of an individual’s financial means and court staff will assist litigants on either side of the dispute. On the ethical front, self-help centers must be careful that lay clerks who give case-specific guidance are not engaged in the unauthorized practice of law. Comparatively, legal aid programs that provide unbundled services must be careful not to circumscribe the attorney-client relationship in unethical ways, and must be wary that nondisclosure of unbundled assistance to the courts may constitute an unethical misrepresentation. The line between these two types of programs blurs when courts contract with legal aid offices to run their self-help centers. In such cases, court-based self-help programs may, in fact, provide the same type of unbundled legal assistance one would receive at a legal aid office.

35. See LEGAL SERVICES CORPORATION, 2008 ANNUAL REPORT: SERVING THE MOST VULNERABLE AMONG US (2008), available at [http://www.lsc.gov/pdfs/LSC\\_2008\\_Annual\\_Report.pdf](http://www.lsc.gov/pdfs/LSC_2008_Annual_Report.pdf) (reporting that grantee agencies completed 535,783 cases with counsel and advice and 74,672 by way of court action); McNeal, *Having One Oar*, *supra* note 11, at n.1 (“Limited legal assistance models are increasingly the predominant method of delivering legal services to the poor.”).

For the middle class, unbundling offers the benefits of choice and affordability. It dissolves the all-or-nothing model of lawyering and creates an opportunity to access the expertise of a lawyer only when the client determines that one is needed most. In the low-income context, however, the element of choice is effectively nonexistent. Low-income clients do not “hire” lawyers to assist with a particular portion of a legal matter and do not dictate where the representation begins and ends. Instead, legal services organizations make programmatic determinations about how best to serve their client populations or how to respond to the priorities of funders, and then design unbundled legal aid programs accordingly.<sup>36</sup> These programmatic decisions are undoubtedly made with the intention of doing the most good with the fewest resources and—in the absence of data—are made based on the intuition and expertise of staff. The range of unbundled services provided to the poor differs among legal aid offices, but can be roughly divided into basic two categories: “brief advice” and a more involved service I will call “pro se assistance.”<sup>37</sup>

Brief advice is the most basic form of unbundled legal aid, and by far the most common. Often, this assistance is rendered via hotline. Many legal aid programs operate hotlines staffed by a “lawyer on call” who aims to answer brief legal questions for low-income persons in a single phone call. A tenant might ask: “How long will an eviction haunt my credit rating?” Or an undocumented worker may inquire: “Am I entitled to overtime pay?” Under the hotline model, personalized advice, based on a detailed interview (let alone fact investigation), is not provided. Indeed, one might ask if the communications provided through such hotlines are legal advice at all, or if they are better characterized as the dissemination of publicly available legal “information.” Hotlines now operate in over 165 programs in forty-nine states, Puerto Rico, and the District of Columbia.<sup>38</sup> The Legal Services Corporation believes that a phone consultation should enable many litigants to resolve their own legal problems without additional intervention by a lawyer.<sup>39</sup> As such, the nation’s major federal funder

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36. Paul R. Tremblay, *Acting “A Very Moral Type of God:” Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2479-84. (1999).

37. *Working Group Report*, *supra* note 14, at 1825-26 (delineating these categories, albeit with different names, and noting that the crucial difference is that brief advice does not require a lengthy diagnostic interview).

38. For a full list of hotlines available, see the Technical Support for Legal Hotlines Project website, sponsored by the Administration on Aging and the AARP Foundation, <http://www.legalhotlines.org>.

39. A study was commissioned to test the efficacy of hotline programs, with the final report released in 2002. See JESSICA PEARSON & LANAE DAVIS, *THE HOTLINE OUTCOMES ASSESSMENT STUDY, FINAL REPORT-PHASE III: FULL-SCALE TELEPHONE SURVEY 1* (2002), available at <http://www.nlada.org/DMS/Documents/1037903536.22/finalhlreport.pdf>. The report indicates a high level of success (48%) for the hotline model, but its methodology has been the subject of criticism, at least in part because the researchers relied on clients’ satisfaction with results as a proxy for successful case outcomes. An independent analysis of the Pearson & Davis data concluded that hotlines have less than an 8% success rate on case outcomes. Ross Dolloff, *Let’s Talk About Values, Not Systems*, *MGMT. INFO. EXCH. J.* (2003). For a critique of a different hotline study, using similar techniques, see Robert Bickel, *Limited Legal Services: Is It Worth It?*, 39 *COLUM. J.L. & SOC. PROBS.* 331, 356-57 (2006).

of legal aid has made funding for hotlines an explicit priority.<sup>40</sup>

More complex unbundling services might be called, broadly, “pro se assistance.” This form of aid varies in nature, but in all cases its key characteristic is a diagnostic interview, during which the lawyer meets the client, learns case-specific information, evaluates the legal problem and identifies doctrinally relevant facts. Pro se assistance involves a more significant investment of attorney resources into helping a client solve his legal problem. In such a model, the lawyer meets with a low-income client in person and, following the diagnostic interview, provides advice to the client on how to move forward with the case.

Within this model, a lawyer may also “ghostwrite” a pleading that raises claims or defenses based on facts provided by the client.<sup>41</sup> When a pleading is ghostwritten, the lawyer does not sign the document or enter any appearance as attorney of record and, depending on the state, may not even indicate that he had a role in preparing it.<sup>42</sup> To all appearances, the client looks like the author of the pleading—he is the sole signatory and he declares himself a pro se litigant on the face of the document.<sup>43</sup>

Sometimes, a group clinic replaces the one-on-one consultation, particularly with family law matters. A lawyer might meet with a number of litigants who have similar legal problems, advise them as a group on relevant law and procedure, and then answer individualized questions. At the conclusion of the group session, it is common for each litigant to draft his own pleading and for the lawyer to review it.

A smaller percentage of unbundled legal aid providers (including the one studied herein) offer continued, but well-circumscribed, assistance to litigants after and beyond the drafting of an initial pleading. In such a program, a lawyer may agree to make a limited appearance in court on behalf of a client to argue a motion. Or a lawyer might agree to participate in limited negotiation on behalf of the client with an opponent.<sup>44</sup> It is also possible that a lawyer may offer behind-the-scenes counseling to the litigant on strategic and substantive issues as

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40. PEARSON & DAVIS, *supra* note 39, at 1 (“Historically, more than two-thirds of the cases handled by the Legal Services Corporation (LSC)-funded legal services programs were for advice and counsel, referral, or brief services. The theory behind Hotlines is that these tasks can be performed effectively through a telephone-based system.”). The Legal Services Corporation has encouraged legal aid programs to serve as many clients as possible through the hotline model, in part to preserve congressional support for subsidized civil legal assistance.

41. Because of the time-limited nature of the attorney-client relationship in unbundled situations, the lawyer typically does not have time to conduct even basic investigation of the facts presented by the client. The lawyer’s role is simply to translate the facts provided by the client into articulated claims and/or defenses.

42. See *infra* Part II(C)(2), for a discussion of the disclosure rules in various states.

43. In addition to pleadings, lawyers also ghostwrite correspondence on behalf of litigants. A lawyer might ghostwrite a demand letter requesting immediate payment of a client’s unpaid wages or a letter putting a landlord on notice of habitability issues in a client’s unit.

44. The ability of a lawyer to make a limited appearance varies by state. Some states have adopted court rules enabling a lawyer to withdraw from a case following a single appearance in court.

the case progresses. In such a case, the lawyer might agree to be available by phone for a certain number of consultations but would likely not appear on behalf of the litigant in court.

Irrespective of the particulars of the delivery mechanism, unbundling pervades the provision of legal services to the poor. As one New York judge remarked about unbundled legal services, “everyone concerned with access to justice is looking at it, talking about it, holding a conference about it, or implementing it.”<sup>45</sup> The prospect of serving a multitude of clients, rather than a handful, is attractive to Congress and to other funders of legal services, as well as to advocates, who constantly seek more efficient ways of allocating inadequate resources. Unbundling also enjoys support from some judges, who are overwhelmed by the number of pro se litigants attempting to access their courts and hopeful that attorney assistance at any level will help share the burden of shepherding low-income clients through the complex litigation process.<sup>46</sup>

### C. Ethical Critiques and Reform

Ethical critiques have plagued unbundling from the outset.<sup>47</sup> The abridgement of the attorney-client relationship, which is demanded by the provision of limited services, has been denounced as incompatible with the duties of competence, diligence, and zeal. And component parts of unbundled practice—notably, ghostwriting—have been attacked as a violation of the duty of candor to the tribunal and an exploitation of pro se leniency.<sup>48</sup> Scholars and practitioners who support unbundling have argued that the model—in all forms—is permitted by current rules and, where that argument is ineffectual, have pursued the updating of ethical norms to permit unfettered unbundling.<sup>49</sup>

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45. Fisher-Brandveen & Klemper, *supra* note 9, at 1109. For a website that maintains comprehensive resources on unbundled legal services, see <http://www.unbundledlaw.org>. The site arose out of a national conference convened on unbundled legal services in October 2000, entitled *The Changing Face of Legal Practice: “Unbundled” Legal Services*.

46. Fisher-Brandveen & Klemper, *supra* note 9. *But see* ABA COALITION FOR JUSTICE, *supra* note 26, at 15 (reporting that in a survey of more than 1,200 judges surveyed about potential solutions to the rise in unrepresented litigants, 73% favored an increase in funding for full legal services, 68% supported an increase in pro bono lawyers, while unbundling garnered the lowest support at 19%).

47. Numerous scholars and practitioners have summarized the ethical debate over unbundled legal practice. *See* Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, 43 CLEARINGHOUSE REV. 377 (2009); Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563 (2007); Rochelle Klemmpner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653 (2006); Rothermich, *supra* note 10; M. Sue Talia, *The Ethics of Unbundling*, CAL. LAWYER MAGAZINE (Jan. 2006); HANDBOOK, *supra* note 10.

48. The ethics of limited appearances has also been the subject of scholarly debate. *See* Farley, *supra* note 47.

49. *See* ANALYSIS OF THE RULES, *supra* note 9; Jill Schachner Chanen, *Florida Unbundles In Its Own Way: Six States Use Differing Rules to Allow Limited Scope Representation*, 3 NO. 1 ABA J. E-REPORT 4 (2004); McNeal, *Having One Oar*, *supra* note 11, at 2619 (“[r]ules governing the practice of law should

Because of unbundling's purported promise to increase access to justice for under-represented populations, the American Bar Association (ABA), as well as local access to justice commissions, have heeded the call to enact ethical reforms in an effort to preserve and promote unbundled legal services. In 2002, the ABA updated its Model Rules to expressly permit, and regulate, unbundling. And at the state level, ethics opinions and amendments to court rules have widened opportunities for advocates to engage in specific unbundling practices, such as ghostwriting, with ethical impunity.

## 1. Ethical Critique and Debate

### a. The Unbundled Attorney-Client Relationship

The most basic of a lawyer's ethical duties is to provide competent representation to a client.<sup>50</sup> Model Rule 1.1 of the ABA Model Rules of Professional Conduct dictates that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>51</sup> Comments to this rule further explain that, to be competent, a lawyer must make an adequate factual inquiry into the legal elements of the client's problem<sup>52</sup> and must be able to determine the various legal issues at stake for the client.<sup>53</sup> In a similar vein, Model Rule 1.3 commands lawyers to act with diligence and zeal in representing a client. The comments to this rule clarify that a lawyer is required to "pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer."<sup>54</sup>

The ethical duties of competence, diligence, and zeal pose challenging issues for a lawyer providing unbundled legal services: Can an attorney satisfy the duty to make a "factual inquiry" by relying solely on the client's representation of facts?<sup>55</sup> Does "thoroughness" require a lawyer to advise a client on legal issues that are outside the scope of the discrete task the lawyer has agreed to

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not be interpreted to narrow the delivery of services and . . . the Model Rules should be interpreted to encourage the use and expansion of delivery modes that increase access."); Rothermich, *supra* note 10, at 2710-15; *Working Group Report*, *supra* note 14, at 1821-22 (arguing that ethical rules need new comments to reflect the changing nature of legal practice, and stating that "ethical provisions should not be an impediment to innovation but should be interpreted to maximize access").

50. See MODEL RULES OF PROF'L CONDUCT R. 1.1.

51. Unless otherwise noted, all references to the Model Rules refer to the Model Rules of Professional Conduct promulgated by the American Bar Association (ABA), which serve as the basis for the ethical rules in forty-three states and the District of Columbia. Five states (of which Nebraska, New York, Oregon, and Ohio are four) maintain ethics rules based on the older ABA Model Code of Professional Responsibility and two states have their own unique rules.

52. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt 5.

53. *Id.* at cmt 2.

54. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt 1.

55. Colorado's rules allow a lawyer to rely on the pro se party's representation of facts unless the lawyer has reason to believe the client is lying. COLO. RULE OF PROF'L CONDUCT R. 11(b). Iowa, Missouri, and Washington have adopted almost identical rules.

undertake?<sup>56</sup> Can a lawyer respond to a client's brief question without a diagnostic interview that might capture additional facts and impact the answer?<sup>57</sup>

Compounding these ethical quandaries is debate over whether, and in what circumstances, an attorney-client relationship forms during the delivery of unbundled legal aid. Some providers contend that the provision of one-time advice, particularly via hotline or in group settings, does not create an attorney-client relationship governed by traditional ethics rules and, though best efforts should be made to deliver advice competently, there exists no formal obligation to comply with a prescribed duty of competence. Others counter that an attorney-client relationship always forms once a client shares confidential information, and that the ethical standards espoused by the Model Rules must be liberally interpreted, or expressly amended, to clarify that competent representation is contextual and can be rendered even when contact between lawyer and client is limited to a brief consultation or telephone advice.<sup>58</sup>

### b. Ghostwriting

In the mid-to-late 1990s, a trio of district court opinions<sup>59</sup> forcefully condemned ghostwriting as unethical, setting off spirited debate about the viability of the practice. The courts focused in particular on the fundamental

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56. Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 319-321 (1997) [hereinafter McNeal, *Redefining Attorney-Client Roles*] (arguing that competence requires a lawyer providing unbundled services to investigate and advise on potential counterclaims even if that lawyer has been asked only to assist the client in preparation of an answer.); see also McNeal, *Having One Oar*, *supra* note 11, at 321-22 (arguing for the adoption of a "reasonable person" standard, noting that if the lawyer believes a reasonable person would benefit from pursuing certain claims, in light of what he may recover, the lawyer should be required by the diligence and zeal standard to identify those claims for the client, even if the unbundled service the lawyer was initially asked to provide does not demand it).

57. At the Fordham Conference on the Delivery of Legal Services to Low-Income Persons, the Working Group on Limited Legal Assistance—comprised of the practitioners and scholars most knowledgeable on this subject nationally—reached consensus on the idea that the ethical requirement of competency should attach to all forms of unbundled aid, but differed on what that meant. Some in the group suggested a "do no harm" principle, while others concluded that a diagnostic process was needed to elicit sufficient facts for the lawyer to make informed decisions about what type of advice to provide; McNeal, *Redefining Attorney-Client Roles*, *supra* note 56, at 336 (arguing that a lengthy diagnostic interview is required before any advice is rendered).

58. See *Working Group Report*, *supra* note 14, at 1828-29 (noting that participants debated whether the delivery of unbundled legal services results in the formation of an attorney-client relationship but did not reach assent on the issue, broadly speaking. They agreed, however, that at least where a diagnostic interview is performed, clients should "receive some of the protections that attach with the formation of the attorney-client relationship," in deference to the traditional rule that the "existence of an attorney-client relationship turns on the client's perception, regardless of what the lawyer says or does.").

59. The three decisions are: *Johnson v. Bd. of Cnty. Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) *aff'd* on other grounds, 85 F. 3d 489 (10th Cir. 1996); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075 (E.D. Va. 1997); and *Ricotta v. California*, 4 F. Supp. 2d 961 (S. D. Cal. 1998). Other cases have analyzed the practice of ghostwriting, but the three discussed herein are the cases that focus on the issue most substantially and are the ones most often cited. Other courts that looked at the issue of ghostwriting have, likewise, condemned it.



unfairness ghostwriting poses to the adverse party and whether the failure of the ghostwriting attorney to identify herself induces the court to provide unwarranted leniency to a litigant who is not truly proceeding pro se.<sup>60</sup> In *Johnson v. Board of County Commissioners*,<sup>61</sup> the court condemned the “unseen hand” of the ghostwriting attorney, calling it grossly unfair to the opponent who does not conceal legal assistance and is “held to a more demanding scrutiny” than his ostensibly pro se counterpart. The court in *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*,<sup>62</sup> echoed this sentiment, noting the “perverse effect” of ghostwriting in tipping all litigation advantage toward the litigant who falsely claims pro se status. And in *Ricotta v. California*, the court concluded that it is deceitful and improper for an attorney to drive the legal framing of a case “while standing in the shadow of the Courthouse door.”<sup>63</sup> Some scholars contend that claims regarding pro se leniency are greatly inflated and that, in fact, judges liberally construe all pleadings and do not accord any special benefit to the unrepresented. These scholars believe that courts have hastily branded ghostwriting as unfair and unethical, particularly because it is often obvious on the face of the pleading that a lawyer had a hand in preparing it.<sup>64</sup>

The courts, and other critics, have also criticized ghostwriting in light of the lawyer’s duty of candor to the tribunal, questioning whom the court would sanction if a ghostwritten document were deemed to be frivolous and a violation of Rule 11 of the Federal Rules of Civil Procedure.<sup>65</sup> While a court might choose to treat a pro se filing with leniency, some have questioned why nondisclosure of identity should shield ghostwriting attorneys from penalties for otherwise sanctionable conduct.<sup>66</sup>

## 2. Ethical Reform

The adoption of ethical reforms to permit lawyering short of full representation has been the primary focus of unbundling proponents since the public promi-

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60. In *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the U.S. Supreme Court announced that pro se pleadings should be liberally construed.

61. *Johnson*, 868 F. Supp. at 1231-32.

62. *Laremont-Lopez*, 968 F. Supp. at 1079.

63. *Ricotta*, 4 F. Supp. 2d at 987.

64. Jona Goldschmidt, *In Defense of Ghostwriting*, 29 *FORDHAM URB. L.J.* 1145, 1157 (2002).

65. Charles F. Luce, Jr., *Unbundled Legal Services: Can the Unseen Hand be Sanctioned?*, <http://mgovg.com/ethics/ghostwr1.htm> (1998); Lauren A. Weeman, *Bending the (Ethical) Rules in Arizona: Ethics Opinion 05-06’s Approval of Undisclosed Ghostwriting May Be A Sign of Things to Come*, 19 *GEO. J. LEGAL ETHICS* 1041, 1062-63 (2006).

66. The courts have also focused on this issue. The *Johnson* opinion characterized ghostwriting as a “deliberate evasion of the responsibilities imposed on counsel by Rule 11” (*Johnson*, 868 F. Supp. 1226, 1231 (D. Colo. 1994)) and the *Laremont-Lopez* court griped, “[w]ho should the Court sanction if claims in the complaint prove to be legally or factually frivolous, or filed for an improper purpose?” (*Laremont-Lopez*, 968 F. Supp. 1075, 1079 (S.D. Cal. 1998)).

nence of the model has grown.<sup>67</sup> Due to ethical attacks on the model, enormous effort has gone into winning acceptance of new standards that enable the ethical implementation of unbundling. The ABA, state ethics commissions, and local courts have made significant progress on many of the thorniest issues, including the nature and extent of the attorney-client relationship, the provision of ghostwriting, and the entering of limited appearances. Yet, certain localities have thwarted efforts at reform, and, to date, advocates continue to urge further modification to age-old standards to enable innovations in the delivery of legal services.

The ABA addressed some, but not all, of the ethical concerns related to curtailment of the attorney-client relationship in its revisions to the Model Rules in 2002. The new rules make explicit that “limitations” on the attorney-client relationship are ethical as long as they are “reasonable under the circumstances” and imposed pursuant to “informed consent.”<sup>68</sup> Moreover, the new Rules dictate that any “limitation” placed on the attorney-client relationship must be considered in determining the level of competence required by the lawyer.<sup>69</sup> In other words, as long as the client agrees to the limited representation, and the attorney acts competently given the services she has agreed to perform, the unbundled relationship is ethically valid. The Model Rules take great pains to make clear that unbundling is permissible; yet, in practice, the new standards are still difficult to apply and require further interpretation. Many of the same questions persist: In a brief advice session, what factual information must a lawyer discern if she is to provide competent assistance? If a diagnostic interview is performed, but facts remain unclear, must a lawyer undertake further investigation before proffering advice and/or ghostwriting assistance? Proponents of unbundling continue to press for additional rules that clarify which forms of unbundled legal aid lawyers can ethically provide.<sup>70</sup>

The states—via adoption of new court rules, amendments to statutes, and opinions issued by ethics commissions—have addressed ghostwriting, with mixed results. Multiple states, including Arizona,<sup>71</sup> California,<sup>72</sup> and Missouri<sup>73</sup>

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67. In addition to adoption of new rules, scholars have also proposed new ways of viewing ethical obligations in light of the proliferation of unbundled legal services programs. See Engler, *supra* note 47, at 384 (pointing out that ethical rules were not adopted with unrepresented parties or legal services programs in mind, and arguing for a context-based approach in analyzing ethical issues as they relate to self-represented litigants).

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

69. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2002). The Ethics 2000 Commission stated that given “the increase in the number of occasions in which lawyers and clients agree to a limited representation, the Commission thought it important to call attention to the relationship between Rules 1.1 (competency) and 1.2 (c) (limiting the scope of representation).” ABA, REPORT OF THE COMMISSION ON THE EVALUATION OF THE RULES OF PROFESSIONAL RESPONSIBILITY (2000).

70. ANALYSIS OF THE RULES, *supra* note 9.

71. State Bar of Ariz. Comm. On the Rules of Prof'l Conduct, Op. 05-06 (July 2005).

72. CAL. CIV. RULE 3.37.

73. MISSOURI RULE 55.03.

have expressly declared anonymous ghostwriting permissible. These states believe judges can readily distinguish pleadings that have been drafted by lay persons from those drafted with the assistance of counsel, and therefore, do not think any unfairness to the opposing party actually exists. Other states have more cautiously endorsed the practice. These states, including Florida<sup>74</sup> and New Hampshire,<sup>75</sup> have espoused a “middle ground” requiring an attorney who ghostwrites a document to stamp it with the words “prepared with the assistance of counsel.” This limited disclosure rule is designed to permit the practice of ghostwriting while preventing the exploitation of pro se leniency.

A few states—New York,<sup>76</sup> Colorado,<sup>77</sup> Iowa, Nebraska,<sup>78</sup> and others—have clarified ethical rules regarding ghostwriting but decided to discourage the practice by requiring full disclosure of the ghostwriting attorney’s name and address on the face of all pleadings. While these states technically permit ghostwriting, it is difficult to preserve the practice with a full disclosure requirement. Scholars and practitioners have criticized stringent disclosure rules, citing concerns that judges will conscript ghostwriting attorneys into full representation if their identities are known.<sup>79</sup>

The ethics of unbundling, and the drive towards reform, has dominated the scholarly and public discourse on unbundled legal services for the past ten years. These ethical debates are useful and important, yet premature. The focus of scholars, practitioners, state ethics commissions, and the ABA on the ethics of unbundling has eclipsed discussion of an arguably more pressing threshold concern—that is, whether the unbundling model produces concrete, favorable outcomes for litigants and is, therefore, sufficiently well-established as a successful access to justice strategy to warrant the ethical reforms surrounding it. Scholarly and empirical attention should be directed toward answering the question of efficacy before further political capital is expended on facilitating the expansion of unbundled legal services programs nationwide.

### III. THE EMPIRICAL STUDY

Underlying the support for unbundled aid, and the focus on ethical reform to facilitate it, is an assumption that unbundling actually achieves access to justice goals and produces tangible benefit for low-income recipients. However, few

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74. Fla. Bar Ass’n Op. 79-7 (2000).

75. N.H. State Bar Ass’n Op. (May 12, 1999).

76. Comm. On Prof’l Ethics, N.Y. State Bar Ass’n, Op. 613 (1990).

77. COLO. RULES OF PROF’L CONDUCT 11(b).

78. Nebraska Court Rule 3-501.2.

79. Fisher-Brandveen & Klemper, *supra* note 9, at 1122-24.

studies have been conducted to test this assumption.<sup>80</sup> Scholars and practitioners at the forefront of the unbundling movement have routinely cited the need to evaluate the model and determine its impact on cases and clients.<sup>81</sup> Yet, to date, a mere two published empirical studies—one measuring client satisfaction and one measuring the effect of advice-only on settlement outcomes—are all that exist to assess the efficacy of the model.<sup>82</sup>

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80. Several studies on unbundled legal services track the number of individuals assisted, evaluate client satisfaction, and assess the impact of programs on courts and court personnel, but a focus on substantive outcomes is quite rare. Bonnie Rose Hough, *Evaluation of Innovations Designed to Increase Access to Justice for Self-Represented Litigants*, 7 J. CENTER FOR FAM., CHILD. & CTS. (2006).

81. Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J. LAW & SOC. CHANGE 295 (2010); Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, 43 CLEARINGHOUSE REV. 377, 379–80 (2009) (“The trend toward increased delivery through unbundling should continue, but with careful monitoring and assessment.”); Rhode, *Connecting Principles*, *supra* note 10, at 397 (assailing the insufficiency of data concerning the satisfaction of clients, the quality of assistance, and its impact on the individuals and communities served, and asserting that “[u]nless we know more about what happens to clients who receive different forms of assistance . . . we cannot make rational choices about program design.”); McNeal, *Redefining Attorney-Client Roles*, *supra* note 56, at 338 (suggesting that the legal community should engage in research before promoting unbundled legal aid to evaluate whether this lawyering model enhances access to legal systems, secures successful results, and operates to prevent imminent legal problems); *Working Group Report*, *supra* note 14, at 1821 (urging assessment and evaluation of unbundled legal services methodologies and pointing out that “there is no baseline data on the success of . . . limited legal assistance models, and no shared vision of how one might measure success”). For a proposed research agenda to determine the efficacy of unbundled legal services, including inquiry into whether the assistance produces client satisfaction, aids clients in more effectively presenting their claims, and/or helps clients achieve the outcomes they wanted, see McNeal, *Having One Oar*, *supra* note 11, at 2644–46 (recommending that study be undertaken in a variety of substantive fields and that the efficacy of unbundled aid be tested as compared to full representation).

82. The two published studies contain the best empirical data available on the impact of unbundled legal aid. A third study (unpublished), conducted by then-Harvard-student, Neil Steiner, examined the possession outcomes achieved by tenants who received unbundled assistance in a group setting at Harvard’s Hale and Dorr Legal Services Program and found that tenants who received assistance with drafting pleadings and propounding discovery maintained possession of their homes 6% more often than tenants who received no assistance (unpublished partial manuscript on file with the author). In addition, individual programs delivering unbundled aid have also issued grant reports and informal publicity materials indicating that their clients have achieved success in court following the receipt of unbundled aid. However, these reports are anecdotal in nature and contain no defined methodology of data collection that explains how the reported successes were achieved. Moreover, it is unclear from these documents how individual programs defined “success” or “client satisfaction” or how outcomes were measured. Therefore, an analysis of these informal reports has been excluded from this paper. Russell Engler, in his paper on existing data on the impact of lawyer representation on case outcomes, reports on some of the informal evaluations of unbundled legal services programs performed by agencies in the Boston area. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 66–69, n.128 (2010) (An unbundled divorce clinic in Lynn, Massachusetts, reported that 80% of participants “succeeded” in court. In Toronto, a limited representation pilot project found that tenant outcomes improved in “almost all” respects following receipt of unbundled aid. In a grant report cited by the Boston Bar Association, an unnamed program reported that 15% of tenants who received advice-only retained possession while 58% of those who received subsequent mediation assistance from a lawyer retained possession. An unbundled legal aid program in Riverside, California, focusing on family law found that clients reported a high level of success in being able to obtain the outcome they sought after receipt of limited legal assistance).

A. *Extant Studies on Unbundled Legal Aid*

Michael Millemann et al. authored the first, and most widely cited, study of unbundled legal aid in 1997.<sup>83</sup> The study evaluated the provision of information and advice to 275 low-income litigants<sup>84</sup> who received advice from clinical law students at the University of Maryland and the University of Baltimore related to divorce, child support, and child custody matters.<sup>85</sup> The Millemann project assessed the efficacy of unbundled legal aid by measuring client satisfaction with the one-time information and advice they received.<sup>86</sup> The study made two interesting findings. First, clients were quite satisfied with the aid they received.<sup>87</sup> Second, client satisfaction was highest when the legal problem they faced was largely a matter of what Millemann calls “mechanical justice,”<sup>88</sup> meaning that the case was simple and there was no question that the litigant was entitled to the legal remedy sought.<sup>89</sup> The study was not designed to capture information about outcomes and how, if at all, the services provided affected litigants.

In the second study, the Empirical Research Group at UCLA School of Law

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83. Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178 (1997).

84. The project delivered information and advice to 4,400 litigants but evaluated the impact on 275 randomly-chosen clients.

85. The students helped clients identify claims and defenses and gave advice on how to plead claims via check-the-box forms. Because students did not actually fill out the forms on behalf of pro se litigants, the assistance cannot be considered ghostwriting but rather advice specific to the completion of a pleading. In fact, Millemann notes that, in advance of launching the project, the lawyers involved described to judicial officers the level of assistance provided by the students and were therefore able to avoid the “general ghostwriting criticism.” In addition, by disclosing to judges the limited form of assistance that the project provided to pro se litigants, they were able to avoid imposition of the more demanding standard of review imposed on represented parties. Millemann, *infra* note 82, at 1188.

86. Clients were interviewed by phone to determine their levels of satisfaction at two primary stages of the case—following provision of the advice and following the issuance of a final order. The study tried to evaluate client satisfaction during four additional stages of the litigation, including while the client awaited a scheduling conference, while the client awaited a preliminary hearing, and while the client awaited a final hearing. However, response rates were at 6% or below in each of these categories. It appears that one of the goals of the project was to determine whether the level of client satisfaction would change based on events that took place throughout the court process. *See id.* at 1185-86.

87. On a scale of 1-10 (1 being lowest and 10 being highest), clients reported an average satisfaction level of 8.3 at the time that the aid was rendered and an average satisfaction level of 8.8 after obtaining a final disposition. *See id.* at 1186.

88. Examples of cases involving “mechanical justice” include an uncontested divorce, a divorce involving no property or children, and a default custody order where the noncustodial parent had disappeared.

89. Satisfaction levels dropped slightly when the legal problem entailed the need for limited judgment and discretion on the part of the advising attorney. A case requiring limited judgment and discretion might be one where the parents agreed on everything but a visitation schedule. With simple advice from a student about what a court would consider a “reasonable” visitation schedule, the client could proceed with appropriate expectations about the resolution of the case. Client satisfaction dropped slightly again when the problem was complex and demanded substantial legal judgment. A complex case requiring substantial legal judgment might be one involving domestic violence, the threat of child abduction, or the collection of child-support arrearages. These are legally difficult problems requiring substantial attorney involvement.

studied the outcomes achieved by litigants who received aid at a court-based, self-help center<sup>90</sup> in Los Angeles County in 2001.<sup>91</sup> Volunteer attorneys staff the center and are charged with providing one-time information and advice to any litigant seeking assistance in any civil matter.<sup>92</sup> The evaluation focused, in large part, on comparing outcomes in eviction cases<sup>93</sup> for fifty center-assisted tenants and fifty tenants who had no legal assistance at all.<sup>94</sup> First, it looked at how tenants resolved their cases (by trial, settlement, or default judgment).<sup>95</sup> Second, it evaluated the settlement outcomes achieved by both assisted and unassisted tenants (trial outcomes and other court judgments were not evaluated).<sup>96</sup> For the litigants who settled,<sup>97</sup> the study found that center-assisted tenants achieved no better outcomes than their unassisted counterparts.<sup>98</sup> The authors explained the lack of favorable impact by concluding that most tenants likely did not have meritorious defenses and, thus, unbundled aid could not necessarily be expected to improve substantive outcomes.<sup>99</sup>

Empirical study of unbundled legal aid has not been undertaken since these evaluations were conducted nearly ten and fourteen years ago, respectively, at the

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90. Typically, court-based programs are staffed by nonlawyer court personnel, and true unbundled lawyering is provided by attorneys at legal aid offices. *See supra* Part II. The program studied by the UCLA Group is a “hybrid” model where the court contracted with legal-aid lawyers to deliver a very limited form of unbundled aid—primarily advice in one-on-one and group settings—at the courthouse.

91. EMPIRICAL RESEARCH GROUP, UCLA SCHOOL OF LAW, EVALUATION OF VAN NUYS LEGAL SELF-HELP CENTER, FINAL REPORT (Aug. 30, 2001) [hereinafter UCLA REPORT].

92. *See supra* Part II, describing the traditional features of court-based unbundled legal aid programs. Although the Center described here is staffed by attorneys, it still has many of the markings of a typical court-based program. It helps litigants in a wide variety of civil matters, provides assistance to litigants regardless of financial means (although the study authors report that the majority of Center clients were poor), and provides assistance to litigants on both sides of legal disputes (notably, however, only 3% of Center clients were landlords; and no mention was made of the gender of the family law clients).

93. The study also made note of some interesting aspects of the Center’s family-law services, including details on the number of litigants assisted and the differences in characteristics between the Center’s client population and the general population of divorce petitioners in Los Angeles. However, the researchers had insufficient data on the resolution of family-law matters to evaluate case outcomes for Center-assisted clients.

94. All 100 tenants in the treatment and control groups litigated their eviction cases in the Van Nuys court in 2001, although not necessarily during the same period. *See* UCLA REPORT, *supra* note 91, at 12.

95. *See id.* at 12.

96. *See id.* at 13. The study did not track the rate at which tenants retained possession of their units or the trial outcomes achieved by the two sets of tenants.

97. Thirty-nine litigants (total) settled. Twenty-one of those got aid at the Center; eighteen did not. *See id.*

98. The study did attribute one outcome-improvement to the Center—a 7% decrease in the default-judgment rate. However, the authors did not examine the files of Center-assisted litigants to confirm this finding with hard data. Instead, the study compared the total 2000 Van Nuys tenant default rate (58%) to the total 2001 Van Nuys default rate (51%) and concluded that, because the Center assisted 10% of the total tenant population in 2001, its services must have been responsible for the increase in tenants responding to their eviction lawsuits in court. This assumption was further tested by interviewing several Center-assisted tenants, 50% of whom said they would not have come to court if they had not been able to receive advice at the Center. *See id.* at 11.

99. The study reported that only 20% of assisted tenants were able to raise an affirmative defense.

inception of the movement. It is noteworthy that, despite the findings of the UCLA report—specifically, that one-time advice does not improve settlement outcomes for low-income litigants—unbundling still enjoys strong, if not near-universal support, as a valuable access to justice tool. While the ethics of unbundling are important to resolve, the public debate should widen its focus. Serious evaluation is needed to determine the success of all aspects of the unbundled legal services model. This includes evaluating the model's impact on all types of outcomes, the impact of services other than advice-only, how unbundling fares relative the alternatives of no representation and full representation—and whether the merits of a litigant's defenses or claims trumps the provision of unbundled aid in determining outcomes.

### *B. Purpose and Description of the Study*

In an effort to contribute to—and highlight the need for—evidence-based research on unbundled legal services, I designed a small-scale empirical project to study aspects of the model that have to date gone unexamined. In particular, I studied the impact of two forms of unbundled aid—ghostwriting and one-time negotiation assistance—on the case outcomes of 96 low-income tenants facing eviction in a single California trial court in San Mateo County.<sup>100</sup> I compared the substantive and procedural case outcomes achieved by recipients of unbundled aid to the outcomes attained by two other sets of litigants: (1) 305 tenants who received no legal assistance with their evictions; and (2) 20 tenants who received full representation.

The purpose of the Study was to shed preliminary light on four questions pertaining to the unbundled model: (1) Does unbundled legal aid produce substantive outcomes for litigants that are more favorable than litigants could have achieved without any attorney involvement?; (2) Does unbundled aid facilitate access to the courts for poor litigants and, therefore, advance procedural justice?; (3) Do distinct forms of unbundled aid impact cases differently?; and (4) What are the implications of the Study in crafting a future research and policy agenda?

This is the first published experimental study to evaluate comprehensive outcomes from tenants who receive unbundled legal services and to make comparisons to both a control group receiving no legal assistance and a secondary treatment group receiving full representation. The study is observational in nature and includes no randomization in the assignment of litigants to particular forms of assistance. Thus, the study cannot provide conclusive data; yet, the findings challenge long-held assumptions about the utility of unbundled legal services and, thus, the study provides a valuable jumping off point for

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100. As noted, *supra* Part II, evictions are routinely cited as one of the greatest areas of legal need for indigent litigants and are often the focus of unbundling efforts.

promoting further public discussion of the unbundled model and future study of its impact. The results of the study are reported herein.

### 1. Anatomy of an Eviction Action in California

Tenants are evicted in California for myriad reasons. Commonly, a landlord claims that the tenant has not paid rent for some period, or has paid rent late. A landlord might also claim that the tenant has breached a material provision of the lease, such as a prohibition on having pets, or that the tenant has broken state, local, or federal law by, for example, routinely creating loud noise on the premises. In the vast majority of jurisdictions nationally, tenants can also be evicted for no reason at all.<sup>101</sup> These “no cause” evictions require more advance notice than do evictions in which some form of tenant misconduct is alleged. Finally, in the current economic climate, tenants are often evicted when the owner of the property misses a mortgage payment and loses the home in foreclosure proceedings. In the study sample, 65% of eviction actions were brought for nonpayment of rent, 27% were initiated by banks post-foreclosure, 3% of evictions were based on the tenant’s material breach of the lease or violation of the law, and 5% of actions did not state a cause. Tenants may defend against evictions by asserting that they did not engage in the conduct the landlord alleges or by raising an affirmative defense that points to the landlord’s own misconduct. Common affirmative defenses include the landlord’s failure to maintain the unit in habitable condition, the landlord’s failure to use proper due process measures to evict the tenant, and the landlord’s discriminatory or retaliatory behavior towards the tenant.

In many, if not most, jurisdictions, eviction actions are known as summary proceedings. That is, in deference to landlords’ property rights and the purported need to evict undesirable tenants swiftly, a full eviction action must be litigated to conclusion within twenty to thirty days from the date the complaint is filed.<sup>102</sup> Tenants retain full rights to conduct discovery and file appropriate motions, in keeping with the entitlements afforded other civil litigants; however, the lightning speed of the eviction process makes it difficult, if not impossible, for tenants to exercise these rights. A motion to dismiss or quash an eviction lawsuit for failure to state a valid claim must be filed within a few days of the filing of the complaint. Similarly, a tenant typically has five to ten days to propound discovery, and no more than fifteen or twenty days to complete it. At the conclusion of discovery, even if the tenant determines that the landlord cannot

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101. In the jurisdiction studied, San Mateo County, this is true for nineteen out of twenty cities, as well as for all unincorporated areas of the County. Eviction control—that is, the requirement to base an eviction on good cause—is often accompanied by rent control.

102. The twenty to thirty day rule is specific to California, and to San Mateo County—the jurisdiction studied—however, eviction proceedings in localities nationwide take place on a similar timeframe.



support the allegations upon which the eviction is based, rarely is there time to seek summary judgment.

In California, as in many jurisdictions, tenants are entitled by statute to request a jury trial. If no affirmative request is lodged with the court in a timely manner, the court will schedule a bench trial. In the study sample of 421 tenants, more than 125 made timely requests for a jury trial. Interestingly, not a single jury trial was held during the study period. The court reported that each of the litigants who opted to fight the eviction at trial “voluntarily waived” their right to a jury trial at some point during the process and were thus assigned to a bench trial.<sup>103</sup> Often, in the court file, there was no record of why or when this occurred.

The extraordinarily fast-paced litigation that defines an eviction, coupled with documented barriers to asserting one’s rights as a tenant (such as the failure of courts to preserve the right to adjudicate a jury trial) creates enormous hurdles for tenants attempting to launch a successful defense.<sup>104</sup> Numerous studies demonstrate that tenants who are fully represented by expert counsel throughout the proceedings fare many multiple times better than unrepresented tenants, independent of the merits of the case.<sup>105</sup> This study makes a contribution to the existing body of literature by looking at the impact of a *moderate* investment of attorney resources on case outcomes.

## 2. The Legal Services Providers

### a. The Provider of Unbundled Legal Services

The Legal Aid Society of San Mateo County<sup>106</sup> (“Legal Aid”) provided the unbundled aid evaluated by this study. Legal Aid is an independent, non-LSC<sup>107</sup> funded legal services provider that has been operating in San Mateo County since 1958. It is one of three providers of legal representation for tenants facing eviction in the County.<sup>108</sup> During the time of this study, Legal Aid had two housing attorneys, one full-time and one part-time. In addition, the agency recruited and trained a cadre of volunteer pro bono attorneys who assisted with the delivery of unbundled aid to tenants.

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103. None of the tenants in the fully represented group waived their right to a jury trial. Each resolved his or her eviction case short of trial (typically by settlement or by motion in court resulting in a favorable judgment).

104. Bezdek, *supra* note 29.

105. See *supra* note 27 for a list of studies describing the fate of unrepresented tenants.

106. San Mateo County, the county directly south of San Francisco County, has a population of 712,690.

107. The Legal Services Corporation funds the San Francisco Bay Area’s largest provider of legal services for the poor, Bay Area Legal Aid. The Legal Aid Society of San Mateo County operates independently from any funding or programmatic restrictions imposed by the LSC and has greater freedom to design and implement innovative legal services programs, if it so chooses.

108. The Stanford Community Law Clinic, see *infra* Part III, also represents tenants in eviction matters. Another legal services organization, Community Legal Services in East Palo Alto, has a paralegal who provides advice to housing clients on a range of matters, but had no attorney on staff at the time this study was conducted.

i. Ghostwriting assistance

During the study period, Legal Aid operated three half-day housing clinics each week in three distinct locations throughout the county. Two of the clinics were held at social services agencies, one in a northern and one in a southern part of the county. The third clinic was held at the San Mateo County courthouse.<sup>109</sup> The majority of tenants who visited the clinics were facing eviction from their homes and had already been served with an eviction lawsuit.<sup>110</sup>

The housing clinics provided each eviction client with unbundled legal aid in the form of ghostwriting assistance. A Legal Aid or volunteer lawyer would meet with each tenant individually and conduct a full diagnostic interview. This often took up to one hour or more. The lawyer would ask the tenant whether the landlord's allegations were true or false, scan the eviction complaint in search of procedural errors in filing, and evaluate whether the tenant had any affirmative defenses.<sup>111</sup> At the conclusion of the one-on-one consultation, the lawyer would ghostwrite a responsive pleading on behalf of the tenant. In crafting appropriate legal defenses, the lawyer would rely solely on the tenant's recitation of facts and the lawyer's own review of the face of the complaint. In keeping with the traditional unbundling model, the lawyer would not typically undertake additional fact investigation prior to ghostwriting the responsive pleading on behalf of the tenant. Once the ghostwritten pleading was prepared, the tenant would sign it, receive instructions on how to file it in court, and be advised on how to prepare for the remainder of the eviction proceeding and what to expect. At the court-based clinics, tenants confirmed in writing that they understood they were not "clients" of Legal Aid and would receive no further legal assistance as their eviction cases progressed. At other clinics, tenants signed a "limited scope" retainer stating that Legal Aid had agreed to assist with the drafting of an answer to the eviction action but could not commit to providing further assistance. The thrice-weekly housing clinics operated until every tenant in an active eviction proceeding had been served. The clinics had the capacity to prepare ghostwritten pleadings for all tenants seeking legal assistance on any particular day.<sup>112</sup>

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109. Legal Aid's court-based housing clinic functions as the tenant-side of the "self-help" program at the San Mateo County courthouse. Legal Aid operates this clinic with grant funding from the court and, in keeping with its mission, accepts only tenants as clients. Court personnel deliver the remainder of the court's "self-help" services to landlords in a different location in the courthouse.

110. This study thus only evaluates unbundled legal aid provided to tenants who are already in formal eviction proceedings. Tenants who have received a "notice to quit" from their landlord (a procedural pre-requisite allowing the tenant a certain number of days to voluntarily vacate the unit before a lawsuit is filed) also come to Legal Aid's housing clinics seeking assistance, but have been excluded from the study. These tenants receive advice from a Legal Aid lawyer and are typically told to return when and if they are served with a lawsuit for more involved assistance.

111. Typical affirmative defenses include, but are not limited to: landlord's failure to maintain a habitable unit, discrimination against the tenant, and waiver of the eviction notice (typically by accepting rent from the tenant after the notice expired).

112. Due to the brief nature of the services provided, clinics providing unbundled assistance often have the capacity to serve everyone who seeks their assistance. It is ethically challenging, if not

## ii. Negotiation Assistance

In addition to the housing clinics, Legal Aid lawyers provided a second form of unbundled aid to tenants in the form of one-time negotiation assistance.<sup>113</sup> In San Mateo County, landlords and tenants who request a jury trial are required to participate in a settlement conference held at the courthouse the week prior to a scheduled eviction trial. Often, the settlement conference is the first time the landlord and tenant will meet face-to-face to discuss a potential resolution to the eviction lawsuit. Settlement conferences are held at the courthouse only once a week and all tenants and landlords with upcoming trials must appear at court on that date and time. A judge nominally presides over the settlement conferences, but takes a passive role. Upon arrival, the parties and their lawyers are banished to the courthouse hallway to discuss settlement informally. Those parties that reach accord re-enter the courtroom and read the contents of their agreement into the court record. Those parties that fail to reach a deal advise the judge accordingly and confirm their upcoming trial date.

Legal Aid lawyers attended these mandatory settlement conferences approximately twice a month<sup>114</sup> during the study period and offered day-of negotiation assistance to tenants who had previously received assistance at a Legal Aid housing clinic. That is, Legal Aid lawyers would stand in the courthouse hallway and negotiate with landlords and their counsel on behalf of as many tenants as possible. If Legal Aid's negotiation assistance yielded a settlement, the lawyer would help to reduce the terms to writing; however, the tenant would appear before the judge without counsel to read the terms into the record together with the landlord.<sup>115</sup>

### b. The Provider of Full Representation

The Stanford Community Law Clinic, the provider of full representation studied, is a Stanford Law School clinical program housed in a community-based office in East Palo Alto, the low-income neighborhood adjacent to the Stanford

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impossible, to implement a randomized trial under these circumstances, as it would require assigning a portion of litigants who seek available help to receive no assistance.

113. Ghostwriting and day-of negotiation assistance are the two primary forms of unbundled legal aid provided to tenants by Legal Aid attorneys. In addition, as tenants' eviction cases progressed, Legal Aid attorneys provided some additional brief advice to tenants by phone. This Study did not track the number or content of phone calls placed by tenants to Legal Aid attorneys. Therefore, some tenants in the unbundled legal aid group received more legal help than this study reflects.

114. Legal Aid lawyers do not attend the settlement conferences every week as a matter of resource limitations.

115. The provision of ghostwriting and negotiation assistance comprises the majority of, but not the complete, case docket of Legal Aid's housing practice. In the study period, Legal Aid also entered limited court appearances for four tenants and provided full representation to one tenant. These cases were excluded from the study because there simply were not enough to evaluate, and also because there was insufficient information about the lawyering process involved in those cases.

campus.<sup>116</sup> The Clinic is a practice-based course offering law students the opportunity to handle legal matters for indigent clients. Fifteen to twenty students enroll in the Clinic each academic quarter and litigate a variety of housing, employment, and criminal records expungement cases, individually or in pairs.<sup>117</sup> The Clinic's eviction docket comprises about one third of the Clinic's total caseload, and all tenants receive full representation.<sup>118</sup> During the Study period, the Clinic screened cases to ensure they were pedagogically appropriate for students to manage.<sup>119</sup> Often, this was a matter of timing. For example, the Clinic, unlike Legal Aid, was less likely to assist tenants whose responsive pleadings were due in less than five days.<sup>120</sup> In addition, the Clinic was more likely to accept cases in which the tenant had been served a notice to quit, but not yet an eviction lawsuit.<sup>121</sup> That said, these criteria were aspirational in nature, and often not actualized. Because one of the Clinic's aims was to fill the eviction docket at the outset of the academic quarter, it was not infrequent for students to accept representation of any tenant seeking eviction assistance during this time period, even in those instances where responsive pleadings had to be filed in court the following day.

Students performed all legal tasks relevant to the eviction matter with close supervision from Stanford clinical faculty. The representation included most or all of the following elements: an initial diagnostic interview, ongoing client counseling, preparation of pleadings, motions, and settlement agreements, negotiation with the landlord or opposing counsel, discovery (including depositions), oral advocacy in court, and representation at trial. Full representation of tenants is challenging and time-intensive. During the study period, the Clinic was the only legal services provider in San Mateo County that regularly provided full representation to tenants in eviction matters.<sup>122</sup>

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116. I was a teaching fellow and supervising attorney in the Clinic from 2007 to 2010.

117. The clinic's practice, including its full-scale representation of tenants facing eviction, is described in Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLIN. L. REV. (2009).

118. During the study period, the Clinic got eviction cases through its own central intake line, through referrals from Legal Aid, and through other ad hoc referrals.

119. Of course, if the Clinic determines a case is fully lacking in merit during the course of representation, the client would be counseled accordingly.

120. Students need sufficient time to learn the relevant law and prepare pleadings. Therefore, many Clinic eviction cases are accepted during the "notice" period (*see supra* note 110, for an explanation of the notice to quit procedure) when formal eviction proceedings have not yet been initiated in court.

121. One further important difference between the Clinic's caseload and Legal Aid's caseload is that the Clinic did not accept nonpayment of rent cases during the first six months of the study period.

122. It is notable that the only legal services provider in San Mateo County, California providing full representation to tenants in housing cases is a law-school based clinic. Law school clinics have freedom from traditional funding restrictions and can deploy resources as they see appropriate from both a service and pedagogical vantage point. *See* Brodie, *supra* note 117.

### C. Methodology

#### 1. The Study Sample

I reviewed and analyzed all 474 evictions filed in San Mateo County from May 19, 2009 to August 7, 2009, plus 20 eviction cases handled by the Stanford Community Law Clinic between September 2007 and May 2009.<sup>123</sup> The San Mateo County courthouse has a distinct case numbering system for evictions and, therefore, it was quite straightforward to obtain a case list of all evictions filed during the timeframes. Excluded from the study are all commercial evictions (n 46),<sup>124</sup> all evictions in which the case file indicated that the tenant had retained other counsel (n 26),<sup>125</sup> and one eviction in which the tenant was a long-term guest at a hotel. In all, the study sample is comprised of the remaining 421 residential eviction cases.

#### 2. Identification of the Type of Lawyering Assistance Provided

From the sample, ninety-six tenants were identified as having received unbundled legal services from Legal Aid. I made this determination by cross-referencing the client lists from Legal Aid's housing clinics with the eviction case list managed by the Court. It was also obvious on the face of most court records that a particular tenant had received unbundled legal services. For each assisted client, Legal Aid completed and signed a proof of service, which the tenant then filed with the court and which was evidence of limited legal assistance. I determined what particular type of unbundled legal services each of the ninety-six tenants received by reviewing Legal Aid's client case files. In every file, an activity log was maintained with detailed notes about the services Legal Aid performed for the tenant. I recorded whether each tenant had received ghostwriting assistance only, or ghostwriting plus negotiation assistance. After accounting for all ninety-six recipients of unbundled legal services, I concluded that 305 tenants had received no legal assistance at all.<sup>126</sup> The remaining twenty tenants received full representation by the Stanford Community Law Clinic.

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123. A review of full representation cases handled during the May 19 to August 7, 2009 timeframe was impossible because the Stanford Community Law Clinic does not take cases during the summer months. In addition, a longer timeframe was needed so that the study could include as many full representation cases as possible. The Clinic launched its eviction practice in September 2007; I included in the study every eviction case the Clinic had handled at the time this study was completed.

124. I assumed, for the purposes of this study, that any eviction filed against a business was a commercial eviction. In addition, when the defendant was not a business, but the monthly rent amount indicated that the eviction might be commercial in nature (i.e., monthly rent over \$3,000), I performed a web search of the address of the unit to determine whether the eviction was residential or commercial.

125. The tenants who retained private counsel were excluded from the study because it was impossible to determine what level of aid they had received. Included in this group are the five tenants to whom Legal Aid provided lawyering services *other than* ghostwriting and negotiation assistance.

126. Of course, it is possible that at least some of these tenants received behind-the-scenes assistance from friends and family that would be difficult to detect in a review of their court files. It is also possible

### 3. Determination of Case Outcomes

I obtained case outcomes for the twenty tenants who received full representation by reviewing case files maintained by the Stanford Community Law Clinic. To determine case outcomes for the group of tenants who received unbundled aid, as well as for the group that received no aid, I conducted an extensive review of the court files of the remaining 401 evictions.<sup>127</sup> For each eviction, I recorded the date that the eviction complaint was filed; the claims raised by the landlord; the amount of rent, if any, that the landlord claimed was owed; the “holdover damages” figure (the per-day value of the unit, used to assess what the tenant owes in back rent if he is ultimately evicted);<sup>128</sup> the defenses, if any, raised by the tenant; the method by which the case was resolved (settlement, default judgment, trial, dismissal, etc.); the date on which the case was resolved; whether the tenant retained possession; the tenant’s move-out date (where the tenant lost possession); whether the tenant was forcibly evicted by the sheriff; whether the resolution of the case required the tenant to make a payment to the landlord, and the amount of any payment; whether the resolution of the case required the landlord to make a payment to the tenant, and the amount of any payment; and whether the landlord was represented by counsel.

### 4. Research Questions

I focused on the impact of different levels of legal assistance on both substantive and procedural outcomes. First, I measured outcomes related to possession: Did the landlord or tenant retain possession of the premises? If the tenant lost possession, how many days, from the filing of the complaint, did the tenant have to move out? Second, I evaluated outcomes related to the exchange of money: Did the case resolve with a court order or agreement requiring either the landlord or the tenant to make a payment? If there was an ordered or agreed-upon payment, how much was the payment? If the tenant had to make the payment, was the payment less than, or in excess of, the tenant’s maximum liability (calculated by adding the nonpayment alleged in the complaint, if any, to all

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that some of these tenants received help from licensed document preparers who did not comply with the statutory mandate to report their assistance on the face of the pleading.

127. For case files with incomplete or missing data, particularly those resolved by the landlord’s dismissal of the action without any explanation as to why, I took down the tenant’s name and phone number with the intention of calling each tenant to procure additional details about the resolution of the eviction action. I made fifteen such calls and found all fifteen numbers disconnected. After making the calls, I abandoned my efforts to supplement the information found in court files with tenant interviews.

128. In the eviction complaint, the landlord can only claim the amount of back rent the tenant owes up until the date of filing. However, at the conclusion of the lawsuit, a non-victorious tenant actually owes not only the back rent claimed in the complaint, but also a prorated amount of additional rent for every day following the filing of the complaint that the tenant remained in possession of the unit. This per day value is dubbed the “holdover damages” figure.

holdover damages)?<sup>129</sup> Third, I analyzed the impact of the two distinct forms of unbundled legal services: Were outcomes more favorable with additional assistance? Last, I assessed procedural outcomes: How was each eviction resolved? How many default judgments were entered against tenants? Did tenants set forth valid defenses to landlord allegations? How did procedural outcomes impact substantive ones?

#### *D. Findings and Analysis*

In the jurisdiction I studied, the provision of unbundled legal services did not have a favorable impact on outcomes. Recipients of unbundled aid fared no better than their unassisted counterparts on either possession or monetary outcomes. They lost their homes just as often, faced just as few days to move out, and made payments to their landlords with the same frequency, and in similar amounts. Nor did outcomes improve with increased unbundled legal aid. Tenants afforded negotiation assistance did not fare better than tenants who received ghostwriting-only services. By contrast, tenants who received full representation achieved outcomes far superior to either the unbundled or unassisted tenant groups.

Despite grim substantive outcomes, the provision of unbundled legal services did advance procedural justice. Tenants who received unbundled aid significantly outperformed unassisted tenants in both evading default judgment and in asserting valid, doctrinally cognizable defenses to their eviction actions. Yet, when procedural gains were re-evaluated to test their impact on substantive outcomes, the apparent gains were minimized considerably. Defaulting tenants achieved different, but not necessarily more favorable, substantive outcomes, and tenants who did not assert a single cognizable defense achieved the same outcomes as tenants who articulated meritorious legal defenses on perfectly executed pleadings. While further research—that is both more sophisticated and larger in scale—is clearly needed before sound and generalizable conclusions can be drawn, the findings of this study provides some challenge to the commonly-held notion that the provision of unbundled legal services is an effective way of equalizing access to justice for indigent litigants.

##### 1. Substantive Justice

I studied two primary substantive outcomes—possession and exchange of money—and looked at the impact of Legal Aid’s unbundled legal services as a whole, and in its two distinct forms, on each outcome. Possession refers to the

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129. The following is an example of how to compute liability for holdover damages: The landlord files an eviction action on June 1 claiming that May rent, in the amount of \$900, was unpaid. If the lawsuit is resolved on June 15 in favor of the landlord, the tenant will owe the \$900 for May rent plus fifteen days worth of holdover damages, computed at the per-day value of the unit (\$30 per day). In total, the tenant will owe \$1,350.

ability of one party or the other to obtain the right to live in the contested unit, and the exchange of money refers to any financial transaction that might be agreed to between the parties, or ordered by the court. The money exchanged is typically related to the re-acquisition of possession by one of the parties. By most standards, possession and money are the factors most critical in evaluating the success of a tenant in defending against an eviction.<sup>130</sup>

#### a. Possession

**Finding 1: The provision of unbundled legal services had no measurable impact on the rate at which tenants retained permanent possession of their homes.**

The data in Table 1 report on the rate at which tenants were awarded possession of their unit.<sup>131</sup>

**TABLE 1. CASES RESOLVED WITH TENANT IN POSSESSION OF UNIT<sup>132</sup>**

No Legal Aid	14%
Unbundled Legal Aid	18%
Full Representation N 137	55%

Above all else, most tenants facing eviction want to keep their homes. The desire to preserve a safe, affordable dwelling is what motivates most tenants to seek legal assistance in defending an eviction. In the study sample, unbundled legal aid offered a slight (4%) advantage to tenants in retaining possession of their homes. However, this benefit was of no statistical significance, per the results of a chi-square test ( $\chi^2 = 0.24$ ,  $p = 0.63$ ).<sup>133</sup> Comparatively, tenants who

130. The results for each outcome were tabulated by measuring all tenants who achieved a particular outcome against the total number of tenants for whom this type of data was available. For outcomes related to possession and the exchange of money, this primarily included tenants whose cases were resolved by settlement or court judgment. I excluded any tenant who lost her case by default judgment. The goal of this study was to compare outcomes for litigants who used court processes to defend against their evictions. Therefore, it was clearer and more valuable to measure substantive outcomes for those tenants who responded to the threat of eviction with action, not inaction, and resolved their cases formally in court. The results of defaulting tenants are examined in Part III(D)(2), which focuses on procedural outcomes.

131. By “permanent possession,” I refer to an award of possession to the tenant that has no stated end date. Of course, the landlord can always initiate a new eviction action, but for purposes of the particular case studied, the issue of possession has been resolved in favor of the tenant for an indefinite term.

132. I excluded all defaulting tenants from this analysis. *See supra* note 130 for an explanation of why this made the results easier to analyze and interpret.

133. A chi-square test evaluates whether differences in observed outcomes are the product of chance or whether the differences are likely to continue to be observed in other randomly chosen samples. All



received full representation retained possession of their homes at a substantially higher rate than did the recipients of unbundled services. Despite the small sample of fully represented tenants, the large outcome differential produced a benefit that was highly statistically significant ( $\chi^2 = 11.17, p = 0.001$ ).<sup>134</sup>

Tenants who received full representation retained possession through victories at actual court proceedings, and not via settlement.<sup>135</sup> Possession is the most contested aspect of an eviction suit, and perhaps it is not altogether surprising that landlords are quite hesitant to give up possession as part of a negotiated agreement. It is possible that unassisted pro se tenants and those who received only unbundled legal services retained possession far less frequently because they did not have the benefit of an attorney representing them in court, where the skilled presentation of legitimate defenses would have been more likely to result in a tenant retaining possession of her home.

**Finding 2: Where tenants lose possession, the provision of unbundled legal services had no statistically significant impact on the number of days the tenant has to move out of her home.**

The majority of tenants lose possession of their units at the conclusion of the eviction action. The loss of possession might be court-ordered (if the eviction matter is resolved at trial), or it might be agreed to between the parties as part of a settlement. It is vitally important that tenants who lose possession of their units have sufficient time to pack up their belongings, locate new housing, and enroll their children in new schools. Without sufficient time, a move cannot be executed successfully. The terms under which a tenant loses possession of his home may well spell the difference between homelessness and mere inconvenience.

Table 2 calculates the average number of days that tenants who lost possession were able to remain in their homes (from the date of the filing of the complaint):

**TABLE 2. AVERAGE NUMBER OF DAYS FOR TENANT TO MOVE OUT (WHERE TENANT LOSES POSSESSION)**

No Legal Aid	47
Unbundled Legal Aid	54
Full Representation	97
N = 105	

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statistical tests contained in this paper were selected and performed by Jordan D. Segall, Ph.D. candidate, Department of Sociology, Stanford University and J.D. candidate, Stanford Law School.

134. Unless otherwise noted, all measurable differences in substantive outcomes between the unbundled and full representation groups were statistically significant at or below the  $p = 0.001$  level.

135. It is worth noting that this Study did not track long-term possession rates for tenants. Thus, tenants who “won” possession in a particular proceeding may have been subsequently evicted.

Again, unbundled legal aid achieved marginally better results, but a one-tailed t test established that the improved outcome was not statistically significant ( $t = -1.21$ ,  $p = 0.12$ ). Tenants who lost possession moved out within 6.5 to 7.5 weeks from the date the eviction complaint was filed—and an average of 2.5 to 3.5 weeks from the date the case was resolved in court—whether they received unbundled assistance or no assistance at all. For tenants who were fully represented, the average number of days to move out rose to 97, a considerable increase (and a statistically significant one, per the results of a one-tailed t test:  $t = -2.75$ ,  $p = 0.004$ ). Fully represented tenants enjoyed double the amount of time—more than three months—to find affordable, alternative housing.

b. Exchange of Money

**Finding 3: The provision of unbundled legal services did not improve tenant outcomes related to the exchange of money.**

In addition to sufficient time to move out, the exchange of money is the second critical factor dictating how likely it is that the tenant’s transition to new housing will be successful. It is particularly important for a tenant to have access to funds when she moves out, because a move typically involves moving costs, and the payment of one month’s rent as a security deposit, in addition to a new, possibly higher, contract rent amount. Waiver of back rent, or receipt of a “move-out stipend” from the landlord, greatly improves the resolution of the case for the tenant, even where she loses possession. Tenants who must make a payment to their landlord at the conclusion of the eviction lose liquid assets, which may negatively impact their ability to secure and move into new housing.

Table 3 demonstrates the impact of the three levels of legal assistance on the exchange of money between the parties:

**TABLE 3. EXCHANGE OF MONEY BETWEEN THE PARTIES**

	Tenant pays landlord	Landlord pays tenant	Neither party makes a payment
No Legal Aid	61%	2%	37%
Unbundled Legal Aid	71%	0%	29%
Full Representation N = 137	0%	55%	45%

In one of the most noteworthy findings, tenants who received unbundled legal services made payments to their landlords in 71% of cases, while tenants who received no assistance paid their landlords 61% of the time, and tenants who were fully represented never paid their landlords. These payments represent partial or full payment for any back rent the landlord claimed was owed, any holdover

damages accrued since the lawsuit was initiated, and any additional costs, fees, or other damages the landlord claimed for the inconvenience of bringing an eviction lawsuit.

Not a single litigant who received unbundled aid—and only one unassisted tenant—was successful in securing a payment from their landlord. That is, even when tenants agreed to voluntarily relinquish possession, they were unable to bargain for a stipend to help defray the cost of re-locating. Comparatively, 55% of the fully represented tenants received payments from their landlords, the majority of whom agreed to move out, but also two who retained possession and obtained court orders requiring their landlords to reimburse their litigation costs. A sizable minority of tenants in all representation groups neither received nor made a payment, meaning the landlord waived all back rent but did not offer any form of move-out stipend to the tenant. The vast majority of cases (90%) in which neither party made a payment were foreclosures where the bank was exclusively focused on repossessing the unit and rarely required that the tenant pay back rent.

In the study sample, tenants receiving unbundled legal services made payments to their landlords more often than tenants with no assistance. Statistically, however, the two groups fared the same ( $\chi^2 = 1.12, p = 0.29$ ). It is quite likely that outcome measures related to possession are inversely related to outcome measures related to the exchange of money. That is, in any particular sample, when possession rates and move-out days increase, it might be expected that tenant payments to landlords might decrease proportionally. In the study sample, tenants who received unbundled aid did slightly better on possession outcomes, but slightly worse on monetary outcomes.

**Finding 4: The provision of unbundled legal services did not decrease the amount of payments, if any, that tenants made to their landlords.**

Table 4 reports on the number of payments made by tenants to landlords that exceed the tenant’s “maximum liability”—that is, the sum of (1) any nonpayment alleged and (2) all accrued holdover damages. The table also shows the ratio of the average tenant payment as compared to the maximum financial exposure faced by the tenant for rent and damages.

**TABLE 4. AMOUNT OF PAYMENT MADE BY TENANT TO LANDLORD**

	<b>Tenant pays landlord more than maximum liability</b>	<b>Average tenant payment, as compared to maximum liability</b>
No Legal Aid	55%	1.37
Unbundled Legal Aid	51%	1.27
Full Representation N = 137	0%	N/A

These data reveal a striking pattern. The majority of litigants who received either no legal assistance or unbundled legal assistance (55% and 51%, respectively) not only agreed—or were ordered—to make payments to their landlords, but made payments that were *greater* than the maximum liability for damages confronting that tenant.<sup>136</sup> In fact, the average payment exceeded the tenant's maximum liability by quite a large margin—27% to 37%. While in this sample, tenant payments exceeded maximum liability slightly more often when no legal assistance was rendered, the difference between the unassisted and unbundled groups was not statistically significant ( $\chi^2 = 0.15$ ,  $p = 0.70$ ).

In many cases, no explanation was provided within the four corners of the court file as to why the agreed-upon or court-ordered tenant payment exceeded the maximum liability for rent and damages. In others, a minute order, or other court document, provided a breakdown of tenant payment and noted that payments above the maximum liability were for landlord costs and attorney's fees, even though the landlord had not typically "prevailed" in court. In five of these cases, all settled under the auspices of the court, the tenant agreed to pay attorney's fees that were not authorized by the rental agreement.<sup>137</sup> In not a single case where tenants paid more than the maximum liability did the court require the landlord to provide an accounting of attorney's fees or litigation costs—even when the amount of the payment was assessed by a judge at trial. Nor was there any judicial oversight over the settlement process to ensure that tenants adequately understood they were undertaking significant financial burdens, often without receiving any significant benefit in return.

The great majority (82%) of tenants who made payments exceeding their maximum liability did so by settlement agreement,<sup>138</sup> and not as the result of a court order. In fact, a combined analysis of settlement, possession, and payment data demonstrates that, during the settlement process, tenants were highly likely to "voluntarily" agree to both vacate their unit *and* make payments that, in some cases, exceeded what they might have been adjudged had they gone to trial and lost. In excess of 45% of tenants in the unbundled and unassisted groups who settled fell into this "worst outcome" category. How could this be? Why does settlement involve so little actual negotiation and give-and-take between landlords and tenants? Why are tenants, to use an appropriate metaphor, so apt to give away the house? It appears that when tenants lack counsel, landlords simply enjoy bargaining power that is far greater than might be considered fair and equitable by average standards. Perhaps landlords overstate their claims with confidence or mischaracterize the amount owed, and tenants without counsel

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136. I calculated the "maximum liability" for each tenant based on an individualized review of the allegations set forth in each complaint as well as a review of relevant statutory law.

137. In California, landlords are not statutorily entitled to attorney's fees. They may collect them upon prevailing in the eviction action only if authorized in the lease.

138. Approximately 70% of tenants who made payments that exceeded maximum liability agreed to do so by settlement.

ultimately agree to worst-case outcomes just to make the eviction “go away” even if the agreed-to result is just as poor as it might have been following adjudication. If negative outcomes can be explained by lack of attorney representation during the settlement process, then one-time negotiation assistance should have an impact on outcomes, and tenants who procure this additional assistance should fare better than those who do not. The following finding tests the impact of negotiation assistance on outcomes.

c. Distinct Forms of Unbundled Legal Services

**Finding 5: Additional unbundled legal aid, in the form of one-time negotiation assistance, did not favorably impact substantive outcomes for tenants.**

If settlements yield poor results for tenants and the dismal outcomes might be partly explained by lack of attorney assistance during the bargaining process, does negotiation assistance on the day of settlement produce any improvement in outcomes—both on payment and possession grounds? The answer, based on the cases I reviewed, is no. In the study sample, negotiation assistance had no beneficial impact on tenant outcomes. In fact, tenants who received negotiation assistance actually fared *worse* than those who obtained only ghostwriting assistance, although the differences recorded between the two types of assistance were not statistically significant. The data in Table 5 compare the impact of ghostwriting plus negotiation assistance to the impact of ghostwriting-only assistance, on each of the substantive outcome measures:

**TABLE 5. DIFFERING LEVELS OF UNBUNDLED LEGAL ASSISTANCE**

	Tenant awarded possession	Average number of move out days	Tenant pays landlord	Tenant pays landlord more than maximum liability
Ghostwriting only	20%	57	68%	55%
Ghostwriting plus negotiation assistance N 96	14%	45	75%	46%

Tenants who received ghostwriting-only assistance won possession 20% of the time, had an average of 57 days to move out, made payments in 68% of cases, and paid more than the maximum liability 55% of the time. Tenants who received ghostwriting plus negotiation assistance fared less favorably on almost every

outcome measure. They were awarded possession in 14% of cases, had an average of 45 days to move out when they lost possession, paid their landlords 75% of the time and paid more than the maximum liability in 46% of cases. Chi-square and one-tailed t tests revealed no statistical difference in outcomes for the two levels of assistance.<sup>139</sup>

Of those in the unbundled group who received negotiation assistance, 93% went on to settle their cases. Therefore, negotiation assistance had a more significant effect on the outcomes achieved at settlement than before a judge at trial. A couple of hypotheses, none of which this study has tested, offer potential insight into why negotiation assistance might produce results that are no more favorable than ghostwriting-only. One possibility, bolstered by the analysis of Finding 4, is that *no amount of unbundled legal aid can compensate for the fact that tenants will be unrepresented at trial*. At the settlement stage, at least in San Mateo County, landlords invariably know whether tenants lack trial counsel. It might be the case that when landlords can anticipate a swift, low-cost, and most likely victorious trip to trial with no organized, lawyer-driven opposition to contend with, they are simply unlikely to settle with tenants on favorable grounds, even when a lawyer for the tenant is present on the day of negotiation.

A second possibility is that *lawyers providing negotiation assistance unintentionally recommended settlements that either undervalued the extent to which landlords wanted to avoid trial or overestimated the likelihood that landlords would pursue judgments for costs and attorneys fees pursuant to a win in court*. Veteran lawyers for the poor typically anticipate that, at an eviction trial, unrepresented tenants will lose possession and be assessed substantial damages, costs, and possibly even attorney's fees. This outlook is informed in part by real-life experience in unsuccessfully asserting the rights of low-income litigants in many forums (although few legal services attorneys go to trial with any frequency) and, in part, by the literature reporting such outcomes as likely. For the most part, these doomsday predictions are correct, as evidenced by Findings 1 through 4, which demonstrate that only a small fraction of litigants achieve outcomes that one might term "positive." Perhaps as a result of these low expectations, lawyers who provided one-time negotiation assistance advised tenants to accept deals that provided even a tiny advantage over the anticipated loss at trial. An extra five days to move out, or a slightly lower payment for attorney's fees, might have looked attractive to a tenant-side lawyer who believed

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139. Statistical tests, comparing the results achieved by the ghostwriting-only group and the ghostwriting-plus-negotiation group were performed for each independent outcome. In no category did the type of unbundled assistance impact outcomes in a statistically significant manner. The results were as follows: tenant awarded possession (  $\chi^2$  0.23, p 0.64); average number of move out days (t 1.59, p 0.94); tenant pays landlord (  $\chi^2$  1.15, p 0.28); tenant pays landlord more than maximum liability (  $\chi^2$  0.15, p 0.70).

the worst possible outcome would materialize in the absence of a settlement agreement. Contrary to expectations, however, the study found that the great majority of landlords did not pursue costs or attorney's fees upon prevailing at trial, even when legally entitled to do so. Thus, settlement negotiations may have taken place in the shadow of inflated predictions about the likely consequences of a loss at trial.<sup>140</sup>

On the other hand, tenants who received no assistance, or ghostwriting assistance only, entered settlement negotiations with less—or no—awareness of the “worst-case outcome” at trial. These unassisted litigants may have argued more strenuously on their own behalf for additional move-out time, or lower payments, unencumbered by the dread of any “likely” catastrophic outcome at trial should settlement talks have stalled. Even though litigants with negotiation assistance received actual lawyer help during the settlement process, which should have resulted in more favorable terms, perhaps the strategic advantage enjoyed by these tenants was offset by the ability of less-assisted tenants to capitalize more fully on the desire of landlords to strike a deal and avoid the expense, hassle, and uncertainty (however slight) of trial.

Attorney involvement in the settlement process substantially improved outcomes only when the tenant was fully represented. In the full representation context, more lawyering equaled better outcomes across the board. Perhaps landlords were especially wary of going to trial against represented litigants and offered additional concessions to avoid it. Furthermore, the fully represented tenants had lawyers who conducted discovery and factual investigation, and were more fully aware of the merits of the tenant's case. These lawyers could better anticipate likely outcomes at trial and apprise landlords of the strength of a tenant's case in more particularized fashion. This may have prompted landlords to improve the terms of negotiated agreements, where warranted.

## 2. Procedural Justice

The following findings evaluate tenant success in achieving procedural justice, based on the type of legal assistance received. Two primary procedural outcomes

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140. A third, locally-relevant factor likely influenced negotiations in which Legal Aid attorneys were present. In California, eviction actions are sealed if they are dismissed by within a sixty day period from the date of the filing of the complaint. This may be hugely important to a tenant who fears that, in the absence of sealing, the eviction will compromise her credit and her ability to secure future housing. Legal Aid attorneys certainly advised tenants of the benefits of entering into, and complying with, a settlement agreement that provided for dismissal of the action within sixty days. In fact, they were able to obtain “dismissal” language in about 40% of the agreements they helped negotiate (the other agreements were characterized as “judgment for landlord”). However, landlords dismissed only three cases. In other cases, the tenant either breached the terms of the agreement and therefore was not entitled to dismissal, or the tenant complied and the landlord breached the agreement by failing to take affirmative steps to dismiss the case. As a result, in the vast majority of cases, tenant evictions were left unsealed.

were examined: (1) whether tenants survived default judgment, and (2) whether tenants raised valid and legally cognizable defenses to the eviction. The procedural outcomes were then tested against each of the substantive outcome measures to determine whether procedural victories can be expected to lead to improved substantive results. The findings revealed that, on both procedural outcome measures, unbundled legal aid produced far more favorable outcomes than no aid. However, procedural wins could not reliably be converted into substantive justice. Avoiding default judgment improved the odds that tenants would retain possession, but also increased the likelihood that tenants would pay their landlords enormous sums of money. Moreover, asserting a cognizable legal defense appeared to have no favorable effect on either possession or monetary outcomes.

#### a. Default Judgments

##### **Finding 6: Unbundled legal aid reduced default judgment.**

In California, tenants served with an eviction lawsuit have five days to respond to the complaint in court. If the tenant fails to file a responsive pleading, the landlord may immediately obtain entry of a default judgment, in which the landlord may seek possession only, or—by filing an extra accounting—possession and damages. Within twenty-four hours, the landlord can convert the default judgment into a writ of possession enforceable by the sheriff’s office. The tenant must vacate the unit immediately or face lockout and forcible removal of his possessions. Thus, it is critical that tenants avoid entry of default judgment by presenting valid defenses to the eviction in a timely fashion.

Tenants who survive default judgment go on to resolve their cases in one of three ways: in court, by settlement, or by the landlord’s voluntary dismissal of the action. In some instances, the case is never resolved because the landlord takes no additional action after the filing of the complaint and the court neither resolves nor disposes of the matter.

Table 6 depicts the impact of legal assistance on the rates at which cases were resolved by each procedural mechanism:

**TABLE 6. METHODS OF CASE RESOLUTION**

	<b>Default judgment</b>	<b>Settlement</b>	<b>Court judgment</b>	<b>Voluntary dismissal</b>	<b>No resolution</b>
No Legal Aid	51%	9%	7%	21%	12%
Unbundled Legal Aid	3%	53%	20%	18%	6%
Full Representation N 421	0%	45%	25%	30%	0%



More than half of litigants who had no legal help lost their homes by default judgment.<sup>141</sup> This finding is significant and demonstrates that unbundled legal services may produce procedural, if not substantive, justice for low-income litigants.<sup>142</sup> In other words, the aid provided a crucial point of entry into the justice system for low-income litigants, presumably requiring landlords to present and prove their cases, and eliminating the windfall of an automatic (and potentially undeserved) victory. To many advocates, procedural justice is paramount.<sup>143</sup> Tenants who respond to their evictions in court become formal participants in the adversarial system. They have the opportunity to raise defenses and have a court adjudicate the lawfulness of their landlord's actions. Nearly three-quarters of tenants who received unbundled legal aid used formal court processes to contest their evictions. Perhaps, as others have concluded, creating an opportunity for litigants to challenge their adversaries is the most that lawyer assistance can and should be expected to achieve.

**Finding 7: Tenants who survived default judgment did not achieve uniform improvements in substantive outcomes.**

It is typically assumed that tenants who default fare less favorably on every conceivable outcome measure than do tenants who do not default. While merely surviving default judgment might advance procedural justice for low-income litigants by bolstering their participation in the adversarial system, it is likely that low-income litigants, if asked, would report that the expectation, or hope, of improved substantive outcomes—and not just the opportunity to participate in the process—is the primary motivation for responding to a lawsuit. Table 7 tests the assumption that a decline in default judgment rates leads to improved substantive results by reporting on case outcomes for tenants who defaulted as compared to tenants who did not:

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141. For an in-depth analysis of the reasons why tenants default, see Erik Larson, *Case Characteristics and Defendant Tenant Default in a Housing Court*, 3 J. EMPIRICAL LEGAL STUD. 121 (2006).

142. The effect of unbundled legal aid on default rates may well be overstated. Many, if not all, of the tenants who visited Legal Aid's housing clinics might have responded to their eviction lawsuits even without attorney assistance. These tenants are likely the most proactive and motivated litigants. Conversely, many, if not all, of the defaulting tenants might have defaulted even if they were aware of and able to access the unbundled legal services provided at Legal Aid's housing clinics. To test the true impact on the overall default rate, it would be necessary to look at the default rate for a period of time when unbundled legal services were not provided in this County, and then to compare it to the default rate occurring in the study period. Nonetheless, it is still interesting to note that tenants who receive unbundled legal services very rarely default, even though they are charged with filing their own responsive pleading in the court and paying all filing costs if a fee waiver is not obtained. The provision of aid is clearly a catalyst for tenants, who might otherwise have been frustrated in their solo efforts, to launch a formal response in court.

143. See Rhode, *Connecting Principles*, *supra* note 10, at 372 ("In most discussions, 'equal justice' implies equal access to the justice system. The underlying assumption is that social justice is available through procedural justice."). For an argument that access to a lawyer, in and of itself, is a laudable goal, see Justine A. Dunlap, *I Don't Want to Play God—A Response to Professor Tremblay*, 67 FORDHAM L. REV. 2601 (1999).

**TABLE 7. OUTCOMES FOR DEFAULTING VS. NON-DEFAULTING TENANTS**

	<b>Tenant awarded possession</b>	<b>Average number of move out days</b>	<b>Tenant pays landlord</b>	<b>Tenant pays landlord more than maximum liability</b>
Defaulting Tenants	0%	21	9%	8%
Non-Defaulting Tenants N 401 <sup>144</sup>	16%	51	67%	53%

The results captured by this table are intriguing: defaulting tenants appeared to do significantly worse on all possession measures, but significantly better on all monetary measures. All results were statistically significant.<sup>145</sup> Defaulting tenants, by definition, lose possession of their homes and, because the opportunity to litigate the eviction is eliminated entirely, the defaulting tenants studied were forced to move out of their units on a much shorter time frame than the non-defaulting tenants. However, while nearly one in six non-defaulting tenants kept their homes and those who lost possession had significantly more time to move, tenants in the non-defaulting group were *far more likely to agree or be ordered to pay their landlords significant sums of money*. Again, as noted in the analysis of Finding 3, the inverse relationship of possession and payment variables is evident. While landlords are entitled to seek awards of both possession and damages when a tenant defaults, the study analyzed *actual* landlord behavior and found that damages were rarely pursued in the default context, despite the existence of an easy process for doing so in San Mateo County. Perhaps landlords were sufficiently satisfied with reacquiring possession swiftly, or perhaps they did not believe a judgment for damages would be easily enforceable against defendants who were no longer easy to locate.

This is not to say that default is preferable—or even equivalent—to fully and robustly litigating claims in court. But it does raise the question of whether it's worthwhile for tenants to launch a defense in court without full representation by an attorney. Non-defaulting tenants maintained possession for an average of four additional weeks, but at the cost of enormous financial exposure (average payment of \$4,197) that had to be satisfied immediately, or could be converted

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144. Fully represented tenants were excluded so as not to unfairly inflate the outcomes of the non-defaulting tenants.

145. Chi-square or one-tailed t with tests were performed for each independent outcome. In every category, the differences in outcomes for defaulting versus non-defaulting tenants were statistically significant. The results were as follows: tenant awarded possession (  $\chi^2$  27.56, p 0.001); average number of move out days (t 10.20, p 0.001); tenant pays landlord (  $\chi^2$  95.67, p 0.001); tenant pays landlord more than maximum liability (  $\chi^2$  70.44, p 0.001).

into a judgment and levied against the tenant's earnings or assets. Legal Aid's unbundled legal services model was successful in reducing default rates and in fostering more participatory methods of dispute resolution yet, the resulting impact on substantive outcomes was mixed and highly dependent on how individual tenants might define success.

**Finding 8: The provision of unbundled legal services greatly increased the rate at which tenants raised cognizable defenses in their responsive pleadings.**

Supporters of unbundled legal services often posit that the provision of limited aid is valuable because it enables tenants to raise valid and meritorious defenses they might not have otherwise known existed. In an oft-cited example, a tenant facing eviction for nonpayment of rent would not know, without attorney assistance, that the failure of her landlord to maintain her premises in adequate condition serves as a viable defense to the eviction. Table 8 depicts the number of tenants who raised at least one cognizable defense<sup>146</sup> in their responsive pleadings, as compared to the number of tenants who raised only non-cognizable defenses.

**TABLE 8. ASSERTION OF COGNIZABLE VS. NON-COGNIZABLE DEFENSES**

	<b>Cognizable</b>	<b>Non-cognizable</b>
No Legal Aid	59%	41%
Unbundled Legal Aid N 149 <sup>147</sup>	97%	3% <sup>148</sup>

Indeed, the provision of unbundled legal services was very effective at helping tenants raise cognizable defenses. Supporters of the model were correct to predict that tenants often have valid defenses that go unexpressed in the absence of legal counsel. A significant proportion—41%—of unassisted tenants failed to raise a single cognizable defense, whereas only 3% of recipients of unbundled aid did the same. If, as many believe, it is the goal of unbundled legal aid to empower and educate litigants, these data may well be evidence that recipients of unbundled

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146. Advocates often use the term “meritorious defenses,” but since this study did not examine whether tenants’ defenses had actual merit, but rather just determined whether they were doctrinally cognizable, based on the claims made by the landlords, the term “cognizable defenses” is employed instead.

147. This figure represents the number of tenants who filed responsive pleadings in court.

148. In all three instances a lawyer providing unbundled legal services drafted a responsive pleading raising a non-cognizable defense, the pleading simply failed to deny any of the landlord’s allegations and did not raise any affirmative defenses. In essence, apart from the tenant’s name and address, the responsive pleading was largely blank.

services are better informed about their rights and, perhaps, as a result, better able to navigate future dealings with their landlords.

**Finding 9: The assertion of cognizable defenses has no favorable impact on substantive outcomes.**

While rarely asserted explicitly, it is likely presumed that a tenant who raises cognizable defenses will fare better, in terms of actual outcomes, than one who does not. Table 9 compares the outcomes of tenants who raised at least one cognizable defense to the outcomes of tenants who raised only non-cognizable defenses (as did one particularly colorful litigant, who defended her eviction by exclaiming “I am woman, hear me roar!”).

**TABLE 9. OUTCOMES BASED ON COGNIZABLE VS. NON-COGNIZABLE DEFENSES**

	Tenant awarded possession	Average number of move out days	Tenant pays landlord	Tenant pays landlord more than maximum liability
Cognizable	16%	51	68%	52%
Non-Cognizable N 149 <sup>149</sup>	14%	52	57%	52%

There was no statistical difference, on any measure, between the outcomes enjoyed by a tenant who raised doctrinally cognizable defenses and those achieved by a tenant who challenged her eviction with defenses unrecognized by law.<sup>150</sup> This might be because a far smaller fraction of litigants resolved their eviction actions at trial—where, presumably, the validity of defenses asserted would matter quite a lot—than through more informal means, where practical factors, such as how fast the tenant is willing to move out, might have greater importance. However, the similarity in outcomes might also be a reflection, as other studies have found, of how infrequently even valid tenant defenses are accorded appropriate weight by trial judges.<sup>151</sup> In San Mateo County, all unrepresented or partially represented tenants, no matter what they say in their own defense, seem to fare equally poorly.

149. Fully represented tenants were excluded because of the concern that the highly successful outcomes would unduly inflate the results for the “cognizable” group.

150. Results, using a chi-square test and a one-tailed t test were: tenant awarded possession ( $\chi^2 = 0.04$ ,  $p = 0.85$ ); average number of move out days ( $t = 0.08$ ,  $p = 0.53$ ); tenant pays landlord ( $\chi^2 = 0.92$ ,  $p = 0.34$ ); tenant pays landlord more than maximum liability ( $\chi^2 = 0.0004$ ,  $p = 0.98$ ).

151. See Bezdek, *supra* note 29.

## IV. LIMITATIONS OF THE STUDY

While the aim of this study was to explore the impact of different levels of attorney assistance on case outcomes, numerous methodological imperfections may have affected, or distorted, the findings. They are discussed herein. For starters, the sample size was small. Although 421 evictions were included in the study, data on most substantive outcomes were available for only a fraction of litigants. A substantial portion of the 421 eviction actions were either voluntarily dismissed by the landlord, without indication on the record as to why, or were left unresolved (and remain open court actions), because the landlord chose either not to prosecute the action or not to advise the court that informal resolution had been reached. As a result, possession and monetary outcomes could be determined for only 137 non-defaulting tenants and 155 defaulting tenants. Because of the small sample size, the likelihood of finding statistical significance in the small observed differences between no aid and unbundled aid was slim. In a larger sample, it might be possible to determine that unbundled aid does reliably produce some improvement in outcomes. Further studies might be able to conclude, for instance, that unbundled legal services will always, or almost always, produce a 4% increase in the rate at which tenants keep their homes, while this study, in Finding 1, found that the 4% improvement was a product of chance.<sup>152</sup>

Second, the study was observational in nature, and was not randomized. That is, tenants self-selected, at least in part, into the various assistance groups and were not randomly assigned to receive a particular level of legal aid.<sup>153</sup> It is possible, for example, that tenants with particular and unique characteristics opted to pursue lawyering assistance, while tenants with a separate and distinct set of characteristics decided to litigate pro se without any attorney involvement. Perhaps, as most analyses of selection bias suggest, the litigants who seek assistance are either those with more meritorious cases or those with personal attributes, such as motivation or persistence, that make it more likely they will prevail in litigation, regardless of the independent merit of their case. Of course, it is also possible to hypothesize that tenants whose cases are *less* meritorious feel they need a lawyer, while tenants who know their landlords' allegations are false might believe they can persuade the tribunal of this on their own. The limitation present in this study is that, in the absence of randomization, there is simply no way to know whether the observed sets of litigants possess either of these traits, or any others, and whether tenant characteristics, rather than level of attorney assistance, may be impacting case outcomes in either direction.

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152. As noted, *supra* Part III, tenants in the study sample retained possession of their homes at an 18% rate with unbundled legal aid and at a 14% rate with no legal aid. However, a chi-square test, based on the study's sample size, determined that the difference was a product of chance, and that the improvement in possession rates could not be attributed to the provision of unbundled legal services.

153. This is true only in part because not every tenant who sought full representation received it. At least some of the tenants who received unbundled legal services might first have been turned away from the Stanford Community Law Clinic due to resource constraints.

Last, the study was conducted during a period of economic fragility, when post-foreclosure evictions were particularly common in San Mateo County. This is important because post-foreclosure evictions differ in two important ways from other residential evictions. In post-foreclosure proceedings, it is more common for the landlord (here, the bank) to win possession of the unit, but far less typical for the landlord to demand any payment. Also, it is more likely for tenants facing a post-foreclosure eviction to default, often because these tenants are unaware of the pending action, the complaint having been served on the former owner of the property rather than the tenant who is occupying the premises. Because an unequal number of foreclosures were observed in each category of assistance (30% of no-assistance cases, 20% of unbundled cases, and 10% of full representation cases)—again, possibly the result of the nonrandomized methodology—it is possible that the study captured results that are impacted, in part, by the foreclosure crisis, and which might change somewhat in a different time period, when post-foreclosure evictions are not as prevalent.

## V. WHERE TO GO FROM HERE

### A. *The Need for More Research*

Legal services organizations, many of them funded by the federal government, allocate substantial resources to unbundling on the premise that some for all is preferable than all for some. This increase in unbundled legal services greatly impacts traditional principles of distributive justice, diluting what it once meant to have an attorney, but making the less-attractive alternative available to the masses of currently unrepresented litigants. Related and recent ethical reforms have made explicit that what it means to have a lawyer if you are poor is quite different from what it means if you are wealthy. The attorneys most low-income litigants can access are no longer bound by the traditional stricture to “pursue a matter [for a client] despite opposition, obstruction or personal inconvenience to the lawyer, and [to] take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”<sup>154</sup> In fact, many lawyers for the poor may tender mere advice, or a brief service of any kind, and then walk away. This is not necessarily bad policy, but the choice must be made with full information. Given the substantial investment the access to justice community has made in unbundling, it is critical that further empirical questions about its effectiveness be answered.

#### 1. Additional “Pilot” Projects

The study described in this Article made a number of findings about the impact of two popular forms of unbundled legal services in one particular jurisdiction, but it was a preliminary study that used available methods and available

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resources. Its reach is modest in nature. However, despite its modest reach, the study reveals the urgent need for more research. Similar pilot projects should be launched to test the outcomes produced by unbundled legal aid in other jurisdictions. It would be valuable to look at the provision of many types of unbundled legal aid<sup>155</sup> in a variety of courthouses, as well as their application to other substantive fields, such as family law, where the model is commonplace. The impact of limited services may change depending on the jurisdiction where the case is adjudicated, or based on the type of legal issue presented. The success of the model might also change based on whether the assisted litigant is a plaintiff or defendant in a particular action. Already, the experiment conducted by the University of Maryland's Family Law Assisted Pro Se Project provides at least some evidence that unbundled aid related to the filing of simple divorce petitions promotes client satisfaction, but that unbundling directed toward more complex matters leaves clients less satisfied (case outcomes were not studied). Further research should be done to determine, for instance, whether those assisted with pro se divorce filings obtained the sought-after divorce and whether litigants involved in more complex cases—for example, a hotly contested child custody dispute—saw improved outcomes with unbundled assistance.

## 2. Randomization

In addition, further trials on the impact of unbundled legal services should be randomized where possible, as social scientists have urged.<sup>156</sup> Randomization is not always ethically viable (for example, in the study described above, Legal Aid had capacity to provide unbundled services to all litigants who sought them and, thus, it would have been ethically problematic to randomly assign a portion of those litigants to “no assistance”). However, it is often the case that a service provider is overwhelmed by demand and must make decisions about who will receive the services offered. Often, the election is made on a first-come, first-served basis. But agencies facing demand that far outstrips supply might be willing, instead, to randomly assign litigants to “assisted” and “unassisted” groups for the purposes of an experimental trial, rather than simply serving the individual who seeks assistance first. Randomization would greatly increase

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155. This might include advice-only, various forms of document preparation, counseling, negotiation assistance, and limited appearances.

156. To date, only one randomized trial testing the impact of attorney assistance on case outcomes has been conducted. See D. James Greiner & Cassandra Wolos Pattanayak, *What Difference Representation? Offers, Actual Use, and the Need for Randomization*, 121 Yale L.J. (forthcoming 2011); Seron et al, *supra* note 27; W. VAUGHN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972). Recently, there has been increased recognition that randomized trials are necessary to truly isolate and evaluate the effect of representation. See Abel, *supra* note 81; David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145 (2007); Jeanne Charn & Jeff Selbin, *Legal Aid, Law School Clinics and the Opportunity for Joint Gain*, 11 MGMT. INFO. EXCH. J. 28 (2007).

confidence that any observed differences in case outcomes are attributable to the level of attorney assistance, and not to other tenant characteristics, such as the merit of individual cases.<sup>157</sup>

### 3. Increase Sample of Fully Represented Litigants

Finally, studies should be undertaken that increase the number of fully represented tenants in the experimental sample. As evidenced by this study, and most studies that have looked at the effect of lawyering on case outcomes, full representation dramatically increases the odds of substantive case victories. The study sample of fully represented tenants was very small, yet it produced improvements in outcomes that were highly statistically significant. Therefore, one might predict that future studies would continue to show that full representation produces results that significantly outpace those achieved by litigants with less assistance. But, it is also entirely possible that an increase in full representation would catalyze a retrenchment in favorable outcomes rather than spurring an expansion of positive results. In the current landscape of infrequently-represented tenants, it might be that landlords, and particularly landlords' counsel, are disposing quickly of evictions where tenants have full representation—even if it means giving ground on certain issues—in order to focus on low-cost proceedings, involving unrepresented tenants, where victory is nearly assured. Fully represented tenants significantly raise the cost of litigation for landlords. It might well be more cost-effective for a landlord to waive rent owing, and permit a tenant to remain in-residence for three additional months, than to respond to discovery requests, take time off of work to submit to a deposition, and potentially face the astronomical expense of trial fees. It would be valuable for future research to focus on a jurisdiction where numerous litigants receive full representation, in order to test whether the infrequency of such representation is artificially inflating the outcomes for the lucky few who obtain it. It would also be worthwhile to test whether an increase in full representation decreases the number of overall evictions, due to the cost involved in evicting a fully represented tenant.

#### *B. The Future of Access to Justice Policy*

The development of future access to justice programs and policies should be guided by a more explicit focus on maximizing favorable case outcomes. Case

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157. Although randomization is the gold standard for conducting experiments, randomized trials carry their own complications and hazards. In Professor Greiner's recent paper, *supra* note 156, which reported on findings from a randomized study that looked at the impact of offers of full representation, almost half of those randomized to receive no assistance were able to find other lawyers willing to assist them and 10% of those offered full representation declined it. While this experiment was able to control for selection biases, the treatment and control groups both included substantial numbers of unrepresented and represented litigants and, thus, were more difficult to effectively compare.



outcomes matter because they matter to the litigants involved. Few individuals would invest the time, energy, and resources necessary to bring or defend an action in court if they were indifferent as to the final result.<sup>158</sup> Simple “access” to a lawyer, or to the court system, is not sufficient if the quality or quantity of that access does not create a greater opportunity for its recipients to achieve the same results as those fully represented by counsel. The ability of litigants to experience parity with the represented on outcome-based metrics should determine, in large part, whether a particular access to justice tool or strategy can be considered successful. Whether by increasing access to full representation or calibrating the delivery of unbundled legal services to achieve measurable improvements in results, it should be a goal of the access to justice community to find ways to promote better substantive case outcomes for poor litigants.

### 1. Increasing Access to Full Representation

Numerous scholars, advocates, and practitioners have long been calling for a right to counsel for indigent litigants in civil cases.<sup>159</sup> The poor, particularly those with legal problems affecting critical economic and social rights, need a lawyer not only to assert meritorious claims and defenses, but to develop facts, craft persuasive arguments, navigate procedural and evidentiary hurdles, and communicate with opponents and judges in a shared professional language. The value of the lawyer is not simply to distill a client’s story into a simple pleading, or to deliver basic advice based on black letter law. Only a lawyer who has accepted a

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158. Others have noted the importance of outcome-based assessments. See Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 871-72 (2004) (stressing the importance of case outcomes, and analogizing that if client satisfaction with attorney services equals access to justice, then a doctor’s pleasant bedside manner equals access to good healthcare); see also Abel, *supra* note 81, at 299 (favoring an “outcome-based” metric by which to judge a particular access to justice intervention, and suggesting, specifically, that the standard should be “whether a particular access to justice intervention leads to the same rate of wins and losses as full and competent attorney representation,” since “we generally assume that attorney representation is a key indicator of fairness.”); Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 *FLA. L. REV.* 481, 495, 507 (1996) (taking issue with the notion that low-income litigants “win” when they are empowered or educated by pro se assistance, and proffering that the only true “win” is a final judgment in the litigant’s favor).

159. For an argument that people facing eviction must have the right to appointed counsel, see Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 *CARDOZO PUB. L. POL’Y & ETHICS J.* 699 (2006). For discussion of current strategies and initiatives in the right to counsel movement, see Raymond H. Brescia, *Sheltering Counsel: Toward a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187 (2009); Engler, *supra* note 47; Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, 41 *CLEARINGHOUSE REV.* 44 (2008); *Symposium, Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 697 (2006). In 2006, the American Bar Association adopted a resolution calling for the provision of “legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.” AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES, Aug. 7, 2006, available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

case for full representation can provide the tailored assistance necessary to bring the legal problem to a successful resolution, particularly as the nature of the problem shifts and develops over the course of time. Of course, it is not possible to demand “victory” in order to demonstrate that legal assistance has been effective. In every case adjudicated in court, there is a winner and a loser; it is perhaps for this reason that providers of unbundled legal services have often looked to more subjective assessment measures, such as client satisfaction, to determine whether the provision of assistance has been a success. Yet, we know that unrepresented parties are losing significantly more often—and in a bigger way—than represented ones.<sup>160</sup> So where a “win” cannot be the standard by which we measure efficacy of an access to justice program, the likelihood of obtaining a substantially better result than the unrepresented can—and should—be that standard. If the courts intend to remain fair and equal arbiters of conflict, the ability of the poor to retain lawyers for full representation needs to be expanded.<sup>161</sup> It is the only tested and assured way to increase the odds that similarly-situated litigants attain the same or similar results.<sup>162</sup>

While pursuit of statutory or constitutional reform to guarantee and fund counsel for the poor in civil matters is critical, the need to make proper decisions about how best to allocate existing lawyering resources is the most immediate concern. It is at least *possible* that the unbundled model, despite serving many more low-income people, might actually be making inefficient use of resources. To use a simplified analogy: If there exists a finite supply of AIDS drugs to distribute in sub-Saharan Africa, should it be divided equally among those who want it, even if this requires lowering the dose to an untested level that has not been proven to improve survival rates? Or should a full dose of medication, proven to boost survival, be provided to a smaller number of AIDS patients, with the remainder of the population required to wait for the next shipment of drugs? Unless and until it is proven that limited intervention on behalf of low-income clients is successful in producing better outcomes than litigants can attain on their own, a return to the traditional model of full representation for fewer clients—a *proven* model of success—should at least be considered, and resource and policy decisions should be made to facilitate increased access to full representation.<sup>163</sup>

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160. See *supra* note 27 for a list of studies showing that fully represented litigants obtain far more favorable results in court than unrepresented litigants.

161. Although some have pointed to the dismal quality of representation in the public defender system, due to too-few lawyers and overwhelming caseloads, and question whether we want to replicate such a system in the civil context. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008.

162. See Abel, *supra* note 81; see also *supra* note 27 for a list of studies that have found that fully represented litigants fare better in court than unrepresented litigants.

163. Of course, greater allocation of lawyering resources toward full representation raises difficult questions about which litigants should have access to free legal help and who should decide. See Tremblay, *supra* note 36, for a discussion of the intricacies and ethical implications of choosing among cases and clients in a resource-limited poverty law office. Other scholars have noted that even 100% access might not produce the desired result.

The adjudicatory system could support a re-directing of attorney resources toward full representation by enacting procedural, ethical, and court reforms to ensure basic access to the justice system and to supplant the “procedural gateway” function currently served by lawyers providing unbundled aid. To begin, default judgment should be eliminated, or procedure should be reformed to allow for judge-driven dismissals of cases. In the landlord-tenant context, landlords should be required to appear in court and make a threshold showing of “proof” to a trial judge that an eviction is lawful before a sheriff can be directed to forcibly remove families and their possessions from their homes.<sup>164</sup> In the administrative realm, there is precedent for requiring a formal demonstration of merit despite an opponent’s non-appearance at trial, before the requested relief is granted.<sup>165</sup> The elimination of default would promote procedural justice in numerous ways: it would deter the filing of baseless evictions, it would reduce the risk of erroneous deprivation of housing for low-income families, and it would hold landlords accountable to the proper procedures for evicting a tenant. Legal Aid attorneys who currently spend substantial time ghostwriting pleadings to ensure that tenants survive default judgment would be far freer to fully represent more clients.

In addition, as others have argued before, the rules regarding unauthorized practice of law must be relaxed.<sup>166</sup> At administrative hearings, “advocates” who have no legal training, but are experts in the subject matter, routinely represent clients in adversarial proceedings. At unemployment insurance appeals, such “advocates” cross-examine witnesses and present legal arguments to administrative law judges. I do not argue here for expansion of non-lawyer participation at court-based hearings or trials. But, it is not unreasonable to propose that well-trained non-lawyers be permitted, under the auspices of an attorney, to offer low-income clients competent advice, and even document preparation, along the lines of a basic unbundled services model, so that trained attorneys can focus on full representation. If ethical rules surrounding the practice of law are to be reformed, it is the rules that prohibit non-lawyers from providing simple legal

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164. This is particularly important because, according to a report prepared by the California Standing Committee on the Delivery of Legal Services, “[m]any of the tenants facing eviction proceedings in California are low-income earners and may not . . . be able to show up at the initial hearing because they are unable to take time off from work . . . and/or are unable to pay for added expenses incident to their attendance at the hearing, such as childcare.” THE STATUS OF LEGAL ASSISTANCE FOR EVICTION ACTIONS IN CALIFORNIA: A REPORT TO THE STATE BAR OF CALIFORNIA BOARD OF GOVERNORS 10 (2005).

165. For example, in the California Division of Labor Standards Enforcement, a worker who seeks damages for unpaid wages must demonstrate to the hearing officer—both factually and legally—that wages are owing, even if the employer never formally opposes the claim.

166. See DEBORAH L. RHODE, ACCESS TO JUSTICE 89-91 (2004); Rhode, *supra* note 3, at 886. *But see* ABA SELECT COMMITTEE REPORT ON THE 2000 MIDYEAR MEETING, available at <http://www.abanet.org/leadership/2000hous.html> (detailing the ABA’s recommendations for enforcing prohibitions against the unauthorized practice of law).

services to the poor that demand modification.<sup>167</sup> It is crucial that we tap into both professionals and paraprofessionals to assist with the delivery of services to the indigent.

Finally, each state should issue high-quality, easy-to-read form pleadings that pro se litigants can comprehend and complete without attorney assistance. Form pleadings should list all available defenses and describe the circumstances in which each can be raised. Specific instructions should be provided on how to serve documents and where to file them. Simple advice on how to prepare for trial (i.e. bring evidence of rent receipts) and what to expect (you will only be able to submit evidence related to defenses you raised) should be provided to each litigant in writing. Although California does maintain and update form pleadings, they are not simple or directive enough for an unrepresented litigant to utilize effectively. For instance, the form pleading for responding to an eviction suit does not advise the tenant of his right to request a jury trial, nor does it advise of arcane rules, such as the requirement to look on the court's website for tentative rulings on pre-trial motions the afternoon before a scheduled hearing. A litigant relying on current court forms has no easy way to access information about very important rights, which substantially undermines the likelihood of a just outcome. While, of course, it will always benefit a litigant to consult with an attorney about processes and strategy, the improvement of court-issued forms might alleviate some of the pressure on legal services organizations to apprise quite so many clients about the basic rights and obligations they have as participants in the legal system.

## 2. Experiment with New Forms of Unbundling

Although the results of this study cautiously suggest that unbundled legal services may not produce favorable substantive outcomes, it could well be that different types of unbundling, or unbundled services directed at different types of legal problems, could prove more effective in bolstering access to justice. Eviction cases are fast-paced and procedurally complex. They require fact finding, knowledge of evidentiary rules, preparation of witnesses, the ability to propound and respond to discovery, and skill at preparing specialized motions, all at breakneck speed. Even substantial unbundling aid can assist only with basic drafting of a pleading and negotiation with one's opponent. An untrained litigant might well find it near-impossible to supplement this basic legal assistance with any expertise of his own, thus making it difficult to bring the case to a successful resolution after initial aid is rendered.

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167. The traditional critique—that such modification of unauthorized practice rules will infringe on the ability of licensed attorneys to procure business—is inapplicable in this context, since the modification proposed would allow for participation of non-lawyers only to serve the indigent, who are unable to retain private counsel.

There are many areas of law where the unbundled model might prove more beneficial in maximizing favorable outcomes. Litigants with less complicated legal matters, particularly those uncontested by an opponent—such as some guardianships or conservatorships—might see improvements in outcomes even with only limited attorney involvement. Similarly, clients whose matters are adjudicated in tribunals without formal evidentiary rules (small claims, public benefits) may be better able to translate simple advice from an attorney into improved performance on the day of a hearing. And last, legal cases resolved on the basis of written submissions, rather than court appearances, might be good candidates for unbundled assistance. Litigants who obtain immigration visas and criminal records expungements in this manner might be able to utilize attorney drafting assistance to achieve a better result, even if no further aid is provided. Experimentation with different forms of unbundled aid in different legal settings, coupled with rigorous evaluation of its impact on case outcomes, is key to determining which aspects of this model are viable, and whether certain modes of practice should be standardized nationwide. As new unbundling programs develop, it is important that innovators focus less on numbers of clients served and more on the quality and impact of the services provided.

## VI. CONCLUSION

The unbundled legal services that were the subject of this study represented the full-time work of one and a half Legal Aid lawyers, one Legal Aid paralegal, and at least one law clerk, supported by the volunteer time of a host of pro bono attorneys. Despite the considerable investment of attorney resources, deployed not only by this organization but also by hundreds of legal services organizations across the country, substantive outcomes for tenants did not improve. The provision of aid did reduce the default judgment rate and was successful in assisting tenants to assert valid, and potentially meritorious, defenses; yet, the achievements of the model in preserving defenses and cultivating increased participation in the justice system did not help tenants get what they truly want: to remain in their homes, or transition to new housing, without significant financial liability.

The provision of unbundled legal services has enjoyed widespread popularity and financial support over the past decade as an effective way of serving a large number of clients while conserving the scant resources available to represent poor litigants in civil cases. The model is supported and promoted by policymakers, practitioners, funders, and scholars, many of whom, to be sure, would far prefer to offer the indigent full representation, but are aware that support does not exist to fund such access to a lawyer. Yet, the impact of the model has not been appropriately studied, and there exist more questions than answers about whether the provision of unbundled legal services is truly an effective method of distributing scarce attorney resources. To answer these questions definitively, further research and experimentation is required. It is vital

to determine whether, and in what circumstances, less than a “full dose” of lawyering might be effective in order to most efficiently appropriate limited funds.

While experimentation with and evaluation of unbundling is undertaken, efforts should also be made to expand the availability of full representation by counsel, even within existing resources constraints. By reforming procedural, ethical, and court-based rules, and creating non-lawyer-driven pathways for litigants to access the courts, attorneys who serve the poor can return their focus, at least in part, to traditional full-service representation. Unless the access to justice community reaches consensus that the value of empowering a large number of litigants to access court processes, irrespective of the result, supersedes the value of keeping fewer tenants in adequate and affordable shelter, innovation in the delivery of legal services must be deliberately conceived to produce effective and concrete results. Unbundling should promote equal justice and not just equal access.