

Comment,  
**PARALEGAL ASSISTANCE AND LIMITED  
REPRESENTATION AS ALTERNATIVES  
TO SELF-REPRESENTATION**

### **Introduction**

The American court system within the last three decades has seen a sharp increase in the number of self-represented litigants.<sup>1</sup> This increase in self-representation has led to a needed re-evaluation of the options for representation available to the public.

When people are left to self-represent they are put at a severe disadvantage relative to those who have an attorney, creating an imbalance in the treatment of parties in the civil justice system. A burden is then placed on the justice system to correct this imbalance. All the while, the problem of self-representation is not solved.

There have been many proposals for ways to fix the self-representation problem. Two of the most promising proposals are greater paralegal assistance and limited representation. This Comment's aim is to explore both options, and examine both the benefits and disadvantages of each. The main focus when evaluating both options will be the ethical obligations that each entails, and considering if the options can be achieved while still upholding the Model Rules of Professional Conduct. The American Bar Association opinions and suggestions on how to ethically practice law will also be considered.

Part I will explore the reasons behind the increase in self-representation. From there, the problems of self-representation and complications that arise from self-representation within family law cases will be addressed. The ethical issues of self-representation will also be explored. Part II will examine the possible solution of expanded paralegal assistance. This section will also address the limits and ethical obligations related to paralegal representation as well as the responsibilities a lawyer and a client hold in the situation. Part III of this Comment will investigate the

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<sup>1</sup> Steven K. Berenson, *A Family Law Residence Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105 (2001).

growing area of limited representation within family law. Once again, the ethical obligations will be weighed against the benefits that limited representation would confer on the public.

## **Part I. The Problem of Self-Representation**

With the recent changes to societal standards and expectations regarding what constitutes a family, family courts are seeing an increase in self-represented or pro se litigants.<sup>2</sup> This increase raises many ethical complications along with problems that hinder or altogether halt the court process.<sup>3</sup> This situation alters the very foundation that the American justice system is built on, fair and equal justice no matter one's social standing. Unfortunately, one class of people is harmed significantly more than the rest, and that is people in the lower socioeconomic class.<sup>4</sup> Though the middle class is also affected by the same limitations, more frequently lower or working-class individuals are the ones left without options.<sup>5</sup> Members of the middle class, when self-representing, are often doing it out of choice to save money instead of necessity due to a lack of funds.<sup>6</sup>

People from a lower socioeconomic class are disparaged far more frequently than those in any other class.<sup>7</sup> They often struggle to find an attorney that can represent them at a price they can afford.<sup>8</sup> Too few individuals can afford the up-front cost of an attorney and even fewer can afford the unpredictable costs associated with contested divorces or child custody hearings without taking on debt.<sup>9</sup> Furthermore, since family court matters fall within civil court jurisdiction, representation by an attorney is not a constitutional right; therefore one is not provided if people cannot afford one.<sup>10</sup> Additionally, places such as Legal Aid that provide free services require their clients to be indigent, which

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<sup>2</sup> *Id.* at 108.

<sup>3</sup> *Id.* at 113.

<sup>4</sup> Mark A. Juhas & Maria E. Hall, *A Bridge to Justice*, 41 L.A. LAW. 20 (June 2018).

<sup>5</sup> Berenson, *supra* note 1, at 119.

<sup>6</sup> *Id.*

<sup>7</sup> Juhas & Hall, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

bars some people who are still low income, just not low enough, from receiving their services.<sup>11</sup>

While there are attorneys that will work based on a sliding fee scale, there are not enough of them to account for the number of low income people that appear in family courts. Currently, there exists a “justice gap” that takes the form of a separation between those that can provide legal services and those that need them.<sup>12</sup> This disconnect limits the access to justice for someone who cannot afford it, because without a trained professional to guide one through the legal process, it is easy to get lost and confused.<sup>13</sup>

When people do not have access to legal counsel they are potentially put at a disadvantage compared to their opposition who might have access to an attorney. A 1992 study of California families, for example, found that there was a link between representation and the ultimate legal custody arrangement.<sup>14</sup> A 2006 Maryland study further showed that whether a party had representation affected the type of custody granted, especially when the case was contested.<sup>15</sup>

Courts routinely “hold pro se litigants to the same standards as licensed attorneys and require them to comply with applicable laws and rules of procedure,” because they believe that “to do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel.”<sup>16</sup> Subsequently, pro se litigants are theoretically held to the same standard as all trained

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<sup>11</sup> See American Bar Association, Legal Services Corporation 2018 Income Guidelines. [https://www.americanbar.org/groups/legal\\_services/flh-home/flh-faq/](https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/) (noting that legal aid “programs generally help people whose income is less than 125 percent of the federal poverty level”; in 2018, that amount in the 48 contiguous states was \$20,575 for a family of two and \$31,375 for a family of four).

<sup>12</sup> Juhas & Hall, *supra* note 4.

<sup>13</sup> *Id.*

<sup>14</sup> See generally ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

<sup>15</sup> WOMEN’S LAW CTR. OF MD., *FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND 48* (2006), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiR6pXP\\_pvkAhVtmK0KHYSMAM8QFjAAegQIARAC&url=http%3A%2F%2Fwww.wlcmd.org%2Fwp-content%2Fuploads%2F2013%2F06%2FFamilies-in-Transition.pdf&usg=AOvVaw2luB-f-z667euM4WNRT9T9](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiR6pXP_pvkAhVtmK0KHYSMAM8QFjAAegQIARAC&url=http%3A%2F%2Fwww.wlcmd.org%2Fwp-content%2Fuploads%2F2013%2F06%2FFamilies-in-Transition.pdf&usg=AOvVaw2luB-f-z667euM4WNRT9T9).

<sup>16</sup> *In re* N.E.B., 251 S.W.3d 211, 211–12 (Tex. App. 2008).

lawyers, and are expected to know when filing deadlines are, how to properly file a motion or a pleading, and how to properly formulate the needed documents. This creates an unequal system because the party with counsel is unfairly advantaged, since they have the benefit of being able to afford the upper hand.

Judges recognize this inequality and try to afford the self-represented party leeway regarding strict compliance with procedural rules.<sup>17</sup> This leeway depends on the individual judge, so the possibility of fair distribution of justice comes down to the luck of the draw essentially for a pro se litigant.<sup>18</sup> Moreover, self-represented litigants place an undue burden on the judge and the staff.<sup>19</sup> Judges and their staff already are limited in the amount of time that can be spent on each case, due to the growth of dockets, especially within family courts. Adding a self-represented litigant into a case creates the need for a judge or their clerk, secretary, or other staff member, to spend a disproportionate amount of time leading a party through the maze of pre-trial motions as well as a potential a trial.<sup>20</sup> Such litigants need guidance in filling out the paperwork required to start or even respond to a case, and without a lawyer to turn to, these litigants frequently turn to court staff for directions.<sup>21</sup> The time taken to explain procedures needed by the pro se litigant takes time away from other duties of the court staff.<sup>22</sup>

When a judge allows leniencies and aids a self-represented litigant in the procedural rules of family law matters, the fundamental principle of a neutral judge is disrupted.<sup>23</sup> Within the American justice system a core principle is that this system will be based upon an adversarial match-up with a neutral party serving as the overseer.<sup>24</sup> When a judge or a member of the court staff is put in a position of assisting one side due to their sympathy for a party's lack of representation, the competing party may perceive a loss of neutrality by the judge or staff.<sup>25</sup> On the other

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<sup>17</sup> Berenson, *supra* note 1, at 113.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 112.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 113.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 113-14.

hand, the justice system is also rooted in the idea of equal justice, which cannot be achieved if the adversarial parties are not at least roughly equal in terms of knowledge of the system.<sup>26</sup>

Additionally, judges have expressed that they experience even greater difficulty maintaining neutral standing when both parties were unrepresented by counsel.<sup>27</sup> Frequently, judges felt as though they had to move from being a referee to becoming a more active participant than in proceedings where counselors were present.<sup>28</sup> Unmistakably, self-represented litigants create a burden on judges as well as their staff to maintain impartiality and fairly dispense justice.

Aiding a nonlawyer in the practice of law contradicts what Rule 5.5 of the Model Rules of Professional Conduct and Comment are aiming to achieve: protecting the public from those who do not know enough about the law to practice in a courtroom.<sup>29</sup> The ABA recognized that it was important to protect the public from the harm that having legally incompetent persons represent them would cause.<sup>30</sup> It would be a natural conclusion that self-representation should be an exception to the Rule, but the Comment makes the reasoning behind the Rule clear. Due to the hindrances self-represented litigants pose to the justice system paired with hardship of maintaining impartiality and the possible ethical questions associated with it, there is a clear need for a solution to the issue of indigent, unrepresented civil litigants.

## Part II. Paralegal Assistance

Though self-representation is a problem in the justice system, and increasingly so in the family court system, there are two strong, suitable options available to attorneys and their staff to help combat this problem. One of the possible options is paralegal assistance. A paralegal is “a person who assists a lawyer in duties related to the practice of law but who is not a licensed attorney.”<sup>31</sup> A paralegal can be certified or registered by a vari-

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<sup>26</sup> *Id.* at 114.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Opinion No. 1 of 1997*, 40 RES GESTAE 22 (Apr. 1997).

<sup>30</sup> *Id.*

<sup>31</sup> David J. Hoey, *Everyday Ethics: Up-to-date Case Law and Paralegal Issues Arising Everyday*, 2008 AAJ-CLE 2153 (2008).

ety of nongovernmental agencies such as the National Association of Paralegals.<sup>32</sup> A number of states further require paralegal certification for someone to be qualified as a paralegal.<sup>33</sup>

Paralegals have become so integrated into legal practice that it is difficult now to find a law firm in which there is not at least one. Commonly, paralegals are trained as assistants, and used to return phone calls, make copies, respond to emails, and occasionally type documents. Paralegals can be used for much more though, and at a less expensive rate than an attorney.<sup>34</sup>

#### A. *Rules, Statutes, and Case Law Regarding Paralegal Assistance*

While only licensed attorneys may represent clients, “all authorities agree that lawyers may delegate tasks to nonlawyers to assist them in that representation.”<sup>35</sup> To add clarification to what tasks are permitted to be delegated, the comment to Section Four of the *Restatement (Third) of the Law Governing Lawyers* states that “a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice.”<sup>36</sup> The Comment adds that tasks assigned to nonlawyers are only permissible “so long as the responsible lawyer or law firm provides appropriate supervision.”<sup>37</sup>

While the Restatement leaves the term “tasks” open to interpretation, it is clear that according to Section Four and the Comment associated with it, that paralegals would be unrestricted from writing pleadings and petitions, along with other motions, so long as a licensed attorney supervised.<sup>38</sup> The American Bar Association had previously issued an ethics opinion regarding categorical exclusions for tasks that nonlawyers are permitted to perform. The ABA stated that assistants working for a lawyer shall not be limited “so long as the nonlawyers do

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 *IND. L.J.* 653, 663 (2010).

<sup>36</sup> *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 4, cmt. (2002).

<sup>37</sup> *Id.*

<sup>38</sup> Tremblay, *supra* note 35, at 664.

not do things that lawyers may not do or the things that lawyers may only do.”<sup>39</sup> The opinion further identifies two specific categorical limitations on tasks that lawyers can delegate to nonlawyers.<sup>40</sup> These limitations are that nonlawyers shall not “counsel clients about matters” nor shall they “appear in court or . . . in formal proceedings that are a part of the judicial process.”<sup>41</sup> The ABA’s opinion on categorical limitations is an influential authority, since it continues to appear in advisory authorities such as state supreme court decisions as well as the National Association of Legal Assistants’ Code of Ethics.<sup>42</sup>

One authority that drew inspiration from the ABA’s opinion was the Supreme Court of South Carolina. In *In re Easler* the court suggested that activities of a paralegal should be limited to those of a “preparatory nature” that would “enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort.”<sup>43</sup> The opinion stated,

The activities of a paralegal do not constitute the practice of law as long as they are limited to work of a preparatory nature, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort.<sup>44</sup>

The *Easler* opinion shows the change in legal culture that created a need for attorneys to have the ability to delegate tasks. Additionally, the opinion demonstrated that courts are likely to allow leniency when permitting paralegals to assist attorneys with cases, so long as paralegals are not completing the final steps or making conclusions on their own.

The Louisiana Supreme Court set clearer parameters of what a paralegal can and cannot do.<sup>45</sup> In its opinion to disbar a lawyer due to inappropriate delegation of legal work to a non-lawyer, the Louisiana Supreme Court narrowly tailored the cate-

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<sup>39</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 316 (1967).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Tremblay, *supra* note 35, at 664-65.

<sup>43</sup> *In re Easler*, 272 S.E.2d 32, 32-33 (S.C. 1980).

<sup>44</sup> *Id.* at 33.

<sup>45</sup> La. State Bar Ass’n v. Edwins, 540 So. 2d 294, 300 (La. 1989).

gory of tasks that a lawyer may delegate to a nonlawyer.<sup>46</sup> The court suggested that while an attorney can delegate the vast majority of tasks, there are two classifications of tasks that a non-lawyer, or paralegal, may not perform.<sup>47</sup> The two tasks prohibited are appearing in court or a similar setting on behalf a client and giving legal advice to a client.<sup>48</sup> Supervision is also a caveat that the Louisiana Supreme Court decided to add, signifying the importance of the supervising attorney having a clear view of what the nonlawyer is doing.<sup>49</sup>

After much recognition from lower courts that paralegals can aid attorneys in extensive ways, the U.S. Supreme Court stated:

It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses, assistance with depositions, interrogatories and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. Much work lies in gray area of tasks that might appropriately be performed by an attorney or a paralegal.<sup>50</sup>

The Supreme Court's opinion recognized that cost was already, in the late 1980's, becoming a bar to the public's ability to access legal assistance. Shortly after the court released its opinion in *Missouri v. Jenkins*, the American Bar Association's Commission on Nonlawyer Practice directed a string of nationwide hearings spanning from 1992-1994.<sup>51</sup> In these hearings the Commission found that lawyers were increasingly assigning substantive legal work to their paralegals.<sup>52</sup> Due to these findings, the ABA recommended that the permissible duties of a paralegal be expanded, with lawyers remaining accountable for the paralegals' actions and work.<sup>53</sup> Rule 5.5 of the Model Rules of Professional Conduct, which addresses the unauthorized practice of law, en-

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Missouri v. Jenkins*, 491 U.S. 274, 286-89 (1989).

<sup>51</sup> *Opinion No. 1 of 1997*, *supra* note 29, at 22.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*



tertain an explicit carve out that allows for paralegal assistance, provided that the supervising attorney retains responsibility for the work delegated.<sup>54</sup>

In *State v. Despain*, the practices a paralegal can handle were more narrowly defined with a clear distinction of what a paralegal cannot do.<sup>55</sup> In *Despian* the South Carolina Supreme Court stated that “it is well settled that a paralegal may not give legal advice, consult, offer legal explanations, or make legal recommendations,” thus creating clear boundaries for what a paralegal can do, preparatory work that is being supervised by an attorney, without participating in the unauthorized practice of law.<sup>56</sup> Additionally, there are no rules or statutes that specifically prohibit paralegals from participating in a wide variety of tasks that normally would be handled by an attorney, such as the preparation of documents, the checking of citations, and help with depositions.<sup>57</sup>

#### B. *Benefits of Paralegal Assistance*

One of the most widely recognized benefits of allowing paralegals to assist lawyers more extensively is the large cost saving that is passed on to the client. If paralegals are permitted to perform upwards of fifty percent of the preparations, clients can have drastic savings. The use of paralegals allows for a more efficient delivery of legal services at a lower price than a lawyer would charge to perform the same services.<sup>58</sup>

While some clients might prefer to pay the increased price for a lawyer to do the work, many low income litigants could benefit from the option of hiring a paralegal to do the preparatory work, so long as that work is still supervised properly.<sup>59</sup> A lawyer can assist this by offering the option to have a paralegal do the majority of preparatory work, when it is viewed as being in the best interest of a client, and making it clear to the client who would be doing the majority of the work and the risks asso-

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<sup>54</sup> MODEL RULES OF PROF'L CONDUCT r. 5.5.

<sup>55</sup> *State v. Despain*, 460 S.E.2d 576 (S.C. 1995).

<sup>56</sup> *Id.*

<sup>57</sup> *Opinion No. 1 of 1997*, *supra* note 29, at 23.

<sup>58</sup> Tremblay, *supra* note 35, at 680.

<sup>59</sup> *Id.*

ciated with it.<sup>60</sup> A client, if guided by a trusted attorney who is vouching for the soundness of work produced, is likely to welcome the savings and efficiency garnered by paralegal assistance.<sup>61</sup>

The second benefit of having greater paralegal assistance is the flexibility allowed to the lawyer and thus the ability to take on more cases. While the attorney must still supervise the paralegal who is assisting, along with the work product that comes from the paralegal, the attorney still experiences time savings. This savings in time can be used to take on more cases or spend a greater amount of time on the cases that are more complex. So although it might seem that an attorney would be taking an economic loss regarding cases delegated to paralegals, they are instead generating the possibility to create more business while alleviating the fear of competing nonlawyer threats, such as businesses that just produce documents at a lower price.<sup>62</sup> Even if an attorney did not take on additional cases, the ability to have a paralegal do the majority of preparatory work allows an attorney greater flexibility in the amount of time devoted to other cases.

Finally, paralegals themselves receive a benefit when they are allowed to have a greater number of duties delegated to them. Paralegals gain greater experience and knowledge with each document they are able to produce or client interview on which they are able to assist. The more experience paralegals are able to gain, the greater their knowledge base and ability to achieve efficiency when working on cases. While this benefit might seem minimal, the overall advantage to the legal system is enormous. One of the criticisms of paralegal assistance is the risk of the quality and competence of service that will be provided.<sup>63</sup> The more experience paralegals are able to gain, the more practice they get at preparing the documents or interviewing clients.<sup>64</sup> The more practice paralegals are able to have at a task under the supervision of an attorney, the more the chances increase that they will get better at those tasks.

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 679.

<sup>62</sup> *Id.* at 680.

<sup>63</sup> *Id.* at 684.

<sup>64</sup> *Id.*

C. *Pitfalls and Risks that Face Attorneys, Clients, and Paralegals*

Throughout the historical growth of paralegal assistance, criticisms have exposed the weaknesses of paralegal assistance. One of the biggest concerns centers on the supervising attorneys and how much supervision is ethically required by them. Moreover, what precisely is ethically sound supervision? Paul Tremblay, a Clinical Professor of Law at Boston College Law School, has suggested that supervising does not mean constant monitoring and observation of tasks.<sup>65</sup> Instead, he suggests that supervision “mean[s] that the lawyer, who is the only person on the team who may orchestrate the lawyering work in its final form, must be confident, within the realm of reason, that the nonlawyer has gotten the task right.”<sup>66</sup>

Following Tremblay’s definition, supervision, in a practical sense, means that lawyers do not have to follow every movement that a paralegal makes, but instead just must be certain that the final product was completed appropriately and that they are willing to have their name attached to the work product. Another part of supervision is ensuring that the client recognizes who is doing the work and accepts the risks willingly.<sup>67</sup> If the client is unaware of precisely who is performing the work and a problem does arise, the lawyer is responsible for the work product produced, and opens him or herself up to a bar complaint from an unhappy client.<sup>68</sup> It is thus sensible and responsible for a lawyer to get approval from a client before delegating significant tasks to a paralegal.<sup>69</sup> It is important that any attorney delegating tasks to a paralegal understands what supervising truly means, because by following that definition the lawyer can avoid many of the quality and completion concerns that might arise.

While it is principally the supervising attorney’s responsibility to get client consent to paralegal assistance on important tasks, a portion of the responsibility lies with the paralegals themselves to ensure that permission has been obtained. Without permission, the paralegal is endangering the supervising attorney

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<sup>65</sup> *Id.* at 680.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 679.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

and risking a bar complaint. Additionally, paralegals are not relieved of their duty to refrain from unauthorized practice.<sup>70</sup> A paralegal assisting in legal responsibilities has a duty to ensure he or she is being supervised properly; if not, the paralegal has an ethical duty to end the unauthorized practice.<sup>71</sup> With paralegals also working to ensure that they are being properly supervised, the issues of quality and completion can be further addressed.

Though there are valid criticisms of having paralegal assistance on the majority of important legal tasks, there are rules to prevent the criticisms from coming to fruition. So long as the paralegal is properly supervised by a competent attorney, paralegal assistance creates a viable option for people who wish to reduce the cost of representation and are willing to accept the associated risks.<sup>72</sup>

### **Part III. Limited Representation**

The second possible option to combat the increase in self-representation is through limited representation by attorneys. Limited representation is a newer and more controversial option for representation when it comes to areas of the law that involve litigation, such as family law.<sup>73</sup> Limited Representation started out as an idea created by Forrest Mosten in 1991.<sup>74</sup> Mosten, a Certified Family Law Specialist, member of the California State Bar, and convener of the first National Unbundling Conference, is known as the “father of unbundling.”<sup>75</sup> While studying self-represented divorce litigants in Arizona, Mosten and the ABA Standing Committee on the Delivery of Legal Services learned that the number of litigants in divorce proceedings in Maricopa County, Arizona had doubled, approaching 50%.<sup>76</sup> Furthermore, the Committee and Mosten realized that many of these litigants

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<sup>70</sup> Hoye, *supra* note 31.

<sup>71</sup> *Id.*

<sup>72</sup> Tremblay, *supra* note 35, at 679.

<sup>73</sup> Michele N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. TEX. L. REV. 159, 168 (2014).

<sup>74</sup> Joni Berner, Jean Biesecker, Mary S. Timpany & Zanita A. Zacks-Gabriel, *Unbundled Legal Services*, 90 PA. B.A. Q. 96, 97 (Apr. 2019).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

were quite adept at handling certain aspects of their own cases.<sup>77</sup> The Committee decided that with slight assistance, a better, more just, outcome could be reached for these self-help litigants.<sup>78</sup> At that time Mosten remembered a system that real estate brokers had used, in which relators would offer a type of “fee for services” program.<sup>79</sup> Mosten thought that this sort of system would work for litigants and suggested this “unbundling” of lawyers services to the Committee.<sup>80</sup> The Committee, seeing the opportunity to assist courts and to have better prepared self-represented litigants, supported the concept.<sup>81</sup>

Limited representation breaks away from the traditional “full service” idea of legal representation by an attorney, in which an attorney does everything in a case, from interviews to research and writing motions and pleadings.<sup>82</sup> Limited representation, often referred to as “unbundled representation” or “discrete task representation,” breaks down the different tasks a lawyer performs when assisting a litigant and offers a menu of just one or a number of those services, but not all.<sup>83</sup> In the area of family law, normal “full service representation” includes gathering facts from both parties, researching the law, advising the client, negotiating, drafting documents, and representing the client in court.<sup>84</sup> Unbundling is separating these services from each other, with the client choosing one or more for an attorney to perform.<sup>85</sup> It is best to view unbundling as tasks performed within the seven following categories: advising clients, legal research, gathering of facts from clients, discovery of facts of the other party, negotiation, drafting of documents, and court representation.<sup>86</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 98.

<sup>81</sup> *Id.*

<sup>82</sup> Berenson, *supra* note 1, at 132.

<sup>83</sup> Struffolino, *supra* note 73, at 167.

<sup>84</sup> Berenson, *supra* note 1, at 130-31.

<sup>85</sup> *Id.* at 131.

<sup>86</sup> Berner, Biesecker, Timpany & Zacks-Gabriel, *supra* note 74, at 98.

A. *Model Rules, Case Law, and ABA Recommendations for Limited Representation*

The first source to examine to establish if limited representation is permissible is the Model Rules of Professional Conduct. The Model Rules provide a standard for all attorneys. The first rule in the Model Rule is one that addresses competency.<sup>87</sup> Rule 1.1 states “a lawyer shall provide competent representation to a client. Competent representation requires that legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>88</sup> The idea of competency is important when it comes to limited representation because the first step in assessing whether to take a case for limited representation is for the attorney to assess if he or she has the required level of competency.<sup>89</sup> One must self-assess if he or she maintains the level of competency in the specific field of law being litigated to properly serve the interests of the client, or would the client’s interests would be better served by another attorney.<sup>90</sup>

Following the competency standard set forth by Rule 1.1, it is clear that limited representation is not the same as partial representation.<sup>91</sup> In the Rhode Island case *Card v. Pichette*, a case that addressed the ethics of limited representation,<sup>92</sup> the court focused on the ethics of limited representation that are related to writing court documents for a client without attaching the attorney’s name.<sup>93</sup> The court distinguished limited representation from partial representation: “while services to clients can be reduced to serve specific, well-defined needs of a client, services essential to attaining a goal cannot be carved out of the bundle.”<sup>94</sup>

The ABA, wanting to encourage the use and expansion of limited representation, in 2000 recommend a change to Model Rule 1.2(c) that would more clearly permit limited representa-

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<sup>87</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 (2009).

<sup>88</sup> *Id.*

<sup>89</sup> Struffolino, *supra* note 73, at 163.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 191.

<sup>92</sup> *Card v. Pichette*, C.A. No. PC 2011-2911 (R.I. Super. Ct. July 26, 2012).

<sup>93</sup> *Id.*

<sup>94</sup> Struffolino, *supra* note 73, at 194.

tion.<sup>95</sup> The recommendation was accepted and the change was adopted in 2002.<sup>96</sup> Next the ABA issued a “practical guide” that advised attorneys on how to properly incorporate limited representation into their practices.<sup>97</sup> In the practical guide, the ABA addresses when limited representation is acceptable, such as when a client would be a good candidate for limited representation.<sup>98</sup> The practical guide also covers the importance of getting the client’s informed consent, and how for best practices, that should always be in writing.<sup>99</sup> Additionally, the ABA practical guide provides an Appendix with sample forms to provide a client when a lawyer is considering limited representation.<sup>100</sup>

Next, the amended Rule 1.2(c) states “a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>101</sup> The Comment for the rule states:

A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which the representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.<sup>102</sup>

The Comment both expands and better regulates the role of limited representation in the litigation system. To be able to practice limited representation, according to the Comment, it must be reasonable under the circumstances and the client must give informed consent.<sup>103</sup> Informed consent means that the client has full understanding of what the representation will entail and that when those tasks are completed, the client will no longer be represented by the attorney.<sup>104</sup>

In the book *Unbundled Legal Services: a Family Lawyer’s Guide*, written by Forrest Mosten and Elizabeth Potter Scully,

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<sup>95</sup> *Id.* at 170.

<sup>96</sup> *Id.* at 170-71.

<sup>97</sup> *Id.*

<sup>98</sup> Berner, Biesecker, Timpany & Zacks-Gabriel, *supra* note 74, at 98-99.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> MODEL RULES OF PROFESSIONAL CONDUCT r. 1.2(c) (2009).

<sup>102</sup> *Id.* r. 1.2(c) cmt.6.

<sup>103</sup> Struffolino, *supra* note 73, at 172.

<sup>104</sup> Berenson, *supra* note 1, at 132.

Mosten and Scully discuss that not every client would be a good fit for limited representation because not all clients will understand what limited representation entails.<sup>105</sup> Mosten suggests that it is not only the lawyer that needs to be proficient at differentiating tasks and maintain boundaries, but also the client.<sup>106</sup> The client and the lawyer must be able to work together while distinguishing the tasks and roles agreed to but also to respect and recognize the limits of the agreed to representation.<sup>107</sup> Part of this responsibility lies with the attorney to set the boundaries in the beginning of the attorney-client relationship, and if that boundary changes to be able to recognize that, stop, and renegotiate the terms of the representation.<sup>108</sup>

#### B. *Benefits of Limited Representation*

Limited representation has multiple benefits for not only the potential clients that otherwise might be litigants, but attorneys themselves as well as the court system. One of the most prominent benefits is that of cost.<sup>109</sup> According to the World Justice Project, the United States ranks 94th out of 113 countries in the accessibility to and affordability of civil justice.<sup>110</sup> Limited representation allows single tasks to be broken out from the others, so instead of a client having to pay thousands of dollars to get assistance through the court system, that client can pay an attorney to prepare the pleadings or do research for them,<sup>111</sup> which are two things that lay people typically do not know how to do without assistance. The fee for this service would be a fraction of what full representation by counsel would otherwise be.<sup>112</sup> For low and middle income clients, this can be the difference of receiving

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<sup>105</sup> Pamela Cardullo Ortiz, *Unbundled Legal Service: A Family Lawyer's Guide*, by Forrest S. Mosten and Elizabeth Potter Scully, ABA Book Publishing (2017), 56 FAM. CT. REV. 709, 710 (Oct. 2019).

<sup>106</sup> *Id.*

<sup>107</sup> Berenson, *supra* note 1, at 132.

<sup>108</sup> *Id.*

<sup>109</sup> Juhas & Hall, *supra* note 4.

<sup>110</sup> *U.S. Rank on Access to Civil Justice In Rule of Law Index Drops to 94th out of 113 Countries*, NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL (Oct. 27, 2016), [http://civilrighttocounsel.org/major\\_developments/217](http://civilrighttocounsel.org/major_developments/217).

<sup>111</sup> Berenson, *supra* note 1, at 131.

<sup>112</sup> *Id.*



some advice and possibly being able to actively participate in the legal adversarial system.

Another benefit of limited representation is the easing of burdens that are placed on the justice system when litigants are self-represented.<sup>113</sup> “In state courts, at least one party is without an attorney in more than two-thirds of cases.”<sup>114</sup> In family law cases the number of self-represented litigants is much higher; in almost 80% of cases at least one party is appearing through self-representation.<sup>115</sup> Self-represented litigants cause a slowing of the court system, entanglement of what are supposed to be neutral overseers, and imbalanced practice when it comes to representation.<sup>116</sup> By allowing pro se litigants to seek limited representation, judges and court staff are able to maintain their neutral standing because the litigant can seek limited representation to fill out documents and pleadings, and receive guidance.<sup>117</sup> Moreover, if litigants are able to receive limited help, the court system will be able to move faster because leniency will not be needed in regard to filling deadlines and cases will be able to proceed in a timely manner. This will also aide in the congestion that occurs within the justice system.

The country as a whole benefits from the concept of limited representation.<sup>118</sup> Frequently, those who need the legal system to solve a problem, like in the instance of domestic violence, opt out or are forced out by the lack of knowledge of the court system or the funds to retain an attorney that has the knowledge.<sup>119</sup> This unmet legal need puts many lives at risk and takes a toll on the

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<sup>113</sup> *Id* at 112.

<sup>114</sup> Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *GEO J. POVERTY L. & POL'Y* 453, 459 (2011); Jed S. Rakoff, *Why You Won't Get Your Day in Court*, N. Y. REV. BOOKS, Nov. 24, 2016, at 4.

<sup>115</sup> Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 *ST. MARY'S J. LEGAL MALPRACTICE & ETHICS* 166, 203 (2012).

<sup>116</sup> Berenson, *supra* note 1, at 112.

<sup>117</sup> *Id* at 131.

<sup>118</sup> Deborah L. Rhode, Kevin Eaton, & Anna Porto, *Access to Justice Through Limited Legal Assistance*, 16 *Nw. J. HUM. RTS.* 1, 3 (2018).

<sup>119</sup> Ortiz, *supra* note 105, at 711.

community.<sup>120</sup> When domestic violence legal needs go unmet, the victim is forced to either stay in an abusive situation or rely on publicly funded assistance to get away from the abuser.<sup>121</sup> Other times it can be the loss of custody of one's children which puts a strain on an already crowded foster care system.<sup>122</sup> Taxpayers pay for these unmet legal needs and the results through increased crime rates, incarceration, emergency medical treatment, and so forth.<sup>123</sup> Providing limited representation can prevent many of these emotionally and economically costly events from occurring.

Finally, similarly to paralegal assistance, limited representation allows attorneys to provide more selective, efficient service that is limited by time boundaries more than "full service representation."<sup>124</sup> If attorneys can participate in limited representation, they can take on more clients than if they are bound to represent their clients through every aspect of their case. Additionally, attorneys are able to structure payment of the representation differently. With limited representation comes the chance for lawyers to deal with fewer billing headaches.<sup>125</sup> Since limited representation covers only a limited number of tasks, the cost of the bill submitted to a client is lower than compared to an attorney who is fully representing a client.<sup>126</sup> An attorney can choose to bill by the task performed instead of the hours committed to the task.<sup>127</sup> This creates more of a flat fee that would be easier for a client, especially a lower or middle income client, to pay.<sup>128</sup> Limited representation thus is an economic advantage for both clients, who save money, and attorneys, who obtain the opportunity to create more.

### C. *Risks and Ethical Obligations*

Though there are benefits to limited representation, there are also some stringent ethical obligations that need to be fol-

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<sup>120</sup> Rhode, Eaton & Porto *supra* note 118.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Juhas & Hall, *supra* note 4.

<sup>125</sup> Ortiz, *supra* note 105, at 710.

<sup>126</sup> Berner, Biesecker, Timpany & Zacks-Gabriel, *supra* note 74, at 98-99.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

lowed and risks that should be weighed before limited representation is sought or offered. The first issue that comes up in limited representation is the terms of representation.<sup>129</sup> When defining the terms of representation, it is of the utmost importance for it to be clear to both the attorney and the client, when the representation starts, what services will be done, and when representation will end. If the terms of representation are not clearly defined and explained for both parties, a possibility exists that an attorney will agree to limited representation but wind up having to represent a client for the full length of the case.<sup>130</sup> Knowing the extent of representation is an issue for both attorney and client, because while the attorney might get pulled into a case that he or she did not originally sign up for, there is also the possibility that a client will be left without representation when the client believed that the representation would last the length of the case.<sup>131</sup>

Another risk faced by attorneys is the possibility of not being allowed to withdraw as counsel.<sup>132</sup> The procedure to withdraw as counsel is different depending on the state in which the attorney is practicing. In California, for example, a client is required to sign a formal document that relieves the attorney of further responsibility once the limited representation is done. If a client fails to do so the attorney must then fill out and file a form saying the representation is done, and specifying the limited duties.<sup>133</sup> The client is then allowed to object.<sup>134</sup> A hearing may then ensue if the client does object; otherwise, the attorney is allowed to withdraw.<sup>135</sup> California has streamlined its process; however, not every state has as seamless a process as California's. If the terms of the limited representation have been negotiated clearly, and the client and attorney are in agreement, there should not be an issue when it comes to withdrawing.<sup>136</sup> Should an attorney choose to participate in limited representation, there

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<sup>129</sup> Berenson, *supra* note 1, at 132.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Juhas & Hall, *supra* note 4.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Struffolino, *supra* note 73, at 193.

is a risk, due to the unpredictable nature of litigation, in which the attorney is not allowed to withdraw.<sup>137</sup>

Due to the unpredictable nature of limited representation as well as family law itself, attorneys are easily scared away from the practice of limited representation. Limited representation is not for every client nor every lawyer, but it is a scenario for lawyers to respond to a change in the field of law. As Forrest Mosten states in his book

If you choose and can afford to operate your practice without unbundling, you probably will be able to do so for at least the next decade. However, just like many doctors in the 1930's opposed health insurance, today few doctors can practice without seeing patients covered by some form of health plan. It's in the tea leaves.<sup>138</sup>

Most state courts have adopted rules that permit the practice of limited representation.<sup>139</sup> In some areas of the country the practice has thrived; in others it has yet to be utilized.<sup>140</sup> While limited representation currently might not be the right fit for all attorneys, those that are competent within the area of family law and have substantial experience can practice and train others on the practice of limited representation. Limited representation is a valid option of practice that provides benefits to the public as a whole, the individual attorney, and most importantly a pro se litigant that otherwise might be scared away from pursuing a legal matter.

## Conclusion

In the early 2000's the ABA stated; "the process often is not fair for those who cannot afford to pay lawyers to represent them in litigation. They include most low and moderate-income families and individuals; that is the majority of the people in our nation!"<sup>141</sup> Self-representation has seen little change and continues to cause difficulties in the practice of law. With the change in societal standards of what constitutes a family, the family court system is seeing an increase in the number of families and indi-

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<sup>137</sup> *Id.*

<sup>138</sup> FORREST S. MOSTEN & ELIZABETH POTTER SCULLY, UNBUNDLED LEGAL SERVICES: A FAMILY LAWYER'S GUIDE (2017).

<sup>139</sup> Ortiz, *supra* note 105.

<sup>140</sup> *Id.*

<sup>141</sup> Struffolino, *supra* note 73, at 171.

viduals that find themselves in their courtrooms.<sup>142</sup> With the increase in people appearing in court there is also an increase in people appearing pro se.<sup>143</sup> Pro se litigants add a strain on the justice system that is already suffering from backlogs and overflowing dockets. Two viable options to ease this strain and create a more fair and equal environment in the courtroom are increased paralegal assistance and limited representation. Both present risks but both also offer a great number of benefits that make them good options for lower and middle income litigants who are looking for options other than going into debt or self-representation.

Lauren Cook

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<sup>142</sup> Berenson, *supra* note 1, at 111.

<sup>143</sup> *Id.*