

# How Judges Can Encourage Unbundling

BY DANIEL M. TAUBMAN AND ADAM J. ESPINOSA

According to the Institute for the Advancement of the American Legal System (IAALS), unbundling of legal services “is a service delivery model that holds promise for the growing number of self-represented litigants.”<sup>1</sup> To realize this promise, “[t]he support of the courts is absolutely essential in order for unbundling to take hold.”<sup>2</sup> This article provides a brief overview of what constitutes unbundling and the applicable procedural and ethical rules. It also discusses how Colorado judges can play a leadership role in encouraging lawyers and pro se litigants to use unbundling.

## What is Unbundling?

Unbundling of legal services—also known as limited scope representation, limited representation, discrete task representation, or some derivative of these words—occurs when an attorney and a client agree that the attorney will perform some, but not all, the legal tasks in a legal matter. It is an alternative to traditional representation, which includes handling all legal tasks for the client.<sup>3</sup> Unbundling may include drafting documents and pleadings (sometimes referred to as ghostwriting), appearing in a limited role in court, and providing legal advice and counsel. Unbundling is permitted under ethical and procedural rules in state and federal courts in Colorado.

The benefits of unbundling are twofold. First, unbundling promotes access to justice. Approximately 273,000 Coloradans went unrepresented in civil, domestic, and county court cases in 2017.<sup>4</sup> When limited representation is available to clients, the judicial system becomes

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more accessible to all. Second, the more lawyers use unbundling, the more prepared litigants become, reducing the burden on court staff and conserving judicial resources. Judges around the state who attended our CLE presentations on unbundling during the past few years uniformly agree that having a litigant represented in court for part of a case is preferable to litigants proceeding without a lawyer for the entire case.<sup>5</sup> Similarly, when a lawyer provides substantial assistance to an otherwise pro se litigant by ghostwriting a pleading or brief, the case is likely to proceed more smoothly. Finally, when a lawyer helps a pro se litigant by coaching him or her before a court appearance or answering his or her questions from the lawyer’s office during a scheduled break at a hearing, the hearing is likely to proceed more efficiently.

## The Rules

The following rules set forth the ethical and procedural rules for unbundling legal services in the Colorado state trial courts: Colo. RPC 1.2(c), C.R.C.P. 11(b) and 311(b), and C.R.C.P. 121, § 1-1(5). In Colorado’s appellate courts, Colo. RPC 1.2(c) and C.A.R. 5(e) set forth the applicable unbundling rules. Local Attorney Rules 2 and 5 for the U.S. District Court of Colorado set forth the rules for engaging in unbundling in the federal trial court in Colorado. While the procedural rules authorizing unbundling in each forum focus on civil practice, Colo. RPC 1.2(c) does not prohibit unbundling legal services in criminal practice. A careful review of these rules and how they work together is essential for practitioners and courts.

## State Trial Courts

Colo. RPC 1.2(c) allows a lawyer to limit the scope or objectives, or both, of the representation if the limitation is reasonable and the client gives informed consent. It is important that the representation be reasonable under the circumstances. For example, an attorney could represent a client in a temporary orders hearing in a family law matter, but not represent the client in the permanent orders hearing or with the remaining legal tasks in the matter. It is also important that the client gives “informed consent” to limit the scope or objectives of representation.<sup>6</sup> Informed consent requires the attorney to counsel the client on the advantages and disadvantages of the limited representation versus full or traditional representation. Representation under Colo. RPC 1.2(c) commonly includes performing discrete tasks on behalf

of the client, such as counseling the client on the legal issue, reviewing documents, drafting correspondence, and negotiating.<sup>7</sup>

C.R.C.P. 11(b) and the corresponding county court rule 311(b) permit unbundling of legal services in Colorado state trial courts by allowing an attorney to draft pleadings or other court documents on behalf of a party without entering an appearance. This type of unbundling is sometimes referred to as “ghostwriting,” but the Colorado Supreme Court has taken the “ghost” out of the rule and now requires the pleading or court document to include the name, address, telephone number, and bar number of the lawyer providing the drafting assistance. This disclosure requirement is not necessary if the lawyer is assisting the client with preprinted judicial forms, which can be found on the Colorado Supreme Court website.<sup>8</sup> To engage in this form of unbundled legal services, the lawyer must still follow Colo. RPC 1.2(c), meaning the representation must be reasonable under the circumstances and the client must give informed consent. Examples of this type of practice might include assisting a client in drafting a dispositive motion (such as a motion to dismiss or motion for summary judgment) or a motion for reconsideration, or helping a client fill out a preprinted judicial form.<sup>9</sup> As mentioned above, this type of unbundling is not an entry of appearance in the underlying matter. Further, this type of representation does not authorize or require service of papers on the attorney assisting in the drafting of the pleading or court document.

C.R.C.P. 121, § 1-1(5) is a relatively new local rule that permits attorneys in Colorado state trial courts, with the client’s consent, to represent a client in a specific court proceeding and then withdraw without leave of the court when that court proceeding has concluded.<sup>10</sup> This rule bridged the gap between Colo. RPC 1.2(c) and C.R.C.P. 11(b) and 311(b), allowing attorneys to engage in unbundled legal services by limiting their representation before the court and allowing them to withdraw as a matter of right when the specific court proceeding concluded. It is important for the attorney engaging in this practice to carefully review and follow the requirements of C.R.C.P. 121, § 1-1(5),

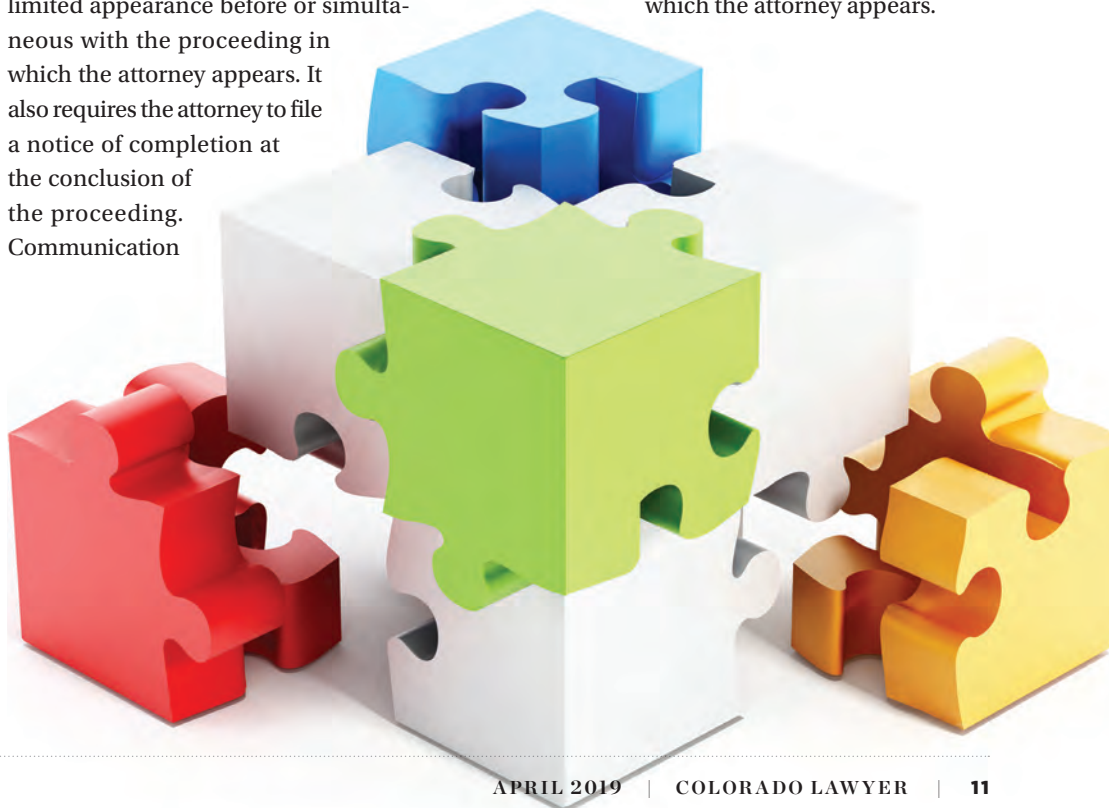
## **C.R.C.P. 11(b) and the corresponding county court rule 311(b) permit unbundling of legal services in Colorado state trial courts by allowing an attorney to draft pleadings or other court documents on behalf of a party without entering an appearance.**

which requires the attorney to file a notice of limited appearance before or simultaneous with the proceeding in which the attorney appears. It also requires the attorney to file a notice of completion at the conclusion of the proceeding. Communication

and service on an attorney who makes a limited appearance for a party are limited to the specific court proceeding for which the attorney appears. Communication and service related to other proceedings should be made to the party and not the attorney.<sup>11</sup>

### *Colorado Appellate Courts*

C.A.R. 5(e) was amended after C.R.C.P. 121, § 1-1(5) and operates in a similar fashion. It allows limited representation of a party in a civil appellate proceeding before the Court of Appeals or the Supreme Court.<sup>12</sup> The appellate rule also requires consent of the client, the filing of a notice of limited appearance before or simultaneous with the proceeding in which the attorney appears, and the filing of a notice of completion at the conclusion of the proceeding.<sup>13</sup> C.A.R. 5(e) is limited to the filing of certain motions before the appellate court, including a notice of appeal and designation of transcripts, a response to an order to show cause, and filing or opposing a writ of certiorari before the Supreme Court. C.A.R. 5(e) allows an attorney who has complied with the rule to withdraw as a matter of right, like C.R.C.P. 121, § 1-1(5). Communication and service are again limited to the specific court proceeding for which the attorney appears.



**Colorado Federal Trial Court**

For many years, unbundling of legal services was prohibited in the U.S. District Court for the District of Colorado. In fact, when that court adopted the Colorado Rules of Professional Conduct, it specifically excepted Colo. RPC 1.2(c). This changed on December 1, 2016, when the federal court amended Rules 2 and 5 of its Local Attorney Rules of Practice to allow limited representation to an unrepresented party or an unrepresented prisoner in a civil action.<sup>14</sup> However, the federal court rules require an attorney to seek leave of the court to engage in limited representation. And, in doing so, the attorney must set forth the scope of the limited representation with particularity and certify the client's approval.<sup>15</sup> The federal rules also require the attorney to seek leave of the court to withdraw after completing the limited representation.<sup>16</sup>

**Judicial Leadership on Unbundling**

As the use of unbundling increases throughout Colorado<sup>17</sup> and the rest of the country,<sup>18</sup> judges can play an important leadership role in promoting and encouraging lawyers to include unbundling as part of their practice.<sup>19</sup> For example, judges can speak at CLE presentations or bar association meetings to educate lawyers about the propriety and increasing use of unbundling. In so doing, judges may allay lawyers' fears that unbundling may present either ethical or malpractice concerns. Judges can educate lawyers about court-approved forms they must use when engaging in limited representation in court. They can also assure lawyers that they can automatically withdraw from a case after completing limited scope representation under C.R.C.P. 121, § 1-1(5).

Judges can also play an important role in educating litigants and the public about the

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availability of lawyers to represent them in part of a case. For example, judges may advise pro se litigants about the availability of lawyers who engage in unbundling under Colo. CJC 2.6, comment two. Also, judges may speak to service groups and other community organizations about the availability of lawyers to engage in unbundling. They can also distribute an excellent brochure prepared by the CBA to educate the public about limited scope representation.<sup>20</sup>

Further, judges can promote unbundling by ensuring that all court staff members are aware of the opportunity for litigants to engage in limited scope representation. Thus, judges can make sure that both self-represented litigant coordinators (sherlocks) and family court facilitators are familiar with limited representation opportunities and procedures. Judges can also ensure that court clerks process unbundled cases properly so that a limited scope representation lawyer only receives court notices during his or her limited representation.



Finally, judges can work with the CBA's Modern Law Practice Initiative to schedule an unbundling presentation—particularly one focused on educating young lawyers—so that all lawyers will be aware of the opportunities to engage in limited representation. Judges can also work with their local bar associations and with local access to justice committees to develop lists of lawyers who are willing to provide unbundled representation. This is already being done in some places but is a practice that can easily be extended throughout the state.

### Issues Important to Judges

As more lawyers engage in unbundling, judicial responsibilities in this area will increase. Among other things, when a lawyer files a notice of limited scope representation, the judge should clarify the extent of such representation with both the litigant and the attorney. This is important because it affects whether the court must communicate with the litigant, the limited scope representation lawyer, or both. This is also important because, in some cases, an unbundling lawyer may transition from limited scope to full representation. When this occurs, it is important that the judge be aware of the change.

The judge must also be aware of when an opposing attorney must communicate with the pro se litigant and when he or she must talk with

the unbundling lawyer. Useful information about such communication issues can be found in CBA Ethics Committee Formal Opinion 101.<sup>21</sup>

Judges must also take care that notices of court hearings and decisions are properly sent to the litigants, the unbundling attorney, or both during a period of limited representation.

### Conclusion

Colorado judges have the opportunity to encourage various forms of limited scope representation in the coming years. They have a responsibility to litigants and lawyers to ensure that cases with limited scope representation are litigated fairly and efficiently. Doing so will ease the burdens presented by pro se litigants and help promote access to justice throughout the state. <sup>CL</sup>

*This article was prepared in conjunction with the Institute for the Advancement of the American Legal System.*



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Both are members of the Colorado Access to Justice Commission and the CBA's Modern Law Practice Initiative (formerly, the Modest Means Task Force). In the latter capacity, they helped organize the "Unbundling Road Show," and together with practicing lawyers, made numerous presentations about unbundling to state and federal judges, as well as lawyers, throughout Colorado.

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### NOTES

- <https://iaals.du.edu/projects/unbundling-legal-services>.
- <https://iaals.du.edu/publications/unbundling-legal-services-toolkit-court-leadership>.
- Traditional representation includes, inter alia, advising clients, gathering facts, discovery, research, drafting documents, negotiating, and representation in court and other forums.
- "Report on Cases and Parties without Attorney Representation in Civil Cases FY 2017," Office of the State Court Administrator, Court Services Division (Jan. 2018).
- To date, over 40 "Unbundling Road Show" presentations have been made across the state to over 750 attendees, including lawyers, state and federal judges, self-represented litigant coordinators, and other members of the community.
- "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Colo. RPC 1.0(e).

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7. The best practice is to put the parties' agreement in writing, signed by all parties, to prevent confusion and ensure the client understands the scope of representation; however, Colo. RPC 1.2(c) does not mandate this.

8. These forms can be found in the Self-Help area on the Colorado Supreme Court website. If the attorney is providing substantial drafting assistance with a pre-printed judicial form, the best practice is for the attorney to follow the disclosure requirements in C.R.C.P. 11(b) and 311(b).

9. Preprinted judicial forms are available on the Supreme Court's website for an attorney representing a client under C.R.C.P. 121, § 1-1(5).

10. C.R.C.P. 121, § 1-1(5) was amended on October 20, 2011.

11. A number of ethical issues related to unbundled legal services are more fully addressed in the CBA Ethics Committee's

Formal Opinion 101, Unbundling/Limited Scope Representation, which was updated and approved on May 21, 2016. See [www.cobar.org/ethicsopinions](http://www.cobar.org/ethicsopinions).

12. C.A.R. 5(e) was amended on October 11, 2012.

13. Preprinted judicial forms are available on the Supreme Court's website for an attorney representing a client under C.A.R. 5(e) and are designated as JDF 640, 641, and 642.

14. See D.C.Colo.LAttyR2 and D.C.Colo.LAttyR5.

15. D.C.Colo.LAttyR5(a)(2). Any change to the scope of the limited representation in federal court must also be approved by the court.

16. D.C.Colo.LAttyR5(b).

17. The CBA's 2017 Economic Survey stated that 10% of Colorado's private attorneys bill at least some of their work as unbundling.

See the CBA's 2017 Economic Survey at 5, [www.cobar.org/portals/COBAR/repository/2017EconomicSurvey.pdf](http://www.cobar.org/portals/COBAR/repository/2017EconomicSurvey.pdf).

18. IAALS, "Better Access Through Unbundling, From Ideation to Implementation" at 1 (Aug. 2018), <https://iaals.du.edu/publications/better-access-though-unbundling> (the unbundling legal services model is "increasing in visibility"). This report was based on an October 2017 two-day national conference in Denver attended by unbundling advocates from 26 states, Washington, D.C., and Canada. The conference was cosponsored by IAALS and the American Bar Association's Standing Committee on the Delivery of Legal Services.

19. One goal of the October 2017 national unbundling conference was to consider how to "engage the bench in order to legitimize the unbundled services model." See IAALS report, *supra* note 18 at 2.

20. [www.cobar.org/Portals/COBAR/LimitedScopeRepresentatin.pdf?ver=2016-01-26-111949-067](http://www.cobar.org/Portals/COBAR/LimitedScopeRepresentatin.pdf?ver=2016-01-26-111949-067).

21. Formal Op. 101, *supra* note 11.

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