

**Family Legal Services Review**  
**Submission on Unbundling & Legal Coaching<sup>1</sup>**  
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***Introduction***

My name is Nikki Gershbain and I am the National Director of Pro Bono Students Canada (PBSC). I am currently on leave from PBSC to complete a one-year fellowship in partnership with the National Self-Represented Litigants Project (NSRLP) to explore the concept of “legal coaching” as a practice model in family law that can increase access to justice for large numbers of otherwise self-represented litigants (SRLs). My preliminary research includes interviews and meetings with over 45 family lawyers and policy-makers, data from a survey that has to date been completed by 55 family lawyers, and preliminary discussions with SRLs.

It is in this capacity that I am writing to express my strong support for the first three recommendations outlined in Justice Bonkalo’s Report, which relate to unbundling and legal coaching<sup>2</sup>. Please note that this submission does not touch on any of the other recommendations in the report.

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<sup>1</sup>I would like to thank the following individuals who in their personal and/or professional capacities provided thoughtful comments on drafts of this submission that greatly contributed to improving my thinking and recommendations: John-Paul E. Boyd (Executive Director, Canadian Research Institute for Law and the Family & Co-Director, Alberta Limited Legal Services Project), Kari Boyle (Coordinator, BC Family Justice Innovation Lab & Manager, BC Family Unbundling Roster Project), Brian Burke (Secretary, Association of Family and Conciliation Courts, Ontario Chapter), Philip M. Epstein Q.C., LSM (former Bencher of the Law Society of Upper Canada, former Chair of the Family Law Section of the Ontario Bar Admission Course, former Chair, Family Law Section, Ontario Bar Association), Aaron Franks (Director, The Advocate’s Society, Adjunct Professor, Osgoode Hall Law School), Robert Harvie Q.C. (Bencher, Law Society of Alberta & Co-Director, Alberta Limited Legal Services Project), Dr. Julie Macfarlane (Professor of Law and a Distinguished University Professor at the University of Windsor & Project Director, National Self Represented Litigants Project), Joel Miller (The Family Law Coach), Tami Moscoe (Counsel, Office of the Chief Justice, Superior Court of Justice, Ministry of the Attorney General) and Sharon Shore (Chair, Family Law Section, Ontario Bar Association). I would also like to thank Rebecca Robinet and William Goldbloom for their excellent research assistance.

<sup>2</sup>Justice Annemarie E. Bonkalo “Family Legal Services Review” (Toronto: Ministry of the Attorney General, 31 December 2016)

<[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family\\_legal\\_services\\_review/#top](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/#top)>

**Recommendation 1:** Lawyers should continue to offer unbundled services and should take steps to ensure the public is made aware of their availability. Lawyers should consider innovative opportunities to offer unbundled legal services, including affiliations with other lawyers and online platforms.

The goal of this project is to refine and formalize legal coaching<sup>3</sup>, treat it as a specialized model of practice that requires education and training, and promote it as part of a comprehensive access to justice plan in family law<sup>4</sup>. The main deliverable will be the development of a training program for lawyers interested in becoming effective legal coaches. This project has been made possible by the generous support of the Law Foundation of Ontario and the University of Windsor, Faculty of Law.

My interest in access to justice in family law is longstanding. From 2001-2004 I practiced family law at Epstein Cole LLP, where a significant portion of my practice was devoted to *pro bono* files. I am a former member of the Law Society's Equity Advisory Group (EAG) and a member of Legal Aid Ontario's Family Law Advisory Committee. From 2009-2010 I co-led, with Professor Michael Treblicock, the University of Toronto's Middle-Income Access to Justice initiative. As National Director of PBSC, I doubled the size of PBSC's award-winning Family Law Project (FLP), which now operates in six provinces and 11 cities across Canada. In the Fall of 2016, I was invited by Justice Bonkalo to serve on the Advisory Committee for her *Family Legal Services Review*.

***The Law Society, Ministry of the Attorney General & Justice Sector Partners Should Adopt and Expand Upon Justice Bonkalo's Unbundling & Coaching Recommendations***

In order to uphold its mandate to govern the legal profession in the public interest, I would submit that the Law Society needs to not only approve, but also to expand upon these recommendations. This submission therefore elaborates on these recommendations, and proposes several additional strategies that the Law Society, the

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**Recommendation 2:** The Law Society of Upper Canada and LawPRO should continue to support the expanded use of unbundled services and should offer continuing legal education opportunities and tools to address the liability concerns that lawyers have raised as an impediment to offering these services.

**Recommendation 3:** The legal profession should support the development of legal coaching and offer continuing legal education opportunities to ensure lawyers are equipped to offer these services. Lawyers should be encouraged to take these training programs, and to offer and advertise coaching services. The Law Society of Upper Canada and LawPRO should consider providing incentives for lawyers to make legal coaching an integral part of their practice.

<sup>3</sup>Throughout this submission, I will refer to unbundling and legal coaching. However, as I set out in more detail below, legal coaching is a type of unbundled service. While it is important not to create an artificial distinction between the two practice models, the concept of legal coaching is different from the legal profession's general understanding of how unbundling is delivered (typically a discrete, one-off service directed by the lawyer). Because I believe legal coaching offers advantages that this traditional form of unbundling does not, I have chosen not to subsume the coaching model into unbundling in my terminology. That being said, lawyers who offer limited scope services on the ground in practice often provide a combination or hybrid of traditional unbundling and legal coaching, depending on client ability, need and means. This is the approach and practice model I will endorse in this submission.

<sup>4</sup>This project is exploring legal coaching in family law, both because family law is the highest area of civil legal need in Canada, and because the nature of a divorce file lends itself particularly well to these alternative practice models. However, unbundling and legal coaching are practice models that can be applied to and are currently being offered as part of other civil practice areas, including employment, estate litigation, general civil litigation, administrative law, and so on.

Ministry of the Attorney General, and other independent justice sector partners can adopt in order to promote and expand unbundling and legal coaching in Ontario.

Justice Bonkalo's first three recommendations would see responsibility for expanding these practice models shared by both individual members of the bar and our legal institutions. While I strongly agree with these proposals, I would suggest that the primary responsibility for these recommendations lies with our legal institutions. This includes the Law Society, LawPRO, Legal Aid Ontario, Court Services, the judiciary and judicial organizations, the bar associations, law schools and government. It is critical that our legal institutions take leadership in promoting limited scope services, creating a professional culture that is conducive to these services, and educating consumers about their availability. Individual family lawyers will not be successful in marketing, advertising and promoting limited scope services without the institutionalized support of the profession. Moving beyond an *ad hoc*, individualized approach will help scale the availability of these services and raise public awareness, thereby increasing access to justice in a more meaningful and systemic way.<sup>5</sup>

There is no one panacea to the complex, multi-faceted problem of a lack of access to legal services in family law. Yet, based on my research and findings to date, I believe that if limited scope services such as unbundling and legal coaching are made more available to the public by the family bar, and if there is greater awareness of the existence and availability of these services by the public, these practice models have the potential to significantly expand access to the family justice system for large numbers of Ontarians who would otherwise go without any legal advice or representation. I believe that legal coaching in particular is a form of unbundling that responds even more directly (than traditional unbundled services) to the needs and preferences of legal consumers, and offers additional advantages for many primarily self-represented litigants. This may include lower costs, less stress and isolation, more personal control over one's matter, the development of generic skills that are useful post-separation, and more confidence in the process and in the justice system.<sup>6</sup>

Delivering unbundling and legal coaching services also offers significant benefits to family lawyers, including enhanced professional satisfaction, work-life balance and

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<sup>5</sup>For an excellent piece on the use of the "Social Lab" model of systems change to develop solutions to complex social challenges, see: Jane Morley Q.C. and Kari D. Boyle, "The Story of BC's Family Justice Innovation Lab", *Windsor Yearbook of Access to Justice*, forthcoming special edition on Innovation & Access to Justice. I am grateful to the authors for sharing the final draft of their paper in advance of its publication and believe the approach they set out for the B.C. family justice system – "systemic, participatory and experimental" – is worth exploring in Ontario.

<sup>6</sup>Mediate BC, *Unbundling FAQs for Lawyers and Paralegals*, (British Columbia: BC Family Unbundled Legal Services Project Unbundling Toolkit for Lawyers and Paralegals, January 2017), p. 5  
<<http://www.courthouselibrary.ca/docs/default-source/unbundling/1/unbundling-faqs-for-lawyers.pdf?sfvrsn=10>>.

expanded business opportunities<sup>7</sup>. Courts benefit from improved efficiencies and freed up staff and judicial time<sup>8</sup>, the justice system more broadly achieves better outcomes for families<sup>9</sup>, and represented parties also save costs<sup>10</sup>.

### **Background to Legal Coaching**

Legal coaching is a form of unbundling that, as Justice Bonkalo notes, “is uniquely characterized by the lawyer equipping the client to move his or her own matter forward (by reviewing documents, preparing them for an appearance, etc.) rather than personally doing the work for the client.”

While the practice of legal coaching is not new – lawyers have been doing this informally for years – the term “coaching” was coined by Dr. Julie Macfarlane in her groundbreaking 2013 National Study on SRLs, which included interviews or focus groups with 259 SRLs from Alberta, British Columbia, and Ontario, as well as with 107 court staff and service providers<sup>11</sup>. A great deal of attention has been paid to Dr. Macfarlane’s findings regarding motivation, challenges and impact. I will not review these findings in detail, but I observe in summary that the number one reason respondents provided for being self-represented was cost, the main challenge they reported was dealing with the complexity of the system, and the biggest impact they experienced was the extreme stress and anxiety of navigating this complex system on their own.<sup>12</sup>

Interviewees were also asked to describe what they would have wanted from a lawyer. Here they identified a number of key qualities and services, including:

1. Help with key tasks;
2. Ongoing strategic advice;
3. Someone who would collaborate in carrying out tasks;
4. Value for money in purchasing professional services;

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<sup>7</sup>NSRLP, *The Nuts and Bolts of Unbundling*, <<https://representingyourselfcanada.com/wp-content/uploads/2016/11/Nuts-and-Bolts-FINAL.pdf>>.

<sup>8</sup>As just one example, one respondent to my survey wrote: “I assisted a self-rep with her Settlement Conference Brief for court in Oshawa. She called to tell me that the judge...did not need her to say anything as her material was clear and child-focused. She said the judge was “very happy” with her material. Then the judge spent time working on the father (who was represented by counsel) and was very critical of father and his material.”

<sup>9</sup>Mediate BC, *Unbundling FAQs for Lawyers and Paralegals*, supra note 6.

<sup>10</sup>Lorne D. Bertrand, Joanne J. Paetsch, Nicholas Bala & Rachel Birnbaum, “Self-represented litigants in family law disputes: Views of Alberta Lawyers” (2012) Alberta Law Foundation, p. 6.

<sup>11</sup>Dr. Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, May 2013 <<https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>>.

<sup>12</sup>On the difficulties faced by SRLs, see also Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, “The Rise of self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants” (2013) *The Canadian Bar Review*, p. 85 & 91-93.

5. Transparency in fees;
6. Active participation in the solicitor-client relationship;
7. To be taken seriously; and
8. Compassion and empathy.

While respondents to Dr. Macfarlane's study may not have used the language of unbundling or legal coaching, they clearly described the service they want. In essence, a legal expert to provide them with ongoing, affordable support in a respectful and encouraging manner. These findings led the NSRLP to ask whether it may be possible to deliver unbundled legal services in a way that responds even more directly to the actual needs and preferences of today's legal consumer. This project is meant to explore that question.

### ***Definition of Legal Coaching***

To date, very little has been written about legal coaching as a practice area, and only a handful of Canadian family lawyers currently advertise themselves as legal coaches.

In a pair of 2013 blog posts introducing the concept, Dr. Macfarlane described the model as one where the lawyer-coach "equip[s] the client to take the next steps themselves." She writes: "SRL coaching is conducted on the assumption that the job of the lawyer-coach is to equip the client to take the next steps themselves."<sup>13</sup> This is not to suggest that legal coaching is not a serious practice model requiring the experience of a skilled lawyer:

[Legal Coaching] is definitely not "lawyering-lite". Coaching assistance is just as challenging (perhaps more so) for our professional skill set as traditional legal advice and advocacy. Coaching for self-advocacy integrates legal knowledge with procedural know-how, attention to apparently obscure details that lawyers understand to be important, strategic savvy, advocacy tools (now shared with the client), and the lawyer's experience and understanding of how conflict develops and may be resolved.<sup>14</sup>

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<sup>13</sup>Dr. Julie Macfarlane, "Lawyers Coaching SRLs in "Self-Advocacy"? Why This Paradoxical Proposition Deserves Your Serious Consideration" (2 October 2012) Slaw (blog), online: <<http://www.slaw.ca/2013/12/16/lawyers-coaching-srls-in-self-advocacy-why-this-paradoxical-proposition-deserves-your-serious-consideration/>> and "Providing Legal Services in a Coaching Model: The What, Why and How", (18 December 2013), Slaw (blog), online: <<http://www.slaw.ca/2013/12/18/providing-legal-services-in-a-coaching-model-the-what-why-and-how/>>

<sup>14</sup>Dr. Julie Macfarlane, "Providing Legal Services in a Coaching Model: The What, Why and How", *ibid.* It is worth noting here that 47% of the respondents to my survey believe that a lawyer should have 3-5 years of experience under her belt to be able to provide effective coaching services, while 23% of respondents believe 6-10 years is appropriate. 16% said no experience is required, while 12% selected 1-2 years. 81%

Justice Bonkalo cites to a definition of legal coaching put forward by the Ontario Chapter of the Association of Family and Conciliation Courts, provided as part of their submission to her review: “...answering questions about process, preparing for court (e.g., what to wear, what to expect, how to make an argument and address everyone), and [providing] emotional support”.<sup>15</sup>

While the definition Justice Bonkalo adopts captures some of what legal coaching entails, in my view it is overly narrow. Indeed, as Justice Bonkalo goes on to note, legal coaching can go beyond procedural coaching or emotional support, to “...involve the provision of substantive legal advice...hearings coaching and/or negotiation and settlement coaching.”<sup>16</sup>

Based on my preliminary research, and borrowing from these other articulations of the model, I propose that the Law Society adopt the following definition of legal coaching:

*Legal Coaching is a type of unbundled service where a lawyer-coach works in partnership with the client to offer behind-the-scenes guidance – procedural, substantive and “cultural” – providing a self-represented litigant with the strategies, knowledge and tools needed to advance their case as effectively as possible in the absence of counsel.*

### **What is Unique About Legal Coaching?**

Although legal coaching is a form of unbundling, it expands on lawyers’ traditional understanding of how unbundling is delivered, that is, as a discrete, one-off service that the lawyer is responsible for (i.e.: by drafting a document or making a court appearance), with minimal input from the client. In practice, many lawyers who provide limited scope services practice a hybrid form of unbundling and coaching. Indeed, unbundling and legal coaching are often so overlapping in practice, in many ways it seems neither necessary nor helpful to draw a bright line between the two service models.

Nevertheless, because I believe legal coaching is a method of practice that can enhance the traditional unbundling framework, it is useful to identify the ways in which it differs from limited scope services as they are conventionally understood and practiced in some cases.

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of the respondents have delivered unbundling and/or coaching services, and so most but not all of the respondents have personal experience with this model.

<sup>15</sup> Association of Family and Conciliation Courts – Ontario Chapter, written submission to the FLSR at 18 cited in Justice Annemarie E. Bonkalo “Family Legal Services Review”, supra note 4.

<sup>16</sup> Justice Annemarie E. Bonkalo “Family Legal Services Review”, supra note 4.

### **1. *The Client Does the Work***

The main difference between unbundling and coaching is that the client, not the lawyer, is tasked with the responsibility of doing the work of the file. Just like a football coach does not get onto the field to score the touchdown, a legal coach is not there to take over a task associated with the file. Without losing sight of the client's capacity and expertise, the legal coach will build the client's potential to self-represent. While a traditional unbundled lawyer might, for example, draft a set of pleadings for a client, the role of the legal coach is to work behind the scenes, guiding the client as she drafts the pleadings, as much as possible on her own.

### **2. *Procedural & Cultural Support are Assumed***

The second major difference between coaching and unbundling is that the legal coach takes responsibility for a client's procedural and "cultural" needs, as well as her substantive legal needs. Unlike a traditional unbundled lawyer, who having drafted the pleadings has likely fulfilled the terms of the retainer, the legal coach's responsibility includes helping the client take the next step in the file. This means offering guidance on the hard skills of lawyering, like drafting, negotiation and advocacy, procedural assistance navigating the process and understanding how one stage of the process will unfold and feed into the next, and what we might call assistance with the legal "culture", such as tips on courtroom etiquette and decorum<sup>17</sup>.

In practice, many lawyers who offer unbundled legal services also assist their clients with the procedural steps related to the unbundled task, often as a courtesy. The difference with the coaching model is that procedural support and other forms of legal information are built into the retainer. Establishing the full scope of the service from the get go is not only a best practice, it offers the client transparency and a better understanding of the service they can expect to receive.

### **3. *Continuity of Service is Preferred***

Unlike unbundling, which is traditionally more of a one-off service (or for some clients, one or more one-off services), legal coaching is most effective in the context of an ongoing solicitor-client relationship.

This is not to suggest that legal coaches should not or do not accept clients mid-way through the file. In practice, legal coaches are providing as little or as much guidance as a client needs, when the client needs it. We know from Dr. MacFarlane's research that more than half of SRLs start with a lawyer, then try handling the file themselves, and

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<sup>17</sup>For a comprehensive list of cultural tips see Nova Scotia Family Law, *Going to Court: Self-Represented Parties in Family Law Matters*, pp.12-15

<[http://www.nsfamilylaw.ca/sites/default/files/video/revised\\_srl\\_workbook2.pdf](http://www.nsfamilylaw.ca/sites/default/files/video/revised_srl_workbook2.pdf)>

only then seek out unbundled services<sup>18</sup>. Legal coaches I have interviewed tell me that even a single, short, focused coaching experience can offer value to an otherwise self-represented litigant, and for some SRLs this will be the most affordable option.

While it would therefore be neither realistic nor desirable to suggest that coaching should only occur from the start of a file, I strongly believe that the earlier in the process a client finds a coach, the more effective the relationship will be. This is true from the perspective of both the client and the lawyer. Continuity of service is not only more likely than not to produce faster and better outcomes for clients, assisting the client from the start can be seen as a risk management tool. That is, by ensuring the lawyer has access to all relevant information as the file unfolds, errors down the road are more likely to be avoided.

#### **4. *The Lawyer and Client Form a Partnership***

Finally, successful coaches will work to build a partnership with their client, while mentoring and guiding them to take the next, discrete step on their own. A team approach means that the client will be an active participant in the relationship, and will participate more fully than they would as part of a more traditional solicitor-client model<sup>19</sup>.

Of course, many lawyers already practice from a client-centred approach – working to maximize the client’s autonomy to the extent possible within a traditional framework. For the legal coach, however, providing the client with more control over her matter, encouraging her to be an active partner, listening to her and having confidence in her ability to make both moral and strategic judgments about her legal matter – all of this will be vital to the success of the relationship. Legal coaching is not a practice model that will appeal to all family lawyers, and may require a paradigm shift for lawyers not be used to the level of trust, communication and feedback this framework demands.

#### ***Hybrid Approaches to Unbundling & Coaching***

With all of that said, there is no one way to develop a limited scope practice. Because members of the public are unlikely themselves to distinguish between unbundling and coaching services, the best model will be one that offers whatever combination of services best supports the preferences and particular situation of individual clients. While it may be conceptually useful to identify the ways in which coaching is different from or expands on unbundling, as Justice Bonkalo observes in her report: “coaching and unbundled services can be provided hand-in-hand.”<sup>20</sup>

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<sup>18</sup>Dr. Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self- Represented Litigants*, supra note 11.

<sup>19</sup>See Dr. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, UBC Press.

<sup>20</sup>Justice Annemarie E. Bonkalo “Family Legal Services Review”, supra note 4.



Most of the lawyers I have spoken with do not draw bright lines between the two practice models. Rather, they offer what is essentially a hybrid between unbundling and coaching that will depend on, as Justice Bonkalo puts it, “the client’s needs, capabilities and financial circumstances.”<sup>21</sup> In my view, this is the most practical, effective approach, and the one I am strongly endorsing.

### ***Benefits to the Public***

Reports, surveys and studies in Canada and elsewhere suggest that primarily self-represented litigants benefit from these alternative practice models, or believe that they would benefit from them. These reports suggest that the availability of limited scope services fills an important gap in the justice system, increasing the likelihood that cases will be resolved according to the merits.

Many of the self-represented litigants who participated in Dr. Macfarlane’s 2013 study looked for and believed they would have benefited from unbundled legal services (although they did not use that term):

Many SRL respondents described a fruitless search for a lawyer who would “just” help them with a part of their case.... Respondents described seeking assistance with completing forms; reviewing completed forms and other documents; writing a letter to the other side; answering questions of law; preparing for a hearing; and representation in court for one hearing only....<sup>22</sup>

In 2015, Ipsos MORI on behalf of the Legal Services Board and Legal Services Consumer Panel in the United Kingdom conducted a study, *Experiences and Perceptions of Unbundled Legal Services*. Based on 35 qualitative interviews with consumers of unbundled services and 14 interviews with providers, the report found a number of benefits to the public including cost, control, speed and outcomes<sup>23</sup>.

In 2016, The Action Group on Access to Justice (TAG) released *Public Perceptions of Access to Justice in Ontario*. Conducted online by Abacus Data, the poll sought feedback from 1,500 Ontarians to assess what the public thinks of the justice system. The poll found that unbundled or partial legal services was the most popular access to justice initiative, with 76% of Ontarians choosing this in their top three. Notably, this view was shared across income brackets.

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<sup>21</sup>Ibid.

<sup>22</sup>Dr. Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, supra note 11 at 92.

<sup>23</sup>Ashley Ames et al, “Qualitative research exploring experiences and perceptions of unbundled legal services” (Ipsos MORI Social Research Institute, 6 August 2015) at 5  
<[https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL\\_060815.pdf](https://research.legalservicesboard.org.uk/wp-content/media/14-086345-01-Unbundling-Report-FINAL_060815.pdf)>

Also in 2016, Mediate BC led the BC Family Unbundled Serviced Project, to encourage more family lawyers in British Columbia to offer affordable, unbundled legal services<sup>24</sup>. The project sought input from the public through an online survey completed by 46 individuals who were or had been involved in a family dispute involving separation or divorce in Canada (primarily B.C., just 11% of respondents were from Ontario). At the end of the survey, respondents were asked whether they would seek unbundled services if they were involved in a family dispute in the future. 71% said they were likely or very likely to seek unbundled legal services. The two major reasons cited by clients in favour of unbundling were legal costs, and control over costs and direction. Additional benefits identified by the study included: price predictability; increased value for money; improved outcomes; increased voice; enhanced empowerment; improved confidence in the process and outcome; improved access to settlement processes including facilitation of informed settlements; and, finally, access to tailored services.<sup>25</sup>

As part of this project, I have started meeting with current and former SRLs in focus groups and individual interviews, to solicit their input on this practice model. At a recent focus group I conducted in Windsor, 8 of the 10 participants told me they would have hired a legal coach had that option been affordable and made available to them at the time (the remaining two participants expressed support for the model, but felt that their personalities and cases were not conducive to coaching). Focus group participants described a series of advantages they felt legal coaching could offer:

- Help understanding “the big picture”: “someone to set out the different steps and what might happen with each of them”; “help finding the logical argument”; “insight and direction”;
- Help organizing their case: “help pulling all the pieces together”; “someone to tell you how to organize information and prepare for court”; “someone to structure and help pull everything together”; “help organizing documents into [the correct] format for court”;
- Help from the get go: “help understanding the process from the start”; “a more complete picture at the beginning”;
- Procedural assistance: “someone to outline the process”; “help navigating the court and the big picture”; “an explanation for each new stage”;
- Legal advice: “an explanation of how the rules apply to my situation”; “legal precedents you can use in your case”; “someone to help me better understand the options so I’m not just trying to stay above water”; “someone to put pros and cons on table, but leave the decision to me”; “someone who can be honest about my chances”;
- Court coaching: “how to present evidence in court”; “what to say in court and when and how to address the judge”; “get me ready for court”; “help me

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<sup>24</sup> Mediate BC, “Family Unbundled Legal Services Project, Summary of Family Survey Responses” (August 2016) <<http://www.mediatebc.com/Education---Training/Family-Unbundled-Legal-Services-Project.aspx>>

<sup>25</sup> Mediate BC, *Unbundling FAQs for Lawyers and Paralegals*, supra note 6.

make the best use of my limited time in court”; “tell me how much information I should provide and what am I not allowed to provide”; “advance trouble-shooting based on what could go wrong”; “an opportunity to rehearse”; “tricks of the trade”;

- Supplementary resources: “modules for each step so you can familiarize yourself before [each stage]”; “a piece of paper for me to take home”; “[appropriate and relevant] resources for each stage”.

The lawyers I have surveyed to date have also identified numerous benefits of unbundling and/or coaching services for clients. I am in the process of developing an SRL survey, and will have more direct feedback from the public on the legal coaching model this summer. In the meantime, these are the benefits articulated by lawyers:

**Table 1**

**What are the benefits to clients in receiving unbundled and/or coaching services, as opposed to traditional legal services? (Select all that apply)**

Answer Choices	Responses
Less costly	95.45% 42
Less stressful than pure self-representation	79.55% 35
More respect from lawyer	13.64% 6
More control than in traditional solicitor-client relationship	43.18% 19
Empowering	59.09% 26
Learn dispute resolution skills that can assist in future	54.55% 24
Faster resolutions	20.45% 9
Better outcomes	20.45% 9
More transparent fee structure	47.73% 21
Better value for dollar	29.55% 13
<b>Total Respondents: 44</b>	

The number one benefit described by 95% of respondents is cost savings for clients. This is consistent with all the research that now shows the single greatest barrier to full representation is cost. While full representation will always be the gold standard of legal services, limited scope services offer an alternative for clients who are unable or unwilling to pay a full retainer, but have modest resources and see value in purchasing the legal services they can afford.

That said, the advantages of unbundled and coaching services go well beyond affordability. Some of these respond directly to the changes we are witnessing in the legal market. Behavioral economists and consumer trend experts report that the 21<sup>st</sup> century consumer is knowledgeable, sophisticated and confident, and is looking for more control, agency and respect in their professional relationships. The lawyer marketing website Avvo describes a “consumer revolution”, where the widespread availability of legal information on-line means lawyers are no longer necessarily seen as the gatekeepers of the law<sup>26</sup>. Today’s divorcing consumer is more likely to google “DIY Divorce” than “how do I find a family lawyer?”. This is a massive cultural shift that requires a new way of thinking about how we deliver family services<sup>27</sup>.

The upside is that unbundled services respond directly to many of the qualities of this new consumer. Indeed, for some clients, legal coaching will not only be an attractive option, it may even offer an improvement on traditional unbundled services. This is because, by offering support over the course of the file, legal coaching is a form of unbundling that addresses the key challenges identified by SRLs in Dr. Macfarlane’s study (cost, complexity and stress). Legal coaching also expands on traditional unbundling by responding more directly to the qualities and services 20<sup>th</sup> century SRLs value, including ongoing advice, task-sharing, active participation, and so on.

### ***Benefits to Lawyers***

As set out above, unbundling and legal coaching are win-wins for clients and lawyers. Of the lawyers I have surveyed to date, 81% indicate that they provide limited scope services. Respondents describe a number of professional benefits to unbundling and coaching:

### **Table 2**

**What are the benefits to lawyers in providing unbundled and/or coaching services, as opposed to traditional legal services? (Select all that apply)**

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<sup>26</sup>Dan Lear, *Avvo and the online legal consumer revolution*, Avvo (slide show), online: <[http://www.osbar.org/docs/resources/16OSBFuturesConference/AvvoandtheOnlineLegalConsumerRevolution\\_DanLear.pdf](http://www.osbar.org/docs/resources/16OSBFuturesConference/AvvoandtheOnlineLegalConsumerRevolution_DanLear.pdf)> See also Dr. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, supra note 19.

<sup>27</sup>*The New Lawyer*, ibid.

Answer Choices	Responses	
Professional satisfaction	<b>60.98%</b>	25
Work-life balance	<b>56.10%</b>	23
Control over practice	<b>53.66%</b>	22
Non-adversarial nature	<b>63.41%</b>	26
Clients more appreciative	<b>58.54%</b>	24
Expanded client pool	<b>63.41%</b>	26
Fewer accounts receivables	<b>53.66%</b>	22
<b>Total Respondents: 41</b>		

The legal coaches I have interviewed one-on-one echo these findings. The most consistent refrain is how “appreciative” and “grateful” their coaching clients are, and how “satisfying” they find the mentoring, training and collaborative side of legal coaching. As one Ontario coach explained: “In my former practice, a client would give me their materials, and it felt as though they were literally dumping their problem on my desk, saying ‘here, it’s your problem now’. As a legal coach, I never feel that way. We are a team, working through the issues together.”

According to MAG, in 2015 57% of litigants in Ontario family courts were self-represented.<sup>28</sup> Some estimates peg that figure as high as 80% in provincial courts in some urban centres. Given these numbers, as well as the fact that cost is the greatest barrier to advice and representation, it makes sense that 63% (to date) of those responding to my legal coaching survey report that expanding their client pool is a key motivator for offering unbundling or legal coaching services.

Last year, the Ryerson Innovation Zone calculated that the annual, unmet market opportunity for Ontario family lawyers is between \$40M to \$200M per year<sup>29</sup>. This calculation is based on the conservative assumption that only 50% of family litigants in Ontario each year are self-represented, or 80,000 per year. Not only is this a conservative estimate, it does not factor in separating or divorcing spouses who have not filed a claim. Further, it assumes that just half of these individuals, or 40,000, would be willing and able to purchase between \$1,000 to \$5,000 worth of legal services.

<sup>28</sup>“Just Facts” (June 2016), online: Department of Justice <<http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>>

<sup>29</sup>Chris Bentley et al, “Legal Innovation Zone’s Family Reform Community Collaboration” (Toronto: Ryerson University, February 2016) at 10 <<http://legalinnovationzone.ca/wp-content/uploads/Ryerson-LIZ-Family-Reform-Report.pdf>>.

## ***The Need to Match Supply & Demand***

While most separating individuals may no longer be interested in or able to afford the traditional, full representation model, there appears to be a massive, untapped market of potential family law clients who want and can afford to purchase some legal help. And yet, despite the existence of this market, the family bar has not embraced these practice models on a systemic level. As part of my research, I have managed to track down about two dozen family lawyers across the country who are actively advertising that they offer unbundling or coaching services, or in most cases a combination of the two. To date, I have identified only a handful family lawyers in Ontario who have developed practices based on these models, and advertise these services.

Of the 46 respondents who completed Mediate BC's public survey, 38% reported using unbundled legal services during their family dispute. 47% of those said it was "somewhat difficult" or "very difficult" to find their unbundled lawyer. One respondent commented: "I pursued this with lawyers until one finally provided the service (information) I required. It was not easy and most lawyers refused."<sup>30</sup> Another noted: "(I) never heard the term [unbundling] before, that's just the way I did it." Another said: "I wish I knew about this option much much earlier. Too much money was spent in the first part of my divorce (a year's salary approximately)."

Few lawyers who offer unbundled and coaching services advertise this option on their websites, or in other ways that would make it easy for potential clients to find them. Of the 62% responding to Mediate BC's survey who did not use unbundled legal services, 31% said it was because "I could not find a lawyer to provide unbundled legal services". While 81% of the 55 lawyers who have to date responded to my national survey reported that they providing unbundling and/or coaching services, only 47% report that they advertise on their website, and only 40% list their services on a public database. The vast majority of respondents, 90%, rely on word of mouth to advertise, as well as other marketing tools:

### **Table 3**

**How do you market your unbundled and/or coaching services? (Select all that apply)**

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<sup>30</sup>Mediate BC, *Unbundling FAQs for Lawyers and Paralegals*, supra note 6 at p.2.; Mediate BC, "Family Unbundled Legal Services Project, Summary of Family Survey Responses", supra note 24. See also Dr. Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, supra note 11. Only 14 of the SRLs in Dr. Macfarlane's study were able to find a lawyer who would agree to provide unbundled services.

Answer Choices	Responses
Website	46.67% 14
NSRLP National Database of Professionals Assisting SRLs	26.67% 8
Other directories	13.33% 4
Law society referral service	6.67% 2
Colleague referrals	40.00% 12
Outreach to other service providers (legal aid, counsellors, community workers)	40.00% 12
Word-of-mouth	90.00% 27
<b>Total Respondents: 30</b>	

Nor is the general public aware of the option of seeking out unbundled or coaching services. 73% of the 46 respondents who completed Mediate BC’s public survey said they were unaware that such services even existed.

This problem is echoed by lawyers. I have interviewed several lawyers working to build an unbundling and/or coaching practice who are having a difficult time finding clients, despite the untapped market identified by the Ryerson innovation Zone. One respondent to my survey put it this way: “The chief challenge is letting self-reps know that this service is available because they aren't thinking of looking for it.”

Last summer, as part of its submission to Justice Bonkalo for the purposes of the Family Legal Services Review, the NSRLP conducted a small volume survey of 50 family lawyers, 65% of whom provide unbundled services. When those respondents were asked how much uptake there is for their services, 50% answered “some demand”. Only 15% answered “lots of demand”, and 35% selected “little demand”.<sup>31</sup>

Alice Woolley and Trevor Farrow describe this disconnect between supply and demand as follows:

There is certainly no lack of work to go around for those who are interested in matching up their services to the kinds of legal needs that are often most pressing and are not currently being met. The issue is not necessarily an over-crowded market; rather, it is the challenge of

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<sup>31</sup>Dr. Julie Macfarlane, “Making it Legal: Some Simple Steps for Moving Unbundling to the Next Stage”(12 July 2016), NSRLP (blog), online: <<https://representingyourselfcanada.com/making-it-legal-some-simple-steps-for-moving-unbundling-to-the-next-stage/>>.

matching up those who are willing and able to provide accessible services with those in need.<sup>32</sup>

The family bar finds itself at a turning point when it comes to the delivery of unbundled and coaching services. On the one hand, lawyers will continue to be understandably reluctant to risk a significant investment of time and energy in developing and advertising a new model of practice, unless they can be assured there will be sufficient demand by the public and therefore a reasonable return on their investment. On the other hand, unless unbundled and legal coaching services are made widely available to every member of the public who wants and can afford to pay for these services, these practice models will not address the family law access to justice crisis in any meaningful way.

In my view, unless the profession develops and implements a multi-pronged and systemic approach to the expansion of limited scope services, we will fail to leverage the potential impact of these innovative models. Indeed, as set out below, Justice Bonkalo's report is just the latest in an increasingly long line of reports suggesting that the widespread availability of unbundled services will be a critical part of any comprehensive access to justice plan, particularly in family law.<sup>33</sup>

### ***Previous Calls for Unbundling and Legal Coaching***

In just under a decade, every Law Society in Canada has amended its Rules of Professional Conduct to define (and therefore implicitly endorse) limited scope representation. The Law Society of Upper Canada did so in 2011, suggesting at the time that these amendments would facilitate the provision of limited scope retainers and enhance access to justice.

In 2013, the *Report on Access to Civil and Family Justice* by the Chief Justice's National Action Committee called upon the legal profession to expand the use of unbundled services through limited scope retainers. Notably, the NAC recommended that essential legal services, including unbundling, "be available to available to everyone by 2018".<sup>34</sup>

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<sup>32</sup>Alice Woolley and Trevor Farrow, "Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges" (2016) 3:3 *Tex A&M L Rev* 549 at 577.

<sup>33</sup>It should be mentioned that in Canada there are now three directories of lawyers who offer unbundled and/or coaching services. The NSRLP houses a national directory that contains the names of almost 200 lawyers across the country from all practice areas. The BC Family Unbundling Roster is a list of 90 family lawyers and paralegals willing to provide unbundled services in family law in particular. The Alberta Limited Legal Services Project is a research study involving over 50 Alberta lawyers offering limited scope retainers, from all practice areas. The results of that study should be available by October 2018, and may also inform Ontario's thinking on these models.

<sup>34</sup>"Access to Civil and Family Justice – a Roadmap for change" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 14. < [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) > .



Also in 2013, the Canadian Bar Association released its report, *Reaching Equal Justice: An Invitation to Envision and Report*. That report called for the availability of limited scope legal services in situations where they meet the meaningful access to justice standard by 2020.<sup>35</sup> It also called for the creation of “best practice guidelines, based on empirical studies of emerging limited scope service models and their impact on meaningful access to justice”.<sup>36</sup> Finally, it recommended the following:

- All law societies provide detailed guidelines to lawyers providing limited scope services, including advice and precedents for limited scope retainers;
- Bar associations, law societies and legal aid organizations develop resources to assist lawyers to provide limited scope services in an integrated, seamless way by equipping lawyers to inform clients about other service providers and sources of information;
- The CBA provides professional development on coaching and other skills that support the delivery of effective limited scope services. The CBA, law societies, other bar associations and legal aid organizations work with PLEI organizations to inform the public about limited scope services; and
- The CBA and the Federation of Law Societies ensure the integration of existing research and evaluations of limited scope service models to formulate evidence-based best practices and identify further research needs.<sup>37</sup>

Dr. Macfarlane’s SRL study was released the same year. She recommended that the bar encourage the delivery of unbundled services in part by making “efforts to find answers to legitimate concerns about due diligence and insurance issues”.<sup>38</sup> She further proposed that “CLE programming should be developed to offer skills training [in unbundled services].”<sup>39</sup>

While some progress has been made on the expansion of unbundled legal services since 2013, and there has been a significant increase in CLE programming relating to unbundling in the last few years, as a profession we still have a long way to go to meet this series of recommendations.

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<sup>35</sup>“Reaching equal justice report: an invitation to envision and act” (Ottawa: The Canadian Bar Association, November 2013) at 95

<[http://www.lsuc.on.ca/uploadedFiles/For the Public/About the Law Society/Convocation Decisions/2014/CBA\\_equal\\_justice.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/CBA_equal_justice.pdf)>.

<sup>36</sup>“Reaching equal justice report: an invitation to envision and act”, *ibid* at p.95.

<sup>37</sup>*Ibid*.

<sup>38</sup>Dr. Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self- Represented Litigants*, *supra* note 11.

<sup>39</sup>*Ibid*, p.123.

## **Concerns About Liability**

Notwithstanding years of research, jurisprudence and policy changes that advocate for, and facilitate the use of, limited scope retainers, fear of liability continues to be one of the main barriers to the expansion of limited scope representation. Of the 32 lawyers the NSRLP surveyed for the Justice Bonkalo review, 79% expressed worry about liability issues (even though almost as many indicated that lawyers should be offering unbundled services).<sup>40</sup>

According to LawPRO, the most common cause of claims against lawyers are communication issues and inadequate investigation or discovery of facts. Although LAWPRO suggests that these risks “are at least equally, if not more likely, to occur during the provision of unbundled legal services”<sup>41</sup>, there would appear to be no evidence that lawyers who provide unbundled or coaching services are more (or even as) likely to face negligence claims or complaints to the regulator.

In a paper exploring malpractice claims in family law, LawPRO’s Litigation Director and Counsel Yvonne Bernstein notes that: “domestic contracts and settlements are the two most problematic areas from a risk management perspective. Combined, they account for 42.81% of all the claims reported between 2009 and 2015 [1240 in total] and 63.2 % of the total cost to the program [\$27.95 million].”<sup>42</sup> By contrast, during this same period claims relating to the scope of the retainer made up just 5.8% of the claims reported and represented just 4.9% of the total cost of the program.<sup>43</sup>

Many of the lawyers I interviewed who regularly deliver limited scope services believe their liability is actually reduced relative to their full-service files. One respondent to my survey referred to the liability issue as “a red herring”, adding that “as lawyers we have best practices we’re told to follow and if we follow them it’s fine. In any practice you’ll have problems, just because it’s a limited retainer it doesn’t make it worse.” One (non-family) lawyer who has built a successful practice around court coaching had this to say about his own experience:

[Liability is] never an issue – the most over-dramatized issue. When you’re on a LSR you have limited liability because you’re only doing one

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<sup>40</sup>Dr. Julie Macfarlane, “Making it Legal: Some Simple Steps for Moving Unbundling to the Next Stage”, supra note 31.

<sup>41</sup>“Limited Scope Representation Resources” *Law Pro* (2017) online:

<<http://www.practicepro.ca/practice/limitedscope.asp>>.

<sup>42</sup>Yvonne Bernstein, LawPRO, *Managing Risk in a Family Law Practice* – paper generously provided to the author by Ms. Bernstein.

<sup>43</sup>The other risk areas, broken down by number of claims and percentage of the program, were Missed Limitations/Deadlines (11.85% and 7.75%); Fee Disputes (10.5% and 4.4%); Claims by Parties Adverse in Interest (7.1% and 4.2%); Preservation/Non-Dissipation of Assets (3.6% and 3.4%); Pensions (2.5% and 3.4%) and Miscellaneous (15.6% and 7.9%).

thing, you're not responsible for the outcome of the case. I see this as the exact opposite – you have less liability not more.

The lawyers I interviewed and who responded to my survey were consistent in their explanations for why they believe their liability is reduced, including that their clients are more informed about the process, have a clear understanding of the service being provided, and a better appreciation for the challenges in the file (because they are responsible for the outcome and are working in collaboration with the lawyer). Lawyers report that clients also tend to be more satisfied with the service they received (see Table 2, above, where 59% of respondents cite “clients more appreciative” as a benefit of this practice model). As one survey respondent put it: “With unbundled clients... they're holding their own dispute – they are more empowered, they have a better sense of what needs to happen [and] they're grateful for the assistance they do get.” Another explained: “The client is more aware of what is going on with their matter, and why.”

Some lawyers expressed frustration with their sense that the regulators, professional associations and insurance providers were not doing enough to endorse and sanction these practice models. As one survey respondent put it: “Stop scaring us about what is against the rules and help us understand what we can do within the rules!”

This is not to say that providing unbundling and coaching services does not carry risks, that lawyers are not right to be concerned, or that they should not be cautious when delivering these services. There are unique challenges when it comes to providing limited services. Given what we know about LawPRO claims, the two main challenges described by 83% of respondents to my survey not surprisingly relate to inadequate investigation or discovery of facts flowing from communication issues with clients:

#### **Table 4**

**Although lawyers who provide unbundled services generally report being less worried about the risk of a negligence claim or a complaint to the regulator than those who do not provide these services, some lawyers continue to worry that offering services on a limited scope basis may increase their risk. What are the challenges of providing competent services when offering unbundled and/or coaching services? (Select all that apply)**

Answer Choices	Responses
Not knowing the full picture	85.37% 35
Investment of time to get up to speed	46.34% 19
No time to explore all issues/angles	56.10% 23
Client may not realize something is relevant	85.37% 35
May not have seen key piece of evidence	63.41% 26
Overlapping issues make unbundling difficult	51.22% 21
<b>Total Respondents: 41</b>	

That said, almost all of the lawyers I have spoken with report taking multiple steps to manage the risks relating to communication and fact-gathering (steps that full-service lawyers are also expected to take). According to 89% of respondents, the number one practice that can mitigate risk is preparation of a detailed, limited scope retainer, followed by 86% who suggest that lawyers ensure their clients understand the scope of that retainer, including what is and what is not included:

**Table 5**

**How can lawyers mitigate against the risks when providing these services? (Select all that apply)**

Answer Choices	Responses
Conduct thorough intake meeting	72.73% 32
Prepare detailed limited scope retainer	88.64% 39
Ensure client understands scope – what is included and what is not included	86.36% 38
Maintain clear communication at all times	81.82% 36
Amend retainer when scope expands	79.55% 35
Work to identify issues client may not realize are at play	79.55% 35
Document all conversations thoroughly	84.09% 37
Screen out inappropriate clients or cases	81.82% 36
Have clear understanding of professional rules re: limited scope retainers and communication with opposing counsel, service of documents, court appearances, etc.	75.00% 33
Do not agree to "pop in and out" of a file	59.09% 26
<b>Total Respondents: 44</b>	

## ***Meehan v. Good***

This submission would not be complete without a discussion of a recent Ontario Court of Appeal decision, *Meehan v. Good*<sup>44</sup>, which has generated understandable concern by lawyers in all practice areas regarding the delivery of unbundled services.

Briefly put, the facts of that case are as follows: Lawyer 1 was retained to assess the accounts of lawyer 2, who had represented the clients in a personal injury claim. The clients then brought an action against the lawyer 1, claiming that he owed a duty of care to advise them of the limitation period of a possible negligence action against lawyer 2. Lawyer 1 was successful in obtaining a summary judgment dismissing the action. The motions judge agreed that lawyer 1 did not owe a duty of care on the possible negligence action, since the clients had retained him only in relation to the assessment of lawyer 2's accounts. The Court of Appeal overturned the decision of the motions judge, because she did not "meticulously examine all of the relevant surrounding circumstances, including but not limited to, the form and nature of the client's instructions and the sophistication of the client."<sup>45</sup> This is the process that is required "to determine whether a duty is owed beyond the four corners of the retainer."<sup>46</sup>

Despite the fact that the Court of Appeal did not make a determination on the merits, the strong perception is that the decision in *Meehan v. Good* has undermined the legal value of a limited scope retainer and therefore created a significant setback for unbundling. This view is almost uniform among the lawyers I have spoken with about this decision, not just in Ontario but across Canada.

That said, having now also consulted with several lawyers who specialize in solicitor's negligence claims, it is my understanding that *Meehan v. Good* has not in fact altered the existing law in Ontario. The Court of Appeal was simply pointing out that the motions judge did not follow the process that has already been established by the courts (and has not been altered as a result of this decision), or that, if she did follow that process, she failed to explain her reasoning. The Court of Appeal sent the decision to trial for a review on the merits.

Given the deep level of concern about this decision, and in light of the vital public interest and access to justice principles at stake, it is important for the Law Society, (as well as LawPRO and the bar associations) to adopt a clear and strong leadership position that supports unbundling and legal coaching, and take concrete steps to create a culture that is conducive to the continued use and expansion of limited scope retainers.

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<sup>44</sup>*Meehan v. Good*, 2017 ONCA 103.

<sup>45</sup>*Ibid* at para 5.

<sup>46</sup>*Ibid*.

As I will now set out, there are several concrete steps the Ministry of the Attorney General, the Law Society, and other independent justice sector partners can take in this regard.

### ***Recommendations***

Based on my preliminary research and analysis, I propose that the Ministry of the Attorney General and the Law Society of Upper Canada – as well as other, independent justice sector partners – take immediate steps to increase access to family services for Ontarians, by implementing and expanding on the unbundling and legal coaching recommendations contained in Justice Bonkalo’s report. This must include:

1. Actively supporting and endorsing the expanded delivery of unbundled services and legal coaching by members of the family bar;
2. Ensuring these services are widely available to the public;
3. Ensuring the public is aware of the value and availability of these services; and
4. Collaborating with other legal institutions to achieve these goals.

My specific recommendations are as follows:

#### I. Recommendations for the Ministry of the Attorney General:

##### *A. Increase Awareness by the Public of Unbundled Services and Legal Coaching*

1. The Ministry of the Attorney General should launch a public education campaign to raise awareness about the availability of unbundled legal services and legal coaching;
2. The Ministry of the Attorney General should have information about unbundled legal services and legal coaching available on its website for the public; these materials should be available for download by both the public and lawyers, who could then easily adapt them, post them on their own websites, or incorporate them into their intake procedures etc.;
3. The Ministry of the Attorney General should educate all court staff, court connected mediators and Information Referral Coordinators (IRCs) about unbundled legal services and legal coaching, and train staff to provide referrals to local practitioners;
4. The Ministry of the Attorney General should ensure that the Family Law Information Centres have up-to-date rosters of unbundled and legal coaching practitioners, to help clients find local lawyers who will offer the services they are seeking;

## *B. Expand the Availability of Unbundled Services and Legal Coaching*

5. The Ministry of the Attorney General should work with an independent service provider to develop interactive smart forms for the most common family forms, which should be made available to the public without charge. Being able to direct unbundled clients to tools that will assist them in completing their documents on their own will facilitate the delivery of affordable unbundled services and legal coaching;
6. The Ministry of the Attorney General should provide space in the courts for practitioners willing to provide same-day unbundled and legal coaching services<sup>47</sup>;

## II. Recommendations for the Law Society:

### *A. Increase Awareness by the Public of Unbundled Services and Legal Coaching*

7. The Law Society should make detailed information about unbundled legal services and legal coaching available on its public website portal<sup>48</sup>;
8. The Law Society should expand its existing directory of lawyers (as part of the Lawyers Referral Service) to identify unbundled practitioners and legal coaches, and include detailed billing models and pricing options for clients<sup>49</sup>;
9. The Law Society should encourage licensees to inform new and potential clients about the availability of unbundled legal services and legal coaching;
10. The Law Society should educate Lawyers Referral Service staff about unbundled legal services and legal coaching, and train staff to provide callers with information about these services and refer them to the directory;
11. The Law Society should develop on-line and print resources for the public, in order to create awareness about the availability of unbundled legal services and legal coaching;

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<sup>47</sup> For example, family lawyer Stacy MacCormac in Cobourg, Ontario is prepared to offer these services: <<http://maccormaclaw.com/maccormac/wp-content/uploads/2016/08/law-times-april-11-2016.pdf>>.

<sup>48</sup> The Law Society of British Columbia has started incorporating information and resources on unbundling on its website: <<https://www.lawsociety.bc.ca/our-initiatives/legal-aid-and-access-to-justice/unbundling-legal-services/>>

<sup>49</sup> Some have suggested to me that the Law Society consider whether local rosters should be encouraged, in circumstances where local communities of practitioners wish to establish parameters on the delivery of these services. For example, I understand that there are family lawyers in Barrie Ontario who maintain a local panel, but members have agreed to an income threshold for unbundled services of \$75K/year. While I personally disagree that unbundled or coaching services should be denied on the basis of income, the development of local rosters may be necessary to generate buy-in from lawyers who would not otherwise want to be part of a directory of unbundled practitioners, or for other reasons, and should be considered. Local rosters may also facilitate buy-in from the local judiciary, and increase the likelihood they will refer SRLs to these resources.

12. The Law Society should work with the legal profession, including the OBA, Advocate’s Society and family bar associations, Legal Aid Ontario, the Family Law Information Centres, community legal clinics and self-help centres, the courts, public legal education organizations, law libraries and family lawyers [hereafter “the profession”], as well as trusted intermediaries in the community, to make these resources broadly available on-line and in print;

*B. Expand the Availability of Unbundled Services and Legal Coaching*

13. The Law Society should encourage licensees to offer unbundled legal services and legal coaching to clients to help reduce costs, where appropriate;
14. The Law Society should educate licensees about the benefits of unbundling and legal coaching for lawyers, and profile members of the bar who are taking leadership on the delivery of these services;
15. The Law Society should create detailed practice management guidelines on limited scope services, treating it as a new business model that requires training and encouragement;
16. The Law Society should continue to expand continuing legal education opportunities in unbundling and legal coaching at a nominal charge, ensure these programs are eligible for professionalism credits, and strongly encourage licensees to take these programs;
17. The Law Society should consider the feasibility and desirability of creating a mandatory certification program for lawyers who wish to provide unbundled or coaching services;
18. The Law Society should provide financial incentives (e.g. fee discounts) for lawyers who complete training programs in unbundled legal services and legal coaching and provide these services to clients;
19. The Law Society should propose that the Rules Committee consider creating a special form that unbundled lawyers appearing in court can present to the judge, to set out the scope of their retainer<sup>50</sup>;
20. The Law Society should create unbundling and legal coaching resources including sample retainer agreements, a guide to best practices, and other practice materials and tools to support the delivery of limited scope services<sup>51</sup>;

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<sup>50</sup>Some lawyers I have interviewed report that judges do not appear to understand or in some cases do not respect the limits of their retainer agreement with their limited scope clients. In Ontario, Rule 15(4) states: “Subrule (3) permits a party to be represented by a lawyer acting under a limited scope retainer, but a limited scope retainer does not, in itself, make a lawyer the lawyer of record for the party.” Concerns about the level of awareness of judges is a barrier that prevents some lawyers from being willing to attend at court for unbundled clients.

<sup>51</sup>These kinds of materials are already available from LawPRO, Mediate BC’s Family Unbundled Legal Services Project and other justice sector organizations. As part of this project, I will be developing a legal coaching curriculum that will also include resources and tools for lawyers. The Law Society should evaluate and, where appropriate, modify the resources that are already in circulation, and take on responsibility for maintaining, expanding and sharing these materials.



21. The Law Society should actively support the development of unbundled and legal coaching billing alternatives (e.g.: flat fee billing), and provide guidelines and precedents for retainer clauses and fee schedules;
22. The Law Society should develop benchmarks for the delivery of unbundled services and legal coaching in family law, collect statistics on that delivery (using members' annual reports), and develop evaluation tools to assess the benefits and limits of these service models from the perspective of both lawyers and clients;
23. The Law Society should use this evaluation data to develop evidence-based best practices and identify further research needs;
24. The Law Society should gather statistics on the number of complaints against family lawyers arising out of limited scope retainers, and the success of those claims relative to others, and make that information widely available to licensees so they can make informed decisions about the risks of these service modes;
25. The Law Society should create a staff position dedicated to the implementation of these recommendations. The individual in this role would coordinate and liaise with the Ministry of the Attorney General and other justice stakeholders, drive toward the development and sustainability of a legal coaching culture in Ontario, and create new programs and partnerships that will increase awareness of these practice models by lawyers and members of the public;

### III. Recommendations for Independent Justice Sector Partners:

#### *A. Increase Awareness by the Public of Unbundled Services and Legal Coaching*

26. The OBA, the Advocate's Society and the family bar associations should work with justice sector organizations to ensure all front-line legal service providers are educated about unbundled legal services and legal coaching, and can provide the primarily self-represented litigants with information about these practice models and local providers;
27. Public legal education and information organizations should educate "trusted intermediaries" in the community about unbundled legal services and legal coaching, and train them to provide the primarily self-represented with information about these practice models and local providers;
28. The National Judicial Institute should ensure judges are educated about unbundled legal services and legal coaching, including about the benefits to the public, the judiciary and the justice system as a whole, as well as the fact that a limited scope retainer does not, in itself, make a lawyer the lawyer of record for a party<sup>52</sup>;

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<sup>52</sup>Mediate BC's Family Unbundled Legal Services Project is currently developing brochures for judges in all three courts in that province that can be modified for use in other provinces and nationally.

29. The National Judicial Institute, the Canadian Judicial Council, the Chief Justices of Ontario and other senior members of the judiciary should encourage judges to support the private bar in delivering limited scope services, speak out in favour of limited scope services, and encourage colleagues to provide primarily self-represented litigants in their courtrooms with information about these practice models and local providers;

*B. Expand the Availability of Unbundled Services and Legal Coaching*

30. The OBA, the Advocate’s Society and the family bar associations should formally endorse the delivery of unbundled services and legal coaching, distribute information about the benefits of these practice models for lawyers, and profile members who are taking leadership on the delivery of these services;

31. The OBA, the Advocate’s Society and the family bar associations should offer continuing legal education opportunities in unbundling and legal coaching at a nominal charge, and strongly encourage members to take these programs;

32. The OBA, the Advocate’s Society and the family bar associations should encourage members to advertise on directories of unbundled practitioners and legal coaches, and to include details about their billing models and pricing options for clients when included as part of those directories;

33. The OBA, the Advocate’s Society and the family bar associations should assist family lawyers with the development, marketing and promotion of limited scope services;

34. The OBA, the Advocate’s Society and the family bar associations should actively support the development of unbundled and legal coaching billing alternatives (e.g.: flat fee billing), and profile members who are taking leadership in developing alternative billing structures;

35. The OBA, the Advocate’s Society and the family bar associations should work collaboratively to institutionalize the delivery of unbundled services and legal coaching in family law. This might include: creating special committees or sections on unbundling and coaching; creating executive positions within these organizations designed to promote unbundling and legal coaching; facilitating the development of professional networks of unbundled lawyers and legal coaches for peer support, the sharing of business practices and resources, and the development of standards of practice; and creating a discrete association devoted to these practices;

36. Legal Aid Ontario should integrate the principles of unbundling and legal coaching into the delivery of legal aid services, where appropriate. This may include using coaching principles to extend certificate hours, providing coaching certificates, creating rosters of trained legal coaches, and creating public legal education programs for primarily self-represented litigants<sup>53</sup>;

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<sup>53</sup>BC’s legal aid provider, the Legal Services Society, integrates coaching principles into its Family LawLINE.

37. LawPRO should publish and widely share the statistics it gathers on the number of negligence claims against family lawyers arising out of a limited scope retainer, and the success of those claims relative to others;
38. LawPRO should provide financial incentives (e.g. policy discounts) for lawyers who complete training programs in unbundled legal services and legal coaching;
39. Law schools should include information and training about how to offer unbundled legal services and legal coaching in the core curriculum;
40. Law schools should develop a practical course in how to develop a viable family law practice that includes practice management tools for unbundling and coaching;
41. Law schools should develop experiential learning opportunities to expose law students to these practice models prior to graduation;
42. Law schools should consider offering a certificate in legal coaching, along the lines of programs currently offered in negotiation, mediation and conflict resolution.

### ***Conclusion***

I strongly believe that limited scope services such as unbundling and legal coaching have the potential to significantly expand access to the family justice system for large numbers of Ontarians who would otherwise go without any legal advice or representation. A hybrid of unbundling and coaching services that is driven by a client's capacity, need and budget offers the single best alternative to full representation. That said, until the public is made aware of the existence of these services, and until the legal profession offers a clear and resounding endorsement of these practice models, family lawyers will continue to be understandably reluctant to invest in these relatively new models. Leveraging the potential of limited scope representation as an access to justice tool requires nothing short of the commitment and leadership of all justice sector players, and a shared, multi-pronged and systemic approach to expansion.