

Unbundled Legal Services Today—and Predictions for the Future

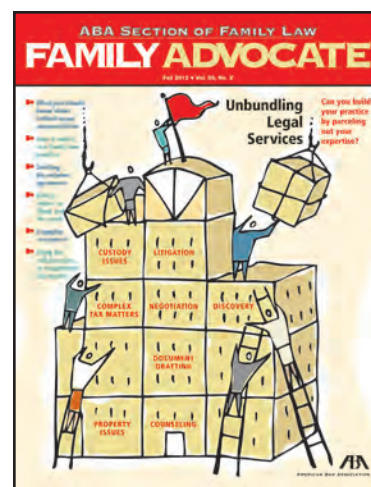
BY FORREST S. MOSTEN

Unbundling is not a new concept. Essentially, unbundling is an agreement between the client and lawyer to limit the scope of services that the lawyer renders. There are numerous replicable models of lawyers successfully unbundling their services to increase legal access. Unbundling can be either vertical or horizontal. Vertical unbundling breaks up the lawyer's role into a number of limited legal services, empowering the client to select only those needed. Horizontal unbundling limits the lawyer's involvement to a single issue or court process.

Examples of vertical unbundling include:

- **Advice:** If a client wants advice only, advice can be purchased at an initial consultation or throughout the case as determined by the client with input from the lawyer. The lawyer and client collaborate in helping the client decide if and when further consultations may be needed in the case.
- **Research:** Based on the lawyer's advice if the client wants legal research, a personal or telephonic/Web unbundled service provides this legal information. Research may take as little as fifteen minutes or as much as ten hours. The client is in charge of determining the scope of the job and who will do the work: the lawyer, the client, or a negotiated collaborative effort between the two.
- **Drafting:** Lawyers can ghostwrite letters or court pleadings for the client to transmit or review and comment on documents the client has prepared, or be engaged only to send a letter on behalf of the client on law-firm letterhead.
- **Negotiation:** The lawyer can teach the client how to negotiate with his or her spouse or the spouse's lawyer directly in preparation for mediation or a settlement meeting. Or the lawyer can be engaged to conduct negotiations on behalf of the client.
- **Court appearances:** If a client desires, an unbundled lawyer can convert to full representation for court appearances, hearings, and mediation. At the other end of the spectrum, lawyers can provide collaborative-law representation in which the lawyer provides all services related to the case, *except* representation in court, from which the lawyer would be disqualified under the terms of a collaborative law agreement.

In horizontal unbundling, the lawyer may be engaged for a single issue of spousal support only, and the client will either represent himself and/or engage another representative to handle all other issues. In the same way, a lawyer might represent a client in a single hearing on temporary child custody, but the client will represent herself at subsequent hearings on child custody or at trial on all issues. Lawyer and client are in charge of determining the scope of representation and in unbundling in friendly jurisdictions, the court and other party are required to honor that lawyer-client decision. See National Center for State Courts at www.ncsconline.org for a state-



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by-state listing of unbundling laws across the country.

The limitation of legal services based on informed consent and a written agreement is permitted in every state and in many Western countries. See ABA Model Rule 1.2(c). Every consultation with a lawyer that goes no further is an unbundled service. “Second opinions” are classic unbundled services. A lawyer can limit the scope of the representation to review and comment on the work of another lawyer, but may do no more. Every time a lawyer writes a single letter, instead of three possible letters, or makes several phone calls, the services are limited and thus unbundled.

Benefits for family lawyers

Unbundling meets the needs of many of us who choose family law practice to directly offer our clients personal help through some of the most difficult situations in their lives. An unbundled practice also gives lawyers a sense of control over their lives, free from deadlines imposed by courts and opposing counsel.

Unbundling also can reduce the risks of malpractice claims and bar complaints. High fees resulting from the need to practice defensively as a full-service attorney creates an economic barrier that may be beyond the ability of many clients to pay. Such defensive postures create the circular route of high insurance costs, high fees, high receivables, negative attorney-client relationships, high client dissatisfaction, and the resulting malpractice claims. Since unbundled clients often pay as they go, those of us who practice unbundling often are paid in full and on time—reducing receivables and giving us a sense of financial satisfaction.

In addition to being viewed as overpriced, lawyers are often perceived as evil parasites feeding on family trouble. In the 1994 ABA Study on Self-Representation in Divorce, Bruce Sales and Connie Beck found that more than 50% of people who were self-represented could afford a lawyer but didn’t want one for two main reasons. First, lawyers were seen as disempowering spouses by superimposing their own values and control, rather than customizing a solution for the family. Second, lawyers were seen as deal wreckers, rather than problem solvers, often making a bad situation worse.

In just under a quarter of a century, unbundling has blossomed into a powerful force in the delivery of accessible family legal services. Almost every state has some form of legislation or professional rule on limited-scope representation, and family lawyers offer unbundling in myriad roles (http://www.americanbar.org/groups/delivery_legal_services/resources.html). Some examples of family-law unbundled services offered in various types of communities throughout the country include:

- **Limited-scope legal services for pro se litigants.** These lawyering roles can be offered to new and existing clients who come in expecting full-service representation or can be marketed directly to referral sources and the public. Such limited services may include legal consultations, ghostwriting of documents and letters, negotiation and drafting, and/or court appearances. Lawyer can be available in the law office, by e-mail, Skype, or other medium. See Stephanie Kimbro, *Serving the DIY Client: A Guide to Unbundling Legal Services for the Private Practitioner* (ABA 2010).
- **Collaborative representation with lawyers only or with an interdisciplinary team.** Many family lawyers have joined collaborative practice groups (see www.collaborativepractice.com) and have chosen to limit their practices to this limited-scope form of practice or have added it to their existing service offerings, which include litigation. See Pauline Tesler, *Collaborative Law* 2d ed. (ABA Section of Family Law 2008), and Forrest S. Mosten, *Collaborative Divorce Handbook* (Jossey-Bass 2009). Collaborative family lawyers receive referrals from mediators, mediation parties, therapists, and financial professionals.

Due to consumer education and demand, by 2032, law firms of all sizes will be proactively offering unbundled services in all areas of law and to clients of all demographics

- **Limited-scope representation of mediation parties, both as shadow legal coaches and in the mediation room.** The need for counsel in mediation to prevent post-mediation remorse is underscored by the number of litigation actions that follow mediated settlements. See James Coben and Peter N. Thompson, “Disputing Irony: A Systematic Look at Litigation About Mediation” (Spr. 2006) 11 *Harv. Neg. L. Rev.* 43. Many family-law litigants might try mediation if they were offered the guidance and protection of a family lawyer who would unbundle services to represent them only in mediation. Such representation could be to review tentative agreements, summary agreements, and final documents and provide negotiation strategy for parties who want to mediate without lawyers in the room. Another option to prevent an impasse is for limited-scope lawyers to attend sessions with their clients and, if the matter does not settle, be available for litigation later.
- **Preventive legal and conflict wellness education.** Family lawyers and courts are offering unbundled conflict-preventive education (information for true informed consent) in a variety of contexts. In Los Angeles, the presiding judge of the Family Department of the Superior Court sends a letter to all litigants urging the use of mediation, collaborative law, and negotiation. The Executive Committee of the Los Angeles County Bar Family Law Section has endorsed the use of unbundled legal services, and attorney Jeffrey Hughes operates a cafe, Legal Grind, that offers cappuccino and weekly lectures on family law topics.

Lawyers also can offer unbundled preventive services in their own practices. Just like a dentist who sends out reminder postcards for you to get your teeth cleaned, lawyers can offer asymptomatic reminders to enforce executory provisions of settlements, such as the deferred sale of a residence or a scheduled assessment of a parenting plan. They can offer a dispute resolution protocol that requires parties to talk directly with a therapist or a mediator before filing future court actions. Unbundling is a mindset that can help clients prevent future conflict.

Predictions for unbundling in 2032

I believe strongly that unbundling is the future of family law practice. Following are my predictions for what will occur within the next twenty years.

- I. Clients will demand unbundling from lawyers and routinely consider handling parts of their legal work themselves.** With consumer use of collaborative law, mediation, and other client-centered services, I predict that the first call of a person in legal trouble will more often be to a peacemaking family lawyer willing to offer unbundled as well as full-service representation. By 2032, forty years of unbundled legal models in practice and supported by public policy and that of the legal profession will have earned the respect and confidence of the public so that limited-scope services will be a top process choice of both consumers and recommending professionals.
- II. Unbundling-friendly legislation, cases, and court rules will be enacted in most states.** The Australian Family Law Court has revolutionized the use of language to promote peacemaking services by labeling mediation, conciliation, collaborative law, and negotiation as primary dispute resolution and has relegated top-down services, such as litigation, arbitration, and evaluation, to alternative dispute resolution (ADR).

In the same way, just as the Uniform Collaborative Law Act requires informed consent by clients about other dispute resolution processes, I predict that by 2032, all lawyers will be required to discuss unbundling options with clients *before* signing a full-service engagement contract.

By 2032, a significant portion of the family law bar will eschew litigation and full-service lawyering and completely fill their professional time with direct, profitable client-peacemaking work, such as unbundled professional services

As bar associations and legislatures determine that further public-policy incentives are needed to encourage unbundling, by 2032, I predict that some or all of the following will be enacted:

- States will publish and make available in every courthouse, consumer friendly brochures describing unbundling.
- Lawyers who offer unbundled services will receive discounts on bar association dues.
- Lawyers who offer consumer-education materials and establish client libraries will receive credit hours for continuing legal education and other state bar benefits.
- Malpractice insurance carriers will offer premium discounts to lawyers who offer unbundled services.
- Courts and legislatures will fund and promote mandatory education for litigants that will include unbundling services offered inside and outside the courthouse.
- Court personnel (including judges and clerks) will be trained to help court users identify and take advantage of unbundling resources in the community.
- Courts, legislatures, and other governmental bodies will have established sophisticated programs of generic advertising and consumer education for public and professional understanding and use of unbundling.

III. Unbundling will be incorporated into the mainstream of the legal profession with bar association and law society sections and task forces supporting it and making it an explicit part of the rules of professional conduct. The momentum built by the ABA Model Rule 1.2(c), approving unbundling as ethical law practice (if based on informed consent), will lead to even more supportive professional rules of conduct on the national and state levels. Just as Texas has already established a separate state bar Section on Collaborative Practice, unbundling will earn its own section elsewhere as well. Just as the Law Society of New South Wales has developed a specialization in dispute resolution (in addition to substantive areas, such as family law), most bar associations will develop similar specialization programs that will include unbundling by 2032.

IV. Law schools and bar examiners will incorporate unbundling as part of professional education curriculum and requirements for licensure. To prepare future lawyers, every law school will have at least a survey course on legal access that will include unbundling. Most schools will have upper-level courses and clinics in unbundled legal services and advanced courses in traditional subject areas (family law, trial advocacy, and client counseling) that will feature modules of limited-scope representation. See findings of the Family Law Education Reform Taskforce at <http://flerproject.org/>.

V. Mediators will recommend unbundled legal assistance to parties as part of their customary mediation protocol. Today, mediation training rarely includes the use of unbundled lawyers. By 2032, I predict that the synergy between mediation and unbundling will be a permanent part of family law practice.

Despite the high numbers of self-represented litigants, mediation is often not selected by pro se litigants due to a lack of knowledge about the benefits of the process and/or their fear of participating in mediation without the assistance of an attorney. Since attorneys are viewed as either unaffordable or deal breakers, many self-presenters forgo mediation and try to go it alone.

A partnership between mediation participants and unbundling family lawyers will be forged in the years ahead. In addition to offering coaching services to

pro se litigants during litigation, more family lawyers will complete mediation training and use that knowledge to offer and market their availability as a mediation coach to parties on a limited-scope basis. Mediation parties will benefit from a lawyer's help in selecting the right mediator, understanding the nuances of the mediator's contract, preparing for opening statements and setting an agenda, formulating negotiation strategy, and in reviewing and offering revisions to documents drafted by the mediator. If, at any time, mediation parties want the advice and support of an attorney during the mediation session, lawyers can offer that assistance on an unbundled basis, without entering a general appearance as counsel of record.

In the same way, in setting up mediations with unrepresented parties, in addition to generally discussing the role of lawyers, mediators will routinely inform the parties about lawyers who can help them on a limited basis and who will not charge a large initial retainer to perform these important services

VI. Client-informed consent will require a discussion of the option of unbundling by attorneys before full-service engagements can be initiated. In many states, lawyers are now required to discuss ADR options before initiating litigation. In collaborative practice, lawyers are required to compare the benefits and risks of collaborative law with other processes (including litigation) before the client signs a binding agreement. By 2032, the family lawyer will have a duty to provide informed consent about the scope of representation, including information about limited-scope representation, a sample limited-scope attorney contract, and the comparison between unbundling and full-service representation. The client's understanding of this information will be required.

VII. The poor and underserved populations will routinely use unbundled legal services, which also will be a standard feature of publically funded and nonprofit legal service programs with attorneys specializing in coaching and client education. Approximately 50% of pro se litigants cannot afford to hire a full-service lawyer. For these people, unbundling is not just an informed choice—it may be their only option to get legal help for their family legal problems. For the poor, it is involuntary unbundling. Unlike many educated, middle-income unbundling clients, many poor litigants do not have the tools or capacity to represent themselves effectively, even with some limited legal assistance.

Due to budget cuts in legal service programs and restrictions on handling family law matters, neither lawyers nor modest-means clients have the full-service option. By 2032, models, such as the nonprofit model of Levitt and Quinn in Los Angeles (www.levitt-quinn.org), will proliferate. Located in a diverse lower-income neighborhood near the courthouse, pro se litigants line up around the block for a \$75 coaching session at which the participants are helped to fill out necessary court forms. The litigants then go to court themselves. Levitt and Quinn holds regular unbundling training programs for its staff and volunteers, to which the wider family-law community is invited.

VIII. Unbundling routinely will be used outside of family law, and most law firms will train their associates in unbundling perspectives and skills. Today, there are incipient unbundling projects outside of family law, both on the Web and in brick-and-mortar models. See Stephanie Kimbro, *Limited Scope Legal Services*, 2010, for descriptions of Koncision Contract Automation for business contracts, www.MyLaw.com, and www.DirectLaw.com, as well as the author's own virtual unbundled estate-planning practice.

Due to consumer education and demand, by 2032, law firms of all sizes will be

proactively offering unbundled services in all areas of law and to clients of all demographics. These services will be offered by unbundling-only firms as well as by firms that still offer a menu of both full and limited-scope services.

IX. Lawyers who unbundle will routinely offer clients unbundled-preventive legal services to improve future relationships and prevent future conflicts. Unbundling was conceived to give limited legal help to people involved in resolving current disputes and conflicts. The future unlimited marketplace for unbundling is a preventive approach that will be used symptomatically and asymptotically. See Thomas D. Barton, *Preventive Law and Problem Solving*, 2009.

Symptomatic preventive planning is using the experience, pain, and cost of recent legal angina to motivate clients to consider ways to avoid similar problems in the future. Asymptomatic legal prevention means working with clients to probe legal soft spots and take steps to prevent future conflict when no dispute is currently raging. See Forrest S. Mosten, "Lawyer as Peacemaker: Building a Successful Law Practice without Ever Going to Court," 43 *Fam. L.Q.* 3, 2009.

As standard practice in 2032, unbundling lawyers will recommend and schedule meetings and assessments with parties who have an ongoing relationship. Building on the success and public acceptance of unbundling services to handle divorces and other family conflicts, families will seek this approach in working out premarital and cohabitation agreements; forming a business partnership; planning an open, surrogate, or stepparent adoption; gearing up for a construction project; or other matters involving continuing relationships. To support this preventive role, more family lawyers will establish client libraries in their offices to offer preventive client education. A client library is a collection of consumer-friendly books, DVDs, audiotapes, brochures, and other resources. It can become the clients' home in the family lawyer's office in which clients draft their own documents, make private telephone calls to family members or other supportive persons, or just have a private cry. See Forrest S. Mosten, *Collaborative Divorce Handbook*, p. 180–81, and Forrest S. Mosten, *Mediation Career Guide*, supra, p. 110–13.

Lawyers also will routinely offer clients an asymptomatic legal-and-conflict-wellness checkup (for the checkup I use, see <http://www.mostenmediation.com/legal/wellness.html>). In offering this checkup, lawyers unbundle their advisor role from their provider role. For example, in asking a client, "Are you adequately covered by life, vehicle, liability (both personal and professional), disability, umbrella, and other insurance?" the lawyer is inquiring about the client's legal health, but is probably not a provider of life insurance.

X. Lawyers who offer unbundled services will more often be full-time peacemakers and refuse engagements involving adversarial litigation. Because unbundling has not yet developed into a critical mass of profitable practice, most limited-scope family lawyers still litigate matters most of the time, despite the growing number of professionals who devote themselves to full-time peacemaking. (See Nancy Cameron, *Collaborative Practice: Deepening the Dialogue* (Law Society of British Columbia, 2004).

By 2032, a significant portion of the family law bar will eschew litigation and full-service lawyering and completely fill their professional time with direct, profitable client-peacemaking work, such as unbundled professional services. Consumers will be offered two basic choices of family lawyers: (1) those who offer full-service litigation services (perhaps also some limited-scope work as well), and (2) those family lawyers who specialize in noncourt nonadversarial limited-scope

services. Both types of family lawyers will be required to complete ongoing legal education in substantive family law. However, just as good trial lawyers require specialized training, unbundling family lawyers will focus their training and practice on the skills and trends necessary to ensure competent and up-to-date unbundled peacemaking services.

25 Tips for Starting an Unbundled Peacemaking Practice...or Incorporating Unbundling Into Your Current Practice

1. Commit to legal access and a consumer approach.
2. Commit to learning the concepts, law, skills and craft of unbundling.
3. Commit to making your living through noncourt unbundling work.
4. Draft and vet a mission statement for your unbundling practice.
5. Draft and vet a business plan for your unbundling practice.
6. Pencil out your profitability. Illustration: If you charge \$150 per hour and believe that you can bill and collect two unbundled or peace-making hours per day, four days a week, for 50 weeks per year, you could anticipate \$60,000 gross income. With 30% anticipated income, your adjusted gross would be \$42,000. With this anticipated base, you could calculate what additional non-unbundling legal work (if any) you would need to pay your living expenses and how much more marketing you would need to do to increase your income.
7. Reflect and continually re-evaluate: How is my plan working; how can I improve?
8. Study law practice management books, particularly Jay Foonberg's, *How to Start and Build a Law Practice*, 5th Edition (ABA 2005).
9. Select an area for your practice that has an underserved population. While it is better to live in the community where you practice, be prepared for a substantial commute to your practice in a geographical area with a shortage of lawyers, particularly lawyers who unbundle.
10. Be clear about the services you are offering. Inventory your current services and think about what limited-scope services you are already offering and let your clients know about them.
11. Be prepared to accurately and succinctly explain the option of unbundling and its benefits and risks to those clients that ask for full service.
12. Be alert to the ethical and malpractice risks of unbundling and be prepared to explain and handle them.
13. Invest the time to prepare unbundling-friendly client handouts and practice materials.
14. Do an unbundling impact study on your website, firm brochure, and other marketing materials to make sure that you inform prospective clients of the unbundled services you offer.
15. Prepare a script for your staff to handle unbundling inquiries from clients on the telephone or from website messages.
16. Install Skype and arrange for conference call telephone service to provide long-distance unbundled services.
17. Refine your assessment screening to make sure that clients are appropriate candidates for unbundling.

18. Always use a current written unbundled client-lawyer limited-scope engagement agreement.
19. Clarify your fee requirements and make sure that your limited-scope clients do not owe you money as this situation only hurts your client relationship and your willingness to render further services to the client in need.
20. Design your office to be unbundling friendly with a client library that provides information and education to do-it-yourself clients.
21. Initiate an evaluation protocol to assess client satisfaction.
22. Let other lawyers in your community know that you unbundle and are willing to handle referrals of clients they will not take.
23. Assemble a board of advisors to meet at least four times a year to guide and evaluate your practice development.
24. Be proactive in finding and utilizing unbundling role models and mentors.
25. Attend unbundling trainings and conferences—even if you must travel.

This list is reprinted from "Ask the Experts," AFCC News, April, 2010. Reprinted with permission.

Take the Quiz Is Unbundling Right for You?

The first step in unbundling is to take the unbundling mindset quiz. Take a few minutes to review how offering unbundled/discrete task/limited scope/coaching legal services matches your personality and professional values and goals.

- I want to spend more time in direct contact with clients and less time interacting with lawyers on the opposing side or in the courtroom.
- I am able to give up the control of doing the legal work myself and am comfortable helping clients who do most of the work on their own.
- I am flexible in changing roles with clients and even adapting to new roles requested by the client (roles that do not conflict with my own professional or personal ethical boundaries).
- I am willing to accept payment for current work only and begin an engagement without an advance retainer or deposit.
- I like having people get the help they can less "unafford."
- I am able to watch clients take my sound advice and make poor or self-destructive decisions—and am willing to help them pick up the pieces and try to make lemonade out of lemons.
- I like to teach clients skills and concepts that will make their cases go better—and maybe even improve their lives.
- I like to prevent problems from ripening into conflict.
- I like to reduce my billing load and work on more of a cash-and-carry basis.
- I like to have more control over my life and not have to cancel vacations or work nights and weekends.
- I am willing to try new approaches that are different than the way I currently practice or even different from the way I was trained.
- I like working with people who like to shop for bargains.

- I am willing to work with people who may have a high mistrust or disregard for lawyers
- I am willing to work with people who have mucked up their legal rights and/or case strategy so that the best that can happen is cutting a loss, rather than gaining a win.
- I want to provide clients with space in my office to do their own background reading, watch helpful videos, do their own legal research, prepare their own work, or just relax and calm down.

Reprinted with permission from Forrest S. Mosten, *Unbundling Legal Services* (ABA, 2000).

Top 10 Tips for Using An Unbundled Approach

- 1. Let clients know that you unbundle.** Tell clients in the first meeting or even on your website that you are available and enjoy helping them on a limited-scope basis: you will meet for short sessions (30 minutes), by telephone or Skype rather in person; or can help them for just one issue (summer vacation) or task (ghost-writing letters to their parenting partner).
- 2. Before a client signs up for full service, offer a comparison with an unbundled approach. Information is the essence of client informed consent.** Compare and contrast a full-service approach with limited services by discussing the benefits and risks of an unbundled approach using the following variables: clients' ability or willingness to handle part of the work themselves, the difference in stress, cost differential, and the ability of the client to later convert to a full-service approach after starting on a discrete task basis.
- 3. Offer stand-alone orientation services.** Unbundle your role as a client educator from that of a service provider. Develop services that can inform divorcing parents individually or together about the legal or parenting issues and available process options in your community—then refer the clients to others rather than providing the services yourself.
- 4. Turn your office into a divorce family classroom.** By creating a client library with DVDs and computerized information, handouts, and access to community resources, you can empower clients' informed decision-making by giving them information to help themselves or keep their costs down within a full-service context.
- 5. Be a shadow coach.** Clients appreciate having you prepare them for negotiations with the other party at Starbucks or a court mediation session and having you available on-call if they need your ideas, advice, or support during the session itself. Your involvement can remain confidential so that the client can get your help without provoking or frightening the other party.
- 6. Attend sessions as a consultant.** As a professional trained and supportive of mediation and collaborative law, you can attend sessions as a client resource rather than an advocate.
- 7. Limit your services to conflict management.** Some matters are not yet agreement-ready, and clients may need help to gather information, handle immediate issues, or locate/engage other experts. Be available for these pre-settlement tasks and be open to the client's utilizing another mediator or representative to actually negotiate the deal when the time is ripe.

- 8. Endorse confidential mini-evaluations (CME).** Put as many barriers as possible between the family and the courthouse—and still get the necessary expertise and recommendations to resolve an impasse. Offer CMEs within the mediation and collaborative processes and recommend the use of CMEs with other neutrals when you already have another professional role.
- 9. Suggest and offer second opinions.** Oncologists often insist that their patients obtain a second opinion before commencing or continuing treatment. So should we. Make such unbundled second-opinion recommendations a standard part of your practice and consider offering second opinions yourself.
- 10. Be an unbundled preventive-conflict wellness provider.** After successfully resolving a family conflict, conduct an unbundled future conflict-prevention consultation to discuss methods to resolve future disputes, regular parenting meetings, and options to monitor and avoid future family conflict. Helping clients maintain family-conflict wellness may be the most important contribution that we make to the divorcing families we serve.

Forrest (Woody) Mosten is internationally recognized as the “Father of Unbundling” for his pioneering work in limited-scope and discrete-task services to provide affordable and understandable legal services to families. He is a Certified Family Law Specialist and Mediator in Los Angeles, for which unbundling and other nonlitigation activities are the foundation of his family law practice. He is the author of four books and numerous articles about unbundling and other issues of legal access and peacemaking. He serves as a keynote speaker for legal conferences worldwide and is an adjunct professor of law at the UCLA School of Law. He has served on the ABA Standing Committee for the Delivery of Legal Assistance, the ABA IOLTA Commission, and has received the ABA Louis M. Brown Lifetime Achievement Award as well as the ABA Lawyer as Problem Solver Award for his contributions to unbundling and legal access. He can be reached at www.mostenmediation.com.