Ethical Implications of Ghostwriting

Maggie Ramsey, April 20, 2012

I. Introduction

With the status of the American economy and unemployment rate, it is no surprise that many parties to actions like marital dissolutions and mortgage foreclosures are seeking ways to curb their legal fees. In fact, an increasing number of litigants are representing themselves without counsel, or proceeding *pro se*, in cases involving home foreclosures, domestic relations, housing matters, and consumer issues.[1] Over the course of the past twenty years, courts in many jurisdictions have shifted from those where litigants were predominately represented by lawyers to those where more parties proceed on their own in divorce tribunals than seek legal representation.[2] The growth of *pro se* litigation can be attributed to the high cost of litigation, anti-lawyer sentiment, and the advent of do-it-yourself law kits, books, and web sites.[3] For example, in family courts, people with moderate incomes are turning to self-representation to gain access to the courts to obtain a divorce. Particularly, litigants who are without children, without real estate or substantial personal property, who have been married less than ten years, and who previously represented themselves in other actions are more likely to represent themselves.[4]

Many lawyers have been or will be faced with *pro se* litigants who want to pay the lawyer to write court papers or pleadings for a flat rate, without making an appearance in court or disclosing his or her involvement to the court or opposing counsel. Many lawyers, believing they can ethically restrict the extent of their representation to assisting with drafting pleadings or

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[1] Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship-A Legal Crisis and Its Solutions*, 45 Fam. L.Q. 45 (2011).
[2] Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 Fam. L.Q. 407, 408 (1994) (quoting *Responding to the Needs of the Self-Represented Divorce Litigant*, ABA Standing Comm. on the Delivery of Legal Serv.s 5 (1994)).
[3] Jona Goldschmidt, *In Defense of Ghostwriting*, 29 Fordham Urb. L.J. 1145 (2002).
[4] Yegge, *supra*, at 409.

answers, have agreed to help *pro se* litigants. In fact, lawyers are allowed by Model Rule of Professional Conduct 1.2(c) to reasonably "limit the scope" of their representation of clients.[5] This may seem ideal to an attorney who does not wish to establish an attorney-client relationship or offer full service to clients. It also seems to work well for those clients who do not have the money to hire an attorney for representation in a divorce, custody, foreclosure, or other common proceeding. A lawyer who undertakes representation that is limited in scope is providing what are known as "unbundled" legal services—that is, representation in which lawyer and client agree that the lawyer will represent the client in a specific transaction without assuming any general duties to the client outside of assuring the adequacy of the relevant documents.[6]

Although the unbundling of services may seem to work well for both the attorney and client, there are a number of cases and ethics opinions which have recently been issued examining whether lawyers may unbundle their services in a particular manner. Specifically, these authorities have considered the propriety of lawyers who write court papers for a *pro se* litigant without disclosing his or her involvement to the court or opposing counsel. That practice is known as "ghostwriting." This paper focuses on the contrast in approaches to the issue of ghostwriting by the American Bar Association (ABA), state ethics panels, and federal and varying state courts. It will examine some of the contrasting authorities which have either condemned or allowed the practice of ghostwriting along ethical lines.[7] Lastly, it will provide guidelines to lawyers faced with the prospect of being paid to ghostwrite pleadings or other papers that will be submitted to the court.

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[5] Model Rules of Prof'l Conduct R. 1.2 (1983).
[6] *See id.*; *see also*, e.g., *Lerner v. Laufer*, 359 N.J. Super. 201, 218, (App. Div. 2003).
[7] *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978); Comm. on Prof'l and Judicial Ethics, Ass'n of the Bar of the City of N.Y., Formal Op. 1987-2 (1987); Comm. on Prof'l Ethics, N.Y. State Bar Ass'n, Op. 613 (1990); Ethics Comm., Alaska Bar Ass'n, Ethics Op. 93-1 (1993); Ethics Comm., N.C. State Bar, RPC 114 (1991); Prof'l Conduct Comm., Ill. State Bar Ass'n, Op. 849 (1983).

II. Ghostwriting: An Outline of Potential Ethical Issues

Imagine that a lawyer named Kate works for a small law firm. One night after work, a family friend calls Kate and says she and her husband are going to divorce. She does not have enough money to obtain a lawyer, so she plans to represent herself but needs help writing the pleadings and other court documents. The friend and her husband have no children and do not own any property besides a small house, which was paid off several years ago. They want to go forward in the divorce as amicably and inexpensively as possible. The couple has agreed to sell their home and divide the proceeds. Kate really wants to help her friend and believes it will not take too much of her time. However, she knows that her firm would not take a case like this, even though Kate has ensured that there are no conflicts of interest. She also does not want to get involved with the legal and ethical strings that would attach to an attorney-client relationship with her friend. Without disclosing her identity to the court or to the husband's attorney, Kate decides to draft pleadings in which her friend can file *pro se*. Kate writes the documents after work and gives them to her friend and reminds her that she will not personally get involved with or appear before the court. Kate is a ghostwriter. Part II of this paper briefly defines ghostwriting and outlines the key ethical issues involved in the practice.

A. Ghostwriting Defined

Ghostwriting is best understood by examining the broader category of "unbundled legal services" or "limited scope representation" under which it falls.[8] Unlike traditional models of legal representation in which an attorney represents a client from the beginning of a case to its

[8] Jeffrey P. Justman, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 Minn. L. Rev. 1246, 1249 (2008) (quoting Delso, 2007 WL 766349, at 12 (listing synonyms for unbundled legal services as "discrete tasks legal services" and "limited scope legal assistance"); Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 Geo. J. Legal Ethics 563, 565 (2007) (describing these services alternatively as "unbundled legal services" or "limited scope representation")).

ultimate conclusion, unbundled representation occurs when attorneys limit their services to isolated tasks.[9] Such tasks may include fact gathering, legal research, coaching, negotiating, making limited court appearances, or drafting court documents.[10] Choosing the type of unbundled representation will vary with the needs of the individual client.[11]

The ghostwriting form of unbundled services occurs when an attorney drafts or prepares filing documents for a party who would otherwise appear unrepresented in litigation.[12] An attorney can only be called a ghostwriter if he or she provides substantial legal assistance to a *pro se* litigant but does not identify himself orherself to the court.[13] The ABA defines ghostwriting as providing legal assistance to litigants who are appearing before the court "*pro se*" by helping them prepare written submissions without disclosing the nature or extent of such assistance.[14] While many courts focus on ghostwriters who draft pleadings, ghostwriting also applies to the drafting of motions, notices, or other court documents.[15]

Although the practice of ghostwriting involves many ethical issues which will be discussed, it also carries with it many advantages for both the *pro se* litigant and the authoring attorney. The benefits of a ghostwriting arrangement for the *pro se* litigant are that the document will be more likely to meet the court's standards, thus protecting the party's legal rights, while also allowing them to sidestep the obligation to work though a lawyer so that they can control their

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[9] Justman, *supra*, at 1249 (quoting Farley, *supra* note 21, at 565.
[10] Justman, *supra*, at 1249 (quoting Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. Rev. L. & Soc. Change 653, 654 (2006)); John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for pro se Litigants: Toward Increased Access to Civil Justice,* 67 Fordham L. Rev. 2687, note 14, at 2691 (1999).
[11] Justman, *supra*, at 1249 (quoting Klempner, *supra* note 23, at 654).
[12] Justman, *supra*, at 1288 (quoting *In re Cash Media Sys., Inc.*, 326 B.R. 655, 673 (Bankr. S.D. Tex. 2005)).
[13] Justman, *supra*, at 1288 (quoting *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 885 (D. Kan. 1997)).
[14] ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 07-446 (2007).
[15] Justman, *supra*, at 1288 (quoting *In re Brown* (*Brown I*), 354 B.R. 535, 541 (Bankr. N.D. Okla. 2006) (discussing a ghostwritten motion to reconsider)).

own case and avoid higher legal costs.[16] The obvious reward for the lawyer is that he can receive an immediate payment for a lesser amount of work than that involved with full representation. Typically, the party pays for the service at the time it is rendered rather than paying a lump sum retainer or being billed on a monthly basis.[17] Moreover, lawyers can help friends or family in legal actions even though the lawyer lacks the time to offer full representation, may be reluctant to represent family members or close friends, or wishes to avoid placing his or her name on the pleading so that he is not at the mercy of the court with respect to withdrawal allowance.[18] Because of these advantages to *pro se* litigants and attorneys, ghostwriting has become more and more common, and therefore more scrutinized over time.[19]

B. Significant Ethical Implications of Ghostwriting

As previously discussed, ghostwriting receives its authority from the Model Rule of Professional Conduct which allows attorneys to limit the scope of their representation.[20] The rule is not absolute and its limits will be discussed in the first part of this section. The rest of the section will examine the most commonly recognized ethical problems relating to ghostwriting, including potentially exploiting *pro se* leniency, violating the obligations of Rule 11, and failing to meet the duty of candor to the tribunal.

1. Limiting the Scope of Representation

Many lawyers have found that applying time-tested ethics rules to new unbundled legal services, such as ghostwriting, is extraordinarily difficult, because the rules of professional conduct are formulated under the assumption that a client will be provided full-service or

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[16] Goldschmidt, *supra,* at 1147.
[17] Goldschmidt, *supra*, at 1146.
[18] Jona Goldschmidt, *An Analysis of Ghostwriting Decisions: Still Searching for the Elusive Harm*, 95 Judicature 78 (2011).
[19] Michael W. Loudenslager, *Giving Up the Ghost: A Proposal for Dealing with Attorney "Ghostwriting" of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearances for Such Attorneys*, 92 Marq. L. Rev. 103 (2008).
[20] Model Rules of Prof'l Conduct R. 1.2 (1983).

traditional representation.[21] However, as stated earlier, the Model Rules of Professional Conduct (Model Rules) as amended in 2002, permit a lawyer in 1.2(c), to "limit the *scope* of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[22] Previously, subsection (c) allowed a lawyer to "limit the *objectives* of the representation if the client consents after consultation."[23] The new version replaced the term "objectives" with "scope," because only the client can limit the objectives, and added the requirement that such limitations be "reasonable under the circumstances."[24] The amendment was intended to give express permission for limited-representation agreements and provide guidelines for lawyers to expand access to legal services by providing limited yet valuable legal services to low or moderate-income persons who would otherwise be unable to obtain counsel.[25] Since the rule requires reasonableness, it generally prohibits a limitation that would violate another ethics rule or provision of substantive law.[26] Furthermore, limited-scope representation is permissible under Rule 1.2 only if the lawyer first clearly explains the limitations to the client and their likely effect on the undertaking, and the client consents.[27]

In general, the scope of services to be provided by a lawyer may be limited by agreement with the client.[28] Model Rules 1.4(b) and 5(b) require the scope of the representation to be communicated and explained to the client, preferably in writing, either before or within a reasonable time after starting the representation, and to the extent reasonably necessary to permit

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[21] Rothermich, *supra* Note, *at* 2693.
[22] Model Rules of Prof'l Conduct R. 1.2 (1983).
[23] Ann. Mod. Rules Prof'l. Conduct s. 1.2 (2011) (quoting ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct*, 1982-2005, at 55 (2006).
[24] *Id.*
[25] *Id.*
[26] Ann. Mod. Rules Prof'l. Conduct s. 1.2 (2011); *see also Johnson v. Bd. of Cnty. Comm'rs for Cnty. of Fremont*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) *aff'd in part, disapproved in part*, 85 F.3d 489 (10th Cir. 1996); *see also* Model Rules of Prof'l Conduct R. 1.2 (1983).
[27] *Id.*
[28] Ann. Mod. Rules Prof'l. Conduct s. 1.2 (2011).

the client to make informed decisions regarding the representation.[29] A limited representation may be appropriate because the client does, in fact, have limited objectives for the representation, such as simply needing help writing or outlining an answer to a complaint.[30] In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. For example, such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.[31]

2. *Pro Se* Leniency

One issue which arises in court and ethics opinions on ghostwriting is that *pro se* pleadings are held to less stringent standards than formal pleadings drafted by lawyers.[32] In fact, the United States Supreme Court in *Haines v. Kerner* found that however artfully crafted pleadings by a *pro se* litigant are, such litigants are held to an easier standard.[33] For example, when tested by a Rule 12(b)(6) motion to dismiss, *pro se* pleadings are held to a less rigorous standard than attorney-drawn complaints in determining whether an actionable claim has been stated.[34] Similarly, when motions for sanctions under Rule 11 are made for frivolous pleadings, *pro se* pleadings receive a greater degree of indulgence than pleadings prepared by attorneys.[35] Since most *pro se* litigants who have elicited ghostwriters do not disclose to the court that they have received attorney assistance, the court continues to hold their pleadings, which are likely written to a higher caliber than most *pro se* pleadings, to a lower standard. Therefore, the *pro se* plaintiff

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[29] Model Rules of Prof'l. Conduct R. 1.4 and 1.5 (2003).
[30] Ann. Mod. Rules Prof'l. Conduct s. 1.2 cmt. 6 (2011).
[31] *Id.*
[32] *Haines v. Kerner*, 404 U.S. 519 (1972).
[33] *Id.*
[34] James M. McCauley, *Unbundling Legal Services: The Ethics of "Ghostwriting" Pleadings for Pro Se Litigants*, Prof. Law., at 59 (2004).
[35] *Id.*

enjoys the benefit of legal counsel while also being subjected to the more lenient standards applicable to those without the benefit of counsel.[36]

Some courts and ethics panels find that this situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the court.[37] For example, the Fourth Circuit Court of Appeals has found that while there is no specific rule that prohibits ghostwriting, the practice unfairly exploits that court's mandate that the pleadings of *pro se* parties be held to a lower standard than pleadings drafted by lawyers.[38] The court said that when complaints filed bear the signature of a plaintiff outwardly proceeding *pro se* but have actually been drafted by a lawyer, the indulgence extended to the *pro se* party creates the perverse effect of skewing the playing field rather than leveling it.[39] Likewise, the Tenth Circuit has found that attorneys who guide the course of the litigation with an unseen hand provide the *pro se* litigant with such an advantage not intended by the courts.[40]

3. Rule 11 Violations

Federal Rule of Civil Procedure 11 (Rule 11) requires that every pleading, written motion, and other paper filed with the court be signed by at least one attorney of record, or, if the party is not represented by an attorney, signed by the party.[41] Under this rule, courts and ethics panels have frowned on ghostwriting, finding that it permits a lawyer to evade the responsibilities

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[36] *Id.*
[37] *Id.; see also Johnson v. Bd. of Cnty. Comm'rs for Cnty. of Fremont*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) *aff'd in part, disapproved in part*, 85 F.3d 489 (10th Cir. 1996) (ghost-writing is *ipso facto* lacking in candor and an evasion of the obligations imposed on counsel by statute and rule); *Ellis v. State of Maine*, 448 F.2d 1325 (1st Cir.1971) (same).
[38] *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997) (*citing White v. White*, 886 F.2d 721, 725 (4th Cir.1989)).
[39] *Laremont-Lopez*, 968 F. Supp. at 1078.
[40] *Duran v. Carris*, 238 F.3d 1268, 1271 (10th Cir.2001).
[41] Fed R. Civ. P. 11(a).

imposed by Rule 11.[42] They find that although the *pro se* litigant signs the paper, she may assert immunity from sanctions because she has not drafted the complaints but has instead received the assistance of counsel.[43] Some courts have even found that allowing ghostwriting may create some risk that lawyers will draft frivolous or poorly researched pleadings, which *pro se* litigants will file with the court.[44] This will, in turn, waste both the time and resources of the court and the opposing party. Moreover, since the ghostwriting attorney is undisclosed, the court could encounter legal and factual obstacles if it attempted to impose sanctions on him or her based upon Rule 11 considerations.[45] On the other hand, other courts and ethics opinions have found that the simple fact that the *pro se* litigant signs the paper instead of the assisting counsel does not hamper the court's ability to sanction frivolous behavior by the parties.[46] They find that it is likely that in those instances, the pleadings would be just as frivolous and maybe even more poorly researched if they had been prepared by *pro se* litigants.[47]

4. Candor to the Tribunal

The duty of candor toward the court mandated by Model Rule 3.3 is particularly significant to ghostwritten pleadings."[48] The rule provides, in the relevant part, that a lawyer must not knowingly fail to disclose a material fact to the court when disclosure is necessary to keep from helping or furthering an illegal, criminal or fraudulent act by the client, or fail to disclose to the court a material fact knowing that the omission is reasonably certain to mislead the court. Some

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[42] Ann. Mod. Rules Prof'l. Conduct s. 1.2 (2011) (citing *Ricotta v. Cal.*, 4 F. Supp. 2d 961 (S.D. Cal. 1998) (lawyer's involvement in drafting *pro se* litigant's court documents constituted unprofessional conduct); *Laremont-Lopez*, 968 F. Supp. 1075 (ghostwriting document filed with court by *pro se* litigant is inconsistent with procedural, ethical, and substantive rules of court); *Johnson v. Bd. of Cnty. Comm'rs*, 868 F. Supp. 1226 (practice of ghostwriting pleadings may subject lawyer to contempt of court "irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar")).

[43] *Laremont-Lopez*, 968 F. Supp. at 1079.

[44] *E.g.*, *Id*.

[45] *Id.*

[46] *In re Fengling Liu*, 664 F.3d 367, 371 (2d Cir. 2011) (quoting NYCLA Comm. on Prof'l Ethics, Op. 742 at 5 (2010)); *see also* Painter, *supra*, at 50.

[47] *Id.*

[48] *Duran v. Carris*, 238 F.3d 1268, 1271 (10th Cir.2001).

courts have found that attorneys cross the line when they gather and anonymously present legal arguments with the actual and/or constructive knowledge that the work will be presented in some similar form in a motion before the court.[49] For example, in *In re Mungo*, the United States Bankruptcy Court for the District of South Carolina held that the failure of an attorney to acknowledge his giving of advice by signing his name constituted a misrepresentation to the court by both the litigant and attorney.[50] Some authorities have expressly required that any document filed by a litigant proceeding *pro se* also be signed by any lawyer who provided assistance in preparing it.[51] For example, in *Duran v. Carris*, the Tenth Circuit held that when a lawyer participates in drafting a *pro se* appellate brief, the lawyer must be acknowledged by signature.[52] Similarly, many state bars' ethics opinions have concluded that under the duty of candor, a lawyer's failure to disclose behind-the-scenes assistance violates Model Rule 8.4, which prohibits conduct involving dishonesty, deceit, or misrepresentation.[53]

One of the first ABA ethics opinions dealing with the subject of ghostwriting involved a case in which a lawyer provided an extensive amount of legal assistance.[54] The lawyer not only drafted the *pro se* litigant's pleading, but also sat in on the trial and offered ongoing procedural advice to the litigant throughout the proceeding.[55] In its ruling, the ABA Committee on Ethics and Professional Responsibility attempted to draw a line between acceptable and unacceptable degrees of assistance, finding that such undisclosed widespread assistance from the lawyer in preparation for the trial as well as during the trial itself was a misrepresentation.[56] Under this

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[49] E.g., *In re Mungo*, 305 B.R. 762, 767-68 (Bankr. D.S.C. 2003).
[50] *Id.*
[51] E.g., Duran, 238 F.3d at 1271.
[52] *Duran*, 238 F.3d at 1273.
[53] Conn. Informal Ethics Op. 98-5 (1998); *see also* Del. Ethics Op. 1994-2 (1994); Ky. Ethics Op. E-343 (1991); Mass. Ethics Op. 98-1 (1998); and N.Y. State Ethics Op. 613 (1990).
[54] ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978).
[55] *Id.*
[56] *Id.*

guidance, a later Massachusetts Ethics Opinion said that a lawyer may provide limited background advice to a *pro se* litigant but cannot provide extensive services such as drafting litigation documents, which would mislead the court and other parties.[57] However, in a surprising Formal Opinion in 2007, which will be discussed next, the ABA took the position that disclosure is not required.[58] The ABA found that the nature or extent of attorney assistance is immaterial and need not be disclosed.[59]

C. Second Thoughts: How the ABA Changed its Stance from 1978 to 2007

The ethical dispute enveloping ghostwriting caused the ABA Committee on Ethics and Professional Responsibility to issue an Informal Opinion in 1978 on the implications of ghostwriting.[60] The opinion referenced a lawyer who assisted a *pro se* litigant in preparing jury instructions, memoranda of authorities and other documents submitted to the court.[61] However, the lawyer also sat in on the trial and at one point during the trial told the court that he was advising the *pro se* litigant on procedural matters.[62] Neither the court nor lawyer for the other party was aware of the lawyer's ghostwriting participation on behalf of the litigant.[63] The Informal Opinion said that contrary to the court's and opposing side's knowledge, because of this participation by the ghostwriting lawyer, the litigant had not really proceeded *pro se*.[64] This, the opinion stated, constituted a misrepresentation.[65] The Informal Opinion took a middle ground on the issue of ghostwriting, however, saying that lawyers may prepare or assist in the

[57] Mass. Ethics Op. 98-1 (1998).
[58] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446, (2007).
[59] *Id.*
[60] ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

preparation of a pleading for a litigant who is otherwise acting *pro se*.[66] However, the lawyer may not provide extensive undisclosed participation which would permit the litigant falsely to seem to be without legal assistance.[67]

Twenty years later, in May 2007, the same ABA Committee issued a Formal Opinion which superseded the 1978 Informal Opinion on the issue of ghostwriting.[68] The Formal Opinion made it a specific point to allow lawyers to provide *undisclosed* legal support, including ghostwriting, to *pro se* litigants, without disclosing such to the court.[69] In the Formal Opinion, the ABA considered the various ethical issues surrounding ghostwriting that have been the concern of many federal courts, including the notion of misleading the court and allowing the lawyer to evade responsibility for frivolous litigation under applicable court rules.[70] Checking off each ethical factor, the Formal Opinion found that ghostwriting does not actually violate any ethical rule or substantive law.

The Formal Opinion said that the test to determine the propriety of ghostwriting is whether the fact of assistance is material to the matter in question.[71] If it is, undisclosed ghostwriting would constitute fraudulent or dishonest behavior by the client and cause the lawyer to violate Model Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).[72] The Formal Opinion reasoned that it is not material to the merits of litigation that a litigant submitting papers to a tribunal on a *pro se* basis has received legal assistance behind the scenes.[73] In the absence of a law or rule requiring disclosure, litigants may go forward *pro se* without revealing that they have received legal

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[66] *Id.*
[67] *Id.*
[68] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446, (2007).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

assistance.[74] The Committee dismissed the fear that ghostwritten documents might give unfair advantages to a *pro se* litigant, because pleadings written more eloquently will not be construed liberally or given more indulgence.[75] Moreover, because the lawyer is making no affirmative statement to the court (and may even be required not to reveal the fact of the representation under Rules 1.2 and 1.6), the lawyer has not been dishonest under Rule 8.4(c), nor has the lawyer circumvented his or her responsibilities under court rules concerned with frivolous litigation.[76]

III. Ghostwriting in Practice: The Opinions and Views of the Federal and State Courts

Will Kate be subject to discipline from her state bar for violating ethics rules if she ghostwrites divorce pleadings for her *pro se* friend to file with the family court? Will the court in which Kate's friend appears *pro se* demand to know who helped write her pleadings? The answer, unfortunately, is possibly. It will largely depend on the governing law of Kate's jurisdiction. Federal and varying state courts have taken different views on the issue of ghostwriting and those decisions will be discussed here.

A. Federal Courts

In the last forty years, most federal decisions regarding the practice of ghostwriting have been unfavorable. Many district court judges have reasoned that the ethical implications discussed above naturally give rise to a prohibition of the practice. These decisions of the courts' low esteem toward ghostwriting will be discussed first. However, a recent and surprising circuit case, which will be discussed later in this section, may have ended the trend of ghostwriting disapproval by interpreting the ethical rules in favor of ghostwriting.

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[74] *Id.*
[75] *Id.*
[76] *Id.*

1. Decisions of Disapproval

The practice of ghostwriting has been most expansively discussed by the district courts, where the issue has often involved extensive drafting or representation by undisclosed attorneys.[77] For example, in *Johnson v. Board of County Commissioners*, former sheriff department workers brought a sexual harassment suit against the county sheriff.[78] Documents allegedly filed by the defendant were actually ghostwritten by a county attorney.[79] The United States District Court for the District of Colorado found that ghostwriting documents for *pro se* litigants may subject lawyers to contempt of court.[80] The court said that ghostwriting gives litigants unfair advantages in that *pro se* pleadings are construed liberally and *pro se* litigants are granted greater latitude in hearings and trials.[81] The court found that ghostwriting also results in evasion of obligations imposed on attorneys by statute, code, and rule, which is *ipso facto* lacking in candor.[82] The court said that ghostwriting is ingenuous and far below the level of candor which must be met by members of the bar."[83]

Similarly, in *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, an opinion specifically written to disapprove of the conduct of the lawyers who had ghostwritten pleadings for seemingly *pro se* litigants, the Eastern District of Virginia categorized ghostwriting as attorney misconduct.[84] *Laremont-Lopez* combined four cases in which several attorneys drafted complaints for various plaintiffs who had received right-to-sue letters from the Equal

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[77] *In re Fengling Liu*, 664 F.3d 367, 370 (2d Cir. 2011).
[78] *Johnson v. Bd. of Cnty. Com'rs for Cnty. of Fremont*, 868 F. Supp. 1226 (D. Colo. 1994) *aff'd in part, disapproved in part*, 85 F.3d 489 (10th Cir. 1996).
[79] *Id.* at 1228.
[80] *Id.* at 1232.
[81] *Id.* at 1231.
[82] *Id.* at 1232.
[83] *Id.*
[84] Rothermich, *supra*, at 2705.

Employment Opportunity Commission for employment discrimination actions.[85] In all four cases, the attorneys drafted the complaints filed in the district court.[86] In most cases, the attorneys were paid a flat fee for their limited representation of the plaintiffs.[87] In some cases, the representation included unsuccessful efforts to settle the employee disputes before filing the complaints.[88] In only one case did the attorneys make a formal appearance as the counsel of record, and that was after the complaint was filed.[89]

The district court's opinion contained nothing about the merits of the plaintiffs' cases but instead solely addressed the show cause order explaining why the ghostwriting attorneys should not be held in contempt of court for their unethical limited representation.[90] The attorneys argued that their representation of the litigants ended once they had drafted the pleadings and before the complaints were filed.[91] The court held that there was insufficient evidence to show that the attorneys knowingly misled the court or intentionally violated ethical or procedural rules and declined to impose sanctions.[92]

However, the court stated that the practice of ghostwriting pleadings without acknowledging authorship and without asking court approval to withdraw from representation was inconsistent with the signature certification requirement of Rule 11.[93] It found that failure to sign the pleadings undermined the court's ability to sanction the attorneys under Rule 11 if the claims in the complaint proved to be legally or factually frivolous, or were filed for an improper purpose.[94] Furthermore, the court held that the practice did not comply with a common local rule providing

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[85] *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Rothermich, *supra*, at 2706.
[91] *Laremont-Lopez*, 968 F. Supp. at 1078.
[92] *Id. at* 1077.
[93] *Id. at* 1078.
[94] *Id. at* 1079.

that once an attorney has entered an appearance, withdrawal is permitted only by order of the court.[95] Lastly, the court stated that allowing attorneys to ghostwrite pleadings for *pro se* plaintiffs abused additional leeway given to *pro se* filings.[96]

Several other district courts holdings have disapproved of the practice of ghostwriting along the same lines. In *Ricotta v. California*, the Southern District of California held that an attorney licensed in the State of California did not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom she shared specialized knowledge.[97] However, it found that gathering and anonymously presenting legal arguments, with the actual or constructive knowledge that the work will be presented in a motion before the court, is attorney misconduct.[98] In *Delso v. Trustees for the Retirement Plan for the Hour Employees of Merck & Co., Inc.*, the District of New Jersey held that a cross-motion for summary judgment ghostwritten by an attorney and allegedly filed *pro se* violated ethical rules and resulted in attorney misconduct.[99] In *Klein v. Spear, Leeds & Kellogg*, the Southern District of New York held that the ghostwritten "voluminous" papers responding to a summary judgment motion by a seemingly *pro se* litigant resulted in ethical violations.[100] Taken together, the above district court cases clearly prohibit the practice of undisclosed ghostwriting as unethical conduct.

In courts that prohibit the practice, the ramifications for ghostwriting attorneys and the *pro se* litigants who use them can be severe. For example, in the 2003 decision, *In re Mungo*, the

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[95] *Id.*
[96] *Id. at* 1078.
[97] *Ricotta v. State of Cal.*, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) *aff'd sub nom. Ricotta v. State of Cal.*, 173 F.3d 861 (9th Cir. 1999).
[98] *Id.*
[99] *Delso v. Trustees For Ret. Plan For Hourly Employees of Merck & Co., Inc.*, CIVA 04-3009 AET, 2007 WL 766349 (D.N.J. Mar. 6, 2007).
[100] *Klein v. Spear, Leeds & Kellogg,* 309 F.Supp. 341, 342–43 (S.D.N.Y.1970); *see also Wesley v. Don Stein Buick, Inc.,* 987 F.Supp. 884, 885–87 (D.Kan.1997) (same with opposition to a motion to dismiss).

United States Bankruptcy Court for the District of South Carolina prohibited ghostwriting.[101] The court said that the practice violated the local bankruptcy rules, the Federal Rules of Civil Procedure, and the South Carolina Rules of Professional Conduct (SCRPC).[102] In finding that the SCRPC disallow ghostwriting[103], the court relied on SCRPC Rule 3.3(a)(2) which forbids a lawyer from concealing a material fact from the court to avoid helping the client commit a criminal act, together with SCRPC Rule 8.4(d) which bans lawyers from taking part in conduct involving dishonesty or misrepresentation.[104] The court said that helping a litigant to appear *pro se* when the attorney is actually drafting the pleadings is obviously deceitful.[105] The court warned that attorneys who ghostwrite could face sanctions which could include suspension or disbarment of the attorney from practice before the court.[106] Furthermore, the *pro se* litigant may also be subject to sanctions, including the *sua sponte* (judge's decision made without a request by any party) dismissal of the pleading.[107]

2. A Landmark Favorable Decision

As more and more federal courts banned ghostwriting, the trend of ghostwriting disapproval came to a halt in November, 2011, after the Second Circuit's Committee on Attorney Admissions and Grievances recommended that an attorney admitted to the Court of Appeals be publicly reprimanded. The Committee had found that attorney Liu had engaged in conduct unbecoming a member of the bar warranting the imposition of discipline.[108] Specifically, the Committee found that Liu had, among other things, violated her duty of candor by helping *pro se* petitioners draft and file petitions for review in the court without disclosing her involvement to

[101] *In re Mungo*, 305 B.R. 762, 768 (Bankr. D.S.C. 2003).
[102] *Id.* at 768-70.
[103] *Id.* at 769.
[104] *Id.* at 769-70.
[105] *Id.* at 770.
[106] *Id.*
[107] *Id.*
[108] *In re Fengling Liu*, 664 F.3d 367, 368 (2d Cir. 2011).

the court (ghostwriting).[109] However, the Second Circuit Court of Appeals (Second Circuit), in *In re Fengling Liu*, adopted all of the Committee's findings of misconduct except for the finding on ghostwriting.[110] As to the ghostwriting charge, the Second Circuit surprised judges and lawyers across the country and held that ghostwriting did not constitute sanctionable misconduct.[111]

The Second Circuit acknowledged that a number of the other circuits have found that attorneys who have ghostwritten for *pro se* litigants had engaged in misconduct.[112] For example, it discussed the First and Tenth Circuits which held that lawyers may not ghostwrite an appellate brief.[113] In *Duran v. Carris*, the Tenth Circuit admonished an attorney for ghostwriting a *pro se* brief without signing it or disclosing his identity to the court.[114] The Tenth Circuit based its opinion on the idea that ghostwriting violates Rule 11, takes advantage of leniency given to *pro se* litigants, and that it consists of misrepresentation to the court.[115] In fact, the court said that participation by an attorney in drafting an appellate brief is *per se* substantial and must be acknowledged by the signature of the attorney involved.[116] For the same reasons, the First Circuit in *Ellis v. Maine* held that briefs prepared in "substantial part" by a member of the bar must be signed by the preparer.[117]

Notwithstanding the fact that the decision in *In re Fengling Liu* would constitute a circuit split, the Second Circuit held that absent a local rule stating otherwise, a lawyer may ghostwrite a

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[109] *Id.*
[110] *Id.* at 369.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Duran v. Carris*, 238 F.3d 1268, 1271-73 (10th Cir. 2001).
[115] *Id.* at 1271-1272.
[116] *Id.* at 1273.
[117] *Ellis v. Maine,* 448 F.2d 1325, 1328 (1st Cir.1971).

brief without disclosing his role to the court.[118] The court said that a determination that Liu violated the New York rule against engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation would require, at the very least, a finding that she knew, or should have known, of either (a) an existing obligation to disclose her drafting of pleadings, or (b) even in the absence of such a general obligation, the possibility that nondisclosure in a particular case would mislead the court in some material fashion.[119]

In determining to allow the practice of ghostwriting, the Second Circuit addressed the other ethical concerns used by federal courts to disallow ghostwriting. As to the concern regarding the relationship between ghostwriting and *pro se* leniency, the court found that the concern was unwarranted because a well-written *pro se* pleading would not actually be given liberal interpretation.[120] As far as the duty of candor to the tribunal, the Second Circuit found that ghostwriters are not dishonest within the meaning of Rule 8.4(c) as long as their pleadings do not affirm that they were written without attorney assistance.[121] In taking this approach, the court did not have to address the importance of candor to the tribunal. Rather, the Second Circuit merely found that in the absence of any express rule that provides otherwise, there does not seem to be a great need for attorneys to disclose themselves in the circumstances. Finally, the court addressed the Rule 11 concern by claiming that Rule 11 requires the signature of an "attorney of record," not a drafting attorney.[122] Furthermore, even if the rule did require a signature by the drafting party, the rule only applies to district court proceedings.[123]

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[118] *In re Fengling Liu*, 664 F.3d 367, 369 (2d Cir. 2011).
[119] *Id.* at 372.
[120] *Id.* at 371 (quoting ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 07–446 (2007)).
[121] *Id.*
[122] *In re Fengling Liu*, 664 F.3d at 373.
[123] *Id.*

The Second Circuit opinion in *In re Fengling Liu* will no doubt be significant to practitioners considering helping *pro se* litigants draft pleadings. On one hand, the opinion may be viewed as a narrow holding. This is because Liu's petitions at issue were fairly simple one paragraph, largely non-substantive documents.[124] If viewed as narrow, the opinion could have a chilling effect for the practice of ghostwriting on lawyers, especially those considering drafting more complicated pleadings or briefs. Conversely, the opinion could further the new trend of approving undisclosed ghostwriting started by the ABA's 2007 Formal Opinion, and be a momentous symbol for the federal courts going forward. In fact, the court noted that in light of the ABA's 2007 ethics opinion, and the other recent ethics opinions permitting numerous forms of ghostwriting, it is possible that the courts and bars that previously disapproved of attorney ghostwriting will modify their opinion of that practice.[125]

B. State Courts

In contrast to many of the federal court precedents, and similar to the Second Circuit decision, a majority of state courts and ethics committees seem to be more open to undisclosed ghostwriting, although that majority might be described as slim.[126] Of twenty-four states that have addressed ghostwriting as an ethical issue, thirteen permit ghostwriting and, of those thirteen states, ten authorize undisclosed ghostwriting while three compel the pleading to signify that it was prepared with the assistance of an attorney; ten states expressly forbid ghostwriting.[127] Nevada flip-flopped: the State Bar Association released an ethics opinion prohibiting

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[124] *Id.* at 381.
[125] *Id.* at 371 (quoting Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro se Prisoners' Access to the Courts,* 23 Geo. J. Legal Ethics 271, 290 (2010) ("Almost all of the federal cases and state ethics opinions opposing ghostwriting were issued before the May 2007 ABA opinion. Because most states look to the ABA *Model Rules* when adopting and amending their own rules of professional conduct, the coming years may see a number of courts and states take a more relaxed stance on ghostwriting.") (internal footnote omitted)).
[126] *In re Fengling Liu*, 664 F.3d at 371 (quoting Robbins, *supra*, *at* 287-88).
[127] Robbins, *supra*, at 288.

ghostwriting, but then withdrew this opinion, taking into account other state bars' concerns that such a ban could impair the availability of *pro bono* legal services.[128]

In general, state courts and ethics panels are largely divided on the many ethical issues of ghostwriting. Most jurisdictions seem to agree that ghostwriting is within the ethical boundaries of the legal profession when drafting non-court documents (*e.g.*, letters, deeds, corporate documents, and insurance forms).[129] However, some state courts have condemned ghostwriting when an attorney drafts a document which is actually filed in court by a *pro se* litigant. For example, an Illinois Ethics Opinion from 2005 said that a lawyer acting as mediator in a domestic relations matter between unrepresented spouses may not ghostwrite a proposed judgment for spouses to file *pro se*.[130]

Other states have amended their rules to accommodate ghostwriting for *pro se* litigants. For example, the California Rules of Court explicitly excuse attorneys who draft documents in family matters from the obligation to disclose.[131] Colorado, on the other hand, requires the drafting attorney to include his or her name, address, telephone number and registration number on the pleading, but clarifies that stating this information does not give rise to an entry of appearance.[132] Moreover, the attorney, by ghostwriting the paper filed by the *pro se* party, certifies to the court that according to what the *pro se* party has told the attorney, who may rely on such information by the *pro se* party, the facts and law on which the document is based are well grounded.[133]

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[128] *Id.*
[129] Alan C. Eidsness & Lisa T. Spencer, *Confronting Ethical Issues in Practice: The Trial Lawyer's Dilemma*, 45 Fam. L.Q. 21, 33 (2011).
[130] Ill. Ethics Op. 04-03 (2005).
[131] The ABA Standing Committee on the Delivery of Legal Services, *An Analysis of Rules That Enable Lawyers to Serve Pro Se Litigants A White Paper*, 45 Fam. L.Q. 64, 78 (2011); *see* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_ 5.pdf.
[132] Colo. R. Civ. P. 11.
[133] Colo. R. Civ. P. 11.

IV. Conclusion: Guidelines for Ethical Ghostwriting

As has been seen, while some courts and bar ethics committees have condemned ghostwriting along the ethical lines discussed, other courts, such as the Second Circuit, finding the benefits of the practice to be substantial, have allowed the practice. Therefore, if and until the courts change their rules according to the Second Circuit's recommendation, attorneys such as Kate who consider being a ghostwriter must read the court's rules carefully to determine whether ghostwriting is allowed in that jurisdiction.[134] In some jurisdictions, the action of an unrepresented litigant filing pleadings written by an attorney without acknowledging this to the court still consists of misrepresentation and subjects the attorney to discipline. Some courts, like the court in *Laremont-Lopez*, may find that the policy rationales such as *pro se* leniency or the efficiency reasons behind Rule 11 implicate a prohibition of the practice of ghostwriting. Such jurisdictions may even require attorneys to identify himself or herself by name and sign the document to comply with decisions such as *Duran.*

In order to avoid attorney discipline or sanctions by the court, ghostwriting attorneys should try to take measures to balance limited representation with being transparent to the court and be sure to continue to act within the bounds of the court rules and law. For example, attorneys may choose to be extra cautious and acknowledge draftsmanship of the pleading by signing and filing it and simultaneously filing a motion to withdraw as counsel, accompanied by an appropriate explanation.[135] With regard to the *pro se* litigant, in order to ensure that he or she fully understands and consents to the limitation on the scope of representation, the lawyer and litigant should execute a written retainer agreement which details the nature of the limited-scope

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[134] *In re Fengling Liu*, 664 F.3d 367, 373 (2d Cir. 2011).
[135] *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997); *see also* James M. McCauley, *Unbundling Legal Services: The Ethics of "Ghostwriting" Pleadings for Pro Se Litigants*, Prof. Law. 59 (2004).
[135] John M. Greacen, *The Status of Unbundled Legal Services*, Judges' J. 39, at 40 (2004).

representation, clearly identifying the services that will and will not be provided, and if appropriate, what additional actions may be necessary for the litigant to take in order to accomplish his or her legal objectives.[136] If the lawyer will be signing any pleadings, then he or she should consider and discuss with the litigant whether the signing constitutes an "appearance" for purposes of post-decree motions or appeal.[137] Importantly, the lawyer must not participate in a ghostwriting arrangement if the litigant is clearly unable to pursue the case on his or her own initiative.[138] Lastly, lawyers who choose to ghostwrite should look out for other professional obligations, such as the duties to perform competently, avoid conflicts of interest, and preserve client confidences.[139] In the end, however, those attorneys who desire to provide ghostwriting services should do so, if possible, to help those who need legal services but can only afford to represent themselves. Nevertheless, an attorney must do so with ethical requirements in mind, in order to uphold his or her reputation and ability to practice law, be fair to the opposing party and court, and perhaps most importantly, to ensure the litigant's legal interests are protected.

[136] Eidsness & Spencer, *supra*, at 35.
[137] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (2007).
[138] Greacen, *supra*.