

NYCLA COMMITTEE ON PROFESSIONAL ETHICS

OPINION 742

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TOPIC

Can a lawyer ethically remain behind the scenes of a litigation and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the court and adverse counsel?

DIGEST

Given New York's adoption of Rule 1.2(c) and the allowance of limited scope representation, it is now ethically permissible for an attorney, with the informed consent of his or her client, to play a limited role and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the tribunal and adverse counsel. Disclosure of the fact that a pleading or submission was prepared by counsel need only be made "where necessary." Disclosure is necessary when mandated by (1) a procedural rule, (2) a court rule, (3) a particular judge's rule, (4) a judge's order in a specific case, or in any other situation in which the failure to disclose an attorney's assistance in ghostwriting would constitute a misrepresentation or otherwise violate a law or an attorney's ethical obligations. In cases where disclosure is necessary, unless required by the particular rule, order or circumstance mandating disclosure, the attorney need not reveal his or her identity and may instead indicate on the ghostwritten document that it was "Prepared with the assistance of counsel admitted in New York."

RULES OF PROFESSIONAL CONDUCT

NY Rules of Professional Conduct 1.2, 8.4; Model Rules 1.2, 8.4, 3.3, 3.4

QUESTION

Whether it is ethical for a lawyer to remain behind the scenes of a litigation and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the court or adversary?

OPINION

As the number of *pro se* litigants continues to rise, attorneys have adapted their services to accommodate the trend in the form of "unbundled" legal services. In such arrangements, the attorney agrees to a limited scope representation of the client. While the types of limited scope representation vary, this opinion focuses primarily on the attorney assisting the *pro se* litigant by

preparing pleadings and other court documents without disclosing his or her role or identity to the court or adversary.

New York's Rules of Professional Conduct (RPC) recognize that clients might benefit from limited scope representation. Rule 1.2 states that a lawyer "shall abide by a client's decisions concerning the objectives of representation" and allows the lawyer to limit the scope of representation so long as the limitation is reasonable and the client gives informed consent. New York Rules of Professional Conduct (RPC) 1.2(a),(c). See also ABA Model Rules of Professional Conduct 1.2(a), (c). Such representation is consistent with a lawyer's duty to "seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession." Jona Goldschmidt, *In Defense of Ghostwriting*, 29 *FORDHAM, URB. L.J.* 1145 at n. 85 (2002). By limiting the scope of their representation, public interest lawyers, *pro bono* attorneys and those servicing clients of limited means can increase the number of clients they are able to assist. See State Bar of Arizona Opinion No. 05-06 (July 2005).

We believe that limited scope legal arrangements with *pro se* litigants provide substantial benefits to individual litigants. Such arrangements can provide equal access to justice for *pro se* litigants who do not qualify for or who are without access to free legal services but who are nonetheless unable to afford prevailing legal fees. As President Jimmy Carter stated, "Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented." (*quoted in* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *GEO. J. LEGAL ETHICS* 369, 371 (2004)). Unbundled legal services provide an opportunity to fill the gap between those who qualify for free legal services and those unable to afford counsel to appear on their behalf, thereby helping to level the playing field for clients of limited means facing a counseled adversary and an increasingly complex legal system. See Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro se Assistance and Accommodation in Litigation*, Note, 54 *Am. U. L. Rev.* 1537, 1556. Importantly, ghostwriting allows attorneys to fulfill their professional obligation to make the system of justice available to all.¹

Moreover, limited scope arrangements can promote an efficient judicial system in a number of ways. Judges have no duty to assist *pro se* litigants in navigating the justice system. See Goldschmidt at fn. 39 and cases cited therein. Even if this were not the case, it would be overly burdensome to rely on judges to guide *pro se* litigants. Allowing a limited scope legal arrangement could reduce expensive and often needless motion practice and unnecessary delay by crystallizing and clarifying relevant issues for trial, thereby assisting untrained individuals through the complex legal and procedural aspects of litigation and assisting judges in making appropriate determinations. Therefore, the only issue is whether such limited scope representation can be provided without disclosing the attorney's participation.

¹ The Colorado, Delaware, Kentucky, Massachusetts, Maine, New Hampshire, Arizona and Virginia Bar Association Ethics Committees support limited scope representation. The Colorado Bar Association Ethics Committee, for example, finds that limited scope representation is consistent with its state's rules of professional conduct requiring an attorney to abide by the client's decision regarding the objectives of the representation. See Colorado Bar Ass'n Ethics Committee, Formal Opinion No.101 (1998). The Colorado Bar reasons that "it may be preferable for a layperson to have limited legal services rather than no services at all." *Id.*

Recent commentary and ethics opinions reflect an emerging trend in support of ghostwriting² as one way of providing limited scope representation. *See* Goldschmidt at 1145; Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 502 (1999); Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 483 (1995); State Bar of Arizona Comm. on the Rules of Professional Conduct Op. 05-06 (2005) (submission of ghostwritten documents without informing the court or tribunal does not violate various ethical rules implicating candor toward the tribunal because the practice is not inherently misleading to the court or tribunal).

Consistent with these trends, the American Bar Association, in 2007, withdrew its previous opposition to extensive undisclosed participation of a lawyer on behalf of a *pro se* litigant and issued an opinion stating that "A lawyer may provide legal assistance to litigants appearing before tribunals '*pro se*' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." ABA Formal Ethics Op. No. 07-446 (May 5, 2007). Model Rules 3.3(b), 4.1(b) and 8.4(c) collectively prohibit attorneys from misrepresenting any fact material to a matter in litigation. In assessing whether ghostwriting runs afoul of these provisions, the ABA reasoned that the fact of assistance was not material to the merits of litigation, and concluded that there was no prohibition in the Model Rules against undisclosed assistance to *pro se* litigants, so long as the attorney does not do so in a way that otherwise violates rules that apply to the lawyer's conduct.

If lawyers were required to always identify the provision of limited scope representation to *pro se* litigants, there is a significant risk that the lawyer would be compelled to assume and/or continue the representation beyond the scope of the agreement. Not only would such a result undermine the purpose of Rule 1.2, it would force a client to spend more money than he or she is able to or force the lawyer to work free of charge. Either result would be problematic. Thus, permitting ghostwriting has the advantage of increasing access to justice on behalf of the unrepresented or underrepresented.

Moreover, permitting ghostwriting is consistent with practice in other areas of the law, in which lawyers draft documents for their clients' signatures, such as prospectuses, correspondence, offering plans, affidavits and legal notices, without disclosing the lawyer's authorship.

Criticisms of Ghostwriting

Despite the trend in favor of ghostwriting, there is authority in New York and other jurisdictions that has criticized ghostwriting for both ethical and procedural reasons. Some authorities that predate the adoption of the 2009 Rules of Professional Conduct, and, in some cases, predate the American Bar Association's 2007 opinion, disfavor the practice. *See, e.g. Delso v. Trustees for Plan of Merck & Co., Inc.*, 2007 U.S. Dist. LEXIS 16643 at *17 (D.N.J., June 19, 2007) (ruling that ghostwriting violated the New Jersey Rules of Professional Conduct,

² This opinion defines ghostwriting to be anything more than *de minimis* involvement on the part of an attorney in drafting submissions for a *pro se* litigant.

ran afoul of the attorney's duty of candor to the court, and contravened the spirit of Fed.R.Civ.P. 11); *Anderson v. Duke Energy Corp.*, 2007 WL 4284904, at *1 n.1 (W.D.N.C. Dec. 4, 2007) ("The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be *pro se* is disfavored and considered by many courts to be unethical."); *Duran v. Carris*, 238 F.3d 1268, 1271-72 (10th Cir. 2001) (ruling that attorneys who "author pleadings and necessarily guide the course of the litigation with an unseen hand" provide an unintended advantage to the *pro se* litigant and the failure of an attorney to acknowledge the giving of advice by signing his name constitutes a misrepresentation to the court by both the litigant and attorney); *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F.Supp. 1075, 1077-78 (E.D. Va. 1997) (holding that, while not prohibited by any specific rule, the practice of ghostwriting "unfairly exploits the ... mandate that the pleadings of *pro se* litigants be held to a less stringent standard than pleadings drafted by lawyers," as well as "effectively nullifies the certification requirements" of Fed.R.Civ.P. 11); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (finding that policy considerations militate against validating a ghostwriting arrangement because (1) the arrangement "implicates the lawyer's duty of candor to the Court"; (2) the arrangement interferes with the Court's ability "to superintend the conduct of counsel and parties during the litigation"; and (3) it would be "unfair to construe a *pro se* litigant's pleadings more liberally than the pleadings of a counseled litigant when in reality the *pro se* litigant has had the benefit of counsel"); *Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (litigant's statements and papers "strongly suggest that he is enjoying the assistance of a lawyer or lawyers who have not formally appeared in the case," a practice that is "grossly unfair" to court and opposing counsel and "should not be countenanced").

One area of concern focuses on the reality that *pro se* pleadings and submissions are generally construed liberally because of the lack of legal knowledge and experience possessed by the litigant. Therefore, it is argued that having an undisclosed attorney drafting pleadings behind the scenes would unfairly give *pro se* litigants broader latitude under pleading requirements. *See, e.g., Klein v. Speer Leeds*, 309 F. Supp. 341 (S.D.N.Y. 1970) (stating that the court should not have to take extra steps to protect *pro se* litigant's rights where he has the assistance of an attorney). *See generally* Goldschmidt at 1150-51. *See also*, ABCNY Comm. Prof. & Jud. Ethics, Formal Op. No. 1987-2 (1987). This argument fails to take into consideration that pleadings drafted by a layperson compared to those drafted by an attorney are generally readily distinguishable. *See Klein*, 309 F. Supp. at 342 (observing about pleadings that "their legal content and phraseology most strongly suggest that they emanate from a legal mind"); *See also, American Bar Ass'n*, Formal Ethics Op. No. 07-446 (2007) (considering that effective assistance will be evident to a tribunal, and ineffective assistance will offer the *pro se* litigant no advantage). Therefore, judges will not be impelled to provide ghostwritten, competent pleadings more latitude.

Furthermore, such an argument seems to imply that judges provide greater deference to *pro se* litigants when ruling on the merits of an action. While judges may provide greater latitude to a *pro se* litigant as far as some procedural rules are concerned, a *pro se* litigant should not enjoy the same extended latitude on the merits of his or her claim. *See Haines v. Kerner*, 404 U.S. 519 (1986) (allowing *pro se* litigant opportunity to offer proof although complaint was inadequate but stating "we intimate no view whatever on the merits of petitioner's allegations").

Also see *In re Hanahan v. Hanahan*, 8 A.D. 3d 712, 714 (3d Dep't 2004) ("The case law makes clear that '[a] litigant's decision to proceed without counsel does not confer any greater rights than those afforded to other litigants.'" (internal citations omitted). *But cf. Sloninski v. Weston*, 232 A.D.2d 913 (3d Dep't 1996) (stating that "an inexperienced litigant who chooses to represent himself or herself in court does so with a degree of risk involved. A litigant's decision to proceed without counsel does not confer any greater rights than those afforded to other litigants, nor may a *pro se* appearance serve to deprive parties in opposition of their right to a fair trial."). This is consistent with judges' duty of impartiality. Treating pleadings more leniently does not make it more likely that a *pro se* litigant will win. It simply makes it more likely that the *pro se* litigant's cause will be heard on the merits, as opposed to being dismissed at the pleading stage. Having limited scope assistance of an undisclosed attorney does not necessarily afford that litigant a substantive advantage, fair or otherwise, over his or her adversary. In fact, many adversary counsels would readily admit that having counsel involved makes proceedings easier, more efficient and fairer.

There is also concern regarding the court's inability to sanction frivolous behavior by party or counsel. On balance, however, we believe the obverse is true. Allowing ghostwriting does not relieve the attorney from any of his or her professional and ethical responsibilities. He or she must still act competently, diligently, without conflict and with due regard for duties to the court as well as to clients. The ghostwriting attorney remains obligated pursuant to ethics rules and court rules to refrain from promoting or participating in frivolous litigation. In fact, where the pleadings indicate that they were prepared by an attorney but do not disclose the identity of the ghostwriting attorney, the court can use its discretion to compel disclosure of counsel and order inquiry into the lawyer's role in frivolous filings. Moreover, with limited scope representation, there is a likelihood that fewer frivolous motions or allegations will be presented.

This Committee acknowledges that the Iowa Supreme Court Board of Professional Ethics and Conduct, the New York State Bar Association Committee on Professional Ethics and the New York City Bar Association have written that undisclosed representation impermissibly misleads the court. See Iowa Sup. Ct. Bd. Of Prof'l Ethics and Conduct, Formal Op. 96-31, N.Y. State Bar Ass'n Comm. On Prof'l Ethics, Op. 613 (1990), N.Y. City Bar Ass'n Comm. On Prof'l & Judicial Ethics, Formal Op. 1987-2 (1987). These associations reasoned, based on then-existing case law in New York and elsewhere, that undisclosed limited scope representation perpetuates a misrepresentation because the *pro se* litigant is not without the assistance of an attorney.³ However, the cases on which these opinions relied (cases that predated the change in

³ The New York City Bar Association stated that an attorney ghostwriting a document must disclose but that he need only indicate that the document was "prepared by counsel" to avoid perpetuating a misrepresentation. See also, New Hampshire Bar Association, Practical Ethics Article (May 12, 1999) (opining that a cautious lawyer should have his client disclose the assistance to the court in every case, but that such disclosure need only state that "This pleading was prepared with the assistance of a New Hampshire Attorney."); Florida Ethics Op. 79-7 (Reconsideration) (Feb. 15, 2000) (concluding that to avoid a violation of the duty of candor to the court, pleadings prepared by an attorney for a *pro se* litigant must indicate "prepared with the assistance of counsel."). Rule 1.2(c) significantly changes the analysis and supersedes the ethics opinions and cases mandating disclosure in every instance. See discussion *infra*.

New York's ethical rules) all involved actual misrepresentations by the attorneys in question, apart from the undisclosed representation, and, as will be discussed below, are limited to the facts of the particular cases before those committees.

While the arguments against undisclosed limited scope legal representation have some merit, we believe that ghostwriting is not an ethical violation in light of the plain language of New York's newly adopted Rule 1.2(c).

New York's RPC 1.2

New York has recently adopted a new set of attorney ethics rules, in particular Rule 1.2(c), that appear to permit the practice of ghostwriting. The new ethics rules, which went into effect April 1, 2009, replace New York's Code of Professional Responsibility and are modeled after the ABA's Model Rules. In contrast to the former Code of Professional Responsibility, New York's new Rules of Professional Conduct expressly provide that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel." NY Rules of Professional Conduct (RPC) 1.2(c) (emphasis added). Although Rule 1.2(c) does not expressly allow ghostwriting, it does so implicitly, by allowing limited scope representation and requiring notice only "where necessary." After all, the Appellate Divisions could have simply proscribed all ghostwriting, but chose not to do so.

Therefore, given that ghostwriting is a form of limited scope representation and that New York's new rules have taken a less restricted approach to limited scope representation, the subject is ripe for reevaluation.

When Is Disclosure Necessary?

RPC 1.2 requires disclosure of a limited scope representation "where necessary." It is essential to determine whether "where necessary" as used in the language of Rule 1.2(c) means that an attorney must disclose assistance through ghostwriting in *every* instance in view of case law in New York and other jurisdictions that hitherto deemed nondisclosure an inherent misrepresentation.

It makes sense that "where necessary" as used in Rule 1.2(c) does not mean that disclosure is needed in *every* circumstance but rather that "necessary" means disclosure must be made where it is essential, imperative, indispensable, required, compulsory or obligatory. Therefore, because "necessary" does not mean that disclosure is required in every circumstance, we believe that disclosure is *necessary* only in the following circumstances: where mandated by (1) a procedural rule, (2) a court rule, (3) a particular judge's rule, (4) a judge's order in a specific case, or in any other situation in which an attorney's ghostwriting would constitute a misrepresentation or otherwise violate a law or rule of professional conduct. Generally speaking, attorneys in New York will have to disclose their limited scope assistance in ghostwriting if a court rule, a judge-made rule or a judge's order in a specific case or a specific circumstance so requires. Even in such cases, we believe that unless otherwise required by the particular rule,

order or circumstance mandating disclosure, the attorney must only indicate that the ghostwritten document was “prepared with the assistance of counsel admitted in New York.”

What If There is No Rule or Order Mandating Disclosure?

Notably, there is some concern that if permitted, the limited representation of a *pro se* litigant might become so expansive that the lawyer will be *de facto* acting as litigation counsel without ever having to appear before the court or having his or her identity disclosed to the adversary. This is one circumstance where disclosure to the court and/or adversary of the attorney’s involvement may very well be necessary because a failure to disclose could constitute a misrepresentation or otherwise violate a rule of professional conduct.

We believe that the limited case law, which in *dicta* stated that nondisclosure of ghostwriting was a misrepresentation, is consistent with this approach. The particular facts of these cases make evident that the attorneys whose conduct was at issue actually perpetuated an independent misrepresentation or fraud upon the court, not through their limited scope representation but, instead, through their violation and/or circumvention of other ethical rules. *See, e.g., Brandes v. Brandes*, 292 A.D.2d 129 (2nd Dept. 2002) (attorney’s deliberate concealment of his representation of his ex-wife by hiring another lawyer was a sham whereby the lawyer participated in a proceeding in which he had a financial interest); *In re Potter*, 2007 WL 2363104, at *3-4 (Bankr. D.N.M. Aug. 13, 2007) (attorney not licensed in the jurisdiction used ghostwriting to circumvent local court rules); *In re Brown*, 354 B.R. 535, 541 (Bankr. N.D. Okla. 2006) (court admonishes attorney who acted as ghostwriter despite the fact that the attorney was previously forced to withdraw from the representation because of conflict of interest).

Even in the absence of overt misrepresentation, there is risk that courts might deem the undisclosed and substantial participation of an attorney on behalf of a *pro se* litigant to be a misrepresentation. While this Committee is hopeful that New York courts will recognize the benefits that will flow from the allowance of undisclosed ghostwriting, see discussion *supra*, until such a time comes, New York attorneys should err on the side of caution by ensuring that notice is given in circumstances where it is obvious that the court or opposing counsel is giving special consideration to an “unrepresented party” as a result of his or her *pro se* status. It is precisely those circumstances that have caused much of the controversy surrounding the issue of ghostwriting. Conversely, if a lawyer is asked merely to review a pleading or a letter for a *pro se* litigant, and the attorney’s involvement is minimal, it appears that there is no duty to disclose under Rule 1.2(c).

While this Committee favors the allowance of ghostwriting, we are mindful that New York courts have yet to interpret Rule 1.2(c). Accordingly, it is possible that a court could determine that a *pro se* litigant has committed a fraud upon the tribunal where he or she fails to disclose to the tribunal and/or opposing counsel that he or she had the assistance of counsel in the preparation of pleadings or other submissions. Although such a holding would seemingly conflict with the plain language of Rule 1.2(c), requiring disclosure only “where necessary,” the Appellate Divisions have given no clarification of what “where necessary” means. The language

is not derived from either the ABA Model Rules of Professional Conduct or the former Code of Professional Responsibility. Given the lack of clarification from the Appellate Divisions, and New York's prior opinions disfavoring ghostwriting, best practices dictate that until there is such clarification, where the attorney's participation on behalf of a *pro se* litigant has been substantial and the circumstances so warrant, practitioners should give notice to the tribunal and/or to opposing counsel.

CONCLUSION

We believe that client interests are best served by allowing limited scope representation when the client requests it. Based on the newly adopted Rules of Professional Conduct in New York, we find that notice of limited representation need not be given in every circumstance. Instead, we believe that an attorney need only disclose his or her assistance in drafting pleadings or other submissions when required by a court rule, a judge's rule or order, or in any other situation in which an attorney's ghostwriting would constitute a misrepresentation or would otherwise violate a rule of professional conduct. In such circumstances, absent a more specific rule of court, a lawyer should usually be able to fulfill any disclosure obligation with the notation "Prepared with the assistance of counsel admitted in New York."