



Could Ghostwriting Come Back to Haunt You?

The Ethics of Ghostwriting Pleadings for Pro Se Litigants

By Caitlyn Parsley and Andrea K. Holder

Sometimes, pro se litigants will ask lawyers to assist them with drafting pleadings, motions, or briefs without signing them. A pleading will appear to be written by a litigant who is representing him- or herself, when, in fact, it was written by a licensed attorney. This practice of anonymously drafting documents for pro se litigants is called “legal ghostwriting,” and the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility has recognized it as a form of “unbundling” of legal services, or limited scope representation. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007). Some jurisdictions have applauded this type of unbundled representation, seeing it as a way to increase access to justice, while other jurisdictions have banned it, seeing it as “dishonest” behavior under Model Rule 8.4(c). The question that arises in this context, then, is whether a lawyer is ethically obligated to disclose the fact or extent of his or her assistance to the court. If the lawyer fails to disclose that he or she provided assistance, is the lawyer being dishonest?

Model Rule 8.4(c) provides that “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Model Rules of Prof'l Conduct R. 8.4(c). In Formal Opinion 07-446, the American Bar Association Standing Committee on Ethics and Professional Responsibility concluded that a lawyer may provide legal assistance to pro se litigants to help them prepare written submissions to the court without disclosing the nature or extent of such assistance. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007). The committee stated that “[l]itigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.” *Id.* at 2. The committee further stated that absent an affirma-

tive statement by the client that can be attributed to the lawyer that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Model Rule 8.4(c). *Id.* at 4. The committee concluded that “there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer’s conduct.” *Id.*

While the ABA Standing Committee on Ethics and Professional Responsibility has concluded that ghostwriting is permissible under the Model Rules, state ethics committees have reached diverging opinions on this subject. Some states, such as Alabama, Arizona, and North Carolina, allow attorneys to ghostwrite pleadings for pro se litigants without disclosing the fact of their assistance to the court. See Ala. State Bar Ass'n, Ethics Op. 2010-01 (2010); Ariz. State Bar Ass'n, Ethics Op. 06-03 (2006); N.C. State Bar Ass'n, Formal Ethics Op. 3 (2008).

Other states require attorneys who ghostwrite pleadings for pro se litigants to disclose their identity to the court. For example, in Nevada, the practice of ghostwriting is unethical unless the ghostwriter’s identity and assistance are disclosed to the court. Nev. State Bar Ass'n, Formal Ethics Op. 34 (2006, Revised 2009). Additionally, under the West Virginia Rules of Professional Conduct, ghostwriting is permissible as long as a lawyer discloses his or her identity when preparing pleadings and other documents filed with the court. W.V. Lawyer Disciplinary Bd., L.E.O. 2010-01.

A third category of states takes a middle ground, permitting attorneys to ghostwrite pleadings for pro se litigants as long as the ghostwriting attorney discloses the fact of his or her assistance to the court, but such states do not require the attorney to disclose his or her identity. For instance, in Florida, any pleadings prepared by an attorney and filed with the court on behalf of a pro se litigant must clearly indicate that the litigant was aided by an attorney. Fla. B. Op. 79-7 (Reconsideration) (2000). Specifically, such pleadings must indicate that they have been “prepared with the assistance of counsel.” *Id.* However, such pleadings need not identify the name of the lawyer who provided the assistance.

Although many state bar associations have taken a favorable view of ghostwriting, there is a tension between



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how state bar associations see ghostwriting and how federal courts view it. For example, a bankruptcy court in South Carolina held that “an attorney’s practice of ‘ghost-writing’ pleadings for ‘pro se’ individuals violates the local bankruptcy rules, the Federal Rules of Civil Procedure, and the South Carolina Rules of Professional Conduct.” *In re Mungo*, 305 B.R. 762 (Bankr. D. S.C. 2003). The court considered ghostwriting to be “a deliberate evasion of a bar member’s obligations.” *Id.*

Federal Rule of Civil Procedure 11 requires counsel to sign all documents submitted the court representing that there are legitimate grounds upon which the filing is based. Fed. R. Civ. P. 11(a). Ghostwriting shields attorneys by “cloak[ing] them in anonymity.” *In re Mungo*, 305 B.R. at 768. As pointed out by the *Mungo* court, “[a]n obvious result of the anonymity afforded ghost-writing attorneys is that they cannot be policed pursuant to the applicable ethical, professional, and substantive rules enforced by the Court and members of the bar since no other party to the existing litigation is aware of the ghost-writing attorney’s existence.” *In re Mungo*, 305 B.R. 762, 768 (Bankr. D. S.C. 2003) (citing *Barnett v. LeMaster*, 12 Fed. App’x 774, 778 (10th Cir. 2001); *Ellis v. State of Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971)). In these jurisdictions, attorneys are subject to sanctions such as suspension and possible disbarment.

Regardless of the division in decisions among jurisdictions, some things are clear. As an attorney, you must consult the local rules of professional conduct and ethics opinions in your jurisdiction to determine the appropriate course of action before you agree to ghostwrite documents for a client. More importantly, you must be sure that there is a clear understanding between you and the client about the limited scope of your representation.

