

2002

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Recommended Citation

Jona Goldschmidt, *In Defense of Ghostwriting*, 29 Fordham Urb. L.J. 1145 (2002).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol29/iss3/17>

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IN DEFENSE OF GHOSTWRITING

*Jona Goldschmidt**

INTRODUCTION

The increased presence of pro se litigants in the court has resulted in more interest in their plight and the challenges it poses for court administration.¹ The growth of pro se litigation is a sign of the times. It 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. Increased literacy has certainly contributed to the increase in pro se litigation. Less appreciated is the increase in computer literacy. As educated people of modest means become computer literate, they increasingly take advantage of court web sites that make forms available, clinics that provide instruction on proceeding pro se, and pro se self-service centers.

This segment of the pro se population still needs legal assistance to make sure their legal papers are in order and to navigate the litigation process. They need more legal assistance than court staff or a pro se clinic instructor can provide. Many prospective pro se litigants seek assistance from either non-lawyer practitioners (whose practices are generally limited to filling in legal forms) or lawyers willing to provide “unbundled” legal services, such as reviewing client-drafted pleadings or ghostwriting papers that will be signed by the client and filed pro se.

This article analyzes the legal community’s resistance to ghostwriting for pro se litigants. Part I examines the nature, extent, and benefits of ghostwriting. Part II analyzes objections to ghostwriting raised in case law and ethics opinions. Part III describes

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1. This interest can be viewed as part of the larger history of court reform, a history that includes the advent of legal services, merit selection, and specialized courts like small claims courts. The national movement towards court reform is reflected in the streamlining of pleading and procedure rules, the adoption of unified court systems, the establishment of racial/gender equality task forces, and the development of user-friendly courts. These developments have all aimed at increasing the quality of legal services and enhancing access to justice. The scarcity of legal services for the poor and the growing numbers of people unable to afford legal services has also led to other access-enhancing developments. These include the bar’s increased promotion of pro bono services and the emergence of a growing number of entrepreneurial non-lawyer practitioners and document-preparation services.

recent ghostwriting recommendations and regulatory developments. Part IV discusses the relevance of the duty of confidentiality and the attorney-client privilege to ghostwriting. Part V analyses the legal community's resistance to ghostwriting—placing it in the context of the legal profession, the adversary system, and resistance to other court reforms. The article concludes that ghostwriting serves a growing segment of the pro se population. The practice does not violate court rules or ethical principles, and does not threaten the courts' institutional interests. Indeed, the rules of confidentiality and the attorney-client privilege support ghostwriting by protecting the identity of counsel against compelled disclosure.

I. NATURE, EXTENT, AND BENEFITS OF GHOSTWRITING

Limited, or unbundled services representation is an alternative to traditional full-service representation. Instead of entering a notice of appearance and representing the client in all aspects of the case, the lawyer only provides limited or discrete services. Typically, the client pays for the service at the time it is rendered rather than paying a lump sum retainer or being billed on a monthly basis. According to Forrest Mosten, the father of unbundled legal services,² limited representation can include advising the client, researching the law, drafting documents, and representing the client in court.³ Limited services representation costs less and allows clients to stay in control of their cases.

Unbundled legal services have always been available in transactional practice, but they are a new development in family law and civil litigation. One study reported a high degree of client satisfaction from unbundled legal services.⁴

Mosten especially promotes unbundled services in family law cases:

2. Forrest S. Mosten, *Unbundled Legal Services and Unrepresented Family Court Litigants: Current Developments and Future Trends*, 40 FAM. CT. REV. 15 n.1 (2002).

3. See generally FORREST S. MOSTEN, *THE COMPLETE GUIDE TO MEDIATION* 10-11 (1997); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423-24 (1994); *Mosten's Model for Unbundling*, WIS. LAW., Sept. 1997, <http://www.wisbar.org> (listing seventeen categories of services to choose from in an unbundling arrangement).

4. See *The Maryland Experiment*, WIS. LAW., Sept. 1997, <http://www.wisbar.org> (describing a seventeen-month experiment at the University of Maryland Clinical Law Program, in which clients rated their satisfaction from 8.1 to 8.8 on a 10-point scale).

Often a party whose spouse has filed for a divorce simply needs to file an Answer Then the party will be able to negotiate with his or her spouse or the spouse's lawyer to resolve the issues of the case. Occasionally, the party may need more complex documents filed, such as Interrogatories, Requests for the Production of Documents, Requests for Admissions, and Motions. In each case, the party may desire to maintain control of their case but need the assistance of a lawyer to file the document properly. An attorney who offers unbundled legal services can help draft documents that the party can file. This way, the document will meet the court's standards, the party will protect legal rights, and the party can continue to negotiate without having to work through a lawyer.⁵

According to Mosten, "Many self-representers can afford lawyers but do not want to use them because they do not want to spend the money, are afraid of losing control over their own lives, or believe that lawyers would actually add to their problems."⁶

No one has systematically collected data on the frequency of ghost writing but judging by the articles, conferences, cases, and ethics opinions on the subject, it appears to have taken hold of the legal community, if not the pro se population itself.

II. ANALYSIS OF OBJECTIONS TO GHOSTWRITING

In the few cases that address ghostwriting, courts often conclude that the practice violates ethical responsibilities, rule requirements, obligations to opposing parties, duties of attorneys as court officers, and principles of fairness. Indeed, ghostwriting is often considered contemptuous or otherwise sanctionable conduct.⁷ The courts have thrown the book at ghostwriters, and the practice has therefore been chilled. This section addresses the dominant rationales for opposing ghostwriting.

5. Forrest Mosten & Lee Borden, *Unbundled Legal Services*, at <http://www.zorza.net> (last visited Feb. 7, 2002).

6. See Forrest S. Mosten, *Mediation and the Process of Family Law Reform*, 37 *FAM. & CONCILIATION CTS. REV.* 429, 441 (1999).

7. See, e.g., *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997). This opinion and others discussed refer to the duties of attorneys, as officers of the court, to be candid and honest with tribunals, and conclude that ghostwriting violates Rule 11, puts the opposing party at unfair disadvantage, and "interferes with the efficient administration of justice." *Id.*

A. The Undue Advantage Argument

A review of the case law indicates that the primary objection to ghostwriting is that it gives pro se litigants an undue advantage over their represented adversaries. In *Johnson v. Board of County Commissioners*,⁸ the most oft-cited case, the pro se defendant was a former county sheriff sued for sexual harassment and civil rights violations. The *Johnson* court indicated its displeasure with the fact that an attorney ghostwrote the defendant's motions for an extension of time while he sought counsel to represent him.⁹ Noting that ghostwriting was "arising with increasing frequency,"¹⁰ the court gave the undue advantage rationale for prohibiting ghostwritten filings:

It is elementary that pleadings filed *pro se* are to be interpreted liberally. [The defendant's] pleadings seemingly filed *pro se* but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The *pro se* litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party.¹¹

The *Johnson* court cited no specific harm or actual undue advantage that resulted from the filing of the ghostwritten papers. Nevertheless, according to the court,

having a litigant appear to be *pro se*, when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar.¹²

8. *Johnson v. Bd. of County Commr's*, 868 F. Supp. 1226 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

9. *Id.* at 1229-32.

10. *Id.* at 1227.

11. *Id.* at 1231 (citations omitted).

12. *Id.* at 1232.

The “unseen hand”¹³ language in *Johnson* and other terms demonizing the ghostwriting attorney¹⁴ are found in most cases on the subject.¹⁵

The unfair advantage argument assumes that since pro se litigants are ill-equipped to prosecute their claims because full representation is unavailable or undesired, there is no reason to provide them with any legal services. Such a sweeping generalization may be true for some complex actions that no lay litigant could prosecute. But, in garden-variety civil and family cases, many persons of ordinary intelligence can navigate the system with forms and pro se assistance programs provided by state courts. Since the level of court users’ general and computer literacy is rising, and since, increasing numbers of litigants are taking advantage of this assistance, federal courts may soon adopt similar programs.

The *Johnson* court cited three cases to support its ruling that ghostwritten papers are improper. One of them, *Klein v. Spear, Leeds & Kellogg*¹⁶ (*Klein I*), was perhaps the earliest anti-ghostwriting case. *Klein I* involved a pro se plaintiff whom the court described as “an habitual litigant who in the past five or six years [had] commenced well over thirty lawsuits against a very large number of defendants.”¹⁷ The court’s description of ghostwriting was condemnatory:

An unverified statement brought to our attention is to the effect that an attorney (or attorneys) have been and still are, actively assisting [the plaintiff] with legal advice . . . by drawing up the papers before us now as well as those submitted on the prior motion. They are quite voluminous and by reason of their legal

13. *Id.*

14. *Id.* at 1230-32 (describing ghostwriting attorney as a “Phantom” or an “undisclosed counsel”).

15. An exception is *Olvera v. Edmundson*, No. 1:01cv74-C, 2001 U.S. Dist. LEXIS 13169, at *1 (W.D.N.C. June 15, 2001). The court did not find ghostwriting improper, perhaps because there was no motion made to hold the pro se plaintiff in contempt or to compel her to disclose the fact and identity of her ghostwriter. *Id.* Rather than demonizing the ghostwriting attorney, the court characterized the ghostwriting as not furthering the judicial process and evidencing inadequate business sense or the ability to properly evaluate the merits of the clients’ cases. The court held that

Review of the pro se complaint reveals that it likely was drafted by a lawyer who has not made an appearance. While not an unethical practice, the court notes that ghostwriting does little for the judicial process, inasmuch as pro se litigants are ill equipped to prosecute the complex issues raised without continued legal assistance.

Id. at *2 n.1.

16. *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341 (S.D.N.Y. 1970).

17. *Id.* at 342.

content and phraseology most strongly suggest that they emanate from a legal mind. If this be true, it should not be countenanced. It is one thing to give some free legal advice (incidentally, plaintiff is apparently not indigent); quite another to participate so extensively and not reveal one's identity. If this is the case, we see no good or sufficient reason for depriving the opposition and the Court of the identity of the legal representatives involved so that we can proceed properly and with the relative assistance that comes from dealing in the open. Besides, where it is unnecessary we should not be asked to add the extra strain to our labours in order to make certain that the *pro se* party is fully protected in his rights. Most importantly, this unrevealed support in the background enables an attorney to launch an attack against another member of the Bar (as was done by this same plaintiff), without showing his face. This smacks of the gross unfairness that characterizes hit-and-run tactics. If this is the situation here, we vigorously condemn it.¹⁸

The foregoing comments are noteworthy for several reasons. First, the court was not dealing with the typical *pro se* litigant of today, most often found in family court. Rather, the court was confronting a rarer kind of *pro se* plaintiff—the kind many judges have in mind when discussing *pro se* litigants—a “pest,” a “nut,” or a “kook.”¹⁹ It appears that the court's concern about ghostwriting resulted from defense counsel's complaint.²⁰ This led the court to argue that undisclosed ghostwriting created—in some unstated way—an unfair advantage for the *pro se* plaintiff. According to the court, ghostwriting enabled one attorney to launch an “attack” on another without disclosing his identity. The court further grounded its objection to ghostwriting by alluding to the (also unspecified) “extra strain” of its labors to protect the plaintiff's rights.²¹

The court did not, however, compel disclosure of the ghostwriting attorney's identity. Instead, it stated that it was “constrained to . . . measure plaintiff's papers with the same preciseness [that it applied] to the claims of the most deserving,”²² implying that the plaintiff was not in such category. With great reluctance, the court found that, while certain claims could be disposed of on

18. *Id.* at 342-43.

19. JONA GOLDSCHMIDT, BARRY MAHONEY, HARVEY SOLOMON & JOAN GREEN, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 60 (1998) [hereinafter MEETING THE CHALLENGE].

20. *Klein*, 309 F. Supp. at 342 (referring to an injunction against future harassment).

21. *Id.*

22. *Id.* at 343.

their merits, others could not, caustically adding its regret that "having blunted [the plaintiff's] spear, we cannot also impale him upon it."²³

The second opinion relied upon in *Johnson* was based on a subsequent action by the same pro se plaintiff in *Klein I*. In *Klein v. H.N. Whitney, Goadby & Co.*²⁴ (*Klein II*), the court described the case as "yet another of the endless suits of plaintiff Ernest Klein."²⁵ It cited the opinion *Klein I* (written by a different judge) and echoed its position on the ghostwriting issue in dicta.²⁶ The court characterized ghostwriting as being—in some unstated manner—grossly unfair to the court and the opposing lawyers and therefore not to be tolerated.²⁷ The court indicated that some of the plaintiff's arguments and papers strongly suggested that he was enjoying the assistance of a lawyer who had not formally appeared in the case.²⁸

The third case relied upon in *Johnson* is *Ellis v. Maine*,²⁹ which involved a pro se prisoner who sought a free transcript to prepare a petition for relief from his judgment and conviction. In denying relief, the court stated:

In a growing number of petitions, of which this is one, the petitioner appears pro se, asserts complete ignorance of the law, and then presents a brief which, however insufficient, was manifestly written by someone with some legal knowledge. We are entirely agreeable to a petitioner having what is colloquially termed a jailhouse lawyer. What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign.³⁰

The court in *Ellis* did not, however, rest its condemnation of ghostwriting on the unfair advantage argument. Rather, it found the practice to violate Rule 11 of the *Federal Rules of Civil Procedure*.³¹

23. *Id.* at 344.

24. *Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699 (S.D.N.Y. 1971).

25. *Id.* at 700.

26. *Id.* at 702-03.

27. *Id.* at 702.

28. *Id.*

29. *Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971).

30. *Id.* at 1328.

31. *See infra* notes 130-49 and accompanying text.

Several years after *Johnson*, the court in *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*³² also condemned ghostwriting. The case involved four attorneys who represented pro se plaintiffs in unsuccessful proceedings before the Equal Employment Opportunity Commission. The attorneys were unwilling to represent the plaintiffs further in the federal actions. Instead, the attorneys drafted complaints on their clients' behalf that were then filed in federal court.³³ The court learned of the ghostwriting from representations the plaintiffs made to the clerk of court, and from "the content of certain documents."³⁴ In condemning ghostwriting, the court cited *Johnson*³⁵ and vehemently declared that the practice would not be tolerated.³⁶

The court stated that "a pro se complaint must survive a motion to dismiss under Rule 12(b)(6) for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"³⁷ The court referred to this relaxed standard" as a "necessary accommodation to those unable to obtain the assistance of one trained in the law."³⁸ The court explained the undue advantage argument as follows:

When . . . complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding *pro se*, the indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it. The *pro se* plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those pro-

32. *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075 (E.D. Va. 1997).

33. *Id.* at 1077.

The extent of the Attorneys' involvement varied with each case. In all four cases, the Attorneys drafted the complaints filed in this Court. In at least three cases, the Attorneys were paid a flat fee for their limited representation of the plaintiffs. In some cases the representation included unsuccessful efforts to resolve the employee disputes prior to filing the complaints. In some cases the Attorneys' courier filed the complaints and even paid the filing fee out of their Law Firm's escrow account. In one case, the Attorneys effectuated service of process on the defendant. Despite their participation in these cases, in only one case did the Attorneys ever make a formal appearance as the counsel of record, and that was after the complaint was filed.

Id.

34. *Id.* at 1076.

35. *Id.* at 1078.

36. *Id.* at 1080.

37. *Laremont-Lopez*, 968 F. Supp. at 1078 (quoting *Lugo v. INS*, 950 F. Supp. 743, 745 (E.D. Va. 1997)).

38. *Laremont-Lopez*, 968 F. Supp. at 1078.

ceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court.³⁹

In *Laremont-Lopez* and the other cases discussed, there was no evidence or allegation of specific harm caused by ghostwriting. These decisions also failed to analyze the undue advantage argument beyond reciting that liberal treatment of pro se pleadings, coupled with more stringent treatment of attorney-drafted pleadings, results in an undue advantage to the pro se litigant who uses ghostwritten documents. The principle, having emerged from cases involving an atypically litigious pro se litigant, continues to be recited and relied upon. Recent cases, like *Laremont-Lopez*, also fail to specify any actual harm from ghostwriting.⁴⁰

39. *Id.* There is a large body of case law indicating that, except for liberality in pleading construction, pro se litigants are on their own. Plaintiffs take their chances when proceeding pro se because judges have no duty to assist them in navigating the justice system. *See, e.g.,* *Hughes v. Rowe*, 449 U.S. 5 (1980); *Maclin v. Paulson*, 627 F.2d 83 (7th Cir. 1980). Pro se litigants are generally held to the same standards as represented parties with respect to rule compliance. *See, e.g.,* *Birl v. Estelle*, 660 F.2d 592 (5th Cir. 1981); *U.S. v. Pinkey*, 548 F.2d 305 (10th Cir. 1977). Some courts have required specific notice to pro se litigants—by the clerk of court or opposing counsel—of certain rules and their effects (e.g., dispositive motions). *See, e.g.,* *Moore v. Florida*, 703 F.2d 516 (11th Cir. 1983); *Heron v. Beck*, 693 F.2d 125 (11th Cir. 1982). Others make general reference to liberality in treatment throughout the litigation. *See, e.g.,* *Phillips v. United States Bd. of Parole*, 352 F.2d 711 (D.C. Cir. 1965). The range of attitudes has been observed empirically. *See* GOLDSCHMIDT, *MEETING THE CHALLENGE*, *supra* note 19, at 52-61 (noting a range of judicial attitudes toward pro se litigants, from the traditional/strict-rule-compliance view to the progressive/relaxed-rule-compliance view); Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 *FORDHAM L. REV.* 1109, 1111-23 (1987) (collecting cases establishing that some courts treat pro se litigants more favorably, while other courts do not accord self-represented litigants any special treatment).

40. *See, e.g.,* *Duran v. Carris*, 238 F.3d 1268, 1271-73 (10th Cir. 2001) (holding that (a) drafting an appellate brief afforded the plaintiff the benefit of the court's liberal construction of pro se pleadings and inappropriately shielded the ghostwriting attorney from responsibility and accountability for his actions and counsel, (b) defense counsel's motion for sanctions against the ghostwriting attorney would be denied, and (c) admonishing him that ghostwritten briefs would in the future result in possible sanctions); *Barnett v. LeMaster*, No. 00-2455, 2001 U.S. App. LEXIS 7874, at *9-12, 23-24 (10th Cir. Apr. 27, 2001) (following *Duran* and holding that a ghostwritten motion for appointment of counsel gave an unfair advantage to the pro se litigant whose pleadings were afforded a more liberal construction than those drafted by an attorney, and ordering counsel who drafted the motion to file an appearance, but not describing any specific harm); *Ostevoll v. Ostevoll*, No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *33 (S.D. Ohio Aug. 16, 2000) (holding that ghostwriting in the form of a photocopy of a petition drafted by a foreign attorney in a previous action, but signed and filed by the petitioner pro se, was a violation of the court's rules (i.e., Rule

One court has cautioned that complaints of ghostwriting must be factually supported, establishing that the ghostwriting did in fact occur. In *Somerset Pharmaceuticals, Inc. v. Kimball*,⁴¹ the plaintiff moved to strike the pro se defendant's allegedly ghostwritten pleadings. The defendant's pleadings had been filed over the span of the two years following the defendant's attorney's withdrawal from the case. The court agreed in principle with the *Johnson* opinion's holding that ghostwriting violates an attorney's duty of candor to the court. The court stated that ghostwriting taints the legal process by creating disparity between the parties.⁴² Nonetheless, the court never reached the question of undue advantage, finding that more than a mere supposition of ghostwriting must be alleged before the court would "thoroughly prejudice a party by striking all their pleadings."⁴³ The court distinguished the situation before it from the *Johnson* case because in *Johnson* the pleadings were admittedly drafted by an attorney; in *Somerset*, however, the court found the pleadings were prepared by the pro se defendant himself. The defendant had merely used a style learned from the pleadings his former attorney had prepared before withdrawing.⁴⁴

There is only one reported case in which an unrepresented party sought to improperly take advantage of the purported liberal interpretation accorded pro se pleadings. In *Wesley v. Don Stein Buick, Inc.*,⁴⁵ the court denied defense counsel's motion for an order compelling the plaintiff (who was an attorney) to disclose the identity of any ghostwriting attorney assisting her, or, alternately, to disclose whether she herself was an attorney.⁴⁶ The plaintiff had claimed she was entitled to pro se status.⁴⁷ Interestingly, the court,

11), but would not be stricken because the acts in the case were "not specifically prohibited by the Rules and did not result in Petitioner gaining an unfair advantage over Respondent"); *Ricotta v. State of California*, 4 F. Supp. 2d 961, 985-88 (S.D. Cal. 1998) (citing *Ellis*, *Johnson*, and *Laremont-Lopez*, *supra*, with approval, and finding more than limited legal assistance to a pro se plaintiff to be "unprofessional conduct," but refusing to grant motion to hold attorney in contempt for ghostwriting seventy-five to a hundred percent of the pro se's response because attorney had no intent to mislead and because professional rules of conduct and court rules fail to provide "clear guidance" on an "interesting and complex" issue).

41. *Somerset Pharmaceuticals, Inc. v. Kimball*, 168 F.R.D. 69 (M.D. Fla. 1996).

42. *Id.* at 72.

43. *Id.*

44. *Id.*

45. *Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288 (D. Kan. 1997).

46. Defendants pointed out that the plaintiff had signed her pleadings with the suffix "esq.," and that "her papers . . . display[ed] a better level of legal knowledge than one might expect from a lay person." *Id.* at 1294 n.2.

47. *Id.*

in denying the defense motion,⁴⁸ said that it would recognize the plaintiff's pro se status and would not construe her pleadings any less liberally despite her disclosure.⁴⁹

In evaluating the undue advantage argument, we should first examine the contention that pro se litigants' pleadings are more liberally construed than those drafted by counsel. It is true that in *Haines v. Kerner*,⁵⁰ the Supreme Court announced a liberal construction rule for pro se pleadings attacked by a Rule 12(b)(6) motion to dismiss. Fifteen years before *Haines* was decided, however, the Supreme Court, in *Conley v. Gibson*, held that no complaint may be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁵¹ This standard is the same as the liberal construction rule for pro se plaintiffs in *Haines*. The Supreme Court has since held that all complaints must be "construed generously,"⁵² and that a court, on a 12(b)(6) motion, "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations."⁵³ Thus, all pleadings, pro se or otherwise, are entitled to the liberal pleading rules of *Conley v. Gibson*⁵⁴ and must be construed favorably to the pleader.⁵⁵ The liberal construction rule for both attorney-drafted and pro se pleadings may explain the comment of the court in *Wesley v. Don Stein Buick, Inc.*: "[The court will] not construe the plaintiff's pleadings, on the motions now pending, any less liberally regardless of the plaintiff's disclosure on this subject."⁵⁶

48. *Id.* at 1307.

49. *Id.* at 1294 n.2. The magistrate's previous grant of the motion to compel disclosure of the ghostwriter's identity or to compel plaintiff to declare whether she was an attorney had been granted on similar grounds raised by the previous cases: that ghostwriting violates the ethical duty of candor to the tribunal and Rule 11; that the disclosure sought may be compelled in the exercise of the court's inherent discretion; and, because the plaintiff "suggested that the court consider her status pro se in construing [the pending motions to dismiss] and her pleadings." *Id.* at 886. Significantly, plaintiff had opposed the motion by arguing that, if granted, it would constitute an "unlawful intrusion into privileged information." *Id.* at 887. The latter argument is discussed *infra* in notes 268-280 and the accompanying text.

50. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

51. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

52. *Pegram v. Herdich*, 530 U.S. 211, 230 n.10 (2000).

53. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

54. *Kush v. Rutledge*, 460 U.S. 719, 721 (1983).

55. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974).

56. *Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288, 1294 n.2 (D. Kan. 1997).

In most civil cases, defense counsel will make a motion to dismiss for failure to state a claim,⁵⁷ a motion for summary judgment,⁵⁸ or both. Courts are required to administer the civil procedure rules governing such motions "to secure the just, speedy, and inexpensive determination of every action."⁵⁹ There are two grounds for granting a motion to dismiss for failure to state a claim: the use of conclusory or non-specific allegations or the failure to allege a required element of the asserted cause of action.⁶⁰ As to the conclusory or non-specific allegations, the objection is that plaintiff failed to provide the defendant the required "(1) . . . short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks."⁶¹ As to the missing element objection, the movant typically presents authorities to establish that a required element of the cause of action is lacking;⁶² that a notice or exhaustion requirement has not been met;⁶³ or that a statute of limitations bars the claim.⁶⁴ In the case of summary judgment, the defendant's argument is factually based but relates to similar deficiencies, asserting that the defendant is entitled to judgment as a matter of law.⁶⁵

Upon receipt of such motions, the plaintiff has a right to file an amended complaint once before a responsive pleading is served and thereafter by leave of court.⁶⁶ Assuming the pro se litigant is made aware of this rule, any deficiencies in the litigant's pleadings, as enumerated in the motion to dismiss, will either be corrected

57. FED. R. CIV. P. 12(b)(6).

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

Id.

58. "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." FED. R. CIV. P. 56(b).

59. FED. R. CIV. P. 1.

60. FED. R. CIV. P. 8(a).

61. *Id.*

62. FED. R. CIV. P. 12(b)(6).

63. FED. R. CIV. P. 12(b)(4), 12(b)(5).

64. FED. R. CIV. P. 8(c).

65. FED. R. CIV. P. 56(e).

66. FED. R. CIV. P. 15(a).

with an amended complaint or result in the claim being dismissed.⁶⁷ Thus, it does not matter whether the court applies the general liberal construction standard of *Conley v. Gibson* or the pro-se liberal construction standard of *Haines v. Kerner*. It is a distinction without a difference. In either case the plaintiff will seek to correct the deficiencies that were alleged in the motion to dismiss or included in the court's ruling on the motions. As such, where is the undue advantage or unfairness to the represented party?

The dark scenario envisioned by ghostwriting opponents is that a pro se litigant will file a ghostwritten, but presumably frivolous or otherwise dismissible action. The court, in denying the defendant's dispositive motions, will erroneously apply the pro se (super) liberal construction rule, thus permitting the matter to proceed to trial. If the court applied a more stringent standard (i.e., the "normal" liberality rule) to ghostwriting pleadings, the same complaint would not likely survive. Practically speaking, however, ghostwriting is obvious from the face of the legal papers filed, a fact that prompts objections to ghostwriting in the first place. This obviousness is reflected in the case law on the subject.⁶⁸ Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motions. A court that refuses to dismiss or enter summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error

67. *Id.*

68. *See, e.g.,* Clarke v. United States, 955 F. Supp. 593, 598 (E.D. Va. 1997) ("Notably, the true author of plaintiff's putatively *pro se* pleadings and supporting documents appears to have had formal legal training"); Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1076 (E.D. Va. 1997) ("Based on . . . the contents of certain documents, it appeared that the complaints were in fact drafted by the attorneys of a local law firm"); Johnson v. Bd. of County Comm'rs, 868 F. Supp. 1226, 1229 (D. Colo. 1994) ("The pleading, too, was obviously drafted by a lawyer"); Klein v. H.N. Whitney, Goadby & Co., 341 F. Supp. 703 (S.D.N.Y. 1971) ("[A]s other judges of this court have noted, . . . his answering papers strongly suggest that he is enjoying the assistance of a lawyer . . ."); Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) ("In a growing number of petitions . . . the Petitioner . . . presents a brief which, however insufficient, was manifestly written by someone with some legal knowledge"). *See also* Alaska Bar Assoc. Op. 93-1 (1993) ("[J]udges are usually able to discern when a pro se litigant has received the assistance of counsel in preparing or drafting pleadings. In that event, the Committee believes that any preferential treatment otherwise afforded the litigant will likely be tempered, if not overlooked.").

in the same manner as if it refuses to deny such dispositive motions against an attorney-drafted complaint.⁶⁹

Consider the case of two pro se adversary parties, one of whom has ghostwriting assistance and the other of whom does not. Under these circumstances, most people would say that the assisted party has an unfair advantage. This is just as true, however, when a pro se plaintiff is opposed by a represented adversary. The point is that ghostwriting, rather than unfairly advantaging the pro se, helps level the playing field and provides a vehicle for enhancing the pro se litigant's access to justice.

Realistically, a pro se-drafted pleading is more likely to be dismissed or otherwise disposed of regardless of the standard applied by the court. When pro se litigants have no attorney to advise them of the necessary elements or factual averments of their claims, the represented party has the undue advantage. Permitting ghostwriting so that complaints are adequately crafted levels the playing field. It also streamlines the litigation process by clarifying the issues and reducing the number of dispositive motions and responses.

In summary, courts that have addressed ghostwriting have almost uniformly condemned it on grounds, among others, that it gives the pro se litigant an unfair advantage.⁷⁰ Ghostwriting complaints are primarily raised by attorneys who wish to maintain their advantage over pro se litigants. Such attorneys attack their pro se adversaries by claiming unfairness in pleading construction standards and attacking the professional conduct of ghostwriting attorneys.⁷¹ Yet the opinions on the issue cite no specific harm, and fail to analyze the unfair advantage argument.⁷² Instead these opinions accept the argument on its face and vilify the ghostwriting attorney

69. It should be noted that the federal rules also provide that "All pleadings shall be so construed as to do substantial justice." FED. R. CIV. P. 8(f).

70. *But see Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001).

[P]articipation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant.

Id.

71. *See, e.g., Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 343 (S.D.N.Y. 1970) (holding that the ghost-written pleading "smacks of the gross unfairness that characterizes hit-and-run tactics").

72. *See, e.g., Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) (offering rationales based on professional ethics to illustrate the harms of ghostwriting, but citing to no actual harm).

as a violator of court rules and ethical principles. As a result, attorneys are discouraged from providing unbundled legal services.

B. Other Rationales Based on Deception

Courts and ethics opinions often cite ghostwriting as a breach of ethical duties and prohibitions concerning deception. The practice has been characterized as a breach of the duties of candor to the court⁷³ and fairness to opposing party and counsel.⁷⁴ Ghostwriting has been held to violate the ethical prohibitions against (1) dishonesty, fraud, deceit, or misrepresentation,⁷⁵ (2) conduct prejudicial to the administration of justice,⁷⁶ and (3) the violation of ethics rules through the acts of another.⁷⁷ Before examining these charges, note that most ghostwriting cases and ethics opinions concede that the attorney-client relationship may properly be limited in objectives and means:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued

. . .

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.⁷⁸

According to the commentary on rule 1.2:

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles The terms upon which representation is undertaken may exclude specific objectives or means The client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [providing that a lawyer "shall provide competent rep-

73. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983) [hereinafter MODEL RULES].

74. *Id.* at R. 3.4.

75. *Id.* at R. 8.4(c).

76. *Id.* at R. 8.4(d).

77. *Id.* at R. 8.4(a). *But see* John C. Rothermich, Note, *Ethical and Procedural Implications of 'Ghostwriting' for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 *FORDHAM L. REV.* 2687, 2728 (1999) (reviewing applicable ethical duties and prohibitions, and cautioning against "stifling the development of these new models of legal practice through application of ethical and procedural norms that were designed with full-service, traditional representation in mind.").

78. MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983).

resentation to a client” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”], or to surrender the right to terminate the lawyer’s services

The *Restatement (Third) of the Law Governing Lawyers*⁷⁹ recognizes the attorney’s duty to “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation.” The *Restatement* also recognizes duties of reasonable competence, diligence, confidentiality, avoidances of conflicts, honest dealing with the client, not employing advantages arising from the attorney-client relationship, and fulfilling “valid contractual obligations to the client.”⁸⁰ Under the *Restatement*, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to a client if the client is adequately informed and consents and the terms of the limitation are reasonable.⁸¹ Limited legal services, commonplace in transactional law, are the only option for many parties, especially in family law, because the costs of more extensive services often outweigh the benefits.⁸²

The *Restatement* provides five safeguards for limited services agreements:

1. a client “must be informed of any significant problems a limitation might entail and the client must consent,”
2. “any contract limiting the representation is construed from the standpoint of a reasonable client,”
3. “the fee charged by the lawyer must remain reasonable in view of the limited representation,”

79. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000) [hereinafter RESTATEMENT GOVERNING LAWYERS].

80. *Id.* § 16(1)-(2). Comment (c) notes:

Individual clients define their objectives differently The client, not the lawyer, determines the goals to be pursued, subject to the lawyer’s duty not to do or assist an unlawful act The lawyer’s duties are ordinarily limited to matters covered by the representation Ordinarily, the lawyer may not act beyond the scope of contemplated representation without additional authorization from the client [However, a] lawyer owes duties to the court or the legal system and to an opposing party in litigation.

Id. § 16 cmt. (c). Comment (f) provides:

Contracts generally create or define the duties the lawyer owes the client One or more contracts between client and lawyer may specify the services the lawyer is being retained to provide, the services the lawyer is not obliged to provide, and the goals of the representation.

Id. § 16 cmt. (f).

81. *Id.* § 19(1)(a)-(b).

82. *Id.* § 19 cmt. (b).

4. "any change made an unreasonably long time after the representation begins must meet the more stringent tests of § 18(1) for postinception contracts or modification," and
5. "the terms of the limitation must in all events be reasonable in the circumstances."⁸³

The commentary cautions that "Reasonableness also requires that limits on a lawyer's work agreed to by client and lawyer not infringe on legal rights of third persons or legal institutions. Hence, a contract limiting a lawyer's role during trial may require the tribunal's approval."⁸⁴ Clients, therefore, have a clear right to enter limited services agreements.

Objections to ghostwriting must also be considered in the context of lawyers' other professional obligations. These include the duty to "seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession."⁸⁵ Lawyers must also be "mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf."⁸⁶

The duty of candor to the tribunal contained in Model Rule 3.3 includes a prohibition on the making of "a false statement of material fact or law to the tribunal."⁸⁷ The duty also obligates an attorney to disclose "a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."⁸⁸ There is no reference in the rule to limited legal services such as ghostwriting. Aside from the Rule 1.2 language permitting limited legal services, the *Model Rules* do not contain any other reference to limited services in pending litigation. The vagueness of the situation has not been lost on the ABA. One ABA director,

83. *Id.* § 19 cmt. (c).

84. *Id.*

85. MODEL RULES, *supra* note 73, at pmb1.

86. *Id.*; see also Alaska State Bar Ass'n Op. 93-1 (1993).

The attorney requesting the ethics opinion states that he is helping many pro se litigants prepare their own child support modification motions. Many of these litigants, he states, are unable to obtain legal counsel due to their poor financial condition. Assistance with their self-help efforts presents one of their few options for access to the courts. EC 2-33 stresses the legal profession's commitment to making high quality legal services available to all.

Id.

87. See MODEL RULES, *supra* note 73, at R. 3.3(a)(1) (2001).

88. *Id.* at R. 3.3(a)(2).

in a presentation to the ABA Ethics 2000 Commission, described the ambiguity surrounding the ethics of ghostwriting as follows:

Unfortunately, conflicting opinions have been issued by state bars, federal courts and commentators about the propriety of this practice. Because ghostwriting raises unresolved issues, such as whether it constitutes a fraud on the court or whether the attorney who provides ghostwriting services must make an appearance on behalf of the client, there is a need for clarity in a rule. . . . [Therefore,] we are not yet prepared to propose a definitive resolution concerning the scope of any proposed rule.⁸⁹

A comment to Rule 3.3 (candor to tribunal) gives some guidance to the ghostwriting attorney: "An advocate is responsible for pleadings and other document prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein."⁹⁰ The same commentary also states, without providing any examples, that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."⁹¹

The candor-to-the-tribunal rule prohibits the following acts: making false statements to the court;⁹² failing to disclose a material fact to a tribunal when necessary to avoid assisting a client commit a crime or fraud;⁹³ failing to disclose controlling, adverse legal authority to the court;⁹⁴ and offering evidence known to be false.⁹⁵ These duties "continue to the conclusion of the proceeding."⁹⁶ The

89. See Alan W. Housman, Director, Center for Law and Social Policy, Excerpts [sic] From Testimony on Ethics 2000, at 6 (2000). Housman goes further by pointing out that

some members have commented that civil legal assistance providers will be chilled from ghostwriting if they must disclose the names of their attorneys. Others have argued that there are dangers to the administration of justice in not requiring disclosure. There also may be a need to clarify what documents would come under the term "ghostwriting." One suggested remedy to these issues is to adopt a rule requiring disclosure only of the fact that an attorney had authored the document instead of disclosing the attorney's name.

Id. at 7. Housman also cites promising new Colorado and Maine court rules, described *infra* notes 232-34 and in the accompanying text, that permit ghostwriting, require ghostwriters to declare their identity, and declare that ghostwriting does not constitute an appearance.

90. See MODEL RULES, *supra* note 73, at R. 3.3 cmt.

91. *Id.*

92. *Id.* at R. 3.3(a)(1).

93. *Id.* at R. 3.3(a)(2).

94. *Id.* at R. 3.3(a)(3).

95. *Id.* at R. 3.3(a)(4).

96. *Id.* at R. 3.3(b).

rule's commentary refers to the "advocate's task," the "advocate's duty of candor to the tribunal," and the advocate's responsibility for pleadings and documents, indicating that it is directed to attorneys appearing in court as advocates.⁹⁷ Confusion reigns, therefore, regarding the scope of the duty of candor to the tribunal, and the question of whether that rule, or others, obligates an attorney advising or ghostwriting for a pro se litigant to enter a formal appearance of record.

The early cases reflecting judicial disapproval of ghostwriting did not find violations of the ethical duty of candor to the tribunal. Rather, their concerns were that ghostwriting adds to the court's work of protecting pro se litigants⁹⁸ and permits one attorney to attack another without "showing his face."⁹⁹ Courts also found the practice of ghostwriting to be grossly unfair,¹⁰⁰ because there is "no good or sufficient reason for depriving the opposition and the Court of the identity of the legal representative(s) involved so that [the court] can proceed properly and with the relative assurance that comes from dealing in the open"¹⁰¹ and because of the possibility of a Rule 11 violation.¹⁰² It was only after the issuance in 1978 of an ABA ethics opinion that courts began condemning ghostwriting on ethical grounds.¹⁰³

ABA Opinion 1414 involved an attorney who drafted a pro se litigant's pleadings and memoranda, sat in on his client's trial, and provided him advice—all without entering a formal appearance. The opinion has been cited by almost every court and state ethics committee addressing ghostwriting. The ABA Standing Committee on Ethics and Professional Responsibility found that an attorney who gives advice to, or prepares a pleading for a pro se litigant does not violate any of the Canons of Ethics under the former ABA Model Code of Professional Responsibility.¹⁰⁴ However, if a lawyer provides additional legal services, the propriety of the lawyer's actions will depend upon the facts involved and the extent of the lawyer's participation on behalf of a litigant who appears to the court and other counsel as being without professional representa-

97. MODEL RULES, *supra* note 73, at R. 3.3 cmt.

98. *See* Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342 (S.D.N.Y. 1970).

99. *Id.* at 343.

100. *Id.*

101. *Id.* at 342.

102. *See* Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971).

103. *See* ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 1414 (1978).

104. *Id.*

tion.¹⁰⁵ Extensive, undisclosed participation by a lawyer that permits the litigant to falsely appear as lacking professional assistance is improper.¹⁰⁶

Such extensive participation violated the predecessors of Model Rule 3.3, namely DR 1-102(A) and former ABA Model Code provisions that relate to the duty of candor to the court. Thus, the ABA opinion find that ghostwriting a pleading or other limited legal services are not a breach of the duty of candor, but a breach will arise if the participation of the attorney is "extensive."

ABA Opinion 1414 is noteworthy for several reasons. In addition to the applicable ethical rules, the opinion cites the ghostwriting cases discussed earlier, *Klein I*, *Klein II*, and *Ellis*. The first two cases were actions by an unusually litigious pro se litigant; the third was an action by a pro se prisoner who petitioned for a free transcript. These cases themselves made no reference to rules of professional responsibility. In *Klein I*, the sole case used to support the *Klein II* and *Ellis* cases, the attorneys had

been, and still are, actively assisting [the plaintiff] with legal advice . . . by drawing up the papers [relating to summary judgment] It is one thing to give some free legal advice (incidentally, plaintiff is apparently not indigent); quite another to participate so extensively and not reveal one's identity [W]e see no good or sufficient reason for depriving the opposition and the Court of the identity of the legal representative(s) involved so that we can proceed properly and with the relative assurance that comes from dealing in the open.¹⁰⁷

The *Klein I* court did not establish a causal relationship between the plaintiff's litigiousness and his attorney's ghostwriting, although it implied such a relationship existed. The court did not point to any specific harm to the defendants from the acts of the ghostwriter; nor did it cite any ethical rules in support of its conclusion. Rather, the court seems to have been reacting to the unusual nature of the plaintiff's attorney-client relationship and the limited scope of the representation agreement between them.¹⁰⁸ The rationale assumes that non-appearing ghostwriters have a duty to "deal in the open"¹⁰⁹ with the court, which, in turn, implies that any at-

105. *Id.*

106. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (1969) (knowingly making a false statement of law or fact); *id.* at DR 7-102(A)(3) (knowingly failing to disclose that which he is required by law to reveal).

107. *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342 (S.D.N.Y. 1970).

108. *Id.* at 342.

109. *Id.*

torney who does more than “give some free legal advice”¹¹⁰ to a litigating client becomes subject to the candor-to-the-court obligations. This raises the question of whether an attorney subject to the candor-to-the-tribunal duties can then be compelled to enter an appearance and involuntarily provide legal services beyond those provided for in the scope-of-the-representation agreement.

ABA Opinion 1414 agreed with the *Klein I* court that some legal services can be provided a pro se litigant without invoking ethical obligations of disclosure.¹¹¹ The ABA Opinion found that a candor-to-the-tribunal obligation arises when there is “extensive and undisclosed participation . . . that permits the litigant falsely to appear as being without substantial assistance.”¹¹²

The post-Opinion 1414 state ethics opinions uniformly acknowledge that unbundled legal services—by agreement of lawyer and client—are specifically authorized in the rules of professional responsibility.¹¹³ These opinions also agree that limited services representation implicates all of the ethical obligations of full-service representation. These obligations include competent representation (Rule 1.3), the duty of diligence and zealous advocacy (Rule 1.3), and the duty not to withdraw if withdrawal would cause material adverse effects to a client’s interests unless for good cause (Rule 1.16).¹¹⁴

110. *Id.*

111. ABA Comm. On Ethics and Prof’l Responsibility, Informal Op. 1414 (1978).

112. *Id.* The question then becomes the following: At what point does such assistance become unethical unless disclosed to the court? The difficulty of drawing a bright line “accounts for some discrepancy between the courts’ condemnation of ghostwriting and the endorsement of *disclosed* ghostwriting by some states’ ethics panels.” See Rothermich, *supra* note 77, at 2707 (emphasis added).

113. See, e.g., Ass’n of the Bar of the City of N.Y., Formal Op. 2001-3 (2001); Colo. Bar Assoc. Ethics Comm., Op. 101 (1998); N.C. State Bar Ass’n, R. Prof’l Conduct 240 (1997); State Bar of Wis., Op. E-97-1 (1997); S.C. Bar Ass’n Op. 90-44 (1990); Ill. State Bar Ass’n Op. 85-6 (1985); Utah State Bar Ethics Advisory Comm., Op. 47 (1978) and Op. 98-14 (1998). One previous summarization of many of the state ethics opinions regarding unbundling inaccurately divides the opinions into one category entitled “Facilitates Unbundling” and another entitled “Raises Concern with Unbundling Issues.” See MARLE ZIDE, MD, LEGAL ASSISTANCE NETWORK, RESULTS OF INFORMAL NATIONAL SURVEY OF ETHICAL OPINIONS RELATED TO “DISCRETE TASK LAWYERING, 1, 3 (2000), <http://www.unbundledlaw.org>. The concerns in the latter opinions involve ethical issues relating to specific forms of unbundled services, such as 1-800 number telephone services, web sites, or ghostwriting, but do not question the propriety of unbundled legal services per se.

114. MODEL RULES, *supra* note 73.

These state ethics opinions¹¹⁵ are more lenient in outcome and tone than the federal cases on ghostwriting.¹¹⁶ The opinions, none of which condemn ghostwriting per se, can be categorized into three major groups: (1) those requiring disclosure of the fact that “extensive” or “substantial” assistance beyond drafting of pleadings was or is being received (the ABA Opinion 1414 approach);¹¹⁷ (2) those finding that the mere act of ghostwriting a pleading and little more constitutes extensive or substantial assistance and requires disclosure of the personal identity of the ghostwriter¹¹⁸ or disclosure of the fact that such assistance was received;¹¹⁹ and (3) those finding that attorneys entering into limited legal services arrangements are bound by all professional responsibility rules, but that no disclosure to the court of their assistance is required.¹²⁰

115. There appear to be no state cases discussing ghostwriting.

116. One commentator has noted the “discrepancy between the courts’ vehement condemnation of ghostwriting and the more lenient perspective of state ethics panels, which generally condone the practice.” See Rothermich, *supra* note 77, at 2698.

117. See Fla. Bar Ass’n Op. 79-7 (2000) (requiring the phrase “Prepared with the Assistance of Counsel” to appear on ghostwritten pleadings); N. H. State Bar Ass’n, Op. (unnumbered) (May 12, 1999) (requiring that ghostwritten pleadings state “This pleading was prepared with the assistance of a New Hampshire Attorney”). Some opinions just indicate the applicable ethics violations where assistance beyond legal advice and drafting of pleadings is provided, without indicating whether the fact that limited legal services was received, or the identity of the ghostwriter, is required. See, e.g., Mass. Bar Ass’n, Op. 98-1 (1998) (attorney providing “substantial and undisclosed involvement” in a pending case is guilty of violating the duty of candor to the tribunal: “ongoing behind-the-scenes representation runs a risk of circumventing the whole panoply of ethical restraints that would be binding upon the attorney if she was visible”); Utah State Bar Ethics Advisory Op. 74 (1981) (finding that an attorney is guilty of misrepresentation under DR 1-102(A)(4) if he provides “any additional assistance” beyond preparation of pleadings and the client “continues to inform the court that he is proceeding pro se”).

118. See Iowa Supreme Court Bd. of Prof’l Ethics and Conduct, Op. 96-07 (1996) (noting that the identity of a military attorney must be disclosed where he has assisted military personnel with “review of the case and in preparation of the pleadings”); Iowa Supreme Court Bd. of Prof’l Ethics and Conduct, Op. 96-31 (1996) (requiring identity of ghostwriter of dissolution petition “for an indigent who wishes to proceed pro se”); N.Y. State Bar Ass’n, Op. 613 (1990).

119. See N.Y. City Bar Op. 1987-2 (1987) (disclosure of role, but not attorney’s personal identity, required in any case involving the preparation of a pleading no matter how extensive the participation).

120. See L.A. County Bar Ass’n Formal Op. 502 (1999) (noting that where an attorney’s engagement is “limited to that of a law consultant who advises client on matters only as client requests, assists in or drafts papers that client will sign and file and attempts to negotiate a settlement” with defense counsel, there is no duty to disclose limited scope of representation to the court so long as attorney complies with all other ethics and court rules, and informs client of importance of complying with court rule governing content and form of pleadings); Alaska Bar Ass’n Op. 93-1 (1993) (finding no duty for attorney to disclose limited legal services to the court where client under-

None of the state ethics cases address the issues of confidentiality or the attorney-client privilege as they relate to ghostwriting or other unbundled services.

Under most state ethics opinions, the court could compel disclosure of the personal identity of any attorney who drafts a pleading filed with the court or likely to be filed with the court¹²¹ and is otherwise found by the court to have “extensively” participated in litigation. The court could also order the terms of the representation agreement to be disclosed. This could result in a non-uniform exercise of discretion on an ad hoc basis. Different judges under different factual scenarios could decide, based on their definition of “extensive” or “substantial” assistance, whether an attorney is guilty of ethics violations for failing to enter a formal appearance. If a pro se party desires that the details of his attorney-client relationship be kept confidential, the order to disclose the ghostwriter and the terms of the representation agreement would be an unprecedented violation of the attorney-client privilege. Such disclosure would force the attorney to breach a confidentiality agreement because a judge has decided that the fact of legal assistance and the confidential nature thereof must be “in the open.”¹²²

stands the limitation, is informed of the risks of proceeding pro se, and where applicable ethics and pleadings rules are followed).

121. See Rothermich, *supra* note 77, at 2696. In the case of ghostwriting attorneys who draft documents for clients “knowing that they will eventually be filed in court, all of the ethics rules regarding the attorneys’ duties to the court and to opposing counsel apply.” *Id.* The question thus becomes, What type of document qualifies as one that “will eventually be filed in court”? Does this mean that a lawyer who drafts a contract for a client, that he reasonably believes under the circumstances will “eventually be filed with the court” in future litigation has an affirmative obligation to disclose his identity to the client’s adversary upon the start of (or before) litigation about the contract? If this is the case, many attorneys are probably not aware of this obligation. If the court seeks accountability on the part of attorneys because there may be reason to believe they have engaged in some impropriety, they have the inherent power to hail them into court or compel someone before the court to identify them for that purpose. This argument is not intended as a challenge to the court’s obvious authority to enforce the law and court rules; rather, it challenges the authority of courts to enforce a blanket disclosure requirement on all ghostwriting cases, or mandate disclosure in cases that lack reasonable grounds to believe that the ghostwriting attorney breached some rule or ethical duty independent of providing ghostwriting and other ordinary legal services.

122. See *infra* notes 260-74, and accompanying text. While some courts are worried about an “unseen hand” guiding pro se litigation, see, e.g., *Johnson v. Bd. of County Comm’rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994), courts generally have not been concerned with ethical violations by non-appearing law partners or supervisors of public law offices who extensively guide the litigation of their associates; of counsel attorneys who are influential in guiding the litigation of other law firms; and in-house counsel or non-attorneys, such as insurance claims managers, that guide the litigation involving their company—all “sight unseen.”

As argued below,¹²³ contrary to the case law and many ethics opinions on the subject, courts may not without cause compel an attorney or client to breach a client confidence that may consist of the fact and identity of legal counsel or the scope of a representation agreement.

As to the other rules of professional responsibility that prohibit deception,¹²⁴ the question is whether the attorney ghostwriter commits acts of misrepresentation, dishonesty, deceit, or fraud upon the court or opposing counsel. None of the relevant rules state as much, but the courts and ethics opinions uniformly reach this conclusion. It is clear that non-appearing attorneys have duties to the court, the administration of justice, and adverse parties and their attorneys.¹²⁵ The question is whether ghostwriting attorneys who go beyond drafting a pleading—absent reasonable grounds to believe in their or their client's intent to unlawfully deceive the court or the opposing party—violate the ethical prohibitions against deceptive conduct.

The cases and ethical opinions on the subject all follow the same pattern. They present the laundry list of claimed ethical breaches relating to deception, and from these conclude that an attorney who fails to voluntarily disclose his or her ghostwriting for—or counseling of—a client thereby commits an act of deception.¹²⁶ The absence of any evidence of a ghostwriter's intent to deceive has not prevented courts and ethics committees from reaching this conclusion. They merely harken back to the undue advantage argument¹²⁷ and cite a litany of ethical duties that make no reference

123. See *infra* notes 270-82, and accompanying text.

124. See *supra* notes 73-77, and accompanying text.

125. See Rothermich, *supra* note 77, at 2696-97 (“[E]thical considerations cannot be limited to adequate regard for her client’s interest, but must include the interests of the courts and opposing parties involved in the envisioned litigation.”).

126. See, e.g., *Johnson v. Bd. of County Comm’rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994).

127. See, e.g., N.H. Bar Ass’n, Op. 2 (unnumbered) (May 12, 1999) (“Several opinions have raised concerns whether ghostwriting under some circumstances violates Rule 3.3 (requiring candor to the tribunal) and Rule 4.1 (requiring truthfulness in statements to others.”); see also Mass. Bar Ass’n Op. 98-1 (1998); ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1414 (1978). These opinions fear that the pro se litigant is attempting to gain an unfair tactical advantage, since pro se pleadings have been held to ‘less stringent standards,’” Mass. Bar Ass’n Op. 98-1 (1998) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). See also N.Y. City Bar Ass’n Op. 1987-2 (finding that disclosure is not required if the lawyer merely assists pro se litigant in filling out standard court forms, but failure to disclose active and substantial assistance constitutes misrepresentation to the court and opposing counsel because pro se litigants receive special consideration and preferential treatment from the court).

to the drafting or counseling assistance in question.¹²⁸ These cases and ethics opinions routinely, without analysis, equate an attorney's "extensive" or "substantial" active assistance to a pro se litigant with intentional deception upon the court and opposing counsel.¹²⁹

C. Rule Violations

A second set of arguments against ghostwriting asserts that ghostwriting violates court rules that regulate papers filed with the court and entries and withdrawals of appearances in pending litigation. Like the ethics rules, the court rules do not explicitly refer to ghostwriting. Neither their language nor their spirit justify a blanket prohibition on ghostwriting or active counseling of a pro se litigant absent reasonable grounds to believe that those acts involve intentional deception or efforts to avoid the rules.

1. *Rule 11 and Similar Pleading Rules*

Rule 11 of the Federal Rules of Civil Procedure provides that, by signing a pleading, motion, or other paper, and by presenting it to the court,

an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

- (1) it is not being presented for any improper purpose . . .
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or . . . are reasonably based on a lack of information and belief.¹³⁰

Sanctions are available for violations of the rule¹³¹ as they are for similar state court rules and statutes.

128. See, e.g., *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994).

129. *Id.*

130. See FED. R. CIV. P. 11(a),(b)(1-4).

131. *Id.* at 11(c).

Courts and ethics committees have erroneously presumed that a ghostwriting attorney who renders substantial assistance to a pro se litigant thereby deliberately violates Rule 11. For example, in *Ellis v. Maine*,¹³² the First Circuit complained that ghostwriting was occurring in “a growing number” of prisoner petitions:

What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F. R. Civ. P. 11, but which exists in all cases, criminal as well as civil, or representing to the court that there is good ground to support the assertions made.¹³³

Following *Ellis*, the *Johnson* court characterized undisclosed ghostwriting as “deliberate evasion of the responsibilities imposed on counsel by Rule 11.”¹³⁴ In *Laremont-Lopez*, the ghostwriting attorneys did not sign the pleadings because they no longer represented the plaintiffs. The court found that this reasoning was “not at odds with the plain language of Rule 11,” yet held that the practice “undermines the purpose of the signature certification requirement of the rule”:¹³⁵

Who should the Court sanction if claims in the complaint prove to be legally or factually frivolous, or filed for an improper purpose? . . . Although the plaintiffs have signed the complaints, they may assert immunity from sanctions because they retained counsel to draft the complaints. Moreover, the Court could encounter legal and factual obstacles if it attempted to impose sanctions on the Attorneys based on Rule 11 considerations . . . Even if the Court is able to determine who is responsible for drafting the complaints, the additional inquiry necessitated by the lawyers’ failure to sign the pleadings interferes with the “just, speedy, and inexpensive determination” of those actions.¹³⁶

With few exceptions,¹³⁷ these and later cases¹³⁸ harshly condemn undisclosed ghostwriting, but only speculate as to potential

132. *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1978).

133. *Id.*

134. *Johnson*, 868 F. Supp. at 1231.

135. *Laremont-Lopez*, 968 F. Supp. at 1078.

136. *Id.* at 1079 (citations omitted).

137. See, e.g., *Ricotta v. California*, 4 F. Supp. 2d 961 (S.D. Cal. 1998), denying a motion for sanctions against ghostwriting attorney because, while the practice is “improper” based on existing precedents,

The parties were unable to point the Court to any local, state or national rule addressing ghostwriting . . . [T]he facts of this case are not nearly egregious

problems arising from the practice. Whatever harm or confusion arose in the ghostwriting case law, none of it stemmed from improperly drafted pleadings. One case, for example, cites a legitimate problem in determining whether the pro se litigant is represented, because he filed ghostwritten pleadings but told the clerk of court he was being represented.¹³⁹ The pro se plaintiff received ghostwriting assistance and was probably still getting advice and counsel during the proceeding. The clerk and the court simply could not figure out what this strange form of attorney-client relationship might be. Consequently, the court decided to castigate counsel, finding his conduct not violative of any rule but nevertheless “improper.”¹⁴⁰

The case of *Ostevoll v. Ostevoll* involved similar confusion regarding Rule 11. In *Ostevoll*, a pro se plaintiff living in Norway

enough for this Court to take the unprecedented step of holding an attorney and a pro se party in contempt for giving and receiving assistance in the drafting of documents. There is nothing in the record to indicate that . . . [the attorney had any] intention to mislead or harm this Court and the other parties involved.

Id. at 987. See also *Olvera v. Edmundson*, No. 1:01cv74-C, 2001 U.S. Dist. LEXIS 13169, at *2 n.1 (W.D.N.C. June 15, 2001) (declining to sanction ghostwriting attorney, but noting that

While not an unethical practice, the court notes that ghost-writing does little for the judicial process, inasmuch as pro se litigants are ill-equipped to prosecute the complex issues raised without continued legal assistance. If a matter is worthy of an attorney taking the time to draft a complaint, it is also worthy of that attorney’s personal appearance.)

138. See, e.g., *Barnett v. LeMaster*, No. 00-2455, 2001 U.S. App. LEXIS 7874, at *9 (10th Cir. Apr. 27, 2001); *Duran v. Carris*, 238 F.3d 1268, 1271 (10th Cir. 2001); *Ostevoll v. Ostevoll*, No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *30-32 (S.D. Ohio Aug. 16, 2000); cf. *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (condemning undisclosed ghostwriting on grounds, inter alia, that it violates Federal Rule of Bankruptcy 9011, the counterpart of Rule 11).

139. See *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. at 1079.

[T]his practice can disrupt the Court’s efficient administration of justice. The Attorneys maintain that they contracted with the plaintiffs for a “limited engagement” to draft the complaints in these cases. Nevertheless, one of the plaintiffs informed the Deputy Clerk of the Court on several occasions that he continued to be represented in his civil action by the Attorneys. Upon contacting the Attorneys, the Deputy Clerk was informed that they were not representing the plaintiff. Hoping to eliminate the confusion, the Clerk requested that the Attorneys write a letter for the Court’s file confirming that they are not representing the plaintiff. The Attorneys provided the letter requested by the Clerk, but nowhere in the letter did the Attorneys disclose that they had drafted the complaint filed in the plaintiff’s case.

Id. The *Laremont-Lopez* court, however, never points to any problem with the ghostwritten pleadings.

140. *Id.* at 1080.

brought a federal action challenging child custody.¹⁴¹ The court was confused as to the identify of plaintiff's representative, because it received various communications from the plaintiff, his foreign attorney, and his local counsel. While Rule 11 was invoked, no violation was found.¹⁴²

In a third case, a bankruptcy court invoked Rule 11 and condemned both ghostwritten petitions and ghostwritten schedules of assets and liabilities. The court mostly speculated about the possibility of problems that could occur, but that did not.¹⁴³ The court did, however, enunciate a new potential problem: the occasional necessity of filing amended schedules where the first filed schedules contained errors or omissions. In a case where the party was represented by an attorney, this would be done routinely; but a pro se petitioner might have no notice of the need for amendment.¹⁴⁴ This matter, of course, does not give rise to a Rule 11 problem.

141. *Ostevoll v. Ostevoll*, No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *2 (S.D. Ohio Aug. 16, 2000).

142. *See Ostevoll*, 2000 U.S. Dist. LEXIS 16178, at *31-32. In denying respondent's motion to strike the pro se pleading, the court found that the filing of a photocopy of a previously filed pleading, with a new signature page containing the pro se petitioner's signature, was not a Rule 11 violation "and did not result in Petitioner gaining an unfair advantage over Respondent." But the court noted its confusion regarding the plaintiff's representation:

[T]he Court has been inundated with faxed letters from Petitioner, his attorney in Norway, and letters from (state local) counsel. Thus, Petitioner, while claiming to be proceeding pro se, is obviously receiving substantial assistance from counsel. Petitioner and counsel have failed to heed the admonitions of the Court with regard to the lack of appearance by counsel on behalf of Petitioner. Instead of retaining counsel to represent him in this matter and having counsel enter an appearance, Petitioner simply utilizes local counsel and his Norwegian attorney, neither of whom is counsel of record, to make requests on behalf of Petitioner through correspondence while, at the same time, making it clear that they are not representing Petitioner in the matter before this Court. We find this conduct troubling. As such, we feel the need to state unequivocally that this conduct violates the Court's Rules and will not be tolerated further.

The court also found counsel's "practice of running interference for Petitioner equally inappropriate." *Id.* (citations omitted).

143. *See In re Merriam*, 250 B.R. 724 (Bankr. D. Colo. 2000).

144. *Id.* at 734. The remedy to this problem, of course, is to provide pretrial assistance to pro se petitioners that includes instructions regarding such matters. Interestingly, on the issue of a pro se litigant's awareness of procedures, FED. R. CIV. P. 83(a)(2) provides that "A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." The rule was adopted, as explained by the Advisory Committee to the 1995 amendments, because

Courts rely on multiple directives to control practice, including publication of the Federal Rules and local rules, as well as "internal operating procedures, standing orders, and other directives." Although such directives con-

The cases and ethics opinions condemning ghostwriting and invoking Rule 11 or similar rules appear to be a product of judges or attorneys who seek sanctions against pro se litigants. These judges and attorneys are simply irritated that someone receiving a modest amount of legal assistance has the audacity to come to court without counsel and believe that he or she can access the justice system. A close look at Rule 11 and the cases interpreting it reveals that the rule could conceivably be invoked by counsel or the court under appropriate circumstances, but provides no justification for a blanket ban on undisclosed ghostwriting.

Rule 11, after the 1983 amendments, was applicable to “anyone who signs a pleading, motion, or other paper.”¹⁴⁵ According to the Advisory Committee Notes, however, in the case of “unrepresented parties . . . the court has sufficient discretion to take account of the special circumstances that often arise in pro se pleadings.”¹⁴⁶ When a party is not represented by counsel, but Rule 11 sanctions appear appropriate, “the absence of legal advice is an appropriate factor to be considered.”¹⁴⁷ Where a pleading is obviously drafted

tinue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such internal directive, unless the alleged violator had been furnished actual notice of the requirement in a particular case.

FED. R. CIV. P. 83 advisory committee’s note on 1995 amendments. The committee went further and suggested a procedure to avoid the “problems” attendant to the complexity of litigation, i.e.,

Furnishing litigants with a copy outlining the judge’s practices—or attaching instructions to a notice setting a case for conference or trial—would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge’s standing order and indicating how copies can be obtained.

Id. One wonders why, if the court recognized the complexity of the system as a whole, it did not take the same approach to the federal rules and local rules, which could be “outlined” for litigants as the committee suggests be done for “internal directives.” Some courts have adopted procedures, particularly for pro se prisoners, simplifying and providing forms for habeas corpus and civil rights action. Courts have a duty to inform pro se litigants of basic legal information needed to access the justice system. Such information should include simplified descriptions of practice and procedure rules.

145. See FED. R. CIV. P. 11 advisory committee’s note on 1983 amendments.

146. See *id.* (citing *Haines v. Kerner*, 404 U.S. 519 (1972)).

147. *Id.* It is well established that pro se litigants are not exempt from Rule 11 sanctions. See also *Warren v. Guelker*, 29 F.3d 1386 (9th Cir. 1994); *Bigalk v. Fed. Land Bank Ass’n*, 107 F.R.D. 210 (D. Minn. 1985). One court has held that pro se

by the litigant, this liberal standard is appropriate. But ghostwritten pleadings are, by definition, drafted by an attorney. Does the court have a means to haul the ghostwriter into court to address an apparent Rule 11 violation under the stricter standard applicable to attorneys?

The notes to the 1993 amendments to Rule 11 answers the question in the affirmative:

The sanctions should be imposed on the persons—whether attorneys, law firms, or parties—who have violated the rule *or who may be determined to be responsible for the violation* When appropriate, the court can make an additional inquiry in order to determine whether the sanctions should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the representation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.¹⁴⁸

Therefore, in appropriate cases, a ghostwriter attorney may be hauled into court, under Rule 11 or the inherent power of the court, and be subject to sanctions. This may be done where a pro se pleading is obviously ghostwritten and there are reasonable grounds to believe a Rule 11 violation has occurred. In that event, the court may compel disclosure of the ghostwriter's identity and proceed accordingly. Practically speaking, the less stringent standard that applies to pro se litigants will not apply because the court will inquire whether the pleading was ghostwritten. If it was, the standard has no relevance. This answers the questions asked by the courts that were "wringing their hands" about potential Rule 11 problems.¹⁴⁹

Future cases in which ghostwriting is detected should be handled differently. There is no justification for invoking Rule 11 as a pretext for barring ghostwriting and additional consultation with a pro

litigants are held to a more lenient standard than professional counsel, with the rule's application determined on a sliding scale according to the litigants' level of sophistication. *Horton v. TWA*, 169 F.R.D. 11 (E.D.N.Y. 1996).

148. *Id.* (emphasis added). See also FED. R. CIV. P. 11 advisory committee's note on 1993 amendments; *Lockary v. Kayfetz*, 974 F.2d 1166 (9th Cir. 1992) (noting that the court may sanction, under its inherent powers, a non-profit legal corporation which controlled and paid for litigation).

149. See *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (E.D. Va. 1997); *Johnson v. Bd. of County Commr's*, 868 F.2d 1226, 1231 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

se litigant. Neither should Rule 11 be used to compel disclosure of the ghostwriter's identity or the terms of the representation agreement, absent a reasonable belief that the rule has been violated.¹⁵⁰

2. *Appearance and Withdrawal Rules*

Two additional grounds for condemning ghostwriting relate to the questions of who is representing a litigant and whether ghostwriting constitutes an evasion of the rules governing appearances and withdrawals. Some of the cases condemning ghostwriting involve the courts' confusion regarding whether a litigant is appearing pro se or by counsel.¹⁵¹ As far as those courts were concerned, there were only two choices for litigants: they could represent themselves in all matters or have an attorney represent them in all matters.¹⁵² There was no middle ground for defining an attorney-client relationship.

The typical pro se litigant likely thinks there is nothing wrong with getting occasional drafting or counseling assistance from an attorney. While the client may believe that she remains pro se, the courts view the matter as an either/or proposition. Pro se litigants may have difficulty explaining their limited representation arrangement, as courts are not yet accustomed to unbundling.

The question then arises whether representation is equivalent to an appearance. The manner of entering an appearance is regulated by local rule.¹⁵³ Under federal law, litigants are entitled to represent themselves or to be represented by counsel.¹⁵⁴ Most courts require either that an entry of appearance form be filed or that an

150. See CHARLES F. LUCE, UNBUNDLED LEGAL SERVICES: CAN THE UNSEEN HAND BE SANCTIONED?, at <http://www.mgovg.com/ethics/ghostwr1.htm> (last visited Feb. 7, 2002).

While Rule 11 provides that an attorney's signature is a certification that the pleading is well-grounded in fact or law, the converse, that the absence of an attorney's signature is a hallmark of a spurious and frivolous pleading, is hogwash . . . [I]t is no more misleading or deceitful for an attorney to ghostwrite a meritorious pleading than it is proper for an attorney to sign a frivolous and groundless pleading. The *real issue* is not the presence or absence of a lawyer's signature, but the intended or reasonably foreseeable effect of the unseen assistance of counsel.

Id. (emphasis added).

151. See *supra* notes 142-149 and accompanying text.

152. *Id.*

153. See 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3154 (2d ed. 1997).

154. 28 U.S.C. § 1654 (2001) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

attorney's name appear on the face of the pleading. A court may prevent an attorney who has entered an appearance from withdrawing from a pending matter.¹⁵⁵ The Thirteenth Amendment, however, may prohibit a court from compelling an appearance of an attorney on behalf of a pro se client for purposes of forced representation in a civil matter.¹⁵⁶ That is not to say the attorney could not be hailed into court for purposes of sanctions. If a court cannot compel an appearance, however, it cannot charge a ghostwriting and consulting attorney with intentional evasion of withdrawal rules.

According to Rule 1.16 of the *Model Rules*, an attorney is required to withdraw from representation of a "matter" when the representation will violate the rules of professional conduct or other law;¹⁵⁷ when the lawyer's physical or mental condition materially impairs the representation;¹⁵⁸ or when the lawyer is discharged by the client.¹⁵⁹ Lawyers may withdraw from a representation only if the withdrawal will have "no material adverse effect on the client's interests."¹⁶⁰ As with the other rules, except Rule 1.2, which authorizes a limited services agreement, this rule makes no reference to limited legal service arrangements, nor does it define the term "matter." Is a "matter" to be equated with an "appearance" in court? No authorities appear to equate the two.

Nevertheless, the court in *Laremont-Lopez*¹⁶¹ condemned the ghostwriting attorneys who never filed their appearance on

155. See MODEL RULES, *supra* note 73, at R. 1.16(c) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

156. See U.S. CONST. amend. XIII (prohibiting involuntary servitude).

157. See MODEL RULES, *supra* note 73, at R. 1.16(a)(1).

158. *Id.* at R. 1.16(a)(2).

159. *Id.* at R. 1.16(a)(3).

160. *Id.* at R. 1.16(b). This paragraph also adds six additional situations where withdrawal "may" be accomplished, i.e., where (1) "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," R. 1.16(b)(1); (2) "the client has used the lawyer's services to perpetrate a crime or fraud," R. 1.16(b)(2); (3) "the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent," R. 1.16(b)(3); (4) "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled," R. 1.16(b)(4); (5) "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client," R. 1.16(b)(5); or (6) where "other good cause for withdrawal exists." R. 1.16(b)(6).

161. *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (E.D. Va. 1997).

grounds that they violated Local Rule 83.1(G). Local Rule 83.1(G) provides that “once an attorney has entered an appearance in a civil or criminal action, withdrawal is permitted only by order of the court, and after reasonable notice to the party represented.”¹⁶² The purpose of the Rule is “to provide for communication between the litigants and the court, as well as ensuring that the court is able to fairly and efficiently administer the litigation.”¹⁶³ After conceding that the attorneys never filed an appearance, the court rationalized its application of the rule as follows:

While the Attorneys in these cases did not initially enter a formal appearance, they did contract with these plaintiffs to provide legal representation directly related to the litigation of these cases. The Attorneys drafted the plaintiffs’ pleadings and, in at least some cases, they were compensated for their efforts. Had they signed the pleadings, as they should have done, they would not have been permitted to terminate their representation without the Court’s permission and adequate notice to the plaintiffs. The Attorneys represented litigants in a federal action, and then terminated their representation, without ever formally appearing before the Court. If the Court permitted Lawyers to provide piecemeal representation to otherwise pro se litigants without entering an appearance, Local Rule 83.1(G) would be circumvented.¹⁶⁴

The court went on to explain how this arrangement “may be convenient for counsel,”¹⁶⁵ but disrupted the court’s “efficient administration of justice.”¹⁶⁶ The court suggested that, rather than permitting the client to file a pleading unsigned by the ghostwriter attorney, the attorney retained only to draft the pleading should instead sign it and file it simultaneously with a motion to withdraw “accompanied by an appropriate explanation and brief.”¹⁶⁷ This

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1077 n.2. However, one commentator notes that “the court did not say whether such a motion would be well-received.” JAMES M. McCAULEY, *THE ETHICS OF MAKING LEGAL SERVICES AFFORDABLE AND MAKING THE LEGAL SYSTEM MORE ACCESSIBLE TO THE PUBLIC* 5 (concluding that reexamination of ethics and unauthorized practice restrictions is necessary to insure that an appropriate balance is struck between protecting the public and increasing access to legal services for those who cannot afford them), <http://members.aol.com/jmccauesq/ethics/articles/probono.htm> (last visited Feb. 5, 2002). One wonders what attorney who has only been paid to draft a pleading would want to prepare the pleading, appear, prepare a motion to withdraw and a supporting brief, and hope for the best.

anomalous decision, finding limited representation regarding a federal action equivalent to an "appearance," is unprecedented, unsupported by any legal or ethical authorities,¹⁶⁸ and unnecessary. A simple inquiry regarding the representation arrangement would have revealed that it was a product of persons of modest means who could not afford full legal services. The court should not have charged counsel with "circumventing" the local withdrawal rule when it was obvious that they were ghostwriting and advising clients who otherwise would have no representation.¹⁶⁹

In summary, the argument that ghostwriting gives pro se litigants an undue advantage ignores reality. First, ghostwritten pleadings are usually of sufficient quality that no liberality of construction is necessary despite the fact that all pleadings are entitled to a liberal construction whether filed pro se or not. Second, the practice of ghostwriting does not constitute a per se violation of Rule 11 because either the pro se litigant or the ghostwriter is still accountable for compliance with the rule. Third, given that rules of ethics permit limited services representation, the court cannot constitutionally compel an attorney to involuntarily enter an appearance for a client. The practical effect of such a rule would require all attorneys who draft a pleading and provide substantial or extensive advice to a client during the course of litigation to file an appearance and represent the client regardless of the terms of their representation agreement. This is a result not countenanced by existing law or procedural or ethics rules, and is not likely to be acceptable to the bar.

168. See Va. State Bar Ass'n Op. 1129 (1988).

169. See LUCE, *supra* note 150:

[S]ome legal assistance is preferable to none at all, and if the client is unable to afford the complete panoply of the attorney's skills, it should not consequently be deprived of all of them. [The *Model Rules* provide for limited representation]. This is not simply an issue of indigent representation; many attorneys could not themselves afford uninsured legal representation. If justice is to be practically available for all, if the litigation is not to become literally the "sport of kings," unbundling legal services must apply [sic] litigation services, too.

Id. at 3.

III. RECENT RECOMMENDATIONS AND REGULATORY DEVELOPMENTS

A. Conferences and Recommendations

1. *Fordham Conference*

In December 1998, a conference was held at Fordham University School of Law entitled "The Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues."¹⁷⁰ A set of published recommendations stemming from the conference partially address ghostwriting as a form of limited legal service.¹⁷¹ The conferees noted that "courts have an affirmative obligation to help litigants and advance limited service methodologies which increase access to the courts."¹⁷² They further noted that "courts and the legal profession should be encouraged to explore innovative efforts to assist pro se litigants."¹⁷³

The conferees created a three-part typology of legal service delivery: (1) traditional, "full-service" representation; (2) limited legal assistance; and (3) general advice.¹⁷⁴ The second category consists of two sub-categories: (1) brief, specific advice and (2) assistance requiring a diagnostic interview.¹⁷⁵ In addition, legal services attorneys have the "luxury" of having clients screened for financial eligibility or to determine whether the matter falls within

170. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *FORDHAM L. REV.* 1751, 1774-78 (1999) [hereinafter *Recommendations of the Conference*].

171. *Id.* at 1751-1800.

172. *Id.* at 1777-78.

173. *Id.* at 1778.

174. *Id.* at 1775-76.

175. *Id.* 1776. The Working Group on Limited Legal Assistance, which developed the relevant recommendations, directed them to "those providing services to low-income people, but did not rule out that these provisions and recommendations could be applicable in a private practice setting as well." See *Report of the Working Group on Limited Legal Assistance*, 67 *FORDHAM L. REV.* 1819, 1824-25 (1999) [hereinafter *Report of the Working Group*]. In the legal services context, it may be possible to categorize clients in this bureaucratic fashion, i.e., based on the time and the amount of paper it takes to deal with their problems. Time is also undoubtedly the primary factor in the private sector. The private attorney-client relationship, however, is not so easily categorizeable and is qualitatively different than the legal services attorney-client relationship. Clients in the private attorney situation may have an initial consultation and then return unexpectedly for additional advice. They may then return because of some new development in the case and retain the attorney to provide a limited service such as writing a letter on their behalf. If the matter is not resolved, full representation may be in order. In other words, the relationship is often contingent on many unknown factors and may continue as long as it is productive (and affordable to the client). Many attorneys will agree that some cases are never really "closed," as they must be, for statistical purposes, in a legal services environment.

the scope of their services, after which they may decline to assist because of their caseload or other reasons.¹⁷⁶ The attorneys may never see a client again after this screening process because a rejected and frustrated client is not likely to return. In the situation faced by private attorneys, in contrast, clients often keep coming back for assistance. The categorization of legal assistance cannot be neatly placed into the three pigeon-holes agreed upon by the Fordham conferees. These categories may be a useful device for parsing the attorney's ethical duties, but do little to enhance a client's access to justice. "The average litigant is more likely concerned with the success of the pleadings than with the ethical quandaries of those who may help draft them."¹⁷⁷

When brief, specific advice is sought, the client should be advised of the limited nature of the services to be provided, and the lawyer must comply with the duties of confidentiality, competent representation, and conflicts avoidance.¹⁷⁸ After limited services have been rendered, "the lawyer or legal services program has no further obligation with respect to this client."¹⁷⁹ In limited services cases, the lawyer should conduct a "diagnostic interview" to elicit "sufficient facts to enable an appropriate decision as to the limited service(s) to offer the client and for the client to make an informed

176. *Recommendations of the Conference, supra* note 170, at 1776-77.

177. See Raul V. Esquivel, III, *The Ability of the Indigent to Access the Legal Process in Family Law Matters*, 1 LOY. J. PUB. INT. L. 79, 94 (2000).

178. *Id.* The Working Group on Limited Legal Assistance debated the issue of whether an attorney-client relationship exists by virtue of the diagnostic interview that it proposes. *Report of the Working Group, supra* note 175, at 1828-29. While not expressly stated, the reference in the report to the general rule that the attorney-client relationship turns on the client's perception, "regardless of what the lawyer says or does," indicates a concern regarding the issue of whether they have ethical duties toward individuals not accepted as clients after the diagnostic interviews:

[W]e ultimately agreed that consumers participating in the diagnostic interview should receive some of the protections that attach with the formation of the attorney-client relationship. Our approach was to define the underlying objectives of the applicable ethical rules, and then to seek to accomplish those objectives. We agreed that the competency requirement attaches regardless of whether an attorney-client relationship has been formed. *We also readily agreed that the information obtained during this process should be kept confidential* [W]e all agreed that the lawyer should be held accountable for the discrete task that she provides and that it must be performed competently.

Id. at 1829 (emphasis added). See also *infra* note 265 (citing two ethics opinions discussing the rule of confidentiality as it applies to attorneys who consult with clients but do not accept their cases.)

179. *Id.*

decision about how to proceed.”¹⁸⁰ Nevertheless, there are those who believe that a “diagnostic interview” is unique to the ghostwriting situation, and that it is necessary—along with ascertaining whether the client can “effectively pursue her case” and whether the forum is “receptive to pro se litigants”—to determine whether ghostwriting assistance will be a “competent solution to the client’s problem.”¹⁸¹ These commentators have uncritically accepted Professor McNeal’s suggested obligations of a ghostwriter and erroneously equated the duty of competent representation with a competent solution. It is true that attorneys must be competent, but no ethical duty mandates that attorneys provide “competent solutions.” If that were so, malpractice insurers would be out of business. This competence includes “knowledge of the circumstances under which the recommended course of action might change and when additional services might be necessary,” information—like all other information obtained in the interview—that is to remain confidential.¹⁸² The need to acknowledge the pro se liti-

180. See *Recommendations of the Conference*, *supra* note 170, at 1777. This “diagnostic interview” should “elicit a variety of factors that would assist the provider in determining the most appropriate choices for [the] client For example, the provider should determine the caller’s ability to use pro se materials.” *Id.* If it is learned that the client is unable to read or write, a legal services agency that offers limited legal services should not, it is recommended, offer the client the “daily pro se clinic on how to get your own order of protection,” nor should it refer the client to a “website on how to get an order of protection.” *Id.* The conferees, in promoting the concept of a “diagnostic interview,” are not recommending anything new as far as the attorney-client relationship. Every competent attorney conducting a client interview should have as an objective the determination of “the appropriate choices for his client.” *Id.* One does not have to be a low-income person seeking limited legal services to expect that from an attorney, whether “brief, specific advice” is sought or more. Anything less would be a breach of the duty of competence, if not a breach of contract, because determining the best choices for them is why people go to lawyers in the first place.

The working group was probably aware of the adverse ghostwriting case law described above. See *supra* notes 8-40 and accompanying text. The concept of the diagnostic interview was presumably developed to emphasize a ghostwriting attorney’s duty to conduct a reasonable inquiry of the facts and issues of a client’s legal problem as required by rules of professional responsibility, Rule 11 and similar rules, and civil legal malpractice law, before drafting a pleading to be filed. The working group recognized a double-edged sword, on the one hand, in responding to the courts’ castigations of ghostwriting attorneys as deliberate evaders of professional ethics and court rules and threatening contempt citations, and, on the other hand, wanting to make sure this recommendation does not come back to haunt them in the future by way of ethical complaints or civil liability. Attorneys cannot avoid potential disciplinary or civil liability by conducting some form of interview in which no legal information or advice is conveyed. Client interviews are not merely a one-way transmission of facts, but are usually a give-and-take of facts and law.

181. See Rothermich, *supra* note 77, at 2714.

182. *Id.* On the issue of confidentiality, Professor McNeal writes:

gant's right to invoke that right of confidentiality as to the fact and identity of legal counsel, ghostwriter or otherwise, subject to an exception for cause, is addressed below.¹⁸³ The diagnostic interview was suggested for cases that fall into the middle of the range between those requiring full representation and those in which only "brief, specific advice" is given.¹⁸⁴

Beyond these, none of the Fordham recommendations refer specifically to ghostwriting. In a later publication, however, Professor Mary McNeal, a member of the working group that developed these recommendations, noted that the application of the recommendations turns on the proposed distinction between brief, specific advice and services requiring a diagnostic interview.¹⁸⁵ She concedes that the distinction "does not lend itself to easy definition,"¹⁸⁶ and that distinguishing between these two forms of legal services "remains difficult,"¹⁸⁷ but explains that ghostwriting falls within the category of services requiring the proposed diagnostic interview:¹⁸⁸

Once the client chooses ghostwriting from the range of limited legal assistance options, the lawyer must elicit additional facts to assist her in drafting the pleadings. The lawyer must utilize at least the same degree of care she would in the traditional full service model. Arguably, a higher degree of care is required here since it will be more difficult for the client proceeding pro se to rectify any errors or omissions.¹⁸⁹

Professional McNeal goes on to make several suggestions regarding additional ethical duties of ghostwriting attorneys.¹⁹⁰ She

Given that the diagnostic interview will generate detailed information about the consumer, maintaining confidentiality is even more imperative in this context than in the "brief, specific advice" setting. Additionally, candor is particularly important given that a full and honest depiction of the facts is essential in determining the appropriate range of services. . . . With respect to form pleadings, hotlines, ghostwriting, and other forms of discrete task representation, information obtained during the diagnostic interview and pursuant to providing the service must be kept confidential.

See Mary Helen McNeal, *Responses to the Conference: Having One Oar or Being Without a Boat*, 67 FORDHAM L. REV. 2617, 2636 (1999) [hereinafter *Responses to the Conference*].

183. See *supra* notes 57-63 and accompanying text.

184. See *Report of the Working Group*, *supra* note 175, at 1826.

185. See McNeal, *Responses to the Conference*, *supra* note 182, at 2619.

186. *Id.* at 2622.

187. *Id.* at 2647.

188. *Id.* at 2635.

189. *Id.* at 2641.

190. See *infra* notes 235-46 and accompanying text.

concludes with suggestions for future research, including a curious suggestion to study “what prospective clients or low-income people in need of legal services want but are not getting from lawyers.”¹⁹¹

2. National Unbundling Conference

Another set of relevant recommendations emanated from an October 2000 conference entitled “The Changing Face of Legal Practice: A National Conference on ‘Unbundled’ Legal Services.”¹⁹² The conferees recommended, inter alia, that the court and bar should adopt rules, regulations, and procedures to permit unbundled services under appropriate circumstances.¹⁹³ According to the conferees, the ethical parameters of unbundled legal services need to be critically examined and the current ethical rules should be revised to increase access to the courts.¹⁹⁴ Does this mean that only poor persons are entitled to limited legal services? If limited legal services include single consultations, preparing contracts, and other discrete services, this suggestion would put many attorneys out of work. Whether those who can afford counsel should benefit from publicly-funded pro se assistance programs is debatable. To

191. See McNeal, *Responses to the Conference, supra* note 182, at 2644 (footnote omitted). Some might say this would be a study of the obvious, as full representation is what all clients want but—if they cannot afford it—cannot get from attorneys.

192. See 26 Recommendations from the Conference, <http://www.unbundledlaw.org/Recommendations/confrecs.htm> (last visited September 4, 2001). For some unstated reason, one of the recommendations emanating from this conference is that “The bar should encourage the adoption of a word or phrase to better describe this set of services, instead of ‘unbundling.’” *Id.* at Recommendation 23. No alternative was suggested.

193. *Id.*

194. *Id.* at Recommendation 3.

The bar, court, consumers, and legal services providers (including non-profit, for profit and ‘dot com’ legal entrepreneurs) should collaborate to develop, provide and promote assisted pro se and ‘unbundled’ services to persons who cannot obtain legal services to gain effective access to justice. These systems should be structured to provide the maximum range of services to low and moderate-income people and to retain core values of the profession.

Id. A comment on the web site publishing these recommendations reflects a belief that unbundled legal services should only be provided to those unable to afford counsel:

There may be resistance by the bar and court if this recommendation [recommendation 3] means providing services for persons who can afford the services of an attorney, but choose not to do so. Implementation of such a recommendation should clarify the difference between free services and those provided for a fee. It should be clear that the “unbundled” legal services system is providing help only to people who cannot afford attorneys. If a person is voluntarily unrepresented then the bar, court and legal services, should not provide “unbundled” service.

Id.

say that no person who can afford full-service representation should be able to arrange for limited-scope representation is untenable.

In addition to recommending that courts establish pro se assistance programs, study the needs of pro se litigants,¹⁹⁵ and evaluate various methods to avoid miscarriages of justice,¹⁹⁶ the group directed some recommendations to the private bar. These included recommendations that the private bar collaboratively consider the development of models of unbundled legal services;¹⁹⁷ promote unbundling and pro se support to bar members through ethics education, law practice management training, and model retainer agreements;¹⁹⁸ establish unbundled services panels recruited, trained, and sponsored by the bar “on a pro bono, reduced fee, or sliding scale fees depending on the client’s ability to pay”;¹⁹⁹ and “experiment” with the use of non-lawyer advocates to provide limited legal services with the “participation” (notably, not supervision) of members of the bar by way of “support and assistance.”²⁰⁰

Finally, and most relevant, is the recommendation that “The bar should examine ways to facilitate pro se litigation, such as the development of plain English uniform laws and pleadings and permissible ghostwriting.”²⁰¹ In addition, “[t]he bar should take steps to define the ethical perimeters [sic] of unbundling and maintain a dialogue with those responsible for ethics and discipline by sharing information, advocating responsible ‘unbundled’ services and seeking accords on permissible methodologies.”²⁰² These latter recommendations reflect the chilling effect of the courts’ and ethics panels’ negative view of ghostwriting.

3. *Kansas State Bar Justice Commission*

Several bar associations and public committees have also issued reports on unbundling and related issues like pro se assistance. The May 1999 Kansas Justice Commission report concludes—without specifically mentioning ghostwriting—that limited legal services “could have substantial benefit for consumers by increasing

195. *Id.* at Recommendation 8.

196. *Id.* at Recommendation 9.

197. *Id.* at Recommendation 15.

198. *Id.* at Recommendation 16.

199. *Id.* at Recommendation 17.

200. *Id.* at Recommendation 18.

201. *Id.* at Recommendation 22.

202. *Id.* at Recommendation 21.

access to legal services.”²⁰³ The report also recommends that the state bar “study the extent to which unbundling of legal services can be accomplished without undermining the lawyer’s ethical obligation to the client,” and that the state bar recommend that the supreme court adopt a rule “permitting unbundling in circumstances where it is appropriate.”²⁰⁴

4. Michigan State Bar Committee

In Michigan, a committee of the State Bar’s Access to Justice for All Task Force issued a report in April 2000 wherein they “recognized that the benefits of unbundling are significant for low and moderate-income clients, their attorneys, and the legal system.”²⁰⁵ On the issue of ghostwriting, the committee studied the “three primary views . . . regarding pleading and document preparation”:²⁰⁶ that ghostwriting, or “drafting assistance,” is (1) ethical and otherwise acceptable, even without disclosure to the court,²⁰⁷ (2) unethical and unacceptable,²⁰⁸ and (3) acceptable provided there is disclosure by way of a notice that a pleading was “Prepared by

203. See Kan. Citizens Justice Initiative, Draft Final Report of the Kansas Justice Commission (May 4, 1999), <http://www.kscourts.org/kcji/draft/index.htm>.

204. *Id.* at Recommendation 15. The “Rationale” for this recommendation states in part that “there are serious ethical issues that must be resolved in determining whether a new Supreme Court Rule should be adopted . . . [and] the Commission recommends that this issue be studied further” *Id.* Of interest also is Recommendation 17:

(a) The Kansas Supreme Court should promulgate a policy statement for the Kansas court system concerning *pro se* litigants to increase uniformity in dealing with these litigants by providing guidance to court administrators, clerks, the bench, the public, and the bar. The statement should specify the services and types of assistance that may be provided to *pro se* litigants without violating rules prohibiting the unauthorized practice of law.

(b) Three pilot projects should be conducted to evaluate the use of *pro se* service centers or kiosks to assist *pro se* litigants. Large, medium-sized and small counties should be selected for the pilot projects.

(c) The *pro se* policy statement should require development of an education program for judges, court staff members, attorney and *pro se* litigants.

205. See STATE BAR OF MICH. ACCESS TO JUSTICE FOR ALL TASK FORCE, REPORT OF THE SERVICE DELIVERY SUBCOMMITTEE WORK GROUP B—UNBUNDLING, 1 (2000), available at <http://www.michbar.org/access/sds/unbundling.pdf>.

206. *Id.* at 10.

207. *Id.* at 10-11.

208. *Id.* at 11. The report’s commentary regarding this position, which is the same as that taken in the cases and opinions described above—*Johnson*, *Laremont-Lopez*, *Wesley*, and ABA Informal Ethics Opinion 1414 are cited—warns that “it is of sufficient significance to the bar and judiciary that a recommendation favoring undisclosed drafting assistance might derail the entire unbundling process.” *Id.*

Counsel” or signed by the preparer.²⁰⁹ The Unbundling Work Group concluded

that low and moderate-income clients in Michigan would be best served by authorizing a system where full disclosure of attorney preparation is required. The group also agreed that it is preferable to require a statement in the form of “Prepared by (attorney’s name),” rather than simply stating that the form was “Prepared by an attorney.”²¹⁰

The committee noted the legitimate concerns of the bench and bar regarding the ethicality and acceptability of certain forms of unbundling (read: ghostwriting). Such concerns, according to the committee, “preclude widespread provision of discrete task representation under existing court rules.²¹¹ The committee recommended a series of steps to promote limited services, including (1) broad dissemination of its report;²¹² (2) modification of Michigan court rules to permitting the filing of ghostwritten pleadings—which would not constitute an appearance—provided the drafting attorney or firm is personally identified,²¹³ and to permit a “limited appearance” permitting an attorney to withdraw after the client’s limited objectives and means have been met;²¹⁴ and (3) miscellaneous promotional methods to educate the public, the media, and the bar about unbundling.²¹⁵

209. *Id.* at 13.

210. *Id.* at 14. The group also agreed “that attorney assistance with previously prepared self-help forms and/or review of client prepared *pro per* pleadings should be excluded from the ‘prepared by’ disclosure statement on the document.” *Id.*

211. *Id.* at 15.

212. *Id.*

213. The proposed rule states:

If a pleading, including a form, has been prepared by an attorney, law firm, or legal services agency which has not appeared formally in the case, the pleading shall indicate the name of the attorney, law firm, or legal services agency that prepared the pleading or form. Such disclosure does *not* constitute an appearance by the attorney in the proceedings.

Id.

214. *Id.* at 16. The proposed rule states: “An attorney may, upon written agreement with the attorney’s client, enter an appearance limited in objectives and means. The attorney who has filed a limited appearance may withdraw from the action when the client’s limited objectives, as set forth in the appearance, have been reached.” *Id.* The commentary explains that “This recommendation would *not* permit an attorney to ‘withdraw at will’ from a court case. Rather, it would require that the attorney: 1) execute a retainer agreement limiting the scope of representation by establishing specific objectives and the means to be employed in achieving those objectives, and 2) withdraw only after achieving the named objectives.”

215. *Id.* at 16.

5. *California State Bar Access to Justice Commission*

This draft report, issued in September 2001, supports the expansion of unbundled legal services.²¹⁶ Its suggestions, however, run counter to the positions taken by the previously-discussed courts, ethics panels, and bar committees.

The recommendations are:

1. *Ghostwriting*: Work with the Judicial Council to develop a rule of court that would allow attorneys to assist in the preparation of pleadings without disclosing that they assisted the litigant if they are not appearing as attorney of record.²¹⁷
2. *Limited Representation Form*: Work with the Judicial Council to develop forms to be filed with the court clarifying the scope of representation when the attorney and client have contracted for limited scope legal assistance.²¹⁸
3. *Notice of Withdrawal*: Work with the Judicial Council to develop a standard form of Notice of Withdrawal to formalize attorney withdrawal and notice at the conclusion of limited scope legal assistance.²¹⁹

216. See LTD. REPRESENTATION COMM. OF THE CAL. COMM'N ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 1 (2001) (on file with author), available at <http://www.calbar.org/2bar/3exd/reports/ub01/unbundlingreport01.pdf>. The report notes how limited legal services

will increase access to the courts and legal assistance because more individuals will get some legal assistance in situations where, because of lack of resources, they would receive no legal help if only full services were available. This practice is also partially consumer driven, as consumers of legal services insist on, and receive, greater control over their legal matters and representation.

Id. From the court's standpoint, unbundling will clarify the presentation of issues and help reduce errors and continuances, demand on court personnel, and court congestion. New procedures can provide clarity about when a party is or is not represented, helping the court and opposing parties address such issues as knowing who needs to be served, and with whom they can negotiate.

Id. From the attorneys' standpoint, unbundling can provide access to many more potential clients, who can afford some, but not the entire, traditional model of legal representation In addition, developing solutions and providing guidance for attorneys who offer limited scope assistance will be a great service, assisting them to avoid malpractice exposure where they perform ethically and competently; ensuring that their involvement in a case is limited to what they contract for; and allowing attorneys to recover court-sanctioned attorney's fees in limited appearances when fees would be awarded for the same tasks if performed in a full service context.

Id.

217. *Id.* at 6.

218. *Id.*

219. *Id.*

The committee made several key points and studied arguments in the report. Regarding “preparation of pleadings or other court documents”²²⁰ for a pro se litigants, the report found that, while the practice does present “some potential ethical concerns,”²²¹ contrary to the authorities discussed, there is no statute, rule, or case

that requires the attorney to disclose his or her participation to either the court or the opposing party. Since the party is the one signing the document, it is the party who is certifying that the document is not fraudulent, misleading, or otherwise improper Because the party is therefore subject to sanctions for an improper pleading, it is important that the attorney advise the client of [the rule prohibiting improper pleading], and the consequences of its violation.²²²

Attention was also given to questions surrounding the termination of limited services representation. The committee found that, in situations going beyond a “brief, one-time event,” an attorney

must take care to properly terminate the representation. If no court appearance is involved, the client must be clearly advised that the agreed-upon representation has been completed, and that the attorney is no longer assisting the client. The client must also be advised of any impending deadlines or other tasks pending, and any other consequences of the attorney’s withdrawal. Where the limited representation has included court appearances, the attorney must also take whatever steps are legally required to assure that he or she is no longer attorney of record.²²³

Not surprisingly, the committee concluded that existing “Rules of Professional Conduct do not preclude the ability of attorneys and clients to limit the scope of the representation provided.”²²⁴ The committee also felt that the ethical duties of maintaining confidences, avoiding conflicts, and assuring competence are just as applicable to limited services representation as to full service representation. The committee found that no changes are necessary in the existing Rules of Professional Conduct. The committee noted, however, the importance of monitoring the work of the state bar commission established to review the ethical rules “to assure that there are no changes which would restrict—and that there

220. *Id.* at 10.

221. *Id.*

222. *Id.*

223. *Id.* at 11.

224. *Id.*

is consideration of changes that might enhance—the ability of clients to obtain the services they need.”²²⁵

The committee also found that limited scope representation benefits the court in several ways. It reduces the number of errors in documents, limits wasted court time due to pro se procedural mistakes, decreases demand upon court staff time, and eases docket congestion.²²⁶ Although litigant focus group respondents reported they would like

an attorney to argue a motion, evidentiary hearing or trial in court . . . this is an area in which attorneys are often cautious about providing limited scope services. Lawyers need certainty that courts will abide by the limitations contained in the retainer agreement. In general, while a court may have a preference for an attorney to represent a litigant for the entire case, the court’s desire for more litigants to be represented in court proceedings can effectively be met by allowing limited scope services.²²⁷

As to preparation of pleadings, the judges in the focus groups conducted by the committee reported that it is generally possible to determine from a pleading whether an attorney was involved in the drafting of the document²²⁸ and that “the benefits of having papers prepared by an attorney are substantial.”²²⁹ Private attorneys who engage in ghostwriting “revealed that they would be

225. *Id.*

226. *Id.* at 12. The report cites comments of judges in focus groups convened by the committee indicating “a strong interest in assisting self-represented litigants obtain as much information and assistance from attorneys as possible.” *Id.* This attitude of California state judges differs greatly from that expressed by the federal judiciary in the cases discussed in section III.A., *supra*. This attitudinal difference might be a product of the caseload differences and institutional constraints to which state court judges are subject, but federal judges are not. Assuming state court judges have a greater motivation in looking for means to smoothly process their heavier caseload than federal judges, they may be more hospitable to ghostwritten pleadings because of their obvious benefit to the court, and they may have less time to develop legal and ethical grounds for challenging their alleged impropriety. This difference may also account for the absence of any state cases on the subject of ghostwriting.

227. LTD. REPRESENTATION COMM. OF THE CAL. COMM’N ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 13 (2001). The committee recommends the Judicial Council adopt a form clarifying that an attorney is making an appearance for a limited issue or for only one hearing. This would provide notice to the court and the other party, and ensure a clear understanding between the client and lawyer regarding the scope of the service. It would also allow clerks and opposing counsel to know who was attorney of record and to whom notice should be sent.

Id.

228. *Id.* at 14.

229. *Id.*

much less willing to provide this service if they had to put their names on the pleadings.”²³⁰ According to the report, the court’s present ability to sanction the pro se litigant who signs an improper, ghostwritten pleading, coupled with its ability to refer the matter for investigation to the State Bar (whether or not disclosure of the ghostwriter is made on the pleading), is sufficient to address the problem.²³¹

In sum, the reviewed state bar reports reflect the diversity of views regarding ghostwriting. One (Michigan) permits it, but requires full disclosure of the attorney’s identity. One (California) permits it, without mandatory disclosure, holding ghostwriters to all pleading and ethics rules. One (Kansas) resolved to study the issue further.

6. Court Rules Authorizing Limited Legal Services

Colorado²³² and Maine²³³ are the first two states to adopt court rules that permit limited appearances in litigation on behalf of pro

230. *Id.*

Issues raised included: increased liability; worry that a judicial officer might make them appear in court despite a contractual arrangement with the client limiting the scope of representation; belief that they are helping the client tell his or her story—and that a client has a right to say things that attorneys would not include if they were directing the case; fear that the client might change the pleading between leaving the attorney’s office and filing the pleading in court; apprehension that their reputation might be damaged by a client’s inartful or inappropriate arguing of a motion; concern that they would be violating the client’s right to a confidential relationship with his or her attorney; [and] worry that they may not be able to verify the accuracy of all the statements in the pleadings given the short time available with the client.

Id. at 10-11.

231. LTD. REPRESENTATION COMM. OF THE CAL. COMM’N ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 10-11 (2001). For some reason, the committee also recommended that the Judicial Council adopt a rule that would specifically allow ghostwriting. The rule would “require that attorneys providing limited task representation disclose their involvement only if the litigant is requesting attorney’s fees to pay for their services.” *Id.* There is some authority that a pro se litigant entitled to statutory attorneys’ fees under the Equal Access to Justice Act is not entitled to fees incurred for ghostwriting or other legal services while representing to the court that he is proceeding pro se. See *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (holding that “important policy considerations militate against validating an arrangement wherein a party appears pro se while in reality the party is receiving legal assistance from a licensed attorney,” citing the duties of candor to the court, interference with the court’s ability to supervise the content of the pleadings, and the unfair advantage argument).

232. See COLO. R. CIV. P. 11 (2000) (signing of pleadings); COLO. CIV. R. 311 (2000) (signing of pleadings); COLO. R. PROF’L CONDUCT 1.2(c) (scope and objectives of representation); COLO. R. PROF’L CONDUCT 4.2 (communication with person rep-

se litigants. Table 1 in the appendix provides a complete overview of the requirements of each state's set of court and professional responsibility rules.

The distinctive features of the rules can be summarized as follows:

1. Both rules²³⁴ have a requirement of disclosure to the court of the fact that a pro se litigant's pleadings or other papers are drafted by an attorney under a limited representation agreement. Both states require that the attorney ghostwriter be identified, but only Maine requires that the court be informed of the scope of the limited representation agreement.
2. Both rules require that limited representation be by agreement between client and attorney, but Maine requires that the agreement be in writing using the court's proposed form or a similar form not inconsistent with it.
3. Both rules require that the attorney explain to the client the benefits and risks of limited representation.
4. Both rules (a) apply the general pleading signature and certification rules to documents prepared pursuant to a limited representation, and (b) permit the ghostwriting attorney to rely on the client's representation for the facts used as the grounds for the pleadings drafted, but (c) Colorado requires the attorney to conduct an independent investigation of the facts whenever those provided by the client are false or materially insufficient. Maine permits the nature of the limited services representation to be a factor in determining the attorney's compliance with the duty of competent representation.
5. Maine exempts from limited appearances instances in which (a) a pleading signed by an attorney is filed and (b) pleadings are filed outside the scope of the limited appearance. Colorado exempts from limited appearances instances in which (a) an attorney signs a filed pleading or (b) appears before a judicial officer.

resented by counsel); COLO. R. PROF'L CONDUCT 4.3 (dealing with unrepresented person).

233. See ME. R. CIV. P. 5 (service and filing of pleadings and other papers), ME. R. CIV. P. 11 (signing of pleadings and motions; sanctions), ME. R. CIV. P. 89 (withdrawal of attorneys; visiting lawyers); MBR 3.4(i) & (j) (commencement and continuation of representation), 3.5(a)(4) (withdrawal from employment), 3.6(a)(2) (standards of care and judgment), 3.6(f) (communicating with an adverse party).

234. References to the states' "rule" or "rules" on limited appearances and representation refer to the set of amendments to the rules of civil procedure and professional responsibility that each state's supreme court promulgated in order to recognize attorney-client relationships that involve discrete tasks, rather than full-service representation.

6. Both rules permit direct communications with a pro se litigant by opposing counsel who has knowledge of the limited appearance or representation.

7. Maine exempts attorneys providing legal advice only in connection with non-profit legal services or court-annexed pro se assistance programs from strict compliance with duties to conduct conflicts checks, unless the attorney has actual knowledge of a conflict.

8. Maine permits an attorney to withdraw from an action where (a) a substitute attorney contemporaneously files an appearance, (b) no motions are pending, and (c) no trial date has been set. Leave of court is required in all other instances, including withdrawal from a limited representation.

9. The Maine rule explicitly cautions that the limited appearance rule has no application to the federal district court, and in Colorado the federal district itself has so indicated by administrative order.

These rules are valuable models that other states should consider if limited representation in litigation is to be realized as a means of enhancing access to justice. The rules address many ethical concerns of the client, the ghostwriting attorney, opposing counsel, and the court itself. Experience with limited representation will no doubt refine these rules further.

B. Proposed Ethical Obligations of Ghostwriters

Commentators have suggested that attorneys offering unbundled legal services have obligations not previously imposed on attorneys. These duties do not exist as to full-service clients, however, and are unnecessary and counter-productive to the cause of promoting unbundling and increasing access to justice.

1. Duty To Predict Pro Se Client's Future Litigation Success

In her commentary regarding the Fordham recommendations,²³⁵ Professor McNeal addresses the duty of competence under Model Rule 1.1 with respect to ghostwriting:

A lawyer choosing to engage in ghostwriting must competently assess the client's ability to accomplish her goals with ghostwritten pleadings. This requires an assessment of the client's ability to advocate effectively for herself and the receptiveness of the applicable setting to pro se litigants. If the lawyer concludes that this particular client is not likely to succeed proceeding pro

235. See *supra* notes 185-91 and accompanying text.

se with the ghostwritten pleadings, the lawyer should not prepare them for the client.²³⁶

This position is problematic for several reasons. First, while attorneys have a duty to do their jobs competently under Rule 1.1, even if full-service representation is provided, there is no ethical duty to “competently assess” the client’s “ability to accomplish her goals.” An attorney-client relationship begins with a dispute in which the client is involved, and the attorney has no way at the outset of predicting the dispute’s outcome. Many factors affect the ultimate resolution of a matter. These include the state of the law on the subject, the facts of the case, the available evidence and witnesses, and the personality of the judge and opposing counsel. The lawyer’s assessment of the case is based on these and other factors, and is likely to change as the case progresses. The attorney does not base a judgment to accept the case based on the “client’s ability to accomplish her goals” because of the multiple factors that will contribute to the eventual outcome.²³⁷

Professor McNeal explains that the client’s “ability to accomplish her goals” includes making an assessment of the “capacity” of the client to proceed pro se.²³⁸ She also mentions the “complexity of the problem,” the “seriousness of the particular problem,” and

236. See McNeal, *Responses to the Conference*, supra note 182, at 2640-41 (citation omitted). Another commentator makes a similar argument in the context of the lawyer’s duty to avoid limitations on the representation that may “be so great as to compromise the lawyer’s duties” of competent and diligent representation:

Before agreeing to limit the scope of the representation, the lawyer should determine whether limited representation would be counterproductive. The lawyer should assess whether the client understands the limited nature of the representation and whether the client is capable of proceeding pro se. For example, consider the pro se litigant’s educational background and linguistic skills to determine whether the client is capable of proceeding pro se.

See Grace M. Jones, *Ghostbusters*, <http://www.state.ma.us/obcbb/ghostbusters.htm> (last visited Nov. 9, 2001). Like Professor McNeal’s proposed “likelihood of success” standard, under the latter standard few pro se clients would be able to purchase and receive the limited representation they seek. See *infra* note 240.

237. Professor McNeal describes her proposed “likelihood of success” standard as follows:

Presumably, the primary goal is to assist legal consumers in obtaining just resolutions of their legal problems. An alternative approach to that goal is to focus on the client’s “likelihood of success” with the limited legal assistance obtained. One should ask what impediments hinder the client in translating the limited legal assistance into a successful resolution of the problem. The nature and extent of these impediments then determine the viability of appropriate limited legal assistance.

Id. at 2642.

238. Professor McNeal describes the assessment of the capacity of the client to proceed as including

the “power dynamic between the parties” as additional factors to be included in the “quite challenging” assessment to be conducted by the attorney.²³⁹ Apparently, attorneys from whom limited legal services are sought should only accept the “perfect” pro se client, one who, in the attorney’s judgment, will successfully navigate the justice system without further assistance. Unfortunately, such pro se clients do not exist. It is impossible to know whether an individual will succeed in the litigation, as much depends on court policies, programs, and the conduct of individual judges and court staff. An attorney willing to provide drafting assistance will not want to make the prediction that the pro se client will “succeed” in the system. Assisting someone who later cannot navigate the system could give rise to liability against the lawyer who, it could be argued, negligently breached his duty to predict his pro se client’s “success.” Such an assessment is not the primary consideration of a full-service attorney and should not be the primary consideration of a ghostwriting attorney. Pro se litigants are entitled to the legal assistance they can afford in order to pursue their legal actions. Attorneys, whether private practitioners or legal service attorneys, should not be gatekeepers, providing access to justice only to those who can “accomplish their goals” or “advocate effectively” for themselves. Many attorneys may not be able to “advocate effectively” in someone’s judgment, but that does not mean they should not be allowed to advocate the best that they can on their clients’ behalf. Pro se litigants should not have to pass some attorney’s litmus test of “ability to accomplish her goals” to be entitled to access the justice system.

Another aspect of the proposed ethical duty of “competently assessing” the client’s ability to “accomplish her goals” in deciding whether to provide ghostwriting services is the need for the attorney to assess “the receptiveness of the applicable setting to pro se litigants.”²⁴⁰ What could this mean? Professor McNeal says this refers to “the willingness of the court to apply the law and procedure accurately, to permit unrepresented litigants to raise their claims, and to expend the necessary resources to resolve issues

the client’s literacy, intellectual ability, vulnerability (emotional, financial, and physical), emotional fortitude and determination. These factors should be analyzed in conjunction with those defined above, cognizant of the obvious tension between determining a prospective client’s ability to proceed on her own and paternalism.

Id. at 2643 (citations omitted).

239. *Id.* at 2643.

240. *Id.* at 2642.

fairly.”²⁴¹ Every attorney hopes and assumes a court will apply the law and procedure correctly. But under this proposal the ghostwriting attorney now has the added duty of predicting whether one or more judges in a court may not “apply the law and procedure accurately” or “permit” the client to raise his or her claims. If so, should the attorney then deny legal assistance to that client and deprive them of access to the justice system? Attorneys always have a view of the likelihood of success in bringing a matter to a particular forum or judge. If the case has merit, however, they proceed with it regardless of the potential inhospitability of the forum. To do otherwise is to abdicate one’s responsibility as a lawyer. Moreover, what if, under the proposal, a lawyer erroneously predicts the court will not be able to accomplish the client’s goals, or accurately apply the law and procedure, or permit the client to raise claims? Will not this create a basis for civil liability against the attorney that made the erroneous assessments?

In sum, Professor McNeal proposes that the attorney in a pro se case base a decision to ghostwrite on factors not applicable or determinative in the case of a client seeking full service representation. The proposal has as its primary goal the protection of the attorney, rather than promotion of an innovative method of legal service delivery. Under her proposal the attorney would deny limited representation because the chances are low that the pro se litigant would succeed, and because of the fear that the client would somehow attribute his or her lack of success to the lawyer. This is a form of gatekeeping, based purely on self-protection.²⁴²

2. *Duty to Monitor Pro Se Client’s Litigation*

Professor McNeal’s commentary on the report of the Fordham Working Group on Limited Legal Assistance states that “if a problem arises due to the [ghostwriting] lawyer’s failure to adequately investigate” the facts, or is otherwise “due to an omission by the lawyer, the lawyer should provide and should be obligated to provide, additional assistance.”²⁴³ If the “difficulty” is not the lawyer’s fault, then

the result should depend on the seriousness of the problem, and whether or not the client can successfully accomplish her goals without further legal assistance. A balance should be struck be-

241. *Id.*

242. Indeed, pro se clients are likely grateful for any legal assistance and are far less likely to complain about inadequate diligence or competence than full-service clients.

243. *Id.* at 2641.

tween a standard so strict that it will discourage lawyers from providing ghostwriting assistance and one so lenient that it will potentially harm clients.²⁴⁴

No one would argue with the proposition that lawyers who err in their representation are obligated to correct the error made whether the client proceeds pro se or otherwise.²⁴⁵ Professor McNeal, however, suggests that, even if the pro se client's "difficulty" is not of the attorney's making, the attorney nevertheless has an ethical obligation to provide further legal assistance, depending on the "seriousness" of the problem and the client's ability to "successfully accomplish her goals without further legal assistance."²⁴⁶ She does not indicate whether the attorney under these amorphous circumstances would be required to provide further legal assistance for a fee or pro bono.

No authority compels the attorney to "rescue" a client for whom ghostwriting services have been provided, but who has met "difficulties" that are not the fault of the attorney.²⁴⁷ It would certainly

244. *Id.*

245. In one anti-ghostwriting article, an attorney argues that

The attorney who drafts a complaint on behalf of a party but allows the party to prosecute the complaint is at risk of a [malpractice] claim should the party's action result in failure . . . [T]hus an unsuccessful result can be laid at the doorstep of the attorney who has crafted the initiating complaint or taken an unseen role in its prosecution.

See PAUL A. SINCLAIR, GHOST STORIES: THE UNSEEN LAWYER, (arguing that ghostwriting is properly sanctionable by court action and bar disciplinary proceedings), http://www.nornbook.com/HB_Fall98/fall98_ghost.html (last visited Oct. 24, 2001). The possibility of a malpractice claim is always present, regardless of the extent of legal services provided. This goes with the territory of practicing law and should not be a deterrent to assisting pro se litigants.

246. Forrest Mosten himself made a surprisingly similar proposal in answer to the oft-heard concern that clients contracting for limited representation "will believe that the coach is doing everything a lawyer needs to do," and then "may not monitor deadlines, or . . . show up for a hearing":

The attorney needs to check from time to time to ensure that the client's strategy is sound, and this should always include the client's monitoring of deadlines. It should also include the client's understanding of when it would be appropriate to ask for more help.

See Mosten & Borden, *supra* note 5. Once legal services have been provided to a full-service client and the representation has ended, there is no further legal or ethical obligation to monitor anything. Why should the situation be different where only limited services are provided? An argument can be made that if such a duty to monitor post-representation events exists, it is equally appropriate in the full-service context.

247. One commentator suggests that

simply drafting pleadings may not be enough to allow people true access to justice. Forcing people to be frustrated does not make them feel empowered. It only furthers their suffering. . . . [but ghostwriting] does address a

be a good deed for the attorney to offer such further assistance, but it is not an ethical or legal duty. That is the nature of limited representation. Unless the services involve consultation throughout the litigation, the end to the attorney-client relationship usually occurs earlier than the conclusion of the legal matter. There is no requirement of further services beyond those contracted for, assuming the client's interests have not been materially affected by the withdrawal as Model Rule 1.16(b) requires.²⁴⁸ Most people would agree that pro se litigants' right of access to the court must be implemented by court-annexed programs. It is the duty of the court to assist the pro se litigant in accessing the justice system. If courts are not doing that, we need to encourage them to do so, and to avoid chilling the willingness of some attorneys to provide such services through threat of procedural or ethical rule violations. Proposals such as Professor McNeals' are protection overkill.

IV. RIGHT TO CONFIDENTIALITY OF THE FACT AND IDENTITY OF LEGAL COUNSEL

We have seen how limited representation rules have been fashioned by two states²⁴⁹ to address the concerns of the federal courts that have "vehemently condemned"²⁵⁰ ghostwriting. Under these rules, the solution to the problem of the purported "undue advantage" that ghostwritten pleadings give pro se litigants, and the alleged breaches of ethical duties and procedural rules by the attorneys who draft such pleadings, is to compel the litigant to disclose the fact and identity of their attorney.²⁵¹ While such a remedy might comfort the court and opposing counsel, such that an "unseen hand" is not "controlling" the litigation, no serious consideration has been given to the issue of a litigant's right of confidenti-

mode of providing low-cost legal services to those litigants who have sophistication to make their own way through the system.

See SILAS HARRINGTON, ARTICLE REVIEW (reviewing Rothermich, *Ethical Implications*, *supra* note 77), <http://www.webcourses.com/web/schools/LEXIS/law/lm800574/6/files/harrington.rev.htm> (last visited Nov. 9, 2001).

248. *Cf. Nicols v. Keller*, 15 Cal. App. 4th 1672, 1684 (Cal. Ct. App. 1993) (finding that an attorney who provides limited representation has the duty to inform the client of legal problems which are reasonably apparent, even though they fall outside the scope of retention; the limitations of the attorney's representation; the possible need for other counsel; and the array of legal remedies available).

249. See *supra* notes 232-34 and accompanying text.

250. See Rothermich, *Ethical Implications*, *supra* note 77, at 2704.

251. In Oregon, pro se pleadings must be accompanied by a certification disclosing whether the litigants selected the document and completed without assistance, or whether they paid anyone to assist them in preparing the document. See ORE. UNIF. TR. CT. R. 2.010(7).

ality with respect to this information. There are many reasons why clients might choose not to disclose the fact that they received or are receiving legal assistance, and from whom. The law and ethical principles entitle them to keep such information confidential.²⁵² Scenarios in which an attorney and client might agree to keep their relationship confidential include: (1) where an attorney is a friend of both the pro se litigant and his divorcing spouse or other adversary in a civil dispute; (2) where the attorney may not want the adverse publicity from public knowledge that he represents a particularly unpopular pro se client; (3) where the pro se client knows that the judge in the case and his ghostwriting attorney do not have a good relationship, and he does not want the disclosure to adversely affect his case; (4) where the attorney who provides ghostwriting services because he is sympathetic to pro se litigants seeks to avoid ostracism for that service by members of his bar association or judges with anti-pro se attitudes; (5) where the attorney wants to assist the pro se client, but does not want to get involved in the matter because opposing counsel is particularly uncivil or a user of hardball tactics that he fears will lengthen the litigation needlessly; (6) where the attorney knows his client will not have the funds to litigate the case fully and he wants to avoid being forced to stay in the case by a judge who may decide that, once he appears, his withdrawal motion should be denied; (7) where the attorney is employed by a private company or non-profit organization and wants to assist a pro se friend in a legal matter, but does not want his employer to know that he is representing the pro se litigant on his own time; or (8) where the attorney may not desire to appear before the assigned judge because of a problem with him in the past, he knows that if he appears and files a notice of substitution of judge the other side will do the same thing, and the third judge may be worse than the first, so—given the client's ability to pay—ghostwriting and coaching the litigant may be in the client's best interest.

Perhaps most pro se litigants would not object to disclosing the fact and identity of their attorney. Some clients, however, "may prefer nondisclosure for strategic reasons or to avoid exacerbating

252. The right to maintain the confidentiality of the fact of counsel, or the identity of counsel, can be viewed not only as a legal privilege, but as a corollary to the right to control one's own litigation, which has its source in adversary theory, history, and tradition. STEPHEN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 10, 24 (1984).

the conflict.”²⁵³ Even if this is the case, the court can compel disclosure of the lawyer’s identity where limited service includes an appearance in certain stages of the litigation and counsel’s identity is of necessity disclosed. But, absent cause or an actual court appearance, the right of confidentiality may be invoked by litigants who object to these disclosures. A related concern is the compelled disclosure of the nature of the limited representation agreement itself, as required by Rule 11(a) of the Maine Rules of Civil Procedure, which regulates limited appearances.²⁵⁴

A. Duty of Confidentiality

American lawyers have a duty of confidentiality²⁵⁵ that protects against compelled disclosure. The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics.²⁵⁶ Specifically, Rule 1.6 provides, in relevant part:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) [disclosure of clients’ criminal acts]; or
 - (2) [disclosure relating to attorney-client litigation, and civil and criminal defense of the lawyer], or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

The commentary to the rule states in part that “A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging sub-

253. Prochnau, *supra* note 5.

254. M. R. CIV. P. 11(a), which requires that a limited appearance “shall state precisely the scope of the limited representation,” could be interpreted narrowly to mean that the court is entitled to know in what stages of the litigation the attorney will be involved.

255. See ABA CANONS OF ETHICS Canon 6 (1908); MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(A) (1969); MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 5 (1998).

256. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(A) (1969).

ject matter.”²⁵⁷ A question that immediately comes to mind is whether compelled disclosure of the fact or identity of counsel would not only chill clients’ ability to communicate fully and frankly with the lawyer, but also the client’s desire to see an attorney at all. One can conceive of many situations in which a client may not wish to make the fact that they have consulted legal counsel publicly known, or, if they have, the identity of that attorney. I think most people would agree that compelled disclosure of the fact or identity of legal counsel would not be tolerated in the non-litigation setting.

The questions is whether the fact and identity of counsel are matters that constitute “information relating to the representation”²⁵⁸ and thus are protected from disclosure under Rule 1.6. If so, would there be an exception to the principle of confidentiality for parties in litigation due to administrative necessity such as the court’s need to supervise its caseload? The commentary to Rule 1.6 specifically states that “The attorney-client privilege applies in judicial and other proceedings.”²⁵⁹ The privilege is, of course, invoked by the attorney who is asked to disclose confidential information relating to the representation. It may have no application to the ghostwriting disclosure question where the client is being asked to divulge what the client seeks to keep confidential.

Neither the commentary to Model Rule 1.6 nor any other part of the Model Rules refer to this disclosure question. The commentary indicates that the confidentiality rule is subject to “limited exceptions.”²⁶⁰ The recognized exceptions deal with the attorney’s disclosure of a client’s criminal or fraudulent conduct, the existence of a substantial threat to someone’s safety, or other disclosures that are adverse to the client’s interest.²⁶¹ The issue in ghostwriting is whether the client can maintain the confidentiality of the fact and identity of their lawyer. Conceivably, there could be an instance in which an anti-ghostwriting court notices that many pro se pleadings are artfully crafted and learns that a certain local attorney is a “known” ghostwriter. The court then may decide to inquire of the attorney who his or her clients are so that sanctions can be imposed under the case law discussed previously. Would the attorney have to disclose the identities of his or her clients?

257. *Id.* at R. 1.6 cmt. 4.

258. *Id.* at R. 1.6 (a).

259. *Id.* at R. 1.6 cmt. 5.

260. *Id.* at R. 1.6 cmt. 9.

261. *Id.* at R. 1.6 cmts. 9, 15.

Absent alleged violations of court rules or other improprieties on the part of the client, probably not, “if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information.”²⁶²

Even in the absence of a reasonable prospect of risk of harm to a client, use or disclosure is also prohibited if the affected client instructs the lawyer . . . not to use or disclose information. Such direction is the client’s definition of the client’s interests . . . which controls However, client limitations on a lawyer’s authority do not alter a lawyer’s obligation under § 63 [regarding using or disclosing client information when required by law or court order].²⁶³

Of course the court’s position may be that ghostwriting per se, is a violation of the procedural and ethical rules and constitutes an unfair advantage to the opposing side. This may constitute sufficient cause to compel an attorney or a client to disclose the fact of legal representation and the identities of the attorney and client. Hopefully, some of the above arguments will persuade courts to find that disclosure can only be compelled where there is a real and not speculative rule violation, breach of ethics, or other litigation-related impropriety, or where counsel personally appears to advocate on the client’s behalf.

Absent specific alleged improprieties, may the court justify compelled disclosure of the fact and identity of counsel due to supervisory or administrative necessity? Where there arise “conflicts between protection of confidential information and other values,” the Restatement Governing Lawyers indicates that

The broad prohibition against divulging confidential client information comes at a cost to both lawyers and society. Lawyers

262. RESTATEMENT GOVERNING LAWYERS § 60 (2000). “In all representation, the relevant inquiry is whether a lawyer of reasonable caution, considering only the client’s objectives, would regard use or disclosure in the circumstances as creating an unreasonable risk of adverse effect either to those objectives or to other interests of the client.” *Id.* at cmt. c(i). The term “adverse effects” includes “personal embarrassment that could be caused to a person of normal susceptibility and a *normal interest in privacy.*” *Id.* (emphasis added).

263. *Id.* at cmt. c(ii). See also *id.* at Reporter’s Notes cmt. c(ii) (noting that “information relating to representation of a client” [under MODEL RULES, supra note 73, at R. 1.6(a)] . . . includes a fortiori information that the client expressly instructed the lawyer to keep confidential”); *In re Pressley*, 628 A.2d 927 (Vt. 1993) (disciplining attorney for violating client instruction not to disclose to husband’s lawyer client’s suspicion that husband was sexually abusing daughter until client had gathered additional evidence”).

sometimes learn information that cannot be disclosed because of the rule of confidentiality but that would be highly useful to other persons. Those may include persons whose personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed. Moreover, the free-speech interests of lawyers is impinged by a broad rule of confidentiality. Nonetheless, despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it. It is recognized that the rule better protects legitimate client expectations about communications to their lawyers and that permitting divulgence would be inconsistent with the goal of furthering the lawful objectives of clients.²⁶⁴

The latter indicates that public institutional needs do not override the rule of confidentiality. There is also some ethics authority that an attorney may resist state agency-mandated disclosure of the names of clients with whom he has a consultation, but whose representation he does not accept.²⁶⁵

But what if a court rule, such as the limited representation rules of Colorado or Maine,²⁶⁶ requires disclosure of the fact or identity of the ghostwriting or coaching counsel? Until challenged, they constitute a specific legal requirement of disclosure and the duty to maintain confidentiality is "superseded when the law specifically requires such use or disclosure."²⁶⁷ Notwithstanding the legal requirement, an attorney in that situation (1) may disclose the re-

264. RESTATEMENT GOVERNING LAWYERS § 60 cmt. b (2000).

265. See Ill. State Bar Ass'n, Op. 90-1 (1990) (finding that a legal services organization cannot be compelled to name for the state labor department those unemployment claimants who were consulted—but whose representation they rejected—as part of complying with the agency's procedure for compensating it for legal services provided to the claimants, such compliance constituting a breach of a client "confidence" or "secret" under Ill. R. Prof. Conduct 1.6(a)). In its opinion, the committee noted that "the [in]convenience of such process cannot be placed above the need to preserve the attorney's obligation of confidentiality as to what we deem to be secrets of persons who consult with the attorney." *Id.* The panel cited its previous Opinion 565 (1977) in support, in which the committee was faced with the similar question whether a lawyer or legal services organization should honor the state public aid agency's request for personal information about persons receiving legal assistance from a publicly-funded program, which was being collected to determine eligibility for funding. The committee ruled that the attorneys and organizations should not honor the agency's client information requests without the client's consent, because to do so might serve as an embarrassment to the client or be otherwise prejudicial, despite the possibility of inconvenience to the state agency.

266. See *supra* notes 232-34 and accompanying text.

267. RESTATEMENT GOVERNING LAWYERS § 63 cmt. a. "In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required." *Id.*

quired information only “after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure,”²⁶⁸ and in fact (2) has a duty to object “when a nonfrivolous argument . . . can be made that the law does not require the lawyer to disclose such information.”²⁶⁹ Such a challenge will surely be made to the limited representation rules of Colorado and Maine.

B. Attorney-Client Privilege

According to the attorney-client privilege, neither client nor attorney may be required “to testify or otherwise to provide evidence that reveals the contents of confidential communications between client and lawyer in the course of seeking or rendering legal advice or other legal assistance.”²⁷⁰ The privilege may be invoked with respect to “(1) a communication, (2) made between privileged persons, (3) in confidence, (4) for the purpose of obtaining or providing legal assistance for the client.”²⁷¹ The client has “the primary authority to determine whether to assert the privilege . . . or waive it.”²⁷²

There are three assumptions that underlie the rule of confidentiality and the attorney-client privilege. First, “vindicating rights and complying with obligations under the law and under modern legal processes are matters often too complex and uncertain for a person untrained in the law, so that clients need to consult lawyers.”²⁷³ Second, “a client who consults a lawyer needs to disclose all of the facts to the lawyer and must be able to receive in return communications from the lawyer reflecting those facts . . . [otherwise] adequate legal assistance cannot be realized.”²⁷⁴ This is because “Lawyers are much better situated than nonlawyers to appreciate the effect of legal rules and to identify facts that determine whether a legal rule is applicable.”²⁷⁵ Third, “clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they

Interestingly, the *Model Rules* contain no required-by-law exception to the rule of confidentiality.

268. *Id.* § 63.

269. *Id.* at cmt. b.

270. *Id.*

271. *Id.* § 68.

272. RESTATEMENT GOVERNING LAWYERS § 68 cmt. c.

273. *Id.*

274. *Id.*

275. *Id.*

could be assured that neither they nor their lawyers could be called later to testify to the communication.”²⁷⁶

The privilege “provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow.”²⁷⁷ The rule “is not subject to ad hoc exceptions”²⁷⁸ where “extreme need can be shown for admitting evidence of attorney-client communications.”²⁷⁹ These principles suggest that, where clients instruct their attorneys to keep the existence of their relationship confidential, or they—as part of their representation agreement—agree that this be done, the attorney responding to any blanket legal requirement that such information be disclosed for all litigants receiving drafting or coaching assistance must first assert the privilege or challenge the legality of the rule, or both.

There is some authority that the attorney-client privilege does not ordinarily apply to the identity of the client, the fact that the client consulted the lawyer, and the general subject matter of the consultation. Testimony about such matters

normally does not reveal the content of communications from the client. However, admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communication. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication.²⁸⁰

However, if the identity of the client, the fact of representation, and the “general subject matter of the consultation” is not normally privileged, does it become privileged if the client directs it to be so, or attorney and client agree that it will remain confidential? According to the Restatement, the answer is in the affirmative:

276. *Id.*

277. RESTATEMENT GOVERNING LAWYERS § 68 cmt. c.

278. *Id.*

279. *Id.* “[A] case-by-case balancing approach would exact a high price of uncertainty, possibly frustrating the purpose of the privilege of inducing frank communication The overwhelming weight of authority states or assumes that the privilege is absolute.” *Id.* Reporter’s Note cmt. c.

280. *Id.* § 69 cmt. g. The “communication” protected by the privilege is defined as “any expression through which a privileged person . . . undertakes to convey information to another privileged person and any document or other record revealing such an expression.” *Id.* § 69. Even under the decisions exempting the identity of the client, the fact of consultation, and the general nature thereof from the privilege, “inquiry must be phrased carefully to avoid intrusion on privileged communications.” *Id.* § 69 Reporter’s Note cmt. g.

A communication is in confidence within the meaning of § 68 if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege.²⁸¹

Insufficient attention has been given to the issue of confidentiality as it relates to mandatory disclosure requirements of court and bar rules authorizing limited appearances and representation. Under the aforementioned principles the fact and identity of legal counsel may in an appropriate case constitute a confidential “communication” under the rule of confidentiality and the attorney-client privilege. Absent cause or a personal appearance to advocate for a client, disclosure under rules authorizing limited appearances or representation would be impermissible and subject to challenge.²⁸²

281. *Id.* § 71.

282. *See also id.* § 59 cmt. c (“Information acquired during the representation or before or after the representation is confidential so long as it is not generally known . . . and relates to the representation”). My position on this issue is not a novel one. *See* Clarke A. Alpert, *Editorial Opposing Lawyers’ Assistance to Pro Se Litigants Is Off the Mark*, 153 N. J. L. J., Aug. 31, 1998, at 833. This letter-to-the-editor questions a previous editorial [153 N. J. L. J., July 20, 1998, at 253] suggesting that lawyers should avoid any involvement with unbundling generally, and in particular the drafting of papers filed pro se. The author disagrees with the suggestion on grounds that (1) a pro se party may need confidential assistance in connection with a litigation matter for a large number of reasons and “is fully entitled to the benefit of the attorney-client privilege in terms of dealing with those whom he has consulted or the details thereof,” (2) the attorney “should have every right to assist a pro se party as little or as much as the pro se party needs, without having to cross the threshold and insist upon being full-fledged counsel of record” because the cost of full representation means the client “will eschew legal assistance altogether if that is his only choice,” (3) “the attorney may not get involved at all if that [full] level of investment of the attorney’s time and analysis is his or her only option,” (4) there is no benefit to such a “draconian rule” to ban ghostwriting, and (5) “it would be cruel to pro se parties with potentially limited resources, to narrow their choices to (1) full representation by an attorney, with the huge investment that entails, or (2) no legal assistance at all.”

A suggestion that the attorney “must” sign any documents in which he has had any participation, even though that participation has been expressly requested by the client to be confidential and/or limited, is heavy-handed and extremely overbroad. It also does not address the “evil” highlighted in your editorial and in the Laremont-Lopez case you cite. If a pro se party can achieve undue advantages by utilizing ghostwritten pleadings, one solution is to mandate that such a party disclose whether or not he/she has received assistance, and a general description of the extent thereof, so that the court can decide how much to bend the rules. This at least would preserve some measure of confidentiality—and not deter attorneys from helping pro se parties.

V. UNDERSTANDING BENCH AND BAR RESISTANCE

Some legal assistance is better than none. Some pro se parties may benefit from the limited legal services they can afford, which may only be drafting or "coaching" assistance. Drafting assistance is the central task in many legal and administrative proceedings, the remainder being presentation of evidence at a hearing. An increasing number of pro se litigants believe they can rely on their own judgment for much of their litigation, including their own trial. Nevertheless, they feel the need to get a good start by filing a proper pleading and getting other information and advice along the way. Given these premises, why has the case law condemned ghostwriting, and why have most judges and bar ethics panels uncritically accepted those opinions?

Judges and lawyers are naturally conservative with respect to reform of the traditional adversary system. Pro se litigation is particularly annoying to the bench and bar because it upsets the adversary system's assumption that both parties are represented by competent counsel, which makes for greater efficiencies in the system. We can expect ghostwriting to increase in relation to future increases in pro se litigation. As pro se pleadings drafted with attorney assistance increase in frequency and pro se litigants receive assistance responding to dispositive motions or other matters, opposing counsel lose their traditional advantage over such litigants by virtue of their specialized legal and procedural knowledge. The playing field is made more level.

This is possibly what motivated counsel in the cases discussed to respond by moving for sanctions and fees, putting the pro se on the defensive and pressuring the assisting attorney to drop the matter or face the wrath of the court or disciplinary committee. This is all the more easy to accomplish when one enlists the aid of the court, by persuading it that limited legal assistance of a certain nature or quantity (i.e., "extensive" or "substantial") is suddenly no longer

Indeed, I submit that there is no real "problem" to remedy. If paperwork filed in court by a pro se party looks good enough to the court to have been done by an attorney, then either an attorney was involved or the pro se party is skilled enough not to warrant the sort of "special treatment" that might otherwise be extended to pro se parties.

Having the party proceed with no legal guidance at all harms the system. Moreover, eliminating all confidential help by an attorney to a pro se party, simply in order to solve the problem of how much deference to give such parties, is totally "off point." At best, such an approach represents massive overkill on an issue that no one appears to have analyzed with respect to the above issues.

Id.

entitled to confidentiality, but evidences deliberate evasion of procedural rules and the violation of ethical rules concerning candor to the tribunal and opposing party. It is time for this segment of the bar to stop criticizing their brethren, who have no illegal or unethical intent, and who simply want to offer limited legal services to those who seek it. If lawyers lose some of their advantage over pro se litigants because of ghostwriting and coaching, that increases access to justice, and the complaining attorneys must accept this new reality.

VI. RECOMMENDATIONS

The ghostwriting case law reviewed earlier does not reflect any harmful effects to the administration of justice from ghostwriting, except for occasional confusion regarding whether a pro se litigant is represented or not, and for what purpose.²⁸³ There will no doubt be occasions when counsel's identity will need to be disclosed. Some form of regulation of limited appearances is, therefore, necessary, and the policy on the subject should contain the following elements:

1. A recognition of the pro se litigant's general right of confidentiality regarding the fact and identity of legal counsel, subject to disclosure for cause or when an attorney personally appears to advocate on behalf of the client.
2. A by-a-preponderance burden of proof upon the party complaining of a pro se litigant's undue advantage from ghostwriting of proving specific harm or undue disadvantage. Such finding should be a condition for the entry of any order relating to the identity of the ghostwriter, the services he or she provides, termination of preferences in treatment the pro se litigant would otherwise receive, or any other relevant issue.
3. The principle that a pro se litigant who has limited legal assistance is still entitled to be treated as a pro se litigant for all purposes not in the control of his attorney under a limited representation. In other words, pro se litigants who are fortunate to be able to afford limited legal services should not be punished for receiving drafting assistance (or failing to voluntarily disclose it) by being denied whatever liberality in treatment they may be entitled to under the circumstances.
4. An express statement in Rule 11-like pleading rules that the requirements of the rule apply equally to persons drafting or assisting in the drafting of all pleadings and papers, or who otherwise direct the litigation.

283. See *supra* notes 8-49 and accompanying text.

5. A permissible limited appearance for attorney representation for discrete litigation matters, with notices to withdraw being permitted without leave of court when the representation objectives and means have been met, provided neither the client's nor the court's interests are adversely and materially affected.
6. Permit any degree of limited legal assistance agreed upon by the parties (eliminating the distinction between "brief, specific" and "extensive or "substantial" legal services) without there arising new ethical duties (such as to conduct a "diagnostic interview," to predict the pro se client's "likelihood of success," or to monitor the client's litigation after termination of the representation) imposed on attorneys offering limited legal services that are not also imposed on all attorneys.

CONCLUSION

Courts and bar ethics committees have condemned ghostwriting and other forms of extensive or substantial assistance to pro se litigants during the course of their litigation. Nevertheless, the benefits of the practices are obvious. They enhance pro se litigants' access to justice through the preparation of pro se pleadings that are less likely to be found insufficient in fact or law, and the preparation and instruction of pro se litigants regarding various stages of the litigation. This avoids expenditure of the courts' time or that of its staff for such purpose, and generally assists citizens to achieve the goal of a meaningful hearing. To provide such service is to meet the needs of those who cannot afford full legal representation and are not eligible for legal aid. Until now, attorneys offering such assistance have been wrongfully accused of deliberate evasion of procedural and ethical rules, rather than being commended for providing innovative legal services to a population that otherwise would have no legal assistance.

To discourage ghostwriting by mandatory disclosure without cause of the fact and identity of the ghostwriter or coaching attorney violates the clients' right of confidentiality as to information about their representation. It also forces a Hobson's choice upon clients who do not wish to disclose such confidences: go to nonlawyer practitioners, computer software, or the internet, with the questionable legal competency and accuracy they provide or get no legal assistance at all. The institutional interests of the court in ascertaining whether a party is represented and for what purpose is served by formulating limited representation rules. Such rules should permit attorneys providing limited legal services to freely

enter an appearance and withdraw per their limited representation agreement, subject to existing ethical requirements that this be done without adversely affecting clients' material interests and only with adequate notice to the court and opposing counsel. Moreover, existing rules, such as Rule 11, are adequate to further the interests of the parties and the court in prohibiting groundless or otherwise improper pleading, because their reach extends to those providing drafting assistance without entering an appearance.

Unrestricted or minimally restricted ghostwriting and coaching of pro se litigants is not, however, a panacea for the needs of this population.²⁸⁴ Courts themselves have to adapt their roles, procedures, and protocols to ensure that access to justice is not limited to those who are so poor they are eligible for legal services or those wealthy enough to afford full-service legal representation.

284. See Marcus J. Lock, Comment: *Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, 72 U. COLO. L. REV. 459, 461 (noting that limited legal services "does not, by itself, go far enough to ensure adequate access to legal services for Colorado's indigent").

APPENDIX

TABLE 1
*Comparison of Features of Colorado and Maine
 Limited Representation Rules**

FEATURE	COLORADO	MAINE
Permits limited representation	Colo. R. Civ. P. 1.2(c) & 11(b)	Me. R. Civ. P. 11(b) Me. Bar R. 3.4(i)
Disclosure requirement		
Fact of limited representation	Colo. R. Civ. P. 1.2(c)	Me. R. Civ. P. 11(b) Me. Bar R. 3.4(i)
Scope of representation agreement	None	Me. R. Civ. P. 11(a)
Attorney's identity	Colo. R. Civ. P. 11(b) CCR 311(b)	Me. R. Civ. P. 11(a)
Exception for assistance with court forms	CCR 311(b)	None
Requires advice to client re: benefits & risks of limited representation	CRPC 1.2(c) Notes and 4.2 Notes CCR 311(b)	Me. Bar R. 3.4(i)
Requires written limited representation agreement	None ²⁸⁵	Me. Bar R. 3.4(i) ²⁸⁶
Permits reliance on client-presented facts	Colo. R. Civ. P. 11(b) CCR 311(b)	Me. Bar R. 3.6(a)(2)

285. While a limited representation agreement is required, there is no explicit requirement that it be in writing. CRPC 1.2(c) Notes. The Notes state that "The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available." The notes also provide examples, e.g., where "a retainer may be for a specifically defined purpose"; where representation is from a legal aid agency and "may be subject to limitations on the types of cases the agency handles"; or where an attorney is retained to represent an insured and "the representation may be limited to matters related to the insurance coverage." The Notes indicate that limited retainer agreements must not require the client to (1) agree to a representation "so limited in scope as to violate Rule 1.1" (requiring competence in representation), or (2) to surrender the right to terminate the attorney, or (3) "the a right to settle litigation that the attorney may wish to continue."

286. "In situations where the lawyer will not be providing limited representation in court, the limited representation agreement need not be in writing, but must be reasonable under the circumstances The reasons a written memorializing agreement is not required in all contexts include (by way of example) the problem non-profit and court annexed legal services programs face in securing such a writing from their clients, and the time entering into the agreement takes in proportion to the time consumed by the limited representation itself. Nevertheless, to the extent a writing may be obtained, it is a better practice to do so for both the lawyer and the client." Me. Bar R. 3.4(i).

TABLE 1 (CONTINUED)

FEATURE	COLORADO	MAINE
Incorporates pleadings rules into ghostwritten papers	CRPC 4.2 Notes	Me. Bar R. 3.6(f)
Requires independent investigation if client facts are false or materially insufficient	Colo. R. Civ. P. 11(b) CCR 311(b)	None
Exception for signed pleadings	None ²⁸⁷	Me. Bar R. 3.4(i)
Exception for representation before judicial officer	Colo. R. Civ. P. 11(b) CCR 311(b)	None
Exception for filing a pleading outside scope of limited representation	None	Me. R. Civ. P. 11(b)
Permits opposing counsel to communicate directly with pro se litigant who has limited representation agreement	CRPC 4.2 & Notes	Me. Bar R. 3.6(f)
Permits limited nature of representation to be a factor in determining competency	None	Me. Bar R. 3.4(i) & 3.6(a)(2)
Exempts attorneys in legal services & pro se assistance programs from conflicts duties	None	Me. Bar R. 3.4(j) ²⁸⁸

287. While not explicitly stating that an attorney providing limited representation who signs a pleading (other than in the form of a limited representation notice under Colo. R. Civ. P. 11(b) or CCR 311(b)) thereby enters an appearance, Colo. R. Civ. P. 11(a), incorporated by reference in CCR 311(a), states that "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name" and "constitutes a certification by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not imposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

288. "A lawyer who, under the auspices of a non-profit organization or a court-annexed program, provides limited representation to a client without expectation of either the lawyer or the client that the lawyer will provide continuing representation in the matter is subject to the requirements of Rules 3.4(a)-(e) only if the lawyer knows that the representation of the client involves a conflict of interest." Me. Bar R. 3.4(j).

TABLE 1 (CONTINUED)

FEATURE	COLORADO	MAINE
Permits withdrawal without leave of court (1) where substitute attorney appears, (2) no motions pending, and (3) no trial date set	None	MRCP 89(a) Me. Bar R. 3.5(a)(4)
Limits rule to state court proceedings	None ²⁸⁹	Me. Bar R. 3.4(j)

*References in each cell are to Colorado Rules of Civil Procedure for Courts of Record (Colo. R. Civ. P.), Colorado Rules of County Court Civil Procedure (CCR), and Colorado Rules of Professional Conduct (CRPC) (*available at* http://www.courts.state.co.us/supct/rules/1999_pdf) (last visited December 23, 2001), and Maine Rules of Civil Procedure (MRCP) (*available at* <http://www.courts.state.me.us/whatsnew/amndmrcivp.5%2c11%2c89.html>) (last visited December 23, 2001) and Maine Bar Rules (Me. Bar R.) (*available at* <http://www.courts.state.me.us/whatsnew/amndmebarrules.html>) (last visited December 23, 2001).

289. There is no explicit reference to the rule's application or non-application to the federal forum in Colorado. However, the U.S. District Court for Colorado issued Administrative Order 1999-6, which states that, despite enactment of the rules permitting limited representation, "[t]hese changes are not consistent with Fed. R. Civ. P. 11 and are also inconsistent with the view of the judges of this court" and "are not applicable in this court."