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Trials & Tribulations

Attorney ghostwriting: A word of caution

As the cost of litigation continues to rise, potential litigants often find themselves unable to pay for a full-scope representation. As a result, individuals have looked for ways to obtain legal counsel while still keeping an eye on their wallets. Enter attorney ghostwriting.

Attorney ghostwriting is the practice of providing limited legal assistance in the form of drafting documents or pleadings. This assistance is frequently undisclosed and the drafting attorney remains anonymous. Ghostwriting is also commonly referred to as "unbundling" legal services or limited-scope representation.

Why would an attorney agree to simply ghostwrite legal documents for a client? For starters, proponents of ghostwriting argue that when this drafting is done pro bono, it can be a great way to satisfy the aspirational pro bono goals in Rule 6.1 of the Rules of Professional Conduct. Additionally, ghostwriting a pleading or motion during the early stages of litigation can provide the attorney with an opportunity to assist a pro se party in a limited capacity without necessarily committing the resources required to fully litigate the matter. As many pro se litigants cannot afford the cost of full-scope representation, ghostwriting represents a means by which a pro se litigant can still receive much-needed legal counsel and access to justice at a critical stage of the litigation.

Ghostwriting can also improve judicial efficiency. Pro se litigants frequently amplify the resources expended by the court and the parties, as pro se litigants generally are unfamiliar with the procedural rules and the substantive law governing their claims. Having the seasoned hand of an attorney draft specific documents can ultimately save the opposing parties, and the court, time and energy.

While ghostwriting may provide some tangible benefits at a reduced cost, many argue that the practice is unethical and any attorney assistance must be disclosed. For example, pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers." *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). This preferential treatment is meant to compensate for the pro se litigant's lack of counsel. As such, pro se litigants are often granted wide leeway to state a cause of action or amend deficient complaints. In the context of ghostwriting, a plaintiff appearing pro se "enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage." *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F.Supp. 1075, 1078 (E.D.Va. 1997).

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Critics of ghostwriting also argue that Rule 3.3 is violated if the attorney fails to disclose his or her assistance or to correct the perception that a pro se litigant has received legal counsel. Rule 3.3 requires that an attorney not "knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

Many critics make similar arguments with respect to the application of Rules 4.1 and 8.4. Rule 4.1 requires attorneys to be truthful in their statements to others: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Ghostwriting critics have seized on this rule, arguing that drafting a document and knowingly permitting a client to sign it amounts to a false statement. Similarly, Rule 8.4(c) requires that an attorney shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Some opponents of ghostwriting have argued that it is deceitful or a misrepresentation not to disclose the assistance of counsel.

State of play in New York

So what is the rule in New York? Unfortunately, the courts have provided little guidance. In 2009 New York adopted Model Rule 1.2(c) which permits limited-scope engagements, a rule that appears to implicitly permit ghostwriting. However, since that time, no black-letter rule prohibiting or permitting ghostwriting has evolved. This lack of precedent impacted the Second Circuit's decision in *In re Fengling Liu*, 664 F.3d 367, 372 (2d Cir. 2011). In that case, the court's disciplinary committee concluded that the attorney's undisclosed ghostwriting violated her duty of candor to the court, contrary to Rule 8.4(c), which barred her from "[e]ngag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." However, in light of the lack of controlling precedent and various ethics opinions that permitted ghostwriting, the court found that there was no way that the attorney knew or should have known that disclosure was required. As such, the court refused to discipline the attorney for failing to disclose the fact that she had authored pleadings for numerous *pro se* litigants.

Perhaps in response to *Liu*, in May 2012 the Second Circuit amended its local rules

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to require pro se litigants to affirmatively disclose attorney assistance. Local Rule 32.2 requires pro se litigants who submit "a paper that an attorney has drafted in whole or substantial part" to "state at the beginning of the paper, 'This document was drafted in whole, or substantial part, by an attorney.'"

Fortunately, despite the lack of direction from the courts, several ethics opinions offer guidance on the subject of ghostwriting. Perhaps most prominent is the American Bar Association's ("ABA") Formal Opinion 07-446. In this opinion, the ABA's Standing Committee on Ethics and Professional Responsibility determined that the fact that a pro se litigant who submitted papers to a tribunal received drafting assistance from an attorney behind the scenes is not material to the merits of the litigation and thus, does not violate Rule 3.3. With regard to the special leniency afforded pro se litigants, the committee opined that permitting litigants to submit papers prepared by an attorney will not secure unwarranted special treatment or unfairly prejudice the other parties, as the assistance of the undisclosed attorney will be readily apparent. As to Rule 8.4(c), the committee determined that nondisclosure of legal assistance was not automatically prohibited by the rule. Dishonesty occurs only where failure to disclose would mislead the court. Absent an affirmative statement, attributable to the attorney, that the litigant received no legal assistance, the attorney has not been dishonest.

Considerable risk

Another notable take on attorney ghostwriting is discussed by the New York County Lawyers Association Committee on Professional Ethics. The 2010 opinion focuses mainly on the impact of Model Rule 1.2(c), adopted by New York in 2009. NYCLA Opinion 742 (April 6, 2010). Specifically, the committee found that ghostwriting was a permissible form of limited-scope representation, so long as the attorney complied with Rule 1.2. The committee noted that while disclosure of the scope of the representation may be necessary in certain circumstances, requiring an attorney to always disclose the scope of the representation would create considerable risk that they would be forced to assume and/or continue the representation beyond the agreed upon scope. This would undermine the intent of Rule 1.2, by either forcing the client to pay for services outside the scope of the representation or requiring the attorney to continue to provide legal services without compensation. The committee concluded that disclosure of legal ghostwriting is only required where there is a court rule, judge's rule or order, or where nondisclosure would violate the Rules of Professional Conduct.

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Finally, the New York State Bar Association Committee on Professional Ethics ("NYSBA Committee") issued an opinion on ghostwriting in 1990, which concluded that there was nothing ethically improper about offering advice and counsel, including the preparation of pleadings, to pro se litigants if the attorney is otherwise in compliance with the ethical rules. However, the opinion also holds that "the preparation of a pleading, even a simple one, for a pro se litigant requires disclosure of the lawyer's participation." The NYSBA Committee determined that disclosing legal assistance prevented misrepresentation and ensured fairness to opposing counsel and candor to the court.

So what should you do? While there appears to be momentum, at least among the ABA and other associations, towards permitting ghostwriting, there is no definitive rule yet, and New York courts have been slow to respond to the increase in this practice. Furthermore, many federal courts are still wary of attorney ghostwriting and have continued to condemn the practice. See *Davis v. Back*, 2010 WL 1779982, at *13 (E.D.Va. Apr. 29, 2010). Moreover, there are certainly some risks associated with ghostwriting. If the court learns that an attorney drafted the papers, it may require the attorney to appear or prohibit the attorney from withdrawing prior to the conclusion of the case if it finds that Rule 1.2(c) has been violated. Of course, a ghostwriting attorney may be subject to discipline for frivolous pleadings or any other violations of the rules.

The safest course of action is to follow the 1990 NYSBA Committee's opinion and disclose your assistance and identity while simultaneously ensuring that the limited-scope agreement between you and your client complies with Rule 1.2. Disclosure avoids many of the potential ethical violations complained of by critics, and strict compliance with Rule 1.2 should effectively limit your involvement to drafting papers. It is also important to check and comply with the jurisdiction's local rules. At the very least, a ghostwriting attorney should indicate on the papers that they were prepared with the assistance of counsel.

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