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Attorney Ghostwriting for Pro Se Litigants - A Practical and Bright-Line Solution to Resolve the Split of Authority Among Federal Circuits and State Bar Associations

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ATTORNEY GHOSTWRITING FOR PRO SE LITIGANTS—A PRACTICAL AND BRIGHT-LINE SOLUTION TO RESOLVE THE SPLIT OF AUTHORITY AMONG FEDERAL CIRCUITS AND STATE BAR ASSOCIATIONS

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I. INTRODUCTION

LUDMYLA Tompkins feels her civil rights were violated,[1] but she cannot afford an attorney to represent her in court, and she does not have the legal knowledge to represent herself.[2] Tompkins arrived in the United States from Ukraine on a "fiancee [sic] visa."[3] As if the challenges of moving to a new country were not enough, Tompkins's life became miserable after her marriage; her husband physically abused her[4] to the point that she had to leave her home and find shelter in a facility for victims of domestic violence.[5] Yet, Tompkins's problems did not end there; the facility evicted her,[6] her husband divorced her,[7] and the two attorneys she found through a non-profit organization declined to

1. *See* Tompkins v. Women's Cmty., Inc., 203 F. App'x 743, 744 (7th Cir. 2006). (Tompkins felt she was excluded from a community shelter because of her Ukrainian origin).

2. *See* Brief of Defendants-Appellees at 12–13, *Tompkins*, 203 F. App'x 743 (No. 06-2164), 2006 WL 2427113, at *12–13. (Tompkins required a Russian interpreter to assist her in communicating with the court and counsel, and she lacked familiarity with the country's customs and practices).

3. *Id.* at 5.

4. *Id.*

5. *Id.*

6. *See* Brief of Defendants-Appellees at 3, *Tompkins*, 203 F. App'x 743 (No. 06-2164), 2006 WL 2427115, at *3. ("She alleges WCI 'evicted' her from the shelter after her temporary stay 'without due process of law.'").

7. Brief of Defendants–Appellees, *supra* note 2, at 5, 2006 WL 2427113, at *5.

assist her.[8] In this state of helplessness, if Tompkins asks an attorney to help her draft a legal complaint (without signing it) so that she can file it pro se,[9] would the ghostwriting attorney violate any ethical or legal duty? This Comment answers that question in the negative, so long as the complaint states that it was prepared with the assistance of counsel.

In light of a split of authority among the federal circuits and state bar associations, this Comment recommends a practical and bright-line solution to the highly controversial issue of attorney ghostwriting. Part II explores the theory of unbundling legal services and the role pro se litigants play in it. Next, Part II introduces the concept of attorney ghostwriting. Part III discusses the ethical and legal duties governing attorney ghostwriting and the split of authority mentioned above. Part IV analyzes attorney ghostwriting issues from the stakeholder's perspective and delves into the reasons why a recent Second Circuit opinion goes overboard in attempting to resolve the ghostwriting debate. Finally, Parts IV and V conclude with a practical and bright-line recommendation for the United States Supreme Court that resolves the split of authority and provides clear guidance to practicing attorneys nationwide.

II. UNBUNDLING LEGAL SERVICES AND THE PRO SE LITIGANT

To fully grasp the complexities of ghostwriting and its legal and ethical impact on attorneys, it is necessary to understand how this practice came about and how it affects pro se litigants.

A. UNBUNDLING LEGAL SERVICES

"For most people, [unbundling] is what access to justice is all about: the ability to get into a lawyer's office quickly and at a price they can afford. In many ways, unbundling is client education at its very best. The lawyer becomes a teacher of client empowerment to a class of one."[10]

Unbundled legal services, also known as "discrete task representation," "limited scope representation," or "alternatives to full-time representation,"[11] is a concept whereby an attorney and her client agree that the attorney will provide some but not all services necessary to resolve the

8. *Id.* at 6–7, 2006 WL 2427113, at *6–7 ("Wisconsin Judicare assisted me in finding attorney [sic] . . . for my divorce . . . [b]ut he did not want to discuss my concerns. He even did not want to review my documents. . . . Wisconsin Judicare assisted me in finding second attorney . . . [but] 'he was unwilling to advance the client's . . . objectives'.").

9. "Pro se" or "pro persona" are Latin terms referring to people who represent themselves. BLACK'S LAW DICTIONARY 1341, 1335 (9th ed. 2009).

10. Forrest S. Mosten, *Unbundling: Current Developments and Future Trends*, 40 FAM. CT. REV. 15, 15 (2002).

11. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422, 447 (1994); *see also* Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 565 (2007).

client's legal problem.[12] For instance, instead of representing a client in a full bundle of legal services,[13] the client and her attorney can agree that the attorney will merely research the relevant legal authority and prepare a memorandum for the client. Alternatively, both parties can agree that the attorney will only draft the initial complaint and the client will file the document with the court and litigate the matter pro se. Regardless of the services provided, unbundling gives litigants an alternative to either paying a hefty retainer for full-service representation or handling the matter on their own.[14]

Forest S. Mosten, considered the "father of unbundling,"[15] zealously advocates that lawyers should proactively provide unbundled legal services to their clients and the public.[16] Mosten elaborates on the strongest feature of unbundled legal services: the client remains in full control of the case.[17] Unlike full-service representation, where the attorney unilaterally decides the scope of services, the strategy, and tactics,[18] the unbundled "client-lawyer relationship is a two-way collaborative process . . . with the lawyer coaching from the sidelines . . . [and being] valued as [a] resource[ ] rather than directing client action or stepping in to act for [the client]."[19] An advocate for unbundling succinctly expressed this advantage: "[A] litigant can hire an attorney, at a set price, for a discrete task, within his means, and where he believes it might be most beneficial."[20]

A second crucial feature of the unbundled model is increased access to

12. DAVID MCGOWAN, DEVELOPING JUDGMENT ABOUT PRACTICING LAW 92 (2011); *see also* J. Anthony McLain, *The Unbundling of Legal Services and "Ghostwriting"*, 71 ALA. LAW. 401, 401 (2010) (referring to unbundling as "a la carte" legal services); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 461 (2011) ("a la carte" services can include "providing telephone, internet, or in-person advice").

13. Mosten, *supra* note 11, at 422–23 (describing the "full service package" for a family lawyer as "(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court.").

14. *See* Steinberg, *supra* note 12, at 462.

15. *See* Mosten, *supra* note 10, at 15 n.a1.

16. *Id.* at 15. Experts concede that the unbundling model is not novel and is commonplace in transactional fields and pro bono. *See, e.g.*, Steinberg, *supra* note 12, at n.32; David M. Forman, *Unbundled Legal Services*, 5 HAW. B.J. 20, 21–22 (2001); ABA SECTION OF LITIG., HANDBOOK OF LIMITED SCOPE LEGAL ASSISTANCE 5–6 (2003), *available at* http://apps.americanbar.org/litigation/taskforces/modest/report.pdf (last visited Aug. 12, 2012) [hereinafter ABA HANDBOOK]. This Comment focuses strictly on unbundling in the litigation context.

17. *See* Mosten, *supra* note 10, at 16 ("The client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package. The client specifically provides for 1. extent of services provided by lawyer, 2. depth of services provided by lawyer, and 3. communication and decision control between client and lawyer.").

18. Forrest S. Mosten, *Unbundling Legal Services: A Key Component in the Future of Access to Justice*, 57 OR. ST. B. BULL. 9, 9 (1997) (stating that in full-service representation, "the scope of needed services is generally decided unilaterally by the lawyer who performs the services and then sends the client a bill that the client is expected to pay").

19. *See* Mosten, *supra* note 10, at 15.

20. *See* Steinberg, *supra* note 12, at 462.

legal assistance and the judicial system,[21] especially for lower income litigants who cannot afford the traditional representation model.[22] The unbundled model allows programs like legal-aid and court-based centers[23] to distribute their scarce resources to a broad client base.[24] In addition, moderate income earners, unlike the indigent population, do not qualify for legal-aid assistance, nor do they hold sufficient legal savvy to represent themselves.[25] Thus, picking and choosing from a list of unbundled legal services at a fixed price is sometimes their only hope of legal assistance and access to justice.[26] Similarly, providing limited services to a client may be the only option for attorneys who do not have the time or resources to undertake full representation.[27] Further, those law firms that cater to the increasing demand for unbundled legal services will find this model very lucrative.[28]

Just as Mosten predicted,[29] the unbundling model has become so pervasive[30] that the American Bar Association (ABA), the largest voluntary professional association in the world,[31] rewrote its Model Rules of Pro-

21. John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2691 (1999); *see also* Steinberg, *supra* note 12, at 456, n.18, 457 (concluding, through empirical study, that an "unbundled legal services program was successful in furthering procedural justice," and achieving "the goal [of] mak[ing] sure a litigant can take the first basic action in advancing her rights").

22. Rothermich, *supra* note 21, at 2690–91. The author concedes that the unbundling modeling is used in various other contexts, which have no effect on affordability for low- to moderate-income earners. For instance, unbundling has been capitalized on by high-volume providers of limited legal assistance via hotlines and websites. *See, e.g.*, LEGALZOOM, http://www.legalzoom.com (providing an easy-to-use, online service that helps people create their own legal documents) (last visited Aug. 4, 2012); THE CTR. FOR ELDER RIGHTS ADVOCACY, http://www.legalhotlines.org/ (last visited Aug. 4, 2012) (providing a list of legal hotlines across the country); PANGEA 3, http://www.pangea3.com/ (providing outsourced legal services to businesses and law firms) (last visited Aug. 4, 2012). Whether such forms of unbundling enhance the legal profession and improve access to the justice system is outside the scope of this Comment.

23. *See* Steinberg, *supra* note 12, at 462, n.34 (distinguishing between two main providers of unbundled assistance for indigent litigants: (1) court-based centers that are staffed by non-lawyers disseminating information about legal processes and providing "self-help" assistance, and (2) legal-aid offices that are staffed with actual lawyers, but require financial eligibility restrictions).

24. *Id.* at 463 ("[UN]bundling offers the benefits of choice and affordability . . . doing the most good with the fewest resources.").

25. *See* Rothermich, *supra* note 21, at 2691.

26. *See id.*

27. *See* McLain, *supra* note 12, at 402.

28. FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 115 (2000). By providing unbundled legal services, Mosten's law firm has become "a major profit center since [it has] no uncollectible fees and the overhead burden is reduced because of the concentration of direct client-lawyer contact." *Id.*

29. *See* Mosten, *supra* note 10, at 17 ("Unbundling is here to stay. It is the way of the future—it is the way that law *will* be practiced for the rest of this century.").

30. *See* Steinberg, *supra* note 12, at 462.

31. AM. BAR ASS'N, http://www.americanbar.org/utility/about_the_aba.html (last visited Aug. 4, 2012).

fessional Conduct in order to expressly permit, encourage,[32] and regulate the practice.[33] Although Rule 1.2(c) affords the attorney and client latitude to limit the scope of legal representation, it mandates two conditions: the limitations must be "reasonable under the circumstances" and the client must provide "informed consent."[34] While the comments to the Rule define "reasonable under the circumstances,"[35] they further dictate that the attorney is not exempt "from the duty to provide competent representation," and that the attorney's representation "must accord with the Rules of Professional Conduct and other law."[36]

Following the ABA's lead, the American Law Institute (ALI) and several states also adopted rules expressly endorsing unbundled legal services. However, they also added some additional caveats.[37] *The Restatement (Third) of the Law Governing Lawyers* requires "five safeguards" with respect to unbundling of legal services:

> First, a client must be informed of any significant problems a limitation might entail, and the client must consent . . . . Second, any contract limiting the representation is construed from the standpoint of a reasonable client . . . . Third, the fee charged by the lawyer must remain reasonable in view of the limited representation . . . . Fourth, any change made an unreasonably long time after the representation begins must meet the more stringent tests . . . for postinception contracts or modifications. Fifth, the terms of the limitation must . . . be reasonable in the circumstances . . . .[38]

Some states have added the requirement that the client's consent to

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32. Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-100, (2011). The ABA Model Rules also encourage attorneys who provide limited legal representation under the court or nonprofit auspices by relaxing the conflicts of interest rules unless the attorney actually knows that the representation involves a conflict. *See* MODEL RULES OF PROF'L CONDUCT R. 6.5(a)(1) (2012); Barrie Althoff, *Ethical Issues Posed by Limited-Scope Representation—The Washington Experience*, 2004 PROF. LAW. 67, 84 (2004).

33. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2012) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

34. *Id.* "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2012).

35. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2012) ("If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be *reasonable* if the time allotted was not sufficient to yield advice upon which the client could rely.") (emphasis added). It is not easy to define *reasonable*; this gray standard is not only difficult to apply, but it will require further interpretation from the ABA and the courts.

36. *Id.* at R. 1.2 cmt. 7–8 (referring to Rules 1.8, 5.6, and 1.1, which define "competent representation" as requiring "the legal knowledge, skill, thoroughness and preparation necessary for the representation").

37. STEPHEN GILLERS, ROY D. SIMON, & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS 47 (Wolters Kluwer, Concise ed. 2012) (listing California, Colorado, Florida, Maine, Missouri, Washington, Wisconsin, and Wyoming).

38. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 cmt. c (2012).

limited representation be in writing.[39] Other states caution attorneys that "the scope of the [legal] services may be limited but their quality may not."[40]

B. The Pro Se Litigant

"The Founders believed that self-representation was a basic right of a free people . . . the right of all parties to 'plead and manage their own causes personally or by the assistance of . . . counsel.'"[41]

One of the largest recipients of unbundled legal services are pro se litigants—plaintiffs and defendants who represent themselves with limited or no attorney assistance. Yet, the pro se phenomenon predates the advent of unbundling[42] and, in criminal trials, is often thought of as a fundamental constitutional right.[43] In fact, many jurisdictions have endorsed unbundling legal services in response to the growing and often unmet demands of pro se litigants.[44]

Recently, there has been an unprecedented growth in the number of pro se litigants,[45] who frequently appear in cases involving family law (e.g., divorce and child-custody matters), traffic violations, housing and landlord–tenant evictions, and personal finance matters (e.g., collections and bankruptcy).[46] According to the 2000 Conference of State Court Administrators, there are two broad reasons for the rise of the pro se phenomenon: (1) a drastic reduction in funding for legal-aid clinics resulting in fewer attorneys available to represent litigants, and (2) the advent of the Internet, which provides unlimited self-help resources, which gives

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39. *See, e.g.*, Fla. Rules of Prof'l Conduct R. 4-1.2(c) (2006); Iowa Court Rules R. 32:1.2 (2010).

40. D.C. Bar Ass'n Legal Ethics Comm., Op. 330 (2005) ("[A]ll the duties that generally attach to lawyer-client relationships will apply to such arrangements, including diligence, loyalty, communication, confidentiality and avoidance of conflict of interest."); Utah State Bar Ethics Advisory Comm., Op. 02-10 (2002); Fla. Rules of Prof'l Conduct R. 4-1.2 cmt. (2006). *But see* Va. State Bar Ass'n, Legal Ethics Op. 1803 (2005) (stating that the creation of a client-lawyer relationship when an attorney provides limited assistance to prisoners should be decided on a case-by-case basis).

41. Faretta v. California, 422 U.S. 806, 830 n.39, 831 (1975).

42. *See* Steinberg, *supra* note 12, at 453 n.2 ("[R]ecognition of the right to represent oneself in legal proceedings predates even the ratification of the Constitution.").

43. *See generally* NAACP v. Meese, 615 F. Supp. 200, 205–06 (D.D.C. 1985) ("[T]he courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien.").

44. Jeffrey P. Justman, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 Minn. L. Rev. 1246, 1251 (2008).

45. Conference of State Court Adm'rs, Position Paper on Self-Represented Litigation 1 (Government Relations Office 2000) ("[T]he recent surge in self-represented litigants is unprecedented and shows no signs of abating."); *see* ABA Handbook, *supra* note 16, at 8 ("[N]ationally, in three or four out of every five cases, one of the two parties is unrepresented . . . [and] both parties are unrepresented in two or three out of every five cases.").

46. *See* Justman, *supra* note 44, at 1251; Deborah L. Rhode, Access to Justice 14 (2004).

many the perception that they can easily handle the legal process without an attorney.[47]

There are several additional reasons why litigants may decide to navigate the legal system on their own. The most important is their inability to afford attorneys.[48] Other reasons include:

> (1) increased literacy rates and education; (2) increased sense of consumerism; (3) increased sense of individualism and belief in one's own abilities; (4) an anti-lawyer sentiment; (5) a mistrust of the legal system; (6) a belief that the public defender in criminal cases is overburdened; . . . [7] a belief that the court will do what is right whether the party is represented or not; [and] [8] a belief that litigation has been simplified to the point that attorneys are not needed.[49]

Some pro se litigants may also use their status "as a trial strategy designed to gain either sympathy or a procedural advantage over represented parties."[50]

Yet it is difficult to imagine why anyone would choose to appear pro se "given the labyrinthine nature of the court system."[51] Noting the difficulties a pro se litigant faces in court, the United States Supreme Court stated: "Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [has] a perfect one."[52]

In light of the hardships faced by pro se litigants and the fact that their pleadings are not as artfully drafted as those drafted by attorneys, the United States Supreme Court held that courts should liberally construe pro se pleadings.[53] Yet, it is debatable whether this standard is applied consistently by all courts.[54] Although the standard was based on *Conley*

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47. CONFERENCE OF STATE COURT ADM'RS, *supra* note 45, at 1.

48. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378 (2005); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 24–25 (2009), *available at* http://www.lsc.gov/justicegap.pdf (citing a 2005 study of unrepresented litigants, "57 percent had incomes under $20,000 per year and 83 percent had incomes of under $30,000 per year").

49. *See* Swank, *supra* note 48, at 378–79, 383 (adding that even individuals that could bring their problems to the court fail to do so because they feel legal intervention would not help, are concerned about the costs even without attorneys, desire to avoid confrontation, believe their problem is not serious, and desire to handle the problem on their own).

50. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1575 (2005).

51. Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 661 (1988).

52. Powell v. Alabama, 287 U.S. 45, 69 (1932) ("If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.").

53. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (holding that pro se pleadings should be held "to less stringent standards than formal pleadings drafted by lawyers.").

54. Because the Court has failed to flesh out how the standard should apply, district courts apply different degrees of leniency. This makes the standard less reliable for pro se litigants. *See* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 971–72 (1990).

v. Gibson,[55] after *Bell Atlantic Corp. v. Twombly* and *Ashcrovt v. Iqbal*,[56] it is unclear how "liberal" this standard is in practice. Although the liberal pleading standard theoretically should not punish a pro se litigant "for his failure to recognize subtle factual or legal deficiencies in his claims,"[57] this seems to be wishful thinking—lower courts generally continue to cite the *Twombly* standard even when considering pro se complaints.[58]

In 2007, inconsistent application of the pro se liberal standard prompted the ABA to encourage judges to provide reasonable accommodations to pro se litigants so as to afford them the opportunity to be fairly heard.[59]

C. Introduction to Attorney Ghostwriting

One of the hallmarks of the unbundling model is known as ghostwriting, which occurs when a person writes a document on behalf of someone else without disclosing her authorship.[60] "Ghostwriting is authoring a legal document for another who appears to be and is presumed to be the actual author."[61] In the context of this Comment, attorney ghostwriting occurs when an attorney drafts legal documents for a pro se litigant "without disclosing authorship of the document[s]."[62] Examples of such documents include pleadings, complaints, notices, motions, and other filings in a court or tribunal.[63]

The practice of attorney ghostwriting developed in response to a growing demand from litigants who want a cost-effective alternative to full-service representation while still retaining control of their cases.[64] The

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55. *Haines*, 404 U.S. at 520–21 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)) (holding that dismissal is appropriate when "it appears, 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'").

56. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (requiring a complaint to allege "enough facts to state a claim to relief that is plausible on its face"); Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) (bolstering the plausibility standard as a device by which lower courts can dismiss weak, not just meritless, cases); *see also* Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159 U. Pa. L. Rev. 585, 607 (2011).

57. Hughes v. Rowe, 449 U.S. 5, 15 (1980).

58. *See, e.g.*, Severin v. Parish of Jefferson, 357 F. App'x 601, 603 (5th Cir. 2009) (per curiam) (applying the plausibility standard to a pro se complaint); Grabauskas v. CIA, 354 F. App'x 576, 576–77 (2d Cir. 2009) (dismissing a pro se complaint for failing to raise a plausible inference of wrongdoing).

59. Model Code of Judicial Conduct R. 2.2 cmt. 4 (2010) ("It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.").

60. Although there are many types of ghostwriting, such as medical ghostwriting and judicial ghostwriting, this Comment focuses solely on attorney ghostwriting.

61. W. Va. State Bar Lawyer Disciplinary Bd., Legal Ethics Op. 2010-01, at 1 (2010).

62. *See id.*

63. *See id.* Although ghostwriting in transactional legal practice is commonplace and generally accepted, this Comment focuses on attorney ghostwriting in the litigation context.

64. *See* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 Fordham Urb. L.J. 1145, 1145–46 (2002).

practice is further fueled by the advent of pro bono[65] services, where attorneys often ghostwrite legal documents for indigent litigants, who then file such documents pro se.

Although the practice of attorney ghostwriting appears to be simple, it is a highly controversial issue that stirs strong passions from many sides.[66] Attorney ghostwriting affects four stakeholders—the pro se litigant, the ghostwriting attorney, the court, and the opposing litigant—whose interests are incongruous.[67] Since the court is the most influential and dominant stakeholder, ghostwriting case law has primarily focused on the court's interest in candid information.[68] The result is sixty years of court opinions wrongfully condemning the practice of attorney ghostwriting and erroneously mandating that attorneys disclose their identity when drafting legal documents for pro se litigants.

In light of this one-sided approach, this Comment aims to illuminate the interests of the other stakeholders and suggest a practical, bright-line solution to the ghostwriting debate. Recently, various bar associations have weighed in on whether an attorney should provide undisclosed ghostwriting assistance to pro se litigants. Although most bar associations support attorney ghostwriting, they disagree on the extent of identity disclosure required of attorneys. After discussing the various interests implicated by attorney ghostwriting, this Comment recommends that lawyers who ghostwrite legal documents for pro se litigants should denote on the document that it was prepared with the assistance of an attorney. To put this recommendation in perspective, an overview of the legal and ethical duties of ghostwriting is critical.

III. THE LEGAL DEBATE SURROUNDING ATTORNEY GHOSTWRITING

Until recently, the case law on attorney ghostwriting consistently condemned the practice. Today, not only are federal circuits at odds with each other, state bar associations are as well. Many ethical opinions conflict with each other on whether attorney ghostwriting is legally permissible. This section explores (1) the ethical and legal duties triggered by ghostwriting; (2) the federal circuit split; and (3) the split of authority among various state and local bar associations as a result of attorney ghostwriting.

65. "Pro bono" is a Latin phrase used in contexts where professional work is done voluntarily, without payment, or at a reduced fee and, typically, for the public good. BLACK'S LAW DICTIONARY 1323 (9th ed. 2009).

66. *See infra* Part III.

67. *See infra* Parts III.A, IV.A.

68. *See, e.g.*, Duran v. Carris, 238 F.3d 1268, 1272–73 (10th Cir. 2001); *In re* Fengling Liu, 664 F.3d 367, 372–73 (2d Cir. 2011); *see also* Goldschmidt, *supra* note 64, at 1159–69.

A. Ethical and Legal Duties Governing Attorney Ghostwriting

Since attorney ghostwriting involves several parties—the pro se litigant, the ghostwriting attorney, the court, and the opposing party—there are many legal and ethical duties applicable to the practice. To illustrate, think of these duties flowing from a triangular relationship,[69] where the court and the opposing litigant are on one side of the triangle, and the pro se litigant and the ghostwriting attorney are on the other two sides.

All parties in this triangular relationship have duties towards each other—the duties of ghostwriting attorneys,[70] pro se litigants,[71] courts,[72] and opposing litigants.[73] Part III primarily focuses on the duties ghostwriting attorneys owe to others.

1. Duties Owed to the Court

The first and foremost duty a ghostwriting attorney owes to the court is the duty of candor.[74] The Model Rules forbid an attorney from making a false statement of fact or law to the court and require her to correct a false statement of fact or law previously made.[75] An attorney should take remedial measures if her client "is engaging or has engaged in criminal or fraudulent conduct related to the proceeding."[76] This duty remains in effect until the conclusion of the proceeding and permits disclosure of confidential information if compliance requires disclosure.[77]

The purpose behind this rule is to set "forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process . . . while maintaining confidences of the client . . . ."[78] Although the Model Rules provide no further explanation as to what undermines the integrity of the adjudicative process, the comments provide examples of egregious conduct that cannot be compared to the mere act of ghostwriting pleadings for pro se litigants.[79] Further, the ABA contends that ghostwriting attorneys do not violate their duties to

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69. *See infra* Appendix A: Two-Way Triangular Relationship in Attorney Ghostwriting. From the point-of-view of pro se litigants, the duties owed to courts and opposing parties are similar and thus can be grouped together.

70. *See e.g.*, Model Rules of Prof'l Conduct R. 1–4 (2011); Fed. R. Civ. P. 11; Restatement (Third) of the Law Governing Lawyers chs. 2, 4–8 (2000).

71. *See infra* Part IV.A.

72. *See* Model Code of Judicial Conduct Canon 2 (2010); *supra* Part II.B (discussing the lenient pro se standard).

73. *See* Model Rules of Prof'l Conduct R. 4 (2011); Restatement (Third) of the Law Governing Lawyers §§ 98–103, 106 (2000).

74. *See* Model Rules of Prof'l Conduct R. 3.3(a) (2011).

75. *Id.* Comment 3 to Rule 3.3 explains that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

76. *Id.* R. 3.3(b).

77. *Id.* R. 3.3(c).

78. *Id.* R. 3.3 cmt. 2.

79. *Id.* R. 3.3 cmt. 12 (providing examples such as bribery; intimidating witnesses, jurors, or court officials; and destroying or concealing evidence).

the court because the behind-the-scenes legal assistance is not a material fact.[80]

The second duty a ghostwriting attorney owes to the court flows out of a rule that a majority of courts cite when they condemn ghostwriting—Rule 11 of the Federal Rules of Civil Procedure.[81] Rule 11 requires that "[e]very pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented."[82] Subsection (b) is particularly relevant, as it deals with the representations made to the court, and states:

By presenting to the court a pleading . . . whether by *signing, filing, submitting*, or later *advocating* it . . . an attorney or unrepresented party certifies 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, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or . . . ;
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.[83]

Note that the language of Rule 11 does not seem to apply to a pleading that an attorney merely drafts but that the pro se litigant signs, files, submits, or later advocates.[84] Rule 11 allows "the court [to] impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation," if "the court determines that [the Rule] has been violated."[85] Rule 11 allows a court not only to sanction an attorney, but also to sanction a pro se litigant if the court determines that the rule has been violated.[86]

The third duty ghostwriting attorneys owe to the court stems from the court's own local procedural rules that mandate when and how attorneys can enter appearances or withdraw from the case.[87] The most common

80. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007).
81. *See infra* Part III.B.
82. FED. R. CIV. P. 11(a) (requiring that if a pleading is unsigned) "the court must strike" it, unless it is promptly corrected). State courts use the state equivalent of Rule 11 to impose these duties on attorneys. *See, e.g.*, ARIZ. R. CIV. P. 11(a).
83. FED. R. CIV. P. 11(b) (emphasis added).
84. *See id.*
85. *Id.* R. 11(c)(1).
86. *See id.* Some courts condemn attorney ghostwriting assuming that without knowing the identity of the attorney, they lack the ability to sanction anyone for a frivolous lawsuit. *See, e.g.*, Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (dictum).
87. *See e.g.*, NEV. S.C.R. 46 (2010) (stating that withdrawal can only be accomplished "upon the order of the court or judge"); *In re* Mungo, 305 B.R. 762, 768 (Bankr. D.S.C. 2003) (holding that "any attorney who files documents for . . . a party in interest shall remain the responsible attorney of record for all purposes").

way for an attorney to make an appearance in court is "by signing and filing a pleading."[88] Yet, as one court stated in condemnation of the practice of ghostwriting: "If the Court permitted lawyers to provide piecemeal representation to otherwise *pro se* litigants without entering an appearance, [the Local Rules] would be circumvented."[89] In regards to withdrawal, the Model Rules state that "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[90] According to a federal district court, the purpose of these appearance rules 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."[91]

The burdens imposed by these local rules on attorney ghostwriting are evident. These rules disturb the innate nature of the unbundling model—attorney ghostwriting exists because full-service legal representation, for a variety of reasons, is not possible.[92] Once a ghostwriting attorney signs the pleadings for a pro se litigant, she has entered an appearance on the case and the local rules require her to stay "on the hook" for the entire litigation, unless she is allowed to withdraw, which a court may or may not permit.[93]

2. *Duties Owed to the Opposing Litigant*

A ghostwriting attorney also owes certain duties to an opposing litigant and other third persons.[94] The Model Rules forbid attorneys from making "a false statement of material fact or law to a third person."[95] The comments to this Rule state that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."[96] Attorneys are also prohibited from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person."[97] Some commentators,

88. *In re* Merriam, 250 B.R. 724, 734 n.14 (Bankr. D. Colo. 2000) ("[T]he manner of entering an appearance is regulated by local rule.").

89. Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079 (E.D. Va. 1997) ("While the Attorneys in these cases did not initially enter a formal appearance . . . [h]ad 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.").

90. MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2011).

91. *Laremont-Lopez*, 968 F. Supp. at 1079.

92. *See supra* Part II.A–C.

93. Michael W. Loudenslager, *Giving Up the Ghost: A Proposal for Dealing with Attorney "Ghostwriting" of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearances for Such Attorneys*, 92 MARQ. L. REV. 103, 139, 144–45 (2008).

94. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2011).

95. *Id.* R. 4.1(a).

96. *Id.* R. 4.1 cmt. 1.

97. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 106 (2000).

while citing to Model Rule 3.4, argue that ghostwriting attorneys "undermine[ ] the integrity of the litigation."[98]

3. *Duties Owed to the Client*

Since the limited legal representation between a ghostwriting attorney and a pro se litigant creates a client–attorney relationship, the attorney owes a host of duties to her client.[99] Apart from the limitations placed on attorneys by Model Rule 1.2(c),[100] ghostwriting attorneys are subject to the duties of care,[101] loyalty,[102] confidentiality,[103] competent representation,[104] as well as the requirements to avoid a conflict of interest[105] and misconduct.[106]

B. Split of Authority Among the Federal Circuits

"What we fear is that . . . actual members of the bar represent [litigants] 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 . . . . We cannot approve of such a practice."[107]

Long before the concept of ghostwriting became popular, the United States Supreme Court decided a patent case where it explicitly criticized ghostwriting, albeit in a different context.[108] The Court reviewed the disbarment order of a patent attorney who had submitted a ghostwritten trade journal article to the Patent Office in support of a patent applica-

98. Lauren A. Weeman, *Bending the (Ethical) Rules in Arizona: Ethics Opinion 05-06's Approval of Undisclosed Ghostwriting May Be a Sign of Things to Come*, 19 Geo. J. Legal Ethics 1041, 1050 & n.55 (2006).

99. *See* ABA Handbook, *supra* note 16, at 19–20 (distinguishing between providing "legal information," which does not create a client-attorney relationship and providing "legal advice," which does. Attorney ghostwriting "is within the second category"). Since the attorney's breach of duties towards her client is not at the forefront of the ghostwriting debate, this Comment discusses these duties only to the extent they are necessary to understand the primary topic.

100. *See* Model Rules of Prof'l Conduct R. 1.2(c) (2011).

101. Restatement (Third) of the Law Governing Lawyers § 16(2) (2000) ("[A] lawyer must . . . act with reasonable competence and diligence."); *see also id.* § 52(1).

102. *Id.* § 16(3) ("[A] lawyer must . . . comply with obligations concerning the client's confidences and property, . . . deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client.").

103. *Id.* §§ 59–60 (stating that a "lawyer may not use or disclose confidential client information . . . if . . . doing so will adversely affect a material interest of the client").

104. Model Rules of Prof'l Conduct R. 1.1 (2011) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

105. *Id.* R. 1.7–1.9 (stating that attorneys cannot represent a client if the representation will be adverse to either the current client or another client); Restatement (Third) of the Law Governing Lawyers §§ 121–22, 128 (2000).

106. Model Rules of Prof'l Conduct R. 8.4 (2011) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .").

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

108. Kingsland v. Dorsey, 338 U.S. 318, 319–20 (1949) (per curium); *id.* at 323–24 (Jackson, J., dissenting).

tion.[109] The majority opinion condemned ghostwriting, holding that "the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith . . . [and] a spirit of trust and confidence."[110] In the dissent, Justice Jackson contradicted himself by defending the ghostwriting attorney[111] while stating that the attorney's "special adaptation" did not "comport[ ] with the highest candor."[112] Yet, because the context of ghostwriting in this case was transactional, the opinion did not directly address the attorney ghostwriting issue as discussed in this Comment.

The court opinions directly addressing the issue—whether ghostwriting attorneys must disclose their identity when drafting pleadings for pro se litigants—belong to three federal courts of appeal: the First and Tenth Circuits mandating disclosure,[113] and the Second Circuit allowing nondisclosure.[114] It is important to note that these court decisions are at opposite extremes.[115] Hence, this Comment resolves this sharp contrast by recommending a practical and middle-ground solution that balances the concerns of all stakeholders of attorney ghostwriting.[116]

Prior to the recent Second Circuit opinion, federal courts unanimously condemned ghostwriting[117] and prohibited attorneys from engaging in undisclosed authoring of legal documents for pro se litigants.[118] These courts identified three main rationales for their hostile view of attorney ghostwriting.

1. Unfair Application of the Lenient Pro Se Standard

When a litigant appears pro se, courts are required to construe the pro

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109. *See id.* at 321 (stating that $8,000 had been paid to a "disinterested labor leader . . . to suppress evidence of the real authorship of the [ ] essay").

110. *See id.* at 319 (majority opinion).

111. *See id.* at 323 (Jackson, J., dissenting) ("The worst that can be said of [the attorney] is that he took advantage of this loose practice [of accepting unsworn publications in support of patent applications] to use a trade journal article as evidence, without disclosing that it was ghost-written for the ostensible author.").

112. *Id.* at 324 ("Ghost-writing has debased the intellectual currency in circulation here and is a type of counterfeiting which invites no defense.").

113. Duran v. Carris, 238 F.3d 1268, 1273 (10th Cir. 2011) (holding that "any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved"); Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (holding that "[i]f a brief is prepared in any substantial part by a member of the bar, it must be signed by him").

114. *See, e.g.*, *In re* Liu, 664 F.3d 367, 373 (2d Cir. 2011) (per curiam) (holding that attorney ghostwriting does not constitute sanctionable misconduct).

115. *See supra* notes 113–14. This distinction will be analyzed in Part IV.B.

116. *See infra* Part IV.C.

117. Courts have used several demonizing terms to refer to ghostwriting attorneys, such as the "unseen hand," or "the attorney [that] guides the course of litigation while standing in the shadows of the Courthouse door." *See* Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1232 (D. Colo. 1994), *aff'd in part, disapproved in part*, 85 F.3d 489 (10th Cir. 1996); Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998).

118. *See, e.g.*, Delso v. Trs. for Ret. Plan for Hourly Emps. of Merck & Co., No. 04-3009 (AET), 2007 WL 766349, at *17 (D.N.J. Mar. 6, 2007); Laremont-Lopez v. Se. Tidewater Opportunity Ctr, 468 F. Sup. 1075, 1079–80 (E.D. Va. 1997); *Johnson*, 868 F. Supp. at 1231–32.

se pleadings liberally and afford them the benefit of any doubt.[119] Courts are skeptical about extending this standard to litigants who appear to be pro se, but whose documents are, in fact, drafted by an attorney.[120] Not only does this give an unfair advantage[121] to pro se litigants,[122] but it "burdens the opposing party with more legal expenses[,] . . . burdens an already overtaxed court system[,] and unfairly expends the precious time and resources of the courts."[123] However, it is debatable whether lower federal courts are even applying the less stringent standard to pro se pleadings, especially in light of the new *Twombly* and *Iqbal* plausibility standard.[124]

2. *Violation of the Duty of Candor and Other Ethical Duties*

Related to the unfair-advantage rationale are the violation of the duty of candor[125] and the inefficient court administration rationales.[126] Although most courts agree that an attorney's drafting assistance should be disclosed, they are split on whether drafting assistance is obviously discernible.[127] Further, courts "vigorously condemn" undisclosed ghostwriting where they see incivility or lack of professionalism, because courts are fearful of an attorney "launch[ing] an attack [ ] [ ] against another member of the Bar . . . without showing his face."[128]

3. *Difficulty in Applying Rule 11 Sanctions*

Another commonly used rationale for condemning undisclosed ghostwriting is that it allows attorneys to "escape the obligation imposed on members of the bar, typified by [Rule 11] . . . of representing to the court

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119. *See supra* Part II.B.; *see also* Karim-Panahi v. L.A. Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988).

120. *Johnson*, 868 F. Supp. at 1231 (referring to the "unwarranted advantage of having a liberal pleading standard . . . [resulting in the] entire process [being] skewed to the distinct disadvantage of the nonoffending party").

121. *Laremont-Lopez*, 968 F. Supp. at 1078 ("The *pro se* plaintiff 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 places the opposing party at an unfair disadvantage . . . .").

122. *See In re* Mungo, 305 B.R. 762, 769 (O.S.C. 2003) (adding that ghostwriting may taint the court's view of "well meaning pro se litigants who have no legal guidance at all and rely on the Court's discretionary patience in order to have a level litigating field").

123. *See* Loudenslager, *supra* note 93, at 119.

124. *See supra* Part II.B. and notes 55–58.

125. *See supra* Part III.A.

126. *Laremont-Lopez*, 968 F. Supp. at 1078 (finding that "[undisclosed ghostwriting] interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court").

127. *Compare id.* at 1079 ("[T]his Court . . . has been unable to confirm that some plaintiffs outwardly proceeding *pro se* were in fact receiving the assistance of trained legal counsel"), *with* Fin. Instruments Grp., Ltd. v. Leung, 30 F. App'x 915, 916 n.1 (10th Cir. 2002) ("[P]leadings . . . demonstrate an *obvious* legal sophistication, a complete familiarity with the rules of civil procedure, and an excellent command of the English language") (emphasis added).

128. Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342–43 (S.D.N.Y 1970) (stating that this unprofessionalism "smacks of the gross unfairness that characterizes hit-and-run tactics").

that there is good ground to support the assertions made."[129] Courts are concerned about the difficulty in punishing anonymous attorneys for frivolous or otherwise improper pleadings under Rule 11.[130] Further, courts denounce undisclosed ghostwriting as violating local rules on making an appearance and requesting a withdrawal.[131]

C. Split of Authority Among the ABA, State, and Local Bar Associations

"[T]here is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct."[132]

The split of authority regarding undisclosed ghostwriting is even more profound with respect to ethics opinions issued by state and local bar associations across the country. Thirty state and local bar associations, including the ABA, have addressed the issue of attorney ghostwriting, and their opinions vary widely.[133] These diverse opinions can be divided into the following four categories. For a comprehensive list of ghostwriting ethics opinions issued by state and local bar associations, see Appendix B.

1. Ghostwriting Not Permitted or Disclosure Required

Some bar associations expressly prohibit attorney ghostwriting.[134] For instance, the Colorado Bar Association warns its attorneys not to engage in this practice.[135] Similarly, the Iowa State Bar Association issued an ethics opinion in 1995 finding that "'ghost writing' of pleadings violates [local rules] prohibiting a lawyer from 'engaging in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [and] is a deception on the court.'"[136] The opinion concluded that "it is improper for an Iowa lawyer to prepare pleadings for use in pro se proceedings . . . ."[137] Yet, in a 1997 ethics opinion, the bar association switched positions and stated that "as long as the Court is informed of the lawyer who prepared the pleading no such violation [of the local rules] would occur and it would not be im-

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

130. *See, e.g.*, *Laremont-Lopez*, 968 F. Supp. at 1079; *cf. supra* note 86.

131. *Laremont-Lopez*, 968 F. Supp. at 1079; *see also* discussion *supra* Part III.A.1.

132. ABA Formal Op. 07-446, *supra* note 80.

133. *See infra* Appendix B: Ghostwriting Ethics Opinions.

134. *See e.g.*, Colo. Bar Ass'n Ethics Comm., Formal Op. 101, n.7 (1998) ("[W]hile there is no specific ethical, procedural or substantive rule against ghostwriting, attorneys 'should have known that this practice was improper.'") (quoting *Laremont-Lopez*, 968 F. Supp. at 1080); Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998) ("[D]rafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.").

135. Colo. Formal Op. 101, *supra* note 134 ("Colorado lawyers should consider *Johnson v. Board of County Commissioners*, [which holds that] ghostwriting violates the duty of candor to the tribunal, and therefore violates the Rules of Professional Conduct.").

136. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Op. 94-35 (1995).

137. *Id.*

proper."[138] Thus, the Iowa State Bar Association now falls into the second category discussed below—disclosure of substantial assistance.

Just like Iowa, other state and local bar associations permit attorney ghostwriting only if the drafting attorney signs the legal pleadings.[139] The State Bar of Nevada, for example, states that "'*[g]host-lawyering' is unethical unless* the 'ghost-lawyer's' assistance and identity are disclosed to the court by the signature of the 'ghost-lawyer' under Rule 11 . . . ."[140] Although some state bar associations, such as in Nevada[141] and New York,[142] adopt the "substantial assistance" language from the second category,[143] they conclude that "preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's name."[144] These bar associations, however, do not require any disclosure when "aiding clients in the preparation or filling out of forms adopted by and/or used by tribunals or federal or state agencies."[145]

2. *Disclosure of "Substantial" Assistance*

The second category of ethics opinions draws a line between undisclosed and disclosed attorney ghostwriting. They generally allow undisclosed ghostwriting, but limit it to situations where the ghostwriting attorney is not providing the pro se litigant with "active or substantial assistance."[146] The "substantial" or "extensive" test originates from the ABA's 1978 ethics opinion, which stated that "extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear without substantial professional assistance is improper."[147] Some ethics opinions specifically define substantial assistance to mean "representation that goes further than merely helping a litigant to fill out an *initial* pleading, and/or providing *initial* general advice and information."[148]

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138. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Op. 96-31 (1997).

139. *See infra* Appendix B: Ghostwriting Ethics Opinions.

140. State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 34, at 1 (2009).

141. *Id.* at 1 ("*Ghost-lawyering*" occurs when an attorney provides *substantial* legal assistance by drafting pleadings for pro se litigants without disclosing her identity).

142. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 613 (1990).

143. *See infra* Part III.C.

144. N.Y. Op. No. 613, *supra* note 142; *see also* Ky. Bar Ass'n, Ethics Op. E-343 (1991) ("[P]reparation of a pleading . . . for use by *pro se* litigants, constitutes substantial assistance that must be disclosed to the Court and the adversary").

145. W. Va. Legal Ethics Op. 2010-01, *supra* note 61.

146. Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994); *see also infra* Appendix B: Ghostwriting Ethics Opinions.

147. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978) ("We do not intend to suggest that a lawyer . . . could not . . . prepare or assist in the preparation of a pleading for a litigant who is otherwise acting *pro se*."). The opinion is ambiguous because it does not define "extensive" or "substantial" assistance, stating that its "determination . . . will depend on the particular facts involved." *Id.*

148. Del. Op. 1994-2, *supra* note 146.

Others have provided their own version of the "substantial assistance" test.[149]

3. *"Prepared By Counsel" Disclosure*

The third category of ethics opinions permit attorney ghostwriting, but are concerned about the potential for an unfair application of the pro se leniency standard.[150] But they also understand the unwillingness of an attorney to sign the prepared pleadings.[151] Hence, instead of requiring the ghostwriting attorney to disclose her identity, they require that the legal documents bear the statement "prepared by counsel."[152] This approach is the only one that incorporates the countervailing interests espoused by the four stakeholders of attorney ghostwriting, and for this reason, this approach would serve as a practical and bright-line solution to the attorney ghostwriting debate.

4. *No Disclosure*

The fourth category of ethics opinions are on the opposite end of the spectrum—they are extremely lenient and do not require any disclosure of ghostwriting assistance. These opinions conclude that attorneys can ethically provide ghostwriting assistance to pro se litigants without disclosing their assistance to the court or the opposing litigant.[153] The most noteworthy is the ABA's 2007 formal ethics opinion on the matter, which states,

> [T]he fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation . . . . [The litigant] will not secure unwarranted 'special treatment' . . . [because] the fact that a lawyer was involved will be evident to the tribunal. . . . [Thus] we do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c).[154]

At the core of many bar associations' ethics opinions, including the ABA's 2007 formal ethics opinion, is the premise that "[w]hen presented with a document prepared with the assistance of counsel . . . a court or tribunal can generally determine whether that document was written with

149. N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Op. 713, at 4 (2008) ("Disclosure is not required if the limited assistance is part of . . . [a] non-profit program designed to provide legal assistance to people of limited means. In contrast, where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward *pro se* litigants while still reaping the benefits of legal assistance, there must be full disclosure to the tribunal."); *see also supra* notes 143–45.

150. Fla. Bar Comm. on Prof'l Ethics, Op. 79-7 (2000).

151. *See* discussion *infra* Part IV.A.

152. N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 742, at 1 (2010) ("Disclosure of the fact that a pleading or submission was prepared by counsel need only be made 'where necessary.'"); *see also infra* Appendix B: Ghostwriting Ethics Opinions.

153. *See infra* Appendix B: Ghostwriting Ethics Opinions.

154. ABA Formal Op. 07-446, *supra* note 80, at 2–4.

a lawyer's help."[155] After the ABA's 2007 ethics opinion, many state bar associations changed their positions from requiring ghostwriting disclosure to allowing non-disclosure.[156] However, the primary flaw in this approach is that it fails to incorporate the interests of courts and opposing litigants, who may be unable to discern the drafting assistance and may improperly apply the pro se leniency standard.[157]

IV. RECOMMENDED SOLUTION TO RESOLVE THE SPLIT OF AUTHORITY

In light of the inconsistent and contradictory federal court decisions and ethics opinions of various bar associations, practicing attorneys need clear guidance—a practical and bright-line rule regarding the practice of ghostwriting and its accompanying disclosure requirements. Part IV analyzes the countervailing interests of the four stakeholders in attorney ghostwriting and how the Second Circuit failed to fairly resolve the attorney ghostwriting debate by ignoring the legitimate interests of the court and opposing litigants. Part IV concludes by proposing a practical, bright-line solution—a solution that the United States Supreme Court can adopt in order to resolve the circuit split and to encourage a resolution of the split amongst state and local bar associations across the country.

A. LOOKING AT ATTORNEY GHOSTWRITING FROM THE LENS OF ITS STAKEHOLDERS

"You never really understand a person until you consider things from his point of view—until you climb into his skin and walk around in it."[158]

Lawyers are trained to look at a problem, analyze all the issues involved, and then propose an effective and practical solution. Hence, to effectively resolve the attorney ghostwriting debate, one must consider the perspectives of all its stakeholders: (1) the pro se litigant, (2) the ghostwriting attorney, (3) the court, and (4) the opposing litigant. Until recently, attorney ghostwriting jurisprudence only addressed the interests of the most authoritative and dominant stakeholder—the court. How-

155. State Bar of Ariz., Ethics Op. 05-06 (2005). The opinion actually contradicts itself by stating "we do not approve of attorney ghostwriting documents that are filed with courts . . . without providing some form of disclosure. Instead, we only confirm that the practice is not prohibited by Arizona's Ethical Rules . . . ." *Id.*

156. *Compare* Conn. Bar Ass'n, Informal Op. 98-5 (1998) (establishing that the identity of the lawyer providing ghostwriting assistance must be disclosed), *with* Conn. Bar Ass'n, Informal Op. 2010-04 (2010) (stating that a ghostwriting attorney "is not required to inform the court that the document was prepared by the lawyer"). *See* Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility & Phila. Bar Ass'n, Joint Formal Op. 2011-100 (2011) (acknowledging the Second Circuit decision and concluding that "a lawyer is not required . . . to disclose . . . the limited engagement to . . . any tribunal in which the client is appearing *pro se*").

157. *See infra* Part IV.B.

158. HARPER LEE, TO KILL A MOCKINGBIRD 30 (Warner Books 1982).

ever, this Comment recommends a practical solution by understanding and incorporating the interests of all parties involved.

1. The Pro Se Litigant

"I can tell you that there is no rule of law, ethical guideline, or policy preference that can place pro se litigants on equal footing with those represented by counsel."[159]

A law student, who was once a pro se litigant stated, "Dealing with pro se litigants is not easy."[160] Given their lack of legal knowledge coupled with the stress that litigation causes, it is surprising how often pro se litigants navigate the complex legal system and represent themselves in court.[161] A comprehensive study of pro se litigants in Phoenix, Arizona revealed striking characteristics—they were relatively well educated (ninety percent had at least a high school education); likely to be young (most had no children or property); and the majority had incomes less than $30,000.[162] The study also found that over half of them either could not afford an attorney or did not want to pay for one.[163]

Regardless of whether it is necessity or choice that triggers pro se litigants to represent themselves, it is certain that they prefer the unbundled model and ghostwriting assistance.[164] This model caters to various levels of legal services, which allows them to choose how much or how little representation they need or can afford.[165] Having greater control over the means and ends of their case provides the added comfort of being in charge of the entire process. In addition to creating the feeling of control, legal advice and drafting assistance may be the only way some pro se litigants can succeed in the complex world of litigation.

One reason pro se litigants avoid disclosing ghostwriting is fear that the attorney's negative history may adversely impact the pro se litigant in the present case.[166] Another reason pro se litigants avoid disclosing drafting assistance to a court is to avoid losing the lenient standard courts normally provide to pro se litigants. Yet, in light of the inconsistency with which courts apply this lenient standard and the fact that the standard has been changed by *Twombly* and *Iqbal*, it is debatable whether the lenient

159. Shon R. Hopwood, Panel Discussion, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229, 1239 (2011). Hopwood is a law student, but he was once a pro se litigant himself.

160. *Id.* at 1230.

161. *See* discussion *supra* Part II.B.

162. *See* John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know* 3 (2002) (unpublished manuscript), *available at* http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf (last visited Sept. 13, 2012).

163. *Id.*

164. *See* Hopwood, *supra* note 159, at 1238-39 (2011) ("All of the [pro se] clients seemed to appreciate the low-cost services we provided.").

165. *Id.*

166. *See* Justman, *supra* note 44, at 1257 (arguing that if an attorney has a negative reputation with a judge or opposing counsel, or if an attorney and an assigned judge lack a good relationship, disclosure of the attorney's identity will adversely affect the client).

standard still applies to pro se litigants.[167]

Besides the affordability issue, one of the major concerns pro se litigants face is the fact that they must navigate the entire process of litigation on their own.[168] As one commentator stated, "[T]he only detriment suffered by the client of a ghostwriting attorney is that the assistance of counsel is limited to the discrete act of preparing a pleading."[169]

2. *The Ghostwriting Attorney*

Attorneys that ghostwrite pleadings for pro se litigants are the scapegoats of the entire model. Federal courts have used denigrating metaphors for ghostwriting attorneys, such as the "unseen hand,"[170] or one who "guides the course of litigation while standing in the shadows of the Courthouse door."[171] However, attorneys that engage in ghostwriting likely do not have any intention of deceiving the court or opposing litigants—such as violating any ethical or legal rule, or securing an unfair advantage for the pro se litigant. They are simply trying to reinvent themselves in the fast-paced, competitive legal market where clients are becoming more savvy, wanting more control, and more often dictating how much they are willing to pay to obtain legal services. Put simply, the attorney's primary interest in providing ghostwriting assistance is to provide billable legal services at a reasonable price, without getting themselves in trouble with the court, an opposing litigant, or the pro se litigant.

Although the biggest criticism of attorney ghostwriting is that the drafting assistance is undisclosed, an attorney may have several reasons to maintain this nondisclosure:[172] (1) the client instructs the attorney not to disclose; (2) the client does not pay the attorney to provide full representation; (3) the attorney fears that disclosing the attorney's identity will constitute a formal appearance causing the attorney to become the "attorney of record";[173] (4) the attorney fears being held responsible for the client's adverse actions;[174] (5) the attorney thinks that the bare minimum fees obtained from the limited representation do not justify exposing the attorney to liabilities from malpractice suits and disciplinary proceedings;

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167. *See* Schneider, *supra* note 56, at 607–08.

168. Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 306 (2010).

169. *Id.*

170. *See* Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1232 (D. Colo. 1994), *aff'd in part, disapproved in part*, 85 F.3d 489 (10th Cir. 1996).

171. Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998).

172. *See id.*; see *supra* Part III.A.

173. *See* ABA HANDBOOK, *supra* note 16, at 75–99. Not only is the attorney of record subject to Rule 11 sanctions, but she is obligated to retain such a status until a court relieves her of that responsibility. *See id.* at 77–78, 113–15. The attorney may be on the hook for representing the client for the entirety of the case because courts "rarely allow counsel to withdraw from a pending matter for financial reasons." Jona Goldschmidt, *Strategies for Dealing with Self Represented Litigants*, 30 N.C. CENT. L. REV. 130, 137 (2008).

174. *See* ABA HANDBOOK, *supra* note 16, at 99. For instance, a client may change the pleading between the time they leave the attorney's office and the time they file it with the court. *Id.*

(6) the attorney may be providing pro bono drafting assistance; or (7) the attorney may be helping a friend, family, or acquaintance, in the spirit of increasing access to justice. Put simply, the primary interest of ghostwriting attorneys is to advance their client's best interests and to make a living by providing legal services, not to deceive anyone.

3. The Court

"I don't think the average lawyer quite realizes the number of cases that we [the judges] have, the number of motions judges have . . . . There are some days I never stop reading, from the minute I get to the office to the minute I leave. And many, many weekends I take work home to finish reading."[175]

As the most authoritative and respected stakeholders in the ghostwriting equation, judges and courts have a mixed perspective with regards to pro se litigants. A 2009 survey of 1,200 trial judges nationwide concluded that the economic downturn had resulted in an increase in pro se litigants.[176] These judges overwhelmingly agree on the consequences of this increase: (1) the pro se litigants are negatively impacted because they fail to present necessary evidence and commit many procedural errors,[177] and (2) the courts are negatively impacted by inefficient and sluggish court administration.[178] The survey results also reflected the phobia courts hold against the unbundling model.[179] When asked what solutions courts recommend to mitigate these issues, 73% suggested an increase in legal services funding (which seems difficult considering recent budget cuts); 68% proposed more pro bono attorneys (which may be difficult to achieve in light of the current economy and the fact that attorneys are so busy with their paid work); 44% suggested an increase in pro se training (a good idea that has been implemented in various jurisdictions); 36% recommended online self-completing forms (another good idea that has been implemented in various jurisdictions); and, not surprisingly, merely 19% advocated for unbundling of legal services (one of the best ideas on the list).[180]

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175. Mary Dunnewold, *Annoying the Judge: Recent Examples of What Not to Do in Federal Court*, STUDENT LAW., Jan. 2012, at 15–16 (quoting The Honorable Phyllis A. Kravitch, a senior U.S. circuit judge).

176. *See* LINDA KLEIN, ABA COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (PRELIMINARY) 2–3, 5 (2010), *available at* http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf.

177. *See id.* at 10–12 (reporting that 62% of judges feel pro se litigants are negatively impacted).

178. *See id.* at 12–13 (reporting that 71% of judges are concerned about the slowness of court procedure because of "the time staff must use to assist self represented parties").

179. *See generally id.*; *see also* Goldschmidt, *supra* note 173, at 138 (stating that the real reasons why early federal courts condemned ghostwriting are: "(1) the novelty of the practice at the time, [and] (2) confusion of the court and the adverse party as to whether the ghostwriter was or was not representing the [pro se litigant] (and to whom notices should be sent)").

180. See KLEIN, *supra* note 176, at 15.

Until recently, the federal courts were hostile to the practice of attorney ghostwriting.[181] Their main interest is in finding out whether a pro se litigant has received any assistance from an attorney, which will help them determine whether to apply the pro se lenient standard. Similarly, many courts feel that undisclosed ghostwriting hinders their ability to effectively administer pro se litigation.[182] Another important interest is the need to sanction or discipline a party for misconduct or for bringing frivolous lawsuits. Although courts have the express authority to sanction or discipline pro se litigants under Rule 11, they seem hesitant to do so.[183] Instead, courts want to condemn the attorney because that is what they are used to doing in full-service representation cases. In short, courts want to know if the "unseen hand" of an attorney is helping a pro se litigant.[184]

4. *The Opposing Litigant*

"*Pro se* plaintiffs usually are zealots, adopting tactics for which lawyers would be sanctioned. They forum-shop with glee, file multiple frivolous motions and appeals, refuse to respond to discovery requests, and try to extort settlements. But—and this is the source of much frustration—judges justifiably tolerate such conduct and stretch whenever possible to assist such plaintiffs."[185]

The author of the above passage accurately summarizes the sentiments of opposing litigants—it is better to deal with an attorney or a represented party than to deal with a pro se litigant.[186] Because of this negative attitude, opposing counsel often remains detached and avoids any communication with self-represented parties.[187] Further, when opposing counsel senses that their pro se adversary is getting ghostwriting assistance, they immediately file a complaint with the court, condemning ghostwriting and requesting the court to sanction the ghostwriting attorney and the pro se litigant.[188] Yet, in reality, the opposing litigant may be trying to prevent the pro se litigant from gaining any assistance (whether from the ghostwriting attorney or the judge) which would help to level the playing field between the parties.[189]

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181. *See supra* Part III.B.

182. United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("[G]host writing . . . interfere[s] with the Court's ability to superintend the conduct of counsel and parties during the litigation."); *see also supra* Part III.B.

183. *See supra* notes 85–86.

184. Brenda Star Adams, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 307 (2005).

185. Paul B. Zuydhoek, *Litigation Against a Pro Se Plaintiff*, LITIG., Summer 1989, at 14.

186. *See* Paula J. Frederick, *Learning to Live with Pro Se Litigants*, GPSOLO MAG., Nov. 2005, at 50.

187. *See* Goldschmidt, *supra* note 173, at 133.

188. *Id.* at 138.

189. *Id.*

Regardless of what motives an opposing litigant has for condemning undisclosed ghostwriting, their interests as a party to litigation should be adequately addressed. The interests of opposing litigants are aligned with courts to some degree—both parties want to know whether an attorney is assisting a pro se litigant. Although they may not admit it, both opposing litigants and courts benefit from artfully drafted pleadings because they are easy to understand and follow the same rules and format both parties are used to seeing.

B. The Second Circuit's Recent Opinion Approving Undisclosed Attorney Ghostwriting

Although the Second Circuit's recent opinion in *Liu* ended the federal courts' unanimous condemnation of attorney ghostwriting, it erroneously shifted the standard from one extreme to the other.[190] As a matter of first impression, the Second Circuit held that undisclosed ghostwriting is not sanctionable misconduct and thereby created a federal circuit split.[191] The Second Circuit's Committee on Attorney Admissions and Grievances recommended that attorney Fengling Liu should be publicly reprimanded for, among other things, violating her "duty of candor by helping *pro se* petitioners draft and file petitions . . . without disclosing her involvement to the Court."[192] Although the court publicly reprimanded Liu for other misconduct, it held that she did not commit sanctionable misconduct by ghostwriting petitions for pro se litigants.[193]

Noting other federal courts' condemnation of ghostwriting and the bar associations' trend toward greater acceptance of the practice, the court found support in "the ABA's 2007 ethics opinion . . . permitting various forms of ghostwriting" and offered four reasons for its approval of undisclosed ghostwriting.[194] First, in regard to the unfair-advantage rationale, the court cited with approval the New York County Lawyers' Association, which found that "ghostwritten pleadings would not be unfairly accorded liberal construction . . . or hamper the court's ability to sanction frivolous behavior by the parties or counsel."[195] While this rationale may seem sound, its premise—the fact that a lawyer was involved will be evident to a court—is flawed.[196] Many courts find it difficult to definitively

190. *In re* Liu, 664 F.3d 367, 372–73 (2d Cir. 2011) (per curium).

191. *Compare id.* at 370, 373 (holding that "[the attorney's] ghostwriting did not constitute misconduct and therefore does not warrant the imposition of discipline"), *with* Duran v. Carris, 238 F.3d 1268, 1272–73 (condemning undisclosed attorney ghostwriting), *and* Ellis v. Maine, 448 F.2d 1325, 1328 (same).

192. *Liu*, 664 F.3d at 368. Liu was also charged with failing to keep her clients apprised of the status of their cases, failing to terminate her representation, and improperly filing petitions. *Id.*

193. *Id.* at 373.

194. *Id.* at 370–73; *see generally* ABA Formal Op. 07-446, *supra* note 80.

195. *Liu*, 664 F.3d at 372 (citing N.Y. Cnty. Lawyers' Ass'n Op. 742, *supra* note 152); *id.* at 370–71 ("[B]ecause there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed").

196. *See supra* Part III.B.2 and note 127.

conclude that an attorney provided drafting assistance to an ostensibly pro se litigant.[197]

Second, addressing the duty of candor argument, the court said that such a violation:

> would require, at the very least, a finding that [the attorney] knew, or should have known, of either (a) an existing obligation to disclose her drafting of a pleading, or (b) even in the absence of such a general obligation, the possibility that nondisclosure in a particular case would mislead the court in some material fashion.[198]

Under this rationale, the Second Circuit seems to suggest that before a court can sanction a ghostwriting attorney, it must inquire into the applicable *mens rea*—whether the attorney knew or should have known of her obligation to disclose or that nondisclosure would mislead the court.[199] Here, the court may have gone too far by adding a *mens rea* requirement to determine a violation of the duty of candor. This is because the requirement (1) adds little value to the resolution of the attorney ghostwriting debate; (2) adds uncertainty by inquiring into an attorney's subjective state of mind; (3) would require violations to be resolved on a case-by-case basis as opposed to creating a bright-line rule; and (4) would lead to inefficient use of the court's limited resources.

Third, the court shrugged off the Rule 11 argument by stating that "Rule 11 . . . does not govern [ghostwriting] . . . since that rule . . . requires the signature of the 'attorney of record,' . . . not a drafting attorney."[200] This rationale is the most persuasive and authoritative because the language of Rule 11 does not encompass attorney ghostwriting, so long as the attorney does not sign the drafted pleadings. Lastly, with respect to the argument that ghostwriting is potentially dishonest and avoids accountability, the court stated that "there is no such dishonesty so long as the client does not make an affirmative representation, attributable to the attorney, that the pleadings were prepared without an attorney's assistance."[201] This rationale is inconsistent with the Model Rules that state that an omission or a failure to make a disclosure is the equivalent of an affirmative misrepresentation.[202]

C. A Practical and Bright-Line Solution—Anonymous Disclosure of Legal Assistance

"[I]t is possible that the courts and bars that previously disapproved of attorney ghostwriting of *pro se* filings will modify their opinion of that

197. *See id.*; *see supra* Part III.C.4; *see infra* Part IV.C and notes 207–09.

198. *Liu*, 664 F.3d at 372 ("[I]n light of this Court's lack of any rule or precedent governing attorney ghostwriting, and the various authorities that permit that practice, we conclude that Liu could not have been aware of any general obligation to disclose her participation to this Court").

199. *See id.*

200. *Id.* at 372 n.5.

201. *Id.* at 372 (citing N.Y. Cnty. Lawyers' Ass'n Formal Op. 742, *supra* note 152).

202. *See supra* Part III.A.1–2.

practice."[203]

In light of the uncertainty regarding the practice of attorney ghostwriting,[204] attorneys are charged with the troublesome task of determining whether a court will sanction them for providing undisclosed ghostwriting assistance to an ostensibly pro se litigant. Further, the state and local bar associations that have not taken a stance on this issue are puzzled in the face of contradictory case law and ethics opinions. Lastly, the undecided federal circuits and lower courts, as well as state courts, need a bright-line rule that they can easily administer and enforce.

In consideration of the best interests of all attorney ghostwriting stakeholders, this Comment recommends a practical and bright-line rule—requiring ghostwriting attorneys and pro se litigants to disclose that the legal document was "prepared with the assistance of counsel." The attorney need not disclose her identity in such situations, unless the court expressly requires otherwise.

The "prepared with the assistance of counsel" disclosure would be the most effective at addressing all the countervailing interests, objections, and concerns of the parties involved. First, this approach resolves one of the biggest objections to ghostwriting—the unfair advantage.[205] By clarifying whether the document was drafted by the pro se litigant or an attorney, the court can effectively determine whether the lenient pro se standard applies to the document. Further, the disclosure will not taint the court's view of a true pro se litigant who has not received any drafting assistance.[206]

Second, this disclosure will provide the court with some transparency and essentially take the guesswork out of the ghostwriting equation.[207] Some courts genuinely cannot discern whether a pleading was drafted by an attorney or a pro se litigant.[208] One commentator stated that: "it seems misplaced to assume that a court or an adverse party will uncover an attorney's assistance as glaringly obvious."[209] Hence, the recommended disclosure will have the effect of taking the word "ghost" out of

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203. *Liu*, 664 F.3d at 373.

204. Courts and bar associations across the country are sharply divided on whether undisclosed attorney ghostwriting is permissible. *See supra* Part III.B–C.

205. *See supra* Part III.B.1.

206. *See* Loudenslager, *supra* note 93, at 119 (avoiding the negative impacts of undisclosed ghostwriting on "litigants who in fact are proceeding completely in a *pro se* capacity").

207. *See* Peter M. Cummins, *The Cat-O'-Ten-Tails: Pro Se Litigants Assisted by Ghostwriting Counsel*, FOR THE DEF., April 2011, at 40, 42 (2011).

208. Fin. Instruments Grp., Ltd. v. Leung, 30 F. App'x 915, 916 n.1 (10th Cir. 2002) (stating that the court could not reach "any definitive conclusion" on whether an attorney provided the drafting assistance); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079 (E.D. Va. 1997) ("[T]his Court . . . has been unable to confirm that some plaintiffs outwardly proceeding *pro se* were in fact receiving the assistance of trained legal counsel.").

209. *See* Cummins, *supra* note 207, at 42 ("[B]ecause of the advent of online resources, legal hotlines, and other resources that were not widely available in decades past, pleadings filed by today's pro se litigants are not always so facially deficient that they could not have possibly been drafted by an attorney.").

"ghostwriting" and addressing the legitimate concerns of the court and the opposing litigant.

Third, since the court is not being misled as to the fact of the drafting assistance, the attorney is not violating the duty of candor and not deceiving the court. Stated another way, since the pro se litigant does not appear to be the actual author of the document, the disclosure nullifies the misrepresentation argument. If an attorney has violated Rule 11 by drafting a frivolous pleading or violated another court rule, the court may still be able to pierce the veil of anonymity and sanction the attorney.[210] The fear of being sanctioned by the court will ensure that attorneys are not providing substandard legal services to pro se litigants. However, when a pro se litigant is the culprit, a court can choose to merely sanction the pro se litigant in an effort to discourage frivolous and improper filings.[211]

Fourth, by not requiring disclosure of the attorney's identity, attorneys will have sufficient incentive to provide unbundled legal services, represent the indigent population, and increase access to justice. Critics of this approach assume that the recommended disclosure will scare attorneys away from providing ghostwriting assistance. However, this is far from being accurate. Most ghostwriting attorneys will be comfortable with an anonymous disclosure because this disclosure will not make them the attorney of record, which would normally require them to be on the hook for the entire case.[212] But if a ghostwriting attorney engages in any misconduct or blatantly violates the duties owed to the court and the opposing litigant, then this approach allows the court to sanction the attorney, thereby safeguarding the court's interest in upholding the ethical and professional standards mandated in its jurisdiction.[213] Stated differently, this approach will protect the ghostwriting attorneys who follow the rules and are genuinely trying to help pro se litigants, but expose others who violate their duties and take advantage of their anonymous status.[214]

With more unbundling and ghostwriting assistance available, the interests of pro se litigants will be promoted, as it will give them the control of hiring an attorney for as much or as little legal assistance as they need or can afford.[215] Although pro se litigants will not want to lose their lenient standard, this determination will depend upon the courts, which may still apply the lenient standard if the attorney provides ineffective

210. *See* Ivy v. Merchant, 666 So. 2d 445, 451–52 (Miss. 1995) (sanctioning a jailhouse lawyer for helping a pro se prisoner file a frivolous claim).

211. *See* Robbins, *supra* note 168, at 302 ("[C]ourts do not need statutory permission to sanction pro se litigants.").

212. *See* Weeman, *supra* note 98, at 1057, 1061 n.114.

213. Loudenslager, *supra* note 93, at 107.

214. Margaret Graham Tebo, *Scary Parts of Ghostwriting*, ABA J., Aug. 2007, at 16, 17.

215. *See* Hopwood, *supra* note 159, at 1238–39 (2011) ("[I]n return for a reduced fee, [the pro se clients] received an attorney-prepared brief that they filed pro se—placing them in a much better position to succeed on their claims.").

assistance.[216]

Fifth, if more pleadings are drafted with the assistance of an attorney, the court and opposing parties will benefit from better-crafted pleadings, which should save time and resources for all parties involved.[217] Not only will this reduce strain on the judicial system, but the courts will share the responsibility of guiding pro se litigants with ghostwriting attorneys. With so many advantages triggered by the disclosure of assistance, this approach seems to be the best solution to the issue of undisclosed attorney ghostwriting.

VI. CONCLUSION

"While ghostwriting was once looked upon with disdain, . . . it has recently been viewed as an opportunity for the bar to provide cost-effective legal guidance to those who cannot afford full representation."[218]

There is no doubt that pro se litigants are appearing frequently in federal and state courts, and our justice system needs to adequately and efficiently address the pro se phenomenon.[219] With the costs of legal representation increasing, and the economy slowing, the legal community devised a solution called "unbundled legal services." Although this model worked quite efficiently for transactional legal services, when it entered the litigation arena it was vehemently condemned. When federal courts were added to the ghostwriting equation, they quickly denounced the "unseen hand"[220] and took the attorney ghostwriting pendulum to an extreme—an absolute ban on undisclosed ghostwriting.

Then came the ABA's 2007 ethics opinion and the Second Circuit's 2011 decision in *Liu*, which swung the attorney ghostwriting pendulum all the way to the other extreme—absolute acceptance of undisclosed ghostwriting.[221] However, the pendulum cannot remain at either extreme and must oscillate back to and rest at the equilibrium position—where the interests of all attorney ghostwriting stakeholders converge.

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216. Even in the context of undisclosed ghostwriting, there is no guarantee that the courts will provide pro se litigants with a lenient standard. *See* Bradlow, *supra* note 51, at 673 ("Courts have also denied judicial assistance and leniency to civil pro se litigants in the context of the amount-in-controversy requirement, pre-trial statements, appearance for depositions, appeal periods, and rules of evidence.") (footnotes omitted); *see also supra* Parts II.B, III.B.1, IV.A.1.

217. *See* KLEIN, *supra* note 176, at 14 (noting that 86% of courts surveyed agreed they would operate more effectively if both parties were represented and that "the court views advocates as an efficiency within an adversarial system"). The survey also found that "[s]ixty-four percent (64%) of the judges agreed that the courts would operate more efficiently if the parties better understood the [legal] system." *Id.* at 15.

218. *See* Hopwood, *supra* note 159, at 1238 (2011).

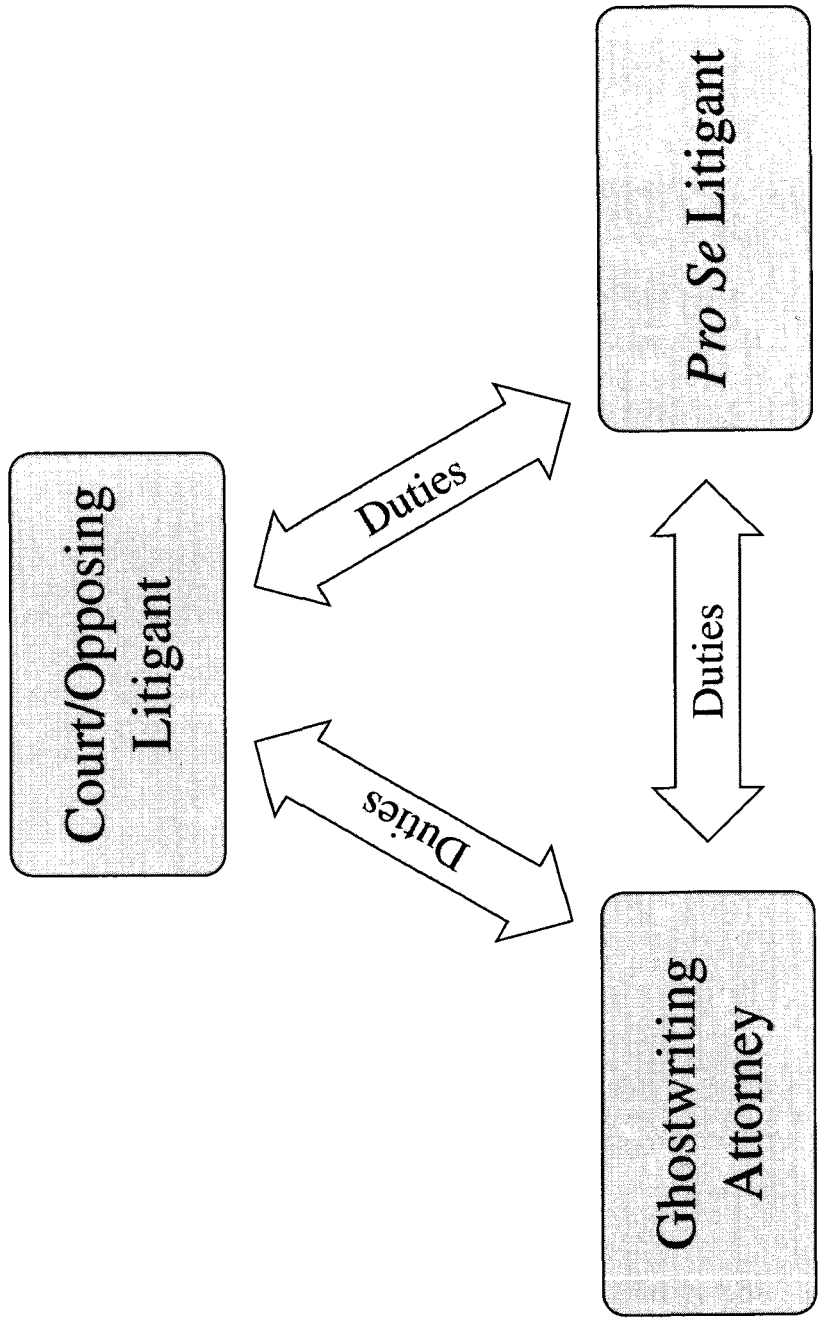
219. Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 111 (2002) ("[L]egal services have become more of a necessity and less of a luxury. . . . [We have] become less dependent on . . . community trust and resort[ ] much more to the legal system for resolution of conflicts . . . [y]et, the cost of legal services remains, even today, so prohibitive that even the middle class cannot afford to retain counsel for the smallest legal matters.").

220. *See* Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1232 (D. Colo. 1994).

221. *See supra* Part III.B–C.

This Comment recommends taking the "ghost" out of "ghostwriting" by requiring attorneys to disclose to courts and opposing litigants that the legal document submitted was "prepared with the assistance of counsel." In addition to the numerous advantages of this increased transparency, this disclosure protects the countervailing interests of all stakeholders of attorney ghostwriting. Ultimately, the federal courts, specifically the United States Supreme Court, must decide on the issue of undisclosed attorney ghostwriting. By adopting the bright-line rule of anonymous disclosure of the drafting assistance, the Court can provide practical guidance to undecided federal circuits, bar associations, and thousands of practicing attorneys nationwide who face this question on a regular basis.

APPENDIX A – TWO-WAY TRIANGULAR RELATIONSHIP IN ATTORNEY GHOSTWRITING



APPENDIX B – GHOSTWRITING ETHICS OPINIONS

Ghostwriting Not Permitted/ Mandatory Disclosure

1. Colo. Bar Ass'n, Ethics Op. 101 (1998) (ghostwriting is improper).
2. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct, Ops. 96-31 (1997), 94-35 (1995).
3. Ky. Bar Ass'n, Op. E-353 (1991).
4. Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998).
5. State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 34 (2006, Revised 2009).
6. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 613 (1990)
7. W. Va. State Bar Lawyer Disciplinary Bd., Legal Ethics Op. 2010-01 (2010).

Disclosure of "Substantial" Assistance

1. Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994)
2. N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Op. 713 (2008).
3. Bd. of Prof'l Responsibility of Supreme Court of Tenn., Formal Ethics Op. 2007-F-153.
4. Va. State Bar Ass'n, Legal Ethics Ops. 1803 (2005), 1761 (2002).

"Prepared By Counsel" Disclosure

1. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978).
2. Fla. Bar Comm. on Prof'l Ethics, Op. 79-7 (2000).
3. Kan. Bar Ass'n, Legal Ethics Op. 09-01 (2009).
4. N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 1987-2 (1987).
5. N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 742 (2010).

No Disclosure

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007).
2. Ala. Bar Ass'n, Ethics Op. 2010-01 (2010).
3. Alaska Bar Ass'n, Ethics Op. 93-1 (1993).
4. Ariz. State Bar Ass'n, Ethics Op. 06-03 (2006).
5. Conn. Bar Ass'n, Informal Op. 2010-04 (2010).
6. D.C. Bar Ass'n Legal Ethics Comm., Op. 330 (2005).
7. Ill. State Bar Ass'n Prof'l Conduct Comm., Op. 849 (1983; Affirmed 1991).
8. L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Ops. 502 (1999), 483 (1995).
9. Me. Bd. of Overseers of Bar Prof'l Ethics Comm'n, Ethics Op. 89 (1988).
10. State Bar of Mich., Ethics Op. RI-347 (2010).
11. N.C. State Bar, Formal Ethics Op. 3 (2008).
12. Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-100 (2011).
13. Utah State Bar Ethics Advisory Op. Comm., Op. 08-01 (2008).