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Unmasking the Ghost: Rectifying Ghostwriting and Limited-Scope Representation with the Ethical and Procedural Rules

Halley Acklie Ostergard
University of Nebraska College of Law

Note*

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TABLE OF CONTENTS

* Halley Acklie Ostergard, University of Nebraska College of Law, J.D. expected May 2014; B.A. Middlebury College, 2009. I would like to thank the members of the *Nebraska Law Review* for their dedication and service to the journal. A special thanks to my family for all the support they have given me and to Chad for the love and levity he brings to my life.

I. INTRODUCTION

Pro se litigants—parties representing themselves without assistance of counsel—have steadily been on the increase since the late 1990s.[1] According to the Administrative Office of the United States, the number of civil pro se cases filed in U.S. district courts in fiscal year 2010 was 24,319, increased from 20,545 in fiscal year 2007.[2] One of the primary factors fueling the rise in pro se litigants is the prohibitive cost of full-service legal representation.[3] Unable to afford lawyers, these individuals face the choice of allowing their claims to lapse or representing themselves. The increased number of parties representing themselves has resulted in a number of challenges for the judiciary and the legal profession at large. In order to help pro se litigants, courts have adopted rules giving leniency to individuals representing themselves.[4] Meanwhile, lawyers adverse to pro se litigants experience added challenges when their opponents are unfamiliar with legal rules and procedures.[5]

Perhaps the greatest challenges resulting from the growth of pro se litigants have been the ethical and procedural concerns surrounding the practice of ghostwriting. Ghostwriting occurs when an attorney enters into limited representation for the sole purpose of anonymously drafting "particular pleadings or other court documents" for "clients who go on to represent themselves in court *pro se*."[6] While ghostwriting holds the potential to increase access to legal representation for low-income litigants, federal courts have almost universally condemned ghostwriting as a breach of an attorney's ethical and professional duties.[7] However, the Second Circuit's recent decision in *In re*

1. Jona Goldschmidt, *An Analysis of Ghostwriting Decisions: Still Searching for the Elusive Harm*, 95 JUDICATURE 78, 79 (2011).
2. *Federal Caseload Trend: More Civil Cases Being Filed Without Lawyer's Help*, THIRD BRANCH NEWS (June 15, 2011), http://www.uscourts.gov/News/NewsView/11-06-15/Federal_Caseload_Trend_More_Civil_Cases_Being_Filed_Without_Lawyer_s_Help.aspx (these numbers are civil pro se cases filed by nonprison inmates; when civil cases filed by inmates are included, the total number of pro se cases filed in fiscal year 2012 was 72,900, up from a total of 70,240 in fiscal year 2007).
3. Goldschmidt, *supra* note 1, at 78.
4. Peter M. Cummins, *The Cat-O'-Ten Tails: Pro Se Litigants Assisted by Ghostwriting Counsel*, FOR DEFENSE, Apr. 2011, at 40.
5. Margery A. Gibbs, *More Are Serving As Their Own Lawyer*, BOSTON GLOBE (Nov. 28, 2008), http://www.boston.com/news/nation/articles/2008/11/28/more_are_serving_as_their_own_lawyer/?camp=pm (stating that cases against pro se litigants are often more lengthy and costly).
6. John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2692 (1999) (emphasis added).
7. Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) (stating that undisclosed ghostwriting by an attorney violates his duty of candor to the tribunal and would also likely qualify as professional misconduct under *Model Rules* 8.4(c) and (d));

Liu[8] rejected the notion that ghostwriting constituted sanctionable misconduct. The development of this circuit spilt on the issue of ghostwriting, as well as evolving trends in ethics opinions and professional rules of responsibility, presents a timely opportunity to revisit the ethical and procedural concerns surrounding ghostwriting.

This Note will examine the ethical and procedural concerns surrounding ghostwriting, as well as the justifications supporting its practice, in an effort to determine how courts should address ghostwriting. Part II will present the background of ghostwriting and the concerns raised by its practice. First, this Note will give a brief explanation of ghostwriting and its relation to the larger movement of unbundled legal services. Next, this Note will outline the current circuit court precedents on the issue of ghostwriting, focusing specifically on the ethical and procedural concerns raised by the practice. Part III will examine the shortcomings of both the majority stance against ghostwriting and the minority posture that ghostwriting is not at odds with ethical and procedural rules. This Note concludes that both the majority and minority positions on ghostwriting are flawed and that reform is necessary to resolve the discrepancies between ghostwriting as a part of limited-scope representation and the ethical and procedural obligations to which lawyers are bound. Ultimately, this Note proposes a solution that supports the best interests of the courts, lawyers, and pro se litigants by remedying the flaws of the majority and minority stances, as well as eliminating the current contradictions about ghostwriting caused by procedural and ethical rules.

II. BACKGROUND

A. Ghostwriting and Limited-Scope Representation

Ghostwriting is just one facet of a broader practice known as limited-scope representation, or unbundled legal services.[9] When most people think of legal representation, they have in mind traditional, full-service representation. In traditional, full-service legal representation, the attorney assists the client in the matter from start to finish, undertaking all of the different legal services necessary to bring about a resolution.[10] In limited-scope representation, however, a lawyer's representation of a client is confined to discrete legal tasks—such as legal research, fact gathering, negotiating, document drafting, or court representation—which the clients select to fit their budget

Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (disapproving of the practice of ghostwriting as a violation of *Federal Rules of Civil Procedure* Rule 11).

8. 664 F.3d 367 (2d Cir. 2011).

9. Rothermich, *supra* note 6, at 2691–92.

10. *Id.* at 2690.

and their needs.[11] In 2002, the American Bar Association (ABA) revised its *Model Rules of Professional Conduct* to permit limited-scope representation, as long as the representation is reasonable under the circumstances and the client gives informed consent.[12] To date, forty-one states have adopted this *Model Rule*, or a variation of it, permitting limited-scope representation in their jurisdiction.[13]

The main benefit of the limited-scope representation model of legal services is that providing legal services in this *à la carte* manner allows many low- and moderate-income individuals access to legal representation that they would otherwise be unable to afford under the traditional model of full-scale representation.[14] National and state studies indicate that nearly eighty percent of low-income individuals in America have unmet legal needs.[15] Furthermore, without some legal assistance from a licensed attorney, many pro se litigants ultimately end up forfeiting their legal rights.[16] While unbundled legal services allow the client and the lawyer to limit the scope of the representation and services the lawyer is providing, the lawyer's ethical obligations and professional responsibilities remain unchanged.[17]

Courts have uniformly agreed that licensed attorneys do not violate procedural and ethical rules when giving legal assistance to fam-

11. SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD 69 (Vicki Been et al. eds., 2d ed. 2008).

12. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2009); STANDING COMM. ON THE DELIVERY OF LEGAL SERVS, AM. BAR ASS'N, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS: A WHITE PAPER 7–8 (2009) [hereinafter ABA WHITE PAPER], http://apps.americanbar.org/legalservices/delivery/downloads/prose/_white_paper.pdf (outlining the changes to the ABA *Model Rule* 1.2 adopted in 2002 as a result of the Ethics 2000 Commission).

13. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS, UNBUNDLING FACT SHEET (2011) [hereinafter ABA UNBUNDLING FACT SHEET], http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/20110331_unbundling_fact_sheet.authcheckdam.pdf; *see also* John T. Broderick Jr. & Ronald M. George, Op-Ed., *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, http://www.nytimes.com/2010/01/02/opinion/02broderick.html?_r=0 (explaining the growth of limited-scope representation and its benefits).

14. Rothermich, *supra* note 6, at 2690–91 (stating a substantial part of the low- and moderate-income populations are unable to afford legal representation under the traditional representation model and that, as an alternative to the full-service model, unbundled legal services seek to provide increased access to the judicial system for these populations); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2009) (stating a client may choose to limit the scope of representation in order to exclude actions the client may think are too costly); *see also* Jeffrey P. Justman, Note, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 MINN. L. REV. 1246, 1250 (2008) (stating that full-service litigation is often too costly for low-income litigants).

15. Justman, *supra* note 14, at 1251.

16. Rothermich, *supra* note 6, at 2689.

17. ABA UNBUNDLING FACT SHEET, *supra* note 13.

ily and friends,[18] nor when giving minor undocumented assistance to a client.[19] Rather, in order to constitute ghostwriting, the attorney must provide substantial legal assistance to the pro se litigant without entering an appearance in the matter or otherwise identifying her involvement in the case.[20]

B. The Majority

The First and Tenth Circuit Courts of Appeal, along with district courts in the Third, Fourth, and Ninth Circuits, have condemned ghostwriting. These courts have cited concerns that ghostwriting constitutes a violation of procedural rules under the *Federal Rules of Civil Procedure* Rule 11 and ethics rules governing candor to the tribunal and misrepresentation.[21]

1. Rule 11 Concerns

Courts have almost universally expressed concerns that ghostwriting violates Rule 11. *Federal Rules of Civil Procedure* Rule 11 requires "every 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."[22] By presenting a signed document in court, the attorney or the pro se party, as the signer, certifies that to the best of her knowledge, the document is not being presented for an improper purpose, the claims presented are warranted by existing law, and the factual contentions have evidentiary support.[23] A court may impose sanctions on "any attorney, law firm, or party that violate[s] [Rule 11] or is responsible for the violation."[24]

The First Circuit decided the initial case addressing the issue of ghostwriting in *Ellis v. Maine*.[25] In dicta, the court condemned the growing number of petitions where "the petitioner appears pro se, asserts complete ignorance of the law, and then presents a brief which . . . was manifestly written by someone with legal knowledge."[26] The court cited Rule 11 in its disapproval of ghostwriting, explaining that lawyers who prepare such briefs and do not sign them "thus es-

18. Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998); *In re* Mungo, 305 B.R. 762, 767–68 (Bankr. D.S.C. 2003);.
19. *Ricotta*, 4 F. Supp. 2d at 987 (stating that ghostwriting occurs when an attorney has played a "substantial role in the litigation").
20. Justman, *supra* note 14, at 1252–53.
21. *See* Duran v. Carris, 238 F.3d 1268, 1271 (10th Cir. 2001), Ellis v. Maine, 448 F.2d 1325 (1st Cir. 1971).
22. FED. R. CIV. P. 11(a).
23. *Id.* 11(b)(1)–(3).
24. *Id.* 11(c).
25. 448 F.2d 1325.
26. *Id.* at 1328.

cape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11 [sic] . . . of representing to the court that there is good ground to support the assertions made."[27]

The Tenth Circuit also expressed concerns with the Rule 11 implications of ghostwriting, noting that attorneys who anonymously draft pleadings "necessarily guide the course of litigation with an unseen hand."[28] The court noted that the absence of an attorney's signature "inappropriately shields [the attorney] from responsibility and accountability for his actions and counsel."[29]

District courts in other circuits have further elaborated on the problem created by ghostwriting under Rule 11.[30] In *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*,[31] the court noted the purpose of Rule 11 is "to deter conduct that frustrates the just, speedy, and inexpensive determination of civil actions."[32] The court reflected that when ghostwritten pleadings are filed for an improper purpose or without sufficient factual basis, in violation of Rule 11, the question of whom to sanction becomes murky.[33] If the court sanctioned the pro se litigant for signing the pleading, the pro se litigant might assert immunity because the attorney drafted the pleadings.[34] Conversely, the court might be unable to sanction the attorney who drafted the pleading if it is unable to ascertain the attorney's identity. Even if the court is able to uncover attorneys' identities, "the additional inquiry necessitated by the lawyers' failure to sign the pleadings interferes with the 'just, speedy, and inexpensive determination' of those actions."[35] Thus, *Laremont-Lopez* held that the absence of the drafting attorney's signature on ghostwritten pleadings undermines the purpose of Rule 11 sanctions.[36]

Lastly, in addition to potentially impeding the courts' ability to administer speedy trials and identify attorneys in need of reprimand, courts have noted ghostwriting can complicate the question of when penalties are proper. In *United States v. Eleven Vehicles*,[37] the court

27. *Id.*
28. Duran v. Carris, 238 F.3d 1268, 1271 (10th Cir. 2001) (quoting Johnson v. Bd. of Cnty. Comm'rs for Cnty. of Fremont, 868 F. Supp. 1226, 1232 (D. Colo. 1994)).
29. *Id.* at 1272.
30. Liguori v. Hansen, No. 2:11-CV-00492-GMN-CWH, 2012 WL 760747 (D. Nev. Mar. 6, 2012); Smallwood v. NCsoft Corp., 730 F. Supp. 2d 1213 (D. Haw. 2010); Ricotta v. California, 4 F. Supp. 2d 961 (S.D. Cal. 1998); Clarke v. United States, 955 F. Supp. 593 (E.D. Va. 1997); *In re* Mungo, 305 B.R. 762 (Bankr. D.S.C. 2003).
31. 968 F. Supp. 1075 (E.D. Va. 1997).
32. *Id.* at 1078.
33. *Id.* at 1079.
34. *Id.*
35. *Id.* (quoting FED. R. CIV. P. 1).
36. *Id.*
37. 966 F. Supp. 361 (E.D. Pa. 1997).

noted that "certain conduct may be sanctionable if committed by counsel but not if committed by a party."[38] Accordingly, the court held that the identity of the drafter of the pleadings is "therefore important to the administration of justice in the case."[39] As these cases have illustrated, courts in the majority believe that ghostwriting interferes with the court's ability to properly oversee parties and counsel during the course of litigation as provided under Rule 11.

2. Liberal Pleading Concerns

The second concern the majority cases shared about the practice of ghostwriting concerned the court's practice of giving leniency to pro se pleadings. In *Haines v. Kerner*,[40] the Supreme Court established the precedent that a pro se complaint, "however inartfully pleaded," must be held "to less stringent standards than formal pleadings drafted by lawyers."[41] The Court explained that in such cases, pleadings "can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.'"[42] While the pro se litigant in *Haines* was an inmate representing himself in a claim of injuries and deprivation of rights while in solitary confinement,[43] the liberal pleading standard applies to all pro se litigants.[44]

In *Duran*, the Tenth Circuit noted the leniency afforded to pro se litigants was created to make up for the pro se litigant's lack of legal expertise.[45] Thus, the absence of an attorney's signature on a pleading anonymously prepared not only has Rule 11 implications, but its absence also requires the court to interpret the pro se litigant's pleading with leniency.[46] And when the pro se litigant is unwarranted in receiving the advantage of the liberal pleading rule—such as when the pleading is actually anonymously written by an attorney—the opposing party is put at a distinct disadvantage. In such a situation, the opposing party is held to a more demanding standard,[47] despite both parties having had the benefit of assistance from legal counsel. Put another way, by personally signing a pleading filed with the court, a litigant is "invoking the leniency of the court."[48] However, when such

38. *Id.* at 367.
39. *Id.*
40. 404 U.S. 519 (1972).
41. *Id.* at 520.
42. Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting *Haines*, 404 U.S. at 520–21).
43. *Haines*, 404 U.S. at 519.
44. *See generally* Rothermich, *supra* note 6, at 2698–99.
45. *See, e.g.*, Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001).
46. *Id.*
47. Johnson v. Bd. of Cnty. Comm'rs for Cnty. of Fremont, 868 F. Supp. 1226, 1231 (D. Colo. 1994).
48. Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 887 (D. Kan. 1997).

a pleading has actually been authored by a licensed attorney, the pro se litigant "may not have a right to assert her *pro se* status for that purpose," as doing so gives her an unwarranted advantage.[49]

District court decisions in other circuits have also attributed unfairness to construing a pleading liberally for a pro se litigant, when in fact the party has benefitted from the assistance of counsel.[50] Moreover, courts have pointed out the unfair leniency accorded to pro se litigants with ghostwritten pleadings "negatively taint[s] the Court towards the appearance of well meaning pro se litigants who have no legal guidance" and who rely on the court's discretion to level the field.[51] In sum, courts in the majority find that when ghostwritten pleadings are unnecessarily given the benefits of the liberal pleading rule, the pro se litigants gain an advantage at the expense of the opposing party, while also undermining the courts' willingness to construe the pleading liberally for true pro se litigants.

3. Professional Responsibility

The last concern courts frequently highlight when condemning ghostwriting is related to an attorney's ethical obligations found in state professional responsibility laws. All states adopt their own rules of professional responsibility and ethics applicable to lawyers practicing in their jurisdiction.[52] Although these rules vary by jurisdiction, many of the rules mirror the American Bar Association's *Model Rules of Professional Conduct*.

a. Candor to the Tribunal and Misrepresentation

The first rules of professional responsibility implicated by ghostwriting are those related to an attorney's obligation of honesty to the court and honesty in their actions. The *Model Rules* proscribe, "A lawyer shall not knowingly make a false statement of fact or law to the

49. *Id.*

50. *See, e.g.*, Smallwood v. NCsoft Corp., 730 F. Supp. 2d 1213, 1223 (D. Haw. 2010) ("[I]n light of the assistance Plaintiff received from counsel, the Court will not liberally construe [the pleading] as it normally would for a pro se party."); Ricotta v. California, 4 F. Supp. 2d 961, 986 (S.D. Cal. 1998) (noting that allowing a pro se litigant to receive "such latitude [from a liberal pleading] in addition to assistance from an attorney would disadvantage the nonoffending party"); United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (holding that when ghostwritten pleadings are filed "the indulgence extended to the *pro se* party has the perverse effect of skewing the playing field rather than leveling it").

51. *In re* Mungo, 305 B.R. 762, 769 (Bankr. D.S.C. 2003) (emphasis added).

52. *See, e.g.*, Lauren A. Weeman, Note, *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, 1045 (2006) (noting that states chose to adopt the *Model Rules*).

tribunal . . . ."[53] Additionally, the *Model Rules* state, "it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[54]

In *Duran*, the Tenth Circuit noted the duty of candor to the court required in *Model Rule* 3.3 has significant implications for ghostwritten pleadings.[55] The court reasoned, "If neither a ghostwriting attorney nor her pro se litigant discloses the fact that any pleadings . . . were actually drafted by the attorney, this could itself violate the duty of candor."[56] Furthermore, the court stated that undisclosed ghostwriting would "likely qualify as professional misconduct under *Model Rule* 8.4(c) . . . [which] prohibit[s] conduct involving misrepresentation . . . ."[57]

Other courts have agreed that situations where lawyers anonymously draft pleadings that a party then signs pro se "implicate[ ] the lawyer's duty of candor to the court."[58] As one court explained, "the party's representation to the court that he is pro se is not true when the pleadings are being prepared by the lawyer."[59]

b. Terminating Representation

Courts condemning ghostwriting also invoke the ethical rules relating to terminating representation. The *Model Rules* provide that "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effects on the interest of the client . . . ."[60] Additionally, "a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation."[61] In many jurisdictions, once an attorney has entered

53. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2009).

54. *Id.* 8.4(c).

55. 238 F.3d 1268, 1272 (10th Cir. 2001).

56. *Id.*

57. *Id.*

58. United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997); *see also* Liguori v. Hansen, No. 2:11-CV-00492-GMN-CWH, 2012 WL 760747 (D. Nev. Mar. 6, 2012) (holding that the level of candor expected of members of the bar is implicated when a party appears pro se after an attorney has drafted the pleadings); Smallwood v. NCsoft Corp., 730 F. Supp. 2d 1213 (D. Haw. 2010) (indicating an attorney's candor to the court is implicated when attorneys ghostwrite pleadings); Ricotta v. California, 4 F. Supp. 2d 961 (S.D. Cal. 1998) (recognizing that ghostwriting a pleading for a pro se litigant is "far below the level of candor which must be met by members of the bar"); *In re* Mungo, 305 B.R. 762 (Bankr. D.S.C. 2003) (stating ghostwriting a pleading for a pro se litigant violates an attorney's duty of candor to the court).

59. *Eleven Vehicles*, 966 F. Supp. at 367.

60. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) (2009).

61. *Id.* 1.16(c).

an appearance in a matter, withdrawal is only allowed by order of the court.[62]

Courts have noted that ghostwriting allows attorneys to circumvent rules requiring the permission of the court before an attorney can withdraw from representation.[63] The purpose of rules requiring an attorney to seek approval of the court in order to withdraw is to ensure there is proper communication between the litigants and the court and to make certain the litigant has reasonable notice prior to the attorney's disengagement from the case.[64] By not signing a pleading they have drafted, ghostwriting attorneys sidestep the requirement that they gain the court's permission before withdrawing, as would be required if they had signed the pleading.[65]

Thus, the courts adopting the majority stance admonishing the practice of ghostwriting find that when an attorney anonymously prepares pleadings for a pro se litigant, the attorney violates the ethical and substantive obligations imposed on members of the bar.[66]

C. The Minority

In *In re Liu*,[67] the Second Circuit broke from the majority stance that ghostwriting constitutes a violation of procedural and ethics rules.[68] The case arose when attorney Fengling Liu was referred to the Second Circuit's Committee on Attorney Admissions and Grievances for a number of concerns, one of which was several pro se petitioners Liu assisted in preparing documents for appeal without disclosing her involvement.[69] The Committee found clear evidence that Liu engaged in "conduct unbecoming a member of the bar" and recommended she be publically reprimanded for her misconduct.[70]

62. *See, e.g.*, *Ricotta*, 4 F. Supp. at 986; Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079 (E.D. Va. 1997).
63. *Laremont-Lopez*, 968 F. Supp. at 1079.
64. *Id.* (stating that withdrawal is allowed only after reasonable notice has been given to the party being represented). A common concern is that terminating representation of a client mid-case will disadvantage the client, causing the client to miss an imminent deadline in the case or generally setting back the client's case because a new attorney will require extra time to be brought up to speed. *See, e.g.*, Hansen v. Brognano, 137 A.D.2d 880 (N.Y. App. Div. 1988) (illustrating the harms a client can face if her counsel terminates representation days before the statute of limitations on her claim runs).
65. *Laremont-Lopez*, 968 F. Supp. at 1079.
66. *In re* Mungo, 305 B.R. 762, 767 (Bankr. D.S.C. 2003).
67. 664 F.3d 367 (2d Cir. 2011).
68. *Id.*
69. *Id.* at 376–78, 381. The Grievance Committee was also looking into concerns that there were deficiencies in briefs prepared by an attorney under Liu's supervision, that six cases filed by Liu were dismissed due to her failure to follow the briefing schedules, and finally that Liu filed thirteen cases in the incorrect venue. *Id.*
70. *Id.* at 387–88.

The *In re Liu* court adopted all of the Committee's findings except the finding that Liu violated her duty of candor in ghostwriting petitions for review.[71] After laying out the precedent established against ghostwriting, the *In re Liu* court examined numerous bar association ethics committee opinions on ghostwriting that suggested a growing inclination to accept the practice of ghostwriting.[72] Ultimately, the court concluded that Liu's ghostwriting was *not* grounds to sanction her for misconduct.[73]

The *In re Liu* court looked to the ABA's Formal Opinion on *Undisclosed Legal Assistance to Pro Se Litigants* in addressing critics' concerns that ghostwriting violates Rule 11.[74] In that opinion, the ABA concluded that, as long as the pro se litigant does not make an "affirmative representation, attributable to the attorney, that the pleadings were prepared without an attorney's assistance," it would *not* be dishonest for a lawyer to draft anonymous pleadings for the pro se litigant.[75] The Committee reasoned that a lawyer only falls under the requirements of Rule 11 when she "make[s] an affirmative statement to the tribunal concerning the matter."[76] Thus, because ghostwriting attorneys do not sign the pleadings, they are not subject to the rule and, therefore, cannot violate its requirements.[77] *In re Liu* also looked to the New York County Lawyer's Association Committee (NYCLA) on Professional Ethics, which had similarly concluded it was ethically permissible for an attorney to draft pleadings for a pro se litigant without disclosing the lawyer's involvement to the tribunal.[78] The NYCLA committee determined that a lawyer only needed to disclose she prepared the pleadings when nondisclosure would constitute misrepresentation or if a rule, order, or statute required it.[79]

Next, *In re Liu* found critics' concerns regarding pro se litigants with ghostwritten briefs being unfairly afforded the benefit of liberal construction may be unwarranted.[80] The ABA reasoned that "if the undisclosed lawyer has provided effective assistance, the fact that the lawyer was involved will be evident to the tribunal," and liberal con-

71. *Id*. at 369.
72. *Id*. at 369–70.
73. *Id.* at 372–73.
74. *See id.* at 370 (citing ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 07-446, at 4 (2007) [hereinafter ABA Formal Op. 07-446], *available at* http://www.americanbar.org/content/dam/aba/migrated/media/youraba/2007/07/07_446_2007.authcheckdam.pdf.).
75. *Id.* at 371 (citing ABA Formal Op. 07–446, *supra* note 74, at 4).
76. ABA Formal Op. 07-446, *supra* note 74, at 4.
77. *Id.*
78. *In re Liu,* 664 F.3d at 371 (citing N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 742, at 1 (2010) [hereinafter NYCLA Op. 742], *available at* http://www.nycla.org/siteFiles/Publications/Publications1348_0.pdf.)
79. *Id.*
80. *Id.* at 370–71 (citing ABA Formal Op. 07-446, *supra* note 74, at 3).

struction will not be applied.[81] Conversely, if the lawyer's undisclosed assistance was ineffective, the ABA concluded, "the *pro se* litigant will not have secured an unfair advantage" by the court applying the liberal pleading standard.[82] The NYCLA committee, in its ethics opinion, similarly found that "ghostwritten pleadings would not be unfairly accorded liberal construction."[83]

III. ANALYSIS

A. The Unreality of the Majority Stance

The relatively brief opinion in *In re Liu* fails to address in detail all of the legitimate concerns about ghostwriting raised by courts in the majority circuits. However, *In re Liu* remains an important decision on the issue of ghostwriting because it signals a likely and necessary change on the stance of ghostwriting.

Most cases condemning ghostwriting were decided prior to recent changes in the ABA *Model Rules of Professional Conduct*. ABA Formal Opinion 07-446, which determined the practice of ghostwriting was not against the *Model Rules*, was adopted in 2007.[84] However, all but two of the aforementioned cases disparaging ghostwriting were decided prior to 2007.[85] Perhaps even more significant, all but three of these precedents were established before the ABA—and subsequently, forty-one states—revised the *Model Rules* to permit limited-scope representation.[86] These circumstances are significant because they raise serious doubts about the relevance of such decisions to the

81. *Id.* at 370 (quoting ABA Formal Op. 07–446, *supra* note 74, at 3) (internal citations omitted).
82. *Id*. at 371 (quoting ABA Formal Op. 07–446, *supra* note 74, at 3) (internal citations omitted).
83. *Id.* (citing NYCLA Op. 742, *supra* note 78, at 4).
84. ABA Formal Opinion 07-446, *supra* note 74, at 1.
85. *See* Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001); Ellis v. Maine, 448 F.2d 1325 (1st Cir. 1971); Ricotta v. California, 4 F. Supp. 2d 961 (S.D. Cal. 1998); Clarke v. United States, 955 F. Supp. 593 (E.D. Va. 1997); United States v. Eleven Vehicles, 966 F. Supp. 361 (E.D. Pa. 1997); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075 (E.D. Va. 1997); Wesley v. Don Stein Buick, 987 F. Supp. 884 (D. Kan. 1997); Johnson v. Bd. of Cnty. Comm'rs for Cnty. of Fremont, 868 F. Supp. 1226 (D. Colo. 1994); *In re* Mungo, 305 B.R. 762 (Bankr. D.S.C. 2003); *see also* Liguori v. Hansen, No. 2:11-CV-00492-GMN-CWH, 2012 WL 760747, at *5 (D. Nev. Mar. 6, 2012) (stating that "'[g]host-writing' is inappropriate" because it harms the opposing party and evades responsibilities under Rule 11 of the *Federal Rules of Civil Procedure* and Rule 8.4 of the *Nevada Rules of Professional Conduct*); Smallwood v. NCsoft Corp., 730 F. Supp. 2d 1213, 1222 (D. Haw. 2010) (agreeing with other federal courts that the practice of ghostwriting is inappropriate).
86. ABA WHITE PAPER, *supra* note 12, at 7–8 (establishing that *Model Rule* 1.2 was revised in 2002 to permit limited-scope representation). All but three of the aforementioned cases condemning ghostwriting were decided prior to this revision. *See* cases cited *supra* note 85. *See also* ABA UNBUNDLING FACT SHEET,

current legal reality, where limited-scope representation is regularly utilized.

While it is perhaps not surprising that the precedents established prior to 2002 do not give much consideration, if any, to the role and implications of unbundled legal services, even the cases decided after 2002 only mention limited-scope representation in a peripheral manner. Of the eight cases decided before 2002, only *Laremont-Lopez*[87] and *Johnson*[88] mention limited-scope representation or unbundled legal services in some manner, and only in *Laremont-Lopez* were unbundled legal services central to the analysis of the ghostwriting issue in the case.[89] In *Laremont-Lopez*, the attorneys argued that because the clients had retained them for the sole purpose of drafting the complaints, their representation of the clients had concluded by the time the complaints were filed with the court.[90] The court found that while the attorneys' reasoning was not at odds with the plain language of Rule 11, their actions undermined the purpose of the signature requirements of the rule.[91] Of three cases decided after 2002, neither *Smallwood*[92] nor *In re Mungo*[93] mentioned limited-scope representation in any capacity. In *Liguroi*, one of the complaints brought against the plaintiffs was that their attempt to unbundle legal services was an ethical violation.[94] However, the court dismissed this claim, noting that the plaintiff had *not* anonymously written pleadings on behalf of the pro se litigant and further that the cases the defendant cited on the issue of unbundling were from a noncontrolling jurisdiction.[95] Thus, the court never addressed how limited-scope representation and ghostwriting relate. While these cases may have been decided correctly at the time, the fact that all of these cases inadequately consider ghostwriting in the context of limited-scope representation places them at odds with the current legal realities, where limited-scope representation is a widely accepted practice.

Thus, the circumstances under which the majority stance against ghostwriting was established are no longer reflective of the controlling rules and realities of the practice of law today. The precedents in many jurisdictions that forbid the practice of ghostwriting are at odds

supra note 13 (establishing that forty-one states have adopted the revised *Model Rule* 1.2 or a variation thereof).

87. 968 F. Supp. at 1077–79.
88. 868 F. Supp. at 1229–31.
89. In *Johnson*, the court's mention of limited-scope representation concerned the attorney's attempt to represent a sheriff only in his official capacity and not his individual capacity and did not relate to the ghostwriting claim. *Id.*
90. *Laremont-Lopez*, 968 F. Supp. at 1078.
91. *Id.*
92. 730 F. Supp. 2d 1231 (D. Haw. 2010).
93. 305 B.R. 762 (Bankr. D.S.C. 2003).
94. 2012 WL 760747, at *5.
95. *Id.* at *5–6.

with the widespread adoption of rules permitting limited-scope representation.[96] The result is that lawyers are stuck in a grey zone, where conflicting rules give them little guidance as to what course of action is allowed. To cloud the matter further, a growing number of states have issued ethics opinions permitting the practice of undisclosed ghostwriting.[97] Although ethics opinions are advisory and do not create rules binding on the court,[98] the existence of such opinions supporting ghostwriting not only shows the widening support of the legal community for the practice, but also creates a "safe harbor" that lawyers may rely on in good faith.[99]

B. The Inadequacies of *In re Liu* and ABA Formal Opinion 07-466

It is clear that the majority stance against ghostwriting fails to take into account recent changes in ethical rules permitting unbundled legal services—and the growing trend of ethics committees endorsing the practice of ghostwriting. However, despite recognizing the growing acceptance of unbundled legal services, it is also clear that the court's holding in *In re Liu*—and ABA Formal Opinion 07-446 upon which the holding is founded—are far from being without faults.

ABA Formal Opinion 07-446 asserted that ghostwriting does not flout Rule 11 because only attorneys who physically sign pleadings make an affirmative statement to the tribunal and, therefore, fall under the scope of Rule 11.[100] While ghostwriting may not facially be at odds with Rule 11, the ABA's interpretation of Rule 11 in Formal Opinion 07-446 is unreasonably narrow. A central principle of Rule 11 is that "attorneys and pro se litigants have an obligation to refrain

96. *Cf.* Rothermich, *supra* note 6, at 2728 (warning courts against "stifling the development of these new models of legal practice [such as limited-scope representation] through applications of ethical and procedural norms that were designed with full-service, traditional representation in mind").

97. *See generally* NYCLA Op. 742, *supra* note 78; N.C. St. Bar, 2008 Formal Ethics Op. 3 (2009); Utah St. Bar Ethics Advisory Op. Comm., Op. 08-01 (2008), *available at* http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_08_01.html; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 713 (2008), *available at* http://www.judiciary.state.nj.us/notices/ethics/ACPE713.pdf; St. Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 05-06 (2005), *available at* http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=525.

98. Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 745 (2002) (noting that the "regulation of the legal profession is primarily the responsibility of state courts" and that while ethics committees help fill in the gaps they do not create enforceable legal authority).

99. *See, e.g.*, Weeman, *supra* note 52, at 1064 (observing how Opinion 05–06 authorizing the practice of undisclosed ghostwriting could act as a "safe harbor" because the court may choose to not sanction an attorney who violated the state ethics rules against the practice of ghostwriting if the attorney had relied in good faith on the Bar Committee's ethics opinion).

100. ABA Formal Op. 07–446, *supra* note 74, at 4.

from conduct that makes administering civil actions unjust or inefficient."[101] Because two of the main concerns courts have about ghostwriting are the possible unfairness and inefficiency it can create, the ABA's narrow interpretation of the rule is inapposite.[102] Furthermore, since Rule 11 specifically provides that the court may sanction "any attorney, law firm or party [that is] responsible for the violation,"[103] there is little question that an attorney need not sign a pleading to fall under the scope of Rule 11.[104] Thus, at the very least, these observations and critiques of ABA Formal Opinion 07-446's response to Rule 11 concerns call into question the sufficiency of the response.

The minority position is inadequate in its consideration of how ghostwriting might create unfairness, or the perception of unfairness, in the judicial process. On the issue of the liberal construction afforded to pro se pleadings, the minority asserts that if the attorney's representation is effective, the liberal pleading standard will not be applied.[105] Conversely, if the attorney's assistance is ineffective, the minority argues the pro se litigant will not receive an unfair advantage by having their pleading construed liberally.[106] ABA Formal Opinion 07-446 points out that courts are frequently able to effectively identify ghostwritten pleadings and accordingly can refuse to apply the liberal pleading standard when it is unwarranted.[107] However, the minority's reasoning fails to consider that pro se litigants with ghostwritten briefs receive an unfair advantage because they need only have a "minimally sufficient pleading[ ]."[108] While parties with counsel only have one chance for their pleading to be construed advantageously, pro se litigants are essentially afforded two chances—first, if the ghostwriter attorney's pleading is deemed sufficient and second, if the attorney has not been effective in his or her representation, under the liberal pleading standard.[109]

Further, while pro se litigants may not be actually or unfairly advantaged by the practice of ghostwriting, the perceived unfairness that results from ghostwriting is against public policy.[110] The Supreme Court has stated that even the appearance of impropriety should be prevented.[111] So, arguably, the appearance of unfairness

101. Justman, *supra* note 14, at 1270.
102. *Id.*
103. FED. R. CIV. P. 11(c)(1)
104. *Cf.* Justman, *supra* note 14, at 1270.
105. *In re* Liu, 664 F.3d 367, 370–71 (2d Cir. 2011).
106. *Id.*
107. ABA Formal Op. 07-446, *supra* note 74, at 3.
108. Justman, *supra* note 14, at 1268.
109. *Id.*
110. *Id.* at 1269.
111. *See, e.g.*, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 482 (1995).

alone makes undisclosed ghostwriting contrary to public policy and is a reason for not permitting the practice of ghostwriting.[112]

These logical inadequacies in defense of undisclosed ghostwriting raise serious questions and clearly show that, for all the deficiencies in the majority's holding against ghostwriting, there are still legitimate concerns that need to be addressed. Unlike the majority stance, *In re Liu* and ABA Formal Opinion 07-446 both recognize that "undisclosed legal assistance to *pro se* litigants constitute[s] a form of limited representation, pursuant to . . . Model Rule of Professional Conduct 1.2(c)."[113] However, the fact remains that a gap exists between lawyers' duties under the ethical rules and the practice of ghostwriting, even as it falls within the broader practice of limited-scope representation. An assessment of the reasons behind this disconnect will reveal possible solutions to remedy the problem.

C. Rectifying the Contradictions Between the Precedents and the Rules

1. The Reasons Behind the Contradictions

While the ABA and most states have adopted model rules that permit the practice of limited-scope representation[114]—of which ghostwriting is a part—many ethical and procedural rules are still at odds with undisclosed ghostwriting. These inconsistencies in the ethical rules create a discrepancy in the way the rules are applied. Lawyers who undertake limited-scope representations are treated the same, and have the same legal and ethical obligations, as lawyers who engage a client under traditional full-scale representation.[115] While no proponent of ghostwriting and unbundled legal services has argued that lawyers engaged in limited-scope representation should be subject to less stringent ethical standards, ghostwriting and limited-scope representation do present challenges that are different than full-scale representation. The fact that the vast majority of the current ethical and procedural rules were created with the assumption of full-scale representation creates problems as courts seek to apply these rules to limited-scope representations.[116]

These contradictions within the rules are what make the practice of ghostwriting problematic in the first place. Many lawyers choose

112. *Id.*
113. *In re* Liu, 664 F.3d 367, 370 (2d Cir. 2011) (citing ABA Formal Op. 07–446, *supra* note 74, at 1).
114. *Cf.* ABA UNBUNDLING FACT SHEET, *supra* note 13 (noting that forty-one states have adopted rules that permit limited-scope representation).
115. *Cf. id.* ("Unbundled services are not a short-cut or second-class services. Lawyers who unbundle must provide competent representation, and must follow all other ethical and procedural rules in their jurisdiction.").
116. *Cf. supra* note 96 and accompanying text.

not to sign their names to pleadings they have drafted for pro se clients—the single act that creates all of the problems and concerns that the majority bemoans about undisclosed ghostwriting—because they worry about being conscripted into full-service representation.[117] Most courts consider drafting a pleading to constitute entering an appearance in a case.[118] Even though the rules allow for limited-scope representation, in many states it is not clear whether an attorney engaged in limited-scope representation needs permission to withdraw from a case, regardless of the terms of a limited-scope-representation agreement. In fact, at least one case explicitly stated the court would have required the ghostwriting attorney to seek permission from the court to withdraw if the attorney had signed the pleadings, despite the attorney and client's agreement to undertake a limited-scope representation.[119] Not only does such action undermine the purpose of unbundled legal services by denying attorney and client control of the scope of representation, but it also perpetuates the perceived need for attorneys to not sign pleadings they have written for pro se litigants. The problem, therefore, rests not with ghostwriting itself, but rather with the uncertainties created by ethical and procedural rules designed with the assumption of full-scale representation.

2. Proposed Solutions to Remedy the Disconnect

The analysis of the majority and minority positions makes clear that *both* stances are flawed and reform is necessary to rectify the discrepancies between ghostwriting as a part of limited-scope representation, as well as discrepancies between ghostwriting and the ethical and procedural obligations to which lawyers are bound. Under the status quo, the inconsistencies between the rules that permit limited-scope representation and the rules written with the assumption of full-scale representation in mind create a grey area, where even lawyers who make a good faith effort to follow the ethical rules may run afoul.[120] Several different solutions have been proposed to eliminate the problems associated with ghosting, including eliminating ghostwriting altogether or requiring anonymous disclosure of attorney in-

117. Justman, *supra* note 14, at 1256.

118. *Cf.* 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, 123–24 (2008) (stating that customarily an attorney signing and filing a pleading constitutes making an appearance in court).

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

120. *Cf.* Weeman, *supra* note 52, at 1054–55, 1064 (noting that an attorney might rely in good faith on the nonbinding Formal Opinion 05-06, which suggests ghostwriting is ethical, even though the binding ethical rules in Arizona do not permit attorneys to enter a limited appearance in the context of ghostwriting).

volvement in drafting pro se pleadings. However, as the following analysis will show, only mandating disclosure in conjunction with amending termination rules addresses the inconsistencies in the rules that make ghostwriting problematic.

a. Eliminating Ghostwriting

Omitting ghostwriting as a permissible form of limited-scope representation would fail to eliminate the Rule 11 and liberal pleading concerns posed by the practice of ghostwriting. While unequivocally prohibiting ghostwriting would likely reduce the numbers of ghostwritten pleadings the court receives, given the secretive nature of ghostwriting, such a ban would not likely stop its practice entirely. Consequently, the court will still face the same problems of losing valuable time detecting ghostwritten pleadings and seeking to ascertain the identity of attorneys who flout the rules. Additionally, the elimination of ghostwriting is not realistic given the increasing trend of pro se litigants. The steady increase in pro se litigants that has occurred over the past three decades will likely continue, and consequently, it is in the best interest of the courts to adopt policies to help ease the added burden such parties place on the legal system.

While many attorneys bemoan the problems that come with litigating against pro se parties,[121] the fact is ghostwriting helps ease some of these challenges.[122] The court, opposing counsel, and pro se litigants all benefit when a pleading is clearly written. In those circumstances, the court can more easily evaluate the case on its merits and the opposing counsel gains a clearer picture of what the pro se litigant is actually arguing.[123] While it is preferable and less complicated for the court if counsel represents a party who would otherwise be a pro

121. Cummins, *supra* note 4, at 40 (remarking that going against a pro se litigant can be a frustrating endeavor and that, due to the liberal pleading standard, it is difficult to obtain an early dismissal of a case); Jennifer S. Forsyth, *Pro Se Litigants: On the Rise and Mucking Things Up*, WALL ST. J. L. (Nov. 28, 2008), http://blogs.wsj.com/law/2008/11/28/pro-se-litigants-on-the-rise-and-mucking-things-up (noting that pro se litigants make things worse for attorneys due to their unfamiliarity with the legal process, which clogs the courts and which can result in expensive and long-lasting mistakes).

122. *See* NYCLA Op. 742, *supra* note 78, at 5 (stating that, in the context of limited-scope undisclosed representation, "many adversary counsels would readily admit that having counsel involved makes proceedings easier, more efficient and fairer").

123. Goldschmidt, *supra* note 1, at 81 (observing that the Supreme Court noted the plaintiffs in *Winkleman v. Parma City School District*, 550 U.S. 516 (1994), received assistance from counsel before filing their complaint pro se). In this article, Goldschmidt also reasons this limited-scope representation most likely included ghostwriting the plaintiffs' complaint and argues the ghostwriting benefitted the pro se litigants as well as the court by enabling the trial and reviewing court to figure out plaintiffs' claim under the Individuals with Disabilities Act. *Id.*

se litigant, having some assistance from a lawyer is better than no assistance.[124]

Furthermore, beyond easing the burdens of the court, by helping pro se litigants navigate the legal system, ghostwriting helps ensure reasonable access to the courts. The Supreme Court has repeatedly held that reasonable access to the courts is a fundamental constitutional right.[125] As one court put it, "[o]ne of the basic principles, one of the glories of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien."[126] However, access to the courts is not very meaningful if individuals who are unable to afford full-scale representation must choose to forgo their legal claims or struggle to navigate the legal system on their own. To the extent ghostwriting—and limited-scale representation on the whole—helps pro se litigants overcome these barriers, ghostwriting helps achieve reasonable access to the courts.

b. Anonymous Disclosure

Seeking to find middle ground between eliminating ghostwriting and allowing the practice to continue unfettered, some jurisdictions have adopted a policy of anonymous disclosure.[127] Under these rules, ghostwriting attorneys need not sign the pleadings or reveal their identity, but they are required to state on the documents that they were "Prepared with Assistance of Counsel"[128] or "Prepared by Counsel."[129] While the anonymous disclosure requirements prevent courts from unfairly applying the liberal pleading standard to ghostwritten briefs, this approach does not eliminate the inefficiency caused when it becomes necessary for the court to ascertain the identity of the attorney. If a court needs to question the attorney about the accuracy of the law or facts contained in the ghostwritten document[130] or determines the attorney has violated some rule of professional responsibility, the court would be forced to expend time and judicial resources to discover the attorney's identity.[131] Thus, despite resolving the liberal pleading concerns, the anonymous disclosure approach is an inadequate solution to resolve the concerns surrounding ghostwriting.

124. *See* ABA WHITE PAPER, *supra* note 12, at 6 (stating that "the better the litigant is prepared, the more efficiently the court operates" and that "choice in most venues is a self-represented litigant who is well prepared or one who is not").
125. Rothermich, *supra* note 6, at 2687–88.
126. NAACP v. Meese, 615 F. Supp. 200, 205–06 (D.D.C. 1985).
127. Loudenslager, *supra* note 118, at 132.
128. *See* Fla. Bar Comm. on Prof'l Ethics, Op. 79–7 (2000).
129. *See* Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial Ethics, Formal Op. 1987–2 (1987).
130. Loudenslager, *supra* note 118, at 144.
131. Justman, *supra* note 14, at 1273–74.

c. Mandating Disclosure and Amending Termination Rules

In order to rectify the uncertainties and contradictions in the ethical and procedural rules that make ghostwriting problematic, courts should require ghostwriting attorneys disclose their identities, in conjunction with amending local appearance rules. Adopting rules that recognize ghostwriting as entering a limited appearance and making clear that such conduct does not require the permission of the court to terminate representation will allay attorneys' concerns about being unwittingly conscripted into full-scale representation. Once such worries of being conscripted into full-scale representation are eliminated, those attorneys will have no justifiable[132] reason for not disclosing their identity. Furthermore, making clear that ghostwriting does not constitute entering an appearance in a case would reconcile the inconsistent manner in which limited-scope representation is treated in the rules—recognizing limited-scope representation as permissible but regulating its practice through ethical and procedural rules created under the assumption of full-scale representation.

Mandating disclosure of ghostwriting attorneys' identities and clarifying termination rules eliminates all of the problems posed by ghostwriting, without jeopardizing its practice. As with anonymous disclosure, mandatory disclosure would prevent the court from unnecessarily and unfairly applying the liberal pleading standard to the pro se client's ghostwritten brief. Additionally, unlike the anonymous disclosure approach, mandatory disclosure also eliminates judicial inefficiency. Under the mandatory disclosure approach, the pro se client would still sign the brief or pleading, which is permitted under Rule 11 when a party is representing himself or herself.[133] However, because the ghostwriting attorney's name would also be present on the

132. Some commentators have noted that other reasons ghostwriting attorneys seek to conceal their participation include 1) trying to gain a tactical advantage for their clients in the litigation or 2) because a conflict prevents them from representing the party. *E.g., id.* at 1254–55. These reasons are not an acceptable motive for ghostwriting, and consequently, the fact that mandatory disclosure would thwart such practices is inconsequential. *Id.* Still, others might argue that attorneys representing clients with unpopular causes have a justified reason to want to conceal their identities. *Id.* However, the *Model Rules* address this concern saying that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2009). Thus, while it may be challenging for an attorney to represent a client with an unpopular cause, the *Model Rules*—and the fact that *Federal Rule of Civil Procedure* Rule 11 has no exceptions—make it clear that representing such unpopular clients is not a justification for the attorney to conceal his or her involvement in the case. *Id.*; FED. R. CIV. P. 11(c)(1).

133. FED. R. CIV. P. 11(a) ("Every 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.").

documents she prepared, the court will easily be able to question the attorney if needed without a potentially time-consuming investigation to determine an attorney's identity. Under these circumstances, ghostwriting would no longer be at odds with Rule 11's purpose "to deter conduct that frustrates the just, speedy, and inexpensive determination of civil actions."[134] Additionally, because the ghostwriting attorney's identity and involvement with the pleadings would not be concealed, the attorney's actions would not constitute misrepresentation nor would they be at odds with her duty of candor to the tribunal.

Some jurisdictions have already employed this solution, mandating disclosure of attorney identities and involvement in ghostwriting, while making clear in their rules that such conduct does not constitute entering an appearance for purposes of withdrawal.[135] For example, Colorado amended its Rule 11 to specifically address situations involving limited representation. The rule requires "pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number."[136] The rule also makes clear that "[l]imited representation of a pro se party under this Rule 11(b) shall not constitute an entry of appearance by the attorney" for the purposes of withdrawal.[137] Florida, Maine, Nevada, Washington, and Wyoming have approved similar rules mandating disclosure of a ghostwriting attorney's identity but clarifying that such practice of limited-scope representation will not require permission of the court in order for the attorney to withdraw from the case.[138] These states have taken the steps necessary to resolve the contradictions in the ethical and procedural rules that make ghostwriting problematic. As such, these states should be a model for other states as they seek to find ways to address the problems associated with the practice of ghostwriting.

IV. CONCLUSION

The practice of ghostwriting is controversial and remains almost universally condemned by the courts. However, recent changes in the rules permitting the practice of limited-scope representation should compel courts to re-examine their hostilities to the practice and encourage the adoption of changes to the disclosure and termination rules in order to allow ghostwriting to be openly practiced.

134. Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997).

135. Loudenslager, *supra* note 118, at 131–33.

136. COLO. R. CIV. P. 11(b).

137. *Id.*

138. Loudenslager, *supra* note 118, at 132–33.

This Note examined the majority stance against ghostwriting and the minority position supporting ghostwriting and found that both postures are flawed. Most of the precedents that comprise the majority stance were decided before courts authorized the practice of limited-scope representation and before the ABA found ghostwriting to be an acceptable practice. Even the opinions written after these developments gave little or no consideration to how ghostwriting was related to the general practice of limited-scope representation. Failure to address ghostwriting in the context of limited-scope representation seriously undermines the majority stance, as it is at odds with the current legal reality. The minority's support of ghostwriting failed to adequately understand the rules and their application, thus overlooking numerous ethical and procedural problems posed by the practice of ghostwriting.

Next, this Note found the problems associated with ghostwriting stem from contradictions and inconsistencies in the rules. Although limited-scope representation has been adopted as an acceptable practice by most jurisdictions, the rules the courts use to regulate its practice were designed to operate with full-scope representation. As a result, in many jurisdictions the rules that permit an attorney to represent a client in a limited scope obstruct the same attorney from terminating that representation in the context of ghostwriting. This Note argued that the growth of pro se litigants made eliminating the practice of ghostwriting unrealistic and unwise. Ultimately, this Note proposed that courts should amend their rules to mandate disclosure of the ghostwriting attorney's identify and make clear that the practice of ghostwriting does not require the attorney seek permission from the court to withdraw from the case. The practice of ghostwriting is not only important for ensuring low-income individuals adequate access to justice, but it can also be an important tool for helping ease the additional burdens pro se litigants place on the courts and opposing parties. With the right reforms, the specter of ghostwriting can be clearly viewed in the light of day, exposing the apparitions that shroud the efforts of the judicial system to provide efficient and effective legal services to everyone—"the humblest citizen, the indigent, the convicted felon, the illegal alien"[139]—as our Constitution intended.

139. NAACP v. Meese, 615 F. Supp. 200, 205–06 (D.D.C. 1985).

NEBRASKA LAW REVIEW

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