St. Mary's Journal on Legal Malpractice & Ethics

Volume 5 | Number 2 Article 2

1-1-2014

Characterizing Ghostwriting.

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ARTICLE

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Abstract. It is well known that legal services are costly and that existing pro bono services are inadequate to help every individual who would benefit from legal assistance. Compounding this unmet need are various restrictions on the types of clients and types of cases that qualify for pro bono services. For example, Legal Services Corporation lawyers may not represent undocumented individuals, and may not undertake a representation in an abortion, desegregation, or assisted suicide matter. One attempt to mitigate this unmet need is ghostwriting. Analogous to presidential speechwriting, ghostwriting in the legal context occurs when a lawyer drafts a pleading or brief for a pro se litigant without attribution. Ghostwriting offers a practical contribution to the shortage of affordable legal services by increasing the number of individuals who are able to receive some, albeit limited, legal assistance. Despite its practical utility, ghostwriting implicates several ethical concerns, and courts have reached conflicting conclusions as to its ethical propriety. This Article analyzes the criticisms of legal ghostwriting and concludes that these concerns have been overstated; legal ghostwriting is consistent with the ethical rules.

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INTRODUCTION

We are all familiar with the basic idea of "ghostwriting," a term defined by Webster's as "writ[ing] books, articles, etc. for another who professes to be the author."[1] Ghostwriting might be conceived as part of a spectrum, with ghostwriting (largely perceived favorably as acceptable) at one end of that spectrum and plagiarism (perceived quite unfavorably as unacceptable) at the other. Plagiarism is defined by Webster's as "to take ideas, writings, etc. from another and pass them off as one's own."[2] The similarity in the definitions of ghostwriting and plagiarism is notable, yet reactions to the two terms differ markedly. Presidential and gubernatorial speechwriters are classic, well-accepted examples of ghostwriting, whereas supporters of plagiarism are hard to find. In a broad sense, this Article seeks to analyze the controversial legal practice of legal ghostwriting to determine whether it is more appropriately classified as traditional ghostwriting (and therefore acceptable) or as plagiarism (and therefore unacceptable).

When individuals wish to avail themselves of the legal system as plaintiffs—or are compelled to participate as defendants—some individuals retain an attorney to handle the matter on their behalf. However, lawyers' services are expensive, with one source reflecting an average of $255 per hour for lawyers with one to three years of experience,

1. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 597 (4th ed. 2002).
2. *Id.* at 1100.

and ranging up to $520 per hour for lawyers with twenty or more years of experience.[3] Accordingly, some individuals may elect to represent themselves if they have legal training; some individuals without legal training may seek help from a legal clinic or from an attorney who is willing to represent them at a reduced fee or who is willing to waive any fee.[4] Unfortunately, clinics through the Legal Services Corporation are underfunded and subject to restrictions on both the types of clients and types of cases that they may accept,[5] and insufficient numbers of attorneys offer pro bono services to make up the difference in need.[6] Still others attempt to represent themselves by using information available on the Internet, in self-help books, or through the patience of court staff. In keeping with our nation's pledge of "justice for all,"[7] and in recognition of the inadequate numbers of low-cost legal clinics and pro bono attorneys to

3. *See* U.S. Attorney's Office for the District of Columbia, *Laffey* Matrix—2014–2015, U.S. DEP'T JUSTICE http://www.justice.gov/usao/dc/divisions/Laffey%20Matrix_2014-2015.pdf (last visited Feb. 23, 2015) (citing Laffey v. Nw. Airlines, Inc., 572 F. Supp. 354, 371 (D.D.C. 1983)) (showing average lawyer hourly rates based on years of experience), *aff'd in part, rev'd in part on other grounds*, 764 F.2d 4 (D.C. Cir. 1984); *see also* Claude R. (Chip) Bowles et al., *Lawyers in a Fee Quandary: Must the Billable Hour Die?*, 6 DEPAUL BUS. & COM. L.J. 487, 499–500 (2008) (citing to Complete Case for the proposition that "the average cost of a lawyer is four thousand dollars").

4. *See* Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 595–96 (2011) (observing that noneconomic reasons also sometimes motivate individuals to proceed pro se, including having consulted with a lawyer who advised that the case was sufficiently straightforward that the litigant could pursue the matter without legal representation).

5. *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 1000–01 (2009) (noting that Congress has "[f]orbidd[en] Legal Services Corporation lawyers [from] accept[ing] many kinds of cases and clients" and providing examples, including restrictions against representing prisoners and undocumented individuals, and restrictions on cases involving abortion, desegregation, redistricting, and assisted suicide).

6. *See* ABA STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON PRO BONO WORK OF AMERICA'S LAWYERS 10, 13 (Feb. 2009), *available at* www.abaprobono.org/report2.pdf (finding that seventy-three percent of the survey respondents reported providing pro bono services; survey respondents provided an average of forty-one hours of pro bono service; only one-quarter of the survey respondents provided fifty or more hours of pro bono service); *see also* MARK H. TUOHEY III ET AL., ABA SECTION OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 9–10 (2003), *available at* http://www.abanet.org/litigation/taskforces/modest/report.pdf (attributing increase in pro se litigation to reduction in funding for legal services organizations and expense of traditional legal representation); State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 05-06, at 4 (2005), *available at* http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=525 ("[O]ften the decision to proceed *in propria persona* is influenced by the high cost of retaining an attorney.").

7. Pledge of Allegiance, 4 U.S.C. § 4 (2012); *see also The Supreme Court Building*, SUP. CT. OF THE U.S., *available at* http://www.supremecourt.gov/about/courtbuilding.aspx (last visited Apr. 13, 2015) (noting that the Supreme Court building is inscribed with the statement "Equal Justice Under Law").

meet the legal needs of low- and middle-income Americans,[8] individuals are permitted to prepare and submit their own court documents; our courts are not restricted only to those represented by counsel.[9]

Despite the theoretical availability of court access to all, when litigants elect to represent themselves in legal proceedings, they are at a serious disadvantage due to the complexity of our legal system.[10] Imagine the confusion of a layperson attempting to navigate a highly specialized maze of statutes, regulations, case law, forms, and procedures without any legal training and without the aid of a lawyer—trying to understand legal authorities without any understanding of legal terminology and precedent, and trying to follow procedures without any understanding of common procedural terminology such as personal jurisdiction, venue, or summary judgment. As one commentator has observed, "[T]he roles of the players remain largely those developed for an idealized world in which all litigants are represented by lawyers."[11]

Lacking the background to present legal assertions in the customary manner, and lacking access to an attorney who could provide that service, pro se litigants often find themselves frustrated—frustrated with their inability to understand what is expected and frustrated with the legal system for its incomprehensibility. Unfortunately, they also often generate

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8. *See* John T. Broderick Jr., & Ronald M. George, Op-Ed., *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 1, 2010, http://www.nytimes.com/2010/01/02/opinion/02broderick.html?_r=0; *see also* Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1549 (2002) (noting that the United States "meets less than one-fifth of the legal needs of the poor, and routinely leaves middle-income households without a remedy they can afford").

9. *See* 28 U.S.C. § 1654 (2012) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."); Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 374–75 (2005) (observing that "[t]he right to represent oneself in the United States courts dates back to the founding of the country" and that "[t]he development of pro se rights in the United States has been tied to the rights of indigents to have access to the courts"); Schneider, *supra* note 4, at 590 ("[A] fundamental precept of American law is that financial status should [not] determine access to courts . . . . Individuals who are unable to afford attorneys should not be denied a forum in which to air their grievances. To ensure that they are not, any party to a case has long been able to proceed without a lawyer.").

10. *See* CHRISTOPHER E. SMITH, COURTS AND THE POOR 39 (1991) (stating that "pro se litigants face a significant challenge in attempting to phrase their complaints in accordance with proper legal terminology and required court procedures"); *see also* Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 512 (2002) ("Indigent pro se litigants . . . suffer significant structural disadvantage when they appear before the court, lacking the equipage needed for an effective presentation."); Schneider, *supra* note 4, at 598 (observing that "[p]ro se litigants often lack a sufficient understanding of procedural and substantive law to initiate a lawsuit properly").

11. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999).

frustration in others, particularly court staff[12] and judges.[13] All litigants are acutely aware of the power of court staff and judges, but pro se litigants are both particularly vulnerable and unusually dependent. Pro se litigants with no legal background or legal assistance are more dependent on court personnel's explanations as to what changes are necessary for compliance, and are vulnerable when court personnel become impatient with pro se documents that are lengthy, poorly written, and legally incomprehensible.[14] Pro se documents often require the expenditure of disproportionate judicial resources in reviewing—and interpreting—those documents.[15]

One attempt to remedy these issues is legal ghostwriting, whereby a licensed attorney drafts one or more court documents for a pro se litigant without undertaking formal representation of the litigant—the drafting of the document(s) is the only legal assistance provided. Such a lawyer is not the litigant's attorney-of-record because formal representation was not undertaken, and accordingly the lawyer's name does not appear on the

12. Swank, *supra* note 9, at 384 (quoting Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 114 (2002)) ("Pro se litigants are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim.").

13. Schneider, *supra* note 4, at 597 ("[T]here exists significant bias against pro se litigants in the court system: 'Pro se litigants are regularly perceived in a negative manner; they are most often attacked for the judicial inefficiencies many judges, attorneys, and observers believe they create.'" (quoting Swank, *supra* note 9, at 384)).

14. *See* Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 182 (1972) (noting the negative effect potentially resulting from a pro se litigant's "inability to communicate effectively in writing," often leading to dismissal for being "rambling and conclusory"); *see also* Schneider, *supra* note 4, at 602 (noting "[d]isparity in the writing capabilities of pro se litigants and represented parties can lead to different rulings on motions to dismiss even when the plaintiffs' grievances arise from identical factual circumstances. This is because the style in which allegations are presented affects their clarity, which, in turn, influences whether judges can discern cognizable legal claims from them. A complaint drafted by a lawyer will likely set forth in neutral language the necessary allegations to state a claim effectively—time, place, specific sequence of events—and end with a prayer for relief. By contrast, if the complaint is drafted without assistance of counsel, it will likely be tainted by emotional language, legal jargon, tangents, and less direct or incomprehensible assertions of fact."); *see also* Swank, *supra* note 9, at 384 ("Pro se litigants may clutter up cases with rambling, illogical pleadings, motions, and briefs.").

15. *See, e.g.*, Ayres v. Ellis, No. 09-4247, 2009 WL 3681892, at *1 (D.N.J. Nov. 4, 2009) (quoting a pro se litigant's unclear factual averments and interpreting from these averments the facts that the litigant "meant to allege"); *see also* Swank, *supra* note 9, at 384 (stating pro se litigants "are believed to be unduly burdensome on judges, clerks, and court processes; many pro se litigants require additional time at the clerk's office and in the courtroom because they do not understand the procedures or the limitations of the court").

brief or motion. The reaction to this practice—in the case law,[16] in ethics opinions,[17] and in the legal commentary[18]—has been inconsistent and divergent, with some authorizing and encouraging the practice, and others condemning the practice as unethical. In this Article, I will examine the existing authorities, analyze the arguments for and against the practice, and offer my proposal for a more reasoned approach.

I. EXISTING AUTHORITIES

There are two major sources of guidance in evaluating legal ghostwriting: (1) ethics opinions and (2) case law. With respect to ethics opinions, a variety of associations publish such opinions; sources include ethics committees within the American Bar Association, state bar associations, and local bar associations. These ethics opinions can be helpful, but they are truly only advisory opinions with no binding authority whatsoever—neither the courts nor state disciplinary authorities are required to follow their conclusions.[19] Accordingly, ethics opinions provide insights into how thoughtful lawyers with an interest in ethical issues analyze particular ethical dilemmas, and a court might find the opinion persuasive, but there is no guarantee that a court would adopt the same analysis. This renders ethics opinions interesting and relevant, but not conclusive.

Ethics opinions addressing legal ghostwriting reflect widely divergent views on its propriety.[20] For example, the Nevada State Bar Standing

16. *See infra* notes 26–38 and accompanying text.

17. *See infra* notes 20–25 and accompanying text.

18. *See* Lindsay E. Hogan, *The Ethics of Ghostwriting: The American Bar Association's Formal Opinion 07-446 and Its Effect on Ghostwriting Practices in the American Legal Community*, 21 GEO. J. LEGAL ETHICS 765, 779 (2008) (concluding that the ABA opinion "fails to provide any convincing arguments against the traditional critiques of ghostwriting"). *See generally* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145 (2002) (supporting ghostwriting); 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 (2008) (analyzing undisclosed ghostwriting critically); Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271 (2010) (supporting ghostwriting).

19. MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 52 (10th ed. 2012) (citing failure to adhere to ethics and case-based guidance with respect to ghostwriting).

20. *See* Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994–2 (May 6, 1994) (noting the "difficult" nature of the issue of disclosure of the representation to courts, and noting that the issue "has produced a broader range of responses from ethics committees and courts"). A 2010 article noted that twenty-four states have addressed ghostwriting, with the majority permitting ghostwriting but with ten states forbidding the practice. Robbins, *supra* note 18, at 286–88; *see also* Peter Geraghty, *Ghostwriting*, YOUR ABA (2011), *available at* http://www.americanbar.org/content/

Committee on Ethics and Professional Responsibility has concluded that ghostwriting is unethical because it constitutes "an act of misrepresentation to the court that violates the attorney's duty of candor to the court as required by [the Nevada ethical rules]"; "exploits the court's practice of holding pro se parties to a less stringent standard for pleadings than lawyers," and "effectively nullifies the certification requirement of Rule 11 and inappropriately shields the [ghostwriting attorney] from accountability under Rule 11."[21]

Reaching the opposite conclusion, the Los Angeles County Bar Association has found no such ethical impropriety, observing "that there is no specific statute or rule which prohibits [an attorney] from assisting [a client] in the preparation of pleadings or other documents to be filed with the court, without disclosing to the court the attorney's role," and further concluding that ghostwriting neither violates Rule 11 nor prevents a court from holding a party responsible for "frivolous, misleading or deceit[ful]" pleadings.[22] Florida has taken an intermediate approach by requiring disclosure that the document was ghostwritten but not requiring disclosure of the authoring lawyer's identity; the pleading must contain the statement, "'Prepared with the assistance of counsel' . . . to avoid misleading the court which might otherwise be under the impression that the person, who appears to be proceeding pro se, has received no assistance from a lawyer."[23]

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dam/aba/publications/YourABA/201103youraba.authcheckdam.pdf (providing a summary of the states' treatment of ghostwriting).

21. State Bar of Nev. Comm. on Ethics & Prof'l Responsibility, Formal Op. 34, at 6–7 (2009).

22. L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 502 (Nov. 4, 1999); *see also* State Bar of Mich. Prof'l Ethics Comm., Ethics Op. RI-347 (2010), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/ri-347.htm ("So long as he or she complies with the Michigan Rules of Professional Conduct and other law, a lawyer may, without appearing in a proceeding or otherwise disclosing or ensuring the disclosure of the lawyer's assistance to the court or to other counsel and other parties, assist a *pro se* litigant by giving advice on the content and format of documents to be filed with the court, including pleadings, by drafting those documents for the litigant, by giving advice about what to do in court or any combination of these."); N.C. State Bar Ethics Comm., 2008 Formal Ethics Op. 3 (Jan. 23, 2009) ("[A] lawyer may assist a pro se litigant without disclosing his participation or ensuring that the litigant discloses his assistance unless the lawyer is required to do so by law or court order."), *available at* http://www.ncbar.gov/ethics/printopinion.asp?id=792; Utah State Bar Ethics Advisory Op. Comm., Op. 08-01 (Apr. 8, 2008) (permitting ghostwriting "unless a court rule or ethical rule explicitly requires disclosure").

23. FLA. R. PROF'L CONDUCT 4–1.2(c) cmt. (2014); *see also* Mass. Supreme Jud. Ct. Order, *In Re*: Limited Assistance Representation (Aug. 1, 2006) (stating if an attorney engages in ghostwriting, "the attorney shall insert the notation 'prepared with assistance of counsel' on any pleading, motion or other document prepared by the attorney. The attorney is not required to sign the pleading, motion or document, and the filing of such pleading, motion or document shall not constitute an

The American Bar Association entered the fray in 2007, issuing a formal opinion supportive of ghostwriting.[24] Although some had hoped that the ABA's stance would generate widespread support for ghostwriting,[25] at this time greater support for ghostwriting is found in ethics opinions than in the case law.

In contrast to ethics opinions, of course, case law carries precedential weight. However, the case law reflects similar divergent views,[26] and the federal courts in particular are heavily weighted against the practice.[27]

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appearance by the attorney."); N.H. R. CIV. P. 17(g) (2015) (stating if an attorney engages in ghostwriting, "the attorney is not required to disclose the attorney's name on such [pleading] . . . [but the pleading] must conspicuously contain the statement 'This [pleading] was prepared with the assistance of a New Hampshire attorney'").

24. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07–446 (2007) ("A lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.").

25. *See, e.g.*, Melville D. Miller, Jr., *Ghostwriting: Not a Current Ethics Concern in New Jersey*, N.J. LAW. MAG., Dec. 2011, at 54, 54 (stating that "[f]ollowing [the ABA's 2007 opinion] there have been no further restrictions or negative articles on ghostwriting . . . . It seems clear that the 2007 American Bar Association (ABA) opinion marks a major watershed"). *But see* Hogan, *supra* note 18, at 779 (contending that the ABA's Formal Opinion "fails to provide any convincing arguments against the traditional critiques of ghostwriting").

26. *Compare* Auto Parts Mfg. Miss. Inc. v. King Constr. of Hous., LLC, No. 1:11-CV-00251, 2014 WL 1217766, at *7 (N.D. Miss. Mar. 24, 2014) ("[A]n attorney who ghostwrites motion briefs and pleadings is acting unethically and is subject to sanctions."), *with In re* Fengling Liu, 664 F.3d 367, 372–73 (2d Cir. 2011) (dismissing charges against attorney alleging dishonesty due to ghostwriting).

27. *See* Jessie M. Brown, *Ghostwriting and the* Erie *Doctrine: Why Federalism Calls for Respecting States' Ethical Treatment of Ghostwriting*, 2013 J. PROF'L LAW. 217, 222 (2013) (noting that "[f]ederal courts have predominantly rejected ghostwriting"); Blake George Tanase, Note, *Give Ghosts a Chance: Why Federal Courts Should Cease Sanctioning Every Legal Ghostwriter*, 48 GA. L. REV. 661, 677 (2014) (noting "the weight of . . . federal authority" is against ghostwriting); *see also* Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) (determining that ghostwriting constituted a misrepresentation to the court by the litigant and the lawyer); Porter v. Bank of Am., No. 1:14-CV-00431, 2014 WL 1819396, at *3 (E.D. Cal. May 7, 2014) ("The practice of ghostwriting is disfavored by Courts . . . . If the Court determines that Plaintiffs are making misrepresentations to the Court by submitting papers signed by Plaintiffs but actually written by someone else, Plaintiffs may be subject to sanctions."); *Auto Parts Mfg. Miss.*, 2014 WL 1217766, at *7 ("[A]n attorney who ghostwrites motion briefs and pleadings is acting unethically and is subject to sanctions."); Falconer v. Lehigh Hanson, Inc., No. 4:11-CV-373, 2013 WL 3480382, at *6 n.2 (S.D. Tex. 2013) (emphasizing that ghostwriting "exposes both litigants and counsel to the possibility of sanctions"); Nelson v. Lake Charles Stevedores, LLC, No. 2:11-CV-1377, 2012 WL 4960919, at *5 (W.D. La. Oct. 17, 2012); Makreas v. Moore Law Grp., APC, No. C-11-2406, 2012 WL 1458191, at *3 (N.D. Cal. Apr. 26, 2012) ("[N]umerous courts have held the practice of ghostwriting is not permitted in the federal courts."); Davis v. Back, No. 3:09-CV-557, 2010 WL 1779982, at *13 (E.D. Va. 2010); Anderson v. Duke Energy Corp., No. 3:06-CV-399, 2007 WL 4284904, at *1 n.1 (W.D.N.C. Dec. 4, 2007) ("The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be pro se is disfavored and considered by many courts to be unethical."); United States v.

Two cases decided in 2014 illustrate the federal courts' continued reluctance toward ghostwriting. In one case, from the federal district court in Nevada, the issue of ghostwriting arose in the context of a prisoner's habeas corpus action in which the prisoner, Mack, filed several motions seeking, among other things, the recusal of the federal district judge.[28] In opposing the motions, the respondents sought to have the court canvass Mack as to whether he was receiving the assistance of counsel.[29] The respondents proffered two reasons for their suspicion that Mack was receiving legal assistance: first, Mack's motions were typewritten, and Mack did not have access to a computer or typewriter, and second, the certificate of service was signed by an attorney.[30] The court noted that it did "not, as a general matter, condone the practice of lawyers 'ghost-writing' pleadings for a party ostensibly appearing *pro se*," but observed that such ghostwriting nevertheless did occur in habeas cases.[31] However, the court found this case "potentially more troublesome," because Mack's situation suggested "that the ghost-lawyer is likely controlling the ongoing litigation of the case as opposed to merely filing the initial petition."[32] The court ordered that the ghostwriting attorney either enter a formal appearance in the matter as Mack's counsel, or cease all legal assistance in the case.[33]

In the second case, from the Eastern District of California, the defendants moved to dismiss the plaintiffs' pro se amended complaint for failing to state any cognizable claim.[34] The plaintiffs failed to file a

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Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (stating that ghostwriting implicates the lawyer's ethical duty of candor to the court); *In re* Mungo, 305 B.R. 762, 768–70 (Bankr. D.S.C. 2003) (holding that ghostwriting "is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court").

28. *See* Mack v. Baker, No. 3:12-CV-00104, 2014 WL 5341728, at *1–2 (D. Nev. Apr. 28, 2014) (arguing the district judge holds bias towards the plaintiff and therefore should be disqualified).

29. *See id.* at *5 (stating the respondents had suspicion that Mack was receiving legal assistance from an attorney).

30. *See id.* at *5 (arguing that Mack did not have the resources needed to submit the motions in the form that they were submitted to the court).

31. *See id.* at *6 (recognizing that, although ghostwriting is not condoned, it is common practice for habeas corpus petitions).

32. *See id.* at *7 (stating a conflict of interest may arise if the attorney who represented Mack in the criminal proceedings is the same attorney suspected of assisting with the motions).

33. *See id.* at *7–8 (demanding the attorney who is suspected of helping Mack to either appear formally as Mack's counsel or refrain from assisting him any further in the case).

34. Porter v. Bank of Am., No. 1:14-CV-00431, 2014 WL 1819396, at *1, *3 (E.D. Cal. May 7, 2014) (granting defendants' motion to dismiss because the complaint "fails to give each defendant fair notice of the claims against them" by lacking specific allegations each defendant's crime committed).

written opposition to the defendants' motion, and at the hearing they attempted to excuse this omission by claiming that they were unfamiliar with the court's procedures.[35] The court was not sympathetic to this claim, however, noting that the plaintiffs' other filings "belie[d] their alleged ignorance of the Court's procedural rules."[36] Noting its disapproval of ghostwriting, the court continued:

> It is unclear whether Plaintiffs are feigning their ignorance of the Local Rules or whether Plaintiffs' written filings are being ghostwritten by a third party (attorney or otherwise). The practice of ghostwriting is disfavored by Courts . . . . The practice of ghostwriting is disfavored for the reasons presented in this action: pro se litigants may ask Courts for leniency due to their lack of legal sophistication while at the same time receiving legal advice from another attorney. Allowing Plaintiffs to do this would grant them an unfair advantage over Defendants. Plaintiffs are forewarned that the Court regards the signing of a paper filed with the Court as an implied representation that the filed paper was written by the signor. If the Court determines that Plaintiffs are making misrepresentations to the Court by submitting papers signed by Plaintiffs but actually written by someone else, Plaintiffs may be subject to sanctions.[37]

At the moment, the propriety of legal ghostwriting depends on the jurisdiction[38] and the court.[39] Challenges to the propriety of legal ghostwriting tend to be rooted in rules of legal ethics: attorneys are ethically mandated to exhibit candor toward the tribunal[40] and to be truthful in statements to others;[41] they are prohibited from asserting frivolous claims or defenses[42] and from engaging in conduct involving

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35. *See id.* at *2 (recognizing that courts will tolerate informalities from *pro se* litigants because they have a right to represent themselves and access to the courts).

36. *See id.* at *1, *3 ("Plaintiffs' filings demonstrate a greater understanding of courtroom procedures than claimed by Plaintiffs at the hearing").

37. *Id.* at *3 (cautioning plaintiffs that ghostwriting is disfavored and they may be subject to sanctions if they are signing and submitting papers prepared by someone else).

38. *See* Pa. Bar Ass'n on Legal Ethics & Prof'l Responsibility & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Ethics Op. 2011–100, at app. B (2011) (listing approaches to ghostwriting by jurisdiction).

39. *See supra* note 27 and accompanying text (noting that federal courts are more consistently opposed to ghostwriting).

40. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2013) ("[A] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

41. *See id.* R. 4.1 ("[A] lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . .").

42. *See id.* R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a

misrepresentation.[43] Authorities critical of ghostwriting have relied on these ethical rules,[44] but most often equate ghostwriting with misrepresentation in finding the practice unethical.[45] In addition, a fairness argument frequently has accompanied ethical analyses of ghostwriting, asserting that ghostwriting permits the assisted litigant to take unfair advantage of lenient approaches to pro se filings when, due to ghostwriting assistance, such special treatment is unjustified.[46]

The next step is to determine whether the concerns expressed by these authorities warrant the conclusion that ghostwriting should be forbidden and sanctionable. It is to that determination I now turn.

II. EVALUATING THE PROPRIETY OF GHOSTWRITING

In short, as we saw in the previous section, critics have tended to equate legal ghostwriting with dishonesty and with invoking an unfairly lenient

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good faith argument for an extension, modification or reversal of existing law.").

43. *See id.* R. 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. . . .").

44. Authorities have opined that ghostwriting implicates issues of candor and truthfulness by virtue of the assisting lawyer's—and the pro se litigant's—failure to disclose the lawyer's role in drafting the court document(s), thereby not being truthful with the court and opposing counsel. *See* Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1232 (D. Colo. 1994) ("Having a litigant appear to be *pro se* when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand . . . is far below the level of candor which must be met by members of the bar."), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1995); *In re* Merriam, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (recognizing that attorney ghostwriting violates a lawyer's "duty of honesty and candor to the court"); Hogan, *supra* note 18, at 768 ("[G]hostwriting can implicate [ABA Model Rule 3.1] because lawyers who draft pleading[s] for pro se litigants are not identifying themselves. This lack of identification will release them from the liability for bringing a frivolous lawsuit.").

45. *See* Barnett v. LeMaster, 12 Fed. App'x 774, 778–79 (10th Cir. 2001) (stating that where the party "entered a *pro se* appearance as well as filed and signed his appeal *pro se*, the attorney who drafted the brief knowingly misrepresented the nature of his or her assistance to Mr. Barnett"); Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) (concluding that ghostwriting of *pro se* litigants' complaints "constitute[d] a misrepresentation to the Court"); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (determining the lawyer's ghostwriting of pro se litigant's appellate brief "place[d] the opposing party at an unfair disadvantage, interfere[d] with the efficient administration of justice, and constitute[d] a misrepresentation to the Court").

46. *See* Porter v. Bank of Am., No. 1:14-CV-00431, 2014 WL 1819396, at *3 (E.D. Cal. May 7, 2014) ("The practice of ghostwriting is disfavored for the reasons presented in this action: pro se litigants may ask courts for leniency due to their lack of legal sophistication while at the same time receiving legal advice from another attorney. Allowing plaintiffs to do this would grant them an unfair advantage over defendants."); *Laremont-Lopez*, 968 F. Supp. at 1078 (stating that ghostwriting unfairly grants pro se litigants "the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel").

standard. The purpose of this section is to explain these concerns in greater detail and evaluate whether these characterizations are accurate. My conclusion is that they are not.

Challenges to legal ghostwriting, both in ethics opinions and in the case law, tend to focus on one (or more) of three potential concerns: (1) whether ghostwriting violates a lawyer's duty of candor because the fact that the pro se litigant received legal assistance constitutes a "material" fact within the meaning of ABA Model Rule 3.3(b) or 4.1(b);[47] (2) whether ghostwriting confers an unfair special benefit on the pro se litigant due to the purportedly "special treatment" that judges accord to pro se pleadings;[48] and (3) whether a ghostwriting lawyer, by failing to disclose his or her role to the court, has engaged in misrepresentation within the meaning of ABA Model Rule 8.4(c).[49] I will address each of these concerns in turn.

A. *The Duty of Candor and Material Facts*

The source of a lawyer's ethical duty of candor is found in ABA Model Rules 3.3 and 4.1.[50] ABA Model Rule 3.3 imposes a duty of candor, prohibiting lawyers from making a false statement of law or fact to a tribunal[51] and requiring lawyers to take reasonable remedial measures to remedy fraudulent conduct;[52] ABA Model Rule 4.1 prohibits lawyers from knowingly making a false statement of material fact to a third person.[53]

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47. *See* N.H. Bar Ass'n Ethics Comm., *Unbundled Services: Assisting the Pro Se Litigant* (May 12, 1999) ("Several opinions have raised concerns whether ghostwriting under some circumstances violates Rule 3.3 (requiring candor to the tribunal) and Rule 4.1 (requiring truthfulness in statements to others)."); *see also* Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 2007-F-153 (Mar. 23, 2007) (requiring disclosure if preparing pleadings creates the false impression that the litigant has not received substantial legal assistance).

48. *See, e.g.*, *Johnson*, 868 F. Supp. at 1231–32 (discussing the reasons ghostwriting gives pro se litigants an unfair advantage).

49. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013).

50. *Id.* R. 3.3, 4.1.

51. *Id.* R. 3.3(a)(1).

52. *Id.* R. 3.3(b). ABA Model Rule 3.3(b) provides:

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Id.

53. *Id.* R. 4.1. ABA Model Rule 4.1 provides: "In the course of representing a client a lawyer shall not knowingly[] make a false statement of material fact or law to a third person." *Id.*

As one court observed, in prohibiting ghostwriting:

> Having a litigant appear to be pro se, when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is [dis]ingenuous to say the least; it is far below the level of candor which must be met by members of the bar.[54]

However, courts critical of ghostwriting have tended to offer a conclusion that ghostwriting violates a lawyer's duty of candor without undertaking an analysis pursuant to ABA Model Rules 3.3 and 4.1.[55] This truncated approach has served to mask the inaccuracy of that conclusion: ghostwriting constitutes neither a false statement of material fact nor fraudulent conduct.

To conclude that legal ghostwriting violates ABA Model Rule 3.3 requires a finding that a pro se litigant's submission of a ghostwritten document constitutes "fraudulent" conduct; to conclude that legal ghostwriting violates ABA Model Rule 4.1 requires a finding that providing legal assistance to a pro se litigant without disclosing that assistance constitutes a "false statement of material fact" by the lawyer.[56] The American Bar Association's formal opinion on ghostwriting summarizes the matter succinctly and clearly, noting that both rules essentially require a determination as to the materiality of the fact of the undisclosed legal assistance by the ghostwriting lawyer:

> Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether

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54. Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1232 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

55. *See* Delso v. Trs. for Ret. Plan for Hourly Emps. of Merck & Co., No. 04-3009, 2007 WL 766349, at *17 (D.N.J. Mar. 6, 2007) (stating that ghostwriting lawyer's "failure to affirmatively advise the Court of his informal assistance [to the pro se litigant] . . . was not emblematic of the candid honesty contemplated by [New Jersey's Rule] 3.3"); United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("[P]articipating in a ghost writing arrangement such as this, where the lawyer drafts the pleadings and the party signs them, implicates the lawyer's duty of candor to the Court."); *In re* Brown, 354 B.R. 535, 545 (Bankr. N.D. Okla. 2006) ("[I]f an attorney writes a pleading, he or she has a duty to make sure that the Court knows he or she wrote it . . . . All counsel owe a duty of candor to every court in which they appear. Inherent in that duty is the requirement that counsel disclose his or her involvement in the case."); *In re* Mungo, 305 B.R. 762, 770 (Bankr. D.S.C. 2003) ("[A]ssisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."); *see also* State Bar of Nev. Comm. on Ethics & Prof'l Responsibility, Formal Op. 34, at 6 (2009) (stating that ghostwriting is unethical because "[i]t is an act of misrepresentation to the court that violates the attorney's duty of candor to the court as required by Nevada Rule of Professional Conduct 3.3").

56. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2013).

> the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of [ABA Model Rules 3.3(b) and 4.1(b), among others].[57]

Ghostwriting as a violation of ABA Model Rule 3.3 or 4.1 thereby requires an inquiry as to whether the nondisclosure of legal assistance constitutes a "material" fact.

Ghostwriting does not constitute a material fact. Black's Law Dictionary defines a material fact as "[o]ne which is essential to the case, defense, application, etc., and without which it could not be supported .... The 'material facts' of an issue of fact are such as are necessary to determine the issue. Material fact is one upon which outcome of litigation depends."[58] Ghostwriting does not satisfy this definition. The fact that the pro se litigant has received legal assistance is not "essential to the case," is not "necessary to determine the issue," and is not a fact "upon which [the] outcome of [the] litigation depends."[59] The American Bar Association's formal opinion reached the same conclusion.

> In our opinion, the 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. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.[60]

Similarly, an Arizona ethics opinion concludes "that the submission of ghostwritten documents without informing the court or tribunal does not violate [Rule] 3.3 . . . because the practice is not inherently misleading to the court or tribunal .... We do not believe that the omission of an attorney's name from a filed document is a false statement of fact or law that either is made or needs to be corrected."[61]

Although ABA Model Rules 3.3 and 4.1 have been cited as reasons for finding ghostwriting unethical, a more common argument is that a pro se litigant's undisclosed legal assistance is unfair, because courts accord greater leniency to pro se litigants.[62]

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57. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446, at 2 (2007).

58. BLACK'S LAW DICTIONARY 881 (5th ed. 1979).

59. *See id.* (defining material fact).

60. ABA Comm. on Ethics & Prof'l Responsiblity, Formal Op. 07-446, at 2 (2007).

61. State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 05-06 (2005).

62. *See In re* Mungo, 305 B.R. 762, 769 (Bankr. D.S.C. 2003) ("[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion.").

B. *Unfair Special Treatment*

Perhaps the single most common justification proffered for the conclusion that ghostwriting is unethical is the contention that ghostwriting provides pro se litigants with unfair special treatment.[63] The reasoning behind this contention is that because courts construe pro se pleadings liberally, a pro se litigant who has received the undisclosed assistance of counsel is receiving an unfair and undeserved benefit, which correspondingly is unfair to the pro se litigant's opponent.[64] As one court explained:

> It is elementary that pleadings filed *pro se* are to be interpreted liberally. [The defendant's] pleadings seemingly filed *pro se* but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny.[65]

Another court, in similarly condemning ghostwriting as unfair, observed:

> When . . . complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding *pro se*, the indulgence extended to the *pro se* party has the perverse effect of skewing the playing field rather than leveling it. The *pro se* plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage.[66]

On the surface, these arguments about the unfairness of ghostwriting might initially seem to have some appeal. However, there is an underlying fallacy to the unfairness argument, as noted by several authorities[67] and

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63. *See, e.g.*, Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231–32 (D. Colo. 1994), (discussing the reasons ghostwriting gives pro se litigants an unfair advantage), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

64. Loudenslager, *supra* note 18, at 116–17 (indicating that courts will relax the requirement of meeting procedural deadlines more for pro se litigants than for those represented by counsel).

65. *Johnson*, 868 F. Supp. at 1231 (citations omitted).

66. Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997); *see also* State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 05-06 (2005) (explaining that those who disfavor ghostwriting argue that "a *pro per* party who is actually receiving the services of a lawyer thus receives the benefits of legal assistance and special treatment by the court at the same time"); State Bar of Nev. Comm. on Ethics & Prof'l Responsiblity, Formal Op. 34 (2009) (stating that ghostwriting is unethical because "[i]t exploits the court's practice of holding pro se parties to a less stringent standard for pleadings than lawyers," among other reasons).

67. *See* Klein v. Speer, Leeds & Kellogg, 309 F. Supp. 341, 342 (S.D.N.Y. 1970) (observing that the challenged pleadings' "legal content and phraseology most strongly suggest that they emanate

eloquently explained by one commentator:

> Practically speaking, . . . ghostwriting is obvious from the face of the legal papers filed, a fact that prompts objections to ghostwriting in the first place. This obviousness is reflected in the case law on the subject. Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure.[68]

Moreover, the "benefit," or "special treatment," or "leniency" accorded to pro se litigants is not a lowering of the standard that the litigant must satisfy in order to prevail on the merits—it is merely a more generous reading of the document to help the litigant survive initial motions to dismiss.[69] If a document is largely incomprehensible, a generous reading is indeed a benefit—however, if a ghostwriter drafted the document, it is likely it is sufficiently coherent that it needs no such benefit. The (hopefully) higher quality of a ghostwritten document thus receives no special treatment because it needs none.[70]

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from a legal mind"); *see also* State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 05-06 (2005) ("[C]ourts are usually able to correctly assess when to afford pro per litigants appropriate latitude and when these litigants are being given the benefit of assistance of counsel."); NYCLA Comm. on Prof'l Ethics, Op. 742, at 4 (2010) ("One area of concern focuses on the reality that pro se pleadings and submissions are generally construed liberally because of the lack of legal knowledge and experience possessed by the litigant. Therefore, it is argued that having an undisclosed attorney drafting pleadings behind the scenes would unfairly give pro se litigants broader latitude under pleading requirements . . . . This argument fails to take into consideration that pleadings drafted by a layperson compared to those drafted by an attorney are generally readily distinguishable."); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (2007) ("[I]f the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage . . . .").

68. Goldschmidt, *supra* note 18, at 1157 (footnote omitted).

69. *See* NYCLA Comm. on Prof'l Ethics, Op. 742, at 4 (2010).

> [The unfairness] argument seems to imply that judges provide greater deference to pro se litigants when ruling on the merits of an action. While judges may provide greater latitude to a pro se litigant as far as some procedural rules are concerned, a pro se litigant should not enjoy the same extended latitude on the merits of his or her claim. . . . Treating pleadings more leniently does not make it more likely that a pro se litigant will win. It simply makes it more likely that the pro se litigant's cause will be heard on the merits, as opposed to being dismissed at the pleading stage.

Id. at 4–5; *see also* Robbins, *supra* note 18, at 310 ("The liberal reading given to pro se pleadings does not provide such an undue advantage. It merely gets beyond the technical niceties and potential ambiguities and joins the issues for the court's consideration. It does not favor the pro se party in any ultimate decision.").

70. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (2007) (noting that "if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal"); *see also* Goldschmidt, *supra* note 18, at 1157–58 ("[W]here the court

The final argument against ghostwriting returns to its ethicality, with a particular vengeance: the accusation that ghostwriting is dishonest and amounts to misrepresentation. This last contention carries significant ethical weight because misrepresentation is considered professional misconduct.[71]

C. *Misrepresentation*

Dishonesty and misrepresentation are ethical issues, falling squarely within ABA Model Rule 8.4.[72] The ABA Model Rules do not expressly refer to ghostwriting, and as noted earlier, although the ABA issued a formal opinion concluding that ghostwriting is not prohibited by Model Rule 8.4,[73] the ABA's characterization of ghostwriting as being ethically permissible does not bind the courts. Several ethics opinions[74] and a number of courts[75] have concluded that ghostwriting constitutes a form of dishonesty or misrepresentation. From time to time, courts have merged

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sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure."); Robbins, *supra* note 18, at 310–11 ("[A]n artfully drafted ghostwritten pleading will not receive—because it does not need—a benevolent interpretation.").

71. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013) (including misrepresentation in the list of professional misconduct by lawyers); *see also In re* Fengling Liu, 664 F.3d 367, 369 (2d Cir. 2011) ("[A] number of other federal courts have found that attorneys who had ghostwritten briefs or other pleadings for ostensibly pro se litigants had engaged in misconduct.").

72. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .").

73. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (2007).

74. *See* Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994–2 (May 6, 1994) ("If the purportedly pro se litigant is in fact receiving behind-the-scenes help and advice from an attorney, nondisclosure of this fact may amount to conduct involving dishonesty, fraud, deceit or misrepresentation."); Ky. Bar Ass'n, Ethics Op. KBA E-343 (Jan. 1991) ("Counsel should not aid a litigant in a deception that the litigant is not represented, when in fact the litigant is represented behind the scenes.").

75. *See* Barnett v. LeMaster, 12 F. App'x 774, 778–79 (10th Cir. 2001) (finding where the party "entered a pro se appearance as well as filed and signed his appeal pro se, the attorney who drafted the brief" knowingly committed a gross misrepresentation to this court); Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) (ghostwriting of pro se litigant's brief "constitute[d] a misrepresentation to this court by litigant and attorney"); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (ghostwriting of pro se litigants' complaints "constitute[d] a misrepresentation to the Court"); United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("Clearly, the party's representation to the Court that he is pro se is not true when the pleadings are being prepared by the lawyer. A lawyer should not silently acquiesce to such representation."); *see also In re* Mungo, 305 B.R. 762, 769 (Bankr. D.S.C. 2003) ("[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation . . . .").

their discussions of misrepresentation, dishonesty, and special treatment, thus tying the three together.[76] Moreover, the courts' discussions often are conclusory and lack explanation.[77] As one commentator has explained, this conclusory approach is part of a pattern.

> The cases and ethical opinions [critical of ghostwriting on the basis of dishonesty and misrepresentation] all follow the same pattern. They present the laundry list of claimed ethical breaches relating to deception, and from these conclude that an attorney who fails to voluntarily disclose his or her ghostwriting for—or counseling of—a client thereby commits an act of deception. The absence of any evidence of a ghostwriter's intent to deceive has not prevented courts and ethics committees from reaching this conclusion. They merely harken back to the undue advantage argument and cite a litany of ethical duties that make no reference to the drafting or counseling assistance in question. These cases and ethics opinions routinely, without analysis, equate an attorney's . . . assistance to a pro se litigant with intentional deception upon the court and opposing counsel.[78]

The courts critical of ghostwriting are not asserting that the arguments or other content within the documents are deceptive or otherwise improper; the sole complaint is that the pro se litigant received help in drafting the document but signed the document without volunteering that they received assistance.

The accusation of misrepresentation overlooks two definitional prerequisites. Black's Law Dictionary defines "misrepresentation" as "[a] material fact stated as fraudulent, negligent, or innocent misstatement, or an incomplete statement."[79] Thus, a misrepresentation occurs with the

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76. *See, e.g.*, *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 situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court. *See* Johnson [v. Bd. of Cnty. Comm'rs], 868 F. Supp. [1226,] 1231 [(D. Colo. 1994)] (ghost-writing is *ipso facto* lacking in candor and an evasion of the obligations imposed on counsel by statute and rule).

Id.

77. *See, e.g.*, Davis v. Back, No. 3:09-CV-557, 2010 WL 1779982, at *13 (E.D. Va., Apr. 29, 2010) (stating that ghostwriting "is strongly disapproved as unethical and as a deliberate evasion of the responsibilities imposed on attorneys"); *see also* State Bar of Nev. Comm. on Ethics & Prof'l Responsibility, Formal Op. 34 (2009) (concluding that ghostwriting "is an unethical practice" because "[i]t is an act of misrepresentation to the court").

78. Goldschmidt, *supra* note 18, at 1168–69 (footnotes omitted).

79. BLACK'S LAW DICTIONARY, http://web.archive.org/web/20131126043515/http://thelawdictionary.org/misrepresentation-2/ (accessed by searching for Black's Law Dictionary, Online Legal Dictionary 2d ed., in the Internet Archive index) (last visited Apr. 13 2015).

"misstatement" of a "material fact,"[80] both of which are missing in the typical ghostwriting scenario. As discussed above, the fact of assistance is not a material fact,[81] and the need for a "misstatement" overlooks the reality that the signature on a pleading or motion typically indicates who is *representing* the party—the signature on the document has never been a conclusive indication of who *drafted* the document. Many a pleading, brief, or motion is signed by a law firm partner, but was drafted by a first-year associate, a summer associate, or even an extern whose name appears nowhere on the document. A pro se litigant is representing herself in the lawsuit, and thus—like the attorney who receives uncredited assistance from others in drafting court documents—the pro se litigant's signature is appropriate, even if he or she received drafting assistance.

The American Bar Association's formal opinion, in addressing whether ghostwriting constituted a misrepresentation to the court, discussed dishonesty as a general matter, opining that the issue of dishonesty depended on whether the failure to disclose the fact of legal assistance would mislead the court. The ABA concluded that unless the client made an affirmative statement that she had not received legal assistance *and* the client's affirmative statement could be attributed to the ghostwriting lawyer, ghostwriting did not constitute dishonesty so as to violate ABA Model Rule 8.4.[82]

If a lawyer has declined to represent an individual for the full duration (whether due to the lawyer's lack of time, the individual's lack of financial resources, or some other reason), it would be inappropriate to sign the complaint as the individual's attorney because doing so indicates that the lawyer is representing the litigant in the action when, in fact, he or she is not.[83] Under those circumstances, immediately after the document is

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80. *See supra* note 57 and accompanying text.

81. *See supra* notes 58–61 and accompanying text; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (2007).

82. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446, at 3–4 (2007).

> [W]e do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obliged under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c).

Id.

83. *See* Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 1994-2 (May 6, 1994) ("We do not recommend that an attorney sign pleadings, motions or other papers where the attorney and client

filed, it would be imperative for the lawyer to promptly file a notice of withdrawal as counsel to avoid erroneous service of subsequent filings upon the lawyer or other unauthorized communications. And although some courts have required this very sequence of events, this approach should not be necessary—because ghostwriting does not satisfy the definition of misrepresentation.

The final section of this Article addresses both inconsistencies that can result from prohibiting legal ghostwriting and the benefits conferred by ghostwriting.

III. CHARACTERIZING GHOSTWRITING

Returning to the opening paragraph of this Article, I offer two arguments in support of the position that legal ghostwriting is more akin to (acceptable) traditional ghostwriting than to (unacceptable) plagiarism. First, one of the foundational characteristics of plagiarism is the use of another's work without permission. In contrast, in legal ghostwriting the pro se litigant has the drafting attorney's permission to sign and file the document. Second, the legal ghostwriting context is essentially one of contract: the attorney and the pro se litigant have an agreement that the attorney will draft the document, then, with the attorney's permission and full expectation, the litigant will sign that document, thereby adopting, endorsing, and arrogating the document's contents to himself. This is just like any contract: typically the lawyer drafts the contract but is not the signatory.[84] It is the client who signs the contract, thereby claiming the terms as his or her own.

Of course, the typical lease agreement or other contract is not a court

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have agreed that the attorney will not be representing the client in litigation. The attorney's signature in such a case would misleadingly indicate that the attorney would be representing the client in the litigation."). The promulgation of ABA Model Rule 1.2, and its subsequent adoption in most states, authorizes lawyers to agree to representations of a limited scope, provided that "the limitation is reasonable under the circumstances and the client gives informed consent." MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013). Taken together with lawyers' professional responsibility to provide legal services to those unable to pay (Rule 6.1) a lawyer's agreement to assist a pro se litigant by drafting one or more documents is authorized by the Model Rules—and the lawyer's work, despite being limited in scope, must still be competent. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2013).

84. *See* Sisson v. Jankowski, 809 A.2d 1265, 1266 (N.H. 2002) (stating that the attorney prepared documents and sent them to the client for the client's "review and execution"); Adams v. Dodson, 106 A.2d 501, 501 (D.C. 1954) (noting that the lawyer "prepared" a document "which the client signed and the lawyer filed"); *see also* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 36:7 (2014 ed.) ("The lawyer prepared estate planning documents, which the client signed.").

document. Although this Article has already addressed potential arguments based on the ethical rules concerning candor and misrepresentation, there is one more potential argument relevant to federal court filings: Federal Rule of Civil Procedure 11. Rule 11 requires that all court filings be signed, and one's signature on the filed document constitutes a certification of the good faith of the filing's purpose and content.[85] Specifically, Rule 11(a) requires the signing of "[e]very pleading, written motion, or other paper . . . by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented."[86] Thus, on its face, Rule 11 anticipates—and authorizes—the signing of court papers by an unrepresented party, and the signing of the papers by the pro se litigant satisfies the rule. Accordingly, the number of federal courts concluding that ghostwriting violates Rule 11[87] is surprising, especially in light of some courts' concession that ghostwriting does not violate the rule's language.[88] Instead, courts have

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85. FED. R. CIV. P. 11.

> (a) Signature. 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. The paper must state the signer's address, e-mail address, and telephone number. . . .
> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—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, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Id.

86. *Id.* R. 11(a).

87. *See* Robbins, *supra* note 18, at 285 & n.73 ("The federal courts have almost universally condemned ghostwriting."); Tanase, *supra* note 27, at 674 ("[N]early all of the federal courts have treated the would-be legal ghostwriter as *persona non grata*.").

88. *See* Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078–79 (E.D. Va. 1997) (conceding that an attorney's interpretation of Rule 11 permitting ghostwriting when retained by a litigant for the discreet purpose of drafting a complaint did not violate the plain language of Rule 11); Delso v. Trs. for the Ret. Plan for the Hourly Emp. of Merck & Co., No. 04-3009, 2007 WL 766349, at *17 (D.N.J. Mar. 6, 2007) (holding that ghostwriting is not a per se violation of Rule 11, even if it does violate the spirit of the rule).

asserted that the practice violates the spirit of the rule.[89]

Moreover, the legal assistance provided by a ghostwriting attorney does not come within Rule 11's certification language. Certification under Rule 11 results from "presenting" a paper to the court, and Rule 11(b) defines "presenting" as "signing, filing, submitting, or later advocating."[90] "Drafting" is not listed, nor would one expect it to appear on the list. Typically an attorney whose signature appears on a pleading is the lawyer who is responsible for the client's matter. Virtually every document filed in a court has had input from individuals whose names do not appear on the document. For example, a pro se litigant may not have had the assistance of a licensed attorney, but may have had help from a non-attorney friend, relative, neighbor, or self-help book—and even a pro se litigant who is an attorney likely received assistance from an associate, paralegal, or intern. Another familiar example is the common practice whereby a lawyer drafts an affidavit for her client's signature. Such affidavits commonly are filed with the court, thus providing an apt analogy because although such affidavits often are drafted by an attorney, they are not signed by that attorney.

Federal courts similarly have asserted that, by failing to sign the court documents that they drafted, ghostwriting permits lawyers to avoid responsibility for the integrity of those documents and evade potential Rule 11 sanctions.[91] Again, however, Rule 11 itself undercuts this contention, because the rule authorizes the imposition of sanctions on

89. *See, e.g.*, *Delso*, 2007 WL 766349, at *16 (ghostwriting violates "the spirit" of Rule 11).

90. FED. R. CIV. P. 11(b).

91. *See* Duran v. Carris, 238 F.3d 1268, 1271–72 (10th Cir. 2001) (finding that "Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case . . . inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel," in part by evading his Rule 11 obligations); Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1978) ("What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by [Rule 11], but which exists in all cases, criminal as well as civil, or representing to the court that there is good ground to support the assertions made."); Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 886 (D. Kan. 1997) ("[G]hostwriting has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11 . . . ."); *Laremont-Lopez*, 968 F. Supp. at 1079 ("Who should the Court sanction if claims in the complaint prove to be legally or factually frivolous, or filed for an improper purpose? . . . [A]lthough the plaintiffs have signed the complaints, they may assert immunity from sanctions because they retained counsel to draft the complaints."); United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("[G]host writing arrangements interfere with the Court's ability to superintend the conduct of counsel and parties during the litigation."); Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994) (describing ghostwriting as a "deliberate evasion of the responsibilities imposed on counsel by Rule 11"), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

unrepresented parties as well as lawyers[92]—and thus a court may sanction a pro se litigant who signed a document that violates Rule 11.[93]

A pro se litigant is simply defined as one who is representing him (or her) self.[94] But pro se litigants are not all created equal. A pro se litigant may be an individual licensed to practice law in that (or another) jurisdiction; an individual who has graduated from law school but who has not yet been admitted to practice; an individual who has completed a year or two of law school; an individual who has never attended law school but has years of experience as a paralegal; an individual with no formal legal education or legal experience but has listened to her lawyer-parents discuss legal matters her entire life; or an individual who has never had any exposure to the law. A pro se litigant may be a college graduate—or have only a sixth-grade education; may be middle-class—or homeless; may be a quick study with strong native intelligence—or have a disability that impairs her intellectual ability or understanding. And, of course, other considerations abound, such as pro se litigants who cannot speak, write, or understand English. Accordingly, although possessing the common denominator of representing themselves in court proceedings, the range of abilities among pro se litigants is wide-ranging, and the caliber of pro se documents correspondingly varies widely.

Moreover, condemning legal ghostwriting is shortsighted. The two primary beneficiaries of legal ghostwriting are the courts and those pro se litigants who are laypersons.[95] Documents drafted by a licensed attorney,

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92. *See* FED. R. CIV. P. 11(c)(1) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.") The rule imposes some limitations on the imposition of monetary sanctions, but the limitation prevents a court from imposing such a sanction against a represented party under some circumstances; there is no such limitation with respect to an unrepresented party. *Id.* R. 11(c)(5).

93. *See generally* L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 502 (Nov. 4, 1999) (listing requirements for ghostwritten court filings). The opinion states:

> The filing of "ghost drafted" pleadings or documents does not deprive a judge of the ability to control the proceedings before the court or to hold a party responsible for frivolous, misleading or deceit[ful] in those pleadings. The pro per litigant, not an attorney, makes representations to the court by filing a pleading or document. California Code of Civil Procedure, § 128.7 requires that every pleading, petition, written notice of motion or other similar paper must be signed by one attorney of record or by the pro per party and that by presenting a document to the court, the attorney or the party is certifying that conditions in subdivision (b) are met.

Id.

94. BLACK'S LAW DICTIONARY 1418 (10th ed. 2014) (defining "pro se" as "[f]or oneself; on one's own behalf; without a lawyer").

95. *See* ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS: A WHITE PAPER 6 (Nov. 2009),

in contrast to those drafted by a layperson, are more likely to be legally coherent, are more likely to conform to local court rules with respect to form, and are more likely to conform to judicial expectations with respect to content—all of which lessens burdens and frustrations for court personnel.[96] A layperson's ability to receive the limited assistance of a licensed attorney in the drafting of one or more documents similarly lessens the burdens and frustrations for pro se litigants, who must otherwise attempt to educate themselves in both the procedure and substance of the law without the benefit of years of legal education, training, and experience.[97]

CONCLUSION

It appears that the criticisms of legal ghostwriting have been overstated. Ghostwriting does not violate an attorney's ethical duty of candor because the fact of receiving undisclosed legal assistance does not constitute a material fact. Arguments that ghostwriting confers unfair special treatment do not withstand scrutiny because courts accord deference to documents filed by pro se litigants only when inartfully drafted and only in the context of whether the lawsuit should be permitted to continue, not in the context of whether the pro se litigant should prevail in the action. Accusations of ghostwriting as constituting dishonesty or misrepresentation similarly fall short. A ghostwritten document does not constitute a misrepresentation because the lack of any reference to the authoring attorney is neither an omission of a material fact nor a

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available at http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf ("The added input from lawyers not only assists the litigants, but the courts as well. The better the litigant is prepared, the more efficiently the court operates.").

96. *See, e.g.*, 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, 1547–50 (2005) (noting the burdens that pro se litigants cause to the courts due to the extra time that court personnel must invest in explaining procedural requirements and in interpreting pro se litigants' documents).

97. *See* N.C. State Bar Ethics Comm., 2008 Formal Ethics Op. 3 (Jan. 23, 2009), *available at* http://www.ncbar.gov/ethics/printopinion.asp?id=792.

> [I]t is ethical for a legal services lawyer to draft a complaint for a pro se litigant's signature, explain how to file the complaint, and review courtroom procedure, including advice about strategy, tactics, or litigation techniques, without listing herself as the attorney of record. There should be no distinction between what a legal services lawyer and a lawyer in private practice may ethically do behind the scene to assist those who cannot afford full representation. For the public policy reasons set forth above . . . a lawyer may assist a pro se litigant without disclosing his assistance to the court and without ensuring that the client discloses the assistance to the court unless the lawyer is compelled to make the disclosure by law or by a court order.

Id.

misstatement—in fact, the lack of any reference to the authoring attorney within court-filed documents is a regular occurrence in situations involving attorney-represented litigants. Indeed, legal ghostwriting benefits both the pro se litigant and the court by enabling the litigant to conform to procedures and legal writing conventions, thereby increasing compliance and comprehension which, in turn, assures that the court will understand the legal arguments, correspondingly reducing frustrations associated with pro se litigation. As urged by the Chief Justices of the California and New Hampshire Supreme Courts, "[F]or those whose only option is to go it alone, at least some limited, affordable time with a lawyer is a valuable option we should all encourage."[98]

98. Broderick & George, *supra* note 8; *see* TUOHEY ET AL., *supra* note 6, at 12 ("We believe that in the great majority of situations some legal help is better than none. An informed *pro se* litigant is more capable than an uninformed one. A partially-represented litigant is more effective than a wholly unrepresented litigant.").