

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

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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

MICHAEL W. LOUDENSLAGER*

More and more pro se litigants are making their way to the courthouse. Pro se litigants have become common, especially in state housing and family law courts and in federal bankruptcy court. In response, a growing number of attorneys have started providing unbundled or limited scope legal services to these litigants. This involves a client hiring an attorney to perform a discrete task in a lawsuit and nothing else. One particular form of discrete task legal services involves attorney “ghostwriting.” In such arrangements, an attorney drafts pleadings or other court documents for pro se litigants. However, the legal assistance that the client received goes unacknowledged, and the attorney remains unnamed on the documents when filed with the court. The pro se litigant then goes on to conduct the litigation on his or her own.

However, court opinions resoundingly have condemned this conduct. Meanwhile, ethics opinions dealing with the issue largely have instructed attorneys to disclose at least the nature of the assistance provided to the litigant, if not the attorney’s actual identity. Nevertheless, the ethics opinions in some jurisdictions have approved of this activity, and some commentators continue to advocate for attorney ghostwriting.

Even so, courts and the legal bar should not sacrifice attorneys’ ethical duties in a desperate attempt to deal with the rising tide of pro se litigants by formally acknowledging and acquiescing to undisclosed attorney ghostwriting of court documents for pro se litigants. Instead, this Article concludes that the duty that an attorney owes to a court to be truthful and candid, to avoid dishonest behavior generally, and to certify the legitimacy of the facts and legal arguments contained in court documents ultimately prohibits ghostwriting. Therefore, courts should require an attorney to acknowledge the drafting assistance that he or she has provided to the client and to reveal the attorney’s identity on the pro se litigant’s court documents concerned.

At the same time, such participation should qualify only as a limited appearance, and express rules should exist affirming this. Otherwise, attorneys will be reluctant to provide limited legal services to pro se litigants due to the fear that a court will determine such activity constitutes making

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a general appearance in the litigation and will keep attorneys “on the hook” for representing the client throughout the entire lawsuit. Only by enacting both of these reforms can jurisdictions hold attorneys to the important duties owed to both the court system and third parties while simultaneously encouraging attorneys to provide limited legal services to pro se litigants.

TABLE OF CONTENTS

I.	INTRODUCTION	104
II.	GROWTH OF PRO SE LITIGATION	107
III.	ETHICS RULES THAT GHOSTWRITING IMPLICATES	109
	A. <i>Model Rule 3.3: “Candor Toward the Tribunal”</i>	109
	B. <i>Rules Generally Proscribing Involvement in Fraud on the Part of Attorneys</i>	110
	C. <i>Federal Rule of Civil Procedure 11(b)</i>	111
IV.	LEGAL AUTHORITY DIRECTLY ADDRESSING ATTORNEY GHOSTWRITING OF COURT DOCUMENTS	112
	A. <i>Condemnation by the Courts</i>	113
	1. Undisclosed Ghostwriting Involves a Misrepresentation to the Court and Provides the Nominal Pro Se Litigant with an Unfair Advantage	113
	2. Ghostwriting Violates Federal Rule of Civil Procedure 11 ...	119
	3. Ghostwriting Frustrates Efficient Court Administration	120
	4. Ghostwriting Violates Court Appearance Rules	121
	B. <i>The “Mixed Bag” of Approaches by the American Bar Association and State and Local Ethics Panels</i>	122
	1. The Old ABA Stance Prohibiting Attorney Ghostwriting	122
	2. The New ABA Position Allowing Attorney Ghostwriting	124
	3. State and Local Ethics Panels	125
	C. <i>Arguments by Ghostwriting Proponents for Allowing Attorney Ghostwriting Without Disclosure</i>	134
V.	RECOMMENDATION TO REQUIRE DISCLOSURE OF GHOSTWRITING AND CONSIDER GHOSTWRITING TO CONSTITUTE A LIMITED APPEARANCE BY AN ATTORNEY	138
VI.	CONCLUSION	144

I. INTRODUCTION

More and more pro se litigants are making their way to the courthouse.¹ Readers envisioning hordes of vexatious, unrepresented parties suing everybody from executive department officials to legislators to judges to

1. See *infra* Part II (discussing growth of pro se litigation).

opposing attorneys (to the mothers of each of these individuals) for a perceived unjust result in prior litigation or some other perceived wrong should reconsider. For various reasons,² pro se litigants dealing with ordinary, everyday legal issues have become common in state housing and family law courts and in federal bankruptcy court, among other venues.³ In response, a growing number of attorneys have started providing unbundled or limited scope legal services.⁴ This involves a client hiring an attorney to perform a discrete task in a lawsuit, but otherwise the client conducts the litigation on his or her own.⁵ One particular form of discrete task legal

2. A debate exists concerning whether the rise in pro se litigants has arisen simply due to individuals of low and moderate income being unable to afford full-service legal representation, *see infra* notes 19–21 and accompanying text (discussing the unmet demand for legal services from those of low to moderate means), or whether pro se litigants more predominantly go unrepresented due to personal preference and despite being able to afford full legal representation, *see infra* notes 26–28 and accompanying text (discussing reasons other than finances that some litigants may choose to proceed unrepresented in court proceedings).

3. *See infra* notes 25–27 and accompanying text.

4. Margaret Graham Tebo, *Scary Parts of Ghostwriting*, A.B.A. J., Aug. 2007, at 16.

5. *See* Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (2006) (“Unbundled legal services, also described as ‘discrete task representation’ or ‘limited scope legal assistance,’ is a practice in which the lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full-service representation. Simply put, the lawyers perform[] only the agreed upon tasks, rather than the whole ‘bundle,’ and the clients perform the remaining tasks on their own.”); Tebo, *supra* note 4, at 16 (describing “unbundling” as “lawyers agree[ing] to be responsible for only carefully delineated portions of a client’s case”); John C. Rothermich, Note, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2691 (1999) (“According to the unbundled model, lawyers provide a prospective client with a choice of assistance from a list of discrete legal tasks, instead of the traditional full-service package.”).

The ABA Standing Committee on the Delivery of Legal Services provided the following medical services analogy to help explain potential clients’ “continuum of need” for unbundled legal services:

A person with a headache is not encouraged to begin his or her response to that pain with an appointment with a brain surgeon. Instead, people will use self-help methods to become educated on the range of services and products available for pain relief. The first professional consulted is more likely to be a pharmacist, for a recommendation for over-the-counter medication. When the problem persists, people may then go to their personal physician. In a few cases, that doctor will refer the patient to a specialist. Similarly, in a complex society with pervasive legal implications to everyday transactions, the continuum of legal services suggests that most legal matters are handled through self-help. Occasionally, people have a need for legal assistance, and as matters move through the continuum, some will have the need for the representation of a lawyer.

ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., REPORT ON THE PUBLIC HEARING ON ACCESS TO JUSTICE 4 (2003), *available at* <http://www.abanet.org/legalservices/downloads/delivery/reportpublichearingonaccesstojustice.pdf>

services involves attorney “ghostwriting.” In such arrangements, an attorney drafts pleadings or other court documents for pro se litigants, but the legal assistance that the client receives goes unacknowledged and the attorney remains unnamed on the documents themselves when the pro se litigant files them with the court.⁶ The pro se litigant then goes on to conduct the litigation or argue the motion concerned on his or her own.

However, court opinions have resoundingly condemned ghostwriting.⁷ Meanwhile, ethics opinions dealing with the issue largely have instructed attorneys to disclose at least the nature of the assistance provided to the litigant, if not the attorney’s actual identity.⁸ Nevertheless, the ethics opinions in some jurisdictions have approved of this activity, and some commentators continue to advocate for courts to allow attorney ghostwriting.⁹

Even so, courts should not sacrifice attorneys’ ethical duties out of desperation in order to deal with the rising tide of pro se litigants and acquiesce in undisclosed attorney ghostwriting of court documents for pro se litigants. Instead, this Article concludes the duty that an attorney owes to a court to be truthful and candid,¹⁰ to avoid dishonest behavior generally,¹¹ and to certify the legitimacy of the facts and legal arguments contained in court documents,¹² implicitly prohibits this practice. However, courts should be more explicit in requiring attorneys to acknowledge the drafting assistance that they have provided to clients and to reveal the attorney’s identity on the pro se litigant’s court documents concerned.¹³ At the same time, courts should promulgate rules that allow such participation to qualify as only a limited appearance, or no appearance at all, and refrain from compelling such attorneys to provide services beyond those the client originally contracted from the attorney.¹⁴ Otherwise, attorneys will be reluctant to provide limited legal services to litigants otherwise proceeding pro se. By enacting both of

[hereinafter ABA HEARING REPORT].

6. See Klempner, *supra* note 5, at 658 (“The practice whereby attorneys draft court documents for clients who represent themselves in court, where the court papers do not reveal that an attorney assisted in their preparation, is known as ‘ghostwriting.’”); Tebo, *supra* note 4, at 16 (describing “ghostwriting” as where “a lawyer drafts court papers for a client but does not enter an official appearance in the case”); Rothermich, *supra* note 5, at 2692 (“One particular form of limited legal assistance, known as ‘ghostwriting,’ consists of the drafting of pleadings and other court documents by attorneys for clients who go on to represent themselves in court pro se. . . . The documents are then filed by the litigant herself, and the attorney has no further involvement with the case.”).

7. See *infra* Part IV.A.

8. See *infra* Part IV.B.3.

9. See *infra* Part IV.B.3.c.

10. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2002).

11. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2002).

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

13. See *infra* Part V.

14. See *infra* Part V.

these reforms, courts can hold attorneys to the important duties owed to the court system while simultaneously encouraging attorneys to provide limited legal services to pro se litigants.

In reaching this conclusion, Part II of this Article examines the relatively recent growth in the number of pro se litigants and discusses some of the possible causes of this phenomenon. Part III presents the main ethics rules that attorney ghostwriting potentially violates. Part IV considers the reaction of the courts, various ethics committees, and commentators to attorney ghostwriting of pro se litigants' court documents. Part V then presents recommendations for dealing with attorney ghostwriting and the policy rationales supporting these recommendations.

II. GROWTH OF PRO SE LITIGATION

Courts, especially those dealing with housing, family, and bankruptcy matters, have experienced significant growth in the number of pro se litigants appearing before them in recent years.¹⁵ In fact, the majority of litigants in these types of cases now proceed pro se without the use of an attorney.¹⁶ Moreover, as many as eighty percent of these matters involve pro se litigants in some jurisdictions.¹⁷ An American Bar Association (ABA) task force has noted that “[n]ationally, in three or four out of every five [family law] cases, one of the two parties is unrepresented” and that “both parties are unrepresented in two or three out of every five cases.”¹⁸

One explanation for this increase in parties proceeding pro se is that people of low to middle income levels simply cannot afford an attorney to represent them.¹⁹ For example, two-thirds of respondents to one survey

15. DEBORAH L. RHODE, ACCESS TO JUSTICE 14 (2004); *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*, 2003 A.B.A. SEC. LITIG. 8 [hereinafter *Modest Means Task Force*].

16. RHODE, *supra* note 15, at 14; *see also* 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, 1539 (2005) (“[I]n some state courts—those that handle traffic, landlord/tenant, and child support or other domestic relations issues, the number of cases in which at least one side is pro se far outnumber those in which counsel represent both parties.”); Brenda Star Adams, Note, “*Unbundled Legal Services*”: A Solution to the Problems Caused by Pro Se Litigation in Massachusetts’s Civil Courts, 40 NEW ENG. L. REV. 303, 314 (2005) (“A 1997 study of pro se litigation in Probate and Family Court in twelve Massachusetts counties found that more than two-thirds of all cases included at least one pro se litigant.”).

17. RHODE, *supra* note 15, at 14; *see also* Swank, *supra* note 16, at 1539 (“In many of these courts, eighty to ninety percent of cases involve at least one pro se litigant.”); Adams, *supra* note 16, at 314 (noting a “1997 study of the Northeast Housing Court found that seventy-nine percent of litigants appeared without counsel”).

18. *Modest Means Task Force*, *supra* note 15, at 8.

19. *See* ABA HEARING REPORT, *supra* note 5, at 4 (“Substantial evidence indicates the existence of a latent marketplace for personal civil legal services to those of low and moderate

“agree[d] that it [was] ‘not affordable to bring a case to court.’”²⁰ According to one survey conducted in Maryland, three-quarters of people of middle income do not contact an attorney when they have a legal problem.²¹ Furthermore, this lack of representation likely increases litigants’ dissatisfaction with the legal system. One survey indicated that up to seventy-five percent of people who had a legal need but did not retain an attorney were dissatisfied with the outcome in their matter.²² Another survey indicated that only about one-half of people of middle income were happy with the result when proceeding pro se.²³ This contrasts with the satisfaction that people who obtain legal representation experience with the judicial system. One survey’s results indicated that two-thirds of people who retained counsel to deal with their legal problems were satisfied with the outcome.²⁴

One commentator, though, has expressed reasons for the growth in pro se litigants other than the lack of affordable legal services. Drew Swank has asserted that the growth in pro se litigants exemplifies predominantly a preference for “doing-it-yourself” that results from several factors, including a distrust of attorneys and the legal system, an “increased sense of consumerism,” and an increase in availability of forms and other assistance for pro se litigants.²⁵ Swank even contends that some people may proceed pro se “as a trial strategy designed to gain either sympathy or a procedural

incomes.”); WILLIAM HORNSBY, IMPROVING THE DELIVERY OF AFFORDABLE LEGAL SERVICES THROUGH THE INTERNET: A BLUEPRINT FOR THE SHIFT TO A DIGITAL PARADIGM 3 (1999), available at <http://www.unbundledlaw.org/program/11%20-%20Lawyering%20over%20web%20-%20hornsby.pdf> (“[Fifty-seven] percent of pro se litigants [in Maryland] proceeded pro se because they could not afford a lawyer.”); Tebo, *supra* note 4, at 17 (quoting James McCauley, ethics counsel for the Virginia State Bar, as stating that “the people most likely to seek unbundled services tend to do so solely for financial reasons”); Adams, *supra* note 16, at 304 (“[T]he majority of pro se litigants [represent themselves] because they cannot afford a lawyer.”); Cristina L. Underwood, Comment, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 442 (2004) (“Many low- and moderate-income households simply cannot afford the cost of personal legal services.”); see also Rothermich, *supra* note 5, at 2688 (“[I]t is estimated that legal services organizations were forced to deny over half of their eligible clients any assistance due to inadequate resources.”).

20. RHODE, *supra* note 15, at 80.

21. *Id.* at 79; see also Rothermich, *supra* note 5, at 2688 (“[L]ow income households’ legal problems involved the judicial system only twenty-nine percent of the time” and “[f]or legal problems of households defined as moderate-income, and thus categorically ineligible for most free legal services, the judicial system was involved only thirty-nine percent of the time.”).

22. *Modest Means Task Force*, *supra* note 15, at 14 n.30 (citing the results of an Oregon survey).

23. RHODE, *supra* note 15, at 80.

24. *Id.*

25. Swank, *supra* note 16, at 1574–75 (listing twelve factors leading to the such growth); see also Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1145 (2002) (“[T]he growth of pro se litigation . . . can be attributed to the high cost of litigation, anti-lawyer sentiment, and the advent of do-it-yourself law kits, books, and web sites.”).

advantage over represented parties.”²⁶ Swank further notes that “[u]ltimately it may be the simplicity of the cases and the nature of the jurisdiction [in terms of the availability of certain types of non-traditional legal assistance for the type of matter concerned], more than the characteristics of the litigants, that determines whether individuals represent[] themselves or not.”²⁷

Regardless of the true cause of the rise in pro se litigants in our courts, be it lack of affordability of legal services or a conscious choice by litigants who can afford legal representation, this phenomenon is extensive enough to merit a response from attorneys and courts. The rest of this Article deals with the appropriateness of one reaction to this phenomenon—attorney ghostwriting of court documents—and provides some recommendations for dealing with this activity.

III. ETHICS RULES THAT GHOSTWRITING IMPLICATES

The current version of Model Rule 1.2(c) expressly allows for the provision of limited scope legal services as long as “the limitation is reasonable under the circumstances and the client gives informed consent.”²⁸ However, Rule 1.2(c) does not address attorney ghostwriting. Several other ethics rules are potentially applicable to attorney ghostwriting of nominal pro se litigants’ court documents. While none expressly forbid such conduct, these rules can serve as the basis for concluding that attorney ghostwriting of documents without disclosure to the court is prohibited ethically.

A. Model Rule 3.3: “Candor Toward the Tribunal”

One of the most applicable rules is Model Rule 3.3, entitled “Candor Toward the Tribunal.”²⁹ Section (a) of this rule states that “[a] lawyer shall not knowingly: (1) 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.”³⁰ Section (b) of Rule 3.3 goes on to state that an attorney representing a client in “an adjudicative proceeding . . . 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.”³¹ The rule goes on to state that these duties “apply even if compliance requires disclosure of

26. Swank, *supra* note 16, at 1575.

27. *Id.* at 1575–76.

28. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002).

29. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2002).

30. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2002).

31. MODEL RULES OF PROF’L CONDUCT R. 3.3(b) (2002).

information otherwise protected by Rule 1.6,³² which deals with protection of confidential information. Furthermore, a comment to Rule 3.3 states that “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”³³

Another comment points out that the purpose of the rule is for attorneys “to avoid conduct that undermines the integrity of the adjudicative process.”³⁴ Thus, the key to whether attorney ghostwriting of court documents for nominal pro se litigants without disclosure violates this rule appears to be whether such conduct “undermines the integrity of the adjudicative process.”³⁵ However, in discussing attorneys’ “obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process,” the comment discusses activity “such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.”³⁶ The mentioned activity seems more severe than ghostwriting of documents for pro se litigants, but the comment does not provide an exhaustive list of conduct that would affect the integrity of the judicial process.

B. Rules Generally Proscribing Involvement in Fraud on the Part of Attorneys

Although Model Rule 3.3 directly addresses representations made to the court and protecting the integrity of the judicial system, several rules more generally proscribe an attorney from participating in fraudulent activity. Model Rule 8.4, entitled “Misconduct,” states that “[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”³⁷ Similarly, Model Rule 4.1, entitled “Truthfulness in Statements to Others,” provides:

32. MODEL RULES OF PROF’L CONDUCT R. 3.3(c) (2002). The nearest Model Code of Professional Responsibility equivalent was DR 7-102(A)(5), entitled “Representing a Client Within the Bounds of Law,” which stated, “In his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact.” MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(5) (1980).

33. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 3 (2002).

34. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 2 (2002).

35. *Id.*

36. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 12 (2002). The comment is consistent with the standard definition of “fraud on the court,” which is “[a] scheme to interfere with judicial machinery performing [the] task of impartial adjudication” and which usually requires egregious conduct, “such as bribery of a judge or jury,” that “undermines the integrity of the judicial process.” BLACK’S LAW DICTIONARY 661 (6th ed. 1990).

37. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2002). This language is very similar to DR

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.³⁸

Moreover, Model Rule 1.2(d) prohibits an attorney from “counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent.”³⁹ A comment to Rule 1.2 provides that a “lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed.”⁴⁰ Furthermore, a comment to Model Rule 3.3 notes that the obligation set out in Rule 1.2(d) “applies in litigation.”⁴¹ Finally, Model Rule 1.6, dealing with an attorney’s duty of confidentiality, allows disclosure of confidential information in order to prevent or remedy client fraud related to the attorney’s provision of legal services to that client.⁴² Therefore, not only is an attorney prohibited from making misrepresentations to the court, but attorneys are prohibited generally from acting fraudulently or from assisting others to act in this manner. Additionally, an attorney can disclose confidential information in order to prevent, mitigate, or remedy instances of fraud that are imminent or have in fact occurred.

C. Federal Rule of Civil Procedure 11(b)

Beyond the ethics rules that govern attorney conduct, Federal Rule of Civil Procedure 11(b) may be applicable to attorneys who ghostwrite documents for pro se litigants without disclosure. Rule 11(b) states that “[b]y

1-102(A)(4) of the Model Code of Professional Responsibility, also entitled “Misconduct,” which stated, “(A) A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(4) (1980).

38. MODEL RULES OF PROF’L CONDUCT R. 4.1 (2002).

39. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2002).

40. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) cmt. 10 (2002).

41. MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 3 (2002).

42. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2), (3) (2003) (“A lawyer may reveal” confidential client information “to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services” or “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”).

presenting to the court a pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the [attorney's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that the document is not "being presented for any improper purpose," that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for . . . establishing new law" and that "the factual contentions have evidentiary support."⁴³ As set out below, several courts have held that attorneys who ghostwrite court documents for nominal pro se litigants improperly avoid this obligation under Federal Rule of Civil Procedure 11(b) to certify that a reasonable basis exists for both the facts and legal arguments presented in the document concerned.⁴⁴

IV. LEGAL AUTHORITY DIRECTLY ADDRESSING ATTORNEY GHOSTWRITING OF COURT DOCUMENTS

Although the various ethics rules that govern attorney conduct do not directly address the propriety of attorney ghostwriting of documents for a nominal pro se litigant, several cases and state and local ethics opinions have explicitly dealt with the issue. Courts have overwhelmingly condemned attorney ghostwriting of court documents.⁴⁵ The ABA, though, recently changed its official stance on the issue.⁴⁶ While an earlier ABA ethics opinion required disclosure,⁴⁷ a recent opinion concluded that attorney ghostwriting of documents for litigants holding themselves out to the court as pro se is appropriate and does not require disclosure.⁴⁸ Nevertheless, the majority of the state and local ethics committees that have addressed the issue have called for disclosure to the court when attorneys draft pleadings or briefs for pro se parties.⁴⁹ However, there is some disagreement as to the extent of the disclosure that needs to be made, with some ethics committees requiring that the attorney only disclose that ghostwriting has occurred, while others additionally require that the attorney disclose his or her identity to the court.⁵⁰ There also is some disagreement as to how extensively the attorney must aid the pro se litigant before disclosure of any kind needs to be made.⁵¹ Despite

43. FED. R. CIV. P. 11(b). This Article refers to the version of Rule 11 in effect prior to December 1, 2007.

44. *See infra* Part IV.A.2 (discussing case law applying certifications of Rule 11 to attorney ghostwriting).

45. *See infra* Part IV.A.

46. *See infra* Part IV.B.1–2.

47. *See infra* Part IV.B.1.

48. *See infra* Part IV.B.2.

49. *See infra* Part IV.B.3.

50. *See infra* Part IV.B.3.a–b.

51. *See infra* notes 123–24, 136–38, 141–42 and accompanying text.

the large amount of authority concluding that ethics rules prohibit attorney ghostwriting, some commentators continue to advocate against requiring any type of attorney disclosure of such activity and raise novel arguments supporting this stance.⁵²

A. *Condemnation by the Courts*

The overwhelming majority of courts to address the issue have prohibited attorneys from engaging in the undisclosed ghostwriting of court documents for otherwise pro se litigants.⁵³ Courts have used four main policy rationales for coming to this conclusion, which are set out below.

1. Undisclosed Ghostwriting Involves a Misrepresentation to the Court and Provides the Nominal Pro Se Litigant with an Unfair Advantage

Several courts have held that attorneys who ghostwrite court documents for pro se litigants without disclosing this conduct to the court make a misrepresentation to the court⁵⁴ and violate applicable attorney ethics rules.⁵⁵

52. See *infra* Part IV.C.

53. See *infra* Part IV.A.1–4.

54. *Barnett v. LeMaster*, 12 F. 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 committed a gross misrepresentation to this court”); *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001) (determining that attorney ghostwriting of pro se litigant’s appellate 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) (finding that attorney 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.”); *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 that violates an attorney’s duty and professional responsibility to provide the utmost candor toward the Court.”); see also *Johnson v. Bd. of County 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*, 85 F.3d 489 (10th Cir. 1995); *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (finding that attorney ghostwriting of pro se litigant’s court documents violates the attorney’s “duty of honesty and candor to the court”).

55. *Anderson v. Duke Energy Corp.*, No. 3:06cv399, 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.”); *Delso v. Trs. for Retirement Plan for Hourly Employees of Merck & Co.*, No. 04-3009, 2007 WL 766349, at *17 (D.N.J. Mar. 6, 2007) (finding that ghostwriting attorney’s “failure to affirmatively advise the Court of his informal assistance of [the nominal pro se litigant], and [that litigant’s] subsequent submission to the Court under her own signature was not emblematic of the candid honesty contemplated by [New Jersey’s] RPC 3.3”); *Ostevoll v. Ostevoll*, No. C-1-99-961, 2000 WL 1611123, at *9 (S.D. Ohio Aug. 16, 2000) (“Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical

The main rationale for this conclusion is that this conduct provides pro se litigants with an unfair advantage against their opponent because courts are more forgiving when interpreting pro se parties' court documents and when applying its procedural rules to pro se litigants.⁵⁶

It is well established that a court must construe pro se litigants' documents more liberally than it would otherwise if legal counsel for a party had drafted the documents.⁵⁷ This rule applies not only during the initial stages of the

and substantive rules of the Court."); *Eleven Vehicles*, 966 F. Supp. at 367 ("[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."); *Johnson*, 868 F. Supp. at 1232 (finding that attorney ghostwriting "will not be countenanced because it is contrary to Colorado Rule of Professional Conduct 1.2(d) which provides '[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent'"); *In re Mungo*, 305 B.R. at 770 ("The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of the 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.").

56. See *Delso*, 2007 WL 766349, at *13 ("Simply stated, courts often act as referees charged with ensuring a fair fight. This becomes an obvious problem when the Court is giving extra latitude to a purported pro se litigant who is receiving secret professional help."); *Laremont-Lopez*, 968 F. Supp. at 1078 ("When, however, complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se . . . [t]he 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, [and] interferes with the efficient administration of justice . . ."); *Johnson*, 868 F. Supp. at 1231 (stating that the pro se litigant'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" and that "[t]he entire process would be skewed to the distinct disadvantage of the nonoffending party"); *In re Mungo*, 305 B.R. at 769 ("[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party."); *In re Merriam*, 250 B.R. at 733 ("When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. . . . [T]he situation 'places the opposing party at an unfair disadvantage' and 'interferes with the efficient administration of justice.'"); see also *Klein v. H. N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702 (S.D.N.Y. 1971) ("[E]njoying the assistance of a lawyer or lawyers who have not formally appeared in this case . . . is grossly unfair to both this court and the opposing lawyers and should not be countenanced."); *Rothermich*, *supra* note 5, at 2697 ("[I]f courts mistakenly believe that the ghostwritten pleading was drafted without legal assistance, they might apply an unwarranted degree of leniency to a pleading that was actually drafted with the assistance of counsel.").

57. See *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) ("An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims."); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("The handwritten pro se document is to be liberally construed."); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (stating that the Supreme Court holds a pro se litigant's complaint "to less stringent standards than formal pleadings drafted by lawyers"); see also *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) ("Because Burgos is a pro se litigant, we read his supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest."); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) ("In civil rights cases where the plaintiff appears pro se, the court must construe the pleadings liberally and

litigation pursuant to a motion to dismiss, but throughout the course of the lawsuit, including the summary judgment stage.⁵⁸ Furthermore, courts will provide pro se litigants with more leeway in meeting procedural deadlines⁵⁹

must afford plaintiff the benefit of any doubt.”); *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Cir. 1984) (“*Pro se* litigants are commonly required to comply with standards less stringent than those applied to expertly trained members of the legal profession.”).

“[T]his rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, there is a limit to the amount of leeway that courts will provide to the documents of pro se litigants. For example, courts are not supposed to “construct arguments or theories for the [litigant] in the absence of any discussion of those issues,” *Whayne v. Kansas*, 980 F. Supp. 387, 393 (D. Kan. 1997) (quoting *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991)), or “supply additional factual allegations to round out a plaintiff’s complaint,” *Whayne*, 980 F. Supp. at 393 (quoting *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997)). *But see* *Fiore v. City of N.Y.*, No. 97 CIV.4935(WK), 1998 WL 755134, at *1 (S.D.N.Y. Oct. 26, 1998) (“Though plaintiff invokes Title VII as his only federal cause of action in the 1995 [New York State Division of Human Rights] complaint, we believe in light of the liberal construction typically afforded to pro se litigants, we could construe that complaint to invoke the protections of the ADA.”). Moreover, “[t]he broad reading of the plaintiff’s complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based. . . . [C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.” *Hall*, 935 F.2d at 1110.

However, at least one federal district court will not read the pleadings of a pro se litigant liberally when the party is a repetitive litigant. *See, e.g., Zimmerman v. Burge*, No. 06-cv-0176, 2008 WL 850677, at *8 (N.D.N.Y. Mar. 28, 2008) (“[T]here are circumstances where an overly litigious inmate, who is quite familiar with the legal system and with pleading requirements, may not be afforded [the] special solicitude’ or status that is normally afforded *pro se* litigants.”) (quoting *Smith v. Burge*, No. 03-cv-0955, 2006 WL 2805242, at *3 n.3 (N.D.N.Y. Sept. 28, 2006)).

58. *See Overton v. United States*, 925 F.2d 1282, 1283 (10th Cir. 1991) (construing “the plaintiff’s pro se pleadings liberally” upon considering the propriety of the district court having granted summary judgment on the pro se party’s claims); *Hall*, 935 F.2d at 1110 n.3 (“The *Haines* rule applies to all proceedings involving a pro se litigant, including . . . summary judgment proceedings.”); *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988) (“This court has recently stated that special solicitude should be afforded pro se litigants generally, when confronted with motions for summary judgment.”); *Richardson v. Kelaher*, No. 97 CIV.0428, 1998 WL 812042, at *3 (S.D.N.Y. Nov. 19, 1998) (judging a pro se plaintiff’s “pleadings by a more lenient standard than that accorded to ‘formal pleadings drafted by lawyers’” in deciding whether to grant the defendants’ motion for summary judgment) (quoting *Haines*, 404 U.S. at 520); *see also Madyun v. Thompson*, 657 F.2d 868, 877 (7th Cir. 1981) (“Adequate knowledge of both the right to file and the necessity of filing counter-affidavits to oppose summary judgment is critical to the *pro se* litigant’s access to a just disposition of the merits of his claim.”).

59. *See Traguth v. Zuck*, 710 F.2d 90, 94–95 (2d Cir. 1983) (holding that the trial court improperly entered default judgment against a pro se defendant when the defendant filed an answer, albeit after the required twenty days subsequent service of the complaint, that presented “meritorious defenses to most of the counts alleged in the complaint” and “there were no grounds for finding that [the pro se defendant’s] default was willful and plaintiffs neither alleged nor proved prejudice”); *Delso*, 2007 WL 766349, at *13 (“Courts often extend the leniency given to *pro se* litigants in filing their pleadings to other procedural rules which attorneys are required to follow.”).

and in preserving issues for appeal.⁶⁰ Courts also are required to provide pro se litigants with additional instruction about deficiencies in their court documents before dismissing their claims.⁶¹ Stated succinctly, courts simply do not require pro se litigants to adhere to procedural requirements in the same manner required of members of the bar.⁶²

Moreover, it often can be difficult for courts to figure out whether an attorney has drafted a document or whether a particularly adept pro se litigant has written it, unless someone with actual knowledge of the attorney's conduct steps forward and gives affirmative testimony to this effect. One court stated that "[i]n the past, this Court has suspected, but has been unable to confirm that some plaintiffs outwardly proceeding *pro se* were in fact receiving the assistance of trained legal counsel."⁶³ Another court stated that it "[could not] reach any definitive conclusion" about whether the party had "misrepresent[ed] her status as a pro se defendant in order to obtain more leeway as an unrepresented party."⁶⁴ This was despite the fact that the party "claimed a limited ability to use the English language" and that her "pleadings before [the] court and the district court demonstrate[d] an obvious legal sophistication, a complete familiarity with the rules of civil procedure, and an excellent command of the English language."⁶⁵ Thus, some courts genuinely struggle to determine when an attorney has in fact provided legal assistance to a litigant presenting himself or herself to the court as proceeding pro se.

Additionally, courts appear reluctant to conclude that a pro se litigant actually has received legal assistance from an attorney without some affirmative confirmation from a third party that this has occurred. For

60. *Bates*, 745 F.2d at 1150 (holding that pro se plaintiff did not waive his appeal when he failed to object explicitly to the court entering judgment against him at trial when the jury's special verdicts were inconsistent).

61. *Graham*, 848 F.2d at 344 ("[I]t does seem inequitable, without a more explicit warning, to expect an incarcerated pro se [litigant] to know that in response to the State's motion for summary judgment he cannot rely upon the papers already filed."); *Karim-Panahi*, 839 F.2d at 623-24 (stating that "before dismissing a pro se civil rights complaint for failure to state a claim, the district court must give the plaintiff a statement of the complaint's deficiencies" and then give the pro se plaintiff leave to amend his or her complaint); *Madyun*, 657 F.2d at 877 (holding that the "district court erred in granting summary judgment [against pro se plaintiff prisoners] without first alerting plaintiffs to the need for counter-affidavits under Rule 56(e)").

62. *See, e.g., Delso*, 2007 WL 766349, at *13 (stating that "in this District, courts will often accept Motions or briefs from *pro se* litigants" without needed supporting documentation, and that "[l]iberal treatment for *pro se* litigants has also been extended for certain time limitations, service requirements, pleading requirements, submission of otherwise improper sur-reply briefs, failure to submit a statement of uncontested facts pursuant to L.Civ.R. 56.1, and to the review given to stated claims").

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

64. *Fin. Instruments Group, Ltd. v. Leung*, 30 F. App'x 915, 916 n.1 (10th Cir. 2002).

65. *Id.*

example, one court pronounced that “[w]hile the practice of filing pro se pleadings which are actually prepared by a legal advocate does taint the legal process and create disparity between the parties, more than a mere supposition should be alleged before utilizing the inherent power of the Court to thoroughly prejudice a party by striking all of their pleadings.”⁶⁶ Similarly, another court suspicious of a pro se litigant having received assistance from an attorney nevertheless went on to apply “the generous reading that is to be afforded to pro se pleadings—a proposition that really should not be applicable if the Complaint was in fact drafted by or with the assistance of a lawyer.”⁶⁷ This occurred notwithstanding the court’s statement that “[d]espite [the litigant’s] nominal pro se status, it seems pretty clear that someone familiar with legal practice and procedure has had a major hand in drafting the Complaint.”⁶⁸

Thus, a significant risk exists that courts will interpret pro se litigants’ documents liberally when an attorney in fact has drafted the document concerned and, thus, will give unfair and unmerited assistance to the nominal pro se party. Additionally, this unmerited assistance continues throughout the course of the lawsuit, especially at points when the opposing party is attempting to get the court to dismiss the nominal pro se litigant’s legal claims. Such assistance has the great potential to allow unmeritorious claims to remain in court well beyond the point at which a court would have dismissed them if the court knew that the nominal pro se party had hired counsel to set out his or her legal claims or arguments. This continuation of unmeritorious litigation not only burdens the opposing party with more legal expenses, but also burdens an already overtaxed court system and unfairly expends the precious time and resources of the courts.

Additionally, one court has noted that undisclosed attorney ghostwriting of court documents for pro se litigants ultimately may affect all pro se litigants negatively because such conduct may taint courts’ views of “well meaning pro se litigants who have no legal guidance at all and rely on the Court’s discretionary patience in order to have a level litigating field.”⁶⁹

66. *Somerset Pharms. v. Kimball*, 168 F.R.D. 69, 72 (M.D. Fla. 1996).

67. *Watkins v. Associated Brokers, Inc.*, No. 98 C 3316, 1998 WL 312124, at *1 (N.D. Ill. June 5, 1998) (citation omitted).

68. *Id.*; *see also Stone v. Allen*, No. 07-0681-WS-M, 2007 WL 2807351, at *1 n.1 (S.D. Ala. Sept. 25, 2007) (noting that “[t]he level of sophistication, polish and legal research contained in plaintiff’s filings strongly suggest that they were ghostwritten by counsel,” but failing to state that the court would treat the plaintiff’s filings in any manner different from the treatment applied to documents filed by a litigant actually proceeding pro se); *Jachnik v. Wal-Mart Stores, Inc.*, No. 07-cv-00263-MSK-BNB, 2007 WL 1216523, at *1 n.2 (D. Colo. Apr. 24, 2007) (construing the nominal pro se plaintiff’s complaint liberally despite stating that the complaint “appears to have been ghostwritten by an attorney”).

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

Thus, pervasive uncertainty about whether litigants presenting themselves as pro se are in fact receiving the aid of an attorney might eventually cause courts to be very reluctant to provide additional assistance to litigants who in fact are proceeding completely in a pro se capacity.

Attorney ghostwriting of pro se litigants' court documents also can be unfair in that it can allow attorneys to cast aspersions on opposing counsel, or even the opposing party, without accountability. One court has decried that attorney ghostwriting of a pro se litigant's court documents "enables an attorney to launch an attack, even against another member of the Bar . . . without showing his [or her] face," which "smacks of the gross unfairness that characterizes hit-and-run tactics."⁷⁰ While that case concerned a repetitive plaintiff who had filed a vexatious lawsuit against a law firm, among other parties,⁷¹ attorney ghostwriting of court documents could give rise to attacks on the integrity or conduct of opposing counsel for which the undisclosed counsel would not have to answer even in meritorious cases. Therefore, ghostwriting of court documents has the potential to increase incivility between parties to litigation and to decrease professionalism between attorneys who are in fact representing opposing parties.

Finally, ghostwriting can be particularly unfair to the opposing side when the opposing side actually is proceeding pro se and is unaware that the other nominal pro se party in fact is receiving assistance from legal counsel in the litigation. In this scenario, the party who in fact is proceeding pro se is deprived of material information about the legal assistance to which the nominal pro se party has access. If privy to this information, the opposing party might change his or her mind about proceeding pro se and go ahead and hire an attorney.⁷² Thus, not having this information could put the opposing party at a severe disadvantage.

70. *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 343 (S.D.N.Y. 1970); *see also* *Delso v. Trs. for Ret. Plan for Hourly Employees of Merck & Co.*, No. 04-3009, 2007 WL 766349, at *15 (D.N.J. Mar. 6, 2007) ("One of the earliest cases regarding ghostwriting laid its concern in the enabling of 'an attorney to launch an attack against another member of the Bar . . . without showing his face.'" (quoting *Klein*, 309 F. Supp. at 343); *In re Mungo*, 305 B.R. at 768 ("An obvious result of the anonymity afforded ghost-writing attorneys is that they cannot be policed pursuant to the applicable ethical, professional, and substantive rules enforced by the Court and members of the bar since no other party to the existing litigation is aware of the ghost-writing attorney's existence.").

71. *Klein*, 309 F. Supp. at 342.

72. *See* CAL. COMM'N ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS app. at 41 (2003) ("There should be a level playing field for [the] opposing party in an unbundled situation. If one side had known the other side had an attorney, instead of learning of it when, all of a sudden, an attorney appeared at a court hearing, they might have brought one too."); *see also infra* Part V (discussing hypothetical "stealth" representation by attorney of nominal pro se litigant through the course of litigation, including during settlement negotiations).

2. Ghostwriting Violates Federal Rule of Civil Procedure 11

The second major rationale that courts have used to conclude that undisclosed attorney ghostwriting of court documents is unethical is that this conduct violates the requirements of Federal Rule of Civil Procedure 11. Courts have reasoned that by failing to sign documents that the attorney has drafted for the nominal pro se litigant, the attorney improperly avoids his or her duty to certify that a reasonable basis exists for both the facts and legal arguments presented in the document.⁷³ This could leave a court without anyone to sanction should it conclude that the document concerned is “legally or factually frivolous” because the rule prohibits “the imposition of monetary sanctions against a represented party for filing legally frivolous claims.”⁷⁴ In fact, whether certain conduct is sanctionable in the first place may depend on whether counsel or a party engaged in it because “certain conduct may be sanctionable if committed by counsel but not if committed by a party.”⁷⁵ Furthermore, “[a court] could encounter legal and factual obstacles if it attempted to impose sanctions” due to a violation of Rule 11 on the attorney

73. *Duran v. Carris*, 238 F.3d 1268, 1271–72 (10th Cir. 2001) (“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, because the attorney avoided his obligations under Federal Rule of Civil Procedure 11.); *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (“What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, but which exist in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made.”); *Delso*, 2007 WL 766349, at *17 (“By failing to affirmatively advise the Court of his assistance of Delso, and by permitting Delso to submit ghostwritten briefing to the Court under her own name, Shapiro failed to certify documentation that he prepared that was submitted to the Court and violated the spirit of [Rule 11].”); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 886 (D. Kan. 1997) (“[G]host-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, Fed.R.Civ.P.”); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (finding that attorney ghostwriting of pro se litigant’s court documents “undermines the purpose of the signature certification requirement”); *Clarke v. United States*, 955 F. Supp. 593, 598 (E.D. Va. 1997) (“Ghost-writing by an attorney of a ‘pro se’ plaintiff’s pleadings has been condemned as both unethical and a deliberate evasion of the responsibilities imposed on attorneys by Federal Rule of Civil Procedure 11.”), *vacated*, 1998 WL 559754 (4th Cir. Sept. 2, 1998); *Johnson v. Bd. of County Comm’rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) (“[G]host-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.”); *In re Mungo*, 305 B.R. at 768 (“Ghost-writing frustrates the application of these rules [concerning attorney certification through signature of court documents] by shielding the attorney who drafted pleadings for pro se litigants in a cloak of anonymity.”); *see also supra* Part III.C (discussing the requirements of Federal Rule of Civil Procedure 11(b)).

74. *Laremont-Lopez*, 968 F. Supp. at 1079; *see also* FED. R. CIV. P. 11(c)(5)(A) (stating that “[t]he court must not impose a monetary sanction: (A) against a represented party for violating Rule 11(b)(2)”).

75. *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997).

who actually drafted the document concerned because the identity of the actual drafter is unknown.⁷⁶

3. Ghostwriting Frustrates Efficient Court Administration

The third rationale that some courts have used to support the decision to prohibit attorney ghostwriting of court documents is that such conduct frustrates a court's efficient administration of its case docket. For example, even if the court is able to discover the identity of the attorney responsible for drafting a deficient document, such an investigation causes the court to have to expend time and resources that would have been unnecessary had the attorney originally disclosed his or her identity and the assistance provided to the litigant on the document.⁷⁷ One bankruptcy court has noted why knowledge of the identity of the person who drafted court documents is particularly important to the timely administration and discharge of a bankruptcy case. The court explained that "it may be more important that . . . attorneys who limit their representation sign the [initial bankruptcy] petition precisely because they will not be representing the debtor throughout the case" and because it is fairly common for documents filed in bankruptcy court to contain errors and omissions, which attorneys routinely correct by amending those documents.⁷⁸ However, if the attorney drafts the initial bankruptcy petition and then is not involved any further in the case, "he or she may have no notice of the need for amendment," and the client may not recognize the need to make amendments.⁷⁹ Thus, "[d]isclosure of the preparer's identity allows the U.S. Trustee, interim trustee or creditor to obtain clarifying or correcting disclosures."⁸⁰

Another bankruptcy court has recognized that attorney ghostwriting of documents hinders its ability to rule on emergency motions and conduct emergency hearings. The court stated that it "has a high volume of cases—many, if not all, involve time-sensitive matters that require the Court to hear matters and issue rulings in an expeditious manner."⁸¹ "An integral part" of the procedures that the court has developed to address such situations include "the need for the filing party to correctly serve the motion and notice of the hearing in an expedited fashion and be immediately prepared to present

76. *Laremont-Lopez*, 968 F. Supp. at 1079; see also *Eleven Vehicles*, 966 F. Supp. at 367 ("[G]host writing arrangements interfere with the Court's ability to superintend the conduct of counsel and parties during the litigation.").

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

78. *In re Merriam*, 250 B.R. 724, 734 n.12 (Bankr. D. Colo. 2000).

79. *Id.*

80. *Id.*

81. *In re Mungo*, 305 B.R. 762, 770 (Bankr. D.S.C. 2003).

evidence justifying the relief sought.”⁸² It is difficult for this to occur if the opposing party indicates it is proceeding pro se, but in fact is unknowingly represented by counsel who should receive notice of such proceedings instead of the client.⁸³

Even if the opposing party somehow is aware that an attorney is assisting the nominal pro se party, that party will be unaware of the extent of the representation and whether the representation ended with the drafting of the initial court documents or extended to dealing with subsequent motions and hearings. These deleterious effects in bankruptcy proceedings are particularly relevant to the issue of attorney ghostwriting of documents because bankruptcy is an area where parties often choose to represent themselves;⁸⁴ the provision of unbundled legal services thus would be useful, and the problem of ghostwritten court documents is likely to be prevalent. Nevertheless, these efficiency concerns are not peculiar to bankruptcy cases. In order for any lawsuit to proceed efficiently, the court and opposing party need to know to whom to communicate—either the party or an attorney acting on behalf of the party—throughout the litigation.

4. Ghostwriting Violates Court Appearance Rules

The fourth policy rationale for prohibiting attorney ghostwriting of court documents is related to this efficiency concern. Courts have stated that ghostwriting of documents for nominal pro se litigants violates court rules governing when attorneys make an appearance before a court.⁸⁵ One court recognized that ghostwriting of court documents allowed attorneys to circumvent its local rule governing when an attorney makes an appearance because by failing to disclose his or her identity and the services provided to the nominal pro se litigant, the attorney avoided appearing in the court.⁸⁶ Customarily, an attorney makes an appearance in a court “by signing and

82. *Id.*

83. The court in this specific case presented a slightly different point, stating that “[p]ro se litigants frequently have difficulty meeting these requirements . . . thus taxing the Court’s system and forcing the Court to expend more time and effort to handle the matter,” and thus the “Court must be able to look to attorneys of record to perform these tasks for the benefit of their clients and case administration.” *Id.* However, this is a rationale for discouraging parties from participating pro se in bankruptcy proceedings rather than for requiring them to disclose that they are in fact represented by counsel instead of continuing to proceed under nominal pro se status.

84. *See supra* note 15 and accompanying text.

85. *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (E.D. Va. 1997) (“[T]he practice of ghost-writing pleadings or motions for otherwise *pro se* litigants allows attorneys to circumvent [a local rule governing entry of an appearance and withdrawal of representation.]”); *see also In re Merriam*, 250 B.R. at 734 (“[The attorney who prepared a bankruptcy petition] chose not to sign the petition because he did not want to enter a general appearance in this bankruptcy case by customary practice of signing and filing a pleading.”).

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

filing a pleading.”⁸⁷ If an attorney “has entered an appearance in a civil or criminal action, withdrawal is permitted only by order of the court, and after reasonable notice to the party represented.”⁸⁸ Moreover, the purpose of the rule governing how an attorney makes an appearance is “to provide for communication between the litigants and the court, as well as ensuring that the court is able to fairly and efficiently administer the litigation.”⁸⁹ The four policy rationales discussed above have led courts to conclude that attorney ghostwriting is prohibited and to resoundingly condemn this activity.

B. The “Mixed Bag” of Approaches by the American Bar Association and State and Local Ethics Panels

Ethics opinions addressing attorney ghostwriting of court documents for nominal pro se litigants have not spoken with the near unanimity that courts have. In fact, the ABA recently changed its position on this activity, concluding that ethics rules do not prohibit it.⁹⁰ However, the majority of opinions from state and local ethics committees require attorneys to disclose in some manner to the court and opposing counsel when they have drafted court documents for an otherwise pro se litigant.⁹¹ In contrast, a small number of state and local ethics opinions have concluded that ghostwriting attorneys do not have to disclose this conduct,⁹² and some commentators continue to argue against requiring disclosure of attorney ghostwriting.⁹³

1. The Old ABA Stance Prohibiting Attorney Ghostwriting

In 1978, the ABA Committee on Ethics and Professional Responsibility addressed the appropriateness under the Model Code of Professional Responsibility of an attorney ghostwriting pleadings and providing other legal

87. *In re Merriam*, 250 B.R. at 734 n.14. However, “[t]he manner of entering an appearance is regulated by local rule.” *Id.*; see also 28 U.S.C. § 1654 (2000) (entitled “Appearance personally or by counsel” and stating that “the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein”). As of 1988, seventy-three federal districts out of ninety-four had a local rule dealing with the appearance and withdrawal of counsel. 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3154 n.12 (2d ed. 1997) (citing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Local Rules Project app. A (1988)).

88. *Laremont-Lopez*, 968 F. Supp. at 1079; see also MODEL RULES OF PROF’L CONDUCT R. 1.16(c) (2002) (stating that a “lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation” and that “[w]hen ordered to do so . . . , a lawyer shall continue representation notwithstanding good cause for terminating the representation”).

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

90. See *infra* Part IV.B.1–2.

91. See *infra* Part IV.B.3.

92. See *infra* Part IV.B.3.

93. See *infra* Part IV.C.

services to a nominal pro se litigant without disclosure to the court or opposing counsel.⁹⁴ The opinion specifically dealt with an attorney “who assisted a ‘*pro se*’ litigant in preparing jury instructions, memoranda of authorities and other documents submitted to the Court.”⁹⁵ At one point, the attorney “involved also ‘sat in on’ the [nominal pro se client’s] trial.”⁹⁶ Apparently, before this occurred, “neither the Court nor the lawyer(s) for the other party or parties knew of the lawyer’s previous participation on behalf of the litigant or the extent of [this participation.]”⁹⁷

The committee began its analysis by finding that the nominal pro se litigant had “engaged in a misrepresentation (perhaps unwitting) by professing to be without representation . . . when, in truth, he was receiving active and rather extensive assistance of undisclosed counsel.”⁹⁸ The committee went on to find that the attorney’s conduct was unethical because the attorney was “involved in the litigant’s misrepresentation” and such conduct violated Disciplinary Rule 1-102(A)(4) of the Model Code, which prohibited attorneys from engaging “in conduct involving dishonesty, fraud, or misrepresentation.”⁹⁹

However, the opinion did not indicate exactly how or to what extent the attorney should have disclosed his assistance to the nominal pro se client. In other words, the opinion did not state whether the attorney should have just indicated on the documents drafted for his client that the client was receiving legal assistance from an attorney generally or whether the attorney should have disclosed his identity on such documents. This opinion also did not indicate how extensively an attorney needed to assist a pro se litigant before he or she must disclose the fact of this aid to a court. In fact, the opinion seemed to suggest that not all legal assistance provided to pro se litigants would need to be disclosed: “We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding *pro se*, or that a lawyer could not, for example, prepare or assist in the preparation of a pleading for a litigant who is otherwise acting *pro se*.”¹⁰⁰ The committee noted that “the determination of the propriety of such a lawyer’s actions will

94. ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1414 (1978).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* (quoting the MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(4) as stating: “A lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”). Model Rule 8.4(c) is the closest corollary to DR 1-102(A)(4) in the current Model Rules of Professional Conduct. See *supra* note 37 and accompanying text (discussing the relevant language from Model Rule 8.4(c) potentially applicable to attorney ghostwriting).

100. ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1414 (1978).

depend on the particular facts involved.”¹⁰¹ “Extensive undisclosed participation by a lawyer, however, that permits the litigant falsely to appear without substantial professional assistance is improper”¹⁰²

2. The New ABA Position Allowing Attorney Ghostwriting

The ABA, though, in a recent, superseding opinion changed its position on attorney ghostwriting.¹⁰³ In May 2007, the ABA’s Standing Committee on Ethics and Professional Responsibility issued a formal opinion in which it concluded that attorney ghostwriting of documents for litigants holding themselves out to the court as pro se is appropriate under the Model Rules of Professional Responsibility without disclosure.¹⁰⁴ The committee’s main rationale for this conclusion was that a court will not disadvantage the opposing party by applying a more liberal interpretation to ghostwritten documents.¹⁰⁵ This results because a court will be able to tell when an attorney has provided such assistance, and if the court cannot detect this, then the attorney did not help the nominal pro se party enough to disadvantage the other party.¹⁰⁶ Therefore, “[b]ecause there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.”¹⁰⁷

The committee further concluded that attorneys who ghostwrite documents do not “circumvent[] court rules requiring the assumption of responsibility for their pleadings,” such as Federal Rule of Civil Procedure 11.¹⁰⁸ The committee reasoned that because the attorney never actually signs the documents and, thus, does not “make[] an affirmative statement to the tribunal concerning the matter,” this conduct never triggers duties set out in Rule 11.¹⁰⁹

Similarly, the committee concluded that attorney ghostwriting of documents did not involve dishonest conduct, which Model Rule 8.4(c) prohibits, because the “lawyer is making no statement at all to the forum

101. *Id.*

102. *Id.*

103. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (2007).

104. *Id.* The committee examined the appropriateness of attorney ghostwriting under Model Rules of Professional Conduct 1.2(d), 3.3(b), 4.1(b), and 8.4(c). *Id.*; see also *supra* Part III.A–B (discussing the language from these rules potentially applicable to attorney ghostwriting).

105. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (2007).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

regarding the nature or scope of the representation.”¹¹⁰ “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).”¹¹¹ Therefore, according to the committee, an attorney does not mislead a court by ghostwriting documents for a nominal pro se litigant.

The committee acknowledged its earlier opinion applying the Model Code of Professional Responsibility to ghostwriting and characterized that opinion as “stating that disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified.”¹¹² However, as set out above, the earlier opinion did not address at all the type of disclosure necessary, whether just the fact of assistance or the actual identity of the attorney involved.¹¹³

3. State and Local Ethics Panels

State and local ethics panels are all over the proverbial board on this issue. The overwhelming majority of ethics panels to have addressed the matter have concluded that an attorney must disclose his or her drafting of court documents for a nominal pro se litigant.¹¹⁴ However, these ethics opinions have disagreed about the extent of the disclosure that must be made. Some ethics opinions have concluded that the identity of the attorney who provided the legal assistance must be disclosed in some manner,¹¹⁵ while others have determined that only the fact of the legal assistance, and not the attorney’s identity, needs to be disclosed.¹¹⁶ Moreover, the ethics panels in the jurisdictions that require some type of disclosure do not agree on how substantial the legal assistance has to be in order to trigger this duty. Some consider any preparation of pleadings beyond an attorney helping a client fill out a standard form to be significant enough to require disclosure¹¹⁷ while others have concluded that more substantial assistance needs to occur to

110. *Id.* The committee went on to suggest that disclosure might even violate an attorney’s duty of confidentiality to the nominal pro se client under Model Rule 1.6 and an attorney’s duty to “abide by a client’s decisions concerning the objectives of [the] representation” under Model Rule 1.2(a). *Id.* at nn.10–11; *see also* MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2003); MODEL RULES OF PROF’L CONDUCT R. 1.2(a), (c) (2002). This Article addresses the confidentiality argument, *infra* Part IV.C.

111. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (2007).

112. *Id.*

113. *See* ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1414 (1978); *see also supra* Part IV.B.1 (discussing the ABA’s earlier opinion on attorney ghostwriting).

114. *See infra* Part IV.B.3.a–b.

115. *See infra* Part IV.B.3.a.

116. *See infra* Part IV.B.3.b.

117. *See infra* notes 124, 141–42 and accompanying text.

trigger the attorney's duty to disclose.¹¹⁸ Finally, a small number of ethics panels have concluded that a ghostwriting attorney simply does not have a duty to disclose to anyone even the fact of his or her having provided legal assistance to a nominal pro se litigant no matter how substantial the legal assistance given.¹¹⁹

a. Opinions Requiring Disclosure of Fact of Ghostwriting and the Identity of the Ghostwriting Attorney

Several state and local ethics committees have concluded that an attorney who provides legal assistance to nominal pro se litigants must disclose his or her identity as well as the fact of having provided such assistance. For example, the New York State Bar Association Committee on Professional Ethics concluded this when it addressed the issue of attorney ghostwriting of the pleadings of a pro se litigant.¹²⁰ The committee endorsed the plan of the inquirer who proposed sending along with the pleadings to counsel for the opposing party a cover letter stating that the client was submitting the pleadings concerned "on a *pro se* basis" and that the attorney's representation of the client was limited to the drafting of these pleadings and providing the client with the cover letter.¹²¹ The committee acknowledged that "the *pro bono* 'efforts of individual lawyers,' together with the availability of legal services offices, 'are often not enough to meet the need' of the indigent."¹²² Nevertheless, the committee concluded that just indicating the fact that the nominal pro se litigant had received some legal assistance without revealing the identity of the attorney who had provided such assistance was "insufficient to fulfill the purposes of the disclosure requirement."¹²³ The committee expressly determined that "the preparation of a pleading, even a simple one, for a *pro se* litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation."¹²⁴

The Kentucky Bar Association's ethics panel came to a similar conclusion, finding that "counsel's name should appear somewhere on the pleading, although counsel is limiting his or her assistance to the preparation

118. See *infra* notes 136–38 and accompanying text.

119. See *infra* Part IV.B.3.c.

120. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 613 (1990).

121. *Id.* The inquirer was "the managing attorney of a legal services office in an upstate rural county who [had] been unable to obtain attorneys within the county to undertake *pro bono* representation of indigent persons served with a summons and complaint in divorce actions." *Id.*

122. *Id.* (quoting the version of N.Y. Code of Professional Responsibility EC 2-25 in effect in 1990). The committee went on to state that it "firmly believe[d] that the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession." *Id.*

123. *Id.*

124. *Id.*

of the pleading.”¹²⁵ It agreed with opinions from other states that found “that the preparation of a pleading, other than a previously prepared form devised specifically for use by *pro se* litigants, constitute[d] substantial assistance that must be disclosed to the Court and the adversary.”¹²⁶ The opinion recognized, on the other hand, that “the opponent cannot reasonably demand” that the court compel “counsel providing such limited assistance . . . to enter an appearance for all purposes.”¹²⁷ “A contrary view would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants.”¹²⁸ However, the opinion stated that “[t]he inclusion of forms for use by *pro se* litigants in a handbook intended for distribution to laymen has not been viewed as the practice of law or as active and substantial assistance implicating any of the above considerations.”¹²⁹

An opinion from the Delaware State Bar Association Committee on Professional Ethics provides another example of an ethics committee that concluded that “it is improper for an attorney to fail to disclose the fact that he or she has provided significant assistance to a litigant.”¹³⁰ The committee concluded that failing to disclose conduct constituting “significant assistance” to a nominal *pro se* litigant “misleads the court and opposing counsel in violation of Rule 8.4(c).”¹³¹ The committee reasoned that a litigant who received limited legal services from an attorney but proceeded *pro se* in the litigation “may receive some advantage, in the form of more lenient treatment concerning procedural matters, for example, if the tribunal perceives the

125. Ky. Bar Ass’n, Ethics Op. E-343 (1991). The inquiry to the committee came also from a legal services organization that could not “satisfy all requests for assistance, and [could not] always obtain alternative (volunteer) *pro bono* counsel.” *Id.* However, the court noted that its “answer would also apply to limited representation provided by lawyers in private practice.” *Id.*

126. *Id.* The opinion went on to state that an attorney, though, “should not hold forth that his or her representation was limited, and that the litigant is unrepresented, and yet continue to provide behind the scenes representation.” *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1994-2 (1994). Once again, the inquiry to the committee came from the director of a legal services organization who, “[b]ecause of staffing limitations and other reasons,” had staff attorneys who “sometimes agree[d] to provide services on a limited basis” to litigants often who had cases “in Family Court or Justice of the Peace Court, which use forms for most pleadings.” *Id.* The opinion went on to state that:

If the litigant’s case [was] in the Court of Common Pleas or [was] an appeal to Superior Court, as in unemployment compensation cases, the litigant may be advised as to how to answer the complaint or file an appeal, or the staff attorneys may prepare the answer or appeal for the litigant’s signature. The litigants are also advised how to file and serve the completed documents.

Id.

131. *Id.*

litigant to be unrepresented.”¹³² The committee emphasized that the “seriousness of the ethical problem increases in proportion to the extent to which services are provided.”¹³³

Moreover, the committee recommended, similar to the New York State Bar Association committee, that the attorney make the required disclosure through “a letter to the court and opposing counsel, indicating the limited extent of the representation.”¹³⁴ The committee indicated that such an attorney, though, should not “sign pleadings, motions or other papers where the attorney and client have agreed that the attorney will not be representing the client in litigation” because “[t]he attorney’s signature in such a case would misleadingly indicate that the attorney would be representing the client in the litigation.”¹³⁵

However, contrary to the ethics opinions from the New York and Kentucky state bar associations, the Delaware ethics committee concluded that in order to constitute “significant assistance,” an attorney’s assistance must go “further than merely helping a litigant to fill out an *initial* pleading, and/or providing *initial* general advice and information.”¹³⁶ Only “[i]f an attorney drafts court papers (other than an initial pleading) on the client’s behalf” or provides legal assistance that “is on-going” would the attorney need to disclose the provision of such legal services.¹³⁷ The committee apparently wanted to allow the legal services organization that made the initial inquiry to be able to continue helping nominal pro se litigants in family law and worker’s compensation matters to fill out their initial pleadings without disclosing that this assistance had occurred.¹³⁸

132. *Id.*

133. *Id.*

134. *Id.* Although not explicitly stated in the opinion, the Delaware ethics opinion appeared to require that an attorney who provided “significant assistance” to a nominal pro se litigant disclose his or her identity in addition to the fact of having provided such legal assistance because the committee explicitly stated that it “agree[d] with the New York State Bar Association ethics committee in concluding that disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited extent of the representation, is required,” *id.*, and as set out above, the New York State Bar Association’s ethics opinion required that a ghostwriting attorney disclose his or her identity. *See supra* notes 120–24 and accompanying text.

135. Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1994-2 (1994).

136. *Id.*

137. *Id.* However, the committee did caution that “whether the pleadings are signed by a *pro se* litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose.” *Id.*

138. *See id.*

b. Opinions Requiring Disclosure of Fact of Ghostwriting but Not the Identity of the Ghostwriting Attorney

The ethics panels of some other state and local bar associations have concluded that an attorney who provides limited legal services to a nominal pro se litigant need only disclose the fact of the assistance and not his or her identity. For example, the New York City Bar Association's ethics committee concluded that "what must be disclosed is the fact that the litigant appearing pro se is receiving legal assistance, not the identity of the person rendering such assistance."¹³⁹ The committee suggested that this could be indicated by including "Prepared by Counsel" on the pleadings concerned.¹⁴⁰

However, the committee departed with the analysis of some other jurisdictions' ethics panels with regard to the level of legal assistance that would trigger this duty to disclose. The committee found an attorney had to make such a disclosure when he or she had rendered "active and substantial assistance" to a nominal pro se litigant.¹⁴¹ "[D]rafting any pleadings falls into that category, except where no more is involved than assisting a litigant to fill out a previously prepared form devised particularly for use by pro se litigants."¹⁴²

In concluding that it was unethical for an attorney to ghostwrite court documents for a nominal pro se litigant, the committee noted "the special consideration" that courts afford to pro se litigants throughout a piece of litigation "to compensate for their lack of legal representation" and found that the failure of a nominal pro se litigant "to reveal that he [or she] is in fact receiving advice and help from an attorney may be seriously misleading."¹⁴³ This results because the nominal pro se litigant "may be given deferential or preferential treatment to the disadvantage of his [or her] adversary."¹⁴⁴ The committee also acknowledged that the "court will have been burdened unnecessarily with the extra labor of making certain that his [or her] rights as a pro se litigant were fully protected."¹⁴⁵ Therefore, an attorney failing to disclose, or to ensure that his or her client will disclose, the legal assistance that the pro se litigant received "may amount to conduct involving dishonesty,

139. N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 1987-2 (1987).

140. *Id.*

141. *Id.*

142. *Id.* The committee went on state that "the making available of manuals and pleading forms would not ordinarily be deemed 'active and substantial legal assistance.'" *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

fraud, deceit or misrepresentation,” which would violate New York Disciplinary Rule 1-102(A)(4).¹⁴⁶

Similarly, the Florida State Bar Association’s Committee on Professional Ethics concluded that a ghostwriting attorney should disclose the fact of the legal assistance provided to the nominal pro se litigant by including “Prepared with Assistance of Counsel” on the document concerned.¹⁴⁷ One judge surveyed by the committee noted that not disclosing this legal assistance to the nominal pro se litigant would violate an attorney’s “duty of candor to the tribunal.”¹⁴⁸ Interestingly, in explaining its rationale for coming to this conclusion, the committee noted a practical consideration expressed by “County Court Judges who responded to an inquiry from the Committee” about an earlier opinion on the topic.¹⁴⁹ These judges “expressed concern about pro se litigants who appear before them having received limited assistance from an attorney and having little or no understanding of the contents of the pleadings these litigants have filed.”¹⁵⁰ These judges “[a]lmost unanimously . . . believed that disclosure of professional legal assistance would prove beneficial, at least where the lawyer’s assistance goes beyond helping a party fill out a simple standardized form.”¹⁵¹

c. Opinions Concluding that Ghostwriting Can Occur Without Disclosure

The ethics panels in a handful of state and local jurisdictions have concluded that attorneys ethically can ghostwrite court documents for litigants presenting themselves to the court as pro se without disclosing this legal assistance to the court or opposing counsel. A fairly recent ethics opinion from the Arizona Committee on the Rules of Professional Conduct illustrated this viewpoint in concluding that “disclosure to the court or tribunal of an

146. *Id.* At the time of this opinion, New York Disciplinary Rule 1-102(A)(4) provided that “a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” *Id.* Model Rule 8.4(c) contains a similar prohibition in the current version of the Model Rules of Professional Responsibility. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2002); *see also supra* note 37 and accompanying text (discussing the relevant language from Model Rule 8.4(c) potentially applicable to attorney ghostwriting).

147. Fla. State Bar Ass’n Comm. on Prof’l Ethics, Op. 79-7 (Reconsideration) (2000). In this opinion, the committee reconsidered its earlier opinion from 1979 in which it concluded that “there is no affirmative obligation on an attorney to sign pleadings prepared by him if he is not an attorney of record.” Fla. State Bar Ass’n Comm. on Prof’l Ethics, Op. 79-7 (1979). Thus, the Florida Bar has moved in the opposite direction of the ABA, going from allowing attorney ghostwriting to prohibiting it.

148. Fla. State Bar Ass’n Comm. on Prof’l Ethics, Op. 79-7 (Reconsideration) (2000) (noting that Florida Rule 4-3.3 of Rules Regulating the Florida Bar set forth counsel’s duty of candor to the tribunal).

149. *Id.*

150. *Id.*

151. *Id.*

attorney's assistance with a court filing is not necessary when the pro per client submits the document for filing."¹⁵² Similar to the reasoning in the ABA's recent ethics opinion,¹⁵³ the Arizona committee's main rationale for concluding that this conduct was "not inherently misleading to the court or tribunal" was that "[w]hen presented with a document prepared with assistance of counsel, . . . a court or tribunal can generally determine whether that document was written with a lawyer's help."¹⁵⁴ Furthermore, the committee concluded that such conduct did not violate Arizona's Ethics Rule 3.3(a)(1), which "proscribes against an attorney making or failing to correct a false statement of fact or law to the court or tribunal,"¹⁵⁵ because it "[did] not believe that the omission of an attorney's name from a filed document is a false statement of fact or law that is either made or needs to be corrected."¹⁵⁶ Accordingly, "[b]ecause the disclosure of an attorney's assistance with court filings is not obligatory under the ethical rules," an attorney did not violate Arizona's ethics rule through the acts of another when the pro per client submitted the documents without disclosing that he or she had received legal assistance in creating the document.¹⁵⁷

The Arizona committee did note that Arizona Rule 11 of Civil Procedure might proscribe this conduct and took pains to note that it was addressing the appropriateness of this conduct only "under the [Arizona] ethical rules" rather than the "potential applicability of Rule 11 as a matter of law."¹⁵⁸ Additionally, the committee explicitly stated that it was "only confirm[ing] that the practice is not prohibited by Arizona's Ethical Rules" and that it

152. Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. No. 2005-06 (2005). Presumably, the ethics panel used the term "pro per" as short for "in propria persona," which means "[i]n one's own proper person." BLACK'S LAW DICTIONARY 792 (6th ed. 1990). Similar to the ethics opinions discussed above, the inquirers were "affiliated with an agency providing legal services to low- and moderate-income individuals," and one of the attorneys "practice[d] in the area of family law." Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. No. 2005-06 (2005).

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

154. Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. No. 2005-06 (2005); *see also* Ala. Bar Ass'n Ethics Comm., Ethics Op. No. 93-1 n.2 (1993) ("[T]he committee believes that judges are usually able to discern when a pro se litigant has received the assistance of counsel in preparing or drafting pleadings" and that therefore "any preferential treatment otherwise afforded the litigant will likely be tempered, if not overlooked.").

155. Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. No. 2005-06 (2005).

156. *Id.*

157. *Id.*

158. *Id.*; *see also* Me. Prof'l Ethics Comm'n of Bd. of Overseers of Bar, Op. No. 89 (1988) (noting that while an attorney who drafts a complaint for an otherwise pro se client "was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff," the lawyer still "remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure").

“[did] not approve of attorneys ghostwriting documents that are filed with courts and tribunals without providing some form of disclosure.”¹⁵⁹

The Professional Responsibility and Ethics Committee for the Los Angeles County Bar Association also concluded that an attorney ethically may ghostwrite documents for a nominal pro se litigant without disclosing this activity to the court.¹⁶⁰ The committee’s main rationale for this conclusion was “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.”¹⁶¹ Although noting in a footnote case authority from other jurisdictions that disapproved of this conduct,¹⁶² the committee stated that it had not found any “published court decisions in California state or federal courts which have required an attorney’s disclosure to the court regarding his or her involvement in preparing pleadings or documents to be filed by a litigant appearing *in propria persona*.”¹⁶³ The committee noted that “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 [conduct] or deceit in those pleadings” because the court can sanction the party proceeding pro se, rather than the attorney, for any such misconduct.¹⁶⁴ Moreover, the court could seek to punish the attorney, once the attorney’s identity was discovered, by lodging “a complaint with the State Bar about the attorney’s participation in the preparation of the document.”¹⁶⁵ Nevertheless, the committee noted that attorneys who ghostwrite documents for pro se litigants would have to comply with any rulings by a federal court that required disclosure.¹⁶⁶

The committee noted that there is “a nationwide debate concerning the ethical propriety of [attorneys’] ‘ghostwriting’ pleadings and documents for a *pro per* litigant to file with a court.”¹⁶⁷ In a corresponding footnote, the committee noted several additional arguments for allowing attorney

159. Ariz. Comm. on the Rules of Prof’l Conduct, Formal Op. No. 2005-06 (2005).

160. Los Angeles County Bar Ass’n Prof’l Responsibility & Ethics Comm., Formal Op. No. 502 (1999). The committee dealt with a situation where a client engaged an attorney “to give legal advice about the litigation and to participate in settlement negotiations,” and the client had filed a “complaint which [the] attorney drafted for her on an hourly fee basis.” *Id.*

161. *Id.*

162. *Id.* at n.8.

163. *Id.* See *supra* note 152 for a definition of “*in propria persona*.”

164. Los Angeles County Bar Ass’n Prof’l Responsibility & Ethics Comm., Formal Op. No. 502 (1999).

165. *Id.*

166. *Id.*

167. *Id.*

ghostwriting of documents without disclosure.¹⁶⁸ The committee asserted that “the practice promote[d] access to the courts” and was “likely to improve the quality of the *pro per* pleadings,” which would result “in increased judicial efficiency and fairness to the parties.”¹⁶⁹ Furthermore, “the practice would support the client’s right to control the extent of an attorney’s involvement” in the representation.¹⁷⁰ However, the committee did not explain exactly how requiring disclosure of the attorney’s assistance would prevent a party from entering into a limited scope representation agreement with an attorney. In the same footnote, though, the committee did note that “[s]ome opinions observe that the attorney deceives, defrauds, misrepresents to, or lacks candor with the court by anonymously assisting the *pro per* litigant.”¹⁷¹ Despite noting these arguments for requiring attorney disclosure, the committee did not counter them or address them any further.¹⁷²

Additionally, an ethics opinion from the Utah State Bar determined that it was not improper “for an attorney to prepare or assist in the preparation of pleadings” without disclosing this to the court.¹⁷³ However, the opinion noted that “when the attorney gives any additional assistance and the litigant continues to inform the court that he [or she] is proceeding *pro se*, [the litigant] has engaged in [a] misrepresentation by professing to be without representation.”¹⁷⁴

Therefore, the general ethical prohibition against an attorney engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation” seemingly would require the attorney to disclose any assistance beyond preparation of pleadings.¹⁷⁵ The committee did not elaborate much further on its reasons for drawing this distinction other than stating that “[t]he extent of an attorney’s participation on behalf of the litigant who appears to the court and other counsel as being without professional representation is the determining factor” as to whether disclosure is required.¹⁷⁶ The opinion concluded by stating that “extensive undisclosed participation by an attorney that permits the litigant falsely to appear as being without substantial professional

168. *Id.* at n.8.

169. *Id.*

170. *Id.* The committee also noted that California law allowed “legal documents assistants and unlawful detainer assistants to assist in the preparation and filing of documents under certain circumstances, without making disclosure to courts” and that requiring attorneys “to make disclosures to courts” might involve “an uneven application of law.” *Id.*

171. *Id.*

172. *Id.*

173. Utah State Bar Ethics Advisory Op. Comm., Op. No. 74 (1981).

174. *Id.*

175. *Id.* (quoting UTAH DISCIPLINARY RULE 1-102(A)(4)).

176. Utah State Bar Ethics Advisory Op. Comm., Op. No. 74 (1981).

assistance is improper.”¹⁷⁷ Therefore, the ethics opinions that conclude that attorneys do not have to disclose ghostwriting tend to do so on the narrow ground that the language of the applicable ethics rules does not expressly prohibit such conduct, and at least one opinion would still require disclosure to the court and opposing counsel if the attorney provides any legal assistance beyond just drafting a pleading.

*C. Arguments by Ghostwriting Proponents for Allowing Attorney
Ghostwriting Without Disclosure*

Commentators who promote allowing ghostwriting of court documents for nominal pro se litigants without disclosure have put forth several arguments. For example, one commentator primarily asserts that courts can detect when an attorney, as opposed to the litigant, has drafted documents.¹⁷⁸ Some of the ethics opinions allowing attorney ghostwriting without disclosure noted above have adopted this rationale.¹⁷⁹

However, proponents of permitting attorney ghostwriting of documents have put forth additional arguments not necessarily emphasized by ethics opinions. The first, and most compelling, argument is that requiring disclosure when an attorney drafts court documents for an otherwise pro se litigant will act as a disincentive to attorneys providing limited legal services.¹⁸⁰ This will result because attorneys will be afraid that courts, once they discover the attorney’s representation of the client, will interpret the attorney’s having drafted pleadings to be the equivalent of entering a general appearance in the court involved.¹⁸¹

177. *Id.*

178. See Goldschmidt, *supra* note 25, at 1157 (“Practically speaking, however, ghostwriting is obvious from the face of the legal papers filed . . . [W]here the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction . . .”).

179. See *supra* notes 106 and 154 and accompanying text.

180. See Klempler, *supra* note 5, at 671 (“Most studies have indicated that requiring disclosure of the name and address of the attorney [who has performed unbundled drafting of legal documents] serves as a deterrent to lawyers offering unbundled legal services.”).

181. See Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 570 (2007) (“Attorneys are often cautious about arguing before a court on a limited matter due to uncertainty that courts will abide by the limitation contained in the retainer agreement and allow the attorney to withdraw upon completion of the agreed-upon task.”); Goldschmidt, *supra* note 25, at 1165, 1189–90 (raising the question of “whether an attorney subject to the candor-to-the-tribunal duties can then be compelled to enter an appearance and involuntarily provide legal services beyond those provided for in the scope-of-the-representation agreement” and noting that “[p]rivate attorneys who engage in ghostwriting ‘revealed that they would be much less willing to provide this service if they had to put their names on the pleadings’”); Rothermich, *supra* note 5, at 2725 (“If the practice of ghostwriting itself constitutes an appearance as attorney of record . . . [a]n attorney could never agree to provide only drafting assistance and preliminary advice because she could always be forced to appear in court and fully represent the pro se litigant as counsel of record.”). For example,

As stated above, attorneys generally enter an appearance by signing the initial pleading filed on behalf of their client.¹⁸² A court could conclude that an attorney's disclosure on such a pleading that the attorney assisted the client in or drafted the pleading for the client, even if the attorney had not signed the pleading, constitutes a general appearance. Once an attorney enters an appearance in the case, the attorney will need the court's consent to end the representation, even if the representation was supposed to end with the drafting of the pleading concerned.¹⁸³ Thus, the attorney's representation of the client may not be limited in the manner initially contemplated by the attorney and client when entering into the representation.¹⁸⁴ This could cause attorneys to refrain from entering into discrete task representations because of a fear that a court ultimately will require that they provide the full array of legal services to the client concerned.

However, the more familiar that courts become with attorneys providing unbundled legal services to clients, the less likely it seems that they would require attorneys who have agreed to provide such services to engage in a full-blown representation of the client concerned. If courts want pro se litigants to receive some legal advice in order to increase the efficiency in which the court can adjudicate their cases, courts should allow attorneys to provide discrete legal services to litigants without being "on the hook" for representing the client throughout the entire case.¹⁸⁵ In fact, the more that courts deal with this type of legal services arrangement, the more likely that

"a lawyer may be unable to represent a victim of domestic violence in an effort to secure a temporary restraining order because the [court's] policies would require the lawyer to make a motion to withdraw, and perhaps show good cause, to be excused from all other parts of the legal dispute." ABA HEARING REPORT, *supra* note 5, at 6.

182. See *supra* note 87 and accompanying text.

183. See *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (E.D. Va. 1997) ("[O]nce an attorney has entered an appearance in a civil or criminal action, withdrawal is permitted only by order of the court, and after reasonable notice to the party represented."); MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2002) (stating that a "lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation" and that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."); see also *Farley*, *supra* note 181, at 570 ("In many jurisdictions, attorneys must obtain permission from the court before withdrawing from a case.").

184. See *Goldschmidt*, *supra* note 25, at 1165 ("This raises the question of whether an attorney subject to the candor-to-the-tribunal duties can then be compelled to enter an appearance and involuntarily provide legal services beyond those provided for in the scope-of-the-representation agreement."); *Rothermich*, *supra* note 5, at 2725 ("If the practice of ghostwriting itself constitutes an appearance as attorney of record simply because it engenders an attorney-client relationship, [the contemplated limited representation] would be rendered impossible by definition.").

185. See *Farley*, *supra* note 181, at 571 ("Proponents of limited appearances argue it is more efficient for the court and fair for litigants to have attorneys actually argue on behalf of low-income, unrepresented litigants in court proceedings.").

they will develop special procedural rules to accommodate such legal representations.¹⁸⁶

The second argument that some commentators have presented is that an attorney's disclosure of the legal services that the attorney has provided to the nominal pro se litigant would violate the attorney's duty of confidentiality to the client and the attorney-client privilege.¹⁸⁷ While an attorney's duty of confidentiality might encompass the fact of his or her representation of a client if a client did not wish to have this revealed,¹⁸⁸ generally an attorney has the option of disclosing confidential information if disclosure is necessary to prevent a fraud and the client has used the attorney's services in furtherance of the fraud.¹⁸⁹ Assuming that courts cannot easily discern exactly when attorneys have drafted documents for pro se litigants, which the language of several court opinions indicates,¹⁹⁰ an attorney can disclose the fact of his or her having provided legal services to the nominal pro se litigant in order to prevent the other party from being disadvantaged by the court inappropriately applying a liberal interpretation to the court documents concerned and being more forgiving in the nominal pro se party's adherence to the court's procedural rules. Additionally, the Model Rules expressly require an attorney to disclose confidential information in order to avoid committing a fraud against the court.¹⁹¹

186. See *infra* notes 212–22 and accompanying text (setting out rules that some courts have developed to deal with otherwise pro se litigants who enter into discrete representation arrangements with attorneys).

187. See Goldschmidt, *supra* note 25, at 1167, 1199 (asserting that “American lawyers have a duty of confidentiality that protects against compelled disclosure” and that “[i]f a pro se party desires that the details of his attorney-client relationship be kept confidential, the order to disclose the ghostwriter and the terms of the representation agreement would be an unprecedented violation of the attorney-client privilege”).

188. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003) (stating that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent”).

189. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2003) (stating that “[a] lawyer may reveal [client confidential] information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services”).

190. See *supra* notes 63–65 and accompanying text.

191. See MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (2002) (stating that “[t]he duties in stated paragraphs (a) and (b) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6,” dealing with an attorney's duty to not disclose client confidential information); see also *supra* notes 30–32 and accompanying text (explaining the prohibition under Model Rule 3.3(a) against an attorney making misrepresentations to a court and the requirement under Model Rule 3.3(b) of taking “reasonable remedial measures, including, if necessary disclosure to the tribunal” to prevent or remedy “fraudulent conduct [of other persons] related to the proceeding”).

Furthermore, the attorney-client privilege normally does not cover the fact that an attorney represents a client.¹⁹² This results because this information does not involve a communication between an attorney and client.¹⁹³ The only exception to this rule is if the revelation of the fact that the attorney represented the client would somehow “reveal the content of a confidential communication,” either “directly or by reasonable inference.”¹⁹⁴ Usually, this exception applies only when the revelation of the identity of the attorney’s client will result in identifying the client as having been involved in some criminal endeavor.¹⁹⁵

192. See, e.g., *United States v. Legal Servs. for N.Y. City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001) (“Courts have consistently held that the general subject matters of clients’ representations are not privileged.”); *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992) (“The identity of a client and the receipt of attorney’s fees normally are not privileged matters.”); *Dietz v. Doe*, 935 P.2d 611, 617 (Wash. 1997) (“Ordinarily, the name of a client is not a confidential communication under the protection of the attorney-client privilege.”); *People v. Adam*, 280 N.E.2d 205, 207–08 (Ill. 1972) (concluding that the attorney-client privilege did not apply to testimony by the client that the client retained an attorney and identifying that attorney “because the privilege applies only to communications made by [the client] to [her attorney]”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. g (2000) (“Courts have sometimes asserted that the attorney-client privilege categorically does not apply to such matters as . . . the fact that the client consulted the lawyer and the general subject matter of the consultation.”).

193. See *Legal Servs. for N.Y. City*, 249 F.3d at 1081 (“Nor does the general purpose of a client’s representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. g (2000) (stating that “[t]estimony about such matters” as, among other things, “the fact that the client consulted the lawyer and the general subject matter of the consultation” usually “does not reveal the content of communications from the client”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68(1) (2000) (requiring, among other things, a “communication” for the attorney-client privilege to apply). The Restatement defines a “communication” to be “any expression through which a privileged person . . . undertakes to convey information to another privileged person.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 (2000).

194. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. g (2000); see also *In re Grand Jury Matter*, 969 F.2d at 997 (stating that an exception to the rule generally not protecting the identity of a client under the attorney-client privilege exists “where disclosure of the identity would also reveal the privileged motive for the client to seek legal advice”) (quoting *In re Grand Jury Proceedings 88-9*, 899 F.2d 1039, 1043 (11th Cir. 1990)).

195. See, e.g., *In re Grand Jury Matter*, 969 F.2d at 997 (“[Under] the ‘last link’ doctrine . . . the identity of the client may become privileged because it ‘may well be the link that could form the chain of testimony necessary to convict the individual of a federal crime.’”) (quoting *Baird v. Koerner*, 279 F.2d 623, 633 (9th Cir. 1960)); *United States v. Legal Servs. for N.Y. City*, 100 F. Supp. 2d 42, 45 (D.D.C. 2000) (“Some courts . . . have recognized an ‘extremely narrow’ exception to this rule, when disclosure would implicate the client in criminal wrongdoing, or when disclosure, in conjunction with information already provided, would be tantamount to revealing an ‘indubitably confidential communication[.]’”) (quoting *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 493 (7th Cir. 1984)), *aff’d*, 249 F.3d 1077 (D.C. Cir. 2001); *Dietz*, 935 P.2d at 617 (“[T]he ‘legal advice’ exception . . . ‘which bars disclosure “where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought.”’) (quoting *Seventh Elect Church in Israel v. Rogers*, 688 P.2d 506, 509 (Wash. 1984)).

However, this exception does not apply to disclosure of attorney ghostwriting. Revealing the fact that a nominal pro se client received legal assistance in preparing his or her pleadings by itself would not reveal any other privileged communication between the client and his or her attorney. Neither would this disclosure necessarily identify the client's involvement in some potential criminal endeavor for which the client originally sought the advice of the attorney. Even if this information somehow would lead to the revelation of some other privileged communication, the attorney-client privilege, similar to an attorney's ethical duty of confidentiality, does not apply to communications in which the client "uses the lawyer's advice or other services to engage in or assist a crime or fraud."¹⁹⁶ Therefore, because the attorney's failure to disclose the assistance provided to the nominal pro se client arguably constitutes a fraud on the court, if not also on the opposing party, the attorney-client privilege would not cover the fact of the attorney's representation even under this scenario. Thus, neither the attorney-client privilege nor an attorney's broader ethical duty of confidentiality to a client provides a justification for attorneys to fail to disclose that they drafted court documents for, or provided other legal assistance to, litigants presenting themselves to the court as proceeding pro se.

V. RECOMMENDATION TO REQUIRE DISCLOSURE OF GHOSTWRITING AND
CONSIDER GHOSTWRITING TO CONSTITUTE A LIMITED APPEARANCE BY AN
ATTORNEY

In order to allow for the courts to fairly and efficiently adjudicate cases involving nominal pro se litigants, courts should require attorneys to disclose their conduct when they ghostwrite court documents for litigants otherwise proceeding pro se or provide some other limited legal services to such litigants. Requiring ghostwriting attorneys to make such a disclosure would prevent courts from continuing to be liberal in interpreting the document concerned, which an attorney in fact drafted, and forgiving in applying its procedural rules to that document.¹⁹⁷ Therefore, the nominal pro se litigant would not obtain an unfair advantage against his or her opponent through the attorney's limited provision of legal services.

As set out above, despite protestations to the contrary in a few ethics opinions and by ghostwriting proponents, courts often have difficulty determining whether an attorney has drafted a document for a pro se litigant and are reluctant to conclude that attorney ghostwriting has occurred unless

196. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82(b) (2000).

197. See *supra* notes 57–62 and accompanying text (explaining the manner in which courts are required to liberally interpret pro se litigants' court documents throughout the lawsuit as well as giving pro se litigants considerable leeway in meeting procedural deadlines).

someone with actual knowledge of the attorney's conduct affirmatively states that such conduct actually has taken place.¹⁹⁸ Thus, although not as egregious as bribing a judge or a juror, undetected ghostwriting does "undermine[] the integrity of the adjudicative process"¹⁹⁹ by giving an unfair advantage to the nominal pro se litigant and does violate an attorney's duty to avoid committing a fraud on the court,²⁰⁰ as well as the attorney's duties to avoid fraud generally,²⁰¹ to make truthful statements to third parties, and to avoid assisting a client to commit fraud.²⁰²

Moreover, requiring disclosure of attorney ghostwriting of court documents, as well as the provision of other unbundled legal services to nominal pro se litigants, will allow an opposing party who was contemplating proceeding pro se to hire an attorney if he or she is able and desires to do so because that party will now be fully informed about the legal services that the nominal pro se party has received.²⁰³ If attorney ghostwriting is allowed to occur without disclosure, this could encourage attorneys to provide more extensive unbundled legal services to a nominal pro se litigant that could severely prejudice an opposing party who actually is proceeding pro se.

For example, an attorney could engage in a more extensive "stealth" representation where the attorney ghostwrites documents for the nominal pro se litigant periodically throughout the lawsuit and even provides legal and strategic advice to that party during settlement negotiations without the knowledge of an opposing pro se party. An attorney might even appear on behalf of the nominal pro se litigant at a hearing to argue an important motion without the opposing party having any advance notice that the attorney would so appear. In such situations, the opposing party is at a significant disadvantage when he or she is legitimately proceeding pro se without any legal assistance. Such "stealth" legal representations also present some additional and, perhaps, not immediately apparent thorny issues, such as whether a "stealth" attorney assisting the nominal pro se litigant with analyzing the other side's discovery documents violates a protective order that

198. See *supra* notes 63–68 and accompanying text.

199. See MODEL RULES OF PROF'L CONDUCT R. 3.3 cmts. 2, 12 (2002).

200. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002); see also *supra* notes 29–36 and accompanying text (discussing an attorney's duty of candor toward the court under Model Rule 3.3).

201. See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2002); see also *supra* note 37 and accompanying text (discussing an attorney's duty to avoid fraud generally under Model Rule 8.4(c)).

202. See MODEL RULES OF PROF'L CONDUCT R. 4.1, 1.2(d) (2002); see also *supra* notes 38–42 and accompanying text (discussing an attorney's duty to avoid making false statements to third parties and assisting client fraud).

203. See CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 72. ("There should be a level playing field for [an] opposing party in an unbundled situation. If one side had known the other side had an attorney, instead of learning of it when, all of a sudden, an attorney appeared at a court hearing, they might have brought one too.").

a court has issued with regard to confidential documents that the opponent produced.²⁰⁴ Admittedly, such behavior goes beyond an attorney simply ghostwriting an initial pleading for a party that otherwise proceeds pro se through the rest of the lawsuit, but failing to require disclosure of attorney ghostwriting potentially opens the door to more extensive abuses by stealth counsel. Thus, the best manner of dealing with attorney ghostwriting in order to prevent any unfair prejudice to the opposing party is to require the disclosure of such activity.

Simply disclosing on the document concerned that counsel prepared it would prevent courts from inappropriately applying a liberal interpretation to the document concerned, and such disclosure would also prevent an opposing party from deciding to proceed pro se without knowledge of the legal assistance that the nominal pro se client was in fact receiving. However, this limited disclosure would not provide the exact identity of the ghostwriting attorney and, thus, would not sufficiently deal with the efficiency concern of courts.²⁰⁵ Just knowing that some unnamed counsel prepared the document will still require a court to engage in an investigation to discover the attorney's identity should the court need to question the attorney about the accuracy of the law or facts contained in the document concerned.²⁰⁶ As pointed out above, being able to follow up with the preparing attorney quickly and efficiently is especially important in bankruptcy cases, an area in which litigants often appear pro se and where the initial petitions filed with the court often need to be amended in order to correct errors and omissions.²⁰⁷

On the other hand, when a court document indicates the name of the attorney who drafted it for an otherwise pro se litigant, the court should not consider the attorney to have entered a general appearance for the litigant concerned and keep the attorney "on the hook" for representing that litigant further in the lawsuit.²⁰⁸ In fact, in order to prevent requiring attorney

204. See *Norbert v. La. Med. Ctr.*, No. 05-1650, 2007 WL 1537021, at *2 (W.D. La. May 24, 2007) (granting defendant's motion to prevent stealth counsel of pro se plaintiff from viewing defendant's sensitive personnel documents unless counsel made an official appearance in the case on behalf of the pro se plaintiff).

205. See *supra* notes 77–83 and accompanying text (discussing the efficiency concerns that courts have expressed about ghostwriting).

206. Beyond investigating some type of malfeasance on the part of either the pro se litigant or the ghostwriting attorney, the court might also need to contact the ghostwriting attorney if the court perceives that the pro se litigant simply does not understand the legal arguments made in the ghostwritten documents sufficiently. See *Tebo, supra* note 4, at 17 (discussing difficult ethics issues that ghostwriting raises identified by James McCauley, ethics counsel for the Virginia State Bar).

207. See *supra* notes 78–80 and accompanying text.

208. See ABA HEARING REPORT, *supra* note 5, at 8 ("State ethics rules and rules of procedure should be examined and, where necessary, modified to permit limited representation that can be promoted and provided on a competitive, cost-effective basis. Specific issues include ghostwriting, limited appearances, fee sharing and client development.").

disclosure of ghostwriting from discouraging attorneys from providing unbundled legal services, courts should consider such disclosure to constitute only a limited appearance. Furthermore, courts should contact ghostwriting attorneys who reveal their identities only when the court determines that some type of problem exists with the document concerned, such as some type of inaccuracy or when the court suspects malfeasance.

Therefore, it would be appropriate for attorneys who ghostwrite documents for litigants just to indicate their names on the documents concerned in some manner other than actually signing the documents concerned. As set out above, such disclosure would not violate an attorney's duty of confidentiality to a client because the disclosure would be made in order to prevent a misrepresentation to the court and opposing counsel.²⁰⁹ Similarly, such a disclosure would not breach the attorney-client privilege because the privilege does not cover the fact of the attorney's representation of the client concerned.²¹⁰ However, if the attorney actually signs the document, this could constitute a general appearance.²¹¹ Instead, the litigant should sign the document, and the attorney should just note in another spot that counsel prepared the document along with counsel's name and contact information.

Moreover, in order to encourage attorneys, despite the disclosure requirement, to provide unbundled legal services to litigants who otherwise would proceed entirely *pro se*, courts should develop explicit procedures that govern the manner in which attorneys make such disclosure and that explicitly state that an attorney making such a disclosure does not enter a general appearance on behalf of the client. Courts that deal with areas in which *pro se* litigants are especially prevalent, such as domestic relations, housing, and bankruptcy courts, should especially consider developing such rules.

Alternatively, states could revise their legal ethics rules so that they expressly require disclosure of attorney ghostwriting of court documents and state that such disclosure constitutes only a limited appearance in the litigation concerned. Whether courts' local rules or states' professional responsibility rules are changed in this manner, the result would be the same—attorneys could provide limited legal services to litigants otherwise proceeding *pro se* in an open and honest fashion, and the contemplated disclosure would not serve as a disincentive to the provision of such unbundled services. However, revision of states' legal ethics codes would probably accomplish this in a quicker and more widespread manner.

209. *See supra* notes 188–91 and accompanying text.

210. *See supra* notes 192–95 and accompanying text.

211. *See supra* notes 87–88, 181–82 and accompanying text (discussing the effect of an attorney's signature on initial pleadings).

A few courts have already developed rules to accommodate the disclosure of attorneys having provided limited legal assistance to otherwise pro se litigants and that designate that such disclosure constitutes only a limited appearance by the attorney concerned. For example, the rules of procedure for Florida family law courts require that an attorney disclose his or her identity on “[a]ny pleading or other document filed by a limited appearance attorney.”²¹² Furthermore, these rules require that “[a] party who files a pleading or other document of record pro se with the assistance of an attorney shall certify that the party has received assistance from an attorney in the preparation of the pleading or other document.”²¹³ Florida’s rules also allow for limited appearances by attorneys providing unbundled legal services for a client.²¹⁴ Such attorneys must file “a notice, signed by the party, specifically limiting the attorney’s appearance only to the particular proceeding or matter in which the attorney appears.”²¹⁵ Then, “[a]t the conclusion of such proceeding or matter, the attorney’s role terminates without the necessity of leave of court, upon the attorney filing notice of completion of limited appearance.”²¹⁶ The filing of such notices at the beginning and end of the limited representation, as well as serving these notices on the other party or the party’s counsel when applicable, should prevent any confusion on the part of the court or the other party as to when they should communicate with the nominal pro se litigant or with the litigant’s attorney regarding a matter.²¹⁷

Similarly, Colorado has amended its rules of civil procedure to accommodate the provision of unbundled legal services. Under Colorado’s new Rule 11, attorneys who provide “drafting assistance” to parties who file documents with a Colorado court as pro se must “include the attorney’s name, address, telephone number and registration number” on the document concerned.²¹⁸ The attorney also must “advise the pro se party that such pleading or other paper must contain this statement.”²¹⁹ Furthermore, “[i]n

212. FLA. FAM. LAW R. P. 12.040(e) (2007). *But see* CAL. R. CT. FAM. R. 5.70 (2007) (“In a family law proceeding, an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the document that he or she was involved in preparing the documents.”).

213. FLA. FAM. LAW R. P. 12.040(d) (2007).

214. FLA. FAM. LAW R. P. 12.040(a) (2007); *see also* FLA. FAM. LAW R. P. 12.040(c) (2007) (“If an attorney appears of record for a particular limited proceeding or matter, as provided by this rule, that attorney shall be deemed ‘of record’ for only that particular proceeding or matter.”).

215. FLA. FAM. LAW R. P. 12.040(a).

216. FLA. FAM. LAW R. P. 12.040(c).

217. *See* Farley, *supra* note 181, at 576–77 (discussing how the filing of notices and developing rules regarding when opposing counsel must contact the attorney providing limited legal services can prevent opposing counsel from improperly contacting the otherwise pro se litigant).

218. COLO. R. CIV. P. 11(b) (2008).

219. *Id.*

helping to draft the pleading or paper filed by the pro se party,” the attorney makes certifications to the court concerning the facts and law on which the document is based similar to those that the attorney would make if he or she actually had signed the document.²²⁰ Moreover, the rule explicitly states 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 purpose of Colorado’s rules governing appearances before Colorado courts and withdrawal.²²¹

Courts in Maine, Nevada, Washington, and Wyoming have enacted comparable appearance rules dealing with unbundled representation of litigants otherwise proceeding pro se.²²² Therefore, a handful of courts have already taken steps to require disclosure of attorney ghostwriting of court documents for otherwise pro se litigants and ensure that such disclosure does not constitute a general appearance in the case from which the attorney will need court approval to withdraw. However, many more jurisdictions should follow the lead of these courts and enact similar court or ethics rules requiring disclosure of the identity of attorneys who ghostwrite documents for litigants who otherwise proceed pro se and enabling this disclosure to constitute only a limited appearance by the ghostwriting attorney.

220. *Id.* (“In helping to draft the pleading and paper filed by the pro se party, the attorney certifies that, to the best of the attorney’s knowledge, information and belief, this pleading or paper is (1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”); *see also* WASH. SUPER. CT. CIV. R. 11(b) (2006) (imposing similar certification requirements for attorneys who “help[ed] to draft a pleading, motion or document filed by the otherwise self-represented person”).

221. COLO. R. CIV. P. 11(b) (2008).

222. *See* ME. CODE OF PROF’L RESPONSIBILITY R. 3.4(i) (2002) (“If, after consultation, the client consents in writing (the general form of which is attached to these Rules), an attorney may enter a limited appearance on behalf of an otherwise unrepresented party involved in a court proceeding.”); NEV. 8TH JUD. DIST. R. PRACT. 5.28 (2006) (requiring that an “attorney who contracts with a client to limit the scope of representation” to “state that limitation in the first paragraph of the first paper or pleading filed on behalf of that client” and stating that “[a]n attorney who contracts with a client to limit the scope of representation shall be permitted to withdraw from [the] representation before the court by filing a Substitution of Attorney” that indicates that the “service has been completed” and “that the client will be representing himself or herself in proper person” and includes “a copy of the limited services retainer agreement between the attorney and the client”); WASH. SUPER. CT. CIV. R. 4.2(b) (2008) (“Providing limited representation of a person under these rules shall not constitute an entry of appearance by the attorney”); WYO. UNIF. R. DIST. CTS. 102(a)(1)(B) (2002) (“[A]n attorney who assisted in the preparation of a pleading and whose name appears on the pleading as having done so shall not be deemed to have entered an appearance in the matter”).

VI. CONCLUSION

Pro se litigants are a fact of life in state and federal courts today, especially in courts dealing with certain subject matter such as bankruptcy, housing, and family law. Therefore, attorneys should be encouraged to provide unbundled legal services, including drafting of initial pleadings or other court documents, to such litigants who desire to receive these services and can afford them. However, the provision of unbundled legal services to litigants who otherwise proceed pro se should not be encouraged at the expense of the opposing party, who is entitled to a fair and impartial adjudication as well as full disclosure regarding the legal services that the nominal pro se party actually is receiving. Moreover, attorneys should not engage in a misrepresentation to the court, as well as to the opposing party, by engaging in undisclosed ghostwriting of documents.

Therefore, states should develop either ethics or court rules that explicitly require attorneys to disclose their identities when they draft court documents for parties otherwise proceeding pro se. At the same time, courts should not consider such disclosures to constitute a general appearance, which would require court approval before the attorney is allowed to withdraw from the representation. Instead, courts should consider such a disclosure to constitute a limited appearance, if it is considered to be any type of appearance at all. A few courts have already adopted rules doing this, but many more courts and jurisdictions still need to do so. Only in this manner can courts and the bar promote the provision of unbundled legal services to otherwise pro se litigants while requiring disclosure of attorney ghostwriting to allow for the fair and efficient adjudication of the lawsuit involved.