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NOTE

ETHICAL AND PROCEDURAL IMPLICATIONS OF "GHOSTWRITING" FOR PRO SE LITIGANTS: TOWARD INCREASED ACCESS TO CIVIL JUSTICE

John C. Rothermich

INTRODUCTION

Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. . . . [T]he doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years.¹

An abstract legal right is worthless without a correlative right of access to the judicial system to enforce it. Accordingly, the Supreme Court has repeatedly identified reasonable access to the courts as a fundamental constitutional right.² Indeed, "[o]ne of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien."³ In the civil context, however, the right to legal counsel does not accompany this fundamental

1. Franz Kafka, *Before the Law*, in *The Complete Stories* 3, 3 (Willa Muir & Edwin Muir trans., Schocken Books 1971).

2. Various decisions have grounded the constitutional right of access to the courts in the Privileges and Immunities Clause, see *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 147-48 (1907), the First Amendment right of petition, see *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), the Due Process Clause of the Fifth and Fourteenth Amendments, see *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971), and the Equal Protection Clause of the Fourteenth Amendment, see *id.* at 385-86 (Douglas, J., concurring). See generally Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* 19-24 (1998) (discussing the legal foundation of the right of self-representation).

3. *NAACP v. Meese*, 615 F. Supp. 200, 205-06 (D.D.C. 1985).

right of access to the courts.⁴ Thus, low-income individuals who wish to invoke their rights or settle their disputes in court must either fall into the minuscule proportion of the population that qualifies for free legal assistance or be forced to bring their own complaints and represent themselves without the benefit of counsel.⁵

The existence of a right to the courts without a correlative right to legal assistance and advice has resulted in the drastic under-representation of low and moderate-income households in the civil justice system.⁶ The most recent study of legal needs among these populations found that low-income households' legal problems involved the judicial system only twenty-nine percent of the time, and that no action of any kind was taken thirty-eight percent of the time.⁷ For 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, and no action was taken in twenty-six percent of cases.⁸ These figures demonstrate that low and moderate-income individuals and families have extremely limited opportunities to access the civil justice system.

Furthermore, dramatic cuts in federal funding for the Legal Services Corporation ("LSC")⁹ have exacerbated these limitations on access to the judicial machinery. The total funding for the LSC in 1997 was \$278 million,¹⁰ a significant reduction from the \$415 million appropriated to the LSC in 1995.¹¹ Even before these cuts, it is estimated that legal services organizations were forced to deny over half of their eligible clients any assistance due to inadequate resources.¹² This insufficient access to legal services affects not only the poorest

4. See, e.g., *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 25 (1981) (holding that there is a right to counsel only when the deprivation of physical liberty is at stake).

5. The right of self-representation in court is itself a long-standing right now codified by Federal law. See 28 U.S.C. § 1654 (1994); Goldschmidt et al., *supra* note 2, at 23.

6. See Carolyn A. Eldred & Roy W. Reese, Temple Univ. Inst. for Survey Research, *Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study 21 & tbl.4-1* (1994).

7. See *id.* at 19 & tbl.4-1.

8. See *id.* at 21 fig.4-1.

9. The Legal Services Corporation is the federal umbrella administration which funds local legal services providers throughout the country.

10. See Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-50.

11. See Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1759 (1994). For 1999, Congress has approved an increase in the LSC budget to \$300 million from the \$283 million appropriated for fiscal years 1997 and 1998. See Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 *Fordham L. Rev.* 2475, 2481 & n.23 (1999) [hereinafter Tremblay, *Moral Type of God*].

12. In 1994, 60% of eligible clients were turned away. See Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, *Judges' J.*, Winter 1995, at 1, 2.

citizens, but also a sizable middle-income population that cannot afford the fees charged by private attorneys.¹³

A suggested solution to this problem of unmet legal needs is the development of "unbundled" legal services, also known as "discrete task representation."¹⁴ This approach to the provision of legal services suggests that lawyers break down the traditional package of full-service representation to clients. Under this rubric, attorneys provide assistance only with selected aspects of a legal problem, depending on the available resources of the legal services office.¹⁵ Studies have shown that without some legal advice or assistance from an attorney, pro se litigants often forfeit a number of their legal rights.¹⁶ Discrete task representation seeks to preserve these rights by allowing lawyers to provide legal advice to pro se litigants, including assistance with the drafting of pleadings and court documents, without actually representing the client as counsel of record.¹⁷ This methodology would allow legal services offices to provide legal assistance to more individuals, potentially increasing access to justice for low-income clients.

This Note focuses on one specific form of unbundled legal assistance: the drafting of pleadings and other court documents by lawyers for clients who go on to represent themselves pro se. This practice, known as "ghostwriting," has raised a host of potential problems, including a possibly unethical exploitation of pro se leniency,¹⁸ violations of Rule 11,¹⁹ violations of local court rules regarding attorney withdrawal,²⁰ and violations of ethics rules prohibiting misrepresentation to the court.²¹ This Note carefully examines the few federal cases that have condemned the practice of ghostwriting along these lines.²² It also considers the contrasting perspective of state ethics panels and

13. See Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate Income Elderly Clients*, 32 Wake Forest L. Rev. 295, 298 (1997) [hereinafter McNeal, *Elderly Clients*].

14. The terms "unbundled legal services," "discrete task legal services," and "limited legal services" are used interchangeably throughout this Note.

15. See McNeal, *Elderly Clients*, *supra* note 13, at 296.

16. See Michael Millemann et al., *Limited Service Representation and Access to Justice: An Experiment*, 11 Am. J. Fam. L. 1, 1 (1997).

17. See *id.* at 3; Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 Fam. L.Q. 421, 421-27 (1994) [hereinafter Mosten, *Family Lawyer*].

18. See *Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994).

19. See *id.* at 1231-32.

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

21. See *Johnson*, 868 F. Supp. at 1232; Goldschmidt et al., *supra* note 2, at 26; Millemann et al., *supra* note 16, at 2; Elizabeth J. Cohen, *Afraid of Ghosts*, A.B.A. J., Dec. 1997, at 80, 80; Lonnie A. Powers, *Pro Bono and Pro Se: Letting Clients Order off the Menu Without Giving Yourself Indigestion*, Boston B.J., May/June 1998, at 10, 10-11.

22. See *Ricotta v. California*, 4 F. Supp. 2d 961 (S.D. Cal. 1998); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075 (E.D. Va. 1997); *Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226 (D. Colo. 1994). Though the

bar associations, which have generally endorsed the practice as meeting ethical and professional standards.²³

Part I briefly explains the concept of unbundled, or discrete-task, legal assistance and defines ghostwriting in particular. Part I also outlines some potential ethical issues that the practice of unbundled legal services might raise, and notes a few other ethical issues specific to the practice of ghostwriting. Part II discusses the way that ethics panels, courts, and commentators have responded to the practice of ghostwriting. This part also suggests some guidelines to assure the ethical viability of the practice. Part III analyzes some courts' condemnation of ghostwriting as a violation of certain procedural rules, specifically Rule 11 and local withdrawal rules, and offers some alternative interpretations of these rules.

I. UNBUNDLED LEGAL SERVICES AND GHOSTWRITING: AN OUTLINE OF POTENTIAL ETHICAL ISSUES

This part briefly defines the practice of unbundled, or discrete-task, legal services in general, with particular focus on the practice of "ghostwriting." It then proceeds to outline some of the key ethical issues inherent in these alternative practice models and notes some particular ethical issues that apply specifically to ghostwriting.

A. *Limited Legal Services and Ghostwriting Defined*

When a client seeks the assistance of a lawyer, most people assume that the lawyer will provide full-service legal representation to that client. This traditional model of legal representation includes every legal service necessary to solve the client's problem from start to finish, including fact gathering, legal advice, legal research, discovery, negotiation, drafting of all required documents, and representation of the client in court.²⁴ In the full-service arrangement, "the scope of needed [legal] services is generally decided unilaterally by the lawyer who performs the services and then sends the client a bill that the client is expected to pay."²⁵ Unfortunately a substantial low- and

practice of ghostwriting might have a greater practical impact in state courts of limited jurisdiction, the same issues identified by the federal courts are likely to apply.

23. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978); Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1987-2 (1987); Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990); Ethics Comm., Alaska Bar Ass'n, Ethics Op. 93-1 (1993); Ethics Comm., North Carolina State Bar, RPC 114 (1991); Professional Conduct Comm., Illinois State Bar Ass'n, Opinion 849 (1983).

24. See Mosten, *Family Lawyer*, *supra* note 17, at 423.

25. Forrest S. Mosten, *Unbundling Legal Services: A Key Component in the Future of Access to Justice*, Or. St. B. Bull., Jan. 1997, at 9, 9 [hereinafter Mosten, *Unbundling*].

moderate-income population is unable to engage this traditional representational model, often for economic reasons.²⁶

Unbundled legal services, also known as discrete-task legal services, represents a proposed alternative to the full-service representation model. The unbundled delivery model seeks to increase access to the judicial system, particularly for low-income populations.²⁷ 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.²⁸ For instance, the lawyer may provide one or a combination of services, such as providing limited legal advice, doing legal research, drafting court pleadings or correspondence, or coaching a client regarding approaches to a negotiation or mediation.²⁹ Once the client selects the services to be performed, the lawyer would contract with the client to provide those services only.³⁰

Models of limited legal assistance delivery range from "brief advice," such as a simple answer to a specific legal question, to the provision of substantial assistance with a legal problem, such as drafting court documents or teaching classes on representing oneself pro se.³¹ Also, contexts in which these models can be practiced vary widely. They might be provided by private attorneys for a limited fee, by legal services offices with legal hotlines or informational websites, or in pro se clinics run by law schools providing legal advice and court forms.³²

In each of these contexts, the unbundled legal service delivery model provides greater access to needed legal advice and assistance for low and moderate-income populations. Moderate-income clients who do not qualify for free legal aid but are unable to afford the full-service package are able to contract for limited assistance with a fixed price.³³ In the context of poverty law, unbundled services models allow community legal services offices to distribute their scarce resources over a much broader client base.³⁴ Regardless of the

26. See Consortium on Legal Servs. and the Pub., American Bar Ass'n, *Agenda for Access: The American People and Civil Justice 10* (1996) [hereinafter *Agenda for Access*]; *supra* notes 6-12 and accompanying text.

27. See Millemann et al., *supra* note 16, at 2; Mosten, *Family Lawyer*, *supra* note 17, at 424-25; Vernetta L. Walker, *Legal Needs of the Public in the Future*, Fla. B.J., May 1997, at 42, 42.

28. See Mosten, *Family Lawyer*, *supra* note 17, at 423.

29. See Mosten, *Unbundling*, *supra* note 25, at 10.

30. See *id.* at 11.

31. See Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 *Fordham L. Rev.* 2617, 2621-22 (1999) [hereinafter *McNeal, One Oar*].

32. See *id.* at 2622-23.

33. See Mosten, *Family Lawyer*, *supra* note 17, at 423. Mosten argues that unbundled services models are valuable not only because they increase the availability of legal assistance, but also because they give clients more control over their own legal decisions. See *id.* at 423-25.

34. It is important to recognize that discrete-task models in the low-income context would not necessarily involve client choice, but would instead reflect legal serv-

circumstances in which it is practiced, the unbundling methodology is consistent with the exhortation of the ABA Consortium on Legal Services and the Public that alternative practice models be developed to increase access to justice.³⁵

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.³⁶ In the paradigm ghostwriting scenario, the lawyer's assistance is specifically limited to the drafting of particular pleadings or other court documents.³⁷ The documents are then filed by the litigant herself, and the attorney has no further involvement with the case.³⁸ Ghostwriting can occur in several contexts. For example, a litigant might contract with an attorney to draft a pleading for a fee.³⁹ Or, alternatively, a legal services office might offer to provide ghostwriting assistance to a client if resource limitations prevent full-service representation of the client in court.⁴⁰

It is important to recognize that ghostwriting is not always practiced according to the paradigm outlined above where a lawyer drafts complete pleadings for a pro se litigant and then terminates the representation entirely. Instead, ghostwriting assistance can be given at varying levels of depth and attorney involvement in a pro se litigant's case. For example, an attorney may agree to provide continuing procedural or other legal advice to the pro se litigant during the course of the proceedings.⁴¹ On the other hand, an attorney might agree solely to review an initial pleading for adequate detail, thus having a minimal hand in the actual drafting.⁴² Different degrees of ghostwriting assistance can generate different kinds of ethical or procedural problems.⁴³

ices offices' own determinations about how to most effectively distribute their resources so as to benefit the greatest number of clients. *See generally* Tremblay, *Moral Type of God*, *supra* note 11, at 2479-84 (1999) (discussing the allocation of scarce legal services resources).

35. *See* Agenda for Access, *supra* note 26, at 10-14.

36. *See* Cohen, *supra* note 21, at 80; George W. Overton, *Lawyers as Ghosts*, Chicago B. Ass'n Rec., Nov. 1995, at 41, 41; Carole R. Richelieu, *Ghostwriting*, Haw. B.J., Oct. 1996, at 18, 18.

37. *See, e.g.*, Powers, *supra* note 21, at 22 (discussing a possible scenario where a lawyer agrees only to do particular work for a client.)

38. *See generally* Mosten, *Unbundling*, *supra* note 25, at 9-10 (describing different forms of limited assistance a lawyer might provide, including ghostwriting).

39. *See* Mosten, *Family Lawyer*, *supra* note 17, at 425-26 (describing possible fee arrangements for attorneys performing discrete legal tasks).

40. *See generally* McNeal, *One Oar*, *supra* note 31, at 2636-37.

41. *See* Mosten, *Family Lawyer*, *supra* note 17, at 428-30 (listing a range of possible degrees of assistance that a lawyer might provide to a pro se litigant).

42. *See* Mosten, *Unbundling*, *supra* note 25, at 10 (suggesting that ghostwriting can involve actually drafting pleadings or simply providing review of the client's own drafts).

43. *See infra* notes 205-10 and accompanying text.

B. *Ethical Implications of Limited Legal Services and Ghostwriting*

As private lawyers and legal services offices for the poor have begun to implement various models of discrete-task legal assistance, it is necessary to closely examine the ethical implications of this practice. The fundamental task of this analysis is to determine how different limited service delivery models can be implemented without compromising clients' interests as defined by established ethics rules. Because the range of possible models of limited legal assistance is so broad, from the provision of legal advice on telephone hotlines to the ghostwriting of pleadings for pro se litigants, consideration of all the different ethical implications is a substantial task.⁴⁴ This section briefly recounts some of the ethical issues raised by commentators regarding the provision of limited legal services in general. It then specifically addresses potential ethical problems engendered by the practice of ghostwriting.

1. The Ethics of Limited Legal Assistance in General

Applying established ethics rules to burgeoning models of limited legal services is difficult because the rules themselves are formulated under the assumption that lawyers always provide full-service representation.⁴⁵ Therefore, many of the ethical issues raised by unbundled legal assistance models are problems of interpreting the rules for the purposes of these new methodologies, not necessarily per se violations of the rules themselves.

Of all ethical norms promulgated in the Model Rules of Professional Conduct,⁴⁶ perhaps none is more difficult to apply to discrete-task legal services models than the requirement of attorney competence.⁴⁷ As Model Rule 1.1 mandates, "[a] lawyer shall provide competent representation to a client."⁴⁸ Further, "competent

44. For a detailed discussion of the ethical implications of a wide variety of unbundled legal services models that is beyond the scope of this Note, see generally McNeal, *One Oar*, *supra* note 31.

45. See, e.g., *id.* at 2638. ("Because Model Rule 1.1 envisions only traditional, full service representation, it is of little assistance in determining how this standard might be applied [to discrete task models]." (footnote omitted)).

46. This Note refers to the Model Rules of Professional Conduct in discussing established ethical norms. Though the Model Rules have been adopted in whole or substantial part by forty-one states, see Stephen Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* at xix (1999), some states' ethics codes are based on the previous Model Code of Professional Conduct, including New York State, while others diverge substantially from both the Model Rules and the Model Code. See *id.* at xix-xx. A discussion of the ethical norms promulgated by the Model Rules, however, is sufficient to provide a ground for general analysis of the ethical implications of limited legal assistance in all jurisdictions.

47. See Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 St. Thomas L. Rev. 97 (1995) (providing a general discussion of whether the ethics rules can adequately assure legal competence in the poverty law context).

48. Model Rules of Professional Conduct Rule 1.1 (1998).

representation” is defined as requiring “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁴⁹ Additionally, a comment to Model Rule 1.1 observes that “[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve.”⁵⁰ The question thus becomes whether the provision of legal services outside the traditional full-service model constitutes the competent practice of law. According to Model Rule 1.1, discrete-task legal services delivery models could be considered ethically incompetent representation unless they involved an adequate investigation of the client’s legal problem taken as a whole.⁵¹

This “adequate inquiry” requirement inherent in the competence rule has different implications on different models of limited legal services delivery.⁵² For instance, a volunteer attorney staffing a general legal hotline can competently answer a simple question about a traffic ticket without a thorough inquiry into the underlying legal and factual circumstances.⁵³ On the other hand, an attorney who has agreed to provide more substantial limited assistance, such as ghost-writing a pleading, would be required to engage in substantially greater investigation of her client’s legal circumstances as a whole to properly determine what further assistance may be required.⁵⁴

The requirement under Model Rule 1.3 that attorneys provide “diligent” representation⁵⁵ provides similar interpretive difficulties in its application to limited legal services delivery models. The exhortation contained in the first comment to this rule, that “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer,”⁵⁶ practically defines what most clients expect from the traditional full-service model of representation. It is unclear, however, what this rhetoric of zealous advocacy requires of a lawyer providing unbundled services.⁵⁷ In deference to lawyer discretion, Model Rule 1.3 provides greater leeway in determining the scope of its diligence mandate than does the competence

49. *Id.*

50. *Id.* Rule 1.1 cmt. [2]. Additionally, Comment [5] suggests that competence requires “inquiry into and analysis of the factual and legal elements of the problem.” *Id.* Rule 1.1 cmt. [5].

51. See McNeal, *Elderly Clients*, *supra* note 13, at 318-25.

52. See generally McNeal, *One Oar*, *supra* note 31, at 2638-40 (discussing the ethical distinctions between unbundled services that entail simple, brief advice, and those which entail more substantial assistance).

53. See *id.* at 2629-30.

54. See *id.* at 2637.

55. Rule 1.3 states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Model Rules of Professional Conduct Rule 1.3.

56. *Id.* Rule 1.3 cmt. [1].

57. See McNeal, *Elderly Clients*, *supra* note 13, at 321.

required by Model Rule 1.1.⁵⁸ In fact, Model Rule 1.3 notes that the Model Rules grant attorneys "discretion" over limiting the scope of their representation.⁵⁹

Model Rule 1.3 generates further ambiguity regarding its application to limited services delivery models. Comment [3] to the Rule begins by stating that "[u]nless the [attorney-client] relationship is terminated as provided in Model Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client."⁶⁰ This suggests that the diligence requirement might prohibit limited legal services. The comment also notes, however, that "[i]f a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved."⁶¹ The comments themselves thus highlight the possible contradictions between diligence as understood in relation to the full-service model and diligent representation in a limited services context.

Another ethical consideration that limited legal services models must contend with is the aforementioned Model Rule 1.16, which provides that an attorney may only withdraw from a representation if such withdrawal will not harm the client's interests.⁶² A strict interpretation of this rule would render discrete-task legal services like ghostwriting impossible, because most clients would obviously be better served by representation that continued through the conclusion of their problem. Model Rule 1.16, however, provides several caveats to its stringent protection of a client's interest by allowing discretionary withdrawal in certain limited circumstances or generally for "good cause."⁶³ In fact, one comment to the rule comes close to actually condoning limited-legal-services practice: "A lawyer may withdraw if

58. See Model Rules of Professional Conduct Rule 1.3 cmt. [1] ("A lawyer has professional discretion in determining the means by which a matter should be pursued.").

59. See *id.*

60. *Id.* Rule 1.3 cmt. [3].

61. *Id.*

62. See *id.* Rule 1.16(b) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.").

63. Model Rule 1.16 allows withdrawal regardless of its effect on the client's interests if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

Id. Rule 1.16.

the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.”⁶⁴ This provision for an agreement limiting the objectives of a representation also inflects the diligence required by Model Rule 1.3, which makes reference to Model Rule 1.16 in allowing a variable scope of interpretations of diligent representation.⁶⁵

The rule that applies most tangibly to an exploration of the ethical propriety of unbundled legal services arrangements is Model Rule 1.2, which concerns the ethically allowable scope of legal representation.⁶⁶ Again, the rule itself suggests contrary conclusions in regard to unbundling issues. Initially, the Rule states that a lawyer “shall abide by a client’s decisions concerning the objectives of representation.”⁶⁷ This reiterates the fact that the Model Rules were formulated with full-service representation, and clients who are able to afford it, in mind. Model Rule 1.2(c), however, states that “[a] lawyer may limit the objectives of the representation if the client consents after consultation.”⁶⁸

Other ethics rules that might require reinterpretation in regard to certain forms of discrete-task representation include Model Rule 1.6, which requires strict confidentiality between attorney and client,⁶⁹ and Model Rule 1.7, which prohibits representation that generates a conflict of interest.⁷⁰ Though these rules apply to all forms of unbundled legal assistance, they generate the most problems for telephone hotlines, legal advice websites, and other forms of services delivery that involve limited assistance to a very large volume of clients.⁷¹

2. Ethical Issues Specific to Ghostwriting

Though all of the possible ethics issues discussed above apply with equal or greater force to attorney ghostwriting of pleadings for pro se litigants, the practice of ghostwriting also raises a unique set of potential ethical problems. Because a ghostwriting attorney generally drafts documents for her client knowing that they will eventually be filed in court, all of the ethics rules regarding the attorney’s duties to the court and to opposing counsel apply. Therefore, a ghostwriting attorney’s ethical considerations cannot be limited to adequate regard for her

64. *Id.* Rule 1.16 cmt. [8].

65. *See id.* Rule 1.3 cmt. [3].

66. *See id.* Rule 1.2.

67. *Id.* Rule 1.2(a).

68. *Id.* Rule 1.2(c).

69. *See id.* Rule 1.6.

70. *See id.* Rule 1.7.

71. *See* McNeal, *One Oar*, *supra* note 31, at 2624-31. It is unclear, for instance, how diligently the providers of a legal advice website must check for all possible conflicts of interest among the large number of potentially anonymous clients. *Cf. id.* at 2626-30 (considering ethical difficulties in the telephone hotline context).

client's interest, but must include the interests of the courts and opposing parties involved in the envisioned litigation. In this regard, the Model Rules specifically impose a duty of candor toward the court regarding all representations made by an attorney in such court,⁷² a duty of fairness to the opposing party,⁷³ and a duty to avoid bringing non-meritorious claims in a court proceeding.⁷⁴

The duty of candor toward the court mandated by Model Rule 3.3⁷⁵ is particularly significant to ghostwritten pleadings. If neither a ghostwriting attorney nor her pro se litigant client disclose the fact that any pleadings ostensibly filed by a self-represented litigant were actually drafted by the attorney, this could itself violate the duty of candor. The practice of undisclosed ghostwriting might be particularly problematic in light of the special leniency afforded pro se pleadings in the courts.⁷⁶ This leniency is designed to compensate for pro se litigants' lack of legal assistance.⁷⁷ Thus, if 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.⁷⁸ This situation might create confusion for the court and unfairness toward opposing parties. It is therefore likely that the failure to disclose ghostwriting assistance to courts and opposing parties amounts to a failure "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," which is prohibited by Model Rule 3.3.⁷⁹ Undisclosed ghostwriting would also likely qualify as professional misconduct under Model Rules 8.4(c) and (d), prohibiting conduct involving a misrepresentation, and conduct that is prejudicial to the administration of justice, respectively.⁸⁰

It is also important to recognize that Model Rule 1.16, generally prohibiting withdrawal that would materially harm the client's interests,⁸¹ is of particular importance to any analysis of ghostwriting. Be-

72. See Model Rules of Professional Conduct Rule 3.3.

73. See *id.* Rule 3.4.

74. See *id.* Rule 3.1. Rule 3.1 closely parallels the requirements of Rule 11 of the Federal Rules of Civil Procedure, discussed *infra* at Part III.A.

75. Model Rule 3.3 reads, in pertinent part:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;
 (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . .

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Model Rules of Professional Conduct Rule 3.3.

76. See *infra* Part II.A.

77. See *infra* notes 85-94 and accompanying text.

78. See *infra* notes 109-13, 134-37, 147-48 and accompanying text.

79. Model Rules of Professional Conduct Rule 3.3(a)(2).

80. See *id.* Rule 8.4(c)-(d).

81. See *id.* Rule 1.16.

cause a ghostwriting attorney may provide substantial assistance in preparation for litigation, her withdrawal from the representation before the litigation would likely harm the client's best interests. Thus, the attorney must be certain that the services are provided in a way that withdrawal is accomplished in accordance with the "good cause" and other exceptions listed in Rule 1.16.⁸²

It is clear that the Model Rules potentially pose a number of ethical obstacles to a ghostwriting attorney. Part II examines the ways in which ethics panels, courts, and other commentators have applied and interpreted these ethical norms in regard to ghostwriting. In particular, it provides an analysis of potential conflicts between courts' condemnation of ghostwriting and ethics panels' endorsement of the practice.

II. APPLICATIONS OF ETHICAL NORMS TO GHOSTWRITING BY ETHICS PANELS, COURTS, AND COMMENTATORS

If ghostwriting is to become a valued and acceptable method of legal assistance, one that might increase access to the judicial system for low and moderate-income populations, it must be practiced in an ethical fashion. To do so, it is necessary to fully understand how courts, ethics panels, and other commentators have applied some of the potential ethical problems outlined above to the practice of ghostwriting. This part considers the discrepancy between the courts' vehement condemnation of ghostwriting⁸³ and the more lenient perspective of state ethics panels, which generally condone the practice.⁸⁴ In addition, this part explores other potential ethical issues that have thus far not been raised by courts or ethics panels in regard to ghostwriting, such as the competence and diligence requirements contained in the Model Rules of Professional Conduct. Finally, this part suggests that ghostwriting can be an entirely ethical practice so long as certain basic guidelines are followed that address the concerns of courts and ethics panels.

A. *Pro Se Leniency*

To properly understand the ethical analyses of ghostwriting offered by the ethics panels and district courts, one must recognize the extent to which pro se litigants receive special lenience in the district courts. It is well-established that pro se pleadings are held to "less stringent standards than formal pleadings drafted by lawyers" when a federal court is considering dismissal.⁸⁵ In fact, the Supreme Court has de-

82. See *id.*; *infra* notes 184-89 and accompanying text.

83. See *infra* Part II.C.

84. See *infra* Part II.B.

85. Haines v. Kerner, 404 U.S. 519, 520 (1972); see Hughes v. Rowe, 449 U.S. 5, 15 (1980); Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988); Bates v. Jean, 745 F.2d 1146, 1150 (7th Cir. 1984).

finer the 12(b)(6)⁸⁶ standard that specifically applies to pro se litigants: "Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁸⁷

The generous manner in which courts construe pro se pleadings is not limited to giving the pleaded facts their maximum effect.⁸⁸ Some courts also recognize possible legal causes of action suggested by the facts alleged in the pleading, even if the pleading itself makes no mention of such causes of action.⁸⁹ Further, federal courts must also give pro se litigants wide leeway to amend deficient complaints⁹⁰ and must explain to the litigant why such complaints are legally deficient and how they might be amended.⁹¹ In other words, "[t]he court must do more than simply advise the pro se plaintiff that his complaint needs to be shorter and more concise."⁹² Also, the lenient reading of pro se pleadings applies not only to motions for dismissal on the pleadings, but also extends to pro se responses to motions for summary judgment against them.⁹³ Finally, courts will tolerate substantial procedural errors by pro se litigants that would not otherwise be permitted if the litigant were represented by counsel.⁹⁴

86. See Fed. R. Civ. P. 12(b)(6) (concerning dismissal for failure to state a claim).

87. *Hughes*, 449 U.S. at 10.

88. See *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) ("We read [the pro se party's] supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest.").

89. See, e.g., *Fiore v. City of New York*, 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 DHR complaint, we believe that in light of the liberal construction typically afforded to pro se litigants, we could construe that complaint to invoke the protections of the ADA." (citing *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994))).

90. See *Karim-Panahi*, 839 F.2d at 623 ("A pro se litigant must be given leave to amend his or her complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" (quoting *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987))).

91. See *id.* at 623-24 ("Moreover, 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." (citations omitted)).

92. *Id.* at 625.

93. See *Richardson v. Kelaher*, No. 97 Civ. 0428(LAP), 1998 WL 812042, at *3 (S.D.N.Y. Nov. 19, 1998). It is important to note that the leniency afforded pro se responses is not unlimited. In *Richardson*, the pro se plaintiff defeated summary judgment on her due process claim against the agency which administered food stamps. See *id.* at *9. Summary judgment was granted to the supervisor of the agency, however, because the pro se plaintiff failed to controvert the defendant's factual assertions in his motion despite the fact that she had been specifically informed that all uncontroverted statements would be taken as true. See *id.* at *8 n.2.

94. See *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Cir. 1984) (finding that a pro se litigant's failure to make a timely objection to the jury's inconsistent verdict did not necessarily waive his right to appeal).

B. *Ethics Panels' Analyses of Ghostwriting*

The first ABA ethics opinion dealing with the subject of ghostwriting involved a case in which a lawyer provided substantially more legal assistance than simply drafting the pleadings.⁹⁵ The lawyer not only drafted the pro se litigant's pleading, but also sat in on the trial and offered continuing procedural advice to the pro se litigant throughout the litigation.⁹⁶ In its ruling, the ethics committee attempted to draw a line between acceptable and unacceptable degrees of assistance.⁹⁷ The committee found that such undisclosed "active and extensive assistance from the lawyer in preparation for the trial as well as during the trial itself" was a misrepresentation to the court, in violation of DR 1-102(A) of the Model Code.⁹⁸ The committee qualified its opinion, however, by making clear that this ruling did not "intend to suggest that a lawyer may never give advice to a [pro se] litigant, or that a lawyer could not . . . prepare . . . a pleading for a [pro se] litigant . . ." ⁹⁹ Thus, this initial ethical analysis of ghostwriting fundamentally endorsed the practice of drafting pleadings for pro se litigants. It reserved its condemnation for more extensive undisclosed assistance beyond drafting pleadings or providing limited advice.¹⁰⁰

The Illinois State Bar Association made a similar distinction between drafting pleadings and providing more substantial assistance to pro se litigants.¹⁰¹ In a 1983 opinion, the Illinois Bar endorsed the practice of attorney preparation of pleadings for divorce litigants who went on to appear pro se without any further involvement the litigation itself.¹⁰² The opinion, however, also required that the attorney take steps to make sure that his withdrawal from representation after the provision of limited services did not prejudice the client's interests as required by DR 2-110(A)(2)¹⁰³ of the Model Code.¹⁰⁴

95. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978).

96. See *id.*

97. See *id.*

98. *Id.*; see also Model Code of Professional Responsibility DR 1-102(A)(4) (1983) (prohibiting attorney assistance in a client's misrepresentation or fraud).

99. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978).

100. See *id.*

101. See Professional Conduct Comm., Illinois State Bar Ass'n, Opinion 849 (1983).

102. See *id.*

103. The older Model Code's DR 2-110(A)(2) is directly analogous to Rule 1.16 of the Model Rules. See *supra* notes 62-63 and accompanying text.

104. As the Illinois State Bar observed:

[S]uch steps would at least include being certain that the client fully understands: the merits of the client's position; the position which the other party to the litigation is likely to take; the procedures involved in a trial of the matter, including the requirements for a valid prove-up of the client's case; and, the consequences of the attorney's failure to appear or act in the proceeding on behalf of the client.

Two years later, the same bar association admonished as unethical a bankruptcy attorney who provided limited drafting service to his clients and subsequently refused to attend hearings or meetings with creditors.¹⁰⁵ It distinguished this opinion from its earlier approval of ghostwriting by pointing out that "there is a material difference in that here an attorney, while still appearing of record in the case, is attempting to limit the scope of his employment."¹⁰⁶ In its second opinion, however, the Illinois Bar was not concerned that the limited representation amounted to a misrepresentation to the tribunal, a concern voiced in the earlier ABA opinion,¹⁰⁷ but rather that the attorney's actions were inconsistent with the ethical requirements of zealous advocacy and attorney competence.¹⁰⁸ In other words, the Illinois Bar was concerned not that ghostwriting itself was unethical, but that it might prejudice the client's interest in certain circumstances.

While neither of the Illinois opinions addressed the fact that undisclosed ghostwriting might unfairly exploit pro se leniency afforded by the courts, two ethics opinions from New York directly focus on this issue. The first, promulgated by the New York City Bar's ethics committee, cautions that undisclosed ghostwriting does indeed unduly prejudice the party opposing the pro se litigant who would unfairly benefit from special pro se treatment.¹⁰⁹ As a solution, the opinion suggests that the ghostwriting attorney endorse the pleadings that she drafts with the words "Prepared by Counsel."¹¹⁰ Such an endorsement would alert the court and the opposing counsel that the pro se litigant received legal assistance, and any lenient treatment accorded

Professional Conduct Comm., Illinois State Bar Ass'n, Opinion 849 (1983). These requirements would be addressed in the diagnostic interview process. See *infra* Part II.E.2.

105. See Professional Conduct Comm., Illinois State Bar Ass'n, Opinion 85-6 (1985).

106. *Id.*

107. See *supra* note 98 and accompanying text.

108. In the words of the second Illinois opinion:

We cannot take on the responsibility of representing a client only in those facets or portions of the case that interests us while ignoring or leaving the client to fend for himself if we are inconvenienced or for some reason do not have the time, ability or inclination to assist the client in all matters.

Professional Conduct Comm., Illinois State Bar Ass'n, Opinion 85-6 (1985) (citing Model Code of Professional Responsibility DR 6-101 and DR 7-101). Again, the Model Code's zealousness and diligence provisions are similar to the requirements of Model Rules 1.1 and 1.3. See *supra* notes 47-61 and accompanying text.

109. See Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1987-2 (1987) ("[The pro se litigant] may be given deferential or preferential treatment to the disadvantage of his adversary. The court will have been burdened unnecessarily with the extra labor of making certain that his rights as a pro se litigant were fully protected." (citing *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342-43 (S.D.N.Y. 1970))).

110. *Id.*

her pro se status could be modified accordingly.¹¹¹ As part of this solution, the committee makes a distinction between providing some legal advice to pro se litigants, which does not require disclosure, and "active and substantial assistance," including ghostwriting, which does require disclosure.¹¹² The committee concludes that disclosing the receipt of legal assistance, along with the inclusion of the words "Prepared by Counsel" on attorney-drafted pleadings, adequately alleviates unfairness to the court without requiring the attorney to disclose her identity.¹¹³ The committee went so far as to praise the ghostwriting attorney, observing that, under these circumstances, she "is taking action consistent with the duty of the legal profession to meet the needs of the public for legal services" by providing limited legal services to a client who cannot afford full representation.¹¹⁴

Similarly, an ethics opinion promulgated by the New York State Bar also recognizes that ghostwriting is a way for legal service providers with limited resources to assist more people.¹¹⁵ The opinion nonetheless concludes, as did the New York City Bar's opinion, that ghostwriting without disclosure is a severe enough misrepresentation to violate DR 1-102(A)(4).¹¹⁶ Thus, the State Bar opinion requires the ghostwriting attorney to disclose that the pro se litigant received legal assistance.¹¹⁷ By mandating that the ghostwriting attorney disclose her identity, however, the State Bar diverges from the City Bar's opinion, which simply requires the endorsement "prepared by counsel" on a ghostwritten pleading.¹¹⁸

In contrast to these New York opinions, which require the disclosure of ghostwriting assistance to prevent possible unfairness, a Virginia ethics opinion simply concludes that undisclosed ghostwriting violates a court rule requiring that ghostwriting attorneys reveal them-

111. The opinion emphasizes that the ghostwriting attorney must also receive assurances from the pro se litigant that the litigant will disclose the assistance she has received. If she does not do so, the lawyer must refuse to provide any assistance and immediately terminate the representation to avoid violating Model Code of Professional Responsibility DR 1-102(A)(4) and DR 7-102(A)(7). *See id.*

112. *Id.*

113. *See id.* A ghostwriting attorney might be reluctant to disclose her identity due to fear of possible sanctions for violations of Rule 11 or being forced to file a formal appearance by local withdrawal rules. *See infra* Part III.

114. Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1987-2 (1997).

115. *See* Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990) ("The overriding concern pertinent to this inquiry is the recognition in EC 2-25 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.").

116. *See id.* at 2. New York's DR 1-102(A)(4), taken from the old Model Code, Model Code of Professional Responsibility (1981), directly parallels Model Rules 3.3(a)(2) and 8.4(c) and (d). *See supra* notes 79-80 and accompanying text.

117. *See* Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990).

118. *See id.*

selves to the court.¹¹⁹ According to this reasoning, ghostwriting would violate ethics rules that prohibit advising clients to disregard court rules.¹²⁰ The opinion concludes, however, that so long as the ghostwriting attorney complies with this rule by disclosing her assistance, there is no other ethical prohibition of ghostwriting assistance.¹²¹ The opinion also cautions that a ghostwriting attorney would still be required to abide by ethical standards of withdrawal and is prohibited from contracting to limit malpractice liability.¹²²

Two other ethics opinions, from Alaska and North Carolina, specifically sanction ghostwriting by legal services attorneys for indigent pro se litigants as an ethically sound practice, without analyzing the spectrum of different degrees of legal assistance that lawyers might provide for pro se litigants.¹²³ The Alaska opinion concludes that undisclosed legal assistance is not an ethically problematic misrepresentation because courts are generally able to discern when a pro se litigant has received legal help with her pleadings and can mediate pro se leniency accordingly.¹²⁴ The North Carolina opinion provides little analysis of the issue except to say that the ghostwriting attorney would be responsible for fulfilling ethical requirements of confidentiality and competence.¹²⁵

Despite some variance in regard to the details of their decisions, all of these ethics opinions fundamentally conclude that ghostwriting itself is an ethically acceptable practice. Indeed, the New York City and State Bar opinions recognized that ghostwriting furthers lawyers' duty to meet the legal needs of the public.¹²⁶ As the State Bar suggested, "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."¹²⁷ According to most of these ethics opinions, however, ghostwriting attorneys must be careful to fulfill certain ethical obligations. Ghostwriting must be disclosed to the court and opposing parties to avoid a material misrepresentation to the court and opposing parties, in violation of Model Rules 3.3 and 8.4.¹²⁸ But it remains

119. See Standing Comm. on Legal Ethics, Virginia State Bar, Legal Ethics Op. 1127 (1988).

120. See *id.*

121. See *id.*

122. See *id.*

123. See Ethics Comm., Alaska Bar Ass'n, Ethics Op. 93-1 (1993); Ethics Comm., North Carolina State Bar, RPC 114 (1991).

124. See Ethics Comm., Alaska Bar Ass'n, Ethics Op. 93-1 (1993).

125. See Ethics Comm., North Carolina State Bar, RPC 114 (1991).

126. See Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1987-2 (1987); Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990).

127. Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990).

128. See *id.*; see also Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1987-2 (1987); Standing Comm. on Legal Ethics, Virginia State Bar, Legal Ethics Op. 1127 (1988). Note, however, that the Alaska opinion does not believe that undisclosed ghostwriting should be categorized

unclear whether adequate disclosure must include disclosure of the ghostwriting attorney's identity.¹²⁹

Most importantly, the ethics committees also uniformly conclude that the practice of ghostwriting creates an attorney-client relationship and all of its attendant obligations.¹³⁰ These obligations would include attorney diligence and competence, maintaining client confidentiality, and assuring that withdrawal does not unduly prejudice the client.¹³¹ According to this analysis, the mere fact that legal assistance is limited cannot justify disregard for ethical standards of attorney conduct, particularly regarding obligations to the client.

C. Courts' Vehement Condemnation of Undisclosed Ghostwriting

In contrast to the cautious endorsement of ghostwriting in ABA and state bar ethics opinions, the few district courts that have explicitly addressed ghostwriting strongly condemn the practice as an unethical misrepresentation to the court. For example, in *Johnson v. Board of County Commissioners*,¹³² the court determined that though the county sheriff's defense pleadings in a sexual harassment suit had ostensibly been filed pro se, the pleadings were actually ghostwritten by an attorney employed by the county attorney's office.¹³³ Upon this discovery, the court condemned the pleadings: "[Undisclosed ghostwriting] necessarily causes the court to apply the wrong tests in its decisional process The pro se litigant would be granted greater

as a misrepresentation, since courts should be able to tell when pro se litigants have received drafting assistance. See Ethics Comm., Alaska Bar Ass'n, Ethics Op. 93-1 (1993).

129. Analysis of courts' application of Rule 11 to ghostwriting suggests that an attorney's identity should be disclosed. See *infra* text accompanying notes 288-91.

130. See Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1987-2 (1987) ("Although the lawyer is not appearing of record, his obligations to his client are no different because of that fact."); Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990) ("Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the [pro se] litigant."); Ethics Comm., Alaska Bar Ass'n, Ethics Op. 93-1 (1993) ("When an attorney limits the scope of his representation, an attorney-client relationship is still created . . . with all the attendant duties and responsibilities called out in the Professional Canons."); Ethics Comm. North Carolina State Bar, RPC 114 (1991) ("[A]ttorney-client relationships would generally be formed under such circumstances and the Rules of Professional Conduct, particularly those concerning confidentiality and conflict of interest would apply."); Professional Conduct Comm., Illinois State Bar Ass'n, Opinion 85-6 (1985) (finding that lawyer representing client without appearing in court failed to fulfill obligations established by attorney-client relationship); Professional Conduct Comm., Illinois State Bar Ass'n, Opinion 849 (1983) (concluding that a ghostwriter would be bound by ethics rules regarding competence and withdrawal); Standing Comm. on Legal Ethics, Virginia State Bar, Legal Ethics Op. 1127 (1988) ("[B]y providing legal advice and assistance to the pro se litigant . . . the attorney-client relationship is established.").

131. See *infra* Part II.E.2.

132. 868 F. Supp. 1226 (D. Colo. 1994).

133. See *id.* at 1231.

latitude as a matter of judicial discretion The entire process would be skewed to the distinct disadvantage of the nonoffending party.”¹³⁴

Johnson not only held that the undisclosed ghostwriting was unfair to adverse parties in the case, but that it also violated Model Code of Professional Responsibility DR 1-102(A)(4), which prohibits attorney conduct involving “dishonesty, fraud, deceit, or misrepresentation,”¹³⁵ and Colorado Rule of Professional Conduct 1.2(d), which prohibits giving advice or assistance in an act “that the lawyer knows is criminal or fraudulent.”¹³⁶ The court reasoned that the unfair exploitation of pro se leniency through undisclosed ghostwriting amounted to a fraudulent act due to the resulting unfairness to opposing parties.¹³⁷ Because the court doubted, however, that the ghostwriting attorney intentionally violated her ethical duties by drafting the defense pleadings, it declined to impose sanctions.¹³⁸ But the court warned that the opinion put attorneys on notice that ghostwriting was unethical, and that future ghostwriters would not escape contempt sanctions.¹³⁹

The Eastern District of Virginia identified an identical ethical violation in *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*,¹⁴⁰ an opinion specifically written to condemn the behavior of the attorneys responsible for another incident of ghostwriting pleadings for ostensibly pro se litigants.¹⁴¹ *Laremont-Lopez* combined four different cases in which several attorneys within a law firm drafted complaints for different plaintiffs who had received right-to-sue letters from the EEOC and wanted to commence employment discrimination actions before the filing deadline expired.¹⁴² Most of the attorneys were paid a flat fee for their limited service of drafting the pleadings, and the plaintiffs proceeded to file the pleadings pro se.¹⁴³ In some instances, the attorneys paid the filing fees, and their couriers filed the complaints with the court.¹⁴⁴ In one case, the attorneys effectuated service on the defendant, and in another case, they actually made a formal appearance as the counsel of record.¹⁴⁵ The district court’s opinion contained nothing about the merits of the plaintiffs’ cases, but instead solely addressed the show cause order explaining why the ghostwriting attorneys should not be held in contempt of court for

134. *Id.*

135. Model Code of Professional Responsibility DR 1-102(A)(4) (1983).

136. *See Johnson*, 868 F. Supp. at 1232 (quoting Colorado Rules of Professional Conduct Rule 1.2(d)).

137. *See id.*

138. *See id.*

139. *See id.*

140. 968 F. Supp. 1075 (E.D. Va. 1997).

141. *See id.* at 1078.

142. *See id.* at 1077.

143. *See id.*

144. *See id.*

145. *See id.*

their unethical piecemeal representation.¹⁴⁶ As in *Johnson*, the *Laremont-Lopez* court reasoned that the undisclosed assistance of an attorney "places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the [c]ourt."¹⁴⁷ *Laremont-Lopez* thus found the practice of ghostwriting to be unethical not only because it was a misrepresentation to the court and opposing parties, but also because the confusion created by the practice results in judicial inefficiency.¹⁴⁸ *Laremont-Lopez* also demonstrates that ghostwriting scenarios can sometimes become complicated: some attorneys only ghostwrote pleadings, while others provided continuing advice, and one actually appeared in court as attorney of record.¹⁴⁹

Another federal case that discusses the issue of ghostwriting, *Ricotta v. California*,¹⁵⁰ specifically recognized the different degrees to which lawyers might assist pro se litigants.¹⁵¹ Disgruntled by the result of his recent divorce action in the state courts, the pro se plaintiff had sued eighteen different defendants, including the county, the local bar, the judge and opposing attorneys in the divorce case, and the State of California, alleging that they all conspired to violate his civil rights.¹⁵² Though the plaintiff apparently drafted his complaint on his own, he received ghostwriting assistance with his response to the defendant's motion to dismiss.¹⁵³ The ghostwriting attorney later explained to the court that she was "performing a personal favor at the request of Mr. Ricotta."¹⁵⁴ The court noted that if providing some limited legal advice to friends and family warranted contempt sanctions, then "virtually every attorney licensed to practice would be eligible for contempt proceedings."¹⁵⁵ The court found, however, that the ghostwriting attorney in this case had done much more than merely provide legal advice.¹⁵⁶ Instead, she had been responsible for drafting "seventy-five to one hundred percent of Plaintiff's legal argu-

146. See *id.* at 1076-77.

147. *Id.* at 1078.

148. See *id.*

149. See *id.* at 1079.

150. 4 F. Supp. 2d 961 (S.D. Cal. 1998).

151. See *id.* at 986-87.

152. See *id.* at 967.

153. See *id.* at 985.

154. *Id.* The ghostwriting attorney described her participation in the preparation of the plaintiff's case as follows:

I had, with regard to the motion to dismiss only, done some legal research and prepared a rough draft a portion [sic] of the memorandum of points and authorities in opposition to the motion. In so doing I acted in the capacity of a law clerk only, performing a personal favor at the request of Mr. Ricotta. At the time I submitted my work to Ricotta I told him it was a rough draft only, and that I was not willing to edit nor even to review his final product.

Id. at 985.

155. See *id.* at 987.

156. See *id.*

ments” in Ricotta’s response to the motion to dismiss.¹⁵⁷ The court then came to a similar conclusion as the two decisions previously discussed: “With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door.”¹⁵⁸ The court held that such substantial assistance was an unethical misrepresentation on the part of the attorney and the pro se litigant.¹⁵⁹ Nevertheless, the court also refused to find the ghostwriting attorney in contempt on the ground that the rules of professional conduct and local court rules do not clearly prohibit ghostwriting.¹⁶⁰ Though the court ruled that the ghostwriting attorney’s conduct was improper, it acknowledged that ghostwriting was not adequately addressed by ethics rules, and it found the imposition of contempt sanctions unwarranted.¹⁶¹ The court went on to suggest that “local courts and professional bar associations . . . directly address the issue of ghostwriting and delineate what behavior is and is not appropriate.”¹⁶²

Taken together, *Johnson*, *Laremont-Lopez*, and *Ricotta* clearly prohibit the practice of undisclosed ghostwriting as an unethical misrepresentation to the court and opposing parties in the litigation. The treatment of ghostwriting in *Ricotta*, however, raises an important issue regarding its supposed impropriety: different pro se litigants might receive different degrees of legal assistance.¹⁶³ The question then becomes, at what point does such assistance become unethical unless disclosed to the court? The difficulty of drawing a bright line accounts for some of the discrepancy between the courts’ condemnation of ghostwriting and the endorsement of disclosed ghostwriting by state ethics panels.¹⁶⁴

D. *Additional Ethical Concerns Regarding Ghostwriting*

The last set of ghostwriting issues discussed here does not focus on whether the practice creates problems for judges, court managers, or attorneys, but instead focuses on whether ghostwriting assistance effectively serves clients’ legal needs.¹⁶⁵ For instance, Model Rule 1.1 mandates that “[a] lawyer shall provide competent representation to a

157. *Id.*

158. *Id.*

159. *See id.*

160. *See id.* at 987-88.

161. *See id.*

162. *Id.* at 988.

163. *See id.* at 986-87.

164. *See supra* Part II.B-C.

165. As Professor Mary Helen McNeal has observed:

It is true that unregulated unbundling would result in greater numbers of people securing access to the courts and the legal system. However, it is critical that we examine the potential costs of that access. They include bad legal results; clients who pursue strategies that will not achieve the result that they want; clients who get immersed in litigation and then are without the resources—financial, intellectual, or emotional—to complete the job;

client."¹⁶⁶ It defines the requirements of competent representation as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹⁶⁷ These general terms provide extremely limited guidance when applied to an attorney providing ghostwriting assistance. Two comments to Model Rule 1.1, however, help to illuminate an interpretation of the rule. Comment [2] notes that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve,"¹⁶⁸ while Comment [5] suggests that competence includes "inquiry into and analysis of the factual and legal elements of the problem."¹⁶⁹ The question thus becomes exactly how deeply a ghostwriting attorney must investigate her client's factual circumstances and legal needs beyond what might be required to simply draft an adequate pleading.

It is difficult to determine exactly how the competence requirements should apply to ghostwriting attorneys.¹⁷⁰ It has been observed that "[a] literal reading of Model Rule 1.1 suggests that if the 'representation' is the discrete task of drafting [a pleading] only, the competency requirements apply to that document only."¹⁷¹ According to this interpretation, so long as the ghostwritten pleading was adequately tuned to the client's problem, it would be competent. This interpretation of Model Rule 1.1 in regard to ghostwriting is arguably unsatisfactory, however, because it might ignore other important underlying legal issues that are important to the client's situation.¹⁷² For instance, if the competency requirements apply only to the ghostwritten document itself, then a lawyer drafting an answer for a pro se defendant would be free to disregard the possibility of important counterclaims.¹⁷³ Therefore, an attorney who simply ghostwrites a pleading as requested by a client, without investigating possible additional claims, arguments, or other legal remedies, might not meet the competence requirement of Model Rule 1.1.¹⁷⁴

The practice of ghostwriting and the attorney-client relationship that it engenders also implicate the diligence requirement contained in Model Rule 1.3.¹⁷⁵ The comments to Model Rule 1.3 emphasize the significant obligations encompassed by diligence: "A lawyer should

and, worst of all, clients who ultimately are unable to resolve the problem without spending large sums of money on legal services.

McNeal, *Elderly Clients*, *supra* note 13, at 333.

166. See Model Rules of Professional Conduct Rule 1.1 (1998).

167. *Id.*

168. *Id.* Rule 1.1 cmt. [2].

169. *Id.* Rule 1.1 cmt. [5].

170. See McNeal, *Elderly Clients*, *supra* note 13, at 318-25.

171. *Id.* at 320.

172. See *id.*

173. See *id.* at 320-21.

174. See *id.* at 320.

175. See Model Rules of Professional Conduct Rule 1.3 (1998) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."¹⁷⁶ This strong language seems to suggest that ghostwriting assistance alone might not satisfy such stringent obligations to the pro se litigant client, and that diligent representation would require a more comprehensive approach to the client's legal circumstance. The comments temper the diligence obligation, however, by noting that "[a] lawyer has professional discretion in determining the means by which a matter should be pursued."¹⁷⁷

A liberal interpretation of the comments to Model Rule 1.3 seem to give a ghostwriting attorney wide "latitude in choosing how much representation to provide."¹⁷⁸ But without engaging in an investigation of the facts underlying the client's legal claim, a ghostwriting attorney's actions might not be consistent with the "commitment and dedication" required by the Model Rule 1.3.¹⁷⁹

A more interesting question is whether the diligence provision requires that the ghostwriting attorney carefully evaluate the client's decision to proceed pro se in the first place.¹⁸⁰ Because a client might lack the ability to successfully proceed pro se if the legal issues were complex, ethical diligence may require assistance in preparing for litigation beyond the simple drafting of pleadings.¹⁸¹ In fact, diligent representation arguably requires an attorney to carefully explain to the client the ramifications of her decision to proceed pro se.¹⁸² According to this analysis, even though the comments to Model Rule 1.3 specifically state that lawyers have discretion to determine the scope of their representation, a diligent ghostwriting attorney would make sure that the client fully understands the risks of such limited representation.¹⁸³

A last ethical concern is whether the agreement between a ghostwriting attorney and her client to terminate representation once pleadings are drafted satisfies Model Rule 1.16 concerning attorney

176. *Id.* Rule 1.3 cmt. [1].

177. *Id.* The comments to Model Rule 1.3 specifically refer to Model Rule 1.2, which allows a lawyer to agree with a client to limit the scope of representation, *id.* Rule 1.2, and Model Rule 1.16 regarding allowed withdrawal from representation, *id.* Rule 1.16; see *supra* notes 62-63 and accompanying text.

178. McNeal, *Elderly Clients*, *supra* note 13, at 321.

179. *See id.*

180. *See id.* at 322.

181. *See id.*

182. *See id.*

183. This idea is often referred to as "informed consent" to the scope of the representation. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. Rev. 1101, 1117-18 (1990) [hereinafter Tremblay, *Community-Based Ethic*] (suggesting that a strict informed consent paradigm often is unsuitable in poverty law contexts where lawyers must make representation decisions based on the scarcity of resources).

withdrawal.¹⁸⁴ Model Rule 1.16(b) states that a lawyer may withdraw from representing a client only if “withdrawal can be accomplished without material adverse effect on the interests of the client.”¹⁸⁵ It could be argued that a ghostwriting attorney’s termination of representation violates this rule because the client would almost certainly be better served if the attorney actually represented her in court. Model Rule 1.16, however, does allow withdrawal in certain circumstances, despite the material harm resulting to the client. These circumstances include when “the representation will result in an unreasonable financial burden on the lawyer”¹⁸⁶ or when “other good cause for withdrawal exists.”¹⁸⁷ Thus, the existence of an attorney-client relationship alone does not, at least according to the Model Rules, unequivocally bind the attorney to represent the client. Particularly in circumstances like ghostwriting, where the client and the assisting attorney have specifically agreed to limit the representation, good cause for withdrawal exists.¹⁸⁸ In fact, none of the ethics opinions that discuss the application of ethics rules regarding withdrawal suggest that the practice of ghostwriting is a per se violation of the rule.¹⁸⁹

E. *Guidelines for Ethical Ghostwriting*

The scarcity inherent in present legal services circumstances make ghostwriting and other limited legal assistance methodologies important new legal practice models.¹⁹⁰ The ABA’s final report on the comprehensive legal needs study serves as a reminder of the dramatic disparity between low and middle-income populations’ legal needs and their ability to access the civil justice system: “[N]early three-fourths [(71%)] of the [legal] situations in low-income households and nearly two-thirds [(61%)] in moderate-income households never were brought to the civil justice system.”¹⁹¹ This disparity is likely to continue to grow, considering the substantial budget cuts suffered by low-

184. See *supra* notes 62-63 and accompanying text.

185. Model Rules of Professional Conduct Rule 1.16(b) (1998).

186. *Id.* Rule 1.16(b)(5).

187. *Id.* Rule 1.16(b)(6).

188. Comment [8] to Model Rule 1.16 specifically authorizes withdrawal “if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.” *Id.* Rule 1.16 cmt. [8].

189. See, e.g., Committee on Prof’l Ethics, New York State Bar Ass’n, Opinion 613 (1990) (noting that the attorney-client relationship is contractual in nature and may be limited by agreement); Professional Conduct Comm., Illinois State Bar Ass’n, Opinion 849 (1983) (warning that though ghostwriting does not violate ethics rules regarding withdrawal, a ghostwriting attorney must take steps to fully inform the client of the consequences of proceeding pro se).

190. See *supra* notes 6-13 and accompanying text.

191. Agenda for Access, *supra* note 26, at 5.

income legal services providers.¹⁹² These hard facts regarding the limited ability of all but the wealthy to address their legal problems in the civil justice system lead the ABA report to encourage the development of discrete-task legal service practices as an integral part of its agenda for increased access.¹⁹³ If courts are cognizant of this situation and respect the fundamental constitutional right of access to civil justice,¹⁹⁴ they must not discourage limited legal service practice models like ghostwriting. Indeed, "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 [legal] profession."¹⁹⁵

1. Recommendation: Mandatory Disclosure to Avoid Unethical Misrepresentation

In light of the deferential treatment afforded pro se pleadings in the federal courts, the courts are correct that undisclosed ghostwriting assistance might give pro se litigants who receive such assistance an unfair advantage in litigation.¹⁹⁶ The New York City and State ethics opinions' conclusion that ghostwriting assistance must be disclosed to the court upon the filing of the complaint seems like the only viable solution to this problem.¹⁹⁷ If any ghostwriting assistance received by a pro se litigant is disclosed to the court upon the filing of the pleading, the court can then moderate any possible lenient reading of the pro se litigant's pleading accordingly to avoid unfair prejudice to opposing parties.¹⁹⁸ Accordingly, disclosing assistance would limit allegations that the ghostwriting attorney had violated ethics rules by assisting the pro se litigant in misrepresenting herself to the court.¹⁹⁹ By definition, disclosure is inconsistent with the misrepresentation prohibited by ethics rules.²⁰⁰

This recommendation, however, is accompanied by a substantial caveat. The concept underlying pro se leniency, that the presence or absence of counsel should not determine the legitimacy of a litigant's claim, remains valid. Once ghostwriting assistance has been disclosed, courts must be extremely careful to avoid denying the pro se litigant appropriately lenient treatment as the litigation proceeds.²⁰¹ If the ghostwriting attorney only helped draft an initial complaint and the litigant is now properly proceeding entirely on her own pro se, it

192. See *supra* notes 10-11 and accompanying text.

193. See *Agenda for Access, supra* note 26, at 11.

194. See *supra* notes 2-3 and accompanying text.

195. Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990).

196. See *supra* notes 109-13, 134-37, 147-48 and accompanying text.

197. See *supra* notes 110-14, 116-18 and accompanying text.

198. See *supra* notes 134-37, 147-48 and accompanying text.

199. See *supra* notes 110-11, 116-17 and accompanying text.

200. See Model Code of Professional Responsibility DR 1-102(A)(4) (1980); Model Rules of Professional Conduct Rule 8.4(c) (1998).

201. See *supra* Part II.A.

would disserve justice if the court subsequently treated the litigant as though she were fully represented by counsel.²⁰² Even if it is inappropriate for the court to give a lenient reading to the initial ghostwritten complaint because it was drafted with the assistance of counsel, the court should still afford the pro se litigant's future filings traditional leniency.²⁰³ Also, the court should still be compelled to provide the same procedural assistance to the litigant, now proceeding entirely pro se, that it would have without the disclosure of ghostwriting assistance.²⁰⁴ If the court disregards these suggestions, the limited assistance given by the ghostwriting attorney could actually put the pro se litigant in a worse position in the litigation than if she had received no assistance at all. Undoubtedly, this situation would undermine low and moderate-income populations' access to civil justice.

It is equally important for courts to recognize, as both of the New York ethics opinions did,²⁰⁵ that not all legal advice given to pro se litigants rises to the level of ghostwriting.²⁰⁶ As *Ricotta v. California*²⁰⁷ emphasized, attorneys often give more limited forms of legal advice to friends, family, and even clients.²⁰⁸ Thus, this disclosure requirement should only apply to situations where attorneys draft complaints for pro se litigants "with the . . . knowledge that the work will be presented in some similar form in a motion before the Court."²⁰⁹ Only if the attorney knows that her ghostwritten work-product will actually be filed by a pro se litigant should she be required to disclose her legal assistance. In fact, as the New York City Bar's ethics opinion properly points out, an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.²¹⁰

Finally, attorneys must recognize that if they continue to provide assistance to an ostensibly pro se litigant throughout the course of the litigation, then disclosure of drafting assistance alone would be insufficient to satisfy their obligations to the court.²¹¹ Otherwise, they would be involved in a continuing misrepresentation to the court and oppos-

202. See *supra* Part II.A.

203. See *supra* Part II.A.

204. See *supra* note 94 and accompanying text.

205. See Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of N.Y., Formal Op. 1987-2 (1987); Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 613 (1990).

206. See *supra* notes 112, 151, 155 and accompanying text.

207. 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998).

208. *Id.*

209. *Id.*

210. See Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1987-2 (1987).

211. For examples of ghostwriters engaging in such undisclosed continuing representation while the litigants purported to be proceeding entirely pro se, see *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341 (S.D.N.Y. 1970), and ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978).

ing parties, and should be required to file an appearance as attorney of record.²¹²

2. Protecting Clients Interests: The Diagnostic Interview

Courts' and ethics panels' concerns that ghostwriting might constitute an unethical misrepresentation resulting in unfairness to opposing parties is relatively easily addressed by requiring mandatory disclosure. No equally simple answer exists, however, for the concern that ghostwriting might not satisfy ethical standards of competent and diligent representation.²¹³ Attorneys offering limited ghostwriting services must take adequate precautions to protect clients' interests and to assure that ghostwriting assistance furthers their legal position rather than hindering it. Fundamentally, ethical standards such as attorney diligence and competence must be interpreted according to the recognition that scarcity of legal resources will always mandate difficult choices regarding their distribution.²¹⁴ In fact, "[b]ecause [the competence rule] envisions only traditional, full service representation, it is of little assistance in determining how this standard might be applied" to unbundled legal services.²¹⁵ Indeed, the only reason ghostwriting might be a valuable model of legal services delivery is because resource limitations of either the client or legal services providers make traditional full-service representation impossible.

Some commentators have suggested that limited legal services can be provided ethically if attorneys engage in an initial "diagnostic interview" with the prospective client.²¹⁶ Such an interview would involve obtaining sufficient information from the prospective client to allow an accurate identification of her legal problem, an assessment of the level of assistance required to solve the problem, the identification of possible problems underlying the immediate legal issue, and the capacity of the client to participate in solving the problem.²¹⁷ Thus, in the ghostwriting context, the assisting attorney must not only gather enough information to draft a pleading for the client, but must also be

212. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978).

213. See *supra* notes 166-79 and accompanying text.

214. See Tremblay, *Community-Based Ethic*, *supra* note 183, at 1103 ("Scarcity of time, of resources, of funds, and of political capital alter significantly the practice experience of the public lawyer representing private clients."); *supra* notes 6-13 and accompanying text.

215. McNeal, *One Oar*, *supra* note 31, at 2638.

216. See *id.*; Millemann et al., *supra* note 16, at 4.

217. See Millemann et al., *supra* note 16, at 4. Professor McNeal provides a slightly different list of essential elements of the diagnostic interview, stating that such an interview: "(1) defines the nature of the legal problem; (2) determines the relevant facts to gather; (3) identifies the client's goals; (4) determines the range of services likely to accomplish the client's goals; and (5) determines the range of assistance appropriate for the client in light of the above inquiries." McNeal, *One Oar*, *supra* note 31, at 2638.

aware of any underlying problems the client may have that could be prejudiced by the ensuing litigation.²¹⁸ Also, the ghostwriting attorney would have to carefully evaluate whether ghostwriting assistance would actually further the client's legal position.²¹⁹ If the client has little ability to effectively pursue her case pro se, or if the intended forum is not receptive to pro se litigants, ghostwriting might not be a competent solution to the client's problem.²²⁰

If a thorough diagnostic interview precedes the provision of ghostwriting assistance, most of the central competence and diligence concerns regarding the practice would be satisfied. The ghostwriting attorney would have conducted a detailed "inquiry into and analysis of the factual and legal elements of the problem," as required by the competence rule, Model Rule 1.1.²²¹ Also, the attorney would have clearly determined what the client's legal problems actually were, and analyzed any possible negative repercussions that would flow from the client's proceeding pro se in court with the ghostwritten pleading.²²²

A thorough diagnostic interview would also adequately satisfy the diligence requirement of Model Rule 1.3.²²³ The ghostwriting attorney would be acting with "commitment and dedication"²²⁴ appropriate to the limited legal services context. Further, the diagnostic interview would provide an adequate understanding of the client's legal situation to allow the attorney to make informed choices about the proper scope of representation in light of resource limitations.²²⁵

Additionally, a properly conducted diagnostic interview would guarantee that a client understands the limited nature of the legal assistance that a ghostwriting attorney is offering to provide. Once the client understands the limitations and possible consequences of proceeding pro se in court, she could make an informed decision about whether to accept the attorney's services. If she chooses to accept the services, the standards of Model Rule 1.2, dealing with limiting the objectives of a representation, would be satisfied.²²⁶ In other

218. See McNeal, *Elderly Clients*, *supra* note 13, at 321-22.

219. Such considerations are particularly important if courts refuse to give lenient readings to the pro se litigant's pleading because it was drafted with the assistance of counsel. See *supra* Part II.A.

220. See McNeal, *One Oar*, *supra* note 31, at 2639.

221. Model Rules of Professional Conduct Rule 1.1 cmt. [5] (1998).

222. This would answer the suggestion that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve." Model Rules of Professional Conduct Rule 1.1 cmt. [2]; *supra* notes 48-54 and accompanying text.

223. See Model Rules of Professional Conduct Rule 1.3; *supra* notes 55-60 and accompanying text.

224. Model Rules of Professional Conduct Rule 1.3 cmt. [1].

225. Comment [1] to Model Rule 1.3 states: "A lawyer has professional discretion in determining the means by which a matter should be pursued." *Id.*

226. Model Rule 1.2 provides: "A lawyer may limit the objectives of the representation if the client *consents after consultation*." *Id.* Rule 1.2(c) (emphasis added).

words, the interview would allow for informed consent on the part of the client to the limited scope of ghostwriting assistance.²²⁷ Once the client agrees to accept limited ghostwriting assistance, the attorney would satisfy competence and diligence requirements provided that she adequately drafted the agreed-upon pleadings, taking into account possible problems the client might have as she proceeds in court pro se.

At minimum, the diagnostic interview should provide the attorney with enough information about her client's legal circumstances that the attorney can be reasonably certain that the provision of ghostwriting assistance will not harm the client. Ideally, "[a] balance should be struck between a standard so strict that it will discourage lawyers from providing ghostwriting assistance and one so lenient that it will potentially harm clients."²²⁸ As long as limited legal services models do not harm clients, any assistance that might further their legal position, even in a very limited way, should not be hindered by ethical rules formulated with traditional full-service representation in mind.

Even if ghostwriting attorneys are able to satisfy their ethical obligations to courts, opposing parties, and clients, there still might be some procedural impediments to the practice that must be overcome. Part III analyzes two procedural issues discussed by the district courts that ghostwriting attorneys must acknowledge: possible violations of both Rule 11 and local withdrawal rules.

III. PROCEDURAL ISSUES RAISED BY GHOSTWRITING

The preceding analysis establishes that ghostwriting is an ethically acceptable practice, so long as such assistance is disclosed to the court and opposing parties upon the filing of the pleadings by the pro se client, and so long as the ghostwriting attorney engages in a sufficient diagnostic interview designed to protect the client's legal interests. A few district courts, however, have not only condemned ghostwriting as an unethical misrepresentation,²²⁹ but also as a violation of both the signature requirement of Rule 11²³⁰ and local withdrawal rules requir-

227. Of course, if the client felt she had no alternatives, her consent to limited representation would not necessarily be voluntary. Though this circumstance is less than ideal, it is mandated by the scarcity of legal resources, particularly in the poverty law context. See Tremblay, *Community-Based Ethic*, *supra* note 183, at 1117-18 (1990) (suggesting that a strict informed consent paradigm often is unsuitable in poverty law contexts where lawyers must make representation decisions based on the scarcity of resources).

228. McNeal, *One Oar*, *supra* note 31, at ___ (+24).

229. See *supra* Part II.C.

230. See Fed R. Civ. P. 11; *Watkins v. Associated Brokers, Inc.*, No. 98 C 3316, 1998 WL 312124, at *2 n.4 (N.D. Ill. June 5, 1998); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 887 (D. Kan. 1997); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997); *Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226, 1231-32 (D. Colo. 1994).

ing permission of the court to withdraw from representation.²³¹ This part explores the district courts' application of these procedural rules to the practice of ghostwriting. First, this part specifically analyzes the applicability of Rule 11 to the practice of ghostwriting and highlights some problems with the courts' interpretation of the rule. It then examines the purpose of local procedural rules prohibiting attorney withdrawal from representation without the permission of the court and considers their applicability to the ghostwriting scenario.

A. Rule 11

The basic purpose of Rule 11 of the Federal Rules of Civil Procedure is to deter the filing of pleadings and motions in court that are not adequately grounded in fact or law.²³² By deterring such baseless pleadings, the rule seeks to maximize judicial efficiency and protect litigants from having to defend themselves in court against unfounded claims.²³³ Rule 11 serves these ends by requiring that any pleading or motion paper submitted to a court be based upon the filing party's belief, formed after a reasonable inquiry, that the paper is not being presented for an improper purpose, its claims are warranted by existing law or a nonfrivolous argument for a change in the law, and its factual allegations or denials have evidentiary support or are likely to after reasonable discovery.²³⁴ The rule then provides for sanctions against any party responsible for violating this certification requirement.²³⁵

To facilitate an analysis of the federal courts' application of Rule 11 to the practice of ghostwriting, it is worthwhile to briefly outline the rule's requirements. Rule 11(a) requires that all documents filed with a court must be signed by at least one attorney of record or, if a party is unrepresented by counsel, by the filing party herself.²³⁶ If a filed document is unsigned, the rule requires that it be stricken by the court.²³⁷ Rule 11(b) states that any attorney or party presenting a pa-

231. See *Laremont-Lopez*, 968 F. Supp. at 1079.

232. See *Business Guides, Inc. v. Chromatic Communications Enters.* 498 U.S. 533, 542 (1991).

233. See *White v. General Motors Corp.*, 908 F.2d 675, 683 (10th Cir. 1990) ("Rule 11 sanctions are meant to serve several purposes, including (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management.").

234. See Fed. R. Civ. P. 11(b).

235. See Fed. R. Civ. P. 11(c).

236. Rule 11(a) reads as follows:

Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. . . . An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Fed. R. Civ. P. 11(a).

237. See *id.*

per to the court, "whether by signing, filing, submitting, or later advocating," is responsible for the reasonable inquiry to assure that it is properly grounded in law and fact.²³⁸ Finally, Rule 11(c) provides for the imposition of sanctions on "the attorneys, law firms, or parties" that have violated the certification requirement of subdivision (b).²³⁹ Such sanctions can be initiated by a motion made by an opposing party, which may only be filed with the court if the challenged paper is not withdrawn within twenty-one days after service of the motion.²⁴⁰ Alternatively, the court, on its own initiative, may order that a party show cause as to why it should not be sanctioned for a violation of the rule.²⁴¹

1. Courts' Application of Rule 11 to Ghostwriting

All of the federal court opinions that specifically address attorney ghostwriting condemn the practice as a violation of Rule 11.²⁴² The courts base their conclusion that ghostwriting violates Rule 11 on a literal reading of the Rule, which requires the person who prepares any document filed with the court to sign the document.²⁴³ As the *Johnson* court stated:

What we fear is that in some cases actual members of the bar . . . prepare briefs for [pro se litigants] which the assisting lawyers do not sign, and thus escape the obligation . . . typified by F.R.Civ.P. 11 . . . of representing to the court that there is good ground to support the assertions made.²⁴⁴

238. Rule 11(b) states:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law . . . (3) the allegations and other factual contentions have evidentiary support

Fed. R. Civ. P. 11(b).

239. Rule 11(c) states: "If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Fed. R. Civ. P. 11(c).

240. See Fed. R. Civ. P. 11(c)(1)(A).

241. See Fed. R. Civ. P. 11(c)(1)(B).

242. See *Watkins v. Associated Brokers, Inc.*, No. 98 C 3316, 1998 WL 312124, at *2 n.4 (N.D. Ill. June 5, 1998); *Ricotta v. California*, 4 F. Supp. 2d 961, 986 (S.D. Cal. 1998); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 886 (D. Kan. 1997); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078-79 (E.D. Va. 1997); *Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226, 1231-32 (D. Colo. 1994).

243. See Fed. R. Civ. P. 11(a).

244. *Johnson*, 868 F. Supp. at 1231-32 (quoting *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971)).

In its brief analysis, however, the court did not address the question of whether the ghostwritten pleadings failed to meet the legal and factual standards of Rule 11(b). It simply concluded that the absence of the drafter's signature was a per se violation of the rule and a deliberate evasion of its requirements.²⁴⁵

The Eastern District of Virginia offered a more substantial discussion of the applicability of Rule 11 to ghostwriting attorneys. In *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*,²⁴⁶ the attorneys who had drafted pleadings for employment discrimination plaintiffs argued that "at the time the complaints were filed their representation of the plaintiffs had terminated, and thus, it was appropriate for the plaintiffs to sign the pleadings."²⁴⁷ Thus, according to the arguments of the ghostwriting attorneys, the signature requirement of Rule 11(a) required only the plaintiff's own signatures because they were effectively unrepresented parties.²⁴⁸

The court admitted that the ghostwriters' argument was "not at odds with the plain language of Rule 11," but nonetheless held that the attorneys' failure to sign the pleadings "undermine[d] the purpose of the signature . . . requirement of the rule."²⁴⁹ Though the court noted that the amended Rule 11 might allow sanctions to be imposed against the ghostwriting attorneys despite their failure to sign, it concluded that a court might nevertheless "encounter legal and factual obstacles" in trying to do so.²⁵⁰ The court noted that such obstacles might include the difficulty of determining whether ostensibly pro se litigants were actually receiving legal assistance from a ghostwriting attorney, as well as problems ascertaining the attorney's identity and imposing appropriate sanctions.²⁵¹ Thus, unlike *Johnson*, *Laremont-Lopez's* application of Rule 11 to ghostwriting attorneys does not focus solely on the literal signature requirement of the rule. Nonetheless, the *Laremont-Lopez* opinion, like *Johnson*, concluded that the practice of ghostwriting itself, regardless of the merits of the document, violates Rule 11.²⁵²

Unfortunately, courts' concern that the practice of undisclosed ghostwriting might allow unscrupulous attorneys to help ostensibly pro se litigants pursue frivolous actions with impunity is not entirely unfounded. A few federal cases document instances where the courts suspect that vexatious pro se litigants have received ghostwriting assistance from attorneys to file frivolous lawsuits, but can neither confirm that such assistance was received nor identify the attorneys

245. *See id.*

246. 968 F. Supp. 1075 (E.D. Va. 1997).

247. *Id.* at 1078.

248. *See id.*

249. *Id.* at 1078 (citation omitted).

250. *Id.* at 1079.

251. *See id.*

252. *See id.*

involved. For example, a court detailed the litigious history of one persistent pro se plaintiff in *Klein v. Spear, Leeds & Kellogg*.²⁵³ Before filing the action at issue in that case, plaintiff Klein had commenced “well over thirty lawsuits against a very large number of defendants,” including libel actions against opposing attorneys and repetitious actions against previously prevailing opponents.²⁵⁴ From the tone of the opinion, the court clearly considered Klein a vexatious litigant pursuing an ever-increasing number of frivolous claims. Though Klein represented himself as a pro se litigant, an unverified statement to the court alleged that Klein was receiving the assistance of an attorney who was ghostwriting his complaints.²⁵⁵ The court recognized that “it is one thing to give some free legal advice,” but it decried the undisclosed ghostwriter’s “extensive” undisclosed assistance.²⁵⁶ The court’s exasperated diatribe concluded: “[T]his unrevealed support in the background enables an attorney to launch an attack, even against another member of the Bar . . . without showing his face.”²⁵⁷ The court did not specifically discuss Rule 11 because the opinion was written before the 1983 amendments to the rule rescued it from its previous dormancy.²⁵⁸

More recently, a court encountered the problem of suspected but unverifiable ghostwriting assistance for a pro se litigant in *Watkins v. Associated Brokers, Inc.*²⁵⁹ Plaintiff Watkins was pursuing allegedly pro se claims against numerous defendants under myriad legal theories in a vain attempt to invalidate the foreclosure of her home.²⁶⁰ Though Watkins was nominally proceeding pro se, “someone familiar with legal practice and procedure has had a major hand in drafting [her] Complaint.”²⁶¹ The court observed that despite this suspected legal assistance, “[a] little learning is a dangerous thing.”²⁶² The court summarily concluded that Watkins’ attempts to assert federal subject matter jurisdiction were “sheer frivolousness.”²⁶³ Due to the “blatant and pervasive violations of Rule 11(b)” contained in the complaint, the court “demand[ed] that the offending lawyer come forward.”²⁶⁴ *Watkins* again illustrates the possibility that an unidentified ghost-

253. 309 F. Supp. 341, 342 (S.D.N.Y. 1970).

254. *Id.*

255. *See id.* (“[Klein’s filings] are quite voluminous and by reason of their legal content and phraseology most strongly suggest that they emanate from a legal mind.”).

256. *Id.*

257. *Id.* at 343.

258. *See* Fed. R. Civ. P. 11 advisory committee’s note (1983).

259. No. 98 C 3316, 1998 WL 312124, at *1 (N.D. Ill. June 5, 1998).

260. *See id.*

261. *Id.*

262. *Id.*

263. *Id.* at *2.

264. *Id.* at *2 n.4.

writer can assist a pro se litigant in advancing frivolous legal positions while evading the application of Rule 11.²⁶⁵

*Ricotta v. California*²⁶⁶ documents a final instance of a pro se litigant pursuing apparently frivolous claims with the help of an undisclosed ghostwriting attorney. Plaintiff Ricotta, dissatisfied with the result of his divorce action in state court, filed a federal suit against eighteen defendants, including the attorney who represented his wife, various state judges, the court commissioner, San Diego County, the state bar, and the State of California.²⁶⁷ Ricotta's alleged causes of action included civil rights violations, RICO violations, and a conspiracy to deprive him of his civil rights.²⁶⁸ Unlike the district court opinions in *Johnson* and *Laremont-Lopez*, the *Ricotta* court began its opinion by carefully addressing all of Ricotta's pleaded causes of action against all of the various defendants before dismissing each one as legally unfounded.²⁶⁹ Noting that several of the defendants had been forced to defend themselves against Ricotta's legal attacks more than once,²⁷⁰ the court generously concluded that "the Plaintiff is dangerously close if not an actual vexatious litigant."²⁷¹ In this last instance of his dogged pursuit of the vast judicial conspiracy against him, Ricotta did not disclose that he had received substantial assistance from a ghostwriting attorney. The ghostwriting assistance might never have been discovered if some defendants had not discerned a glaring stylistic disparity between different parts of his complaint and contacted the suspected ghostwriter.²⁷²

These cases illustrate the concerns that motivate courts to identify undisclosed ghostwriting as violative of the requirements of Rule 11. They emphasize the abuses that might arise when attorneys offer ghostwriting assistance without at least some investigation of their pro se clients' allegations and possible prior history of pro se litigation. Or, from a more cynical perspective, these cases illustrate unscrupulous attorneys' ability to knowingly assist in the pursuit of frivolous litigation through the practice of undisclosed ghostwriting without fear of Rule 11 sanctions.

265. It is interesting to note that the court did not consider levying Rule 11 sanctions against Watkins herself, despite the fact that she presumably signed the frivolous complaint.

266. 4 F. Supp. 2d 961 (S.D. Cal. 1998).

267. *See id.* at 967-77.

268. *See id.* at 967.

269. *See id.* at 972-82.

270. *See id.* at 982.

271. *Id.*

272. *See id.* at 985.

2. Recommendations for a Proper Application of Rule 11 to Ghostwriting

According to the application of Rule 11's signature requirement offered by the *Johnson* and *Laremont-Lopez* courts,²⁷³ only the person who actually signs the pleading or paper certifies that it is not being filed for any improper purpose and that the legal and factual contentions are warranted by a reasonable inquiry as required by part (b) of the rule.²⁷⁴ This view also assumes that sanctions levied against violators of the rule, provided for by part (c),²⁷⁵ could only apply to those who actually affix their signature to the offending document. According to this interpretation, ghostwriting attorneys who do not sign any pleadings drafted for pro se litigants would effectively be free to disregard the requirements of Rule 11 entirely. Ghostwriting attorneys would thus not be forced to conduct the "inquiry reasonable under the circumstances" mandated by Rule 11(b)²⁷⁶ and would not be subject to sanctions.

This interpretation of Rule 11, which emphasizes the signing of the pleading as the action that engenders all of the duties created by the rule, is consistent with the Supreme Court's pre-1993 reading of Rule 11 in *Pavelic & LeFlore v. Marvel Entertainment Group*.²⁷⁷ In *Pavelic*, the Court, in giving Rule 11 its "plain meaning," held that only attorneys or parties who actually sign a pleading could be held liable for sanctions levied against that pleading under Rule 11.²⁷⁸ Thus, sanctions awarded against the plaintiff's attorney's law firm were improper, and only the signing attorney himself could be held responsible under the rule.²⁷⁹

The 1993 amendments to Rule 11, however, expressly overruled *Pavelic*. The text of the previous version of Rule 11 specifically mandated that the signer of the document was responsible for the reasonable inquiry into the factual veracity and legal legitimacy of the arguments therein.²⁸⁰ The 1993 amendments, however, abolished the absolute connection between the drafter's signature and her liability for fulfilling the rule's requirements. Instead, the new rule states that the court may "impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) *or are responsi-*

273. See *supra* Part III.A.1.

274. See Fed. R. Civ. P. 11(b).

275. See Fed. R. Civ. P. 11(c).

276. See *id.*

277. 493 U.S. 120, 123-24 (1989).

278. See *id.* at 125-26.

279. See *id.*

280. See Fed. R. Civ. P. 11(a) (1983) (amended 1993) ("The signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . .").

ble for the violation.”²⁸¹ The advisory committee’s notes to the 1993 amendments to Rule 11 emphasize this change, noting that it allows the court to sanction any parties “responsible” for the violative document, not necessarily the person who actually signed it.²⁸² The advisory committee’s notes to the rule specifically state that the court can make an “additional inquiry” in order to determine who should be sanctioned for a particular violation of Rule 11.²⁸³

In light of this analysis of the 1993 amendments to Rule 11, *Johnson*’s application of the rule to a ghostwriting attorney for simply failing to sign the pleading is misplaced.²⁸⁴ Under the amended version of Rule 11, the ghostwriting attorney’s failure to sign the pleading that she had drafted for the defendant sheriff²⁸⁵ did not immunize her from sanctions as the court contended.²⁸⁶ Just as the advisory committee suggested, the court had determined the identity of the ghostwriting attorney responsible for the pleading and could have levied Rule 11 sanctions against her.

Requiring a pro se litigant to disclose an attorney’s assistance in drafting pleadings when they are filed not only responds to courts’ accusations that ghostwriting is unfair and disingenuous,²⁸⁷ but also placates concern that the practice allows attorneys to evade the certification requirements of Rule 11.²⁸⁸ First, the ghostwriting attorney would be disclosing the fact that she was involved in the drafting of the pleading. Under the 1993 amendments to Rule 11, which allow the court to levy sanctions against any party who is responsible for a violation of the rule (not solely the party who signs the document),²⁸⁹ this disclosure would notify the court of the attorney’s possible responsibility for any substantive violations. The ghostwriting attorney

281. Fed. R. Civ. P. 11(c) (emphasis added). Subdivision (b) also disconnects the signature requirement from the requirement of reasonable inquiry by using the words “[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading” to describe the individuals responsible for the reasonable investigation instead of using the word “signer” as the 1983 version of the rule did. Fed. R. Civ. P. 11(b).

282. See Fed. R. Civ. P. 11 advisory committee’s notes (1993).

283. See *id.* (“When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court.”).

284. See *Johnson v. Board of County Comm’rs*, 868 F. Supp. 1226, 1231-32 (D. Colo. 1994). The suggestion that a ghostwriting attorney would be required to enter a formal appearance as attorney of record in order to satisfy Rule 11 is also incorrect according to this analysis of the 1993 amendments. See *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 887 (D. Kan. 1997) (suggesting that failure to enter an appearance as attorney of record results in evasion of Rule 11 requirements).

285. See *Johnson*, 868 F. Supp. at 1228.

286. See *id.* at 1231-32.

287. For a discussion of why ethical concerns require disclosure of ghostwriting assistance to the court, see *supra* Part II.E.1.

288. See *supra* notes 244-45, 249-50 and accompanying text.

289. See *supra* notes 249-51 and accompanying text.

would thus be subject to sanctions under Rule 11(c) and could not be accused of evading the rule's requirements.²⁹⁰ Second, disclosing the ghostwriting attorney's identity would minimize the efficiency concerns expressed in *Laremont-Lopez*.²⁹¹ If a ghostwriting attorney's identity were disclosed, along with her involvement in the drafting of the pleading, the court would not be forced to conduct any satellite inquiry into these questions.

Even if disclosure of a ghostwriting attorney's identity were mandatory, however, she should only be held responsible for violations of Rule 11 in the most egregious circumstances. Several aspects of the rule itself and its interpretation by courts support this conclusion. First, Rule 11(b) requires the party responsible for a complaint to conduct only "an inquiry reasonable under the circumstances" to ascertain the factual correctness and legal validity of a pleading or other court document.²⁹² Because a ghostwriting attorney generally engages in such a limited representation due to severe constraints on time and resources,²⁹³ the reasonableness of her inquiry into her client's allegations should be judged accordingly. Courts have specifically held that the standard of a reasonable inquiry under Rule 11 depends on the time and resources available to an attorney under the circumstances.²⁹⁴ Thus, only a limited investigation of the client's allegations by a ghostwriting attorney would be "reasonable under the circumstances." The courts should only consider Rule 11 sanctions against a ghostwriting attorney if it were obvious to the attorney that the client's allegations were false.²⁹⁵

Second, courts should be reluctant to levy Rule 11 sanctions against a ghostwriting attorney because the attorney no longer has responsibility for the litigation of that pleading when it is actually filed. The litigant, now proceeding pro se, makes the decision about whether a potentially frivolous claim should be withdrawn under the "safe harbor" notice provision of the amended Rule 11;²⁹⁶ therefore, she

290. See Fed. R. Civ. P. 11(c).

291. See *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (E.D. Va. 1997) ("[T]he additional inquiry necessitated by the lawyers' failure to sign the pleadings interferes with the 'just, speedy, and inexpensive determination' of those actions."); *supra* notes 249-51 and accompanying text.

292. See Fed. R. Civ. P. 11(b).

293. See *supra* notes 33-40 and accompanying text.

294. See, e.g., *Blue v. United States Dep't of the Army*, 914 F.2d 525, 546 (4th Cir. 1990) (recognizing that the reasonableness of a Rule 11 inquiry depends on the circumstances of the representation); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987) ("The amount of investigation required by Rule 11 depends . . . on the time available to investigate . . . the Rule does not require steps that are not cost-justified.").

295. Examples might be instances where an attorney knew that the client had filed similar previous claims and lost. See *supra* notes 253-57 and accompanying text.

296. See Fed. R. Civ. P. 11(c)(1)(A) ("A motion for sanctions . . . shall not be filed with . . . the court unless, within 21 days after service of the motion . . . the challenged paper . . . is not withdrawn or appropriately corrected.").

should also be responsible for possible sanctions. Because the ghostwriting attorney has no control over the future withdrawal of the pleading that she drafted, she should only be liable for Rule 11 sanction in circumstances where it was unquestionably clear that the pleading itself was frivolous. The attorney does have an ethical duty, however, to make sure the client understands her potential liability for continued support of a frivolous contention.²⁹⁷

This analysis is not intended to suggest that courts should not take the litigant's pro se status into account when considering levying sanctions against her. Courts generally accord pro se litigants more lenient treatment under Rule 11 than parties represented by counsel.²⁹⁸ The Advisory Committee's notes to the 1993 amendments to Rule 11 also state that a court should consider a litigant's legally untrained status when considering Rule 11 sanctions.²⁹⁹ Fundamentally, the courts should have particularly good reasons to even consider Rule 11 sanctions against either a ghostwriting attorney or her pro se litigant client.³⁰⁰

B. *Application of Local Withdrawal Rules to Ghostwriting*

Most federal district courts have local rules of procedure that require an attorney of record representing a client in a case before the court to obtain the court's permission before withdrawing from her representation of that client.³⁰¹ Though these local withdrawal rules do not always contain identical language,³⁰² they all require that an attorney must obtain the leave of the court to withdraw from a representation once she has appeared on behalf of a client in that court. These local rules are procedural and should be distinguished from ethical rules concerning attorney withdrawal discussed earlier.³⁰³

297. *See supra* Part II.E.2.

298. *See* Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994); Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990); Elmore v. McCammon, 640 F. Supp. 905, 910 (S.D. Tex. 1986).

299. *See* Fed. R. Civ. P. 11 advisory committee's notes (1993) ("[W]hether the responsible person is trained in the law . . . may in a particular case be [a] proper consideration[].").

300. For a discussion of such egregious instances of ghostwriting abuse, *see supra* notes 253-72 and accompanying text.

301. *See, e.g.*, E.D. Pa. Local R. 5.1(c) ("An attorney's appearance may not be withdrawn except by leave of court, unless another attorney of this Court shall at the same time enter an appearance for the same party."); E.D. Va. Local R. 83.1(G) ("No attorney who has entered an appearance in any civil or criminal action shall withdraw such appearance, or have it stricken from the record, except on order of the Court and after reasonable notice to the party on whose behalf said attorney has appeared.").

302. *See supra* note 301.

303. *See* Rusinow v. Kamara, 920 F. Supp. 69, 70-71 (D.N.J. 1996) (noting that local withdrawal rule requiring the permission of the court to withdraw from a representation and ethical withdrawal rules protecting clients are distinct attorney obligations).

1. One Court's Application of Local Withdrawal Rules to Prohibit Ghostwriting

In *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*,³⁰⁴ the court held that a group of attorneys who had ghostwritten complaints for several different employment discrimination plaintiffs had violated Local Rule 83.1(G), the withdrawal rule for that court.³⁰⁵ Though the court admitted that the ghostwriting attorneys did not enter a formal appearance as counsel of record, it found that because the attorneys contracted "to provide representation directly related to the litigation of these cases," they represented the plaintiffs substantially enough to incur the obligations of the Rule.³⁰⁶ Thus, according to the court, the attorneys' termination of their representation of the plaintiffs without the permission of the court violated the rule even though they never formally appeared as counsel of record and the ghostwritten pleadings were filed pro se.³⁰⁷ Indeed, the attorneys' representation of the litigants terminated before any pleadings were ever filed with the court.³⁰⁸

At first glance, the *Laremont-Lopez* court's logic seems counterintuitive. How could the ghostwriting attorneys have failed to obtain permission to withdraw from a legal representation that had already ended before the litigation ever began, before the court was ever involved in the case? In simpler terms, how is it possible for one to disappear without permission if one never appeared in the first place? To answer these questions, it is necessary to pinpoint the moment in the course of an attorney-client relationship at which local withdrawal rules like 83.1(G) take effect. One must determine exactly what act engages this obligation of an attorney to notify her client and obtain the court's permission to withdraw from the representation. If the practice of ghostwriting itself constitutes an appearance as attorney of record simply because it engenders an attorney-client relationship, it would be rendered impossible by definition. An 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.

Before closely considering the language of the rule and the nature of the appearance whose unauthorized termination it prevents, it is useful to keep in mind the *Laremont-Lopez* court's explanation of the purposes that these withdrawal rules are intended to fulfill. Accord-

304. 968 F. Supp. 1075 (E.D. Va. 1997). This case has been discussed previously in regard to both unfairness and Rule 11 issues. See *supra* notes 140-49, 246-52 and accompanying text.

305. *Id.* at 1079-80.

306. The court also noted that some of the attorneys received monetary compensation for their assistance. See *id.* at 1079.

307. See *id.*

308. See *id.*

ing to the court, the basic purpose of the rule is to “ensur[e] that the court is able to fairly and efficiently administer” justice.³⁰⁹ Because the court suffered substantial confusion in trying to determine if the pro se plaintiffs were represented in these cases, and if so by whom, the court decided that this efficiency rationale behind the rule had been thwarted.³¹⁰ Therefore, according to the court, “[t]he Local Rule is intended to eliminate this confusion and ensure that the appropriate litigants and attorneys receive proper notice of all proceedings.”³¹¹

2. An Analysis of Local Withdrawal Rules and Their Inapplicability to Ghostwriting

Local Rule 83.1(G), invoked by the *Laremont-Lopez* court, provides that “[n]o attorney who has entered an appearance in any civil or criminal action shall withdraw such appearance, or have it stricken from the record, except on order of the Court and after reasonable notice to the party on whose behalf said attorney has appeared.”³¹² To determine whether the court applied the rule to the ghostwriting attorneys correctly, the fundamental inquiry is whether an attorney’s provision of assistance in preparing pleadings, without further representation, constitutes the entering of an “appearance.” The term “appearance,” as applied to attorneys, is not defined anywhere in the Local Rules for the Eastern District of Virginia, nor is it defined in the Federal Rules of Civil Procedure as applied to attorneys.³¹³ The same district’s Local Rule 83.1(F), however, does provide that “[a]ny counsel presenting papers, suits, or pleadings for filing, *or making an appearance*, must be members of the bar of this court.”³¹⁴ This language implies that presenting papers and making an appearance are distinct actions. Confusingly, however, the same rule also provides that “Any counsel who joins in a pleading, motion, or other paper filed with the Court will be held accountable for the case by the Court.”³¹⁵ Thus, this section contributes to the perplexity, rather than clarifying the is-

309. *Id.* (citing *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676 (3d Cir. 1986)).

310. *See id.* at 1079. This conclusion, however, is somewhat fact-specific. The attorneys here did not all specifically agree only to ghostwrite the plaintiffs pleadings. Instead, some of them provided only drafting assistance, some provided advice about the litigation itself, and one actually entered a formal appearance and represented the plaintiff in court. *See id.* Thus, in a ghostwriting scenario in which an attorney clearly agreed *only* to draft the pleadings and disclosed this arrangement to the court, the efficiency problem might not arise.

311. *Id.*

312. E.D. Va. Local R. 83.1(G).

313. Even Professors Wright and Miller, in their authoritative treatise on civil procedure, only discuss the term “appearance” as it relates to litigants themselves for jurisdictional purposes, not as it applies to the attorneys who represent such litigants. *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1344 (2d ed. 1990).

314. E.D. Va. Local R. 83.1(F) (emphasis added).

315. *Id.*

sue, by introducing the ambiguous terms “joins” and “held accountable” into the interpretive milieu.

Though the Virginia rules themselves provide little guidance in defining an “appearance” for the purposes of Local Rule 83.1(G), it might be possible to discern its meaning by reference to similar rules for other district courts. A similar rule for the Eastern District of Pennsylvania, Local Rule 5.1(c), provides that “[a]n attorney’s appearance may not be withdrawn except by leave of the court, unless another attorney of this Court shall at the same time enter an appearance for the same party.”³¹⁶ Though this language in itself provides no additional guidance, it is preceded by Local Rule 5.1(a), which provides that “[t]he filing of a pleading, motion or stipulation shall be deemed an entry of appearance.”³¹⁷ According to this definition of “appearance,” the act of *filing* the pleading, not the act of writing it, nor the formation of an attorney-client relationship, would engage the relationship between the litigant and the court and thus invoke the obligations of the local withdrawal rules. This definition seems to exclude an attorney who solely provided ghostwriting assistance with a pleading which her client filed pro se. Instead, it would be the pro se litigant herself who is making an “appearance” in court, not the ghostwriting attorney whose relationship to the case has already been terminated. The fact that the *Laremont-Lopez* court interpreted “appearance” differently than it is defined by the rules of other courts does not itself, of course, make the court’s interpretation erroneous. This inconsistency, however, supports an argument that the Virginia court’s interpretation of the withdrawal rule is inconsistent with the plain meaning of “appearance,” which seems to be closer to the definition provided by the Pennsylvania rule.

Textual analyses aside, it is still necessary to consider whether the *Laremont-Lopez* court’s interpretation of Local Rule 83.1(G) better serves the rule’s intended purpose. The court identified the fundamental purpose of the rule as the avoidance of confusion and inefficiency which wastes the court’s time and resources.³¹⁸ The court argued that the confusion engendered by the uncertainty of the status of the pro se plaintiffs’ legal representation undermined its ability to fairly and efficiently administer the case.³¹⁹ This interpretation of the

316. E.D. Pa. Local R. 5.1(c).

317. E.D. Pa. Local R. 5.1(a).

318. See *supra* note 309 and accompanying text. It is important to note that Local Rule 83.1(G) requires clear communication to the represented party, not only the court, about the status of legal representation and possible withdrawal. See E.D. Va. Local R. 83.1(G). Most instances of ghostwriting, however, would not violate this section of the rule because the pro se litigant would obviously be aware that she is proceeding with the litigation on her own. Issues of required communication between the ghostwriting attorney and the pro se litigant client are addressed in some detail at *supra* Part II.E.2.

319. See *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1079 (1997).

rule as facilitating clarity of communication regarding the status of litigants' legal representation and the identity of such counsel is consistent with other caselaw examining the invocation of such local withdrawal rules.³²⁰ Outside of the specific factual circumstances of the ghostwriting representation in *Laremont-Lopez*,³²¹ however, in cases where the ghostwriter-client relationship has clearly ended, the practice of ghostwriting would not generate such an inordinate amount of confusion for the court. Particularly if the ghostwriting assistance were disclosed to the court upon the filing of the ghostwritten pleadings, such confusion would be avoided.³²²

Because disclosure of ghostwriting largely addresses *Laremont-Lopez*'s efficiency concerns, it should not violate local withdrawal rules. The basic notice function of the rules will have been satisfied. Also, because ghostwriting attorneys by definition do not generally file a formal appearance in court, they should not be subject to the local withdrawal rules which only require permission of the court to withdraw once such an appearance has been made. Even if the courts insist on making the strained argument that the drafting of pleadings is a functional appearance before the court, they should refrain from applying the local withdrawal rules as a matter of policy. If courts recognize that ghostwriting can be an ethically acceptable means to increase access to civil justice, a constitutional right,³²³ they should not apply these local procedural rules so as to inhibit the practice.

CONCLUSION

The practical effects of the increasing practice of unbundled legal services will continue to be analyzed as such practices are implemented and new models are developed. Already, however, such models are providing more legal assistance to more people, incrementally increasing access to civil justice. Courts and bar associations should make every effort to avoid stifling the development of these new models of legal practice through applications of ethical and procedural norms that were designed with full-service, traditional representation in mind. If the legal community takes the right of access to civil justice seriously, new experiments that increase access to legal advice and representation should be encouraged.

320. See *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676, 679 (3d Cir. 1986) (“[T]he purposes of Local Rule 18(c) include providing for communications between the litigants and the court, as well as ensuring effective court administration.”); *Wolgin v. Smith*, Civ. A. 94-7471, 1996 WL 482943, at *2 (E.D. Pa. Aug. 21, 1996) (citing *Ohntrup* as well as mentioning other factors including prejudice to the litigants).

321. See *supra* note 310.

322. For a discussion of the implications of full disclosure of ghostwriting assistance, see *supra* Part II.E.1.

323. See *supra* notes 2-3 and accompanying text.

As one small piece of this process, ghostwriting in particular should not be prohibited through overly literal interpretations of ethical or procedural rules. So long as ghostwriting assistance is disclosed to the court and opposing parties, the majority of courts' ethical and procedural concerns will be assuaged. Though ghostwriting is an entirely ethical practice, however, attorneys must vigilantly assure that such limited legal assistance does not denigrate the interests of their clients.

Notes & Observations