GIVE GHOSTS A CHANCE: WHY FEDERAL COURTS SHOULD CEASE SANCTIONING EVERY LEGAL GHOSTWRITER

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I. INTRODUCTION

A friend comes to you, a lawyer, seeking legal advice. She cannot afford to hire an attorney and thinks her problem is not worth that much money, but she would like your perspective on her situation. You decide to hear her out. Your friend tells you that she plans to litigate a small matter on her own, but she is concerned about how to tell her story in court. As you listen to your friend explain the situation, you realize that her case has some merit, but that her explanation is disorganized and does not focus the most relevant facts. She says she wants to file a pleading soon.

As every budding law student learns, if a lawyer dispenses legal advice, that lawyer may be establishing an attorney-client relationship.[1] However, your schedule is swamped, and your friend does not have the money or inclination to hire you to represent her for this small-potatoes problem. You tell her that you can give her some simple help, but you cannot represent her in court.[2] When she agrees, you write down your thoughts on a sheet of paper, transmuting her narrative into legally cognizable claims, and tell her to use that writing as the basis for the pleading she files in court. Your friend ecstatically thanks you, and you feel that you have done your good deed for the day; after all, you saved the court and her potential adversary from wading through a mess of a pleading, and you helped your friend with her legal trouble.

As they say, no good deed goes unpunished.[3] In a majority of federal districts, a court would likely find your assistance

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[1] *See, e.g.*, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980) (finding an attorney-client relationship based on a short consultation where attorney said there was probably no cause of action); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2012) (establishing duties to prospective clients at consultation).

[2] More discussion than this is probably necessary to obtain informed consent and properly limit the scope of representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2012) (requiring reasonability under the circumstances and informed consent). But those topics are beyond the scope of this Note.

[3] This saying is often attributed to Oscar Wilde or Clare Boothe Luce, but "there is an earlier occurrence of 'No good deed goes unpunished' in the *Zanesville* (Ohio) *Signal*, 5 Nov. 1942, attributed there to Walter Winchell." YALE BOOK OF QUOTATIONS 476–77 (Fred R. Shapiro ed., 2006). The saying is probably derived from a proverb, "Every good deed brings its own punishment." *Id.*

unethical, illegal, and subject to sanctions.[4] If your friend files in a state court, however, you most likely did nothing illegal or professionally unethical, although depending on the state, she might have to disclose your assistance in some fashion.[5] This striking fissure between federal and state approaches to legal ethics was acknowledged in 2011 by the Second Circuit when that court declined to follow the prevailing federal approach, predicting a revision of federal jurisprudence and creating a circuit split.[6] Although the Second Circuit clearly declined to recognize so-called "legal ghostwriting"[7] as conduct worthy of automatic sanctions (splitting from other circuit courts), the court did not specify any particular reason why it found federal precedents unpersuasive, and instead merely observed that the federal courts are increasingly out-of-sync with state courts.[8]

For decades, federal courts have taken a dim view of the practice of legal ghostwriting, largely ignoring developments in ethical and legal standards espoused at the state level and by various bar associations, including the American Bar Association (ABA).[9] However, the Second Circuit acknowledged these changing norms by declining to impose sanctions for legal ghostwriting and explicitly questioned the validity of other circuits' precedents based on changing ethical norms.[10] Although the Second Circuit noted widespread acceptance of legal ghostwriting outside the federal judiciary and predicted a turning tide in federal courts, it failed to specifically refute any of the reasons given in earlier federal decisions for sanctioning legal

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[4] Jona Goldschmidt, *An Analysis of Ghostwriting Decisions: Still Searching for the Elusive Harm*, 95 JUDICATURE 78, 79 (2011). *But see In re* Fengling Liu, 664 F.3d 367, 372–73 (2d Cir. 2011) (declining to sanction for ghostwriting).

[5] *See infra* Part II.B.

[6] *See In re Fengling Liu*, 664 F.3d at 372–73; *infra* Part II.C.

[7] The terms "legal ghostwriting" and "ghostwriting" are used interchangeably in this Note.

[8] *See In re Fengling Liu*, 664 F.3d at 372 (concluding that the court could not sanction ghostwriter for violating duty of candor without ghostwriter knowing that the technique was prohibited or would mislead the court).

[9] Subject to one recent exception, generating a circuit split, discussed *infra* at Parts II.C and III.

[10] *See In re Fengling Liu*, 664 F.3d at 371 ("In light of the ABA's 2007 ethics opinion, and the other recent ethics opinions permitting various forms of ghostwriting, it is possible that the courts and bars that previously disapproved of attorney ghostwriting of *pro se* filings will modify their opinion of that practice.").

ghostwriting.[11] These older cases chiefly rely on Rule 11 of the Federal Rules of Civil Procedure and the ethical duty of candor towards a tribunal (which encompasses the notion that it is unfair for a *pro se* litigant to have drafting assistance and that ghostwriters are avoiding court regulation), as well as several other minor ethical and procedural concerns, to justify the issuance of sanctions.[12]

This Note argues that federal courts should cease to automatically sanction legal ghostwriting because such sanctions lack sound grounding in legal or ethical rules. Courts issuing these automatic sanctions have relied on a strained interpretation of Rule 11, referencing not the text but the "spirit" of the rule, a justification which can be safely ignored or overruled.[13] Federal courts should also decline to automatically issue sanctions under inherent judicial powers because legal ghostwriting is not a violation of any general ethical duty or duty towards the court.[14] This change would not foreclose the use of sanctions for unethical conduct committed through the use of legal ghostwriting.[15]

Part II of this Note explains the nature of legal ghostwriting and reviews the history of state and federal approaches to the issue. First, this Part explores the conceptual origins of legal ghostwriting within the larger modern movement to offer a variety of unbundled legal services and the uphill battle in which its proponents first fought for the approach.[16] Then it catalogs the various state responses to the practice of legal ghostwriting.[17] Finally, this Part reviews the pertinent federal ghostwriting decisions, starting with the decades of hostility in lower courts, moving on to the sparse and unreferenced Supreme Court decisions, and ending with the Second Circuit's refusal to treat ghostwriting as inherently sanctionable conduct.[18]

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[11] *See id.* at 369 (noting *Duran v. Caris*, a prominent appellate decision sanctioning ghostwriting on Rule 11 grounds, but neglecting to comment on that court's reasoning).

[12] *See infra* Part II.C.

[13] *See infra* Part III.A.

[14] *See infra* Parts III.B, III.C.

[15] *See infra* Part III.B.*2*.

[16] *See infra* Part II.A.

[17] *See infra* Part II.B.

[18] *See infra* Part II.C.

Part III of this Note grapples with the federal courts' rationales for issuing per se violation sanctions and argues why each justification is insufficient. First, it examines Rule 11's role in sanctioning courts' decisions and contends that Rule 11 offers no textual support and scant "spiritual" support for their positions.[19] Second, it examines the policy arguments that might justify automatically issuing sanctions under the inherent power of courts to regulate their proceedings and finds that they are insufficiently grounded in empirical reality and modern ethical norms.[20] Finally, this Part scrutinizes the professional ethics justification for issuing sanctions and demonstrates that ethical norms no longer preclude legal ghostwriting.[21]

Part IV of this Note concludes that the federal courts should no longer automatically issue sanctions against legal ghostwriters.[22]

II. BACKGROUND

A. UNBUNDLED LEGAL SERVICES AND LEGAL GHOSTWRITING

In the traditional model of legal services, the client hires the attorney as a representative from the beginning to the final conclusion of a large legal task, such as litigating a lawsuit, and is billed by the hour.[23] However, traditional representation includes numerous discrete tasks that may not necessarily have to be purchased in a "bundle" together.[24] A lawyer can provide sixteen or more "unbundled" services to a client, such as coaching for

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[19] *See infra* Part III.A.

[20] *See infra* Part III.C.

[21] *See infra* Part IV.

[22] *See supra* Part III.B.

[23] Jessika M. Ferm, *The Billable Hour Zombie: Why You Need to Act Now to Avoid an Attack on Your Business*, LAW PRACTICE TODAY (July 2010), http://apps.americanbar.org/lpm/lpt/articles/ftr07101.shtml (describing economic factors threatening the "traditional hourly billing system"). Indeed, the traditional hourly model may be on the wane. *See generally* Amy Miller, *GCs, Law Firms, and Flat Fee Arrangements: A Matter of Trust*, AMLAW DAILY, June 8, 2009 (reporting a trend toward alternative fee arrangements, such as flat fees, during the 2007–2009 recession).

[24] *See generally* FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000) (explaining that his inspiration for unbundled legal services came from the real estate profession). Mosten is often credited with coining the phrase "unbundled legal services," which is used interchangeably with "discrete task representation" and "limited scope representation." AM. BAR ASS'N, UNBUNDLING FACT SHEET (2011).

negotiations or reviewing court documents.[25] One such service is the discrete task of legal ghostwriting, which is when a lawyer drafts or assists in drafting documents to be submitted to a court without making a formal appearance in court.[26]

The practice of legal ghostwriting is as old as western civilization.[27] In ancient Athens, the law required every free citizen to speak for himself in legal proceedings.[28] Some less gifted speakers turned to the original legal ghostwriters, "logographers," to write their speeches.[29] Although the law in the United States does not require self-representation, the expense of representation may consign persons of limited means to *pro se* litigation.[30]

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[25] *See* Forrest Mosten & Lee Borden, *Unbundled Legal Services*, http://www.zorza.net/resources/Ethics/mosten-borden.htm. Mosten and Borden have attempted to provide a clear and concise list of unbundled legal services, including "Evaluation of clients' self-diagnosis of the case and advising client about legal rights," "Preparing and/or suggesting documents to be prepared [i.e., ghostwriting]," "Counseling client about possible appeal," and a seventeenth residual "other services as needed by the client" category. *Id.*

[26] *See, e.g.*, *In re* Ellingson, 230 B.R. 426, 435 n.12 (Bankr. D. Mont. 1999) (defining ghostwriting as the "act of an undisclosed attorney who assists a self-represented litigant by drafting his or her pleadings as part of 'unbundled' or limited legal services"). Mosten & Borden, *supra* note 25, describes an early application of the ghostwriting concept to the U.S. legal system:

> Often a party whose spouse has filed for a divorce simply needs to file an Answer, the legal document that avoids default. Then the party will be able to negotiate with his or spouse or the spouse's lawyer to resolve the issues of the case. . . . [T]he party may desire to maintain control of their case but need the assistance of a lawyer to file the document properly. An attorney who offers unbundled legal services can assist with drafting these documents and the party can file them. This way, the document will meet the court's standards, the party will protect his or her rights, and the party will continue to be free to negotiate without having to speak or work through a lawyer.

[27] 4 THE NEW ENCYCLOPÆDIA BRITANNICA 8 (Dale Hoiberg et al. eds., 15th ed. 2012)

[28] *Id.* The gendered language is intentional; there were no female citizens in Athens.

[29] *Id.*; *see also* JAMES L. GOLDEN ET AL., THE RHETORIC OF WESTERN THOUGHT 7 (4th ed. 1989) ("[I]t was possible to secure the services of a capable ghostwriter if one had the necessary means. Many of the leading orators of ancient Greece, such as the great Demosthenes, amassed considerable fortunes by serving as legal ghostwriters (logographers) for the well-to-do.").

[30] *See* WILLIAM HORNSBY, IMPROVING THE DELIVERY OF AFFORDABLE LEGAL SERVICES THROUGH THE INTERNET: A BLUEPRINT FOR THE SHIFT TO A DIGITAL PARADIGM 3 (1999), *available at* http://www.visalaw.com/news/aba.pdf ("[Fifty-seven] percent of pro se litigants [in Maryland] proceeded pro se because they could not afford a lawyer."); Margaret Graham Tebo, *Scary Parts of Ghostwriting*, 93 A.B.A. J. 16, 17 (2007) (quoting James McCauley, ethics counsel for the Virginia State Bar, saying that "the people most likely to seek unbundled services tend to do so solely for financial reasons"). *See generally* PATRICIA A. GARCIA, AMERICAN BAR ASSOCIATION, LITIGANTS WITHOUT LAWYERS: COURTS AND LAWYERS

American courts increasingly encounter *pro se* litigants, particularly in bankruptcy and family law cases.[31] Although courts usually focus on ghostwritten pleadings,[32] motions and other documents can be ghostwritten as well.[33]

Proponents of unbundled legal services emphasize the benefits of increasing access to justice for low and middle income individuals and providing assistance for clients who want autonomy over the process and strategy of litigating.[34] The market for unbundled legal services, while partly driven by individuals interested in *pro se* representation,[35] mostly exists because of the dead zone between the lowest income earners who qualify for legal aid and those wealthy enough to afford traditional representation.[36] Unbundled services allow lawyers to tap into that market by offering an affordable form of legal service.[37]

MEETING THE CHALLENGES OF SELF-REPRESENTATION (2002) (noting that the cost of retaining a lawyer has increased *pro se* representation in the United States).

[31] *See* Madelynn Herman, *Self-Representation: Pro Se Statistics*, National Center for State Courts (Sept. 25, 2006) (estimating that the *pro se* representation rate in family law cases overall averaged 67% in California, 73% in Florida's large counties, and 70% in some Wisconsin counties). The other chief area of *pro se* litigation is prisoner petitions. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURT (2010) (reporting that in 2010, *pro se* litigants filed approximately 26% of all actions filed in federal court, and that 93% of prisoner petitions and 10.5% of non-prisoner petitions were filed *pro se*).

[32] *See, e.g.*, *In re* Fengling Liu, 664 F.3d 367, 369 (2d Cir. 2011) (defining ghostwriting as a situation where a *pro se* litigant has documents drafted by an attorney, regardless of whether there is disclosure or anonymous disclosure).

[33] *See, e.g.*, *In re* Brown, 354 B.R. 535, 541 (Bankr. N.D. Okla. 2006) (discussing ghostwriting of a motion to reconsider); Jackson v. Am. Lubricant Co., No. 18482, 2001 WL 221661, at *1 (Ohio Ct. App. Mar. 2, 2001) (same).

[34] *See, e.g.*, *Jackson*, 2001 WL 221661, at *1 (describing the attractions of unbundling as cost and autonomy); Mosten & Borden, *supra* note 25 ("Perhaps the biggest selling point for unbundling is that it costs less. When the parties do most of the work themselves and hire an attorney only for what they need, they save money. But that's not the only benefit from unbundling. It also allows them to stay in control.").

[35] *See, e.g.*, THE NEW YORK STATE BAR ASSOCIATION, COMMISSION ON PROVIDING ACCESS TO LEGAL SERVICES FOR MIDDLE INCOME CONSUMERS REPORT AND RECOMMENDATIONS ON "UNBUNDLED" LEGAL SERVICES (Dec. 2002) ("Unbundling is seen as a way to increase legal access for middle income consumers . . . . Clients find unbundling attractive because it saves money and gives them more control over the process and strategy decisions.").

[36] John C. Rothermich, Note, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2688 (1999) ("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.").

[37] *Id.*

However, unbundled legal services generally, and ghostwriting in particular, have faced numerous obstacles and still do in some jurisdictions.[38] The two principal roadblocks to legal ghostwriting are: (1) that attorneys practicing discrete task representation may violate the "duty of candor" to courts by working on a lawsuit but failing to make an appearance in court and by unfairly manipulating judicial accommodation of *pro se* litigants;[39] and (2) that legal ghostwriting is a violation of Rule 11,[40] or its bankruptcy equivalent,[41] which requires that documents be signed by an attorney of record.[42]

Despite the initial hostility toward unbundled legal services, many courts have reversed course and now welcome at least some forms of unbundled legal services.[43] In 2007, the American Bar

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[38] See *infra* II.C for how federal jurisdictions generally offer the most resistance to legal ghostwriting.

[39] *See* Duran v. Carris, 238 F.3d 1268, 1271–73 (10th Cir. 2001) (concluding that because ghostwriting unfairly gives a *pro se* litigant the benefit of liberal *pro se* pleading construction and shields the ghostwriter from accountability, the practice violates "[t]he duty of candor toward the court"); Haines v. Kerner, 404 U.S. 519, 520 (7th Cir. 1972) (holding *pro se* complaints "to less stringent standards than formal pleadings drafted by lawyers"); MODEL CODE OF JUDICIAL CONDUCT, R. 2.2, cmt. 4 ("It is not a violation of this Rule [requiring impartiality and fairness] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.").

[40] *See, e.g.*, Barnett v. LeMaster, 12 F. App'x 774, 778–79 (10th Cir. 2001) (admonishing a ghostwriting attorney on Rule 11 grounds); Knight-McConnell v. Cummins, No. 03 Civ. 5035, 2005 WL 1398590, at *1 n.2 (S.D.N.Y. June 13, 2005) (saying that ghostwriting raises "concerns under Rule 11"); Wash. v. Hampton Rds. Shipping Ass'n, No. 2:01CV880, 2002 WL 32488476, at *5 n.6 (E.D. Va. May 30, 2002) ("Ghostwriting is in violation of Rule 11."). *But see* Kircher v. Charter Twp. of Ypsilanti, No. 07-13091, 2007 WL 4557714, at *4 (E.D. Mich. Dec. 21, 2007) (noting that ghostwriting is improper even though it may not per se violate Rule 11).

[41] *In re* West, 338 B.R. 906, 915, 917 (Bankr. N.D. Okla. 2006) (fining an attorney $1,000 for violating the bankruptcy equivalent to Rule 11); *In re* Cash Media Sys., Inc., 326 B.R. 655, 674 (Bankr. S.D. Tex. 2005) (fining an attorney $11,290.05 for violating the same); *In re* Mungo, 305 B.R. 762, 770–71 (Bankr. D.S.C. 2003) (admonishing an attorney for violating the bankruptcy court equivalent to Rule 11); *In re* Merriam, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (stating that ghostwriting violates Rule 11 and "interferes with the efficient administration of justice").

[42] FED R. CIV. P. 11.

[43] *See infra* Part II.B. At least one court has called for law schools to teach how to practice unbundled legal services in their clinics in order to increase its use. *See, e.g.*, Rochelle Klempner, *Unbundled Legal Services In Litigated Matters In New York State: A Proposal To Test the Efficacy through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654–56 (2006).

Association also amended its model rules to expressly permit unbundled legal services.[44]

B. STATE COURT APPROACHES

State bars and ethics committees have resolved the issue of whether to allow legal ghostwriting in many different ways.[45] Their approaches can be grouped into several categories: (1) permitting anonymous ghostwriting;[46] (2) requiring disclosure of the ghostwriter's identity when the lawyer was heavily involved in the drafting ("substantial assistance");[47] (3) always requiring disclosure of ghostwriting, but not the identity of the attorney ("anonymous disclosure");[48] (4) always requiring identity disclosure ("mandatory disclosure");[49] and (5) banning the practice.[50]

1. Anonymous Ghostwriting. This is the standard endorsed by the American Bar Association, which states that whether a *pro se* litigant received help in preparing documents is not material to the merits of litigation, precluding an obligation to disclose.[51] States permitting anonymous ghostwriting have reached their

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[44] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

[45] Peter Geraghty, *Ghostwriting*, YourABA 2011 Article 3, *available at* http://www.americanbar.org/publications/youraba/201103article11.html (taking inventory of different states' treatment of ghostwriting and how those policies were reached). A minority of states have yet to adopt an approach. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 286–88 (2010) (stating that, of twenty-four states that have addressed the issue, thirteen permit ghostwriting and, of those thirteen states, ten permit undisclosed ghostwriting while three require the pleading to indicate that it was prepared with the assistance of counsel; ten states expressly forbid ghostwriting).

[46] *See. e.g.*, N.C. State Bar, 2008 Formal Ethics Op. 3 (2009) (finding undisclosed ghostwriting permissible unless substantive law or a court order requires disclosure).

[47] *See, e.g.*, Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 2007-F-153 (2007) (requiring disclosure if preparing pleadings and other legal documents creates the false impression that the litigant is without substantial legal assistance).

[48] *See, e.g.*, Fla. Bar Ass'n, Op. 79-7 (reconsideration) (2000) (requiring "Prepared with Assistance of Counsel" label).

[49] *See, e.g.*, COLO. R. CIV. P. 11(b) ("attorney may . . . provide limited representation . . . to a pro se party," provided that pleadings contain the attorney's name).

[50] *See, e.g.*, Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. No. 98-1 (1998) ("[P]roviding more extensive services, such as drafting ("ghostwriting") litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.").

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

approach different ways, either upholding it under existing rules[52] or specifically amending ethical rules to permit it.[53] The Arizona State Bar Committee on the Rules of Professional Conduct issued Formal Ethics Opinion 05-06, interpreting the most recent version of the Arizona ethical rules and its previous opinions, and advised attorneys in Arizona that undisclosed ghostwriting is ethically permissible without need for amendment to the procedural or ethical rules.[54] Following a different route, the Montana Supreme Court ordered the ethical conduct rules to be modified[55] and adopted an amended version of Rule 11 (Montana's rules are modeled on the Federal Rules) to explicitly permit legal ghostwriting.[56] Both the Montana and Arizona approaches require

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[52] *See, e.g.*, Me. Ethics Comm'n, Op. 89 (1988) (permitting ghostwriting); Ala. Bar Ass'n Ethics Op. 2010-01 (2010) (deciding that when lawyers offer limited scope representation, it is not inherently misleading to not reveal attorney's involvement); Ariz. State Bar Ass'n Ethics Op. 06-03 (2006) (permitting ghostwriting); D.C. Bar Op. 330 (2005) (determining that if a party is proceeding *pro se*, opposing counsel should treat that party as unrepresented unless and until that counsel receives reasonable notice of representation from the party or her lawyer); Ill. State Bar Ass'n Op. 849 (1983) (permitting anonymous ghostwriting for divorce and pleadings); State Bar of Mich. Op. RI-347 (2010) (permitting anonymous ghostwriting); N.C. State Bar, 2008 Formal Ethics Op. 3 (2009) (determining that a lawyer may assist without disclosing involvement unless required to do so by law or court order); Utah State Bar Ethics Advisory Op. 08-01 (2008) (determining that it is not unethical to provide extensive undisclosed legal help to a *pro se* party unless a court rule or ethical rule explicitly requires disclosure).

[53] *See supra* note 52.

[54] *See* State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 05-06 (2005), *available at* http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=525 ("An attorney representing a client may enter into an agreement limiting the scope of services to a specific and discrete task. . . . The attorney providing limited scope representation is not required to disclose to the court or other tribunal that the attorney is providing assistance to a client proceeding *in propria persona*."). The opinion was issued at the query of two attorneys affiliated with an agency providing services to low-income clients.

[55] *See* Order *in re* Changes to the Montana Rules of Civil Procedure and the Montana Rules of Professional Conduct at 2 (2010) No. AF 07-0157 (No. AF 09-0688) (adopting proposed changes); MONT. RULES OF PROF'L CONDUCT R. 1.2(c) (2011) (stating the new rule).

[56] *See* Order *in re* Changes to the Montana Rules of Civil Procedure and the Montana Rules of Professional Conduct at 2 (2010) No. AF 07-0157 (No. AF 09-0688) (adopting proposed changes); MONT. R. CIV. PRO. 11(e) ("An attorney may help to draft a pleading, motion, or document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or document. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts."). But this change was not without controversy. *See* Mont. Ethics Comm.,

that the limited scope representation be reasonable under the circumstances and that it be made with the client's informed consent.[57] Pennsylvania also chose to permit anonymous ghostwriting,[58] following the ABA position, while dismissing the possibility of *pro se* litigants exploiting their self-represented status because Pennsylvania offers no special treatment to *pro se* litigants.[59] California generally permits anonymous ghostwriting unless the *pro se* litigant seeks attorney's fees, in which case the name of the ghostwriting attorney and the nature of the assistance must be disclosed.[60] New Jersey's approach sits on the edge of this category; although anonymous ghostwriting is generally permitted, the state's rules require disclosure when assistance is "a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward *pro se* litigants while still reaping the benefits of legal assistance"[61] or when "the lawyer, not the *pro se* litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation."[62]

2. Substantial Assistance. Under this approach, a minimal level of help from an attorney is permissible without disclosure, but at some point that assistance becomes so great as to warrant disclosure.[63] Jurisdictions differ on what type of assistance

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Op. 101216 (2010) (opposing the amendments as "a troubling step in the direction of 'mass produced' or 'drive through' representation").

[57] *See* MONT. RULES OF PROF'L CONDUCT 1.2(c) (2011) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing."); State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 05-06 (2005), *available at* http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=525 (explaining the requirements of reasonableness and informed consent).

[58] Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility and Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-100 (2011).

[59] *See* Lance J. Rogers, *Joint Ethics Opinion Gives Thumbs Up To Unbundled Service, Including Ghostwriting*, THE UNITED STATES LAW WEEK, Jan. 24, 2012 ("The committees were not swayed by the argument that pro se litigants receiving undisclosed assistance might catch an undeserved break because . . . Pennsylvania law does not excuse pro se litigants from adhering to the applicable rules, and actually warns nonlawyers who choose to represent themselves that they assume the risk that their lack of expertise and legal training will prove to be their undoing.").

[60] CAL. R. CT. 3.37. The Family and Juvenile Rules used to also permit ghostwriting. CAL. R. CT. 5.70 (Repealed).

[61] N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 713 (2008).

[62] *Id.*

[63] *See, e.g.*, Bd. of Prof'l Responsibility of Sup. Ct. of Tenn., Op. 2007-F-153 (2007) (requiring disclosure if preparing pleadings and other legal documents creates the false

triggers the duty to disclose, "some using imprecise terms such as 'substantial,' 'significant' or 'extensive' to demarcate the requisite quantum of aid which would trigger the duty to disclose."[64] However, the meanings of these terms can be unclear or even be interpreted to prohibit ghostwriting.[65]

3. Anonymous Disclosure. A handful of states permit ghostwriting to be done anonymously, but require that documents prepared with the help of an attorney in some way be designated as such. The states clearly following this path are New Hampshire, Florida, and Kansas.[66] New York's stance has been debated by its various bar associations, whose views included both the anonymous disclosure and the mandatory disclosure approach,[67] but appears to now be settled on the anonymous ghostwriting standard.[68]

4. Mandatory Disclosure. A number of state jurisdictions require the name of the ghostwriting attorney to always appear on

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impression that the litigant is without substantial legal assistance); Va. State Bar Ass'n Legal Ethics Op. 1761 (2002) (distinguishing between drafting pleadings, which would require disclosure, and providing fill-in-the-blank forms, which would not); Va. State Bar Ass'n Legal Ethics Op. 1127 (1988) (advising that "failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be misrepresentation"); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 713 (2008) (citing the Connecticut Bar's 1998 opinion that extensive aid requires disclosure).

[64] N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 713 (2008).

[65] *See, e.g.*, Duran v. Carris, 238 F.3d 1268, 1273 (10th Cir. 2001) (drafting an appellate brief is substantial assistance *per se*).

[66] *See* Fla. Bar Ass'n Op. 79-7 (2000) ("Any pleadings or other papers prepared by an attorney for a pro se litigant and filed with the court must indicate 'Prepared with the Assistance of Counsel.' "); N.H. State Bar Ass'n Ethics Comm., Unbundled Services – Assisting the Pro Se Litigant (1999) (stating that although perhaps minimal assistance to clients of modest means would not have to be disclosed, attorneys should err on the side of caution and "disclose the assistance to the court and opposing counsel in nearly every case"); Kan. Ethics Op. 09-01 (2009) (providing that ghostwriting is permissible so long as "Prepared with the Assistance of Counsel" appears on the documents).

[67] *Compare* N.Y. City Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 1987-2 (1987) ("At the minimum, the court and adverse counsel must be informed that the litigant is, or will be, 'receiving assistance from a lawyer.' It would be appropriate to endorse the pleading, 'Prepared by Counsel.' "), *with* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 613 (1990) (permitting attorneys to prepare pleadings for *pro se* litigants, but only if, among other requirements, the attorney's name is disclosed to the court and opposing parties).

[68] *See* N.Y. Cnty. Lawyer's Ass'n Comm. on Prof'l Ethics, Op. 742 (2010) ("[I]t is now ethically permissible for an attorney, with the informed consent of his or her client, to play a limited role and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the tribunal and adverse counsel.").

any ghostwritten documents.[69] This standard is intended as a prophylactic measure against attorneys using ghostwriting to violate the rules in *pro se* cases.[70]

5. Ghostwriting Prohibited. Only a handful of states have banned the practice outright.[71] These states have not amended any rules in order to specifically block the use of legal ghostwriting, but instead have determined that it was impermissible under their existing legal and ethical duties.[72]

C. FEDERAL COURT APPROACHES

Unlike the majority of state jurisdictions, which permit some form of ghostwriting, nearly all of the federal courts have treated the would-be legal ghostwriter as *persona non grata*.[73] The hostility to ghostwriting predates the modern *pro se* litigation movement by several decades.[74]

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[69] *See, e.g.*, COLO. R. CIV. P. 11(b) ("attorney may . . . provide limited representation . . . to a pro se party," provided that pleadings contain the attorney's name); Ky. Bar Ass'n, Ethics Op. KBA E-343 (1991) ("[C]ounsel's name should appear somewhere on the pleading."); Alaska Bar Ass'n Ethics Op. 93-1 (1993) (deciding that a lawyer's assistance must be disclosed unless lawyer merely helped client fill out forms designed for *pro se* litigants); Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct Ops. 96-31 (1997), 94-35 (1995) (requiring disclosure even if the attorney only assists with a one-time simple pleading); State Bar of Nev. Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 34 (2006, revised 2009) (deciding that a lawyer who provides substantial assistance to a self-represented litigant must disclose such assistance); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994) (requiring disclosure, but recommending against attorney signatures to avoid the misleading indication that the attorney represents the client).

[70] *See* COLO. R. CIV. P. 11 (describing duties of attorney affixing name to ghostwritten documents).

[71] *See, e.g.*, Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998) ("[P]roviding more extensive services, such as drafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.").

[72] Such was the case in New York until the adoption of ABA Model Rule 1.2(c) allowing for limited-scope representation. *See* N.Y. Cnty. Comm. on Prof. Ethics, Op. 742 (2010) (following the ABA trend and claiming that previous New York opinions are no longer applicable).

[73] *See* Robbins, *supra* note 45, at 285 & n.73 ("The federal courts have almost universally condemned ghostwriting."); Sejas v. Mortg. IT Inc., No. 1:11cv469 (JCC), 2011 WL 2471205 (E.D. Va. June 20, 2011) (detecting ghostwriting because *pro se* litigant previously claimed to know no English, while castigating ghostwriting generally and telling attorneys to stay away from the practice because it is "inconsistent with the procedural, ethical and substantive rules of this Court").

[74] *See* Goldschmidt, *supra* note 4, at 79 (explaining the early anti-ghostwriting cases come from the 1970s, while the *pro se* movement come into force in the 1990s).

In the 1970s, three federal courts addressed ghostwriting and attacked it with four lines of reasoning: (1) ghostwriting violates Rule 11;[75] (2) ghostwriting gives a *pro se* party an undue advantage; (3) ghostwriting interferes with the efficient administration of justice; (4) ghostwriting violates local rules about the appearance and withdrawal of counsel.[76] The rationales from these three cases were reaffirmed by a few cases in the late 1990s which relied on them and anchored their reasoning to ethics violations, thus providing the precedential basis for continued resistance to legal ghostwriting in the federal courts.[77]

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[75] While a violation of Rule 11 would be a sufficient reason for a court to sanction an attorney, courts possess an inherent power to regulate attorneys and have a broad power to sanction for abuse of the judicial process. *See* Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge Is Like an 800-Pound Gorilla*, 14 REV. LITIG. 195, 196–97 (1994) (discussing how Rule 11 is not a limit on the sanctioning power and that "federal judges have a license to sanction lawyers and litigants virtually at will and without regard to any limitations in the Rules and statutes").

[76] *See* Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970) (criticizing, in dicta, a probable ghostwriter because "we see no good or sufficient reason for depriving the opposition and the Court of the identity of the legal representative(s) involved so that we can proceed properly and with the relative assurance that comes from dealing in the open" and "where it is unnecessary we should not be asked to add the extra strain to our labours [sic] in order to make certain that the *pro se* party is fully protected in his rights. Most importantly, this unrevealed support in the background enables an attorney to launch an attack, even against another member of the Bar (as was done by this same plaintiff), without showing his face. This smacks of the gross unfairness that characterizes hit-and-run tactics."); Klein v. H.N. Whitney, Goadby & Co., 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (claiming that ghostwriting was "grossly unfair" to the court and opposing counsel without specifying precisely why), Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (mentioning in dicta that ghostwriting circumvents, but not that it violates, Rule 11). "These opinions were ultimately adopted by almost all federal courts that subsequently addressed the issue." Goldschmidt, *supra* note 4, at 80.

[77] *See* Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231–32 (D. Colo. 1994), *aff'd in part and disapproved in part*, 85 F.3d 489 (10th Cir. 1996), *cert. denied sub nom*, Greer v. Kane, 519 U.S. 1042 (1996) (condemning ghostwriting for the same legal reasons as the 1970s cases, but also on the basis of ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978) (subrogated by the later ABA opinion), which cited the same cases, and holding that "extensive" or "substantial" ghostwriting assistance was unethical); Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (containing the frequently cited language about ghostwriting having "the perverse effect of skewing the playing field rather than leveling it"); Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) ("Attorneys cross the line . . . when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door.").

The Supreme Court has only addressed ghostwriting twice.[78] One case, *Kingsland v. Dorsey*, predates all the previously mentioned federal precedents but was cited by none of them.[79] In *Kingsland*, the Court upheld a decision by the Commissioner of Patents to disbar an attorney for the "gross misconduct" of ghostwriting an article used in support of a patent application that was purportedly written by a disinterested party.[80] Dissenting over whether the ghostwriting was sufficient to support disbarment, Justice Jackson wrote:

> Ghost-writing has debased the intellectual currency in circulation here and is a type of counterfeiting which invites no defense. Perhaps this Court renders a public service in treating phantom authors and ghost-writers as legal frauds and disguised authorship as a deception. But has any man before Dorsey ever been disciplined or even reprimanded for it? And will any be hereafter?[81]

The other Supreme Court decision, *Winkelman v. Parma City School District*,[82] mentions ghostwriting, or perhaps some other kind of limited scope representation, without taking a stand one way or the other.[83] The Sixth Circuit dismissed for lack of counsel a suit by *pro se* parents litigating under the Individuals with Disabilities Act, but the Supreme Court reversed and found a

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[78] One reason that there is so little federal appellate case law on ghostwriting may be that so few *pro se* cases make their way into federal court in the first place; aside from bankruptcy, the main source of *pro se* federal court litigants is prisoners. Bernard J. Pazanowski, *Federal Courts Play Catch Up on Ghostwriting As States Cheer 'Unbundled' Legal Services*, THE UNITED STATES LAW WEEK (Jan. 3, 2012).

[79] 338 U.S. 318 (1949) (per curiam). District courts may have overlooked *Kingsland* because it dealt with ghostwriting of documents used as evidence, a practice which probably does not fall within the definition of the modern term of art "legal ghostwriting." *See supra* Part II.A.

[80] *Kingsland*, 338 U.S. at 320–22.

[81] *Id.* at 324.

[82] 550 U.S. 516 (2007).

[83] The Court did not specify what attorney assistance the *pro se* parents received. *See* Goldschmidt, *supra* note 4, at 81 ("While neither the majority nor the dissenters specified the nature of the limited representation that took place in this case, we can infer that it probably included ghostwriting their complaint.").

parental right to litigate claims under the Act.[84] The majority mentioned, without comment, that the *pro se* plaintiffs "had also obtained counsel to assist them with certain aspects of the proceedings, although they filed their federal complaint, and later their appeal, without the aid of an attorney."[85] Thus, there is essentially no Supreme Court holding dealing with the reasoning advanced by the lower courts with regards to legal ghostwriting, and no modern cases opining on the issue at all.

Against the weight of persuasive—but not binding—federal authority,[86] the Second Circuit has recently decided to break from the other circuits and the holdings of numerous district courts by permitting anonymous ghostwriting.[87] The court decided that the attorney facing sanctions could be publicly reprimanded for numerous violations, but not legal ghostwriting: given absence of any controlling rule or precedent punishing ghostwriting and endorsement of the practice by many authorities (such as the ABA opinion and the formal opinions of various state bars and New York bars), the attorney could not have knowingly withheld information or acted in bad faith.[88] The court did not establish a general rule on ghostwriting, but merely held that anonymous ghostwriting is not automatically sanctionable.[89] The court also predicted that "in light of the ABA's 2007 ethics opinion, and the other recent ethics opinions permitting various forms of ghostwriting, it is possible that the courts and bars that previously

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[84] *Winkleman*, 550 U.S. at 535.

[85] *Id.* at 521.

[86] *In re* Fengling Liu, 664 F.3d 367, 369 (2d Cir. 2011) ("[A] number of other federal courts have found that attorneys who had ghostwritten briefs or other pleadings for ostensibly *pro se* litigants had engaged in misconduct."). In *Duran v. Carris*, 238 F.3d 1268, 1271–73 (10th Cir. 2001) (per curiam), for example, the Tenth Circuit admonished an attorney for ghostwriting a *pro se* brief for his former client without acknowledging his participation by signing the brief. The court stated that the attorney's conduct had inappropriately afforded the former client the benefit of the liberal construction rule for *pro se* pleadings, had shielded the attorney from accountability for his actions, and conflicted with the requirement of Rule 11(a) that all pleadings, motions, and papers be signed by the party's attorney. *Id.* at 1271–72; *see also* Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (disapproving of members of the bar "represent[ing] petitioners, informally or otherwise, and prepar[ing] briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar . . . of representing to the court that there is good ground to support the assertions made").

[87] *In re Fengling Liu*, 664 F.3d at 372.

[88] *Id.* at 372–73.

[89] *Id.* at 373.

disapproved of attorney ghostwriting of *pro se* filings will modify their opinion of that practice."[90] The court observed, but did not address, the substance of other courts' contrary holdings.[91]

III. ANALYSIS

Since the initial hostile reaction in federal courts to legal ghostwriting, the district courts have typically applied the per se prohibition of the practice mechanically, neglecting any analysis of the underlying justifications of the ban, sometimes without finding or even suspecting any substantive harm or ethical violation.[92] Although the Second Circuit declined to issue sanctions against legal ghostwriting, the court neglected to comment on the reasons provided by the other circuit courts, and instead rested on the idea that the legal community's general doubt about the issue precluded the court from finding the attorney culpable enough to deserve a sanction for ghostwriting.[93] This section seeks to flesh out the Second Circuit's holding by directly addressing the reasons provided in previous federal decisions and articulating why they are insufficient to warrant per se sanctions against legal ghostwriters. The three lines of reasoning addressed are: (1) that legal ghostwriting violates Rule 11;[94] (2) that certain policy reasons require prohibiting the practice;[95] and (3) that legal ghostwriting violates professional ethical obligations.[96]

A. RULE 11 DOES NOT TEXTUALLY PROHIBIT LEGAL GHOSTWRITING

The Supreme Court of the United States prescribes the Federal Rules of Civil Procedure under statutory authorization of

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[90] *Id.* at 371.

[91] *See id.* at 369 (citing approaches to ghostwriting in two circuits).

[92] *See, e.g.*, Sejas v. Mortgage IT Inc., No. 1:11cv469 (JCC), 2011 WL 2471205 (E.D. Va. June 20, 2011) (reiterating that "ghost-writing legal documents . . . is inconsistent with the procedural, ethical and substantive rules of this Court" without further explanation or discussion of the consequence of ghostwriting in that particular case).

[93] *In re Fengling Liu*, 664 F.3d at 372–73.

[94] *See infra* Part III.A.

[95] *See infra* Part III.B.

[96] *See infra* Part III.C.

Congress.[97] Rule 11 governs several topics: the signing of pleadings, motions and other papers; representations to the court; and sanctions.[98] The Advisory Committee states that one of the purposes of Rule 11 is to embody the principle that attorneys and *pro se* litigants are to "refrain from conduct that frustrates the aims of [Federal Rules of Civil Procedure] Rule 1."[99] Rule 1 succinctly states that: "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[100]

Rule 11, the only statute cited in federal ghostwriting decisions, appears most related to legal ghostwriting in subsection (a), which reads: "Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented."[101] Rule 11(b) then states that "[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [that the writing is proper, nonfrivolous, and supported by the facts]."[102]

Neither the text nor the spirit of Rule 11 prohibits legal ghostwriting. First, a plain language reading of Rule 11 does not implicate the practice of ghostwriting;[103] unrepresented parties sign and submit their own pleadings and accordingly no attorney has presented anything to the court. In the most recent federal appellate opinion sanctioning legal ghostwriting, the Tenth Circuit quoted the relevant part of Rule 11(a), but then turned to policy

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[97] *See* 28 U.S.C. § 2072 (2006) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure.").

[98] FED. R. CIV. P. 11.

[99] FED. R. CIV. P. 11 advisory committee's note (1993).

[100] FED. R. CIV. P. 1.

[101] FED. R. CIV. P. 11(a).

[102] FED. R. CIV. P. 11(b).

[103] *See* Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (condemning ghostwriting but finding it "not at odds with the plain language of Rule 11").

concerns without ever specifically explaining how Rule 11(a) was violated.[104] The Tenth Circuit also determined that legal ghostwriting violated Rule 11(b) because:

> It is disingenuous for [the litigant and the ghostwriter] to argue that ghost writing represents a positive contribution such as reduced fees or pro bono representation. Either of these kinds of professional representation are analogous to the concept of rescue in the field of torts. A lawyer usually has no obligation to provide reduced fee or pro bono representation; that is a matter of conscience and professionalism. Once either kind of representation is undertaken, however, it must be undertaken competently and ethically or liability will attach to its provider.
>
> Competence requires that a lawyer conduct a reasonable inquiry and determine that a filed pleading is not presented for an improper purpose, the positions taken are nonfrivolous, and the facts presented are well grounded. [Rule 11].[105]

The text of Rule 11(a) does not proscribe legal ghostwriting. The phrasing "[e]very pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented" is satisfied if a *pro se* party signs the document.[106] The court's conclusion appears to flow from the premise that representation is a binary concept, that is, if a litigant is assisted in any capacity, then the litigant's attorney takes on the full range of professional responsibilities. This line of reasoning is both detached from modern notions of representation[107] and at odds with the text of Rule 11(b).

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[104] Duran v. Carris, 238 F.3d 1268, 1271–72 (10th Cir. 2001).

[105] *Id.* at 1272.

[106] FED. R. CIV. P. 11(b).

[107] *See* MODEL CODE OF PROF'L CONDUCT R. 1.2(c) (2009) (permitting limited scope representation); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-466 (2007) (permitting anonymous ghostwriting); *infra* Part III.B.

Rule 11(b), by implication, excludes legal ghostwriting as a basis for discipline. The canon of statutory interpretation[108] *expressio unius est exclusio alterius*[109] precludes a conclusion that legal ghostwriters "present" a document to the court as described in Rule 11(b). Rule 11(b) defines presentation as "presenting to the court a [document]—whether by signing, filing, submitting, or later advocating it."[110] The rule is written so as to define "presenting" as signing, filing, submitting, or advocating a document—not drafting one. The *Duran* opinion glosses over the text of Rule 11(b) because the court does not mention how a ghostwriting attorney can be said to have "presented" anything to the court.[111]

Second, legal ghostwriting should not be proscribed as a violation of the spirit of Rule 11.[112] There is scant evidence for the conclusion that the rule-drafters intended to prevent legal ghostwriting. Opponents of ghostwriting miss the point when arguing that the purpose of Rule 11 is "that attorneys be responsible for their submissions to the Court";[113] at issue is whether drafting assistance constitutes a submission in the first place. The 1983 Advisory Committee Notes for Rule 11 do not

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[108] There is considerable inconsistency within the federal court system in interpreting the procedural rules, with both the Supreme Court and lower courts vacillating between focusing on the text and drafters' intent. *See generally* David Marcus, *When Rules are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretation*, UTAH L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1852856 (taking inventory of all case law regarding interpreting the Federal Rules of Civil Procedure and noting the dearth of scholarly guides on the subject). This Note will accordingly offer reasons originating from both the text and drafters' intent.

[109] *See* Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQ. L. REV. 191, 191 (1931) ("One of the most important rules of construction-of statutes, constitutions and similar instruments seems to be the rule that the expression of one subject, object, or idea is the exclusion of other subjects, objects, or ideas.").

[110] FED. R. CIV. P. 11(A).

[111] In possibly the very first anti-ghostwriting appellate opinion, the First Circuit seems to have already conceded that legal ghostwriting does not violate Rule 11 by characterizing the practice as a circumvention of the rule. *See* Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) ("What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by [Rule 11].").

[112] This is a common argument advanced by district courts. *See, e.g.*, Delso v. Trs. for Ret. Plan for Hourly Emps. of Merck & Co., Civil Action No. 04-3009 AET, 2007 WL 766349, at *16 (D.N.J. Mar. 6, 2007) (advancing the argument that ghostwriting violates "the spirit" of Rule 11).

[113] *Delso*, 2007 WL 766349, at *16.

mention document drafters as within the scope of the rule.[114] In fact, the words "draft" and "write" do not appear anywhere in Rule 11 or in the extensive commentaries of the Advisory Committee Notes.[115] The most informative interpretive guideline provided in the Federal Rules is Rule 1, which states that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[116] The Advisory Committee notes confirm that Rule 11 is intended to facilitate Rule 1's objectives.[117] If anything, permitting legal ghostwriting fosters inexpensive determinations because limited scope representation is almost by definition less expensive.[118] Legal ghostwriting also enhances the speed of cases and the likelihood of just results because *pro se* litigants with assistance can more clearly articulate the facts and their legal arguments.[119]

The Tenth Circuit's opinion in *Duran v. Carris* invokes the same thinking as district courts that admit that the text of Rule 11 does not prohibit ghostwriting: the court focuses on common-law duties to the court and ethical concerns and merely uses Rule 11 to give greater legal form to these arguments.[120] This is an unpersuasive use of Rule 11. Rule 11 does not support the policy arguments for prohibiting ghostwriting.

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[114] *See* FED. R. CIV. P. 11 advisory committee's note (1983) ("Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. . . . the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings . . . ."); *id.* ("Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.").

[115] *See generally id.*

[116] FED. R. CIV. P. 1.

[117] *See* FED. R. CIV. P. 11 advisory committee's note (1993) (noting that the purpose of the rule is to stop conduct that "frustrates the aims of Rule 1").

[118] *See* Charles F. Luce, Jr., *Unbundled Legal Services: Can the Unseen Hand be Sanctioned?*, *in* CHARLES F. LUCE, JR. ON LEGAL ETHICS AND THE PRACTICE OF LAW (July 10, 1998), http://www.mgovg.com/ethics/ghostwr1.htm ("The Rule 11 hard liners who would not admit the existence of this possibility [a situation where a pro se litigant must choose between ghostwriting assistance and no assistance at all] ignore not only the language of Rule 11 itself, but of the first rule of civil procedure, that all the rules 'shall be construed and administered to secure the just, speedy and *inexpensive* determination of every action.' ").

[119] *See supra* Parts II, III.B.

[120] 238 F.3d 1268, 1271–73 (10th Cir. 2001).

B. POLICY REASONS PROVIDED IN OLD CASES FOR PROHIBITING LEGAL GHOSTWRITING HAVE BEEN OVERRIDDEN BY SUBSEQUENT EMPIRICAL EVIDENCE AND MODERN ETHICAL NORMS

Rule 11 is not the only source of authority for judicial sanctions against ghostwriting; in fact, Rule 11 may be redundant to the inherent power of federal judges to manage their own proceedings and the conduct of those who appear before them, particularly those who the judges believe have abused the judicial process.[121] Federal courts sanctioning legal ghostwriting have relied on these policing powers in their opinions and have provided several policy reasons for prohibiting the practice.[122] These policy reasons can be grouped into three categories: (1) legal ghostwriting gives a *pro se* party an undue advantage;[123] (2) the practice interferes with the efficient administration of justice;[124] and (3) legal ghostwriting violates local rules about appearance and withdrawal of counsel.[125] Ultimately, all of these justifications simply assume that legal ghostwriting is a detrimental practice; this assumption is no longer sound because the empirical data and state practice refute it.

1. A Pro Se *Litigant Using Drafting Assistance Does Not Necessarily Receive an Undue Advantage.* Perhaps the strongest argument of the anti-ghostwriting courts is that a *pro se* litigant with legal assistance unfairly takes advantage of the deference given by federal courts. In *Haines v. Kerner*[126] the Supreme Court suggested that federal courts hold *pro se* pleadings to less stringent standards than those drafted by lawyers.[127] In the context of ghostwriting, district courts often cite *Laremont-Lopez v.*

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[121] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43–44 (1991) (providing an overview of the inherent powers of federal courts); S.D. Shuler, Chambers v. NASCO, Inc.*: Moving Beyond Rule 11 into the Uncharted Territory of Courts' Inherent Power to Sanction*, 66 TUL. L. REV. 591, 593 (1991) (warning about the implications of emphasizing inherent powers); Stephen K. Christiansen, Note, *Inherent Sanctioning Power in the Federal Courts After* Chambers v. NASCO, Inc., 1992 BYU L. REV. 1209, 1216–28 (arguing that the *Chambers* holding created a new inherent power).

[122] *See supra* Part II.C.

[123] *See infra* Part III.B.*1*.

[124] *See infra* Part III.B.*2*.

[125] *See infra* Part III.B.*3*.

[126] 404 U.S. 519 (1972).

[127] *See id.* at 520–21 ("[W]e hold [allegations of the *pro se* complaint] to less stringent standards than formal pleadings drafted by lawyers. . . .").

Se. Tidewater Opportunity Ctr.,[128] in which the court explains *Haines* and further claims that:

> When, however, complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding *pro se,* the indulgence extended to the *pro se* party has the perverse effect of skewing the playing field rather than leveling it. The *pro se* plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel.[129]

These courts say, in essence, that fairness demands that *pro se* litigants receive deferential treatment or legal assistance, but not both. If a court must give deferential treatment, *pro se* litigants cannot receive legal assistance.[130]

This line of reasoning is an egregious example of putting the cart before the horse;[131] it requires *pro se* litigants to have poorly drafted pleadings so that courts can then treat those pleadings deferentially—in other words, federal courts may leave *pro se* litigants worse off despite the stated policy goal of helping them. The famous maxim of the late scholar Karl Llewellyn can resolve this backwardness: "the rule follows where its reason leads; where the reason stops, there stops the rule."[132] If the general purpose of federal courtroom procedural rules is "to secure the just, speedy, and *inexpensive* determination of every action and proceeding,"[133]

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[128] 968 F. Supp. 1075 (E.D. Va. 1997); *see, e.g.*, Chaplin v. Du Pont Advance Fiber Sys., 303 F. Supp. 2d 766, 773 (E.D. Va. 1997) (citing *Laremont-Lopez*).

[129] *Laremont-Lopez*, 968 F. Supp. at 1078.

[130] At least one state, Pennsylvania, avoids this problem by permitting ghostwriting but not offering not deferential treatment to *pro se* litigants. *See* Rogers, *supra* note 59.

[131] The first English explanation of this phrase might be in George Puttenham's, *The arte of English poesie*, 1589 ("[W]e call it in English prouerbe, the cart before the horse, the Greeks call it Histeron proteron, we name it the Preposterous.").

[132] K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 189 (Oceana Publications, Inc. 1981) (1930) (emphasis omitted). This principle is relevant in many areas of statutory interpretation. *See, e.g.*, Aetna Life & Cas. Co. v. Barthelemy, 33 F.3d 189, 193 (3d Cir. 1994) (applying principle in insurance context); Anderson v. United Tel. Co. of Kan., 933 F.2d 1500, 1504 (10th Cir. 1991) (applying principle in context of motion for directed verdict); G. & T. Terminal Packaging Co. v. Consol. Rail Corp., 830 F.2d 1230, 1238 (3d Cir. 1987) (Aldisert, J., dissenting) (applying principle in context of federal preemption).

[133] FED. R. CIV. P. 1 (emphasis added).

and if the purpose of the *Haines* holding is to assist *pro se* litigants' access to just results,[134] then federal courts should distinguish *Haines* when evaluating ghostwritten documents.[135]

The anonymous disclosure method, described *supra* Part II.B.*3* provides one possible solution to any lingering fairness problems. Anonymous disclosure requires attorneys to write something to the effect of "prepared with assistance of counsel" on any documents they draft, plainly announcing that deferential treatment is unnecessary.[136] A court can then interpret the documents without deference and all other parties are placed on notice of the legal assistance that the litigant has received.

2. Legal Ghostwriting Does Not Meaningfully Interfere with the Efficient Administration of Justice. Opponents of legal ghostwriting also argue that when a court determines a legal ghostwriter has committed some ethical violation, determining the identity of the drafter wastes valuable judicial resources.[137] This argument originated in the 1970 *Klein v. Spear, Leeds & Kellogg* opinion[138] and hinges on the speculative fear of ghostwriting abuse. According to what appears to be the only empirical research on the effects of legal ghostwriting, after over forty years this fear remains unsubstantiated:

> Given the lack of documented harm to adverse parties in ghostwriting decisions, and only the minimal harm to [*pro se* litigants] themselves from the practice, it is apparent that courts are content to impose sanctions

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[134] *See supra* notes 126–30 and accompanying text.

[135] The Supreme Court's lack of comment on the possible ghostwriting it identified in *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 521 (2007) may hint at tolerance for the practice, especially since many federal courts bring up the issue of legal ghostwriting on their own or in dicta, but the general practice of courts refusing to discuss unraised issues precludes certainty in this conclusion.

[136] *See* Luce, *supra* note 118 ("[T]he attorney's hand, even if not identified, must be acknowledged to avoid a foreseeable unfair effect. This duty need not take the form of the attorney signing the pleading, but can be as effectively discharged by the attorney conspicuously indicating in the pleading, perhaps in the signature block, 'prepared with the assistance of counsel,' or words to similar effect."). A number of state jurisdictions have reached the same conclusion. *See supra* Part II.B.*3*.

[137] *See* Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970) ("[W]e should not be asked to add the extra strain to our labours [sic] in order to make certain that the *pro se* party is fully protected in his rights.").

[138] *Id.*

> or threaten to do so primarily because the early precedents described above declared the practice unethical or illegal in the abstract. Federal courts' disapproval of the practice is based on cases pre-dating the *pro se* litigation movement, and whose reasoning is questionable. . . . The data analysis conducted in this study . . . does not support these fears. There are no published cases of documented harm or adversary disadvantage from ghostwriting.[139]

That a court would have to find a ghostwriter appears highly unlikely and courts should not sanction the practice based on a speculative harm that has not materialized after forty years.

Further, requiring mere ghostwriters to sign the documents may actually hamper the administration of justice. If an attorney enters a formal appearance, a court might conclude that the attorney is the "attorney of record" upon whom process can be served on behalf of the *pro se* litigant; in a worst case scenario the attorney might be conscripted into litigating the entire matter.[140]

Given the slim chance of harm and the ample benefits to the efficient administration of justice, this policy concern militates for approval, not condemnation, of legal ghostwriting. If courts remain anxious about access to drafters, they could require ghostwriters to put their contact information on drafted documents without actually signing them for presentation purposes, as the mandatory disclosure states often do.[141]

3. A Ban on Legal Ghostwriting as a Violation of Local Appearance Rules Involves Circular Reasoning. Some courts have cited their local rules as a reason to sanction a legal ghostwriter.[142] Whether or not local rules *should* ban ghostwriting in the first place turns on whether it is wise for federal courts to accept legal ghostwriting. If ghostwriting is beneficial in substance then, to

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[139] Goldschmidt, *supra* note 4, at 87.

[140] *See* Robbins, *supra* note 45, at 293–94 (explaining why an attorney wanting to assist in drafting pleadings would not want to sign those pleadings).

[141] *See supra* Part II.B.*1*.

[142] The Tenth Circuit is an example of a jurisdiction in which lawyers are permitted to engage in unbundled legal services under state rules of professional responsibility (COLO. R. PROF'L CONDUCT 1.2(c)), but are stopped by a federal court local rule (D.C. Colo. Local Civ. R 83.4) from ghostwriting or entering limited appearances.

the extent that local rules conflict with the practice, these rules should be amended.[143] Given the demonstrable advantages to *pro se* litigants[144] and the speculative nature of any prejudice to the administration of justice,[145] these local practices are at best arbitrary.

C. UPDATES TO LEGAL PROFESSIONAL ETHICS UNDERMINE THE CLAIM THAT LEGAL GHOSTWRITING IS AN ETHICAL VIOLATION

While early anti-ghostwriting opinions did not specifically rely on the norms of professional ethics to support their decisions,[146] some later cases cited then-contemporary ethics opinions to bolster the early precedents.[147] In the ensuing decades, the limited-scope representation movement gained momentum: now the majority of state bar and ethics committees that have examined the issue and the ABA Ethics Committee permit legal ghostwriting in at least some form.[148] As the Second Circuit has noted, judicial treatment of legal ghostwriting should evolve along with ethical evolutions of

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[143] One district court, attempting to accommodate both ghostwriting and the local rule banning the practice, has staked out the lonely position that attorneys who seek to draft pleadings should sign the pleadings and file them simultaneously with a motion to withdraw "accompanied by an appropriate explanation and brief." Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1077 (E.D. Va. 1997). Jona Goldschmidt criticized this suggestion as "unsupported by any legal or ethical authorities, and unnecessary," and argued that "[t]he court should not have charged counsel with 'circumventing' the local withdrawal rule when it was obvious that they were ghostwriting and advising clients who otherwise would have no representation." Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1177–78 (2002).

[144] *See supra* Part II.

[145] *See supra* Part III.B.*2*.

[146] *See supra* Part II.B.

[147] *Id.*; *see, e.g.*, Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226 (D. Colo. 1994), *aff'd in part, disapproved in part*, 85 F.3d 489 (10th Cir. 1996), *cert. denied sub nom.*, Greer v. Kane, 519 U.S. 1042 (1996) (condemning ghostwriting for the same reasons as the 1970s cases, but also on the basis of ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978) (subrogated by the later ABA opinion)).

[148] *See supra* Part II.B. Although the Arizona Bar determined legal ghostwriting was ethically permissible, the committee partially punted the issue to the state courts by recognizing that Arizona's Civil Procedure Rule 11 (equivalent to Federal Rule 11) might still prohibit legal ghostwriting. *See* State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 05-06 (2005) (deciding legal ghostwriting is ethically permissible, but leaving whether it violates Rule 11 to the courts to decide "as a matter of law"). However, there do not seem to be any cases of a court relying on a Rule 11 equivalent as a stand-alone justification for prohibiting the practice.

the practice.[149] As a model, judges need look no further than the standards that have changed to permit judges themselves to ghostwrite in *pro se* cases.[150]

Given the turned tide in the realm of professional ethics, federal courts will find it difficult to rely, in good faith, on ethical reasons for prohibiting legal ghostwriting. The ethical rules and opinions on which federal courts relied have been reversed, and the federal courts should follow suit.

IV. CONCLUSION

As the limited-scope representation movement has gained momentum, the practice of legal ghostwriting for *pro se* litigants has been gradually accepted by the majority of state jurisdictions in some form.[151] In contrast, the federal courts have lagged behind and for the most part continue to sanction ghostwriters for ethical and rules violations.[152] The Second Circuit's refusal to issue automatic sanctions for ghostwriting has created a split that highlights the datedness of holdings in other circuits in light of the developments in state jurisdictions.[153]

The holdings in those old federal cases flow from three sources—Federal Rule 11, the inherent power of courts to manage attorneys, and the ethical rules governing lawyers. Each line of reasoning has been flawed from the start or has been left behind by evolving ethical norms. First, neither the text of Rule 11 nor its

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[149] *See In re* Fengling Liu, 664 F.3d 367, 371 (2d Cir. 2011) ("In light of the ABA's 2007 ethics opinion, and the other recent ethics opinions permitting various forms of ghostwriting, it is possible that the courts and bars that previously disapproved of attorney ghostwriting of *pro se* filings will modify their opinion of that practice.").

[150] Under the ABA *Model Code of Judicial Conduct*, federal judges are specifically permitted to act as legal ghostwriters.

> MCJC Rule 3.10, which provides that judges may bring actions *pro se*, also states that they "may, without compensation, give legal advice to and *draft or review documents* for a member of the judge's family . . ." The *Code of Conduct for United States Judges* contains the same provision. It is also common knowledge that federal judges' opinions (as well as those of most state appellate judges), "all too often are ghostwritten by fourth year law students."

Goldschmidt, *supra* note 4, at 87.

[151] *See supra* notes 43, 45.

[152] *See supra* notes 73–77.

[153] *See supra* notes 86–91 and accompanying text.

"spirit" proscribe legal ghostwriting. Instead, the Rule implicitly excludes drafting assistance from its scope,[154] and relevant Advisory Committee commentary even states that the Rules should be interpreted in favor of the same goals that legal ghostwriting often fulfills.[155]

Second, although courts retain an inherent power to sanction attorneys for misconduct related to court operations, current norms and empirical evidence undermine a stance against ghostwriting.[156] Any remaining concerns can be addressed by applying rules from the state approaches to legal ghostwriting—a far less draconian solution than banning the practice altogether.[157]

Finally, the ethical concerns raised in old cases are unsound now that actual legal ethics organizations and bar associations, particularly the American Bar Association, have come out in favor of the practice.[158] Federal courts have previously relied on the ethical determinations of those organizations in making decisions, and should continue to follow the guidance of those authorities rather than mechanically apply rusty precedents.

The federal courts have reached a watershed moment in the practice of legal ghostwriting: either they can continue to follow flawed, outdated reasoning and totally prohibit the behavior, or they can follow the Second Circuit and many states and permit the practice at least in some circumstances. The former position requires sanctions regardless of whether the practice is used for profit or pro bono and regardless of whether any substantive misconduct has taken place. The latter position still permits sanctions, or even heightened sanctions, for ethical misconduct committed through the use of legal ghostwriting. However, the Second Circuit's approach would do away with automatic sanctions in *pro se* cases where legal ghostwriting can help promote the fair and efficient administration of justice.

Blake George Tanase

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[154] *See supra* Part III.A.
[155] *See supra* Part III.A.
[156] *See supra* Part III.B.
[157] *See supra* Part III.B.
[158] *See supra* Part III.C.