

The Ethics of GHOST Lawyering

BY ALLISON SCHOENTHAL AND JEREMY FEINBERG

Given the rapid approach of Halloween, we'd like to share a "ghost story" with you.

Imagine being approached by an elderly woman with limited income who seeks your help in saving her from eviction. She is not eligible for free legal services from local resources because she has some income, but she can't afford the traditional rates that a New York lawyer might charge. Nor does she have the money to save her home. She asks that you merely help draft a complaint, which she will submit as a pro se plaintiff. You won't be asked to do anything else, and although you will not collect your normal fees, you also will not have to tie yourself up with the case after that initial investment of time. Your heart strings are tugged and you draft an eloquent complaint, which the client loves, with the explicit understanding that this will be your only involvement in the case. As you get ready to have her sign and send the document, you wonder, "do I need to disclose my assistance to the court or to the other side?" This is the world of "ghost-lawyering," often referred to as "ghostwriting." As used in this article, ghostwriting will refer to the anonymous assistance by counsel to litigants who appear before the court as pro se parties.

Ghost-Lawyers May Fill an Important Need, But Raise a Tough Question

There is no question that there is a great need for assistance from lawyers for pro se litigants of low to moderate incomes, and that providing "unbundled" legal services, or limited representation by counsel, benefits clients, attorneys and the court system. The foreclosure and consumer credit crises of recent years have only added to the sharp growth of pro se litigants coming to the New York state courts. See NYC Bar Op. 2009-2 (noting that as of 2007 there were nearly 1.8 million self-represented litigants, and cataloging some of the challenges such litigants present to the courts).

We therefore do not dispute that the underlying goal of ghost-lawyering is a salutary one – to provide assistance, even limited or "unbundled" assistance, to those in need but who cannot afford a lawyer's normal fee and do not otherwise qualify for free lawyer-assistance programs. Consistent with that underlying goal, many legal services organizations such as bar associations, court-annexed volunteer programs and not-for-profits have stepped up and provided invaluable structure and framework for attorneys wishing to provide this type of assistance.

Thus, the good ghosts, the motivated attorneys and legal services organizations, trying to assist those of limited means, are acting in a manner consistent with the New York Rules of Professional Conduct's aspirational goals for all attorneys. See Rule 6.1 (stating that all lawyers should aspire to at least 20 hours of pro bono legal service per year).

But, whether or not those ghost-lawyers *ethically* need to disclose their involvement in a litigation to the court or to their clients' adversaries is a much knottier question that has been debated in the courts and

by ethics committees across the country. New York is no different: within this state there are three ethics opinions reaching different outcomes and making strong arguments on both sides. This article proposes a bright-line approach – requiring disclosure in all cases where a lawyer participates behind the scenes in a litigation in which the litigant holds himself out as pro se. This approach avoids the uncertainty of several other proposed rules that leave disclosure of the lawyer’s role to fact-specific interpretation and attorney discretion. It is also consistent with the letter or spirit of the applicable ethical rules in New York and drastically reduces the risk of attorney disciplinary action. Finally, it has the added benefits of promoting the availability of such “limited services lawyers” to those in need and making the courts more accessible.

Current View In New York: Is Ghostwriting Ethical?

There are three key ethics opinions in New York addressing ghostwriting. Two come out against ghostwriting without disclosure of the lawyer’s role; one suggests that disclosure is only necessary in limited circumstances.

In 1987, the NYC Bar Ethics Committee issued a formal opinion rejecting ghostwriting without disclosure and proposing that the lawyer should endorse pleadings with a statement that they were “Prepared by Counsel.” NYC Bar Op. 1987-2. The Committee emphasized that pro se pleadings are treated more liberally in the courts and that nondisclosure would be disadvantageous to opposing counsel and the court, which will have been “burdened unnecessarily with the extra labor of” ensuring the pro se litigant’s rights were protected. The Committee concluded that non-disclosure could be deemed “a misrepresentation to the court and adverse counsel where the assistance is active and substantial or includes the drafting of pleadings.” The Committee did not define “active and substantial assistance,” noting that it will vary from case to case. The Committee did carve out from its definition, however, providing manuals and pleading forms to a pro se litigant or offering some legal advice without drafting court documents.

In 1990, the New York State Bar Association Committee on Professional Ethics published an opinion on ghostwriting. NYSBA Op. 613 (1990). Like the NYC Bar, the NYSBA Committee concluded that a lawyer’s role should be disclosed. It acknowledged the importance of pro bono legal work and that “the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession.” But it found that “the preparation of a pleading, even a simple one, for a pro se litigant constitutes ‘active and substantial’ aid requiring disclosure of the lawyer’s name.” Significantly, the NYSBA committee parted company with the NYC Bar on the degree of disclosure, concluding that the lawyer must disclose his name on the pleading – simply indicating that a lawyer assisted with its preparation is not enough.

The NYSBA Committee made clear that there was nothing unethical about lawyers providing limited assistance to otherwise pro se clients – so long as the lawyer discloses his role and otherwise complies with the applicable ethics rules. In particular, the opinion stated that the lawyer must still define the lawyer-client relationship to the client, and “most important, no pleading should be drafted for a *pro se* litigant unless it is adequately investigated and can be prepared in good faith.” *Id.* at 5.

The most recent opinion goes the other way, at least in significant part. New York County Lawyers Opinion 742 concludes that under many circumstances, it is ethically permissible for a lawyer to prepare litigation materials for a client without disclosing the attorney's participation. NYCLA Op. 742 (April 16, 2010). In doing so, the committee acknowledged, but largely rejected, the criticism that undisclosed ghostwriting has faced from bar associations and courts around the country (including in New York), in favor of what it discerned to be a more recent trend supporting the practice without ethical concern. Quite correctly, the NYCLA opinion focuses on New York Rule of Professional Conduct 1.2 and other authorities to make the undeniable point that "limited scope representation" provides a needed service that benefits both clients and the court system. Clients benefit because of increased access to the courthouse and the benefit of a lawyer's (limited) guidance. The court system benefits, according to NYCLA, because a "limited scope legal arrangement could reduce expensive and often needless motion practice and unnecessary delay by crystallizing and clarifying relevant issues for trial, thereby assisting untrained individuals through the complex legal and procedural aspects of litigation and assisting judges in making appropriate determinations." NYCLA Op. 742 at 2.

In concluding that ghost-lawyering is normally ethically appropriate, however, the NYCLA opinion expanded on its view in two ways. First, the committee noted that if disclosure of the attorney's limited role were required in every case, "there is a significant risk that the lawyer would be compelled to assume and/or continue the representation beyond the scope of the agreement." This result would, in the committee's view, undermine Rule 1.2, and decrease the chance that lawyers would provide these services. Second, the committee reasoned that the plain language of Rule 1.2, which allows for limited representation but does not explicitly mention ghostwriting, must have been intended to allow it implicitly. Indeed, according to the committee, "the Appellate Divisions could have simply proscribed all ghostwriting, but chose not to do so," requiring notice of limited service representation only "when necessary." NYCLA Op. 742 at 6, citing Rule 1.2(c). The committee interpreted "when necessary" to mean something less than always for ghost-lawyers, limited, instead, to those circumstances mandated by "(1) a procedural rule, (2) a court rule, (3) a particular judge's rule, and (4) a judge's order in a specific case, or any other situation in which an attorney's ghostwriting would constitute a misrepresentation or otherwise violate a law or rule of professional conduct." NYCLA Op. 742 at 6.

Despite this seeming departure from New York precedent, the NYCLA opinion cautioned would-be ghost-lawyers to err on the side of disclosure unless and until there is clear authority defining "when necessary" under Rule 1.2(c). In addition to acknowledging the lack of clarity in the law, the committee also suggested that if a lawyer is ever providing so much assistance for a client on an undisclosed basis that he is becoming *de facto* litigation counsel, that is a basis for disclosure in itself, as it carries a much greater risk of misleading or deceiving the court. NYCLA Op. 742 at 7. Even when disclosure is "necessary," according to NYCLA, the attorney's identity does not need to be disclosed, but rather the phrase "Prepared with the assistance of counsel admitted in New York" is sufficient.

That there are three different ethics opinions covering New York, with conflicting views of the "proper" outcome, does not make the job of a lawyer trying to do the right thing any easier. Adding to the difficulty is that ethics opinions are not binding on disciplinary committees or the courts, which often disagree with the ethics committees. Further, there is no hierarchy among ethics opinions. County-wide opinions carry no more weight than city-wide opinions, for example. See Jeremy Feinberg, *Ethics Research Made Easy, Or At Least, Easier*, NYPRR (July 2008) (discussing the role of ethics committees).

Indeed, ethics committees have been known to reverse themselves on the same issue over time. By way of example, and pertinent here, the ABA issued an informal opinion in 1978 concluding that "extensive undisclosed participation" by an attorney on behalf of a pro se client violates ethics rules. ABA Informal Op. 1414 (June 6, 1978). The ABA reversed itself in May 2007, issuing Formal Opinion 07-446 which, interpreting the Model Rules, concludes that attorneys may provide anonymous assistance to pro se litigants so long as they do not provide "material assistance." The ABA concludes that ghostwriting legal documents is not material, thus adding a fourth reasoned, but inconsistent, voice to the debate.

In short, while the ethics opinions offer guidance and important analysis, they are not the last word on the topic. Nor is there, yet, any binding case law in New York for practitioners to follow. If the New York courts follow the majority of their brethren outside the State, however, it is likely that the courts will condemn ghostwriting. See e.g. *Johnson v. Board of County Commissioners*, 868 F. Supp. 1226 (D. Colo. 1994), in which the court condemned the practice of ghostwriting, holding, "Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar". Also, *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F. Supp. 1075 (E.D. Va. 1997) (the practice of ghostwriting exploits the court's leniency to pro se litigants, nullifies the certification requirement of FRCP 11 and circumvents the rules requiring withdrawal of appearance by counsel); *Davis v. Bacigalupi*, 2010 WL 1779978 (E.D. Va. 2010) ("To the extent that the Plaintiff is being advised by counsel in a 'ghost-writer' capacity, such a practice is strongly disapproved as unethical and as a deliberate evasion of the responsibilities imposed on attorneys, and this Order serves as a warning to that attorney that his actions may be unethical and could serve as a basis for sanctions."); *Gordon v. Dadante*, 2009 WL 1850309 (N.D. Ohio 2009); *U.S. v Eleven Vehicles*, 966 F Supp. 361, 367 (E.D. Pa. 1997). Complicating the situation further, the New York Rules of Professional Conduct are less than 2 years old, and there is very little interpretative authority to guide attorneys. As one leading commentator on New York ethics has pointed out, "New York lawyers will have to live in a world of uncertainty until courts and ethics committees clarify New York's standards for determining when notice to a tribunal or opposing party is necessary." *Simon*, New York Rules of Professional Conduct Annotated, at 40 (2009 Ed.). For these reasons, a reasonable bright-line rule has much to commend it.

Ghostwriting Should Be a Treat, Not a Trick, to Lawyers

So, in this uncertain environment, what's a well-meaning New York practitioner to do? The safer route and, we submit, the more ethical route, is to disclose at least the attorney's role, if not the attorney's identity (or the identity of a legal services organization), in all cases. (We do not mean to suggest that if a lawyer provides any non-legal assistance to a pro se litigant that that must be disclosed. Indeed, if a lawyer did nothing more than provide the courthouse address or telephone number, disclosure, of course, would not be necessary.)

This disclosure rule would benefit the litigants, the courts, and the lawyers in at least three ways. First, it would provide clarity. By requiring disclosure, there will be a bright-line rule. There will be no issue as to whether the attorney was providing "active and substantial aid" (see NYS Bar Op. 613) or whether disclosure falls under the multi-pronged definition of "necessary" set forth in the NYCLA opinion. Attorney-prepared court documents can be marked as "Prepared with the Assistance of Counsel." Those prepared by a legal services organization can instead say "Prepared with the Assistance of a Legal

Services Organization.” Documents merely exchanged between counsel, but not required to be filed in court, can be designated in the same way.

The clarity would also benefit the courts. It would diminish any burden that would come from determining whether there is an undisclosed lawyer aiding the pro se litigant. It would also avoid making a court take the protective steps it might otherwise be inclined to take if there were an unassisted litigant in the case.

Second, the bright-line rule will greatly decrease any risk of disciplinary action for a ghostwriting lawyer and should hopefully increase the number of lawyers willing to take on limited legal services representation. There are a number of disciplinary rules implicated for a lawyer who does not disclose, as the existing bar opinions and case law recognize. The NYCLA opinion, among other authorities, correctly notes that absent definitive instruction from the appellate courts, lawyers simply can't know how disciplinary authorities will treat undisclosed ghostwriting. See NYCLA Op. 742 at 7-8.

As in the hypothetical we started with, if an attorney drafts a complaint which is filed bearing only the signature of a pro se litigant, it may well be found to violate Rule 8.4 which instructs attorneys not to “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation,” or Rule 1.2(d) which prohibits a lawyer from assisting a client in engaging in fraudulent conduct. Rule 1.2(d); also, Rule 8.4(c); see also NYC Bar Op. 1987-2 (citing former DR 1-102[A][4]) and former DR 7-102[A][7]); and NYSBA Op. 613 (same). The same filing may also implicate Rule 3.3(a)(1), prohibiting a lawyer from, among other things, making or failing to correct a false statement of fact to a tribunal, or Rule 3.3(b) which requires a lawyer to remediate “fraudulent” action a client takes before a tribunal. See also NYCLA Op. 742 at 3. The failure to disclose may even implicate Rule 3.3(e), which requires a lawyer to divulge the identity of his clients to a tribunal “unless privileged or irrelevant” to the action. Rule 3.3; NYSBA Op. 613 at 3 (citing former DR 7-106[A] and Virginia Op. 1127 [1988]).

Despite the lack of any published New York disciplinary cases in this context to date, courts from other jurisdictions, as described above, have sanctioned, disciplined, or sharply criticized ghostwriting lawyers. See, e.g., *Davis v. Bacigalupi*, 2010 WL 1779978 (E.D. Va. 2010); *Gordon v. Dadante*, 2009 WL 1850309 (N.D. Ohio 2009), *supra*. Disclosure should protect a lawyer from most, if not all, of these risks because the lawyer or legal services organization is providing the court and/or the adversary the very information which, if withheld, could be found to be a fraud or misrepresentation. Thus attorneys should be protected from violations of Rules 1.2(d), 3.3(a), 3.3(b) or 8.4(c). (There is virtually no interpretative authority for either Rule 3.3[e] or its predecessor DR 7-106[B][2]. Nonetheless, we believe under these circumstances, where the lawyer discloses his involvement but not his identity, there should not be a violation of that Rule, either.) Surely, decreasing the disciplinary risks for lawyers via disclosure will encourage even more attorneys to start providing these legal services.

Disclosure will also assist in a third way – it will help advertise the availability and willingness of attorneys and legal service providers to offer unbundled legal services. This can only help match more lawyers and legal services organizations with litigants who need their assistance.

As a side effect, disclosure will also increase accountability on the part of the lawyers assisting the pro se clients. Attorneys may overlook their obligation to ensure documents are truthful and accurate if not required to sign the documents (or even disclose) since they may feel that they will not be held

responsible for faulty or flawed papers. See, e.g., *Laremont-Lopez v. Southern Tidewater Opportunity Center, supra* (noting effect of undisclosed ghostwriting on Rule 11 certification requirement). This hurts both the clients and the courts. It seems fair to expect that with disclosure, the quality of attorney work-product will only increase.

Finally, nothing in our proposed disclosure rule should prevent a lawyer or legal services organization from going even further, and placing his or its name on litigation materials. Providing legal services to those in need is one of the best things about our profession and it is something that lawyers should be proud of and willing to share when they do it. Except for the rare lawyer who is trying to get away with violation of a disciplinary rule through nondisclosure, we see no harm in having a lawyer disclose his limited assistance to the court and opposing counsel.

CONCLUSION

A bright-line rule that requires some form of disclosure from lawyers providing limited legal services – to the extent of indicating that a lawyer or a legal services organization assisted a pro se litigant – is the ethical, and safe, route. It provides a simple standard and much needed clarity for lawyers, litigants and the courts. It greatly diminishes, if not eliminates, the risk of disciplinary violations that might follow from ghostwriting without any disclosure. Additionally, it helps make legal services more widely available to those in need, and encourages additional lawyers to provide that assistance, furthering the important cause of access to justice.

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Undeniably Important – Pro Bono Work Made Easier By Recent Ethics Developments

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The words “pro bono publico,” a Latin phrase meaning “for the public good,” is one expression that all attorneys and many clients know. In the practice of law, the public good to be served consists of providing legal services to the needy and increasing access to justice for all. The willingness of lawyers to share their training and expertise with those who cannot afford it is unquestionably one of the highest virtues of our profession. The New York Code of Professional Responsibility recognizes this:

Each lawyer should aspire to provide at least 20 hours of pro bono services annually by providing legal services at no fee and without expectation of fee to: (1) persons of limited financial means, or (2) not for profit, governmental, or public service organizations, where the legal services are primarily designed to address the legal and other basic needs of persons of limited financial means, or (3) organizations specifically designed to increase the availability of legal services to persons of limited financial means. EC 2-34 (formerly EC 2-25).

The same Ethical Consideration also suggests that lawyers should, *in addition*, reduce their fees whenever the fees would “significantly deplete the recipient’s economic resources,” or the recipient is a person of limited financial means, and that lawyers should also strive to participate “without compensation in activities for improving the law, the legal system or the legal profession. . . .” *Id.*

Although the goal assigned to lawyers by EC 2-34 requires them to perform a relatively modest amount of pro bono services every year (one out of every 85 hours for a typical lawyer, assuming a total of 1700 billable hours), past surveys conducted on behalf of the New York State Unified Court System suggest that this goal has not been regularly met. See 2004 Report entitled “The Future of Pro Bono” (available at www.nycourts.gov/reports/probono/index.shtml) (last visited 7/30/08). According to the report, which studied the provision of pro bono legal services statewide in 2002, fewer than half of New York State’s attorneys (only 46 percent) had performed any pro bono work for the poor. This was a

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slightly lower percentage than the percentage in 1997, the last time a survey was previously performed. *Id.* at iii. According to the survey, the percentage of lawyers who met the 20 hours goal was even lower – only 27 percent. *Id.*

The report and its findings are obviously no longer fresh news. And although no updated New York-based survey figures are available today, there is some reason to think that the next time survey results are available, the numbers will have improved. *See, e.g.*, Mark O'Brien, "New Software Speeds Pro Bono Work," *Law Technology News* (April 22, 2008) (noting that "[p]ro bono hours among the Am Law 100 increased 58 percent from 2001 to 2006").

New York, in particular, has seen a number of developments, particularly in the ethics and professional responsibility context, that have made it easier for lawyers to engage in pro bono practice. In this article, I will run through some of those recent developments, and then discuss some reasons why attorneys should do (or should do more) pro bono work—reasons above and beyond the obvious incentive that it is the right thing to do.

Ethics Developments Relating To Pro Bono Work

Law firms cite conflicts of interest as one of the biggest hurdles to expanding their pro bono practices. From their perspective, the disincentive is not only the opportunity-cost of devoting attorney time and resources to unpaid matters, but also the risk of inadvertently precluding future income-generating matters. Just because a client cannot pay for legal services does not mean that he cannot have differing interests from an existing or potential client of the firm. One easy-to-envison scenario would confront a lawyer whose law firm represents a number of banks and financial institutions, if he were asked to represent a small debtor seeking bankruptcy advice on a pro bono basis. If the clients of the law firm happened to include creditors of the pro bono client, a conflict or potential conflict under DR 5-105 or DR 5-108 might arise, leading the firm to conclude that it could not, or should not, take on an otherwise proper and appropriate pro bono representation.

Situations like this were the subject of an opinion by the Professional and Judicial Ethics Committee of the New York City Bar Association (the "Committee") in early 2005. The Committee was asked to opine on the appropriateness of two bar-sponsored programs that would provide volunteer lawyers to small debtors in Chapter 7 bankruptcy proceedings. NYC Bar Op. 2005-1. The two programs were not quite identical – in one the lawyer would assist the pro bono client only to the point of commencing a Chapter 7 proceeding (a limited representation that the Committee found to be appropriate), while in the other program, the volunteer lawyer would remain as counsel throughout the Chapter 7 proceeding.

Analyzing the conflict of interest issues under DR 5-105, the Committee concluded that because of the specific statutorily-driven process through which a Chapter 7 bankruptcy proceeds, there would normally not be sufficient adversity between parties to rise to the level of a conflict-of-interest, at least until the point at which a law firm's creditor-client would be required to file objections to the Chapter 7 proceedings brought by the firm's pro-bono debtor-client. *Id.* The Committee asserted a number of caveats to this conclusion, stating that the level of adversity (and, therefore, the analysis) might be different if, among other things, the materiality of the debtor's debt to the client were high, or if the pro bono client were already involved in collection litigation with the financial institution client. *Id.*

Ultimately, the Committee concluded that lawyers should, in the initial interview with the pro bono client, ask a series of questions to help draw out the facts. If present, some facts could raise the level of adversity with the financial institution client to the point that would confirm that a conflict existed. *Id.* The Committee also recommended that, particularly in a proceeding in which the lawyer would assist throughout the entire process, the lawyer should advise the pro bono client

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Fourth, and finally, pro bono work can build up and develop client interaction, an area that is difficult to strengthen in law school or in the early stages of a practitioner's career. Depending on the matter, pro bono assignments can give lawyers the opportunity to work with clients one-on-one, and build up their communication and listening skills. One attribute that separates a good lawyer from a great lawyer is the ability to be left alone in a room with a client or client representative and carry on a helpful conversation. And that helpful conversation does not mean a time-passer like how the Mets or Yankees did the previous night, or what the current weather report is. The abilities to draw out and listen to client wants and needs, and to respond and counsel appropriately to client concerns and worries, are skills that will attract the attention of more senior lawyers, and more importantly, the firms' clients, in a positive way. By its very nature, pro bono work can force you to focus on and improve these skills more readily, perhaps, than common types of billable work.

To my mind, any of these reasons alone is enough to provide a sound motive for increasing one's commitment to pro bono work. Under the recent changes to, and interpretation of, the ethics rules which I've described, I hope you and your colleagues will seek out new pro bono matters, whatever your current position. If you want to take a first step in finding a pro bono matter, or if you're simply looking for further information, one of many helpful resources can be found on the New York State Unified Court System's website at <http://www.nycourts.gov/attorneys/probono/index.shtml> (last visited 8/5/08). ■

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