

## **GHOSTWRITING AND PRO BONO**

Ethics rules in many jurisdictions permit attorneys to engage in ghostwriting: when a lawyer drafts, or assists in drafting, a pleading, motion, or other document filed by an otherwise pro se litigant. Some jurisdictions require the pro se litigant to disclose that they received assistance from an attorney, while others do not. This guide examines how ghostwriting increases access to justice for otherwise self-represented clients who may not be able to obtain legal representation and discusses competing concerns. This guide also reviews the rules and ethics opinions on ghostwriting across all fifty states and the District of Columbia.

### **What Is Ghostwriting?**

Ghostwriting is a component of limited scope representation where an attorney may draft pleadings or other documents for a pro se client who then files the documents with the client's own signature. Representation is limited to this drafting assistance. Ghostwriting allows clients who cannot afford full scale representation to navigate the legal process and allocate resources to the legal services they need most. It also allows attorneys to assist low-income clients in a piecemeal way that is less time-consuming and more easily accomplished than full representation.

### **Ghostwriting and Access to Justice**

Ghostwriting expands access to justice by allowing pro se clients who may not otherwise be able to afford representation to obtain some form of legal assistance. It promotes judicial efficiency by ensuring pro se pleadings are more intelligible and more likely to clearly state the party's position. It also promotes judicial fairness as it allows unrepresented parties a better opportunity to advocate for themselves and increases their access to the justice system.

Allowing pro se parties to access assistance for the difficult task of drafting documents, particularly in uncomplicated disputes like many family law matters, bankruptcy proceedings, landlord tenant disputes, and even in many civil proceedings, gives the party the opportunity to present their argument affordably but effectively. Attorneys can spend limited time and resources drafting documents or even advising how to complete a checkbox answer form during a brief advice clinic and make an enormous difference in the outcome of a pro se party's litigation.

Many jurisdictions within the United States have adopted rules or ethics opinions on ghostwriting, dictating what level of disclosure of attorney assistance is required, if any. The most lenient policies allow for completely undisclosed assistance and do not require the pro se party to disclose either the identity of the ghostwriter or the fact that an attorney assisted in drafting the document. More restrictive policies either require anonymous disclosure of the fact of attorney assistance or require attorneys to put their name and bar number on documents that they have assisted in drafting.

### **Attorney Concerns Regarding Disclosure**

Allowing attorneys to provide undisclosed drafting assistance to pro se clients can ease concerns that may discourage attorneys from providing this type of limited scope service. Some attorneys

may be concerned that identifying themselves on pleadings by name and bar number will give the incorrect impression of continued representation. When lawyers must identify themselves, there can be a perception of conflicts with current clients, whether known or unknown. There may be a fear of ethical violations or even malpractice suits. Attorneys may also be uncomfortable being identified on a document that they drafted but that the client had final control of in its production. Many of these concerns can be alleviated by more permissive ghostwriting rules that do not require any disclosure of attorney involvement. When an attorney's concerns are mitigated, they are more likely to provide this service to those in need.

## **Objections to Non-Disclosure**

Opponents of ghostwriting argue that such assistance is deceptive and misleading to the court. The ethical concern is that by allowing attorneys to assist pro se clients with drafting without declaring themselves to the court, attorneys will shirk their professional and ethical responsibilities and mislead the court and opposing counsel. There is also a concern that ghostwriting will give a pro se client an unfair advantage, allowing them to benefit both from attorney legal advice and from a more favorable pleading standard which is typically given to pro se parties (pro se pleadings are to be liberally construed).

Those against ghostwriting cite several rules which impose both ethical and procedural responsibilities on attorneys and which ghostwriting would violate, including:

- ABA Model Rule of Professional Conduct (“MRPC”) 1.2(c) Scope of Representation and Allocation of Authority Between Client and Lawyer; stating that a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. What is “reasonable” is contested as those against ghostwriting state that undisclosed assistance is misleading and thus unreasonable.
- MRCP Rule 3.3 Candor toward the Tribunal; stating that attorneys have a duty to not knowingly make false statements of fact or law or fail to correct a false statement made. Ghostwriting opponents contend that providing undisclosed assistance is misleading to the court by allowing it to believe the party is truly pro se and drafting their own documents when that is not the case.
- MRPC Rule 8.4 Misconduct; stating that professional misconduct includes fraud, dishonesty, and deceit. Ghostwriting opponents may believe undisclosed ghostwriting is deceit and thus is misconduct.
- Federal Rules of Civil Procedure Rule 11 Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions; stating that by signing/presenting a pleading the attorney is certifying that to the best of their knowledge the pleading is in good faith, and when ghostwriters do not sign, they are escaping liability and responsibility under Rule 11 for pleadings they write. On the other hand, attorneys who provide only limited ghostwriting assistance may be unable to sign because they are uncomfortable making that certification.

## **Ghostwriting Rules Are Becoming More Lenient**

Despite these concerns, many states are becoming more lenient in their position on ghostwriting. Trends are gearing towards either permitting nondisclosure or only requiring anonymous disclosure of the fact that attorney assistance was rendered.

Ethics committees and state supreme courts are concluding that the benefit to low- and modest-income clients outweighs the objections to non-disclosure, particularly given that it is unlikely that courts will actually be misled or that pro se parties will receive any form of unwarranted benefit. Drafting assistance will likely be so apparent to a court that it will not need to apply a liberal construction standard to the pro se party's documents, even if the assistance is undisclosed. If the assistance is particularly unskilled such that a court cannot recognize it was drafted by an attorney, the pro se party will not reap the benefits of having an attorney draft the pleading. No undue benefit is given if that pro se client receives a more lenient standard.

### **ABA Ghostwriting Rule**

The American Bar Association ("ABA") takes a permissive approach to providing undisclosed legal assistance to pro se litigants. The ABA states in Formal Opinion 07-446 (May 5, 2007) that the Model Rules of Professional Conduct do not prohibit ghostwriting, nor do they require disclosure of the nature or extent of the assistance or the identity of the attorney.

Some jurisdictions have adopted the ABA position, while other jurisdictions have adopted more limited ghostwriting rules. The categories of ghostwriting rules include:

- Requiring disclosure of the extent of the ghostwriter's assistance and the ghostwriter's identity.
- Requiring disclosure of attorney assistance but not disclosure of the ghostwriter's identity.
- Requiring disclosure of the ghostwriter's assistance or identity where the assistance is "extensive" or "substantial" but not for minor assistance like drafting complaints or only assisting with state provided forms.
- No disclosure or identification is required but ghostwriters are bound by professional responsibility rules (ABA position).

Some jurisdictions have no rule governing ghostwriting or undisclosed document assistance. Many jurisdictions do not have binding rules but rather have ethics opinions which are advisory and nonbinding on courts in the jurisdiction and are trumped by local rules or court orders. Rules on ghostwriting are only binding if they come from the state's supreme court orders, from rules of procedure or professional conduct that states have adopted as binding, or from binding judicial opinions on the subject.

Some jurisdictions only have ethics opinions from the state bar that permit ghostwriting without

disclosure of attorney assistance or identity; however, this does not mean that ghostwriting attorneys are free to provide unlimited undisclosed assistance in that state. Ghostwriters and pro se litigants need to check local rules and policies of judges in specific courts, particularly in federal courts. For example, Virginia has stated ghostwriting is not unethical and lawyers are not required to disclose their assistance or identity, but the local rules in the Eastern District of Virginia state that the identity of the attorney must be disclosed. The Western District has no such provision, so an attorney seeking to provide ghostwriting services in Virginia would inform themselves of the various local rules.

### Ghostwriting in Federal Courts

Despite many state jurisdictions beginning to accept ghostwriting, most federal courts faced with this issue have rejected ghostwriting without disclosure as unethical, including the Tenth Circuit (*Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001)), First Circuit (*Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971)), Eastern District of Virginia (*Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F.Supp. 1075 (E.D. Va. 1997)), Bankruptcy Court for the District of South Carolina (*In re Mungo*, 305 B.R. 762, 767 (Bankr. D.S.C. 2003)), and Southern District of California (*Ricotta v. California*, 4 F.Supp.2d. 961 (S.D. Cal. 1998)), plus many more. A few federal courts have ruled differently, e.g., the Second Circuit (*In re Fengling Liu*, 664 F.3d 367, 369–73 (2d Cir. 2011)) now allows undisclosed drafting assistance, but most federal courts remain against ghostwriting, particularly where it is undisclosed. The wide variety of rules among jurisdictions mean that access to this service is provided unequally and is highly dependent on the court in which the self-represented individual is litigating. More uniform rules that promote ghostwriting would allow for more equal access to justice for those that cannot afford full scale representation.

### Summary of Ghostwriting Rules and Ethics Opinions<sup>1</sup>

The chart below reviews the rules governing ghostwriting in all fifty states and the District of Columbia. The chart summarizes whether the state has adopted a binding rule or put forth an advisory ethics opinion that follows the ABA rule, whether there is a different position on undisclosed ghostwriting, or whether the jurisdiction has not yet published a stance on ghostwriting.

State	Rule (or Ethics Opinion) <sup>2</sup>	Rule Highlights	Additional Notes
ABA	<a href="#">ABA Ethics Opinion 07-446</a>	Disclosure of the ghostwriter's assistance or identity is not required.	
Alabama	<a href="#">Alabama Ethics Opinion 2010-01</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	

<sup>1</sup> Some rules include additional stipulations. See the text of the actual rules for complete information.

<sup>2</sup> Ethics Opinions and Rules of Professional Conduct are advisory and not binding but may be cited by courts. Court rules or opinions are binding on courts in that jurisdiction.

State	Rule (or Ethics Opinion) <sup>2</sup>	Rule Highlights	Additional Notes
Alaska	<a href="#">Alaska Bar Assoc. Ethics Opinion No. 93-1</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Arizona	<a href="#">State Bar of Arizona Ethics Opinion 05-06</a>	Disclosure of the ghostwriter's assistance or identity is not required under Arizona's Ethical Rules.	Opinion allows ghostwriting but does not necessarily "approve." States that ghostwriting may violate Rule 11 but otherwise does not comment on that issue.
Arkansas	<a href="#">Supreme Court of Arkansas December 2017 Opinion</a>	Disclosure of ghostwriter assistance and identity is required by including a notation that reads "This document was prepared with the assistance of [insert name of attorney], a licensed Arkansas lawyer, pursuant to Arkansas Rule of Professional Conduct 1.2(c)."	Opinion Modifies Rules 11 and 64 and adds Rule 87 to Arkansas Rules of Civil Procedure
California	<a href="#">California Rules of Court Rule 3.37</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Colorado	<a href="#">Colorado Bar Association Ethics Committee Formal Opinion 101</a>	As provided by Rules 11(b) and 311(b) of the Colorado Rules of Civil Procedure, attorney's must disclose the fact of their assistance as well as their identity when ghostwriting for pro se parties. When the attorney assists in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court they are not subject to the disclosure requirements.	
Connecticut	<a href="#">Connecticut Superior Court General Provisions Rule 4-2</a>	Disclosure of ghostwriter's assistance required by including the notation "prepared with assistance of counsel" but disclosure of attorney's identity is not required.	
Delaware	<a href="#">Delaware State Bar Assoc. Ethics Opinion 1994-2</a>	Disclosure of assistance is required if the assistance is significant.	Significant assistance includes preparation of pleadings or other documents (other than assisting in the preparation of an initial pleading), or providing legal advice and assistance on an on-going basis during the course of the litigation.

State	Rule (or Ethics Opinion) <sup>2</sup>	Rule Highlights	Additional Notes
District of Columbia	<a href="#">DC Bar Ethics Opinion 330</a>	Disclosure of the ghostwriter's assistance or identity is not required by Rules of Professional Conduct (ABA Position).	Opinion notes that ghostwriters or pro se litigants should check for court rules requiring disclosure in the jurisdiction.
Florida	<a href="#">Florida Bar Ethics Opinion 79-7</a> <a href="#">Rules of Professional Conduct Rule 4-1.2 comment</a>	Disclosure of ghostwriter's assistance required by including the notation "prepared with assistance of counsel" but disclosure of attorney's identity is not required.	*Guidance comes from committee commentary which is provided to aid lawyers' application of the Rules but is not authoritative*
Georgia	No rule		
Hawaii	No rule		
Idaho	No rule		
Illinois	<a href="#">Illinois Supreme Court Rule 137</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Indiana	No rule		
Iowa	<a href="#">Iowa Rules of Civil Procedure Rule 1.423</a>	Disclosure of ghostwriter's assistance required by including the notation "prepared with assistance of counsel" and must disclose attorney's identification information.	
Kansas	<a href="#">Kansas Supreme Court Rule 115A(c)</a>	Disclosure of ghostwriter's assistance required by including the notation "prepared with assistance of a Kansas licensed attorney" but disclosure of attorney's identity is not required.	
Kentucky	<a href="#">Kentucky Bar Assoc. Ethics Opinion KBA E-441</a>	Disclosure of ghostwriter's assistance required by including the notation "prepared with assistance of counsel" but disclosure of attorney's identity is not required.	
Louisiana	<a href="#">Guidelines for Best Practice in Pro Se Assistance</a>	No binding rule; advises attorneys not to engage in undisclosed drafting assistance.	
Maine	<a href="#">Maine Professional Ethics Commission Opinion #89</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Maryland	<a href="#">Maryland Rules of Professional Conduct Rule 19-301.2. (1.2)</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	*Guidance comes from committee commentary which is provided to aid lawyers' application of the Rules but is not authoritative*

State	Rule (or Ethics Opinion) <sup>2</sup>	Rule Highlights	Additional Notes
Massachusetts	<a href="#">Massachusetts Supreme Judicial Court Order Re: Limited Assistance Representation</a>	Disclosure of ghostwriter's assistance required by including the notation "prepared with assistance of counsel" but disclosure of attorney's identity is not required.	
Michigan	<a href="#">Michigan Rules of Professional Conduct Rule 1.2(b)(1)</a>	Disclosure of ghostwriter's assistance required by including the statement "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)" but disclosure of attorney's identity is not required.	
Minnesota	No rule		
Mississippi	<a href="#">Ethics Opinion No. 261 of the Mississippi Bar</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Missouri	<a href="#">Missouri Supreme Court Rules Rule 55.03(a)</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Montana	<a href="#">Montana Rules of Civil Procedure Rule 11(e)</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Nebraska	<a href="#">Nebraska Rules of Professional Conduct Rule 501.2(c)</a>	Disclosure of the ghostwriter's assistance and identity is required.	
Nevada	<a href="#">Nevada Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 34</a>	Disclosure of the ghostwriter's assistance and identity is required under Rule 11.	
New Hampshire	<a href="#">Rules of The Superior Court of the State of New Hampshire Rule 17(i)</a>	Disclosure of ghostwriter's assistance required by including the notation "This filing was prepared with the assistance of a New Hampshire attorney" but disclosure of attorney's identity is not required.	
New Jersey	<a href="#">New Jersey Supreme Court Advisory Committee on</a>	Disclosure is not required if the assistance is part of an organized Rule 1:21-1(e) (Rules Governing the Courts and Practice of Law) non-	The opinion states that where ghostwriting assistance is used as a tactic to benefit both from judicial leniency to pro se



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	<a href="#">Professional Ethics Opinion 713</a>	profit program designed to provide legal assistance to people of limited means.	parties and from legal assistance in drafting, disclosure is required including the identity of the attorney.
New Mexico	<a href="#">New Mexico Rules of Professional Conduct Rule 16-303(E) Commentary</a>	Disclosure of the ghostwriter's assistance or identity is not required so long as it does not violate the rules of the tribunal.	*Guidance comes from committee commentary which is provided to aid lawyers' application of the Rules but is not authoritative*
New York	<a href="#">New York City Bar Assoc. Ethics Opinion 1987-2</a>  <a href="#">New York State Bar Committee on Professional Ethics Opinion 613</a>  <a href="#">New York County Lawyers Assoc. Committee on Professional Ethics Opinion 742</a>	<p>NYC: Disclosure of the ghostwriter's assistance is required but the ghostwriter's identity is not.</p> <p>NY State Bar: Disclosure of the ghostwriter's assistance and identity is required.</p> <p>NY County: Disclosure of ghostwriter's assistance or identity is not necessary unless mandated by a procedural rule, a court rule, a particular judge's rule, or a judge's order in a particular case. Where disclosure is required under such circumstances, the ghostwriter's identity is not required, only the fact of assistance.</p>	Three key ethics opinions addressing ghostwriting.
North Carolina	<a href="#">North Carolina State Bar 2008 Ethics Opinion 3</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	Unless there is a court order or law which states otherwise.
North Dakota	<a href="#">North Dakota Rules of Civil Procedure Rule 11(e)(1)</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Ohio	No rule		
Oklahoma	<a href="#">Oklahoma Rules of Civil Procedure Rule 33</a>	Disclosure of the ghostwriter's assistance and identity is required.	
Oregon	<a href="#">Oregon Uniform Trial Court Rule 2.010(7)</a>	Disclosure of the ghostwriter's assistance and identity is required.	



State	Rule (or Ethics Opinion) <sup>2</sup>	Rule Highlights	Additional Notes
Pennsylvania	<a href="#">Pennsylvania Bar Association Opinion 2011-100</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	There may be some circumstances where non-disclosure is unethical but there is no general obligation to disclose.
Rhode Island	<a href="#">Rhode Island Supreme Court Order on Provisional Rules for Limited Scope Representation</a>	Rule 1.2(d)(1) requires disclosure of the ghostwriter's assistance and identity.	
South Carolina	No rule		
South Dakota	No rule		
Tennessee	<a href="#">Board of Professional Responsibility of the Supreme Court of Tennessee Formal Ethics Opinion 2007-F-153</a>	Disclosure is not required for introductory pleadings including complaints as this assistance is not considered substantial. Where the assistance is substantial, disclosure is required.	Disclosure is not required where doing so allows the pro se litigant to protect his or her claim or matter from being barred by a statute of limitation, administrative rule, or other rule where the ghostwriter will not provide further assistance.  Disclosure is required where not doing so creates the false impression that the litigant is without substantial legal assistance.
Texas	No rule		
Utah	<a href="#">Utah State Bar Ethics Opinion No. 08-01</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	
Vermont	No rule		
Virginia	<a href="#">Virginia State Bar Legal Ethics Opinion 1874</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	The opinion specifically mentions it is following the ABA rule.
Washington	<a href="#">Washington State Bar Association Advisory Opinion: 202002</a>	Disclosure of the ghostwriter's assistance or identity is not required (ABA Position).	The opinion specifically mentions it is following the ABA rule. The opinion only applies to state court civil matters

State	Rule (or Ethics Opinion) <sup>2</sup>	Rule Highlights	Additional Notes
West Virginia	<a href="#">West Virginia Office of Disciplinary Council Legal Ethics Opinion 2010-01</a>	Disclosure of the ghostwriter's assistance or identity is required for any pleading or document filed with a court, tribunal, or state or federal agency.	No disclosure is required for assistance in writing letters or documents if the letter or document is not intended to be filed.
Wisconsin	<a href="#">Supreme Court of Wisconsin Order Amending Wis. Stat. § 802.05(2m)</a>	Disclosure of ghostwriter's assistance required by including the statement that "This document was prepared with the assistance of a lawyer." Disclosure of the attorney's identity is no longer required.	
Wyoming	<a href="#">Wyoming Rules of Professional Conduct Rule 1.2[7]</a>	Disclosure of the ghostwriter's assistance and identity is required.	

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