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Ghostwriting Appellate Briefs

Appellate attorneys are often asked to assist in various ways with appeals, including ghostwriting appellate briefs. Ghostwriting is when an attorney drafts a legal brief on behalf of a pro se or pro per client without disclosing to the court that the attorney drafted the brief. This article considers the ethical issues raised by ghostwriting appellate briefs on behalf of pro se litigants in state and federal appellate courts.

California Court of Appeal

California court rules allow for an attorney in a civil case to represent a client in a "limited scope representation." Cal. R. Court, Rule 3.35. The attorney does not have a duty to disclose the nature of the representation to the court. Rule 3.37(a) provides that: "In a civil proceeding, an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the documents that he or she was involved in preparing the documents." Thus, under Rule 3.37(a) an attorney may ghostwrite an appellate brief for a pro se litigant in the California Court of Appeal.

Ninth Circuit Court of Appeals

In contrast to California appellate courts, ghostwriting appellate briefs may be improper in the Ninth Circuit. At present, the law is unclear in the Ninth Circuit.

The First Circuit and Tenth Circuit have held that attorneys may not ghostwrite appellate briefs. *Duran v. Carris*, 238 F.3d 1268, 1272-1273 (10th Cir. 2001); *Ellis v. State of Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971). In *Duran*, the appellee requested that the court issue sanctions alleging that appellant's pro se brief was actually ghostwritten by his former attorney. The Tenth Circuit issued an order to show cause and stated that the situation "constitutes a misrepresentation to this court by litigant and attorney." *Duran*, 238 F.3d at 1272. The court held that "the participation by an attorney in drafting an appellate brief is per se substantial [assistance], and must be acknowledged by a signature." *Id.* at 1273. The Tenth Circuit did not impose sanctions, but admonished the attorney "that this behavior will not be tolerated by this court, and future violations of this admonition will result in the possible imposition of sanctions." *Id.*

In a recent Second Circuit opinion, the appellate court concluded that an attorney who had ghostwritten and filed a petition for review had not engaged in sanctionable misconduct. *In re Fengling Liu*, 664 F.3d 367, 369 (2nd Cir. 2011). The court reviewed the various authorities on the subject of the ghostwriting in federal courts, as well as

ethics opinions by bar associations from across the country. *Id.* at 369-72. The Second Circuit concluded that the attorney could not have known of any obligation to disclose her participation because no rule prohibited ghostwriting. *Id.* at 372. The court also stated that there was no evidence that the attorney was acting in bad faith. *Id.* The court recommended that it consider amending its rules to resolve the ghostwriting matter in the future. *Id.* at 373, fn. 7.

The Ninth Circuit does not have any appellate authority directly on point. However, district courts in the Ninth Circuit have held that the anonymous drafting of pleadings and motions in district courts may be unethical. In *Ricotta v. State of California*, 4 F. Supp. 961, 986-988 (S.D. Cal. 1998), *aff'd without opinion* 173 F.3d 861 (9th Cir. 1999), the district court refused to sanction the ghostwriting attorney, but admonished the ghostwriting attorney that she had engaged in questionable conduct. *Id.* at 987-88. The court reviewed the three areas of concern implicated by ghostwriting. First, because the standard practice in federal courts is to interpret filings by pro se litigants liberally, allowing a pro se litigant to receive this liberal interpretation when the pro se is actually receiving assistance from an attorney would disadvantage the opposing party. *Id.* at 986. Second, ghostwriting evades the responsibilities imposed on counsel by Federal Rule of Civil Procedure, Rule 11, which obligates members of the bar to sign all documents submitted to the court and represent that there are grounds to support the assertions made in the filing. *Id.* Third, ghostwriting implicates the ABA's Model Code of Responsibility DR 1-102(A)(4), providing that an attorney should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *Id.* The district court reasoned: "It is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings. Attorneys cross the line, however, 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." *Id.* at 987.

This year the federal district court in the Central District of California granted a motion for sanctions based, in part, on ghostwriting. *Ayvazian v. The Moore Law Group,* 2012 U.S. Dist. LEXIS 88556 (C.D. Cal. 2012). In its unpublished opinion, the court relies upon the *Ricotta* decision and states, "The Court reminds the Plaintiff that the practice of 'ghostwriting' violates the rules of professional conduct and undermines the litigant's status as pro se." *Id.* at *10. The court concludes that the "likelihood that the

impermissible practice of ghostwriting was used in the present complaint is but another factor in support of the Court's decision to grant sanctions under Rule 11." *Id.* at *10-11.

Conclusion

The issue of ghostwriting is controversial and many commentators argue that ghostwriting preserves unrepresented litigants' access to justice. However, despite the controversy, ghostwriting an appellate brief in federal court raises ethical issues that cannot be overlooked. Before agreeing to ghostwrite an appellate brief in federal court, the drafting attorney needs to confirm that the jurisdiction allows ghostwriting. Because there is a lack of clear guidance in the Ninth Circuit, prudence suggests that until such guidance is provided, attorneys should not ghostwrite briefs submitted to the Ninth Circuit.

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