LEO 1874: LIMITED SCOPE REPRESENTATION—REVIEWING PLEADINGS FOR PRO SE LITIGANTS—SUBSTANTIAL ASSISTANCE AND "GHOSTWRITING"

Law Firm has contracted with a pre-paid legal services plan ("Plan") to review and comment to Plan Members on certain documents submitted to Law Firm by Plan Members. "Plan Members" or "Members" are persons who contract with the Plan for access to services provided by Law Firm. Law Firm is compensated by the Plan for this document review service (and a wide range of other designated services) on a membership per capita basis.[1] In addition to the services designated for payment on a membership per capita basis, the Plan allows a Member to request certain other legal services by the Law Firm, including representation before tribunals, on a discounted hourly fee-for-service basis in which the fee is paid by the Member to the Law Firm.

A Member requests Law Firm to review and provide legal advice on a Warrant In Debt with a Bill of Particulars that the Member has prepared for *pro se* filing in a General District Court and a petition for a change of custody that the Member has prepared for filing *pro se* in a Juvenile and Domestic Relations District Court. A review of these documents may fall under the designated document review service described above for which Law Firm is paid on a capitated basis. Law Firm agrees to review and provide advice on these documents, provided the Member agrees to transmit a letter to the court at the time of the filing of the documents that includes this language:

> At the request of [Member] Law Firm has reviewed the attached pleading or document or a version thereof that [Member] has informed Law Firm that he/she intends to file in this court *pro se*. Law Firm has provided legal advice to [Member] regarding the pleading or document. Member has neither retained Law Firm to represent [Member] before this court in the proceeding initiated by the attached pleading or a version thereof nor has Law Firm agreed to represent [Member] in such proceeding. This letter is merely notice to the court that Law Firm has reviewed and provided legal advice to [Member] with regard to the attached pleading or a version thereof to assist [Member] in accurately presenting his/her claim to the court in the proceeding.

Questions Presented

You have asked the Committee to address these questions:

1. Has Law Firm fully satisfied its ethical obligations of notice to the court as described in LEOs 1127, 1592, 1761 and 1803 by the actions described above?

For the reasons set out in this opinion, there is no ethical obligation to notify the court of the lawyer's assistance to the *pro se* litigant. To the extent that LEOS 1127, 1592, 1761 and 1803 are inconsistent with this opinion, they are overruled.

2. Does Law Firm have an affirmative obligation to determine if the pleading or a version thereof was filed and the letter transmitted to the court with it?

[1] Law Firm's compensation is based on the number of members residing in the Law Firm's state, not on the number of times a Member calls Law Firm for the designated service.

No.

3. If Law Firm determines that the pleading or a version thereof was filed without the letter, does Law Firm have an obligation to transmit a similar notice to the court?

No.

4. Does the Law Firm have an obligation to determine if the pleading was filed in the form reviewed by the Law Firm and to advise the tribunal if any change was made prior to its filing?

No.

5. Does Law Firm have an obligation to determine in advance whether or not the court in which the pleading or document will be filed will consider the notice to be an appearance and Law Firm ruled counsel of record and then so notify the Member prior to filing?

The question of whether the assistance provided to a *pro se* litigant constitutes an "appearance" is a question of law beyond the purview of this Committee. A lawyer owes a duty of competence to a client, even if the representation has been limited by agreement. This would include determining a particular court's rules, decisions or policies in regard to "ghostwriting" or providing undisclosed assistance to *pro se* litigants and advising a *pro se* litigant of any applicable law.

6. Does Law Firm have an obligation to appear as counsel of record in the proceeding even if Member refuses to engage Law Firm or compensate Law Firm on the discounted fee-for-service basis as provided in the Plan?

Probably not, but this depends on whether the court has deemed the lawyer to have entered an appearance on behalf of the Member. See discussion below.

7. Does Law Firm have an obligation to determine if the opposing party or parties to the proceeding are represented by counsel and, if so, to provide counsel with a similar notice?

No. Because the representation in your hypothetical will have terminated, no further ethical obligations are owed.

8. Would any answer to the questions above change if Member directly compensated Law Firm for the requested review on a fee-for-service basis if the review was not covered under the capitated payment portion of the Plan?

No.

DISCUSSION

Question 1 assumes that Law Firm has an obligation to notify the court if it has provided assistance to a member that seeks a document review of pleading that *the member has prepared* and intends to file *pro se*. This assumption appears to be based on the Committee's prior guidance in Legal Ethics Opinions 1127 and 1592. The Committee will review and analyze each.

Legal Ethics Opinion 1127

In LEO 1127, the committee was asked whether it is ethically permissible for a lawyer to advise and assist a *pro se* litigant in pending employment litigation by providing legal advice, legal research,

recommendations for courses of action to follow in discovery and redrafting of documents prepared by the litigant himself. The Committee opined that there was nothing in the Code of Professional Responsibility that prohibited a lawyer from rendering such assistance to a *pro se* litigant. However, in LEO 1127, the committee pointed to former DR 7-105(A), which requires that a lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding. Rule 3.4(d) of the current Rules of Professional Conduct adopts the identical language. Rule 3.4(d) is violated when a lawyer *knowingly* disregards "a standing rule or a ruling of a tribunal made in the course of a proceeding." (Emphasis added). LEO 1127 explains that the lawyer cannot disregard a court's rule or requirement that the identity of the drafter of a pleading be disclosed. While this may be a correct statement of an ethics rule, the rules of procedure in state and federal court do not require the identification of a lawyer who prepares a pleading for a *pro se* litigant. The rules of procedure require that a pleading be signed by a lawyer admitted to practice before that court, or by the unrepresented party.[2] In your hypothetical, the *pro se* litigant signs and files the pleading, not the lawyer. In effect, LEO 1127 advises lawyers to avoid a non-existent rule of procedure.. Absent a standing rule of procedure that requires disclosure of the *drafter* of a pleading, who does not sign that pleading nor enter an appearance as counsel of record, neither Rule 3.4(d) nor former DR 7-105(A) comes into play.

By way of example, United States District Court Judge Henry Morgan held:

> The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding *pro se* is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit's mandate that the pleadings of *pro se* parties be held to a less stringent standard than pleadings drafted by lawyers, *see, e.g., White v. White*, 886 F.2d 721, 725 (4th Cir. 1989) (citations omitted), (2) effectively nullifies the certification requirement of Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), and (3) circumvents the withdrawal of appearance requirements of Rule 83.1(G) of the Local Rules for the United States District Court for the Eastern District of Virginia ("Rule 83.1(G)").

Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997).

Thus, the issue is not that the *drafting attorney* violated any rules of procedure in that court, but rather *circumvented* certain rules governing certification of a pleading and withdrawal of an appearance in court—by not having signed the "ghostwritten" pleading. Judge Morgan found that the "ghostwriting" attorney "circumvented" his obligations under Rule 11 and under Local Rule 83.1(G). But circumventing or avoiding the obligations of a rule is not the same as violating the rule. There was no rule of procedure requiring that the identity of the drafting attorney be disclosed, as discussed and assumed in LEO 1127. Further, it is more likely that the lawyers chastised by Judge Morgan in *Laremont-Lopez* reasonably believed that they were acting in good faith and did not *knowingly* disregard any standing rules in the federal court. Without a rule of procedure prohibiting their conduct how could they know? The attorneys in this case maintained that they were retained by the plaintiffs for the discrete limited purpose of drafting the complaints. They argued that at the time the complaints were

[2] Va. S. Ct. R. 1:4(c): "Counsel or an unrepresented party who files a pleading shall sign it and state his address."

filed their representation of the plaintiffs had terminated, and thus, it was appropriate for the plaintiffs to sign the pleadings as unrepresented litigants. In short, their position is that they did not sign the pleadings because they no longer represented the plaintiffs. *Laremont-Lopez, supra,* 968 F. Supp. at 1078. It is hard to question this argument. Indeed, Judge Morgan allowed that the attorneys' reasoning was "not at odds with the plain language of Rule 11" but nevertheless held that they had circumvented the rule by not having signed the pleadings. But this still begs the question of whether the lawyers in this case had *knowingly* disregarded any standing rule that required disclosure of their identity as the drafter of pleadings filed by the *pro se* litigants. As to the lawyers in *Laremont-Lopez*, the court found that they had not:

> The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding *pro se* is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, *there is no specific rule which deals with such ghost-writing.* Therefore, the Court FINDS that there is insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted.

Laremont-Lopez, supra, 968 F. Supp. at 1079-80. (Emphasis added). Judge Morgan found that the lawyer's conduct was *inconsistent* with the rules but did not find that they had *violated* any of those rules. However, lawyers are now on notice, because of *Laremont-Lopez* and other federal court cases, that "ghostwriting" may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court.

Legal Ethics Opinion 1592

In this opinion, the committee addressed a situation in which an attorney was retained by an uninsured motorist insurance carrier to defend the carrier in an action in which the uninsured motorist ("Defendant Motorist") has appeared *pro se*. Although Attorney A had not entered an appearance on behalf of the Defendant Motorist, the Defendant Motorist consulted with Attorney A, and Attorney A assisted Defendant Motorist and/or gave Defendant Motorist advice in regard to responding to discovery requests propounded by the Plaintiff in the case. The Committee opined:

> Under DR 7-105(A), and indications from the courts that *attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the pro se client*, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4). The committee cautions that Attorney A may wish to obtain Defendant Motorist's assurance that he will disclose A's assistance to the court and adverse counsel. See LEO #1127; Association of the Bar of the City of New York Opinion 1987-2 (3/23/87), ABA/BNA Law. Man. on Prof. Conduct, 901:6404.

(Emphasis added). LEO 1592 does not cite any specific cases for the italicized language nor was this conclusion reached in any of the "ghostwriting" opinions rendered in the federal courts in the Eastern District of Virginia. Moreover, controlling authority in state court says just the opposite. *Walker v. American Ass'n of Prof. Eye Care*, 268 Va. 117, 597 S.E.2d 47, (2004)(lawyer who assisted *pro se* plaintiff with preparation of motion for judgment signed only by plaintiff as a *pro se* litigant and filed pleading with court together with filing fee did not appear on plaintiff's behalf as counsel of record). Without any supporting authority, LEO 1592 reaches the conclusion that a lawyer who assists a *pro se* litigant by preparing a pleading or providing her with legal assistance is deemed by the court to have entered an "appearance" as counsel of record on behalf of that person. That conclusion is incorrect, but at least one circuit court has deemed the litigant "represented by counsel" when a lawyer prepared for a client a motion for judgment for the client to sign and proceed *pro se*. *See Walker, supra*.

LEO 1592 concluded that the lawyer violated DR 7-105(A) following the approach taken in LEO 1127. The opinion also cites former DR 7-102(A)(3), which states: "In his representation of a client a lawyer shall not . . .conceal or knowingly fail to disclose that which he is required by law to reveal." Application of this rule under these circumstances raises some questions. First, as the attorney argued in *Laremont-Lopez*, the lawyer-client relationship was concluded when the "ghostwriting" attorney completed the drafting of the pleading. So when the *pro se* litigant filed his pleading with the court, he was not represented by counsel. DR 7-102(A)(3) on its face speaks to misconduct by a lawyer in the course of representing a client. The rule seems inapplicable to the circumstances presented in the opinion. Second, was the lawyer "required by law" to disclose that he or she assisted the *pro se* litigant? As stated in the discussion of LEO 1127, there was no rule violated when the attorney failed to disclose his identity as the drafter of the pleading. Judge Morgan was frustrated by the fact that the attorney had circumvented some other rules, but made no finding that the rules had been violated by the "ghostwriting" attorney and acknowledged that there was no rule forbidding "ghostwritten" pleadings. Finally, LEO 1592 cites DR 1-102(A)(4) as having been violated when the lawyer failed to disclose his "substantial assistance" to an unrepresented defendant motorist. This rule is nearly identical to current Rule 8.4 (b): "A lawyer shall not. . .engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law." Application of this rule assumes, of course, that the "ghostwriting" lawyer is being dishonest or deceitful for not having disclosed his assistance to the *pro se* litigant, even though no standing court rule or law required such disclosure.

Other Bar Opinions

State and local ethics committees have reached different conclusions on whether disclosure of a lawyer's assistance to a *pro se* litigant is required by the Rules of Professional Conduct. Some have opined that no disclosure is required.[3] Others, in contrast, have expressed the view that the identity of

[3] New York County Law Ass'n Ethics Op. 742 (2010)(disclosure of lawyer's assistance not required unless necessary by law, rule of court or court order); New Jersey Ethics Op. 713 (2008)(disclosure not required unless lawyer behind the scene controlling litigation); ABA Formal Op. 446-07(2007)(litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure). Some state bar opinions have struck a "middle ground" stating that the lawyer's assistance should be disclosed if not the lawyer's identity. Arizona Eth. Op. 06-03 (July 2006) (Limited Scope Representation; Confidentiality; Coaching; Ghost Writing); Illinois State Bar Ass'n Op. 849 (Dec, 9,1983) (Limiting Scope of Representation); Maine State Bar Eth. Op. 89 (Aug. 31, 1988); Los Angeles County Bar Ass'n Eth. Op. 502 (Nov. 4, 1999) (Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for In Pro Per

the lawyer providing assistance must be disclosed on the theory that failure to do so would both be misleading to the court and adversary counsel, and would allow the lawyer to evade responsibility for frivolous litigation under applicable court rules.[4] The ABA's Standing Committee on Ethics and Professional Responsibility took the "middle ground" approach adopted in LEOs 1127 and 1592 stating that disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified.[5] The ABA has since taken the position, as have other jurisdictions, that the fact of assistance need not be disclosed, a position this Committee has likewise chosen to adopt, overruling LEOs 1127 and 1592 to the extent they are inconsistent with this opinion. *See* ABA Formal Op. 07-446 (May 5, 2007). We conclude that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a *pro se* litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct. This Committee does not believe that the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the lawyer or client, and therefore there would be no violation of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).

Analysis

LEOs 1127 and 1592 did not address the right of the client and the lawyer to agree to limit the scope of the engagement as explicitly authorized by Rule 1.2(b): "[a] lawyer may limit the objectives of the representation if the client consents after consultation." Perhaps that is because there was no counterpart in the Code of Professional Responsibility for current Rule 1.2(b).[6] With Virginia's adoption

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Litigant); Los Angeles County Bar Ass'n Eth. Op.483 (Mar. 20, 1995) (Limited Representation of In Pro Per Litigants). *But see* Alaska Eth. Op. 93-1 (March 19, 1993) (Preparation of a Client's Legal Pleadings in a Civil Action Without Filing an Entry of Appearance) (lawyer's assistance must be disclosed unless lawyer merely helped client fill out forms designed for pro se litigants).

[4] Colorado Bar Ass'n Eth. Op. 101 (Jan. 17, 1998) (Unbundled Legal Services) (Addendum added Dec. 16, 2006, noting that Colorado Rules of Professional Conduct amended to state that a lawyer providing limited representation to *pro se* party involved in court proceeding must provide lawyer's name, address, telephone number and registration number in pleadings); Connecticut Inf. Eth. Op 98-5 (Jan. 30, 1998) (Duties to the Court Owed by a Lawyer Assisting a *Pro Se* Litigant); Delaware State Bar Ass'n Committee on Prof'l Eth. Op. 1994-2 (May 6, 1994); Kentucky Bar Ass'n Eth. Op. E-343 (Jan. 1991); New York State Bar Ass'n Committee on Prof'l Eth. Op. 613 (Sept. 24, 1990).

[5] ABA Inf. Op. 1414 (June 6, 1978) (Conduct of Lawyer Who Assists Litigant Appearing *Pro Se*), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495, at 1414 (ABA 1986). *See also* Florida Bar Ass'n Eth. Op.79-7 (Reconsideration) (Feb. 15, 2000); Iowa Supreme Court Bd. Of Prof'l Eth. & Conduct Op. 96-31 (June 5, 1997) (Ghost Writing Pleadings); Massachusetts Bar Ass'n Eth. Op. 98-1 (May 29, 1998); New Hampshire Bar Association (May 12, 1999) (Unbundled Services: Assisting the *Pro Se* Litigant); Utah 74 (1981); Association of the Bar of the City of New York, Committee on Prof'l & Jud. Eth. Formal Op. 1987-2 (Mar. 23, 1987).

[6] DR 7-101(B)(1) stated that a lawyer may, "with the express or implied authority of his client, exercise his professional judgment to limit or vary his client objectives and waive or fail to assert and waive or fail to assert a right or position of his client." This provision seems quite different from current Rule 1.2(c) as the former rule only authorizes the lawyer to waive or fail to assert positions of the client in mid-stream after the representation has begun. In contrast, and more appropriate to the subject of "ghostwriting" a pleading for a *pro se* litigant, Rule 1.2(c) and Comment [6] focus on an agreement reached between lawyer and client at the outset of the representation. Most of the newer ethics opinions on "ghostwriting" rely heavily on Rule 1.2 and the right to limit the scope of the representation.

of most of the ABA Model Rules in 2000, a discussion of Rule 1.2(b) and "unbundling" legal services became a hot topic not only in Virginia but across the country as well.

We agree with the reasoning in ABA Formal Op. 07-446 that:

> The fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.

Some case decisions and ethics opinions have required disclosure of the lawyer's assistance on the basis that *pro se* litigants are treated more leniently and held to less stringent standards than litigants that are represented by counsel. This Committee does not share this concern and believes that a *pro se* litigant that receives undisclosed assistance by a lawyer will not receive any unwarranted special treatment. In many instances, if the lawyer has been competent and effective with his undisclosed assistance it will be obvious to the court and other parties that a lawyer has been involved. If the undisclosed lawyer has not been competent or effective, the *pro se* litigant will have no advantage. We see no reason to conclude, as some decisions and opinions have, that undisclosed assistance will give the *pro se* litigant an "unfair advantage." As noted by one commentator:

> Practically speaking … ghostwriting is obvious from the face of the legal papers, a fact that prompts objections to ghostwriting in the first place.… Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motion. A court that refuses to dismiss or enter summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error in the same manner as if it refuses to deny such dispositive motions against an attorney-drafted complaint.

Jona Goldschmidt, *In Defense of Ghostwriting,* 29 FORDHAM URB. L.J. 1145, 1157-58 (2002). Because there is no reasonable concern that a litigant appearing *pro se* will receive an unfair benefit from a tribunal as a result of undisclosed legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.

Nor does the Committee believe that providing undisclosed assistance to a *pro se* litigant violates Rule 3.3. Similarly, this Committee believes that non-disclosure of the lawyer's assistance is not an act of dishonesty, fraud, deceit or misrepresentation that is prohibited by Rule 8.4(c) nor is the lawyer assisting the *pro se* litigant in conduct that is illegal or fraudulent in contravention of Rule 1.2(c). Finally, we believe that assistance to a *pro se* litigant is not a material fact that must be disclosed to another party under Rule 4.1. The Committee believes that a lawyer who has been asked by a *pro se* litigant for limited assistance on some discrete tasks and undertakes them in a manner that comports with Rule 1.2(b) and all other applicable rules of conduct should not be subject to discipline for having done so.

This opinion assumes that the lawyer is practicing in a jurisdiction where no law or tribunal rule requires disclosure of such participation, prohibits litigants from employing lawyers (e.g., small claims

courts), or otherwise regulates such undisclosed advice or drafting. If there is such a regulation, the boundaries of the lawyer's obligation are beyond the scope of this opinion.

Your inquiries in Questions 1-4 have been answered on the basis that the Rules of Professional Conduct do not obligate the lawyer to ensure that the court is informed that a *pro se* litigant has received assistance from the lawyer. The Committee adds that it is not practical to require that lawyers *ensure* that a court is informed of his assistance to a *pro se* litigant after the lawyer-client relationship has ended and the lawyer has no control over what pleadings are actually filed with the court.

In regard to your Question Number 5, whether the court in which the pleading is filed will regard Law Firm as having entered an appearance on behalf of Member is a question of law beyond the Committee's purview.[7] However, as part of the lawyer's duty of competence under Rule 1.1, the lawyer should exercise diligence and research the particular court's view of "ghostwriting" pleadings for a *pro se* litigant. As one court stated:

> Nevertheless, the Court considers it improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as *pro se.*[8]

Thus, regardless of whether the preparation of a pleading for a *pro se* litigant constitutes an "appearance," the lawyer must make a reasonable effort to determine if the particular court will permit the preparation of a lawsuit on behalf of a *pro se* litigant that is not signed by the lawyer preparing the document, as some courts do not allow such a practice on procedural, ethical and substantive grounds.[9]

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[7] *See Walker v. American Ass'n of Prof. Eye Care,* 268 Va. 117, 597 S.E.2d 47 (2004)(lawyer who assisted *pro se* litigant with motion for judgment signed only by plaintiff as *pro se* party and filed pleading with clerk's office with filing fee did not enter an appearance on behalf of plaintiff).

[8] *Laremont-Lopez v. Southeastern Tidewater Opportun*ity *Ctr.*, 968 F.Supp. 1075, 1077 (E.D. Va. 1997). *See also Sejas v. MortgageIT, Inc.,* 1:11cv469 (JCC) (E.D. Va. 2011): "[T]his Court admonishes Plaintiff that 'the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court.") *Laremont-Lopez v. Southeast Tidewater Opportunity Ctr*., 968 F. Supp. 1075, 1080-81 (E.D. Va. 1997). The Court further warns any attorney providing ghostwriting assistance that he or she is behaving unethically. Davis v. Back, No. 3:09cv557, 2010 WL 1779982, at *13 (E.D. Va. April 29, 2010) (Ellis, J.)."

[9] *Barnett v. LeMaster*, 12 F. App'x 774, 778–79 (10th Cir. 2001) (stating that where the party entered a *pro se* appearance as well as filed and signed his appeal *pro se*, the attorney who drafted the brief knowingly committed a gross misrepresentation to this court); *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001) (determining that attorney ghostwriting of *pro se* litigant's appellate brief constitute[d] a misrepresentation to this court by litigant and attorney); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (finding that attorney ghostwriting of *pro se* litigants' complaints constitute[d] a misrepresentation to the Court); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("Clearly, the party's representation to the Court that he is pro se is not true when the pleadings are being prepared by the lawyer. A lawyer should not silently acquiesce to such representation."); *In re Mungo*, 305 B.R. 762, 769 (Bankr. D.S.C. 2003) ("[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."); *see also Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) ("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 far below the level of candor which must be met

As some courts have complained that "ghostwriting" evades the lawyer's obligations under Rule 11 of the Federal Rules of Civil Procedure, Law Firm must also be mindful of its obligation to not assist a Member in the preparation of a pleading that is frivolous. See Rule 3.1.[10]

This Committee observes that, in contrast to the federal court precedents, a majority of state courts and state bar ethics opinions point to a positive trend toward acceptance of undisclosed assistance to *pro se* litigants. *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)(reporting that of 24 states that have addressed this issue, 13 permit ghostwriting, and of those 13 states, 10 permit undisclosed ghostwriting while 3 require a statement on the pleading to indicate it was prepared with the assistance of counsel; 10 states expressly forbid ghostwriting). Even some federal courts have "softened" their position toward ghostwriting. The Second Circuit, in an attorney disciplinary case styled *In re Fengling Liu*, Doc. No. 09-90006-am, 2011 U.S. App. LEXIS 23326 (Nov. 22, 2011), while publicly reprimanding immigration lawyer for other misconduct, found that her ghostwritten pleadings were not improper:

> We also conclude that there is no evidence suggesting that Liu knew, or should have known, that she was withholding material information from Court or that she otherwise acted in bad faith. The petitions for review not at issue were fairly simple and unlikely to cause any confusion or prejudice. Additionally, there is no indication that Liu sought, or was aware that she might obtain, any unfair advantage through her ghostwriting. Finally, Liu's motive in preparing the petitions—to preserve the petitioner's right of review by satisfying the thirty-day jurisdictional deadline—demonstrated concern for clients rather than a desire to mislead this Court or opposing parties. Under these circumstances, we conclude that Liu's ghostwriting did not constitute misconduct and therefore does not warrant the imposition of discipline.

In response to Question Number 6, this is a question of law beyond the Committee's purview. Assuming the court deems Law Firm to have appeared as counsel for Member, Law Firm would have a duty to perform the tasks required of counsel of record to protect Member's interests in the pending case unless and until Law Firm is granted leave to withdraw, even if Member refuses to pay for Law Firm's services.

As to your Question Number 7, to perform only the limited and discrete task of preparing a pleading for a person to file *pro se*, the Committee does not believe the Rules of Professional Conduct require that notice of that limited representation be given to an opposing party or their counsel.

As to your Question Number 8, the Committee believes that the manner in which Law Firm is compensated does not affect how the questions in this opinion are addressed.

One final point deserves attention. Although this Committee disagrees with those opinions and court decisions that declare that undisclosed assistance to a *pro se* litigant violates rules of conduct,

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by members of the bar."), *aff'd*, 85 F.3d 489 (10th Cir. 1995); *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (finding that attorney ghostwriting of *pro se* litigant's court documents violates the attorney's duty of honesty and candor to the court).

[10] "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

finding that the Rules of Professional Conduct do not prohibit such conduct, the Committee suggests that lawyers who undertake to prepare or assist in the preparation of a pleading for a *pro se* litigant consider inserting a statement to the effect that "this document was prepared with the assistance of a licensed and active member of the Virginia State Bar." Because the fact of the lawyer's assistance may be confidential under Rule 1.6(a), the lawyer should not include such a statement if the client objects to revealing that fact.

This opinion is advisory only and is not binding on any court or tribunal.