# ETHICS OPINION 2010-01

## The Unbundling of Legal Services and "Ghostwriting"

**QUESTION:**

May a lawyer participate in the "unbundling" of legal services? Must a lawyer that only "ghostwrites" a pleading or complaint on behalf of a pro se litigant reveal his involvement to the court?

**ANSWER:**

Rule 1.2, Ala. R. Prof. C., allows a lawyer to limit the scope of his representation, and thereby, the services that he performs for his client. As such, a lawyer may participate in the "unbundling" of legal services. Ordinarily, a lawyer is not required to disclose to the court that the lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.

2) The issue of the lawyer's involvement in the matter is not material to the litigation.

3) The lawyer is not required to disclose his involvement to the court by law or court rule.

**DISCUSSION:**

In recent years, the practice of offering clients "unbundled" legal services has grown in popularity. "Unbundled" legal services are often referred to as "a la carte" legal services or "discrete task representation" and involve a lawyer providing a client with specific and limited services rather than the more traditional method of providing the client full representation in a legal matter. The unbundling of legal services falls into three general categories: consultation and advice; limited representation in court; and, document preparation. For example, the client and lawyer may agree that the lawyer will be available for

consultation on an hourly basis regarding a specific matter, but the lawyer will not undertake to represent the client in the matter or file a notice of appearance in the case. Sometimes, the lawyer may agree to make a limited appearance on behalf of the client at a hearing, but will not represent the client in the actual trial of the matter. Most often, however, the lawyer agrees to prepare an initial complaint for a client that the client will then file pro se. In that instance, the lawyer's drafting of the complaint is most often referred to as "ghostwriting".

The rationale behind offering clients the option of unbundled legal services is two-fold. First, the unbundling of legal services is viewed as a means of helping clients control the cost of litigation by allowing the client to pick and choose which services the lawyer will actually provide. Advocates of the unbundling of legal service contend that such limited representation provides lower and middle income individuals greater access to legal assistance than they would normally be able to afford. Advocates argue that many such individuals do not have the financial means to employ a lawyer under the more traditional full representation approach. Another proposed benefit is that the unbundling of legal services allows a lawyer to provide limited assistance to individuals when the lawyer may not have the time or resources to undertake full representation.

The offering of unbundled legal services is implicitly authorized under Rule 1.2(c), Ala. R. Prof. C., which provides as follows:

RULE 1.2 SCOPE OF REPRESENTATION

* * *

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

Moreover, the Comment to Rule 1.2, Ala. R. Prof. C., provides in pertinent part as follows:

Comment

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Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose.

> Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.
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> An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

As such, the Disciplinary Commission holds that a lawyer may limit the scope of his representation, and thereby, the services that he performs for his client in a specific matter. In doing so, the lawyer must be careful not to agree to or allow his representation to be limited to such an extent that the lawyer cannot provide competent representation as mandated by Rule 1.1, Ala. R. Prof. C. Additionally, any agreement by a lawyer and his client to limit the scope of representation or the services to be performed by the lawyer should be reduced to a written document signed by both the client and the lawyer.

As discussed earlier, there are three general categories of unbundled legal services: consultation and advice; limited representation in court; and, document preparation. Under the first two categories, disclosure to the court of the lawyer's involvement is not required or will otherwise be readily apparent to the court. Generally, whether an individual has sought the advice of an attorney is protected by the attorney-client privilege and Rule 1.6 of the Alabama Rules of Professional Conduct. As such, a lawyer who merely provides advice to a client appearing pro se is not required to disclose to the court or the opposing party his consultation with the client. Where a lawyer makes a limited notice of appearance on behalf of a client, the lawyer should simply advise the court and opposing party of the nature of his limited appearance.

The more difficult question is whether a lawyer must disclose his assistance to the court when the lawyer prepares or drafts pleadings on behalf of a pro se litigant. In reviewing the opinions of other state bar associations, there appear to be varied opinions regarding whether the lawyer must disclose his

assistance. Some states require lawyers to identify any documents that they prepare on behalf of a pro se litigant by including a statement on the document that the document was prepared by the lawyer.[1] Other states require a lawyer to include a statement on the document that indicates that the document was prepared with the assistance of counsel. However, the lawyer is not required to personally identify himself.[2]

These states have held that such disclosure is mandated by a duty of candor to the court. In addition, some courts have also held that a lawyer has a duty to disclose to the court the fact that the lawyer has drafted pleadings on behalf of the client. In Duran v. Carris, the Tenth Circuit held as follows:

> Ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name. Besides the imprimatur of professional competence such a signature carries, its absence requires us to construe matters differently for the litigant, as we give pro se litigants liberal treatment, precisely because they do not have lawyers. See Haines, 404 U.S. at 520-21.
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> We determine that the situation as presented here constitutes a misrepresentation to this court by litigant and attorney. See Johnson, 868 F.Supp. at 1231-32 (strongly condemning the practice of ghost writing as in violation of Fed. R. Civ. P. 11 and ABA Model Code of Professional Responsibility DR 1-102(A)(4)). Other jurisdictions have similarly condemned the practice of ghost writing pleadings. See, e.g., Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (finding that a brief, "prepared in any substantial part by a member of the bar," must be signed by him); Ellingson v. Monroe (In re Ellingson), 230 B.R. 426, 435 (Bankr. D. Mont. 1999) (finding "[g]host writing" in violation of court rules and ABA ethics); Wesley v. Don Stein Buick, Inc., 987 F.Supp. 884, 885-86 (D. Kan. 1997) (expressing legal and ethical concerns regarding the ghost writing of pleadings by attorneys); Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F.Supp. 1075, 1077 (E.D. Va. 1997) (finding it "improper for lawyers to draft or assist in

[1] See Kentucky Bar Assoc., Ethics Op. E-343; Connecticut Bar Assoc., Ethics Op. 98-5; Colorado Bar Assoc. Ethics Op. 101; New York State Bar Assoc. Ethics Op. 613; and Delaware Bar Assoc. Ethics Op. 1994-2.

[2] Florida Bar Assoc. Ethics Op. 79-7; Iowa Op. 98-1; Kansas Bar Assoc. Ethics Op. 09-01; and Massachusetts Bar Assoc. Ethics Op. 98-1.

drafting complaints or other documents submitted to the Court on behalf of litigants designated as pro se"); United States v. Eleven Vehicles, 966 F.Supp. 361, 367 (E.D. Pa. 1997) (finding that ghost writing by attorney for pro se litigant implicates attorney's duty of candor to the court, interferes with the court's ability to supervise the litigation, and misrepresents the litigant's right to more liberal construction as a pro se litigant).

> We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to "substantial" assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature.[footnote omitted] In fact, we agree with the New York City Bar's ethics opinion that "an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing." Rothermich, supra at 2712 (citing Committee on Prof'l and Judicial Ethics, Ass'n of the Bar of the City of New York, Formal Op. 1987-2 (1987)). We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. See id. at 2711-12. We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved.

238 F.3d 1268, 1271-72 (10Th Cir. 2001) While the court in Duran v. Carris requires lawyers to disclose their involvement in the drafting of legal briefs for pro se litigants, Alabama courts have yet to issue such a rule or opine on the issue of disclosure.

Further, a number of bar associations, including the American Bar Association, have concluded that no such duty of disclosure exists.[3] In ABA Formal Opinion 07-446, the American Bar Association framed the issues as follows:

> Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure

[3] See Arizona State Bar Assoc. Ethics Op. 06-03 and Maine Ethics Op. 89.

> independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).

The American Bar Association then concluded that, absent a law or local court rule requiring disclosure, the fact that a lawyer drafted the legal documents for a pro se litigant is "not material to the merits of the litigation" and does not need to be disclosed to the court. In essence, the American Bar Association held that the duty of candor to the court does not impose an affirmative duty on a lawyer to disclose to the court that he drafted a particular legal document for a client. Moreover, the ABA commented that, more often than not, the fact that a document filed by a pro se litigant was drafted by a lawyer will be readily apparent to the court and opposing party. If either the court or the opposing party believes that whether a document was ghostwritten is a material issue to the litigation, then they may raise the issue with the pro se party.

In Alabama, the duty of candor to the court is encompassed within Rule 3.3, Ala. R. Prof. C., which provides as follows:

> RULE 3.3 CANDOR TOWARD THE TRIBUNAL
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> (a) A lawyer shall not knowingly:
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> (1) make a false statement of material fact or law to a tribunal;
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> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or
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> (3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
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> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Upon review of Rule 3.3, the Disciplinary Commission finds that, ordinarily, the drafting of a legal document by a lawyer for filing by a pro se litigant does not constitute a false statement of material fact. As such, a lawyer is not required to disclose to the court that the lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.

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