Unbundled Services – Assisting the Pro Se Litigant

By the NHBA Ethics Committee
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Most lawyers have drafted documents such as letters and contracts for a client knowing that the client intended to send these documents to another person. Ordinarily, such actions would not seem to present an ethical issue. A question has arisen, however, whether a lawyer may draft pleadings for a client who wants to represent herself *pro se*. The issue arises primarily where the Court is unaware that the litigant is receiving assistance.

This issue may have broad implications for people who do not have the economic resources to hire an attorney to represent them in court. Many low and moderate income individuals may want limited assistance, because that is all they can afford. In addition, organizations who provide legal assistance to these individuals may want to try to stretch limited resources further by providing unbundled services to the many rather than full services to the few. Accordingly, the legal profession may well want to support and encourage these practices.

The propriety of the lawyer's actions will probably depend upon the particular facts involved. Informal Opinion 1414 (ABA 1978). For purposes of this article, we will look at several hypothetical situations and then discuss more general principals.

Hypothetical 1

Facts. A new client walks in and asks the lawyer to draft a complaint for the Federal District Court. The lawyer takes all the client's representations at face value and drafts a complaint.

Discussion. Rule 11(a) of the Federal Rules of Civil Procedure requires in part that every pleading shall be signed by an attorney of record or, if the party is not represented by an attorney, by the party. Under Rule 11(b), this signature amounts to certification that the pleading is not presented for an improper purpose, that the claims are warranted, and that the allegations have evidentiary support.

Courts will take into account a party's *pro se* status when it determines whether a filing is reasonable under Rule 11. *Young v. Corbin*, 889 F.Supp. 582, 586 (N.D.N.Y. 1995); *Brown v. Consolidated Freightway*, 152 F.R.D. 656, 660 (N.D.Ga. 1993), *Harmon v. O'Keefe*, 149 F.R.D. 114, 116 (E.D.Va. 1993). This relaxed standard has caused at least one federal court to condemn the ghostwriting of pleadings for a *pro se* litigant.

> 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, (2) effectively nullifies the certification requirement of Rule 11 of the Federal Rules of Civil Procedure, and (3) circumvents the withdrawal of appearance requirements of Rule 88.1(G) of the Local Rules for the United States District Court for the Eastern District of Virginia.

Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F.Supp. 1075, 1077-8 (E.D.Va. 1997) (citations omitted). After a hearing in that case, the District Court found:

> that the evidence is insufficient to establish that the Attorneys intentionally misled the Court or knowingly violated any of the Court's procedural, disciplinary, or ethical rules. ... 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*. *Id*. at 1077.

In making its ruling, the District Court considered the attorneys' allegations that this practice of ghostwriting pleadings was hardly unique.

> The Court has previously suspected that some *pro se* plaintiffs were receiving the assistance of counsel, but these suspicions have not been confirmed. This Court is unaware that this practice is as widespread as represented by counsel at oral argument and by affidavit.

Id. We are left to wonder just how widespread is the practice.

The practice had been apparently consistently employed by one "habitual litigant who in the past five or six years has commence well over thirty lawsuits against a very large number of defendants." *Klein v. Spear, Leeds & Kellogg*, 309 F.Supp. 341, 342 (S.D.N.Y. 1970). Apparently, this litigant's losses merely served as springboards for libel actions against the prevailing parties' attorneys. In this suit against a pair of lawyers, the District Court learned that some other lawyer was "actively assisting the litigant with legal advice and, in the main, by drawing up the papers before us now." *Id*. The court concluded that this "should not be countenanced."

Apparently, neither the litigant nor his lawyers took the hint. The following year, the same litigant was back in court. The court in this second case suspected that the litigant was again filing pleadings ghostwritten by an attorney. *Klein v. H. N. Whitney, Goadby & Co.*, 341 F.Supp. 699 (S.D.N.Y. 1971). A different judge concurred with the earlier conclusion "that this practice, if it be the case here, is grossly unfair to both this court and the opposing lawyers and should not be countenanced." *Id*. at 702. Nevertheless, neither court apparently attempted to learn the identity of the lawyers or refer them for disciplinary action.

All three of these cases involved situations where the *pro se* litigants arguably were using a lawyer's advice for evil ends. Clearly, a lawyer should not assist a client to engage in any action that the lawyer could not do. For example, Rule 3.1 prohibits a lawyer from bringing a proceeding unless there is a basis for doing so that is not frivolous. Rule 8.4 prohibits a lawyer from violating the Rules of Professional Conduct through the acts of another.

Conclusion. Accordingly, in considering the first hypothetical, the Committee concludes that the lawyer should not assist the client if the lawyer knows or suspects that the client will misuse the assistance.

Hypothetical 2

Facts. A long-time client asks the lawyer to draft a complaint for a collection action in small claims court. Based on the lawyer's familiarity with both the client and the client's business dealings, the lawyer reasonably believes there is a substantial basis for the claim.

Discussion. In this hypothetical, the lawyer has a reasonable basis to believe that she is not assisting a client to engage in improper behavior. In addition, the lawyer is assisting the client in preparing something that is designed for non-lawyers but which may be confusing or intimidating for some. Several jurisdictions have concluded that a lawyer may assist a client in preparing forms that are designed for *pro se* litigants. Formal Opinion 1987-2 (N.Y.C. 1987); Ethics Opinion 93-1 (Alaska 1993).

Conclusion. The Committee concurs that limited assistance in the circumstances of the second hypothetical would not violate the Rules of Professional Conduct. These two hypotheticals, however, leave a large area in the middle.

General Discussion

Most jurisdictions that have considered the general question have concluded that the lawyer has a duty to notify the court and opposing counsel of any significant assistance afforded the *pro se* litigant. Ethics Opinion 93-1 (Alaska) ("The lawyer's assistance to the client must be disclosed to the court and to opposing counsel unless the lawyer merely helped the client fill out forms designed for pro se litigants."); Formal Opinion 1987-2 (N.Y.C.) ("A lawyer may not prepare pleadings or documents for a *pro se* litigant, or must withdraw from assisting such litigant, if the litigant fails to disclose the lawyer's assistance to opposing counsel and the court."); Legal Ethics Opinion 1127 (Virginia 1988) ("under certain circumstances, failure to disclose that the attorney proved active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel").

Several opinions have raised concerns whether ghostwriting may under some circumstances violate Rule 3.3 (requiring candor toward the tribunal) and Rule 4.1 (requiring truthfulness in statements to others.) Informal Opinion 1414 (ABA); Opinion 98-1, ___ *Massachusetts L. Rev.* 85 (Mass. 1998). These opinions fear that the *pro se* litigant is attempting to gain an unfair tactical advantage, since *pro se* pleadings have been held to "less stringent standards." *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (allegations in *pro se* complaint held to "less stringent standards than formal pleadings drafted by lawyers" for purposes of motion to dismiss.)

As with the other opinions discussed above, the extent of the lawyer's assistance seems to be the one of the primary factors that bear on whether the conduct violates ethical rules. In Informal Opinion 1414 (ABA), it appeared "the litigant was receiving active and extensive assistance from the lawyer." In condemning the lawyer's actions, that opinion concluded that "the determination of the propriety of such a lawyer's actions will depend upon the particular facts involved and the extent of a lawyer's participation on behalf of a litigant who appears to the Court and other counsel as being without professional representation."

A recent opinion from Massachusetts reached a similar conclusion.

> The committee believes that limited scope arrangements between attorney and client may offer real benefits to the poor and disadvantaged, but it has concerns about substantial and undisclosed involvement by attorneys in cases where the client is acting *pro se*.

Opinion 98-1 (Mass.) The opinion went on to agree with, and quote, the conclusion from Informal Opinion 1414 (ABA).

This Committee concurs. Although the Rules expressly prohibit a lawyer from silently assisting a *pro se* litigant from abusing the court system, the Rules do not directly prohibit all limited assistance. The Committee believes that substantial assistance must be disclosed to the court and the opposing party. Limited assistance to clients of modest means for economical rather than tactical reasons probably need not be disclosed under most circumstances.

Put another way, whenever the client does make disclosure, the provision of unbundled services should not create an ethical problem. A cautious lawyer would require the client to disclose the assistance to the court and opposing counsel in nearly every case. Indeed, a lawyer should wonder about the motives of a client who was reluctant to make such disclosure. Such client may be trying to gain a tactical advantage from concealing the assistance.

The disclosure need not be elaborate. The following notation on a pleading should suffice: "This pleading was prepared with the assistance of a New Hampshire attorney."

The First Circuit apparently requires disclosure not only of the assistance, but also the name of the attorney. "If a brief is prepared in any substantial part by a member of the bar, it **must** be signed by him." *Ellis v. State of Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (emphasis added). The Committee is not aware of any similar requirement before the New Hampshire Supreme Court. The Committee suspects, however, that under most circumstances writing a brief would constitute "active and extensive assistance" within the meaning of Informal Opinion 1414 (ABA).

Written Agreement

There are good reasons in most situations for lawyers to have written agreements concerning their services and fees. The reasons for such written agreements may be even more compelling in cases where the client wants to limit the scope of services.

First, an attorney considering this type of limited arrangement should be careful to make sure both the attorney and the client understand the exact scope of representation. Rule 1.2(c) allows the lawyer to limit the objectives of the representation if the client consents after consultation. Without a written agreement limiting the scope of representation, however, the lawyer runs the risk that the client may later claim that the scope extended beyond the limited services.

Second, an attorney providing limited legal services should be very careful at the outset to make sure the client understands that the attorney's participation may have to be disclosed to the Court. If that understanding is not established in the written agreement as a condition of employment, the attorney may find himself or herself in an ethical bind between the duty to disclose and the obligation of confidentiality under Rule 1.6.