

L.E.O. 2010-01

GHOSTWRITING OR UNDISCLOSED REPRESENTATION: WHAT IS PERMISSIBLE AND WHAT IS NOT PERMISSIBLE

INTRODUCTION

The Lawyer Disciplinary Board has received a request to determine whether an attorney can ghostwrite letters as a service to *pro se* litigants. The question arose when an attorney drafted letters without disclosing authorship of the document.¹ The Lawyer Disciplinary Board, in this L.E.O., offers its advice as to the propriety of ghostwriting as undisclosed representation for clients after an analysis of the Rules of Professional Conduct.

Ghostwriting is authoring a legal document for another who appears to be and is presumed to be the actual author. It can include preparing pleadings and other documents filed with the Court or tribunal, or preparing letters or other documents on behalf of the client. Other jurisdictions have arrived at different conclusions for the permissibility of ghostwriting: some allowing it without disclosure when dealing with *pro se* litigants², and some finding that help provided by an attorney to any person should be disclosed³.

¹ Actually, the issue presented to the Board was whether the attorney must disclose authorship of letters written for persons the attorney characterized as "non-clients." However, the Board believes this characterization is not accurate. When a lawyer agrees to perform some legal service and thereafter undertakes such performance, an attorney client relationship exists. See State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 446 S.E.2nd 906 (1994).

² See ABA Formal Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007); Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. No. 2005-06 (2005); Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. No. 502 (1999); and Utah State Bar Ethics Advisory Op. Comm., Op. No. 74 (1981).

³ See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 613 (1990); Ky. Bar Ass'n Ethics Op. E-343 (1991); and Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994).

Ghostwriting is just one form of undisclosed representation. Other forms may include advising the client, reviewing documents, or “coaching” the client prior to or at hearings, depositions, meetings or negotiations. This L.E.O. addresses only undisclosed authorship of documents.

The ABA notes that undisclosed legal assistance may be a form of “unbundling” of legal services and that a lawyer is generally allowed to accomplish such “unbundling” and, therefore, limit the scope of his or her representation of a client under Model Rule of Professional Conduct 1.2(c). See ABA Formal Op. 07-446.

DISCUSSION

1. Rules of the West Virginia Rules of Professional Conduct that are applicable to ghostwriting and/or undisclosed representation.

Rule 1.2(c) of the West Virginia Rules of Professional Conduct is the same as the Model Rule. This rule provides “[a] lawyer may limit the objectives of the representation if the client consents after consultation.” Nevertheless, while this rule may allow undisclosed representation, other rules also need to be considered. These include Rule 3.3, which deals with candor to the tribunal; Rule 3.4, which deals with fairness to opposing party and counsel; and Rule 8.4(c), which deals with misconduct “involving dishonesty, fraud, deceit or misrepresentation.”

2. Issues with ghostwriting.

One significant concern is that preparing documents on behalf of a client that are filed with the court or other tribunal without disclosing the attorney's authorship constitutes misrepresentation, fraud, or lack of candor with the tribunal as well as with the opposing party. Ghostwritten documents can also possibly affect how the tribunal will view and treat certain litigants, particularly *pro se* parties. By not disclosing an attorney's assistance in a case, a *pro se* party may receive an unfair advantage from the tribunal due to the tendency to treat *pro se* litigants with more leniency than attorneys. Further, if a tribunal determines that the pleading was frivolous, it will have to expend time establishing attorney involvement, and, if unsuccessful, will be unable to sanction the attorney responsible.

3. When disclosure is required.

Balancing the interests to unbundle and provide undisclosed services against the concerns of fairness, honesty and candor, the Board reasons that disclosure of the attorney's representation is required for preparation of any pleading or other document (with the exception of forms as discussed below) to be filed with a court or tribunal, or with a state or federal agency once the case becomes contested. This disclosure must include the attorney bar number and other necessary contact information. The attorney may also state his or her representation is limited and describe the limitation.

4. When disclosure is not required.

Attorneys routinely provide legal advice and counsel to clients and write letters or documents on their behalf without disclosing their representation. In this regard, attorneys who write letters or other documents on behalf of an individual do not have to disclose their identities if the letter or document is not intended to be filed with a tribunal, or authorship is not otherwise required by law.

The Board also finds that aiding clients in the preparation or filling out of forms adopted by and/or used by tribunals or federal or state agencies does not require attorney disclosure. The attorney is not preparing the pleading or document for the tribunal in the traditional sense of forming and positing legal arguments and theories based upon factual information from the client. Rather, the form, itself, instructs and directs the legal argument and theory by the factual questions asked of the client. While the attorney may provide legal advice to aid in the filling out of the form, the attorney is not preparing the pleading.

5. Procedures that should be followed when an attorney limits his or her services to a client.

When an attorney provides legal services to a client whether in limited form or not, the Rules of Professional Conduct will apply and care is required. For instance, a conflict check is necessary, even on such “unbundled” legal services.

An attorney client relationship exists with any representation, whether undisclosed or disclosed, whether limited or traditional, and the same ethical obligations are owed to all clients.

Rule 1.2(c) of the West Virginia Rules of Professional Conduct permits a lawyer to limit the objectives of representation "if the client consents after consultation." Thus, the client must be informed and give consent to the undisclosed representation or limited representation in a written representation contract. The client should also be informed of what the attorney will be doing, but more importantly, what the attorney will not be doing on his or her behalf. The written agreement should explicitly clarify the scope of representation in order to protect both the client and attorney. Of course, the consideration or lack thereof for services provided should be specified in the written agreement.

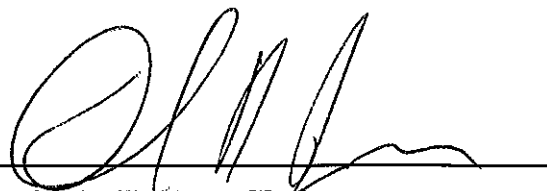
The written representation contract should also state that the client has reviewed the contract and understands its implications. That is, at a minimum, the contract should state: that the client understands the limitation of the representation and of the work the attorney will provide; that the attorney has explained and the client understands the disadvantages, if any, of having limited representation; that there may possibly be other issues present in the matter which will not be reviewed or investigated by the attorney; and that if there are other issues or claims the client would like reviewed or investigated, the client should seek another attorney's assistance.

When an attorney notes his or her limited representation on a pleading or other document, it is important to insure that the tribunal and other parties understand the attorney's limited role. One way to accomplish this may be to state the nature of the limited representation in any court document filed while staying within the bounds of confidentiality. In any event, the attorney will be subject to all rules of procedure, including the Trial Court Rules, and whether the Court accepts an attorney's limited representation in a matter will be a matter of judicial discretion.

CONCLUSION

While the Board finds that ghostwriting as a form of undisclosed representation is permissible under the Rules of Professional Conduct, the attorney must disclose his or her identity when preparing pleadings and other documents filed with a tribunal. The Board also finds that when attorneys limit their representation of clients, they should follow certain procedures to ensure that the client is fully aware of and consents to the specific limitations and their possible ramifications.

APPROVED by the Lawyer Disciplinary Board on the 29th day of October, 2010, and
ENTERED this 8th day of November, 2010.



David A. Jividen, Chairperson
Lawyer Disciplinary Board