Note

Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting

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Rosann Delso was in a bind. Unable to afford an attorney to represent her in a disability benefits claim on behalf of her deceased husband, Delso decided to pursue her case against pharmaceutical giant Merck on her own.[1] Such pro se[2] representations pose significant challenges, as Delso soon learned; complex filing requirements left Delso feeling frustrated and confused.[3] To help her navigate these procedural minefields, Delso turned to attorney Richard Shapiro for help.[4] Delso knew Shapiro from his work with her husband's union at Merck, so she asked Shapiro to "informally assist" her in drafting the

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1. Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *2 (D.N.J. Mar. 6, 2007).

2. The term "pro se" means "on one's own behalf" and describes litigants who appear in court without any attorney representation. BLACK'S LAW DICTIONARY 1236 (7th ed. 1999). Some jurisdictions also refer to this representation alternatively as "in propria persona," State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Ethics Op. 05-06 (2005) [hereinafter Ariz. Ethics Op. 05-06], or as "in pro per" representation, L.A. County Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. No. 502 (1999) [hereinafter L.A. County Formal Op. 502].

3. *Delso*, 2007 WL 766349, at *4.

4. *Id.*

documents she submitted to the court.[5] Shapiro agreed to this limited representation, rather than the traditional "full-service model,"[6] because of his concern that his previous employment for the union would pose a conflict of interest.[7] By drafting documents for Delso without signing his name, Shapiro believed he could satisfy the court's filing requirements without violating any procedural or ethical rules.[8]

Unfortunately for Shapiro, a federal court in New Jersey disagreed.[9] In an opinion critical of Shapiro, the court explained that when attorneys provide such informal assistance, or "ghostwriting," they violate procedural and ethical rules.[10] It noted that by failing to sign his name to court documents, Shapiro avoided the responsibility that the procedural rules impose on him, and violated ethical rules of candor and honesty.[11] Ultimately, the court ordered Shapiro to either enter an appearance to fully represent Delso or cease representing her altogether.[12]

Richard Shapiro is just one of many attorneys to engage in the practice of ghostwriting in recent years.[13] These attorneys,

5. *Id.*

6. Under the traditional full-service model, legal services are a single product, including "advice, fact investigation, legal research, drafting correspondence and pleadings, negotiation, representation at hearings, formal discovery, and trial." Helen Hierschbiel, *The Ethics of Unbundling: How to Avoid the Land Mines of "Discrete Task Representation,"* OR. ST. B. BULL., July 2007, at 9, 9, *available at* http://www.osbar.org/publications/bulletin/07jul/barcounsel.html.

7. *Delso*, 2007 WL 766349, at *4.

8. *Id.* at *4 n.3.

9. *Id.* at *17–18.

10. *Id.* at *12–18 (explaining that ghostwriting violates a state ethics rule requiring a lawyer's candor and honesty to tribunals, and also offends Federal Rule of Civil Procedure 11).

11. *Id.* at *15.

12. *Id.* at *18.

13. *See, e.g.*, Kircher v. Charter Twp. of Ypsilanti, No. 07-13091, 2007 WL 4557714, at *4 (E.D. Mich. Dec. 21, 2007) (explaining that an attorney evidently provided "substantial assistance" to a putative pro se litigant); Anderson v. Duke Energy Corp., No. 3:06cv399, 2007 WL 4284904, at *1 n.1 (W.D.N.C. Dec. 4, 2007) ("[I]f counsel is preparing the documents being filed by the Plaintiff in this action, the undersigned would take a dim view of that practice."); Stone v. Allen, No. 07-0681-WS-M, 2007 WL 2807351, at *1 n.1 (S.D. Ala. Sept. 25, 2007) ("The level of sophistication, polish and legal research contained in plaintiff's filings strongly suggest that they were ghostwritten by counsel."); Jachnik v. Wal-Mart Stores, Inc., No. 07-cv-00263-MSK-BNB, 2007 WL 1216523, at *1 n.2 (D. Colo. Apr. 24, 2007) (noting that the complaint "appears to have been ghostwritten").

as well as some commentators, justify ghostwriting as a practice that gives low-income litigants increased access to civil representation they otherwise would not be able to afford.[14] Such arguments are persuasive, especially given pro se litigants' ever-growing need for legal representation.[15] Yet as opponents note, ghostwriting, at least when not disclosed to courts, raises serious procedural and ethical problems.[16] Ethically, an attorney's failure to disclose her assistance on a client's pleadings may violate rules requiring the attorney to be candid and honest.[17] Procedurally, ghostwriting may give putative pro se litigants an unfair advantage, and may decrease the efficiency of court proceedings.[18] Most importantly, ghostwriting may violate an attorney's obligation under Federal Rule of Civil Procedure 11 (Rule 11) to certify that pleadings she signs are well-grounded in fact and in law.[19]

This Note examines the procedural and ethical issues surrounding the practice of ghostwriting. Part I describes the rise of ghostwriting in recent years, paying particular attention to the arguments offered to justify or criticize the practice. Part II analyzes previous proposals to resolve the ghostwriting problem from an exclusively procedural perspective, and questions whether such proposals adequately address the goals of the Federal Rules of Civil Procedure. Finally, Part III offers a solution to the procedural problems ghostwriting poses: courts should broaden the scope of Rule 11 to indicate clearly when attorneys must sign pleadings they draft. By amending Rule 11

14. *See, e.g.*, Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1208 (2002); John C. Rothermich, Note, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2728 (1999).

15. *See* Drew A. Swank, *The Pro Se Phenomenon*, 19 B.Y.U. J. PUB. L. 373, 376–77 (2005) (noting the increasing frequency of pro se litigation).

16. *See, e.g.*, *Delso*, 2007 WL 766349, at *14–18 (arguing that ghostwriting violates ethics rules requiring attorneys to be candid to courts); Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L. REV. 1315, 1334–35 (2000) (discussing how courts and ethics boards in several states condemn ghostwriting).

17. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2004) (indicating that it is professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation").

18. *See, e.g.*, *Delso*, 2007 WL 766349, at *14–18; Rothermich, *supra* note 14, at 2696–720.

19. *See, e.g.*, *Delso*, 2007 WL 766349, at *15–17; Rothermich, *supra* note 14, at 2716–20.

and its federal and state civil court analogs,[20] courts can ensure that attorneys take responsibility for the documents they help draft, while also providing clarity for attorneys who wish to assist pro se litigants. In short, courts need to incentivize disclosure, something that previous ghostwriting proposals have failed to do.

I. THE RISE OF GHOSTWRITING

Ghostwriting is best understood by examining the broader category of "unbundled legal services" or "limited scope representation" under which it falls.[21] Unlike traditional models of legal representation, in which an attorney represents a client from the beginning of a case or transaction to its ultimate conclusion, unbundled representations arise when attorneys limit their service to discrete tasks.[22] Such tasks include fact gathering, legal research, coaching, negotiating, making limited court appearances, or drafting court documents.[23] Indeed, unbundled services can take countless forms, varying with the needs of the individual client.[24]

So-called limited scope representation is not in itself a new development in attorney-client representation.[25] In many transactional fields, unbundled legal services are commonplace, with attorneys assisting clients in discrete tasks ranging from contract drafting to negotiation of purchase agreements.[26] A lawyer's assistance in such transactions may constitute a sub-

20. *E.g.*, FED. R. BANKR. P. 9011; MINN. R. CIV. P. 11.

21. *E.g.*, *Delso*, 2007 WL 766349, at *12 (listing synonyms for unbundled legal services as "discrete tasks legal services" and "limited scope legal assistance"); Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 565 (2007) (describing these services alternatively as "unbundled legal services" or "limited scope representation"); *see also* N.J. Advisory Comm. on Prof'l Ethics, Op. 713 (2008) [hereinafter N.J. Ethics Op. 713], *available at* www.judiciary.state.nj.us/notices/ethics/ACPE713.pdf (dubbing this kind of representation "short-term limited legal services").

22. Farley, *supra* note 21, at 565.

23. Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (2006); Rothermich, *supra* note 14, at 2691.

24. Klempner, *supra* note 23, at 654.

25. Hierschbiel, *supra* note 6, at 9.

26. David M. Forman, *Unbundled Legal Services*, HAW. B.J., Aug. 2001, at 20, 20; Sylvia Stevens, *Understanding 'Unbundling': Creating a Menu of Legal Services May Improve Accessibility*, OR. ST. B. BULL., Nov. 1998, at 25, 25.

stantial percentage of the client's overall project, or it may be limited to a mere review of documents already created by the client.[27]

For many years limited scope representation remained largely a transactional phenomenon; clients needing litigation assistance either chose to hire attorneys for the entire duration of their case, or opted to pursue their claims alone.[28] Unfortunately, neither option meets the needs of many civil litigants, especially those of limited means.[29] On one hand, pro se representation often leads to unnecessary delays, unfair negotiations, and skewed case outcomes.[30] Because pro se litigants ordinarily lack legal training and expertise, they may have a greater chance of losing on procedural grounds,[31] despite the Supreme Court's mandate that pro se pleadings be held to "less stringent standards than formal pleadings drafted by lawyers."[32] Conversely, full-service representation often proves too costly for many low-income civil litigants.[33] While legal service organizations and pro bono programs provide some impoverished individuals with legal representation,[34] these programs lack sufficient resources to meet the growing need for civil representation among low-income earners.[35]

27. Klempner, *supra* note 23, at 654; Stevens, *supra* note 26, at 25.

28. *See* Klempner, *supra* note 23, at 654 (noting that unbundled legal services are "far less established and common in the litigation context").

29. *See* Swank, *supra* note 15, at 376 (noting the increase of pro se litigants in so-called poor people courts).

30. Brenda Star Adams, Note, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 306–13 (2005).

31. *Id.* at 308–10.

32. *See* Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

33. *See* Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5, 5 (arguing that clients forego attorney assistance because it is "unnecessarily expensive"); Anthony Zapata, *Legal 'Ghostwriting' in Indiana: An Analysis*, RES GESTAE, Sept. 2005, at 20, 23; Adams, *supra* note 30, at 304.

34. Minnesota and Arizona have self-service centers that cater to low-income, self-represented litigants, and other states have court-sponsored clinics that educate pro se litigants about court procedures. Adams, *supra* note 30, at 304–05; *see also* Zapata, *supra* note 33, at 20–21 (noting that many state supreme courts have created pro se advisory boards to advise self-represented litigants).

35. *See* Farley, *supra* note 21, at 563 (explaining that legal services organizations and pro bono programs only meet fifteen to twenty-five percent of the need of the nation's poor); Micklewright, *supra* note 33, at 5 (noting that the Legal Services Corporation turns away "thousands of potential clients annually because of cutbacks in funding").

Indeed, it is difficult to overstate the problem impoverished individuals have in achieving adequate legal representation. According to several national and state studies, nearly eighty percent of the nation's poor have unmet legal needs.[36] Pro se representation is a manifestation of this problem, as legal aid attorneys are not able to provide legal representation in the same manner as attorneys in private practice.[37] In some specialized contexts, including traffic, housing, family, and small claims courts, pro se litigants are particularly ubiquitous.[38] Given that pro se litigants may be disadvantaged by the lack of an attorney,[39] these figures suggest that traditional models of legal representation are ineffective.[40]

In response to the ever-increasing needs of low-income individuals, many jurisdictions have allowed limited scope representation in litigation.[41] This process first involved revising ap-

36. ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE: FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 9 (1996) [hereinafter ABA, AGENDA FOR ACCESS], *available at* http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf (concluding that "many low- and moderate-income Americans confront legal issues in their lives and receive no help"); LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 18 (2005) [hereinafter JUSTICE GAP], *available at* http://www.lsc.gov/JusticeGap.pdf; ALGODONES ASSOCS., THE AMERICAN BAR ASSOCIATION LEGAL NEEDS STUDY 6 (1998), http://www.algodonesassociates.com/legal_services/assessing_needs/ABA%20Legal%20Needs.pdf (concluding that between sixty-one and seventy-five percent "of all low-income legal needs are unmet").

37. *See* JUSTICE GAP, *supra* note 36, at 18 (noting that on average there is one legal aid attorney for every 6861 people nationally while there is one private practice attorney for every 525 people in the population); Beth Lynch Murphy, Results of a National Survey of Pro Se Assistance Programs: A Preliminary Report, http://www.ajs.org/prose/pro_murphy.asp (last visited Mar. 12, 2008) (indicating that over ninety-five percent of state respondents to an American Judicature Society study reported that there had been an increase in pro se litigation in their courts in the previous five years).

38. *See* Memorandum from Madelynn Herman, Pro Se Statistics (Sept. 25, 2006), *available at* http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm (last visited Mar. 12, 2008) (listing state court pro se statistics for domestic relations matters, such as divorce, small claims, landlord/tenant, probate, and other civil matters).

39. *See* Adams, *supra* note 30, at 308–10.

40. *See* Hierschbiel, *supra* note 6, at 9 ("Improving access to justice in the face of decreasing government funding and rising legal costs continues to challenge the legal community.").

41. *E.g.*, COLO. R. CIV. P. 11(b); ME. R. CIV. P. 11(b); WASH. SUPER. CT. CIV. R. 11(b); Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct No. 849 (1983) (concluding that an attorney may agree in advance with his client to limit the attorney's employment to drafting court documents, as long as the client gives his informed consent to such a limitation of employment).

plicable ethics rules to expressly permit limited representations.[42] The American Bar Association (ABA) and some state ethics boards have rewritten ethics rules to allow a lawyer to limit his representation if such a representation is "reasonable under the circumstances" and if the client gives informed consent.[43] Accordingly, attorneys can assist a civil litigant at any of several points from before a case is filed until its ultimate resolution.[44] An attorney's assistance may be brief, such as providing advice concerning a narrow issue in the litigation, or it may involve the more time-consuming tasks of drafting court documents or teaching a client to represent herself pro se.[45] It is during this more extensive involvement that ghostwriting arises.

A. DEFINITION OF AND REASONS FOR GHOSTWRITING

Ghostwriting occurs when an attorney "prepares documents for filing for a party who would otherwise appear unrepresented in litigation."[46] While many courts focus on ghostwriters who draft pleadings,[47] ghostwriting also applies to the drafting of motions, notices, or other court documents.[48] An attorney is only a ghostwriter if he or she provides "substantial legal assistance to a pro se litigant, but does not enter appearance or otherwise identify himself or herself in the litigation."[49] Attorneys who either disclose their assistance to a court, or who

42. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2004) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

43. *See id.* R. 1.2 cmt. 6 (explaining that limited representation may be appropriate when the client has limited objectives for the representation); *id.* R. 1.2 cmt. 7 (noting that limited representation would not be appropriate when, for example, the attorney's limited work would be insufficient to yield advice on which the client could rely).

44. Rothermich, *supra* note 14, at 2691.

45. *Id.*

46. *In re* Cash Media Sys., Inc., 326 B.R. 655, 673 (Bankr. S.D. Tex. 2005).

47. *See, e.g.*, *In re* Ellingson, 230 B.R. 426, 435 n.12 (Bankr. D. Mont. 1999) (defining ghostwriting as the "act of an undisclosed attorney who assists a self-represented litigant by drafting his or her *pleadings* as part of 'unbundled' or limited legal services" (emphasis added)).

48. *See, e.g.*, *In re* Brown (*Brown I*), 354 B.R. 535, 541 (Bankr. N.D. Okla. 2006) (discussing ghostwriting of a motion to reconsider); Jackson v. Am. Lubricant Co., No. 18482, 2001 WL 221661, at *1 (Ohio Ct. App. Mar. 2, 2001) (same).

49. Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 885 (D. Kan. 1997).

provide minor undocumented assistance to a client are not considered ghostwriters.[50]

Although the type of assistance that may be deemed "substantial" initially seems difficult to ascertain, several authorities have attempted to clarify this ambiguity.[51] In the Southern District of California, attorneys ghostwrite by drafting "seventy-five to one hundred percent" of a client's document, or by presenting arguments "with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court."[52] For the First Circuit, any documents "manifestly written" by an attorney qualify.[53] The ABA defines ghostwriting as "active and extensive" assistance "in preparation for the trial as well as during the trial itself,"[54] a formulation dubbed the "substantial assistance approach."[55] Whatever the precise definition, the term ghostwriting applies when a court perceives that an attorney is guiding the course of litigation "with an unseen hand."[56]

Precisely because ghostwriting occurs behind the scenes, it is not altogether clear why attorneys choose to help draft pleadings and other court documents for pro se litigants without disclosure.[57] Yet an analysis of ghostwriting cases reveals several

50. *See* Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) (explaining that an attorney must play a "substantial role in the litigation" to qualify as a ghostwriter).

51. *See* Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (defining "substantial" by the amount of the brief preparation allocable to the attorney); *Ricotta*, 4 F. Supp. 2d at 987; *Brown I*, 354 B.R. at 544 (noting that the drafting of pleadings constitutes substantial assistance); Lauren A. Weeman, Note, *Bending the (Ethical) Rules in Arizona: Ethics Opinion 05-06's Approval of Undisclosed Ghostwriting May Be a Sign of Things to Come*, 19 GEO. J. LEGAL ETHICS 1041, 1058–60 (2006) (explaining the "substantial assistance approach" to defining ghostwriting); *cf. In re* Eastlick, 349 B.R. 216, 221 n.17 (Bankr. D. Idaho 2004) (explaining that preparation of a bankruptcy petition, schedules, and statements constitutes "material" participation, which is improper if not disclosed).

52. *Ricotta*, 4 F. Supp. 2d at 987.

53. *Ellis*, 448 F.2d at 1328.

54. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1414 (1978) [hereinafter ABA Informal Op. 1414].

55. *See* Weeman, *supra* note 51, at 1058.

56. Duran v. Carris, 238 F.3d 1268, 1271 (10th Cir. 2001) (internal quotation marks omitted).

57. Several authorities note the difficulty in analyzing ghostwriting because of the inability to identify ghostwriters. *See In re* Brown (*Brown I*), 354 B.R. 535, 545 (Bankr. N.D. Okla. 2006) (berating a ghostwriting attorney for playing "a game of 'catch-me-if-you-can'"); *In re* Cash Media Sys., Inc., 326 B.R. 655, 673 (Bankr. S.D. Tex. 2005) (dubbing ghostwriting "sub-rosa beha-

broad explanations for the practice. These justifications include a desire to avoid ethical or procedural rules, the fear of adverse legal or social consequences, and an effort to gain an advantage for the client.

1. Avoiding Ethical and Procedural Rules

First, several cases indicate that attorneys ghostwrite documents to circumvent applicable procedural and ethical rules. In *In re West*, for example, an attorney who failed to comply properly with a bankruptcy court's electronic filing system instead coached his client to submit paper motions, on the premise that a pro se client's failure to abide by electronic submission requirements would be forgiven while an attorney's would not.[58] Recognizing the attorney's attempt to circumvent the pleading rules, the court held that the attorney violated the bankruptcy analog to Rule 11 and imposed $1000 in sanctions.[59]

In re Potter provides another example of ghostwriting to circumvent local court rules.[60] There, an attorney who was not licensed to practice in the District of New Mexico wrote court notices for a putative pro se litigant appearing in bankruptcy court.[61] The court declared that this effort to "circumvent and manipulate" the bankruptcy process was "unacceptable,"[62] and prohibited the attorney from representing any party *pro hac vice*[63] in the future.[64]

vior"); *In re* Mungo, 305 B.R. 762, 768 (Bankr. D.S.C. 2003) (condemning ghostwriters for shielding themselves in a "cloak of anonymity"); *ABA Committee Abandons Previous Stance That Required Revealing Ghostwriting Lawyers*, Laws. Man. on Prof. Conduct (ABA/BNA) No. 14, at 352 (July 11, 2007) (characterizing ghostwriters as "shadow lawyers").

58. *See* 338 B.R. 906, 909–10 (Bankr. N.D. Okla. 2006).

59. *Id.* at 914–15, 917.

60. *See In re* Potter, No. 7-05-14071, 2007 WL 2363104, at *3–4 (Bankr. D.N.M. Aug. 13, 2007).

61. *Id.*

62. *Id*.

63. Attorneys appearing *pro hac vice* are not licensed to appear before a particular court, but, with court approval, may do so "[f]or this occasion or particular purpose." BLACK'S LAW DICTIONARY 1227 (7th ed. 1999).

64. *In re Potter*, 2007 WL 2363104, at *4; *see also* Chaplin v. Du Pont Advance Fiber Sys., 303 F. Supp. 2d 766, 772–73 (E.D. Va. 2004) (admonishing an attorney for similar behavior); *cf.* Te-Ta-Ma Truth Found.—Family of URI, Inc. v. World Church of the Creator, 246 F. Supp. 2d 980, 984 (N.D. Ill. 2003) (criticizing a "non-attorney law school graduate" for potentially ghostwriting court documents).

Avoiding potential conflicts of interest represents another reason attorneys choose to ghostwrite for pro se litigants. *Delso v. Trustees for the Retirement Plan for the Hourly Employees of Merck & Co.* is the most obvious example of this phenomenon—attorney Shapiro was concerned that his previous representation of the union at Merck would have been adverse to his representation of Rosann Delso.[65] Although the court ultimately found no conflict present,[66] *Delso* nevertheless demonstrates that attorneys may decide to ghostwrite in order to conceal conflicts of interest from the court.[67] Previous cases bolster this conclusion. In both *Somerset Pharmaceuticals, Inc. v. Kimball*,[68] and *In re Brown* (*Brown I*),[69] an attorney withdrew or was disqualified from representing a party because of a possible conflict of interest, and yet continued to assist that party through ghostwriting.[70]

In fact, *Brown I* is broadly representative of a growing class of ghostwriting cases found in bankruptcy courts.[71] As the procedural history of *Brown I* indicates,[72] ethics rules may prevent attorneys from representing debtors in multiple bankruptcy proceedings.[73] The problem in *Brown I* arose from attorney

65. *See* Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *3–4 (D.N.J. Mar. 6, 2007).

66. *Id.* at *18.

67. It is important to note that in *Delso*, Richard Shapiro encouraged Rosann Delso to inform the court of his assistance drafting her motions. *Id.* at *4 n.3.

68. 168 F.R.D. 69, 71 (M.D. Fla. 1996).

69. *In re* Brown (*Brown I*), 354 B.R. 535, 541 (Bankr. N.D. Okla. 2006).

70. For other examples of conflicts of interest as manifested through ghostwriting, see Alling v. Am. Tool & Grinding Co., 96 F.R.D. 221, 223 (D. Colo. 1982), and Att'y Grievance Comm'n of Md. v. Lawson, 933 A.2d 842, 850 & n.1 (Md. 2007).

71. *See, e.g.*, *In re* Potter, No. 7-05-14071, 2007 WL 2363104, at *3–4 (Bankr. D.N.M. Aug. 13, 2007); *In re* Brown (*Brown II*), 371 B.R. 486, 493 (Bankr. N.D. Okla. 2007), *amended by* 371 B.R. 505 (Bankr. N.D. Okla. 2007); *Brown I*, 354 B.R. at 541–46; *In re* West, 338 B.R. 906, 914–15 (Bankr. N.D. Okla. 2006); *In re* Cash Media Sys., 326 B.R. 655, 673–75 (Bankr. S.D. Tex. 2005); *In re* Mungo, 305 B.R. 762, 767–71 (Bankr. D.S.C. 2003); *In re* Merriam, 250 B.R. 724, 732–33 (Bankr. D. Colo. 2000).

72. For the 2007 iteration of the case, see *Brown II*, 371 B.R. at 493. For the 2006 version, see *Brown I*, 354 B.R. at 539–40.

73. For example, Model Rules of Professional Conduct 1.7 and 1.8, which prohibit an attorney from representing a client with a concurrent or successive conflict of interest, may prohibit an attorney in bankruptcy court from representing a debtor if the attorney himself was a prepetition secured creditor of the client. MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8 (2004); *see also Brown II*, 371 B.R. at 491–93.

James Matthews's multiple representations of the Brown family.[74] Having earned attorneys' fees representing the Browns in 2003, Matthews secured a promissory note under which the Browns owed him $30,000 for his legal work.[75] When the family later required more bankruptcy assistance, Matthews was forced to withdraw because the promissory note Brown owed constituted an interest "adverse" to the Browns.[76] Not wanting to leave his former clients without representation, Matthews continued to draft court documents, a practice the court formally admonished.[77] The proliferation of ghostwriting in bankruptcy cases suggests that this scenario is not unique.[78]

2. Fear of Adverse Legal or Social Consequences

A report of the Minnesota State Bar Association Pro Se Implementation Committee noted that unbundled services like ghostwriting also arise out of attorneys' fears of being conscripted into full-service representation.[79] Under this rationale, ghostwriters do not disclose their identity because they believe doing so would require them to assume additional obligations like court appearances and negotiations with opposing counsel for which they simply do not have time.[80] While these fears may seem unfounded because of ethics rules permitting limited representation,[81] some attorneys nevertheless worry that inexperienced pro se litigants cannot handle other aspects of the

74. *See Brown II*, 371 B.R. at 493; *Brown I*, 354 B.R. at 541.

75. *Brown II*, 371 B.R. at 491.

76. *Id.* at 492.

77. *Id.* at 493.

78. *See, e.g.*, *In re* Bell, 212 B.R. 654, 657 (Bankr. E.D. Cal. 1997) (noting another attorney's attempt to avoid a conflict of interest through ghostwriting).

79. MINN. STATE BAR ASS'N PRO SE IMPLEMENTATION COMM., REPORT OF THE MSBA PRO SE IMPLEMENTATION COMMITTEE MAY 2003 TO 2006, at 7, http://www2.mnbar.org/committees/pro-se/CommitteeFinalReport.pdf (last visited Mar. 12, 2008) [hereinafter MSBA REPORT] (explaining that "fear of having to stay on a case forever" and "being unable to withdraw" is one principal concern related to unbundled legal services); *see also* Elizabeth J. Cohen, *Afraid of Ghosts*, A.B.A. J., Dec. 1997, at 80, 80 (arguing that the dangers of ghostwriting lie in the possibility that a "very real lawyer-client relationship may have been formed, with all its attendant obligations").

80. *See* Goldschmidt, *supra* note 14, at 1198 (arguing that a ghostwriter, among other motives, wants to "avoid being forced to stay in the case by a judge who may decide that, once he appears, his withdrawal motion should be denied").

81. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2004).

case on their own, thus requiring the ghostwriting attorney to continue the representation.[82]

On a less tangible level, an attorney's negative reputation with a judge or opposing counsel might give the attorney pause in disclosing ghostwriting assistance.[83] If an attorney and an assigned judge lack a good relationship, the attorney might worry that disclosure of his assistance will adversely affect the client.[84] The anonymity of ghostwriting thus serves as a security blanket to protect the client's legal rights.

Similarly, ghostwriters may fail to disclose their assistance for social reasons. Professor Jona Goldschmidt identified several scenarios in which disclosure of an attorney's assistance might negatively impact the attorney's social standing because of an "unpopular pro se client."[85] An attorney concerned about how an employer, a bar association, a local judge, or the public at large would view representation of an unpopular client may ghostwrite the documents to afford the client legal representation without risking harm to the attorney's reputation.[86]

3. Gaining an Advantage for the Client

Finally, the most oft-cited reason attorneys choose to ghostwrite documents is a desire to take advantage of the latitude courts provide pro se litigants.[87] Almost every case to discuss ghostwriting has suggested that attorneys use ghostwriting as a strategy to gain an advantage for their clients.[88] This argument seems logical, given that courts construe pro se pleadings more liberally than those of represented parties, and

82. *See* Margaret Graham Tebo, *Scary Parts of Ghostwriting*, A.B.A. J., Aug. 2007, at 16, 17 (explaining lawyers' fear that pro se litigants "'might not be truly able to handle other aspects of the case on their own,'" and that lawyers question where their responsibilities with limited representations begin and end).

83. Goldschmidt, *supra* note 14, at 1198.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

88. *See* Duran v. Carris, 238 F.3d 1268, 1271–72 (10th Cir. 2001); Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *12–14 (D.N.J. Mar. 6, 2007); Ricotta v. California, 4 F. Supp. 2d 961, 986 (S.D. Cal. 1998); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997); Johnson v. Bd. of County Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994); *In re* Mungo, 305 B.R. 762, 769 (Bankr. D.S.C. 2003); *In re* Merriam, 250 B.R. 724, 733 (Bankr. D. Colo. 2000).

afford pro se litigants wide latitude at trial.[89] Some commentators and ethics opinions reject this conclusion, instead arguing that the obviousness of the assistance will prevent courts from giving putative pro se clients any extra advantage.[90] Whatever the ultimate validity of these arguments, theoretically at least, ghostwriting attorneys employ this tactic as a means to gain an advantage for their clients.

While this is certainly not a comprehensive list, it does shed light on ghostwriters' fundamental reasons for failing to disclose their assistance to courts. Importantly, many of these rationales suggest that ghostwriters shield their identities out of a desire to avoid adverse ethical and procedural consequences. These explanations will prove vital in Part III, because any viable solution to ghostwriting must address courts' and attorneys' concerns.

B. CRITICISMS OF GHOSTWRITING

Courts and ethics opinions have criticized ghostwriting for both ethical[91] and procedural reasons.[92] On the ethics side, opponents invoke two principal concerns. First, they argue that ghostwriters violate ethical duties of candor to tribunals and third parties.[93] A Colorado court, for example, explained that ghostwriting was "far below the level of candor which must be met by members of the bar."[94] The candor argument is rooted in the proscription Model Rules of Professional Conduct (Model Rules) 3.3(a)(1) and 4.1(a) place on making false statements of

89. *E.g.*, *Johnson*, 868 F. Supp. at 1231 (noting that "pleadings filed *pro se* are to be interpreted liberally" and that pro se litigants are granted "greater latitude" in subsequent court hearings and at trial).

90. *E.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (2007) [hereinafter ABA Formal Op. 07-446]; Goldschmidt, *supra* note 14, at 1157–59.

91. *E.g.*, Johnson v. City of Joliet, No. 04 C 6426, 2007 WL 495258, at *2 (N.D. Ill. Feb. 13, 2007) (describing ghostwriting as "unprofessional conduct" that is "patently unfair"); *In re Merriam*, 250 B.R. at 733 (explaining that ghostwriting violates "the duty of honesty and candor to the court").

92. *E.g.*, Knight-McConnell v. Cummins, No. 03 Civ. 5035, 2005 WL 1398590, at *1 n.2 (S.D.N.Y. June 13, 2005) (explaining that ghostwriting raises "concerns under Rule 11"); *In re Merriam*, 250 B.R. at 733 (noting that ghostwriting violates Rule 11 and "interferes with the efficient administration of justice").

93. *See, e.g.*, Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998) (noting that ghostwriting litigation documents "would usually be misleading to the court and to other parties, and therefore would be prohibited"); Rothermich, *supra* note 14, at 2697.

94. *Johnson*, 868 F. Supp. at 1232.

material fact to tribunals and third parties.[95] By permitting clients to submit documents pro se, ghostwriters arguably create a "false impression of the real state of affairs" by permitting clients to imply that the documents were created without legal assistance.[96] In any court with the equivalent to Model Rules 3.3 or 4.1, ghostwriting arguably constitutes misconduct.[97]

Similarly, critics contend that ghostwriting may violate Model Rule 8.4(c), which proscribes conduct "involving dishonesty, fraud, deceit or misrepresentation."[98] One ethics opinion explained that "non-disclosure" of an attorney's assistance to a pro se litigant is a misrepresentation, at least where the assistance is "active and substantial or includes the drafting of pleadings."[99] Some courts agree, noting that ghostwriting violates either Rule 8.4(c)[100] or Rule 8.4(d) as conduct "prejudicial to the administration of justice."[101]

Procedurally, ghostwriting implicates both of the fundamental aims of the Federal Rules of Civil Procedure (Federal

95. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2004) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); *id.* R. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.").

96. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 98-5 (1998) [hereinafter Conn. Informal Op. 98-5]; *see also* Va. State Bar Standing Comm. on Legal Ethics, Informal Op. 1592 (1994) (explaining that a failure to disclose an attorney's assistance "may also be a misrepresentation to the court and to opposing counsel").

97. The Model Rules are not binding authority on any particular jurisdiction; instead, as their name suggests, they serve as templates on which states may base their rules of professional conduct. *See* E. Norman Veasey, *Introduction* to MODEL RULES OF PROF'L CONDUCT, at xv (2004) (noting the variations in adopting the Model Rules among the fifty states and the District of Columbia).

98. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2004).

99. Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial Ethics, Formal Op. 1987-2 (1987) [hereinafter City of N.Y. Formal Op. 1987-2].

100. Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *14 (D.N.J. Mar. 6, 2007); Ostevoll v. Ostevoll, No. C-1-99-961, 2000 WL 1611123, at *9 (S.D. Ohio Aug. 16, 2000); Ricotta v. California, 4 F. Supp. 2d 961, 986 (S.D. Cal. 1998); *In re* West, 338 B.R. 906, 915 n.36 (Bankr. N.D. Okla. 2006); *In re* Mungo, 305 B.R. 762, 769–70 (Bankr. D.S.C. 2003) (explaining that ghostwriting violates the local equivalent to Rule 8.4(c)).

101. *See* Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001); *Delso*, 2007 WL 766349, at *14.

Rules): fairness and efficiency.[102] One main concern with ghostwriting from this perspective is the perception that it gives pro se litigants an undue advantage over parties represented by counsel.[103] Given the liberality attributed to documents submitted by unrepresented parties,[104] applying a stricter standard to pleadings signed by attorneys arguably gives pro se litigants "unwarranted advantage" over their represented counterparts.[105] Stated differently, ghostwriting arguably creates a "disparity between the parties" by giving two parties represented by lawyers different pleading standards.[106] Over time, courts' continued efforts to give "greater latitude" to pro se litigants at trial may exacerbate this advantage.[107] Ghostwriting thus may have "the perverse effect of skewing the playing field rather than leveling it."[108]

Courts have also asserted that the practice "interferes with the efficient administration of justice."[109] Opinions addressing efficiency issues note that overcrowded dockets require streamlined procedures.[110] Ghostwriting forces courts to order a ghostwriter to reveal himself, an effort that inevitably takes time away from other matters.[111] This so-called satellite litiga-

102. *See* FED. R. CIV. P. 1 (explaining that the Rules should be administered to secure "just, speedy, and inexpensive" outcomes in every action).

103. *See Duran*, 238 F.3d at 1271–72; *Delso*, 2007 WL 766349, at *13; *Ricotta*, 4 F. Supp. 2d at 986; Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 885–86 (D. Kan. 1997); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997); United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997); Johnson v. Bd. of County Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994); *In re* Brown (*Brown I*), 354 B.R. 535, 542 (Bankr. N.D. Okla. 2006).

104. *See* Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (noting that pro se pleadings are held to "less stringent standards than formal pleadings drafted by lawyers").

105. *Johnson*, 868 F. Supp. at 1231.

106. Somerset Pharms., Inc. v. Kimball, 168 F.R.D. 69, 72 (M.D. Fla. 1996); *see also In re* West, 338 B.R. 906, 915 (Bankr. N.D. Okla. 2006) (indicating that ghostwriting "places the opposing party at an unfair disadvantage" (internal quotation marks omitted)).

107. *Wesley*, 987 F. Supp. at 886.

108. *Laremont-Lopez*, 968 F. Supp. at 1078.

109. *In re West*, 338 B.R. at 915 (internal quotation marks omitted); *In re* Merriam, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (quoting *Laremont-Lopez*, 968 F. Supp. at 1078) (internal quotation marks omitted).

110. *See, e.g.*, *In re* Mungo, 305 B.R. 762, 770 (Bankr. D.S.C. 2003) (explaining that ghostwriting "tax[ed] the Court's system" and "forc[ed] the Court to expend more time and effort to handle the matter").

111. *See, e.g.*, Stewart v. Angelone, 186 F.R.D. 342, 344 (E.D. Va. 1999) ("[T]he court ORDERS petitioner to identify counsel, and to declare whether

tion is inefficient in that it prevents courts from adjudicating issues on the merits.[112] Both *Delso* and *In re West* are examples of this phenomenon, because both courts conducted hearings or conferences to determine if an attorney was helping the putative pro se litigant.[113] These actions do not endear ghostwriters to courts; one attorney was fined over $11,000 for having "wasted" the court's "time and resources."[114]

Perhaps the most fundamental arguments against ghostwriting arise from Rule 11.[115] At the core of the Federal Rules is the requirement imposed by Rule 11 that every document be signed "by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party."[116] By presenting a signed document in court, each attorney or unrepresented party certifies that the document is not being presented for an improper purpose, that the legal contentions are warranted by existing law, and that the allegations and factual contentions have evidentiary support.[117] Attorneys, law firms, or parties responsible for violating any of those requirements may be subject to sanctions under Rule 11.[118]

Ghostwriters violate Rule 11 by escaping the certification requirement in Rule 11(b) that an attorney has factual and legal support for the assertions she is making.[119] Put another way, "the extent of pre-filing factual investigation and legal research required to be done in a particular case may vary depending upon whether a party is represented by counsel or proceeding pro se."[120] Ghostwriters, knowing that a pleading will be submitted by a pro se litigant, may consequently conduct

counsel intends to represent him in this case.").

112. BLACK'S LAW DICTIONARY 1343 (7th ed. 1999) (defining satellite litigation as "[p]eripheral skirmishes involved in the prosecution of a lawsuit"); Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 101 (1993).

113. Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *4 (D.N.J. Mar. 6, 2007); *In re West*, 338 B.R. at 910–13.

114. *In re* Cash Media Sys., Inc., 326 B.R. 655, 674 (Bankr. S.D. Tex. 2005).

115. *See* FED. R. CIV. P. 11.

116. *Id.* R. 11(a).

117. *Id.* R. 11(b)(1)–(3).

118. *Id.* R. 11(c).

119. *See* Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971).

120. United States v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997).

more minimal research than if a document were submitted under the attorney's name.[121] Moreover, even if an attorney conducts a reasonable inquiry, by omitting his name, the attorney leaves courts to speculate about the extent and thoroughness of the legal research. Recognizing these concerns, courts addressing the issue have either held that ghostwriting is a per se violation of Rule 11,[122] or that it "contravene[s] the spirit" of the rule.[123]

These arguments pervade the commentary on ghostwriting, whether in court decisions, journal articles, or ethics opinions. From the undue advantage and Rule 11 concerns to complaints about inefficiencies and conflicts of interest, these arguments are important because they represent obstacles reformers must overcome. Accordingly, the solution in Part III attempts to resolve these problems by broadening the scope of Rule 11 to indicate expressly the extent to which attorneys may assist otherwise pro se parties.

C. JUSTIFICATIONS FOR GHOSTWRITING

Until recently, courts, ethics opinions, and scholarly commentary generally criticized the practice of ghostwriting. In 2002, however, the movement to support ghostwriting began with Professor Goldschmidt's article, *In Defense of Ghostwriting*.[124] Goldschmidt offered in-depth support for the practice, by both refuting criticisms and by offering new arguments to justify it.[125] Subsequent ethics opinions, including a 2007 ABA Eth-

121. *See id.* (describing how the standards for investigation and research are different for pro se parties than for parties represented by counsel).

122. Barnett v. LeMaster, 12 F. App'x 774, 778–79 (10th Cir. 2001) (admonishing a ghostwriting attorney); Washington v. Hampton Rds. Shipping Ass'n, No. 2:01CV880, 2002 WL 32488476, at *5 n.6 (E.D. Va. May 30, 2002) ("Ghostwriting is in violation of Rule 11."); *In re* West, 338 B.R. 906, 915, 917 (Bankr. N.D. Okla. 2006) (sanctioning an attorney $1000 for violating the bankruptcy equivalent to Rule 11); *In re* Cash Media Sys., Inc., 326 B.R. 655, 674 (Bankr. S.D. Tex. 2005) (sanctioning an attorney $11,290.05 for violating the bankruptcy equivalent to Rule 11); *In re* Mungo, 305 B.R. 762, 770–71 (Bankr. D.S.C. 2003) (admonishing an attorney for violating the bankruptcy court equivalent to Rule 11).

123. Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *17 (D.N.J. Mar. 6, 2007); *accord* Kircher v. Charter Twp. of Ypsilanti, No. 07-13091, 2007 WL 4557714, at *4 (E.D. Mich. Dec. 21, 2007) (noting that ghostwriting is improper even though it may not per se violate Rule 11).

124. *See* Goldschmidt, *supra* note 14.

125. *Id.* at 1178, 1208–09.

ics Committee formal opinion, followed suit.[126] By debunking myths about ghostwriting and offering justifications for the practice, proponents hope to encourage these kinds of unbundled services.[127]

Proponents of ghostwriting critique the "undue advantage" argument on both theoretical and practical levels.[128] The theoretical argument is grounded in *Conley v. Gibson*, the civil procedure case in which the Supreme Court held that a plaintiff's complaint will only be dismissed if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[129] Defenders of ghostwriting argue that no matter what degree of liberality a court employs in construing a pro se litigant's pleadings, ultimately the court may not dismiss a case unless the *Conley* "no set of facts" requirement is met.[130] The unfair advantage argument thus fails because each party's pleading is ultimately treated equally under the *Conley* standard.

Practically, proponents of ghostwriting argue that pro se litigants receiving ghostwriting assistance will never be given an undue advantage, because judges can readily recognize when putative pro se litigants are receiving legal assistance behind the scenes.[131] According to an ABA Ethics Committee's opinion, "if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal."[132] Experience supports this premise, as many courts have recognized the presence of ghostwriters.[133]

126. *See, e.g.*, ABA Formal Op. 07-446, *supra* note 90.

127. Goldschmidt, *supra* note 14, at 1209 (arguing that courts need to ensure that access to justice is not limited to either the extremely poor or the extremely rich).

128. *Id.* at 1157–58; *see also* N.J. Ethics Op. 713, *supra* note 21 (explaining that a client's entitlement to confidentiality may provide "an initial thrust against disclosure" in limited scope representation).

129. Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007). Many scholars note, however, that even though the Supreme Court significantly narrowed the *Conley* standard in *Twombly*, any new limits are likely to apply only in antitrust cases. *See, e.g.*, Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/31/LRColl2007n31Bradley.pdf (arguing that *Twombly* "did not rework pleading rules across the board" and that it merely "modif[ied] the elements of an antitrust conspiracy claim").

130. Goldschmidt, *supra* note 14, at 1157.

131. ABA Formal Op. 07-446, *supra* note 90.

132. *Id.*

133. *See, e.g.*, Fin. Instruments Group, Ltd. v. Leung, 30 F. App'x 915, 916

To respond to the criticism that ghostwriters violate Rule 11 by escaping the certification requirement, proponents advance two alternative hypotheses. The first, a strict reading of the rule, maintains that an attorney's limited representation is finished prior to submitting any court documents.[134] Under this rationale, ghostwriters are under no obligation to disclose their representation because the pro se litigant assumes all of the rule's responsibilities by being the one who submits the documents to the court.[135] Alternatively, Goldschmidt argues that any Rule 11 concerns are moot, because, pursuant to the 1993 advisory committee notes, ghostwriters may be subject to sanctions even if they choose not to disclose their assistance.[136] When putative pro se parties make frivolous assertions that violate the rule, for example, courts have the broad authority to sanction anyone responsible, and may even impose sanctions exclusively on individuals like ghostwriters who do not sign the documents presented in court.[137]

The most compelling justification for ghostwriting is that it increases low-income litigants' access to civil justice.[138] Relying on the vast need for legal services among low-income litigants,[139] proponents argue that for many, "some legal assis-

n.1 (10th Cir. 2002) ("Leung's pleadings before this court and the district court demonstrate an obvious legal sophistication, a complete familiarity with the rules of civil procedure, and an excellent command of the English language."); United States v. Bell, 217 F.R.D. 335, 339 n.2 (M.D. Pa. 2003) ("The court notes with interest that Bell's objections include citations prepared in Bluebook format. These documents strongly suggest the assistance of a legally trained person who is ghostwriting Mr. Bell's legal arguments."); Watkins v. Associated Brokers, Inc., No. 98 C 3316, 1998 WL 312124, at *1 (N.D. Ill. June 5, 1998) ("Despite [the Plaintiff's] nominal pro se status, it seems pretty clear that someone familiar with legal practice and procedure has had a major hand in drafting the Complaint.").

134. *See* Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997).

135. *See id.*

136. Goldschmidt, *supra* note 14, at 1174.

137. *See* FED. R. CIV. P. 11 advisory committee's note to the 1993 amendments, *reprinted in* 146 F.R.D. 401, 589 (1993) [hereinafter 1993 Advisory Notes] ("When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the representation to the court.").

138. Farley, *supra* note 21, at 585–86 (stating that limited appearances for low-income litigants increase their access to justice); Goldschmidt, *supra* note 14, at 1208; Adams, *supra* note 30, at 306–13 (stating that pro se litigation causes delays and increases the chance for litigants to lose).

139. *See, e.g.*, ABA, AGENDA FOR ACCESS, *supra* note 36, at 8 (concluding that "many low- and moderate-income Americans confront legal issues in their

tance is better than none."[140] Providing unbundled services like ghostwriting meets a critical need that legal service organizations and pro bono clinics simply cannot fulfill.[141]

In addition, proponents emphasize that ghostwriting meets the needs of many clients in practice areas in which pleadings normally constitute the bulk of an attorney's work.[142] This is especially true in areas like family law: "Often a party whose spouse has filed for a divorce simply needs to file an Answer . . . . Then the party will be able to negotiate with his or her spouse or the spouse's lawyer to resolve the issues of the case."[143] Permitting ghostwriting in these practice areas makes sense, because concerns about the inability of pro se litigants to effectively pursue their case would not apply.[144]

The most recent justification for ghostwriting is rooted in client confidentiality and the attorney-client privilege.[145] This argument recognizes that on some occasions, an attorney may have valid reasons to keep secret the fact of legal assistance, such as a desire to represent an unpopular litigant.[146] In these instances, Model Rule 1.6, which imposes a duty on attorneys to keep in confidence "information relating to the representation of a client," may shield the client from divulging the attorney's identity.[147] Although it is unclear whether the identity of the attorney constitutes such "information," the public policy of

lives and receive no help"); JUSTICE GAP, *supra* note 36, at 18 (compiling national and state studies of pro se representation, and concluding that "less than one in five—20 percent—of those requiring civil legal assistance actually receive it").

140. Goldschmidt, *supra* note 14, at 1206.

141. *See* Farley, *supra* note 21, at 563 (explaining that legal services organizations and pro bono programs only meet fifteen to twenty-five percent of the overall need of the nation's poor). Indeed, one jurisdiction considers increasing low-income litigants' access to civil justice of such importance that it permits ghostwriting only as part of an organized, nonprofit program to provide legal assistance to people of limited means. *See* N.J. Ethics Op. 713, *supra* note 21.

142. *See* Swank, *supra* note 15, at 376 (documenting the proliferation of pro se litigation in "traffic, landlord/tenant, and child support or other domestic relations issues").

143. Goldschmidt, *supra* note 14, at 1147 (internal citation omitted); *see also* David L. Walther, *Ghostwriters in the Sky*, 17 AM. J. FAM. L. 61, 61 (2003) (explaining that one of the more "common forms" of unbundled services in marital settlements is "ghost writing").

144. *See, e.g.*, Olvera v. Edmundson, No. 1:01CV74-C, 2001 WL 1019385, at *1 n.1 (W.D.N.C. June 15, 2001) (arguing that pro se litigants are "ill equipped to prosecute the complex issues raised without continued legal assistance").

145. Goldschmidt, *supra* note 14, at 1197–1205.

146. *Id.* at 1197–98.

147. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004).

promoting legal representation may justify nondisclosure.[148] The identity of the attorney may also be privileged, especially if the client "directs it be so."[149] Goldschmidt, for example, concluded that "insufficient attention" has been paid to the confidentiality and attorney-client privilege inherent in ghostwriting, but that in an "appropriate case," these doctrines may prevent disclosure.[150]

In sum, proponents of ghostwriting seek to debunk courts' criticisms of the practice, while also emphasizing the benefits of ghostwriting. Such arguments must be taken into account in Part III to ensure that any solution yields these same advantages. Part II analyzes previous solutions to concerns raised by ghostwriting, and indicates how each remedy fails.

II. PREVIOUS SOLUTIONS TO THE PROBLEMS WITH GHOSTWRITING

Previous solutions to the problems with ghostwriting can be classified into three categories. At one end of the spectrum, some authorities suggest that ghostwriting does not violate ethical or procedural rules, and thus does not merit any change in those rules.[151] Their "solution" to ghostwriting, in short, is maintaining the status quo. Representing the other extreme, some courts and commentators argue that ghostwriting clearly contravenes ethical and procedural rules.[152] As a solution, these authorities suggest that only mandatory disclosure of the ghostwriting attorney's identity will suffice.[153] Finally, some commentators recognize procedural and ethical concerns with ghostwriting, but argue for so-called anonymous disclosure whereunder a ghostwriting attorney merely discloses the fact of assistance, rather than his or her identity.[154]

148. Goldschmidt, *supra* note 14, at 1197–1203; *see also* ABA Formal Op. 07-446, *supra* note 90 (noting that an attorney "may be obliged under Rules 1.2 and 1.6 not to reveal the fact of the representation").

149. Goldschmidt, *supra* note 14, at 1204.

150. *Id.* at 1204–05.

151. *See, e.g.*, ABA Formal Op. 07-446, *supra* note 90 ("We conclude that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct."); Goldschmidt, *supra* note 14, at 1208–09.

152. *See, e.g.*, Johnson v. Bd. of County Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994); Conn. Informal Op. 98-5, *supra* note 96; Rothermich, *supra* note 14, at 2712.

153. *E.g.*, Rothermich, *supra* note 14, at 2711–12.

154. *See, e.g.*, ABA Informal Op. 1414, *supra* note 54 (arguing that "exten-

Unfortunately, these solutions fall short of resolving the ethical and procedural issues arising from ghostwriting. Proponents fail to adequately address the fundamental procedural problems of fairness and efficiency implicated by the practice. Anonymous disclosure, while addressing fairness concerns, does not remedy the inefficiencies caused by ghostwriting, especially with respect to Rule 11. Finally, proposals to mandate disclosure—at least those that do not specify how attorneys will be compelled to identify themselves—fail to offer ghostwriters incentives to disclose their assistance.

Part II uncovers these deficiencies by analyzing previous solutions from an exclusively procedural perspective. A procedural analysis, which focuses on whether a particular practice comports with judicial goals of fairness and efficiency, avoids the seemingly intractable debates over the ethics of ghostwriting.[155] More to the point, a procedural solution effectively renders any ethical ambiguities surrounding the practice moot, because most ethics opinions acknowledge that relevant court rules have supremacy over ethics opinions.[156] As one ethics board wrote, implications of ghostwriting are "first and foremost a question of procedural law to be answered by the courts."[157] This Part thus critiques past procedural discussions of ghostwriting as a foundation for the solution proposed in Part III.

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sive undisclosed participation" by an attorney is improper, but leaving the door open for more limited participation); Weeman, *supra* note 51, at 1056–61 (discussing the states that adhere to an "anonymous disclosure" approach, and recommending such an approach for Arizona).

155. *See, e.g.*, Weeman, *supra* note 51, at 1066 (noting that the "schism" between proponents of ghostwriting and those opposing it has widened, and that confusion surrounding the ethics of ghostwriting has escalated).

156. *See* ABA Formal Op. 07-446, *supra* note 90 ("We assume a jurisdiction where no law or tribunal rule requires disclosure of such participation . . . or otherwise regulates such undisclosed advice or drafting."); Ariz. Ethics Op. 05-06, *supra* note 2 (noting that the opinion does not revisit the committee's conclusion that ghostwriting may be prohibited by Rule 11, and that the legal boundaries of ghostwriting should be defined by those "with requisite authority"); N.J. Ethics Op. 713, *supra* note 21 (failing to comment on Rule 11's applicability to ghostwriting because "[t]his Committee has no jurisdiction over questions of federal civil procedure"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 613 (1990) (noting that lawyers should be "mindful of any court rule or authoritative judicial determinations" concerning ghostwriting); L.A. County Formal Op. 502, *supra* note 2 (sanctioning ghostwriting as long as there is "no court rule to the contrary").

157. Ky. Bar Ass'n, Ethics Op. KBA E-343 (1991).

A. SHORTCOMINGS OF THE NONDISCLOSURE APPROACH

The ABA Committee on Ethics and Professional Responsibility (ABA Committee) and Professor Goldschmidt are the two foremost authorities that advocate ghostwriting without any disclosure.[158] Both sources, for example, attack the undue advantage argument by explaining how courts ordinarily recognize ghostwritten pleadings.[159] Each argues that pro se litigants receiving ghostwriting assistance will not be given an undue advantage, either because courts will not construe effectively crafted documents liberally, or because ineffectively drafted documents will, by their nature, not provide the litigant with any benefit over an adversary.[160]

While both authorities are likely correct that courts refuse to give obviously ghostwritten documents the leniency normally accorded to pro se parties,[161] they fail to address a corollary of the advantage argument—that once a pro se litigant has submitted a ghostwritten document, she has *already* received an unfair advantage over her represented counterpart. In other words, ghostwriting gives pro se litigants two bites at the proverbial pleadings apple.[162] The unfairness lies not in the hypothetical discrepancy in pleading standards, but rather in the *opportunities* the pro se litigant has to achieve the minimally sufficient pleadings. While represented parties would only be afforded *one* opportunity to have their pleadings construed advantageously, the putative pro se litigant would be given the additional safety net of liberal construction if the attorney's ghostwriting assistance turned out to be ineffective.[163]

158. *See* ABA Formal Op. 07-446, *supra* note 90; Goldschmidt, *supra* note 14, at 1208–09.

159. *See* ABA Formal Op. 07-446, *supra* note 90; Goldschmidt, *supra* note 14, at 1178.

160. *See* ABA Formal Op. 07-446, *supra* note 90; Goldschmidt, *supra* note 14, at 1157–58.

161. *See, e.g.*, Barnett v. LeMaster, 12 F. App'x 774, 779 (10th Cir. 2001) (recognizing that the liberal construction normally afforded to pro se litigants is "no longer warranted" because of the presence of a ghostwriter); *cf.* Goktepe v. Lawrence, No. 3:03CV89, 2005 WL 293491, at *1 (D. Conn. Jan. 26, 2005) (refusing to construe the putative pro se litigant's pleadings "using the liberal standard typically afforded to *pro se* litigants in the past" because the litigant was actually an attorney).

162. *See In re* Brown (*Brown I*), 354 B.R. 535, 545 (Bankr. N.D. Okla. 2006) (arguing that a ghostwriter should not get a free bite "at the apple" of pleadings).

163. Of course, both represented parties and pro se litigants do have the ability to amend their pleadings once as a matter of course. FED. R. CIV. P. 15(a).

Moreover, both Goldschmidt and the ABA Committee fail to recognize that even if ghostwriting does not afford pro se litigants an actual advantage, it gives rise to an appearance of impropriety that is contrary to public policy.[164] On several occasions, the Supreme Court has underscored the "significant" public interest in preventing even the appearance of impropriety.[165] Although this interest more frequently arises in the context of public elections,[166] the Court has also concluded that in judicial proceedings, public policy militates towards preventing any improper appearances, such as those that may arise from ghostwriting.[167] Permitting the practice without any disclosure would run contrary to this expressed public policy interest.

The ABA Committee and Professor Goldschmidt differ on whether ghostwriting violates Rule 11.[168] On one hand, the Committee argues that ghostwriting does not contravene the rule, because only lawyers who physically sign pleadings make the affirmative statements that invoke Rule 11.[169] On the other hand, Goldschmidt correctly points out that ghostwriters may fall under the ambit of Rule 11: "[I]n appropriate cases, a ghostwriter attorney may be hailed into court, under Rule 11 or the inherent power of the court, and be subject to sanctions."[170] Goldschmidt persuasively cites the advisory committee notes to Rule 11 for the proposition that even attorneys who do not sign pleadings or other documents may be subject to the rule.[171]

164. *See* Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *11–12, *16 (D.N.J. Mar. 6, 2007) (discussing how ghostwriting may raise an appearance of impropriety, and later, asserting that ghostwriting violates public policy).

165. *See, e.g.*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 482 (1995).

166. *See* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982); Buckley v. Valeo, 424 U.S. 1, 30 (1976).

167. *Cf.* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 867 (1988) (discussing the appearance of impropriety created by a judge who failed to recuse himself as a federal statute required); Young v. U.S. *ex rel* Vuitton et Fils S.A., 481 U.S. 787, 811 (1987) (noting the appearance of impropriety when a judge appointed a prosecutor with personal interests in the prosecution).

168. *Compare* Goldschmidt, *supra* note 14, at 1169–78 (arguing that ghostwriters may be subject to Rule 11 sanctions), *with* ABA Formal Op. 07-446, *supra* note 90 (arguing that ghostwriters are only bound by Rule 11 if they sign pleadings and thereby make an affirmative statement).

169. *See* ABA Formal Op. 07-446, *supra* note 90; *accord* Kircher v. Charter Twp. of Ypsilanti, No. 07-13091, 2007 WL 4557714, at *4 (E.D. Mich. Dec. 21, 2007) (noting the plaintiff's argument that Rule 11 does not apply to "non-signer[s] or non-presenter[s]").

170. Goldschmidt, *supra* note 14, at 1174.

171. *Id.* (citing 1993 Advisory Notes, *supra* note 137, at 589).

Unfortunately, neither authority reaches the correct result concerning the applicability of Rule 11 to ghostwriting. First, the ABA Committee relies on an unduly narrow view of Rule 11 as applying only to attorneys or parties who physically sign documents.[172] The ABA Committee ignores both the purpose behind Rule 11,[173] as well as the advisory committee notes that explicate the rule's meaning.[174] A fundamental Rule 11 principle is that attorneys and pro se litigants have an obligation to refrain from conduct that makes administering civil actions unjust or inefficient.[175] Given that many courts bemoan both the unfairness[176] and the inefficiency[177] of ghostwriting, the ABA Committee's narrow reading of Rule 11 misses the mark, especially given courts' broad authority to sanction anyone "responsible" for violating the rule.[178]

Goldschmidt also errs in concluding that absent a reasonable belief that Rule 11 has been violated, there is no reason to compel disclosure of the ghostwriter's identity.[179] This argument ignores the Federal Rules' goals of fairness and efficiency, and problematically places the burden on courts to compel disclosure of the ghostwriter's identity,[180] a course of action that is less efficient than mandatory disclosure. In fact, nothing in Goldschmidt's logic would require *any* attorney to certify that her factual and legal assertions had a reasonable basis. Under his paradigm, if a court were concerned about the assertion made by any party, whether represented or not, it could simply wait until there were "reasonable grounds to believe a Rule 11 violation occurred," and then compel disclosure of the attorney's identity.[181] Such a pleading regime would not only be inefficient, but would also fail to deter attorneys or parties from pre-

172. *See* ABA Formal Op. 07-446, *supra* note 90.

173. The purpose behind Rule 11, as well as all of the Federal Rules, is to "secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

174. *See* 1993 Advisory Notes, *supra* note 137, at 583–92.

175. *See id.*

176. *E.g.*, Duran v. Carris, 238 F.3d 1268, 1271–72 (10th Cir. 2001); Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *12–14 (D.N.J. Mar. 6, 2007).

177. *E.g.*, *In re* West, 338 B.R. 906, 915 (Bankr. N.D. Okla. 2006); *In re* Mungo, 305 B.R. 762, 769–70 (Bankr. D.S.C. 2003); *In re* Merriam, 250 B.R. 724, 733 (Bankr. D. Colo. 2000).

178. 1993 Advisory Notes, *supra* note 137, at 588.

179. Goldschmidt, *supra* note 14, at 1175.

180. *See id.* at 1174.

181. *Id.*

senting frivolous or improper allegations, an outcome clearly contrary to the fundamental aims of Rule 11.[182]

Goldschmidt's final contribution to the ghostwriting debate is his contention that requiring disclosure of an attorney's identity would violate duties of confidentiality and the attorney-client privilege.[183] While this suggestion largely implicates ethics rules,[184] it is important to address because any proposal requiring disclosure would have to overcome these concerns. Goldschmidt argues, in essence, that myriad reasons for which a client chooses not to disclose the fact of legal assistance justify ghostwriting.[185] Applying this argument to an attorney's duty of confidentiality, the mere fact of representation is "information relating to the representation" of a client, which attorneys must not disclose.[186] Similarly, the identity of an attorney may be protected under the attorney-client privilege because it is a communication made between privileged persons in confidence for the purpose of providing legal assistance.[187]

Goldschmidt's arguments, however, are flawed because they misapprehend the nature of client confidentiality. By noting that "[t]he issue in ghostwriting is whether the *client* can maintain the confidentiality of the fact and identity of their lawyer,"[188] Goldschmidt assumes that the duty of confidentiality applies to clients. However, Model Rule 1.6 applies specifically to lawyers, and neither the rule itself nor any comments thereto suggest that clients may invoke the rule to shield their attorneys' identities.[189] Moreover, given that most explanations for ghostwriting arise out of an attorney's wish to avoid identification, Goldschmidt's speculation that there may be "many situations in which a client may not wish to make the fact that they have consulted legal counsel publicly known" is unpersuasive.[190]

182. *See* FED. R. CIV. P. 11(b)(1).

183. *See* Goldschmidt, *supra* note 14, at 1199–205.

184. *Id.* at 1199–202 (discussing how ghostwriting implicates Model Rule 1.6).

185. *See id.* at 1198.

186. *Id.* at 1199 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004)).

187. *Id.* at 1203 (citing RESTATEMENT (THIRD) GOVERNING LAWYERS § 68 cmt. c (2000)).

188. *Id.* at 1200 (emphasis added).

189. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004) (failing to discuss the rule's application to clients).

190. Goldschmidt, *supra* note 14, at 1200.

Similarly, when Goldschmidt asserts that a communication between a lawyer and a client is privileged if the client requests that it be so, he assumes that clients often will have reasons to shield the identity of their attorneys.[191] This argument ignores the vast majority of cases addressing ghostwriting, wherein attorneys, not clients, were motivated to shield their identities.[192] Moreover, even when clients might have valid reasons to shield their attorney's identity, the analogy Goldschmidt draws is inapt because of the consensus that the mere identity of a client is not protected by the privilege.[193] While Goldschmidt is correct that courts have not addressed the inverse—whether an *attorney's* identity may be privileged—his suggestion that the privilege might apply to an attorney's identity is speculation at best.[194]

Proponents of nondisclosure thus fail to analyze thoroughly the procedural implications of ghostwriting. As a result, their proposed "solution" to the problem—that the nature or extent of a ghostwriter's legal assistance "need not be disclosed"—is ineffective.[195] While these authorities persuasively note that most courts refuse to give effectively ghostwritten pleadings a liberal construction, they ignore both the real and the perceived unfairness of ghostwriting. Moreover, these authorities fail to address efficiency concerns, namely, that already overburdened courts would waste judicial resources identifying ghostwriters. A different solution is needed to address these procedural concerns.

B. SHORTCOMINGS OF THE ANONYMOUS DISCLOSURE APPROACH

Recognizing some of the problems ghostwriting creates, some authorities support a middle-ground position, that of "anonymous disclosure."[196] Under this approach, a ghostwriting attorney must declare that pleadings or other papers are "Prepared with Assistance of Counsel," but need not identify herself

191. *Id.* at 1203–05.

192. *See, e.g.*, *In re* West, 338 B.R. 906, 909–10 (Bankr. N.D. Okla. 2006) (noting an attorney's attempt to circumvent electronic pleading rules by advising his client to submit written documents pro se).

193. *See, e.g.*, *In re* Grand Jury Subpoenas, 906 F.2d 1485, 1492 (10th Cir. 1990); *In re* Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 451–52 (6th Cir. 1983); *In re* Grand Jury Witness, 695 F.2d 359, 361 (9th Cir. 1982); *In re* Grand Jury Proceedings, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc).

194. Goldschmidt, *supra* note 14, at 1203–04.

195. *See, e.g.*, ABA Formal Op. 07-446, *supra* note 90.

196. *See* Weeman, *supra* note 51, at 1056.

to the court.[197] Essentially, this argument is based on the premise that ghostwriting problems arise from a court's ignorance of the fact of attorney assistance, rather a specific attorney's identity; as long as a tribunal is aware that a ghostwriter helped a pro se litigant, it is not necessary for the client to indicate the attorney's identity.[198]

Authorities who recommend anonymous disclosure favor this approach because it eliminates fairness concerns.[199] Anonymous disclosure brings to light the attorney's assistance, thus removing any possibility that a court would give the litigant undue latitude.[200] As long as the court is aware that the pro se litigant appearing before it has received some form of assistance from an attorney, "the court can [then] determine what degree of leniency is appropriate."[201]

While the anonymous disclosure approach is a useful first step in solving some of the procedural concerns raised by ghostwriting, it does not go far enough to alleviate the inefficiencies of the practice. Specifically, failure to mandate disclosure of the attorney's identity places a burden on courts to locate ghostwriters when Rule 11 concerns arise.[202] In the event that a court needed to contact a ghostwriter, for example because of a concern about the ghostwriter's reasonable investigation into the factual and legal assertions made, the court would be unable to do so without the attorney's identity.[203] While a court could attempt to compel the pro se litigant to disclose the attorney's identity, this process would, at best, take up valua-

197. *See, e.g.*, Fla. Bar Comm. on Prof'l Ethics, Op. 79-7 (2000); City of N.Y. Formal Op. 1987-2, *supra* note 99 (mandating the use of the phrase "Prepared by Counsel").

198. City of N.Y. Formal Op. 1987-2, *supra* note 99.

199. *Id.*

200. *See* Weeman, *supra* note 51, at 1057.

201. *Id.*

202. *See, e.g.*, Stewart v. Angelone, 186 F.R.D. 342, 344 (E.D. Va. 1999) ("[T]he Court ORDERS petitioner to identify counsel, and to declare whether counsel intends to represent him in this case.").

203. For the most prominent example of a court concerned about frivolous allegations while being unable to identify the alleged ghostwriter, see Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970) (condemning a ghostwriter who supported the "irresponsible tactics" of a litigious plaintiff, and characterizing such assistance as "hit-and-run tactics"), and see also Byrne v. Nezhat, 261 F.3d 1075, 1093–94 (11th Cir. 2001) (recounting one attorney's contention that an opponent did not conduct the "requisite pre-filing investigation of the facts underpinning the complaint's claims" and arguing that one attorney was using his client's case as a "vehicle to continue his vendetta" against the opposing parties).

ble judicial resources.[204] Even though the attorney would be subject to Rule 11,[205] the difficulty of locating the attorney might make it impossible to "readily discipline[]" the attorney.[206]

Advocates of anonymous disclosure would likely present two counterarguments to efficiency concerns. First, they might question the degree to which courts actually would have to track down an unidentified ghostwriter, arguing that efficiency concerns are overblown. Yet the number of recent cases in which courts have ordered the disclosure of either the identity of the ghostwriter or a fact related thereto weakens this argument.[207] Moreover, even if courts choose not to compel disclosure of the ghostwriter, the inefficiencies of satellite litigation—merely having to conduct hearings or conferences to address potential consequences of ghostwriting—suggest that anonymous disclosure does not eliminate the inefficiencies of ghostwriting.[208]

Second, while advocates of anonymous disclosure might argue that pro se litigants assume responsibility for Rule 11 violations made by the ghostwriter, this answer is insufficient because it forces inexperienced pro se litigants to "assume the

204. *See In re* Cash Media Sys., Inc., 326 B.R. 655, 673–74 (Bankr. S.D. Tex. 2005) (suggesting that ghostwriting wastes judicial resources).

205. Although ghostwriters who anonymously disclose assistance arguably would not be subject to Rule 11, Weeman, *supra* note 51, at 1057–58, the language of Rule 11 and the advisory committee's note suggests that anyone responsible for a violation may be subject to sanctions under the rule, *see* 1993 Advisory Notes, *supra* note 137, at 588.

206. Weeman, *supra* note 51, at 1057.

207. *See* Johnson v. City of Joliet, No. 04 C 6426, 2007 WL 495258, at *3 (N.D. Ill. Feb. 13, 2007) ("We therefore order Johnson to disclose to the court in writing the identity, profession and address of the person who has been assisting her by February 20, 2007."); Blue Chip IR Group, Ltd. v. Furth, No. 2:06CV185 DS, 2006 WL 2350157, at *1 (D. Utah Aug. 11, 2006) (ordering a suspected ghostwriter to "file a Notice of Appearance in compliance with the rules of this Court if he intended to continue to appear"); Stewart v. Angelone, 186 F.R.D. 342, 344 (E.D. Va. 1999) ("[T]he Court ORDERS petitioner to identify counsel, and to declare whether counsel intends to represent him in this case."); *In re* Brown (*Brown II*), 371 B.R. 486, 493 (Bankr. N.D. Okla. 2007) (recounting the court's previous order to an attorney to "make a full disclosure to the Court regarding any fees he had billed or payments he had accepted"), *amended by* 371 B.R. 505 (Bankr. N.D. Okla. 2007); *cf.* Nasrichampang v. Woodford, No. 04CV2400BTMRBB, 2006 WL 3932924, at *1 (S.D. Cal. Mar. 3, 2006) (ordering an attorney to acknowledge "future ghostwriting" by signing "all court documents").

208. Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *4 (D.N.J. Mar. 6, 2007); *In re* West, 338 B.R. 906, 910–13 (Bankr. N.D. Okla. 2006).

risk" of a lawyer's conduct. From a procedural perspective, such a regime would be unfair to the pro se litigant, who could be sanctioned for filing frivolous legal claims of which she was utterly ignorant. Rule 11 clearly does not condone such an outcome; the advisory committee notes indicate that "responsibility for [frivolous contentions of law] is more properly placed solely on the party's attorneys."[209] In short, any solution must place responsibility for conducting a reasonable investigation, and the concomitant possibility of being sanctioned, on the attorney or party who drafts the pleadings.

C. SHORTCOMINGS OF THE MANDATORY DISCLOSURE APPROACH

Of the three solutions to the problems with ghostwriting, the mandatory disclosure approach comes closest to promoting procedural values of fairness and efficiency. It is not surprising that many of the authorities advocating mandatory disclosure for ghostwriters are courts,[210] for these tribunals are the bodies that weigh procedural values most frequently.[211] In fact, courts have uniformly condemned ghostwriting,[212] emphasizing both fairness and efficiency in doing so.[213] When discussing fairness, courts reiterate the concern that ghostwriting gives pro se litigants an undue advantage over opposing parties.[214] With regard to efficiency, tribunals have noted that identifying

209. 1993 Advisory Notes, *supra* note 137, at 589.

210. *E.g.*, Duran v. Carris, 238 F.3d 1268, 1271–73 (10th Cir. 2001); *Delso*, 2007 WL 766349, at *12–16; Ricotta v. California, 4 F. Supp. 2d 961, 985–87 (S.D. Cal. 1998); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1077–79 (E.D. Va. 1997); Johnson v. Bd. of County Comm'rs, 868 F. Supp. 1226, 1231–32 (D. Colo. 1994); Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970); *In re* Brown (*Brown I*), 354 B.R. 535, 541–42 (Bankr. N.D. Okla. 2006); *In re* West, 338 B.R. 906, 914–16 (Bankr. N.D. Okla. 2006); *In re* Cash Media Sys., Inc., 326 B.R. 655, 673 (Bankr. S.D. Tex. 2005); *In re* Mungo, 305 B.R. 762, 768–70 (Bankr. D.S.C. 2003).

211. For ethics opinions that advocate mandatory disclosure, see Conn. Informal Op. 98-5, *supra* note 96 ("It is our opinion that a lawyer who prepares and controls the content of a pleading, brief or other document to be filed with a court must, in some form satisfactory to the court, inform the court that the document was prepared by the lawyer.") and Iowa State Bar Ass'n Comm. on Prof'l Ethics & Conduct, Formal Op. 96-31 (1997), and compare N.J. Ethics Op. 713, *supra* note 21 (requiring disclosure when ghostwriting is used as a tactic "to gain advantage in litigation," while permitting ghostwriting if such assistance is part of a "non-profit program designed to provide legal assistance to people of limited means").

212. *See Brown I*, 354 B.R. at 541 (explaining that ghostwriting has been met with "universal disfavor" in federal courts).

213. *E.g.*, *In re Mungo*, 305 B.R. at 768–70.

214. *E.g.*, *Johnson*, 868 F. Supp. at 1231–32.

ghostwriters imposes an "extra strain" on courts,[215] and forces courts to expend unnecessary time adjudicating nondispositive issues.[216] Finally, courts identify both fairness and efficiency concerns when ghostwriters escape certification requirements of Rule 11; it is unfair for an opposing party to have to respond to potentially frivolous claims, and it is inefficient for the courts to sanction attorneys who are not identified in frivolous documents.[217]

John C. Rothermich supplements these courts' discussions of the procedural values related to ghostwriting by focusing on fairness and efficiency concerns in an in-depth manner.[218] Rothermich's analysis is the closest any previous commentator has come to evaluating how procedural values of fairness and efficiency apply to ghostwriting. His focus on "maximiz[ing] judicial efficiency" and "protect[ing] litigants from having to defend themselves against unfounded claims" directly implicates the procedural values inherent in the Federal Rules.[219] In fact, Rothermich's conclusion—that attorneys should somehow be compelled to disclose their assistance in drafting pleadings when they are filed—appears to alleviate the undue advantage, inefficiency, and Rule 11 concerns.[220]

While Rothermich's solution comes closer than any previous attempt to address procedural concerns, it fails to incentivize disclosure in a specific manner. Specifically, Rothermich offers no model for how to encourage attorneys to disclose their assistance.[221] He provides no paradigm—whether in the form of a carrot or a stick—that would alter the current system and its accompanying ambiguities. Given that several courts have noted that "there [are] no specific rules dealing with ghostwriting," this lack of a proposal is surprising.[222]

215. *Klein*, 309 F. Supp. at 342.

216. *See In re Mungo*, 305 B.R. at 770.

217. *See, e.g.*, Johnson v. City of Joliet, No. 04 C 6426, 2007 WL 495258, at *2–3 (N.D. Ill. Feb. 13, 2007) ("It would be patently unfair for Johnson to benefit from the less-stringent standard applied to *pro se* litigants if, in fact, she is receiving substantial behind-the-scenes assistance from counsel.").

218. *See* Rothermich, *supra* note 14, at 2715–24.

219. *Id.* at 2716.

220. *Id.* at 2722.

221. *Cf. id.* at 2728–29 (concluding that courts and bar associations should encourage limited scope representation by permitting disclosed assistance, but failing to offer a model to encourage courts and bar associations to do so).

222. *E.g.*, Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1077–78 (E.D. Va. 1997).

Experience since publication of Rothermich's article confirms the need for concrete incentives to require disclosure of attorney assistance. In the nearly ten years since Rothermich argued for mandatory disclosure, incidents of ghostwriting have only increased.[223] While there were only a handful of documented cases in 1999, now there are dozens of cases in which pro se litigants appear to be benefiting from ghostwriters.[224] For some specialty courts like bankruptcy, ghostwriting appears to be increasing with particular intensity.[225] Although some of these cases merely address the concerns with ghostwriting in passing or in footnotes,[226] it is clear that ghostwriting is a much more pervasive issue now than ever.[227] Given the procedural concerns with the practice, this trend suggests that reformers must take the next step to solve the ghostwriting problem—incentivizing disclosure through specific explication of court rules. At the same time, any solution to the problems with ghostwriting must take into account the growing need for limited scope representation, especially amongst low-income litigants. Part III offers such a solution.

223. *See* Tebo, *supra* note 82, at 16 (noting that courts around the country "increasingly are coming to grips with the practice").

224. *See, e.g.*, Kircher v. Charter Twp. of Ypsilanti, No. 07-13091, 2007 WL 4557714, at *4 (E.D. Mich. Dec. 21, 2007); Johnson v. City of Joliet, No. 04-C-6426, 2007 WL 495258, at *2 (N.D. Ill. Feb. 13, 2007); *In re* Potter, No. 7-05-14071, 2007 WL 2363104, at *3 (Bankr. D.N.M. Aug. 13, 2007); *In re* Brown (*Brown II*), 371 B.R. 486, 493 (Bankr. N.D. Okla. 2007), *amended by* 371 B.R. 505 (Bankr. N.D. Okla. 2007); *In re* Brown (*Brown I*), 354 B.R. 535, 542 (Bankr. N.D. Okla. 2006).

225. *See, e.g.*, *In re Potter*, 2007 WL 2363104, at *3–4; *Brown II*, 371 B.R. at 493; *Brown I*, 354 B.R. at 541–46; *In re* West, 338 B.R. 906, 914–15 (Bankr. N.D. Okla. 2006); *In re* Cash Media Sys. 326 B.R. 655, 673–75 (Bankr. S.D. Tex. 2005); *In re* Mungo, 305 B.R. 762, 767–71 (Bankr. D.S.C. 2003); *In re* Merriam, 250 B.R. 724, 732–33 (Bankr. D. Colo. 2000).

226. *See, e.g.*, Stone v. Allen, No. 07-0681-WS-M, 2007 WL 2807351, at *1 n.1 (S.D. Ala. Sept. 25, 2007); Edwards v. Creoks Mental Health Serv., Inc., No. 05-CV-0454-CVE-SAJ, 2007 WL 2254344, at *1 (N.D. Okla. Aug. 3, 2007); Jachnik v. Wal-Mart Stores, Inc., No. 07-cv-00263-MSK-BNB, 2007 WL 1216523, at *1 n.2 (D. Colo. Apr. 24, 2007); Johnson v. City of Joliet, No. 04 C 6426, 2007 WL 495258, at *2 (N.D. Ill. Feb. 13, 2007); Ariola v. Onondaga County Sheriff's Dep't, No. 9:04-CV-1262, 2007 WL 119453, at *3 (N.D.N.Y. Jan. 10, 2007).

227. *See* Tebo, *supra* note 82, at 16 (indicating that ghostwriting is a "trendy" legal issue because of its increasing frequency).

III. EXPANDING RULE 11 AS A SOLUTION TO PROBLEMS WITH GHOSTWRITING

In developing a solution to the procedural concerns raised by ghostwriting, it is important to delineate the objectives of any such proposal. The above analysis suggests four goals that reformers to procedural rules should strive to achieve. First, changes to procedural rules must resolve any unfairness, whether real or perceived, that pro se litigants receive through ghostwriting. Second, any solution must eliminate procedural inefficiencies inherent in the practice. Third, procedural reforms must clearly bring attorneys giving limited scope representation under the auspices of Rule 11; even though ghostwriters arguably already may be subject to sanction under the rule, courts' confusion with the applicability of Rule 11 to ghostwriting warrants an increase in clarity.[228] Finally, reforms must alleviate proponents' concerns that mandatory disclosure would conscript attorneys into full-scope representations.

This Part strives to achieve these goals by recommending amendments to Rule 11. Section A discusses the advantages of state and local rules that have authorized limited scope representation. Section B then synthesizes these arguments and offers item-by-item revisions to Rule 11. This proposal is designed to resolve procedural concerns of fairness and efficiency in ghostwriting, while ensuring that low-income litigants are not disadvantaged under a system of mandatory disclosure.

A. REVISIONS TO STATE COURT ANALOGS TO RULE 11

Of the revisions to state court pleading rules, the most basic addition is a provision expressly allowing limited representation in litigation. Colorado, for example, expressly declares that attorneys may prepare court documents for pro se litigants, but must include "the attorney's name, address, telephone number and registration number."[229] Maine's version of

228. *Compare In re West*, 338 B.R. at 915, 917 (sanctioning an attorney $1000 for violating the bankruptcy equivalent to Rule 11), *and In re Cash Media*, 326 B.R. at 674 (sanctioning an attorney $11,290.05 for violating the bankruptcy equivalent to Rule 11), *with* Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *17 (D.N.J. Mar. 6, 2007) (stating that ghostwriting does not violate Rule 11, but that it "contravene[s] the spirit" of the rule), *and Kircher*, 2007 WL 4557714, at *4 (noting that while ghostwriting may not violate Rule 11, it is still improper).

229. COLO. R. CIV. P. 11(b).

Rule 11 also expressly authorizes limited appearances for attorneys, and requires attorneys to "state precisely the scope of the limited representation."[230] Various courts in Washington, Florida, and Nevada have adopted similar rules that authorize attorneys to restrict their representation to drafting court documents.[231] Such rules meet the conscription objective by allaying attorney fears that their assistance in drafting a document will later turn into full-service representation.[232]

State pleading rules also feature an express certification requirement for drafters of otherwise pro se parties' documents. Colorado's version of Rule 11 mandates that attorneys providing drafting assistance attest that the document is well-grounded in fact, is warranted by existing law, and is not intended for any improper purposes.[233] A Washington Superior Court rule also acknowledges that attorneys may help "to draft a pleading, motion or document filed by the otherwise self-represented person," so long as the attorney makes the usual certification that the document is not otherwise improper.[234] The benefit of these rules is that they ensure that both represented parties and pro se litigants conduct a reasonable inquiry into the facts and law of claims asserted in court.

Finally, an important corollary to the certification requirement is a provision that permits attorneys to rely on their clients' recounting of facts in most circumstances.[235] Specifically, this provision recognizes that certification could prove burdensome in limited scope representations, and so authorizes an attorney providing such representations to "rely on the pro se party's representation of facts," unless the attorney believes that the representations are "false or materially insufficient."[236] This provision is beneficial because it addresses the concern that "the lawyer [in a limited scope representation] may have

230. ME. R. CIV. P. 11(b).

231. *See* FLA. FAM. L.R.P. 12.040(a)–(d); 8TH JUD. DIST. CT. NEV. R. 5.28(a); WASH. SUPER. CT. CIV. R. 11(b).

232. *See* Goldschmidt, *supra* note 14, at 1198 (indicating that a desire to avoid being conscripted into a full-service representation is one justification for ghostwriting); MSBA REPORT, *supra* note 79, at 7 (explaining that "fear of having to stay on a case forever" and "being unable to withdraw" is one principal concern related to unbundled legal services).

233. COLO. R. CIV. P. 11(b).

234. WASH. SUPER. CT. CIV. R. 11(b).

235. *See* COLO. R. CIV. P. 11(b); WASH. SUPER. CT. CIV. R. 11(b).

236. COLO. R. CIV. P. 11(b).

to spend so much time on the case that limited representation is no longer cost-effective."[237]

B. PROPOSED REVISIONS TO RULE 11

Incorporating these state court innovations, this Section proposes subdivision-by-subdivision changes to Federal Rule 11.[238] Each of the suggested revisions attempts to broaden the rule to account for the changing nature of attorney-client representation manifested in ghostwriting. Overall, the proposed changes draw on state templates to bring ghostwriters under the auspices of Rule 11, to promote procedural goals of fairness and efficiency, and to provide clarity to attorneys who wish to provide limited scope representation.

Each subsection below revises provisions in Rule 11 to regulate ghostwriting. Suggested revisions are shown in italics, and language to be omitted is stricken. The revisions begin with the signature requirement in Rule 11(a), and continue through the certification and sanctions portions in Rule 11(b) and (c). Other portions of the rule requiring no revisions, such as Rule 11(c)(1), (c)(3) and (d), are not further addressed here. Following each proposed change is a discussion of the benefits and disadvantages of amending the rule, the ultimate objective of which is to properly weigh procedural values that arise from the practice of ghostwriting.

1. The Signature Requirement

> **(a) Signature.** Every pleading, written motion, and other paper *substantially prepared by an attorney* shall be signed by at least one attorney of record in the attorney's individual name, or, if the ~~party is not represented by an attorney~~ *pleading, written motion, or other paper is not substantially prepared by an attorney, it* shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. A~~n unsigned~~ paper *not signed by its drafter* shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

First, the language "substantially prepared by an attorney" is added to indicate exactly when an attorney must sign a court document. Focusing on who prepares it, rather than on wheth-

237. Tebo, *supra* note 82, at 17.

238. While this Section only discusses Federal Rule of Civil Procedure 11, its analysis is equally applicable to similar rules in other federal and state courts. *See, e.g.*, FED. R. BANKR. P. 9011; MINN. R. CIV. P. 11.

er an individual is "represented," addresses the precise problem with ghostwriting—when an attorney assists a client with drafting, but nevertheless has the client present it to the tribunal. Adding the word "substantial" also comports with some courts' hesitancy to sanction ghostwriters who merely provide informal advice to friends or colleagues.[239] To provide further clarity, comments to the new amendments would elaborate on the meaning of the term "substantial assistance" by referencing previous decisions.[240]

Second, permitting courts to strike papers not signed by their drafters has the distinct benefit of imposing consequences on ghostwriters who conceal their assistance. Broadening the rule, in other words, ensures that documents signed by putative pro se litigants, but obviously written by an attorney, could be stricken. Given courts' demonstrated ability to spot attorney-assisted pleadings,[241] this possibility is the first incentive to encourage ghostwriters to identify themselves to a tribunal. While opponents might criticize this provision as unfairly punishing a pro se litigant for an attorney's failure to sign a document, this criticism is mitigated by the coincidence of interests between a drafting attorney and her client. Knowing that her client could be harmed irreparably by having her pleadings stricken, a ghostwriting attorney would not likely risk violating the rule, especially given that some attorneys ghostwrite specifically to help low-income or unpopular litigants who otherwise cannot obtain legal representation.[242]

2. The Certification Requirement

(b) Representations to Court.

239. *See, e.g.*, Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) (explaining that an attorney must play a "substantial role in the litigation" to qualify as a ghostwriter); *In re* Brown (*Brown I*), 354 B.R. 535, 544 (Bankr. N.D. Okla. 2006) (noting that the drafting of pleadings constitutes substantial assistance); *cf. In re* Eastlick, 349 B.R. 216, 221 n.17 (Bankr. D. Idaho 2004) (explaining that preparation of a bankruptcy petition, schedules, and statements constitutes "material" participation, which is improper if not disclosed).

240. *See, e.g.*, *Ricotta*, 4 F. Supp. 2d at 987.

241. *See, e.g.*, Stone v. Allen, No. 07-0681-WS-M, 2007 WL 2807351, at *1 n.1 (S.D. Ala. Sept. 25, 2007); Edwards v. Creoks Mental Health Serv., Inc., No. 05-CV-0454-CVE-SAJ, 2007 WL 2254344, at *1 (N.D. Okla. Aug. 3, 2007); Johnson v. City of Joliet, No. 04 C 6426, 2007 WL 495258, at *2 (N.D. Ill. Feb. 13, 2007); *In re* Potter, No. 7-05-14071, 2007 WL 2363104, at *3 (Bankr. D.N.M. Aug. 13, 2007).

242. *See, e.g.*, Goldschmidt, *supra* note 14, at 1147, 1198.

> ***(1) Full Service Representation***. By presenting to the court (whether by signing, filing, submitting, or later advocating), a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> *(A)* It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> *(B)* The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> *(C)* The allegations and other factual contentions have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;
>
> *(D)* The denials of factual contentions are warranted on the evidence, or, if specifically so identified, are reasonably based on a lack of information or belief.

There is only one major change in the first provision of Rule 11(b): the entire rule is divided into "full service representation" and "limited scope representation" subparts. As a result, the four certification requirements currently in Rule 11(b)(1)–(4) would be relabeled 11(b)(1)(A)–(D). The substance of these provisions remains the same.

> ***(2) Limited Scope Representation.*** *An attorney may provide drafting assistance to an otherwise pro se party in a court proceeding. Pleadings, written motions or other papers filed by the pro se party that were prepared with substantial drafting assistance of an attorney shall include the attorney's name, address, telephone number and registration number. In drafting the pleading, written motion or other paper, the attorney certifies that, to the best of the attorney's knowledge, information and belief, formed after a reasonable inquiry under the circumstances, subdivisions (A) through (D) of subsection (b)(1) of this rule are met. The attorney in making this inquiry may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney shall make an independent reasonable inquiry into the facts.*

There are several substantial changes to this subdivision, the most important of which is the acknowledgement that an attorney's representation of a party need not last for the entire duration of a civil action. Instead, by separating the certification provisions of the rule into "full service" and "limited scope"

portions, the Federal Rules would for the first time expressly permit attorneys to provide discrete task representation.[243]

Equally important are the substantive additions to Rule 11(b). First, the provision allowing attorneys to draft documents for otherwise pro se parties will, as did the Colorado and Maine rules, allay fears that drafting lawyers will later be conscripted into full-service representation.[244] The requirement that an assisting attorney disclose his identity recognizes fairness and efficiency concerns, and applying the certification requirements of Rule 11 also acknowledges these procedural values. Finally, to address potential concerns about the "cost-effectiveness" of limited scope representation,[245] the proposed revisions explain that a reasonable inquiry may involve less work in a limited task representation than a full-service representation.

Opponents of these changes might argue that they would not alleviate the conscription concern. In other words, critics might assert that the proposed revisions do not expressly indicate when an attorney may withdraw from a limited scope representation. Unlike court rules in Florida and Nevada,[246] the above provision does not permit attorney withdrawal without leave of court, an omission that opponents could use to undermine the proposed rule's efficacy.

However, the proposed changes, when combined with additional commentary to the rule, go as far as any revisions to Rule 11 can while still remaining true to its substance. Rule 11, above all else, concerns an attorney's duties to conduct a reasonable investigation and to certify such an effort to relevant tribunals.[247] Adding any withdrawal provisions would not square with this main purpose; indeed, the Florida and Nevada withdrawal provisions are not found in Rule 11 equivalents likely for this very reason.[248] Still, the language in the rule ex-

243. *Cf.* 1993 Advisory Notes, *supra* note 137, at 583–92 (failing to distinguish between full-service and limited scope representations in previous iterations of Rule 11); FED. R. CIV. P. 11 advisory committee's note to the 1983 amendments, *reprinted in* 97 F.R.D. 165, 198–201 (1983) (same).

244. *See* Goldschmidt, *supra* note 14, at 1198; MSBA REPORT, *supra* note 79, at 7.

245. *See* Tebo, *supra* note 82, at 17 (raising concerns about the cost-effectiveness of limited scope representation).

246. *See* FLA. FAM. L.R.P. 12.040(a)–(d); 8TH JUD. DIST. CT. NEV. R. 5.28(a).

247. *See* 1993 Advisory Notes, *supra* note 137, at 584–85.

248. *Cf.* FLA. FAM. L.R.P. 12.040(a)–(d) (failing to address the signature and certification requirements in Rule 11); 8TH JUD. DIST. CT. NEV. R. 5.28(a)

pressly permitting an attorney to provide drafting assistance to otherwise pro se parties could hardly be clearer in approving the kind of limited representation inherent in ghostwriting, as long as the attorney discloses her identity. Any ambiguities surrounding when an attorney may withdraw from representing a pro se client can be addressed in commentary to the rule, a compromise that addresses opponents' concerns while limiting the proposed changes a more practical level.

Overall, the proposed revisions largely achieve the four objectives outlined at the beginning of this Section. The first—to eliminate any real or perceived unfairness present in ghostwriting—is clearly realized because the proposed rule requires attorneys to identify themselves. More than any previous proposal, the new rule also eliminates inefficiencies that ghostwriting places on courts, by providing concrete language courts can adopt to incentivize disclosure. In other words, because the new rule expressly requires ghostwriters to disclose their assistance, it avoids the de facto burden that the practice places on courts to identify anonymous ghostwriters. Third, forcing drafting attorneys to bear the certification burden avoids potential unfairness to pro se litigants who might otherwise have to "assume the risk" of sanctions even for an attorney's legal errors. Finally, the last objective—making clear that limited drafting assistance will not turn into full-scale representations—is addressed by the language permitting drafting assistance, and may also be discussed in comments to the proposed rule.

3. Sanctions

> (c)(2)(A) Monetary sanctions may not be awarded against a represented party *or pro se litigant whose legal assertions were drafted by an attorney* for a violation of subdivision (b)(2).

There is only one minor change of note to the sanctions provision of Rule 11. The clause in Rule 11(c)(2)(A) precluding the award of monetary sanctions against a represented party for frivolous legal contentions should be expanded to apply to pro se litigants who rely on limited drafting assistance from an attorney. This avoids the potential unfairness that could result were a pro se litigant to sign pleadings drafted by an attorney and later be sanctioned.[249]

(same).

249. *See* 1993 Advisory Notes, *supra* note 137, at 589 (noting that responsibility for violations of Rule 11(b)(2) "is more properly placed solely on the

Much more importantly, applying the broad sanctions provisions to the updated certification rule would yield significant incentives for limited representation attorneys to disclose their assistance. Knowing that failure to do so would be a per se violation of subdivision (b), ghostwriting attorneys would be on notice that such action could trigger the array of sanctions listed in the rule.[250] Combining currently existing sanctions provisions with the proposed certification and representation rules would yield the very incentives for disclosure that previous proposals failed to provide.[251] The result would be a rule that, for the first time, acknowledges the changing nature of attorney-client representation and corrects the unfairness and inefficiencies that have arisen as a result of the rule's failure to address ghostwriting.[252]

4. Process for Revising Rule 11

The obstacles to amending Rule 11 are the strongest arguments against this proposal, for in the nearly seventy-year history of the rule, it has only been amended twice,[253] and the process of amending the rules has been described as "glacial."[254] Specifically, amending the Federal Rules requires seven steps: initial consideration by the advisory committee, publication of proposed amendments and public comment, consideration of the public comments and final submission of the amendments to the Standing Committee of the Federal Judicial Conference, approval by the Standing Committee, Judicial Conference approval, Supreme Court approval, and

party's attorneys" than on a represented party).

250. Possible sanctions under Rule 11 include directives of a nonmonetary nature, orders to pay a penalty into court, and reasonable attorneys' fees sufficient to deter repetition of violative conduct. FED. R. CIV. P. 11(c)(2).

251. *Cf.* Rothermich, *supra* note 14, at 2728–29 (concluding that courts should encourage limited scope representation by permitting disclosed assistance, but failing to offer a model to encourage courts and bar associations to do this).

252. *See* Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) (noting that Rule 11 does not expressly address ghostwriting); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1077–78 (E.D. Va. 1997) (same); Johnson v. Bd. of County Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994) (same).

253. Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 2 (2002) (explaining that, to that date, Rule 11 had only been amended twice).

254. Jeremy A. Colby, *E-SOP's Fables: Recent Developments in Electronic Service of Process*, J. INTERNET L., June 2006, at 3, 5.

congressional review.[255] The most recent revision to Rule 11 demonstrates that years might pass from the time amendments are proposed to when they are ultimately adopted.[256]

Yet the two previous revisions to Rule 11 suggest that the above amendments would be feasible. The 1993 revisions, for example, addressed a proliferation in satellite litigation caused by the 1983 amendments to the rule.[257] Just as the 1993 amendments attempted to reduce the expenditure of judicial resources,[258] the proposed amendments would increase the efficiency of judicial proceedings by preventing courts from having to hold conferences and hearings to identify potential ghostwriters. Especially as the salience of ghostwriting increases and its inefficient effects become felt more appreciably,[259] courts facing the same problem could readily turn to the same solution of amending the rule as a way of increasing courtroom efficiency.

In addition, the proposed changes would serve a second justification for the 1993 revisions—to lessen the "chilling effect" of previous versions of the rule.[260] As Professor Goldschmidt persuasively argues, the current uncertainty about the propriety of ghostwriting has had a chilling effect on those who wish to provide limited assistance to otherwise pro se parties.[261] For years, legal service organizations have wished to provide this representation, but have feared that providing some assistance would tax their resources if it later turned into full-service representation.[262] Amending the rule to authorize limited representations will provide the clarity well-meaning attorneys need to increase low-income litigants' access to civil justice.

Given the plight of so many low-income civil litigants like Rosann Delso and the procedural benefits amending Rule 11 would yield, the cost of doing so—having to endure the slow-

255. Sonia Salinas, *Electronic Discovery and Cost Shifting: Who Foots the Bill?*, 38 LOY. L.A. L. REV. 1639, 1641 n.15 (2005).

256. *See* Hart, *supra* note 253, at 12 (describing how the 1993 amendments were proposed in 1990).

257. *See* Kobayashi & Parker, *supra* note 112, at 100–01.

258. *See id.*

259. *See* Tebo, *supra* note 82, at 16 (explaining that courts around the country "increasingly are coming to grips with the practice" of ghostwriting).

260. Hart, *supra* note 253, at 11–12.

261. Goldschmidt, *supra* note 14, at 1184.

262. *See, e.g.*, Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994) (recounting a legal service organization attorney's request for an advisory opinion on the ethics of ghostwriting).

moving machinery of the Federal Judicial Conference—is simply too small to reject this proposal. Approximately eighty percent of low-income individuals have legal needs that go unmet,[263] and fifty percent of those requesting assistance from legal services programs are turned away due to a lack of program resources.[264] In 2006, over forty percent of federal district court appeals in civil cases came from pro se litigants.[265] These figures, when combined with the increasingly pervasive nature of ghostwriting in federal courts, demand a solution that both resolves procedural concerns and eliminates barriers to legal representation. While slow to enact, amending Rule 11 is just such a proposal.

CONCLUSION

Current rules of civil procedure do not effectively regulate the practice of ghostwriting. While in theory Rule 11 sanctions may be imposed on attorneys who fail to disclose their assistance, in practice this is unlikely to occur because of the difficulty courts face in locating ghostwriters. Moreover, the increasing prevalence of ghostwriting highlights concerns about both the ethics of the practice and the extent to which ghostwriting is consistent with procedural values. As the above analysis suggests, ghostwriting raises fairness concerns, both because putative pro se litigants are given two opportunities to submit minimally sufficient pleadings, and because the practice raises an appearance of impropriety. Ghostwriting is also inefficient because it places a burden on courts to locate the ghostwriters if the need ever arises.

To alleviate efficiency concerns caused by ghostwriting, as well as to prevent any real or perceived unfairness, reformers should revise Rule 11 to acknowledge limited scope representation. Such a change would borrow from state court templates, and would encourage otherwise hesitant attorneys to provide discrete task representation. Given the extreme need for pro se representation, such a rule will further equal justice for low-

263. JUSTICE GAP, *supra* note 36, at 18 (compiling national and state studies of pro se representation, and concluding that "less than one in five—20 percent—of those requiring civil legal assistance actually receive it").

264. *Id.* at 4.

265. Admin. Office of the U.S. Courts, 2006 Judicial Facts and Figures tbl.2.4, http://www.uscourts.gov/judicialfactsfigures/2006/Table204.pdf (last visited Mar. 12, 2008) (providing data on the number of pro se cases filed in the U.S. Courts of Appeals, excluding the Federal Circuit).

income civil litigants. Adopting the proposed revisions to Rule 11 will also promote fairness by preventing any undue advantage that might attach to putative pro se litigants who receive ghostwriting assistance, and will promote efficiency by enabling courts to easily identify drafters of court documents. In short, an expanded Rule 11 can capture the ghost that is haunting many civil courts today.