

**When the Pro Se Debtor is Represented by a Ghost
Problems with Ghostwriting**

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I. What is Ghostwriting and what is the problem?

A. Ghostwriting is the situation in which an attorney prepares documents for filing for a party who otherwise appears unrepresented in the litigation. See *In re Merriam*, 250 B.R. 724, 733 (Bankr. S. Colo 2000); *In re Cash Media Systems*, 326 B.R. 655 Bankr. S.D. Tex. 2005). It has also been described as “when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar.” *In re Mungo*, 305 B.R. 762, 767 (Bankr. D.S.C. 2003)

1. Note that ghostwriting is **not** providing substantial assistance to another attorney in preparing pleadings, motions, etc., because at least one attorney has assumed the obligations of Fed. R. Civ. P. 11/Fed. R. Bankr. P. 9011.
2. Query: is it ghostwriting to provide “sample” pleadings to a party who wishes to proceed pro se?
3. There are cases dealing with ghostwriting of orders which are not the subject of this outline. Such practice is also condemned. See *In re Colony Square*, 819 F 2d 272 (11th Cir., 1987)

B. What is the big deal? Why courts don’t like ghostwriting.

1. Deliberate attempts by members of the bar to avoid their obligations under Fed. R. Civ. P. 11 and, if applicable, local court rules;

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2. Providing pro se litigants—whose pleadings are traditionally construed liberally—with an advantage based on perceived deceptive conduct; and
3. Violations of an attorney's duty of candor toward the Court. Ghostwriting creates the impression that the client drafted the pleading. *In re Merriam*, 250 B.R. at 733; *In re West*, 338 B.R. at 911.

II. Bankruptcy cases on Ghostwriting

- A. *In re Mungo*, 305 B.R. 762 (Bankr. D.S.C. 2003). This case involved a pro se debtor who filed motions to convert his individual case from Chapter 7 to Chapter 11 and for reinstatement of the automatic stay with respect to previously abandoned property. At the time the motions were filed, the debtor's business was in bankruptcy as well and was represented by lead and local counsel. Information came to light that corporate bankruptcy counsel had actually drafted the pro se motions filed by the debtor in his individual case. The Court entered a show cause order, and ultimately issued a published opinion admonishing corporate bankruptcy counsel for their conduct and vacating their employment in the case.
- B. *In re Merriam*, 250 B.R. 724 (Bankr. D. Colo. 2000). Failure of ghostwriting attorney to sign bankruptcy petition “potentially misleads the Court, the trustee and creditors, and distorts the bankruptcy process.” *Accord In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001); *In re Johnson*, 317 B.R. 347 (Bankr. C.D. Ill. 2004); *In re Cash Media Systems*, 326 B.R. 655 (Bankr. S.D. Tex. 2005); *In re West*, 338 B.R. 906 (Bankr. N.D. Okla. 2006).
- C. *In re Castorena*, 270 B.R. 504 (Bankr.D. Idaho 2001). Attorney, offering Debtors services to assist them in filing a petition for bankruptcy relief, attempted to limit his responsibilities as counsel by declining to formally appear as the Debtors' attorney of record in the bankruptcy case. His clients technically appeared *pro se*. This Court said “there is no excuse for a lawyer, who counsels a debtor regarding a bankruptcy and prepares that debtor's petition, schedules and related documents, to fail to sign the petition.” 270 B.R. at 514. “Preparing pleadings for a party who will then appear unrepresented has been characterized by some as ‘ghostwriting.’ Courts generally disapprove of such conduct and find it sanctionable.” See *id.*, 250 B.R. at 733.
- D. *In re Johnson*, 317 B.R. 347, (Bankr. C.D. Ill 2004) held that failure to sign bankruptcy petitions prepared by the attorney and filed as *pro se* was a violation of Rule 9011 and disgorgement of the \$400 was a proper sanction.

- E. *In re West*, 338 B.R. 905 (Bankr. N.D. Okla. 2006). Attorney had ghostwritten pleadings to avoid ECF requirements and attempted to deceive the court into believing the pleadings were written by the debtors. The attorney was assessed a monetary sanction of \$1,000. and a copy of the order was provided to the Disciplinary Committee

III. Ghostwriting as viewed by State Bars

A. American Bar Association.

1. Informal Opinion 1414 (June 6, 1978). The ABA Committee on Ethics and Professional Responsibility was asked whether there were ethical restrictions on assisting a pro se litigant by preparing jury instructions, memoranda of authorities and other documents submitted to the Court. The Committee opined:
 - a. “[T]he litigant . . . has engaged in a representation A lawyer who engages in such conduct is . . . involved in the litigant’s misrepresentation.”
 - b. “We do not intend to suggest that a lawyer may never . . . prepare or assist in the preparation of a pleading for a litigant.”
2. What if the ghostwriting is disclosed to the court?
 - a. The Comment to Model Rule 1.2©, in discussing ghostwriting, states that “[s]uch surreptitious representation is not looked upon favorably,” but notes that some cases and ethics opinions permit ghostwriting so long as it is disclosed to the court. Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct at Rule 1.2 Comment (5th ed. 2003).
 - b. However, see *In re Merriam*, 250 B.R. at 734, footnote 11 stating that a disclosure of fees under Rule 2016 alerts the court to the consultation by the attorney, but “such disclosures do not substitute for the signature that certifies that the petition was not filed for improper purposes and that there was a reasonable investigation.”
3. Model Rule 6.5. allows a lawyer, under the auspices of a program sponsored by a nonprofit organization or court, to provide “short-term limited legal services” to clients without the expectation of continuing representation in the matter.

- a. This Rule was adopted in 2002 but to address fears that conflict-of-interest rules were limiting volunteer legal services. Center for Professional Responsibility, American Bar Association, Annotated Model Rules of Professional Conduct at Rule 6.5 Comment (5th ed. 2003). Ghostwriting is not mentioned in the Comments to the Rule. Id.
- b. Query: what are “short-term limited services” in the context of bankruptcy?

B. Maryland Committee on Ethics

1. Docket 77-1 (Docket 77-35). Opined that it would be a violation of Disciplinary Rules for an attorney to prepare an answer for an adverse party appearing pro se. Among other reasons, the Committee believed that the practice improperly misleads the court by giving the impression that a pleading has been prepared by a pro se party.
2. Docket 90-11. Reconsidered Docket 77-1 in light of adoption of Rules of Professional Conduct but still concluded that preparation of answer for adverse party would still be improper.
3. The ability to limit representation in bankruptcy matters has been restricted by Md. Local Bankr. R. 9010-5. Most local rules have similar provisions

C. District of Columbia

1. Ethics Opinion 330 (July 2005). Committee opines that D.C. Rules of Professional Conduct do not require lawyers to disclose limited assistance to pro se parties, but notes that Courts may impose their own disclosure requirements.
2. Rules of Professional Conduct.
 - a. Rule 1.2© is worded differently from the Model Rule: “A lawyer may limit the objective of the representation if the client consents after consultation.” Note that the “reasonable under the circumstances” requirement is missing.
 - b. The ability to limit representation in bankruptcy matters has been restricted by D.C. Local Bankr. R. 9010-1.

D. Virginia

1. Legal Ethics Opinions.

- a. LEO 1127 (1988). A lawyer may prepare discovery requests, pleadings or briefs for signature by a pro se litigant, but involvement must be disclosed to the court.
- b. LEO 1592 (1994). Assistance of attorney who drafts pleadings for pro se party must be disclosed.
- c. LEO 1761 (2002). A legal services office may ethically provide forms to pro se litigants and not violate any disclosure requirements imposed by a court, so long as no assistance is provided in the completion of the forms.
- d. LEO 1803 (2005). An attorney who actually drafts a pleading, either in whole or in part, must disclose involvement. The attorney does not, however, need to appear as counsel of record.

2. Proposed Rule 1.2(b)- (c):

(b) A lawyer may limit the scope of the representation if the client consents after consultation, during which consultation the lawyer shall include disclosure of the risks and benefits of such limited representation. In any limited representation, the lawyer shall remain bound by all Rules of Professional Conduct.

(c) A lawyer may assist in the preparation of pleadings or other filings in a tribunal on behalf of a pro se litigant. If the lawyer substantially prepares a filing for a tribunal, the lawyer must take reasonable measures to assure that the lawyer's role is disclosed in writing to the tribunal and to the opposing counsel. If a lawyer substantially prepares a pleading for a pro se litigant, the lawyer must identify him or herself in the pleading as having substantially prepared the pleading for the client to file pro se. All rules and regulations governing competence, due diligence and the requirement that pleadings be meritorious shall apply to the lawyer's conduct in preparing the pleading.

- 3.. If this rule is adopted, does it by referring to all rules and regulations adopt Rule 9011?

IV. Ghostwriters as “debt relief agencies.”

- A. Attorneys who ghostwrite are likely “debt relief agencies” under BAPCPA. Debt Relief Agencies are defined as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration.” 11 U.S.C. § 101(12A). An “assisted person” is defined as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.” 11 U.S.C. § 101(3).
- B. This would also apply to non-attorney petition preparers who have a duty under 11 U.S.C. § 110 to disclose their involvement and provide other information.
- C. By definition an attorney is not a petition preparer. 11 U.S.C. § 110(a)(1). See: *In re Johnson*, 317 B.R. 347, (Bankr. C.D. Ill 2004) in which court acknowledged that attorneys cannot act as petition preparers.