ORANGE COUNTY BAR ASSOCIATION Formal Opinion 2014-1 (Ghostwriting by Contract Lawyers and Out-of-State Lawyers)

Issue:

What ethical issues are raised when (1) a lawyer licensed to practice law only outside of California and who resides outside of California, or (2) a contract lawyer licensed to practice law in California, ghostwrites documents submitted to the court by another California lawyer?

Factual Hypotheticals:

This opinion examines two hypothetical factual scenarios involving ghostwriting:

Hypothetical #1:

California Counsel of Record is a member of Law Firm. California Counsel of Record hires Out-of-State Lawyer to draft pleadings and other documents in connection with a case pending in California state court in which California Counsel of Record and Law Firm represent Client. Out-of-State Lawyer is licensed in and resides in a state other than California, and is not admitted to practice law in California or otherwise authorized to practice in California temporarily. Nor is Out-of-State Lawyer associated with Law Firm. The documents, which are submitted to the California court, are reviewed and signed by California Counsel of Record, but do not in any way indicate Out-of-State Lawyer participated in drafting the documents.

Hypothetical #2:

An independent Contract Lawyer not associated with Law Firm, who is licensed to practice law in California, also drafts documents for California Counsel of Record. Contract Lawyer's role in preparing the documents is not revealed in the documents, which are submitted to a California state court under the name of California Counsel of Record and Law Firm. The Client is not aware of the involvement of contract lawyer.

Discussion:

The practice of an attorney writing documents filed with the court without disclosure to the court or opposing counsel of the attorney's involvement (colloquially referred to as "ghostwriting") is expressly authorized in the context of a lawyer providing unbundled legal services (also known as limited scope representation) to a *pro se* litigant. Specifically, California law authorizes a client to file with the court a document drafted by an attorney, without disclosing to the court the attorney's involvement, unless legal fees are sought by the client litigant.[1] Cal. Rules of Ct.,

[1] Where the client in a civil proceeding seeks recovery of attorneys' fees incurred drafting a document, the litigant must disclose to the court the information required for a proper determination of the attorneys' fees, including the name of the attorney who assisted in preparation of the document; the time involved or other basis for billing; the tasks performed; and the amount billed. Cal. Rules of Ct., Rule 3.37(b). Rule

Rule 3.37 (2012);[2] *see also* Cal. Rules of Ct., Rule 5.425(f) (allowing lawyer to draft documents for *pro se* client in family law proceeding without disclosure to court). This opinion considers whether a lawyer ethically may engage in ghostwriting not directly for a *pro se* litigant, but rather for another lawyer on behalf of a client.

Duty of Candor to the Court

One issue raised by the practice of ghostwriting is whether a lawyer's duty of candor to the court requires him to disclose to the court the ghostwriter's involvement in preparing the submitted document. Business and Professions Code section 6068(d) provides that a lawyer has a duty "[t]o employ, for the purpose of maintaining the causes confided to him or her, those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Cal. Bus. & Prof. Code § 6068(d); *see also* Cal. Rules Prof'l Conduct, Rule 5-200(A) (attorney "[s]hall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth"); Rule 5-200(B) (attorney "[s]hall not seek to mislead the [court] by an artifice or false statement of fact or law"). The question here is whether, by filing papers with the court that do not disclose the ghostwriting author's efforts, the lawyers involved are violating their respective duties of candor to the court.

In the context of unbundled legal services provided to a *pro se* litigant, where the client files papers with the court that do not disclose the attorney's involvement in their preparation (that is, the context expressly allowed by Rule 3.37(a)), the American Bar Association concluded that there is no deception by a lawyer engaged in such ghostwriting because there is no statement made to the court by that lawyer. ABA Op. 07-446 (2007). Other jurisdictions' ethics committees are split regarding whether ghostwriting in the context of a limited scope representation is misleading to the court.[3] Many jurisdictions agree with the ABA that such a practice is not inherently misleading, but some require notification to the court, and others require such notification only if the contribution is substantial. *Id*. at 1-2.

Those jurisdictions requiring disclosure generally base their conclusions on the notion that *pro se* litigants often receive special treatment from the court, and that, as a result, it would be unfair and dishonest if the *pro se* litigant in fact were represented in connection with a court filing. *See, e.g.,* Association of the Bar of the City of New York, Committee on Prof'l & Jud. Eth. Formal Op. 1987-2) ("Pro se litigants are the beneficiaries of special treatment. They are 'commonly

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3.37(b) does not specifically address whether such disclosure is necessary when a litigant seeks to recover fees in the form of sanctions – for example, in the context of a discovery motion. The Committee expresses no opinion on whether Rule 3.37(b) applies to a litigant seeking sanctions, whether or not based on attorneys' fees incurred.

[2] Rule 3.37(a) provides, "In a civil proceeding, an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the documents that he or she was involved in preparing the documents."

[3] *Compare* Arizona Eth. Op. 06-03 (July 2006); Illinois State Bar Ass'n Op. 849 (Dec. 9, 1983); Virginia Legal Eth. Op. 1761 (Jan. 6, 2002) (all finding no disclosure of ghostwriting is required), *with* Colorado Bar Ass'n Eth. Op. 101 (Jan. 17, 1998), Connecticut Inf. Eth. Op. 98-5 (Jan. 30, 1998); Delaware State Bar Ass'n Committee on Prof'l Eth. Op. 1994-2 (May 6, 1994); Kentucky Bar Ass'n Eth. Op. E-343 (Jan. 1991); New York State Bar Ass'n Committee on Prof'l Eth. Op. 613 (Sept. 24, 1990) (all finding some disclosure required).

required to comply with standards less stringent than those applied to expertly trained members of the legal profession.'" (citing *Bates v. Jean*, 745 F.2d 1146-1150 (7th Cir. 1984)); Alabama Bar Op. No. 2010-01 (noting that the absence of disclosure "requires us to construe matters differently for the litigant, as we give pro se litigants liberal treatment, precisely because they do not have lawyers"). These same concerns do not exist where a lawyer is ghostwriting not directly for the client, but rather for another lawyer.[4]

Some federal courts have held that ghostwriting violates the lawyer's certification obligations under Rule 11. Fed. R. Civ. Pro. 11. That rule requires either that an attorney representing a litigant sign the documents filed with the court, or that an unrepresented party sign the documents. The signer certifies that the document is being filed in good faith, for a proper purpose, is not frivolous, and has an evidentiary basis. *Id.*

Federal courts addressing ghostwriting by attorneys for *pro se* litigants are split.[5] In a California District Court case, *Ricotta v. State of California*, 4 F. Supp. 2d 961, 987-988 (S.D. Cal. 1998), the court found that ghostwriting a substantial part of a *pro se* litigant's pleadings was "unprofessional" conduct; but the court did not hold the attorney in contempt because the conduct was not a violation of any rule or law.

One federal bankruptcy court held that, in order to recover attorneys' fees for appearances made by the contract lawyer on behalf of the debtor, the debtor must inform the court of the participation of the contract lawyer. *In re Wright*, 290 B.R. 145, 156 (C.D. Cal. Bkrtcy. 2003). This appears to be consistent with Rule 3.37(b).

Duty of Honesty

Lawyers also have an ethical duty of honesty. The issue in the context of ghostwriting is whether submission of papers to the court that do not disclose the ghostwriting lawyer's involvement violates this important ethical duty.

The commission of any act involving moral turpitude, dishonesty or corruption, whether or not the act is committed in the course of one's relations as an attorney, and whether or not the act is a felony or misdemeanor, constitutes cause for disbarment or suspension. Cal. Bus. & Prof. Code § 6106.

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[4] We do not share these concerns in any event, even in the context of ghostwriting for a *pro se* litigant. Nor did the ABA in its Formal Opinion 07-446: "[M]any authorities studying ghostwriting in [the *pro se*] context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage."

[5] *Compare In re Liu*, 664 F.3d 367 (2d Cir. 2011) (dismissing charges that lawyer violated duty to avoid dishonest conduct by not informing the court of her assistance in drafting petitions filed *pro se*) *with Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971) (where lawyer's contribution to drafting a brief is substantial, lawyer violates Rule 11 if she does not sign name to brief submitted by a *pro se* litigant); *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001) (ghostwritten brief by attorney for *pro se* appellate litigant is a misrepresentation to court by litigant and attorney). For a summary of federal court views on ghostwriting, *see* Jessie M. Brown, *Ghostwriting and the Erie Doctrine: Why Federalism Calls for Respecting States' Ethical Treatment of Ghostwriting*, 2013 J. of Prof. Lawyer 217 (2013).

Just as a lawyer does not violate his duty of candor by ghostwriting for a *pro se* client to whom he is providing unbundled legal services, neither does he violate his duty of honesty. The ABA expressly reaches this conclusion in its Formal Opinion 07-446, concluding that it does not violate Model Rule 8.4[6] because the lawyer is making no statement to the forum, and the lawyer's assistance would not be material to the court, in the absence of any affirmative statement by the client that the documents were prepared without legal assistance. ABA Formal Opn. 07-446 (2007). Similarly, the Los Angeles County Bar Association concluded that ghostwriting documents for *pro se* litigants is not a deceptive practice, but that lawyers must follow the law as articulated by the courts. Los Angeles County Bar Ass'n Ethics Op. No. 502 (1999). For the same reasons discussed above, the failure to disclose the presence of a ghostwriting lawyer would raise even fewer honesty concerns where the ghostwriting is done for another lawyer instead of for a *pro se* litigant, as neither the court nor opposing counsel would be under the misimpression that documents were drafted by a non-lawyer deserving of special treatment.

Duties of Competence and Supervision

A lawyer has a duty to perform services competently, including the application of diligence, learning, and skill. Cal. Rule Prof'l. Conduct, Rule 3-110 (A) and (B). This includes the duty to supervise the work of subordinate employees. *Id., Discussion*; State Bar of California Formal Opinion No. 2004-165 at p. 2.

Unauthorized Practice of Law

Only active members of the California State Bar may practice law in California, which includes advising clients regarding legal issues and acting on a client's behalf regarding legal matters. Cal. Bus & Prof. Code § 6125. This prohibition applies to both non-attorneys and out-of-state attorneys. *See Birbrower, Montalbano, Condon & Frank, PC v. Super. Ct.*, 17 Cal. 4th 119, 128 (1998). The issue here is whether the ghostwriting by Out-of-State Lawyer, who is not licensed in California or otherwise admitted in California, and resides outside of California, constitutes the unauthorized practice of law.[7]

Lawyers admitted to practice and residing in another state may practice in California temporarily through California's Multijurisdictional Practice Program, and pursuant to California Rules of Court 9.45, 9.46, 9.47, 9.48, through *pro hac vice* admission.[8] Persons engaged in the unauthorized practice of law in California commit a misdemeanor offense. Cal. Bus & Prof.

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[6] Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[7] Similar issues may arise when a non-California lawyer who is a member of a law firm that also has California lawyers works on a California matter.

[8] A person who is a California resident but licensed to practice law in a state other than California may not appear *pro hac vice* in California. Cal. Rule of Ct. Rule 9.40; *see also Paciulan v. George*, 229 F.3d 1226, 1228-29 (9th Cir 2000). Similarly, a person who is regularly engaged in business activities in the State of California or regularly employed in the State of California is not eligible to appear as counsel *pro hac vice.* Cal. Rules of Court, Rule 9.40.

Code § 6126. A member shall not aid in the unauthorized practice of law. Cal. Rule Prof'l Conduct, Rule 1-310.

Where no member of a law firm engaged in a representation is admitted to practice in California, an attorney cannot collect fees for practicing law in California. *Birbrower,* 17 Cal. 4th at 137. In *Birbrower,* a New York law firm represented a California client in a dispute, making arrangements for arbitration in California, and negotiating settlement, using attorneys not licensed in California. The California Supreme Court held that the practice of law in California entails (1) sufficient contact with a California client to render the nature of legal service a clear legal representation; and (2) the engagement in sufficient activities in the state or the creation of a continuing relationship with a California client that includes the exercise of legal duties. *Id.* at 128. Physical presence in California is a factor, but is not dispositive: "[O]ne may practice law in violation of section 6125 although not physically present by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means." *Id.* at 128-29.

In *Birbrower*, the Court held that each case must be decided on its individual facts, but that the firm before it had practiced law in California when representing a California client in a dispute. Specifically, the Court relied on the facts that the lawyer traveled to California to advise a California client, met with the client, made preliminary arbitration arrangements, and negotiated a settlement using attorneys who were not members of the California bar. *Id.* at 129, 140.

In a federal case, *Winterrowd v. Am. Gen'l Annuity Ins.,* 556 F.3d 815 (9th Cir. 2009), an Oregon lawyer assisted a California lawyer litigating a case before the United States District Court for the Central District of California, although the Oregon attorney was neither licensed in California nor admitted *pro hac vice* in the Central District. The court noted that the Oregon attorney did not "appear" before the court, did not sign any pleadings, and had little contact with opposing counsel or clients. It also noted that the California attorney supervised the Oregon attorney. The court held that there was no ethical violation:

> so long as the particular person admitted in that state is the person who, on behalf of the firm, *vouched for the work of all of the others and, with the client and in the courts, did the legal acts defined by that state as the practice of law....*
> The important requirement in this respect is simply that the local man must be admitted in the state and *must have the ability to make, and be responsible for making, decisions for the lawyer group.*

Id. at 824-25 (citing ABA Comm. on Prof'l Ethics Opinions, No. 316 (1967)) (emphasis added).

Duty To Keep Client Informed

"A [lawyer] shall keep a client reasonably informed about significant developments relating to the employment or representation, . . ." Cal. Rules of Prof. Conduct, rule 3-500. Similarly, a lawyer has a duty "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the

attorney has agreed to provide legal services." Cal. Bus. & Prof. Code § 6068(m).

State Bar of California Formal Opinion No.1994–138 provides guidance on what the term "significant development" means under Rule 3-500 and Section 6068(m):

> To determine whether the use of an outside lawyer constitutes a significant development, counsel must look at the circumstances of the particular case. Included in the relevant factors are "(i) whether responsibility for overseeing the client's matter is being changed; (ii) whether the new attorney will be performing a significant portion or aspect of the work or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client."

In re Wright, 290 B.R. 145, 151-52 (C.D. Cal. Bkrtcy. 2003), *quoting* State Bar of California Formal Opinion 1994–138. In addition to these factors, the client's reasonable expectations under the circumstances may be considered. *See* State Bar of California Formal Opinion No. 2004-165 at p. 3.

The lawyer using an outside contract lawyer to ghostwrite should inform his client that he has hired an outside lawyer or law firm if the use of the outside lawyer or law firm is a significant development. Where the lawyer reasonably expects, at the outset of the case, that he will use the services of a contract lawyer to perform significant functions, he also should include such a disclosure in a written fee agreement. State Bar of California Formal Opinion No. 2004-165 at p. 4[9]; *see also* Cal. Bus. & Prof. Code § 6148 (requiring written fee agreement in certain situations); ABA Op. 88-356 (1988) (arrangement must be disclosed to the client only when temporary lawyer performs work without close supervision of lawyer associated with Law Firm).

Application:

Hypothetical #1:

In our opinion, Out-of-State Lawyer is not violating the duty of candor to the court or the duty of honesty under California law[10] because Out-of-State Lawyer has made no affirmative statement to the court or in any other way misled the court or opposing counsel. As for California Counsel

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[9] To the extent a contract lawyer can be viewed as splitting a fee with the lawyer who hires him, then Rule 2-200 would require the client's written consent to the arrangement. State Bar of California Formal Opinion No. 1994-138 stated a three-part test for determining whether an arrangement with a contract lawyer constitutes the division or splitting of fees:

> (1) The amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If payment meets all three criteria, no regulated division of fees has occurred.

State Bar of California Formal Opinion No. 2004-165 (quoting State Bar of California Formal Opinion No. 1994-138); *see also* ABA Op. 88-356 (1988) (finding rationale for fee-splitting rules did not apply in the temporary or contract lawyer situation).

[10] Because the opinions of various jurisdictions differ, an out-of-state lawyer also must consider the applicable ethics rules and opinions of the jurisdiction in which he is licensed to practice law.

of Record and Law Firm, we conclude that they need not disclose the involvement of Out-of-State Lawyer to the court unless a fee request is made because the involvement of Out-of-State Lawyer is not material to the court. *See* Rule of Court 3.37(a). Following the logic of the ABA opinion in the *pro se* context, the involvement of Out-of-State Lawyer is not material to the court in the absence of a fee request because there is no special treatment that otherwise might be given to California Counsel of Record and Law Firm as a result of the court's lack of knowledge of the involvement of Out-of-State Lawyer.

If the engagement of Out-of-State Lawyer would be material to Client, California Counsel of Record should disclose his engagement to Client. Such disclosure should occur at the outset of the representation if Law Firm knows it will be using an out-of-state lawyer or as soon as Law Firm engages Out-of-State Lawyer to work on Client's matter.

Whether Out-of-State Lawyer is engaging in the unauthorized practice of law in California, and whether California Counsel of Record and Law Firm are aiding in his unauthorized practice of law, will depend on the specific factual situation and the scope of Out-of-State Lawyer's involvement. The analysis will consider the significance of the contact with the client and the activity in the state, which may occur in person or remotely through the use of technology, as discussed in *Birbrower*. Assuming there is no significant involvement with Client, however, the mere act of Out-of-State Lawyer's ghostwriting a document for California Counsel of Record is not likely to constitute the unauthorized practice of law in California.

Finally, California Counsel of Record's duty of competence includes the duty to supervise subordinate lawyers, which would include Out-of-State Lawyer, so that the representation of Client by Law Firm is handled in a competent manner.

Hypothetical #2:

Under the facts of this hypothetical, there is no issue regarding the unauthorized practice of law because both Contract Lawyer and California Counsel of Record are admitted to practice in California.

In our opinion, Contract Lawyer is not violating his duty of candor to the court or the duty of honesty under California law and ethics rules because the Contract Lawyer has made no affirmative statement to the court. California Counsel of Record has not violated the duty of candor as long as he has not misled the court regarding the lawyer or lawyers working on the case. Depending on the scope of Contract Lawyer's services, however, his involvement may be a material development that should be disclosed to Client. To the extent Client or California Counsel of Record does not want to disclose to the court or opposing counsel the involvement of Contract Lawyer, California Counsel of Record should advise Client regarding the possibility that Client will not be able to obtain an award of attorneys' fees for the work of Contract Lawyer. Finally, it is conceivable, depending on the financial arrangement between Contract Lawyer and Law Firm, that it may be necessary to obtain Client's written consent to the arrangement.[11]

[11] *In re Wright* suggests that, at least in the bankruptcy context, a lawyer seeking fees for work performed by a contract lawyer always must be able to demonstrate he had the consent of his client to the

Finally, Contract Lawyer and California Counsel of Record both have a duty of competence which includes the duty to supervise Contract Lawyer so that the representation of Client by Law Firm is handled in a competent manner.

Conclusion

There is nothing inherently unethical with a client or lawyer hiring another lawyer – often a contract lawyer – to ghostwrite a document to be submitted to court, without identifying the contract lawyer or disclosing his involvement. Only when the client or lawyer seeks to recover his attorneys' fees must the contract lawyer's role be disclosed to the court. If, however, the involvement of the contract lawyer constitutes a significant development, then his involvement must be disclosed to the client. Whatever the relationship, however, both lawyers must comply with their ethical obligations, including their duties of competence. In addition, to the extent the contract lawyer is not admitted to practice in California, both lawyers must guard against the potential unauthorized practice of law.

arrangement with the contract lawyer. 290 B.R. at 156. As discussed above, however, consent under California ethics rules and, in particular, Rule 2-200, is required only in limited circumstances.