Ghostwriting Appellate Briefs: The Rules Aren't So Clear

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A pro se litigant badly wants to file an appeal but can't afford a lawyer. She approaches an attorney whose name she received from a friend and asks for help. Unwilling to sign on pro bono but feeling bad for a friend of a friend, the lawyer offers to sketch out a bare bones version of the arguments, which the pro se can reformat and flesh out as her brief.

Or suppose Lawyer A wants Lawyer B to handle an appeal. Lawyer B doesn't want the case—the client isn't his cup of tea or the positions seem embarrassingly weak—but he agrees to write a portion of the brief as a "consultant" because the argument mirrors one he just drafted for another brief. With minimal effort, he can help Lawyer A and reap a small fee without the hassle of appearing, taking responsibility for the full appeal, and so on.

In these scenarios, a lawyer has decided to ghostwrite, that is, draft all or part of an appellate brief while remaining undisclosed. Is that kosher? Like apparitions themselves, the answer is hazy.

No procedural or disciplinary rule directly addresses ghostwriting, though several seem to come close. Texas Appellate Rule 9.1 mandates that, "[i]f a party is represented by counsel, a document filed on that party's behalf must be signed by at least one of the party's attorneys." The same requirement appears in Federal Appellate Rule 32(d).

But the rules do not say how much assistance constitutes representation, and if one lawyer has ghostwritten for another, the appearing lawyer's signature alone appears to satisfy the obligation in any case.

Rule 28.2.1 of the U.S. Court of Appeals for the Fifth Circuit requires briefs and nonprocedural motions to include a "Certificate of Interested Persons" identifying all "counsel in the case," but there is no guidance on whether ghostwriters fit this description. It might refer only to counsel who've appeared in the case, particularly since it exists to facilitate recusal decisions and anonymous drafting ordinarily cannot give rise to recusal.

Then there are the disciplinary rules. The one often cited to prohibit ghostwriting is Rule 3.03,

"Candor Toward the Tribunal." It precludes a lawyer from knowingly making "a false statement of material fact or law" to the court, and Comment 2 suggests that some omissions may also count as affirmative misrepresentations. Yet like the signature rule, Rule 3.03 only applies to "a lawyer who is representing a client before a tribunal," and the existence of a ghostwriter may not be material anyway.

Similarly, Rule 8.04(a)(3) generally precludes "conduct involving dishonesty, fraud, deceit or misrepresentation." Ghostwriting probably doesn't rate as this sort of serious misconduct.

Because Rule 1.02(b) permits lawyers to limit the scope of their representation, an attorney can agree to draft some or all of a brief without representing the client for all purposes. Still, this leaves open whether the ghostwriter is necessarily engaged in representation in the first place.

Federal appellate courts are split on the propriety of ghostwriting. The First and Tenth circuits condemn the practice (see *Duran v. Carris* from the Tenth in 2001, and *Ellis v. State of Maine* from the First in 1971). So have a great many federal district courts.

One concern voiced by opponents is that pro se litigants with ghostwritten papers may reap the benefit of the more liberal reading typically given submissions from nonlawyers, though an attorney was actually, secretly involved. Another is that a ghostwriter's anonymous status renders him sanction-proof and thereby liberates him from duties owed to the court, such the obligations to fairly describe facts and cite unfavorable precedent. The First and Tenth Circuits mention Fed. R. Civ. P. 11 in this regard, though that rule only applies in district court.

On the other hand, the Second Circuit recently reversed sanctions against a lawyer for ghostwriting papers in the trial court (see *In re Liu* from 2011). The court highlighted state ethics opinions allowing the practice and particularly emphasized a 2007 opinion from the American Bar Association's Committee on Ethics and Professional Responsibility.

The ABA committee concluded that ghostwriting is not material and so need not be disclosed. It agreed with commentators who argue that nondisclosure does not give pro se parties an unfair advantage because effective legal assistance will be obvious to the court. Nor has the ghostwriter been dishonest, according to the committee, since she made no affirmative misrepresentation.

Other proponents of ghostwriting cite the growing number of people unable to afford standard legal fees and the trend toward "unbundled" services permitted under Rule 1.02(b) as reasons to allow or even encourage limited, undisclosed assistance from lawyers.

In the wake of the ABA opinion, several states have issued ethics opinions endorsing ghostwriting or changed their rules to allow it. As the Second Circuit noted in *Liu*: "[I]n contrast to the federal court precedents, a majority of state courts and state ethics committees are reportedly more open to undisclosed ghostwriting, although that majority might be described as slim."

For all this ferment, Texas lawyers remain in the dark. The Texas State Bar has not issued an ethics opinion on ghostwriting and neither Texas courts nor the Fifth Circuit seem to have considered it. Until one or the other occurs, Texas lawyers tempted by the prospect of anonymous appellate work will have to take their chances.
