

GIVING UP THE GHOST: ALASKA BAR ETHICS OPINION 93-1 AND UNDISCLOSED ATTORNEY ASSISTANCE REVISITED

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ABSTRACT

Twenty years ago, the Alaska Bar Association adopted Ethics Opinion No. 93-1 which permitted attorneys to “ghostwrite” pleadings and provide other undisclosed services to pro se litigants. The goal of this ethical guidance was to enable attorneys to assist low-income individuals who could not otherwise afford representation. Ethics Opinion No. 93-1 construed “ghostwriting” broadly as an attorney’s undisclosed assistance to a pro se client whether by providing legal advice or drafting pleadings or other documents. This Note argues that, despite the moral allure of its theoretical justifications, ghostwriting is unnecessary, provides little demonstrable benefit to pro se litigants, and potentially conceals the unethical practice of law. Ghostwriting may also confuse the interactions between judges and pro se litigants in a way that works against the pro se party’s interests. Specifically, this Note argues that ghostwriting may cause judges to misapprehend pro se litigants’ legal understanding and to withdraw prematurely the solicitude those judges are otherwise required to give. Therefore, the Alaska Bar Association should revise its guidance on ghostwriting to require attorneys providing unbundled services to append their Alaska Bar Number on their submissions. This requirement would discourage abuses, enable judges effectively to manage pro se litigants, and still permit experimentation in the unbundled legal market.

INTRODUCTION

For several decades, Alaska’s bench and bar have debated how best

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to respond to the increasing number of individuals who represent themselves in court because they believe the services of a lawyer are unaffordable, unavailable, or undesirable. Pro se litigants present a number of challenges to state court systems: they frequently have difficulty managing procedural requirements and articulating their legal claims; they require judges and courthouse staff to instruct them on basic matters that lawyers handle with dispatch; and they often drop-out of or fail unnecessarily in the pursuit of justice due to a lack of knowledge and appropriate resources, thus creating a massive pool of unmet legal needs. The increasing number of such litigants, therefore, raises a question: can courts and the legal profession devise a way to provide these citizens with effective “access to justice” while maintaining a neutral and efficient tribunal and upholding the values of the legal profession?

Twenty years ago, the Alaska Bar Association Ethics Committee led the State’s effort to respond to this problem by issuing Opinion No. 93-1 (“Alaska Op. 93-1” or the “Opinion”).¹ Alaska Op. 93-1 permitted attorneys to “ghostwrite” the filings of pro se litigants under certain conditions as a means of enabling attorneys to assist low-income individuals who could not otherwise afford full representation.² The Opinion did not define “ghostwriting,” but seemed to construe it broadly as an attorney’s undisclosed assistance to a client who proceeds pro se, regardless of whether this assistance takes the form of writing pleadings or providing legal advice.³ In either case, the attorney neither enters an appearance in the litigation nor signs the documents he helps to prepare. The Opinion operated under an implicit assumption that a lawyer’s “ghostwriting” services to a pro se client would amount to less than traditional, full-service representation.⁴ In this respect, Alaska Op. 93-1 anticipated by more than a decade the Alaska Supreme Court’s adoption of a revised Rule 1.2(c) of the Alaska Rules of Professional Conduct (“ARPC”), which officially permitted Alaska attorneys to limit

1. Alaska Bar Ass’n Ethics Comm., Op. 93-1 (1993) [hereinafter Alaska Op. 93-1], available at <https://www.alaskabar.org/servlet/content/365.html>.

2. *Id.* at 1.

3. *See id.* at 1-2 (discussing a lawyer’s provision of “legal services” and using classes taught by non-profit legal assistance organizations as an example).

4. In the litigation context, full-service representation is typically defined as charging a client a single fee to handle all aspects of the litigation. Jeffrey P. Justman, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 MINN. L. REV. 1246, 1247 n.6 (2008) (citing Helen Hierschbiel, *The Ethics of Unbundling: How to Avoid the Land Mines of “Discrete Task Representation,”* OR. ST. B. BULL. (July 2007), available at <http://www.osbar.org/publications/bulletin/07jul/barcounsel.html>).

the scope of their representation of clients.⁵

Since 1993, Alaska has used a two-pronged approach to address the challenges of increased pro se litigation: (1) providing direct administrative assistance to such litigants, at least in the area of family law, and (2) formally encouraging attorneys to provide “unbundled” legal services that are more affordable for low-income clients.⁶ The Alaska Court System provides direct assistance through its Family Law Self-Help Center (“FLSHC”), which supplies forms, instructions, and neutral administrative guidance.⁷ The FLSHC also refers clients to the Alaska Bar Association’s list of lawyers who provide unbundled legal services.⁸

The basic terms for providing unbundled services are set by ARCP Rule 1.2(c), which states that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.”⁹ Lawyers who provide unbundled legal services modify the terms of the traditional attorney-client relationship with respect to litigation by creating a contract to complete discrete tasks for a client on a fee-for-service basis rather than charging a retainer fee for managing an entire case.¹⁰ Such unbundled

5. See ALASKA S. CT. ORDER NO. 1544.

6. See *Pro Se Resources by State*, AM. B. ASS’N, http://americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state.html (last updated Dec. 14, 2011) (outlining limited representation and family-law self-service centers as the two options available); Alaska Op. 93-1, *supra* note 1, at 1 (encouraging attorneys to cooperate with organizations providing unbundled services).

7. *Self-Help Center: Family Law*, ALASKA CT. SYS., <http://courts.alaska.gov/selfhelp.htm> (last updated Aug. 9, 2013). According to the FLSHC’s Director, Stacey Marz, the Center receives an average of 7,500 client contacts every year. Telephone Interview with Stacey Marz, Dir., Family Law Self-Help Ctr. (May 14, 2013).

8. *Finding a Lawyer*, ALASKA CT. SYS., <http://courts.alaska.gov/shclawyer.htm> (last updated July 15, 2003).

9. ALASKA RULES OF PROF’L CONDUCT R. 1.2(c); see ALASKA S. CT. ORDER NO. 1544 (effective Oct. 15, 2004) (officially emending ARPC R. 1.2(c) to require that the limitation be reasonable under the circumstances and subject to the consent of the client and emending Alaska R. Civ. P. 81 to permit the “limited appearance by counsel”). The ARPC were rescinded in their entirety and new rules adopted in 2009, but Rule 1.2(c) was unchanged. ALASKA S. CT. ORDER NO. 1680 (effective Apr. 15, 2009).

10. *Unbundled Legal Services - Information*, ALASKA BAR ASS’N, https://www.alaskabar.org/servlet/content/unbundled_legal_services_1246.html (last visited Oct. 11, 2013); Stephanie Kimbro, *Law a la Carte: The Case for Unbundling Legal Services*, GP SOLO, http://www.americanbar.org/publications/gp_solo/2012/september_october/law_a_la_carte_case_unbundling_legal_services.html (last visited Oct. 11, 2013); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 454 (2011). Unbundled services are only truly novel in the litigation

services purport to address problems of under-representation by providing limited services for limited cost, thus “servicing clients within their ability to pay.”¹¹

Unbundled services bear a clear—though controversial—relationship to the goal of providing greater legal support for low-income persons. What is less clear is why a state bar or court system should permit attorneys providing those services to do so from behind a veil of anonymity. The Alaska courts have never addressed ghostwriting, but federal courts that have opined on the issue have been almost uniformly critical of the practice.¹² Critics of ghostwriting suggest both that it is contrary to various rules of professional conduct and that it undermines some of the fundamental requirements of a self-regulating profession, such as transparency and responsibility.

This Note argues that the Alaska Bar Association should revise its guidance in Alaska Op. 93-1 to disentangle the ability of an attorney to provide unbundled services from the ethical license to remain anonymous. Specifically, this Note asserts that the Alaska Bar should amend its current guidance to require that any attorney-assisted filing be explicitly identified as such (e.g., by appending “Prepared with the Assistance of Counsel” along with the attorney’s Alaska Bar number), though the attorney’s name need not be disclosed. This would bring the Alaska Bar’s ethical guidelines into conformity with the opinions of the Florida,¹³ New Hampshire,¹⁴ and New York City¹⁵ bar associations. The recent action of the Florida Bar Association deserves special consideration because it is the only state bar to reverse its position on

arena. *See id.* at 461 n.32 (citing Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 *FORDHAM URB. L.J.* 1107, 1108–09 (2002)) (noting that “unbundled legal services” are not new except in the litigation arena).

11. *See* Forrest S. Mosten, *Unbundling Legal Services: Servicing Clients within Their Ability to Pay*, 40 *JUDGES’ J.* 15, 15–16 (2001) (noting popular belief that lawyers are unaffordable and that unbundling can make legal services affordable).

12. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 *GEO. J. LEGAL ETHICS* 271, 285 n.73 (2010) (collecting cases critical of the practice).

13. Florida State Bar Ass’n Comm. on Prof’l Ethics, *Op. 79-7* (Reconsideration) (2000) [hereinafter *Florida Op. 79-7*], available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/8cbbba193ca2133185256b2f006cac97?OpenDocument>.

14. N.H. Bar Ass’n Ethics Comm., *Unbundled Services – Assisting the Pro Se Litigant*, N.H. B. ASS’N, (May 12, 1999), available at <http://www.nhbar.org/pdfs/PEA5-99.pdf>.

15. Ass’n of the Bar of the City of New York Comm. on Prof’l & Judicial Ethics, *Formal Op. 1987-2* (1987), available at <http://www2.nycbar.org/Ethics/eth1987-2.htm>.

ghostwriting after holding an inquiry of county court judges in the state.¹⁶

In support of this view, this Note advances three main arguments: (1) a lawyer's ability to provide unbundled legal services to low-income clients—and thus, theoretically, increase “access to justice”—does not depend upon his ability to remain undisclosed; (2) ghostwriting has shown little demonstrable benefit to pro se litigants and may actually hinder a judge's ability to manage her obligations to pro se litigants effectively; and (3) ghostwriting's marginal benefits do not outweigh its potential costs to professional integrity.

I. ALASKA OP. 93-1, ACCESS TO JUSTICE, AND THE RISE OF PRO SE LITIGATION

The Alaska Bar Association's ethics opinions are initiated in response to inquiries from Alaska attorneys who confront novel or unclear ethical issues in their practices.¹⁷ Alaska Op. 93-1 was drafted in response to an inquiry from a family law attorney who had a large number of low-income clients who needed professional assistance with child support modification motions and could not afford to retain counsel.¹⁸ The attorney inquired whether it was ethical to provide this limited service without entering an appearance in the litigation.¹⁹ Alaska Op. 93-1 does not indicate how much the attorney was paid for this service, nor whether the service was offered singly or as part of a menu of services from which the client could choose as the litigation progressed.²⁰ Nevertheless, the Alaska Bar Ethics Committee concluded that as long as an attorney clearly informed her client of the limitations and risks of limited legal services, and conducted herself in accordance with all the relevant standards of professional conduct, she need not disclose her role in preparing filings to the court.²¹ The Alaska Bar Board of Governors adopted the opinion in March of 1993.

Alaska Op. 93-1 and the situation to which it responded were not, of course, conceived in a vacuum. Since the 1970s, the Alaska Bar, along with every other state bar in the country, has dealt with an increasing number of pro se litigants entering the court system. Studies from the 1990s note dramatic numbers of such litigants, especially in the context

16. See Florida Ethics Op. 79-7, *supra* note 13 (reversing previous position).

17. Telephone Interview with Steve Van Goor, Bar Counsel, Alaska Bar Ass'n (Feb. 7, 2013).

18. *Id.*; Alaska Op. 93-1, *supra* note 1, at 1.

19. Alaska Op. 93-1, *supra* note 1, at 1.

20. See *id.* (not addressing pay or the menu issue).

21. *Id.*

of family law.²² More recent data from Anchorage courts handling family law cases indicate similar numbers. Since 2009, for example, 37 to 43% of the contested divorce and custody cases in Anchorage courts had two unrepresented parties.²³ In that same period, between 26 and 29% of these family law cases had only one represented party.²⁴ Though reliable data is difficult to obtain, recent law review articles on pro se litigation suggest that, even outside the realm of family law, the number of unrepresented litigants nationally is rising.²⁵

This increase in the number of self-represented litigants casts doubt on whether the legal profession is adequately fulfilling its duty of meeting the public's needs for legal services: a troublesome problem for state bar associations.²⁶ Public-spirited members of the bar have long recognized the so-called "representation gap" between the poor and the well-off.²⁷ Some commentators believe that the rise of pro se litigation is

22. See Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 571 n.82 (1993) (finding, based on figures from 1990, that in an Arizona family court 88.2% of divorce cases had one pro se litigant and 52% had both parties proceeding pro se).

23. Telephone Interview with Stacey Marz, Dir., Family Law Self-Help Ctr. (May 14, 2013).

24. *Id.* Mark Andrews's contribution to this issue of the *Alaska Law Review* cites substantially similar data, relying upon Katherine Alteneider, *Literacy and the Courts*, 24 ALASKA JUST. F. 1 (2007), available at justice.uaa.alaska.edu/forum/24/2summer2007/242.summer2007.pdf. See Mark Andrews, *Duties of the Judicial System to Pro Se Litigants*, 30 ALASKA L. REV. 189, 189-90 (2013). The fact that the available data from the Family Law Self-Help Center has remained steady since at least 2007 suggests that the number of pro se litigants is perhaps no longer increasing.

25. See Alteneider, *supra* note 24, at 1 (noting, without citing data, an increase in the number of self represented litigants in Alaska); Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 479 (2002) (explaining that filings in federal courts have increased dramatically and that a significant percentage of those filings involve pro se litigants). See also Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1018 (2002) (commenting that filings by pro se litigants have increased in the past decade); Madelynn Herman, *Pro Se Statistics*, NAT'L CENTER FOR ST. CTS. (Sept. 25, 2006), <http://web.archive.org/web/20120504035215/http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm> (providing more recent, but scattered, data).

26. See John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2689 (1999) (describing unbundled legal services as a suggested solution to the problem of unmet legal needs).

27. See generally LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS (2009), available at <http://www.lsc.gov/sites/default/files/LSC/pdfs/docume>

essentially a function of this gap. They view pro se litigants as reluctant participants in the legal system, going it alone because they cannot afford to pursue a legal solution to their problems in any other way.²⁸ But going it alone, they rarely succeed.²⁹ As a response, many commentators argue that the American commitment to equal justice under the law demands that the legal profession develop new, unbundled ways of meeting low-income citizens' needs at lower costs.³⁰

The reaction of state bars to the rise in self-represented litigation is also driven by economic considerations. Increased pro se litigation changes the legal marketplace, especially for attorneys providing legal services to individuals of modest means.³¹ On this view, more self-representation means fewer clients.³² For these attorneys, the issue is not necessarily about "access to justice" or other ideals, but may instead be about their ability to unbundle their services so as to maintain their position in a changing marketplace.³³

nting_the_justice_gap_in_america_2009.pdf (attempting to document the representation gap).

28. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1542 (2005). This view is undoubtedly true in many cases, but not in all. *See id.* at 1573-76 (providing an overview of the many other reasons why many litigants proceed pro se).

29. *See* Michelle N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166, 211-12 (2012) (describing the procedural difficulties of pro se litigation). There are no clear statistics on the rate of failure for pro se litigants as compared to represented litigants with similar claims. Litigants, of course, fail for all sorts of reasons. Nevertheless, it is widely believed that pro se litigants are less successful than represented ones. Judges used to speak about this frankly in terms of a self-represented litigant's right "to commit judicial suicide." *Burks v. State*, 748 P.2d 1178, 1183 (Alaska Ct. App. 1988) (Coats, J., dissenting). For reasons discussed below, this rhetoric is now out of favor, however accurate it might be in relation to actual consequences.

30. *See* Steinberg, *supra* note 10, at 453-54 ("The provision of 'unbundled' legal aid has been this decade's response to the severe shortage of lawyers available to represent poor litigants."); *see also* 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, 345-46, 348 (2005) (encouraging limited representation in Massachusetts to protect indigent litigants from having to pay more than they can afford and noting the author's belief that "our system [is] one that provides justice for all its litigants, regardless of financial status").

31. *See* Adams, *supra* note 30, at 313-14 (describing pro se litigation's impact on attorney demand).

32. *Id.* at 304. However, there are currently no significant studies indicating whether the increase in self-representation has actually appreciably reduced the number of clients served by such lawyers.

33. This was arguably less important in 1993, the year of Alaska Op. 93-1.

Against this background, the Alaska Bar Ethics Committee justified attorney ghostwriting primarily as a way of making legal services available to individuals in “poor financial conditions” who might not otherwise have effective access to the courts.³⁴ The Ethics Committee recognized that ghostwriting could easily become a way for lawyers to provide unethical or incompetent services from behind the “veil [of] anonymity.”³⁵ Therefore, in Alaska Op. 93-1, the Ethics Committee exhorts lawyers who might provide these services to abide by all ethical rules and professional canons. The Opinion asserts that a lawyer providing limited or undisclosed services still must provide her client with high-quality work.³⁶ Her agreement to provide such services creates a lawyer-client relationship like any other, with all of its attendant duties.³⁷ For example, if the attorney assists the pro se litigant in the preparation of documents that the attorney could not ethically sign, then the attorney has violated her obligation not to act unethically through the act of another.³⁸

Alaska Op. 93-1 gestures at many of the relevant issues of professional responsibility surrounding ghostwriting, but does not address some of the most difficult questions, like whether there is a limit to the extent attorneys may assist a client before they are required to disclose their participation. Consequently, the Opinion’s brief and generalized treatment of the issue has been subject to several misinterpretations. For instance, Alaska Op. 93-1 apparently suggests that attorney ghostwriting is properly limited to filings other than pleadings and motions. This is the interpretation of the American Bar Association’s (“ABA”) Standing Committee on Ethics and Professional Responsibility, which has interpreted attorney ghostwriting in Alaska as requiring disclosure unless the “lawyer merely helped fill out forms

Today, an increasing number of individuals use private document preparation services rather than hiring an attorney. *See* ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS: A WHITE PAPER 5, 11 (2009) (noting the need for the professional rules to enable a “lawyer to limit his or her services and to compete with those who provide only legal information,” such as a legal self-help website).

34. Alaska Op. 93-1, *supra* note 1, at 1. Alaska has also established a lawyer’s role in promoting “access to the legal system.” ALASKA RULES OF PROF’L CONDUCT pmb1.

35. Alaska Op. 93-1, *supra* note 1, at 1 n.1.

36. *Id.* at 1; *see also* ALASKA RULES OF PROF’L CONDUCT R. 1.2, cmt. 7 (“[A]n agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation.”).

37. Alaska Op. 93-1, *supra* note 1, at 1.

38. *Id.* at 1 n.1. The relevant rule is now ALASKA RULES OF PROF’L CONDUCT R. 8.4(a).

designed for pro se litigants.”³⁹ The Advisory Committee on Professional Ethics for the Supreme Court of New Jersey embraced a similar interpretation by lumping Alaska Op. 93-1 in with state bar opinions that require disclosure only when a “requisite quantum of aid” has been given to the pro se litigant.⁴⁰

What these interpretations identify as a rather restrictive ethics opinion prohibiting undisclosed attorney assistance with pleadings is, upon a closer reading, a very expansive allowance for the undisclosed assistance of counsel.⁴¹ In an endnote to Alaska Op. 93-1, the Ethics Committee states its awareness that “attorneys may get involved in preparing pleadings and filings for clients outside the area of domestic relations, and for purposes which are not as worthy.”⁴² Though this sentence implies that pleadings in some contexts may be less worthy, it is not intended to suggest that preparing pleadings in an undisclosed manner is itself unworthy or contrary to the rule. In fact, the text of the Opinion repeatedly discusses preparing pleadings as one of the tasks that may be undisclosed and cites as support a Virginia Ethics Opinion permitting a lawyer to prepare “discovery requests, pleadings or briefs without entering an appearance.”⁴³ While the authors of Alaska Op. 93-1 clearly believed that the practice of ghostwriting filings should be limited, they did not provide ethical guidelines for determining the proper scope of that practice. They simply stated that an attorney who prepares or assists in the preparation of a pleading signed by a pro se litigant is “under the same ethical constraints as if [she] were to sign the pleading with [her] own name.”⁴⁴

Some of the confusion surrounding the interpretation of Alaska Op. 93-1 is undoubtedly due to the Opinion’s unspoken commitment to the

39. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-446, at 1 n.3 (2007) [hereinafter ABA Op. 07-446] (discussing undisclosed legal assistance to pro se litigants in various jurisdictions).

40. N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics, Op. 713, at 3–4 (2008).

41. See Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1166 n.120 (2001) (correctly identifying the expansive allowance for undisclosed assistance in Alaska Op. 93-1).

42. Alaska Op. 93-1, *supra* note 1, at 1 n.1.

43. *Id.* at 2; see Va. Legal Ethics Op. 1127 (1988), available at <http://www.vacle.org/opinions/1127.htm>. Note that Alaska Op. 93-1 erroneously cites to Va. Op. 1129.

44. Alaska Op. 93-1, *supra* note 1, at 1 n.1. This is a perplexingly broad suggestion, especially given that an attorney’s signature is often presumed to be ethically required, including under FED. R. CIV. P. 11. See Richard G. Johnson, *Symposium: Happy (?) Birthday Rule 11: Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819, 862–64 (2004) (quoting *Duran v. Carris*, 238 F.3d 1268, 1271–73 (10th Cir. 2010)) (noting the interplay between ghostwriting, the duty of candor, and Rule 11).

ethical legitimacy of unbundled legal services. Alaska Op. 93-1 directly defends the ability of a family law attorney to help a pro se client prepare a motion for child support modification without entering an appearance in the litigation (and thus, one assumes, without doing more for the client). The Opinion is written generally as a defense of undisclosed services, but is focused throughout on the goal of permitting attorneys to provide more services to low-income clients. In a sense, the real concern driving Alaska Op. 93-1 is permitting attorneys to serve clients according to the clients' financial means without undermining the quality of those services or making them unaffordable. What Alaska Op. 93-1 never makes clear is why allowing an attorney, for example, to write a pro se client's child support modification motion should entail allowing that attorney's assistance to be undisclosed.⁴⁵

The idea of unbundled legal services has often been criticized as a threat to the ethical demands of competency and zealousness in representation, as well as to the attorney's duty to avoid frivolous claims.⁴⁶ In its most persuasive form, the argument against unbundled services is twofold. First, the professional rules are grounded in a form of relationship (full-service representation) that encourages and incentivizes compliance with those rules. And second, limiting the "attorney-client relationship" by unbundling legal services deprives many of the professional rules of this grounding. A lawyer who provides unbundled services completes a limited task, based on limited contact with the client, for a limited fee. In this situation, the limited fee provides the attorney with little material incentive to spend the requisite amount of time and effort to comply with ARPC 1.1 (demanding competent legal services) and ARPC 3.1 (prohibiting frivolous claims).

Some critics have also highlighted the lack of continuity in attorney-client relationships based on unbundled services.⁴⁷ This lack of continuity potentially deprives the attorney-client relationship of the ongoing interaction that fosters loyalty and the attendant zeal in advocacy. ARPC 1.16, which sets limitations on how and under what

45. Steve Van Goor, current ethics counsel to the Alaska Bar Association, has acknowledged that, to his recollection, little attention was paid in the debate over Alaska Op. 93-1 to exactly why non-disclosure was important to the broader justification of increasing access to justice. Telephone Interview with Steve Van Goor, Bar Counsel, Alaska Bar Ass'n (Feb. 7, 2013).

46. See Richard Zorza, *Re-Conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 *FORDHAM L. REV.* 2659, 2665 (1999) (noting critics' concerns about competency and zeal).

47. See *id.* at 2667 ("Traditional ethical rules place—or at least appear to place—a high value on continuity of representation . . . Critics claim that partial service models implicitly or explicitly violate those rules.").

conditions an attorney may withdraw from representation, inscribes a desire for continuity in the attorney-client relationship, especially over the course of a single litigation.⁴⁸ The explicit concern of ARPC 1.16 is to prevent an attorney from leaving a client in the lurch in a manner detrimental to his or her interests. However, the concern with continuity also encourages an attorney to provide competent services by fostering a personal relationship that can deepen the lawyer's commitment to the client's cause.⁴⁹

Since the revision of ARPC 1.2(c) in 2004, the debate in Alaska over unbundled services has largely been settled. Proponents of unbundled services trust that, in concert with the other rules of professional conduct, ARPC 1.2(c)'s requirement that any contractual limitations on representation be "reasonable" and subject to the client's informed consent will prevent abuses. These proponents, even outside of Alaska, believe that the potential gains promised by unbundled services in meeting the unmet legal needs of low-income citizens outweigh the costs of potential abuses by attorneys who offer such services in an incompetent or irresponsible manner.⁵⁰ To date, the Alaska courts and the Alaska Bar Association have never sanctioned an attorney for abusing the terms of unbundled services. But this fact does not suggest that such abuses have not occurred, nor that they will not occur in the future when such services likely become more common.⁵¹ Given that the

48. See *id.* (noting limitations on an attorney's freedom to withdraw from representation).

49. See *id.* (explaining how partial focus can lead to less competent work and explaining that concerns about continuity derive in part from concerns about competence).

50. See Rothermich, *supra* note 26, at 2720, 2728 (noting how "abuses . . . might arise when attorneys offer ghostwriting assistance without at least some investigation of their pro se clients' allegations," but concluding that "[c]ourts and bar associations should make every effort to avoid stifling the development of these new models of legal practice" because "such models are providing more legal assistance to more people, incrementally increasing access to civil justice").

51. See Letter from Sheldon Schwartz, County Court Judge, Dade County, Florida, to Elizabeth Tarbert, Ethics Counsel, Florida Bar (March 1, 1999) (on file with author) [hereinafter Schwartz Letter] ("At one time, the practice of law was a [truly] honorable profession and unfortunately recently it has become more of a business enterprise."). Judge Schwartz does not elaborate on his meaning in this letter. It is reasonable to infer, however, that he does not regard public-spirited lawyers who conscientiously assist low-income clients as the culprits of abuses of ghostwritten assistance. The problems of ghostwritten assistance, he seems to suggest, become clear when enterprising lawyers take the money of low-income citizens to provide low-quality work that does not actually benefit the client because the client cannot understand it nor successfully use it in court. The opinions of Florida county court judges on this issue will be discussed in greater detail below.

Alaska courts apply a quite forgiving standard to pro se filings,⁵² they are unlikely to notice a pro se filing that is ghostwritten in an incompetent manner by an attorney. They would likely simply assume that it is another incompetent effort by a pro se litigant. In such a situation, the Alaska Bar would still have an interest in protecting the integrity of the profession against an attorney who took money from a client to produce a product that is potentially indistinguishable from what a smart pro se litigant could produce himself. Given the potential for abuse within the limits currently set by Rule 1.2(c), the question becomes whether the ethical license to ghostwrite for pro se clients adds something of clear value to the enterprise of expanding legal services that is worth the potential cost.

II. ALASKA OP. 93-1 AND THE NATIONAL DEBATE OVER GHOSTWRITING

In beginning to think about how Alaska Op. 93-1 might be revised in order to address misunderstandings and unanswered questions, it is useful to consider the Opinion in relation to both the federal case law and the ethics opinions of other states. To a great extent, the courts and state bar associations have been at an impasse on the acceptability of attorney ghostwriting. The federal courts have largely condemned the practice, while many state bar associations – and, recently, the American Bar Association itself – have embraced it. At the federal level, the list of condemnatory cases is impressive.⁵³ In one of the most frequently cited

52. See *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987) (stating that pleadings of pro se litigants should be held to a lower standard than pleadings done by lawyers).

53. See *Robbins*, *supra* note 12, at 285 (noting that federal courts have almost universally condemned ghostwriting); see, e.g., *Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir. 2001) (finding that ghostwriting constitutes a “misrepresentation to this court”); *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (“If a brief is prepared in any substantial part by a member of the bar, it must be signed by him.”); *Delso v. Trs. for the Ret. Plan for the Hourly Emps. of Merck & Co.*, No. 04-3009, 2007 WL 766349, at *14-16 (D.N.J. Mar. 6, 2007) (holding that undisclosed ghostwriting violates several ethics rules and the spirit of FED. R. CIV. P. 11); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 887 (D. Kan. 1997) (requiring pro se defendant to disclose whether she was represented by an attorney); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997) (“[T]he Court considers it improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as *pro se*.”); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (“Important policy considerations militate against validating an arrangement wherein a party appears pro se while in reality the party is receiving legal assistance from a licensed attorney.”); *Johnson v. Bd. of Cnty. Comm’rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994), *aff’d in part*,

cases, *Johnson v. Board of County Commissioners for County of Fremont*,⁵⁴ the court condemned ghostwriting as a violation of both Rule 11 of the Federal Rules of Civil Procedure and the applicable standards of professional ethics.⁵⁵ Quoting one of the earliest cases to address the subject, the district court stated:

What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.⁵⁶

The court in *Johnson* also argued that ghostwriting is a form of misrepresentation to the court, claiming that it violates what is now Model Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation.⁵⁷

Beyond the specific concern with Rule 11, many of the federal courts have expressed concern that when an attorney ghostwrites a pro se litigant's filings the attorney allows the litigant to take unfair advantage of the court's leniency toward pro se litigants or otherwise

disapproved in part, 85 F.3d 489 (10th Cir. 1996) ("Having a litigant appear to be *pro se* when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous [sic] to say the least; it is far below the level of candor which must be met by members of the bar."); *In re Brown*, 354 B.R. 535, 545 (Bankr. N.D. Okla. 2006) (footnote omitted) ("[I]f an attorney writes a pleading, he or she has a duty to make sure that the Court knows he or she wrote it. The Court is not required to play a game of 'catch-me-if-you-can' with a ghostwriter. All counsel owe a duty of candor to every court in which they appear. Inherent in that duty is the requirement that counsel disclose his or her involvement in the case."); *In re Mungo*, 305 B.R. 762, 767 (Bankr. D.S.C. 2003) ("[T]he Court recognizes the act of ghost-writing as a violation of *Local Rule 9010-1(d)* and in contravention of the policies and procedures set forth in the South Carolina Rules of Professional Conduct and the Federal Rules of Civil Procedure."); *Ostrovsky v. Monroe (In re Ellingson)*, 230 B.R. 426, 435 n.12 (Bankr. D. Mont. 1999) (holding that court rules, particularly FED. R. CIV. P. 11, as well as the then-current ABA Standing Comm. Op. 1414, prohibiting ghostwriting).

54. 868 F. Supp. 1226 (D. Colo. 1994).

55. *Id.* at 1231.

56. *Id.* at 1231-32 (quoting *Ellis*, 448 F.2d at 1328).

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

causes undue confusion or inefficiency.⁵⁸ In *Johnson*, the court discussed an attorney's ghostwritten assistance as an "unseen hand" guiding the course of litigation to the detriment of the opposing party.⁵⁹ Few courts, however, would read this negative "unseen hand" metaphor to include very limited forms of assistance, such as advising a friend about how he might proceed with a given legal matter. In *Riccotta v. California*,⁶⁰ the court attempted to draw the line between innocuous forms of limited assistance and forms of assistance that have a detrimental impact on judicial proceedings. The court stated:

Attorneys cross the line . . . when they gather and anonymously present legal arguments, with the actual and constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door.⁶¹

In addition, some courts believe that attorneys who work behind the "cloak of anonymity" evade the effective enforcement of the rules of professional conduct, thus depriving their clients of one important avenue of redress in the event of attorney negligence or misconduct.⁶²

Twenty-four states have addressed the issue of whether to permit attorney ghostwriting.⁶³ According to the Supreme Court of New Jersey Advisory Committee on Professional Ethics, these state opinions can be grouped into roughly three categories.⁶⁴ The first group finds that attorneys have no duty to disclose assistance to a pro se client as long as they provide that assistance ethically and competently and violate no court rules.⁶⁵ Alaska Op. 93-1, which was among the first state bar ethics

58. See, e.g., *Laremont-Lopez*, 968 F. Supp. at 1077-78 (stating that ghostwriting unfairly allows pro se parties to benefit from legal help and be held to a less stringent standard simultaneously).

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

60. 4 F. Supp. 2d. 961 (S.D. Cal 1998).

61. *Id.* at 987.

62. *In re Mungo*, 305 B.R. 762, 768 (Bankr. D.S.C. 2003).

63. Robbins, *supra* note 12, at 286 n.80 (citing Maryland Legal Assistance Network, *Informal National Survey of Ethical Opinions Related to "Discrete Task Lawyering"* (2003), <http://www.unbundledlaw.org/thinking/ethicsurvey.htm>).

64. New Jersey Advisory Comm. on Prof'l Ethics Op. 713, at 2-3 (2008).

65. See *id.* at 3 (stating that some ethics opinions find no duty to disclose limited representation). See also N.M. R. of Prof'l Conduct R. 16-303 cmt. 15 (2008); Cal. R. Ct. 3.37(a) (2007); Minn. State Bar Ass'n Pro Se Implementation Comm., Final Report (2006); N.C. State Bar Ass'n Ethics Comm., Formal Op. 2005-10 (2006); Ariz. State Bar Ethics Op. on Rule 05-06 (2005); D.C. Bar Ass'n Legal Ethics Comm., Op. 330 (2005); Alaska Op. 93-1, *supra* note 1; Me. State Bar Ass'n, Ethics Op. 89 (1988); Utah State Bar Ethics Comm., Op. 74 (1981).

opinions to address this issue,⁶⁶ falls into this first group.⁶⁷ The second group prohibits the practice outright.⁶⁸ The third group imposes a limited duty of disclosure, sometimes by using an “imprecise” demarcation based on the “requisite quantum of aid.”⁶⁹

Recently, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-446 (“ABA Op. 07-446”) which supersedes its earlier guidance on the issue and attempts to lead state bar organizations toward a more open embrace of ghostwriting. ABA Op. 07-446 makes the obligation to disclose contingent on whether “the fact of assistance is material to the matter” involved in the litigation.⁷⁰ In most instances, of course, this would not be the case. The fact that an attorney provides ghostwritten assistance will rarely be material to a client’s substantive legal dispute. Thus, the ABA opinion suggests that in almost all cases there is no duty to disclose.⁷¹

In a recent case, the Second Circuit Court of Appeals discussed ABA Op. 07-446 in the context of a case about whether to censure an attorney for ghostwriting.⁷² The Second Circuit did not directly express an opinion on whether the practice violated an attorney’s professional obligations or court rules, but simply noted the split among the state bars and court opinions.⁷³ In the light of this widespread disagreement, the court decided that, at the very least, it is reasonable to believe that the attorney in question did not know that what she was doing was wrong or that disclosure was required.⁷⁴ Accordingly, the court did not impose public censure for this conduct.⁷⁵ Nevertheless, the court noted that the ABA’s new support for attorney ghostwriting likely indicated

66. Preceding it were ABA Informal Op. 1414 (1978); Utah State Bar Ethics Comm., Op. 74 (1981); Ass’n of the Bar of N.Y.C. Comm. on Prof’l and Judicial Ethics, Op. 1987-2 (1987); Me. Bar Op. No. 89 (1988); Va. Legal Ethics Op. 1127 (1988); N.Y. State Bar Ass’n Ethics Op. 613 (1990).

67. New Jersey Advisory Comm. on Prof’l Ethics Op. 713, at 3–4.

68. Robbins, *supra* note 12, at 287 n.83 (identifying ten states that expressly prohibit the practice).

69. Conn. Bar Ass’n Comm. on Prof’l Ethics, Op. 98-5 (1998); Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1994-2 (1994); Fla. State Bar Ass’n Comm. on Prof’l Ethics, Op. 79-7 (2000); Ky. Bar Ass’n Op. E-343 (1991); Mass. Bar Ass’n Comm. on Prof’l Ethics, Op. 98-1 (1998); N.H. Bar Ass’n Ethics Comm., *Unbundled Services – Assisting the Pro se Litigant* (1999); Utah State Bar Ethics Comm., Op. 74 (1981).

70. ABA Op. 07-446, *supra* note 39.

71. See *id.* (stating that the fact that a litigant who submitted papers on a pro se basis had received legal assistance is not material to the litigation’s merits).

72. See *In re Liu*, 664 F.3d 367, 371 (2d Cir. 2011) (discussing ABA Op. 07-446).

73. *Id.*

74. *Id.* at 372–73.

75. *Id.* at 373.

the future direction of the debate.⁷⁶ “Because most states look to the ABA Model Rules when adopting and amending their own rules of professional conduct, the coming years may see a number of courts and states take a more relaxed stance on ghostwriting.”⁷⁷

While the Second Circuit opinion suggests a possible rapprochement between the courts and state bars over the issue of ghostwriting, a recent ethics opinion by the Florida State Bar Association suggests a different course for the future.⁷⁸ In 1999, the Florida Bar Association Committee on Professional Ethics sent inquiries to county court judges in the State regarding an earlier bar ethics opinion defending ghostwriting.⁷⁹ The earlier opinion stated that “[i]t is not uncommon for a lawyer to offer limited services in assisting a party in the drafting of papers while stopping short of representing the party as attorney of record. Under these circumstances, there is no ethical impropriety if the attorney fails to sign the pleadings.”⁸⁰ Almost unanimously, the county court judges responded that the permissive stance toward “ghosted pleadings” should be reversed.⁸¹ In response, the Florida Bar issued a Reconsideration of Florida Opinion 79-7, requiring that “[a]ny pleadings or other papers prepared by an attorney for a *pro se* litigant and filed with the court must indicate ‘Prepared with the Assistance of Counsel.’”⁸²

The Florida county court judges offered various reasons why they believed the practice of ghostwriting should end or at least be modified to include some form of disclosure. Several of them believed that the practice simply did not help *pro se* litigants.⁸³ These judges reported that the *pro se* litigants who receive this limited assistance of counsel come before the court with (poorly-drafted) documents they do not understand and cannot adequately explain.⁸⁴ This, of course, is a

76. *Id.* at 371.

77. Robbins, *supra* note 12, at 290.

78. See Florida Op. 79-7, *supra* note 13 (requiring all documents prepared with assistance of counsel and filed with the court to clearly reflect the participation of an attorney).

79. *Id.*

80. *Id.* (excerpting the original Florida Op. 79-7).

81. *Id.*

82. *Id.*

83. See, e.g., Letter of Charles G. Cofer, County Court Judge, Duval County, Florida, to Elizabeth Tarbert, Florida Bar Ethics Counsel (March 9, 1999) [hereinafter Cofer Letter] (on file with author); Letter of Michael Samuels, County Court Judge, Dade County, Florida, to Elizabeth Tarbert, Florida Bar Ethics Counsel (March 3, 1999) [hereinafter Samuels Letter] (on file with author).

84. See Samuels Letter, *supra* note 82; Schwartz Letter, *supra* note 51 (complaining of *pro se* litigants who “come before the court [and] are not properly prepared and have not been properly counseled and often have filed

criticism of unbundled legal services in general, not only of undisclosed assistance. From the perspective of one county judge, however, the problem with ghostwriting is that it undermines the court's ability "to monitor any abuses of the privilege which members of the bar have to assist *pro se* litigants."⁸⁵ Although this judge reported that the unbundled assistance of attorneys often results "in individuals coming before [him] who have either misconstrued the advice given to them, or who have insufficient understanding of the advice to apply it appropriately in a courtroom setting," he did not reject such assistance outright.⁸⁶ Instead, he suggested that attorneys who help prepare the filings of *pro se* litigants should disclose that they have done so by appending a short statement to that effect and including the attorney's state bar number.⁸⁷ This disclosure would simultaneously enable the court to monitor for apparent abuses and discourage such abuses by the sheer fact that such monitoring is possible.

Due in part to responses of the county judges, the Florida Bar Association decided that the theoretical benefits of attorney ghostwriting were outweighed by its costs.⁸⁸ Florida Opinion 79-7 (Reconsideration) is the only state bar opinion to reverse an earlier opinion based on the opinions of judicial actors. To some extent, judges who reject ghostwriting may be expressing their rather austere view of professional ethics without adequate concern for how the legal needs of low-income persons are going to be met.⁸⁹ However, for many judges, "the effect of ghost-writing on the operation of [the c]ourt cannot be overemphasized."⁹⁰ From this perspective, the problem with ghostwriting is that it fails to do the very thing that proponents of the practice use to justify it: give *pro se* litigants more effective access to justice.

III. ALASKA OP. 93-1 AND PRO SE ACCOMMODATION IN THE ALASKA COURTS

The story of Florida Op. 79-7 is instructive for thinking about how the Alaska Bar Association could revisit many of the arguments of

improper or inaccurate pleadings")

85. See Cofer Letter, *supra* note 82.

86. *Id.*

87. *Id.*

88. Florida Op. 79-7, *supra* note 13.

89. See *In re Mungo*, 305 B.R. 762, 769 (Bankr. D.S.C. 2003) (emphasizing that ghostwriting is an act of "misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court").

90. *Id.* at 770.

Alaska Op. 93-1. Pro se litigants who pay an attorney for an unbundled service must ultimately come before a judge and argue their cases. Some critics of ghostwriting worry that pro se litigants who have benefitted from the assistance of an attorney will have an unfair advantage in relation to the opposing (represented) party because the pro se litigant will receive both judicial leniency and professional help. It is possible, however, that the situation could be quite the opposite. If a pro se litigant presents ghostwritten documents, it could just as easily lead a judge to withdraw prematurely the kinds of special consideration that pro se litigants might require. Ghostwriting might confuse a judge's already quite complicated task of discerning how to balance a pro se litigant's needs with the judge's obligation to remain impartial.⁹¹

Alaska Op. 93-1 was conceived at a time when the Alaska courts were in the midst of their own effort to define how they would address the particular needs of pro se litigants while preserving the impartiality of the judicial forum. Following the Supreme Court's decision in *Haines v. Kerner*,⁹² which established a generous pleading standard for pro se litigants, the Alaska Supreme Court issued several opinions in the 1980s that continue to shape how Alaska judges manage these litigants.⁹³ In *Breck v. Ulmer*,⁹⁴ the Alaska Supreme Court followed *Haines* by declaring that judges must hold "the pleadings of *pro se* litigants . . . to less stringent standards than those of lawyers."⁹⁵ *Breck* established a framework in which pro se litigants would not only receive special consideration and guidance at the pleading stage, but also on procedural matters that arise over the course of litigation. The *Breck* court also determined that judges have a special obligation to inform pro se litigants "of the proper procedure for the action he or she is obviously attempting to accomplish."⁹⁶

The Alaska Supreme Court was aware that such a regime of judicial

91. With pro se litigants, as with under-performing lawyers, the judge must sometimes simply watch as the unskilled party goes down in flames regardless of the potential, but unsuccessfully articulated, merits of his case. See *Burks v. State*, 748 P.2d 1178, 1183 (Alaska Ct. App. 1988) (Coats, J., dissenting) (commenting on the pro se party's right "to represent himself regardless of how bad an idea that might be for him").

92. 404 U.S. 519 (1972).

93. *Id.* at 520 (stating that the court will hold the pleadings of pro se litigants "to less stringent standards than formal pleadings drafted by lawyers"). See also *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) ("Even in the formal litigation context, pro se litigants are held to a lesser pleading standard than other parties."); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) ("The handwritten pro se document is to be liberally construed.").

94. 745 P.2d 66 (Alaska 1987).

95. *Id.* at 75.

96. *Id.*

generosity would potentially threaten a judge's fundamental obligation to provide an impartial forum for the consideration of all litigants' claims. Therefore, in *Bauman v. State, Division of Family & Youth Services*,⁹⁷ the court limited the holding in *Breck* by declaring that "to instruct a pro se litigant as to each step in litigating a claim would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side."⁹⁸ *Bauman* required a litigant to make a genuine effort to learn and comply with procedural requirements before the court would extend leniency.⁹⁹ Yet the court also provided the judge significant discretion on how much guidance to offer a pro se litigant.¹⁰⁰

Alaska Op. 93-1 makes no direct mention of the struggle of Alaska courts to deal with the rise of pro se litigants. However, implicit in most defenses of attorney ghostwriting is the claim that such undisclosed assistance will actually help those clients in the courts.¹⁰¹ As one proponent of ghostwriting puts the issue, "[p]ermitting ghostwriting so that complaints are adequately crafted levels the playing field. It also streamlines the litigation process by clarifying the issues and reducing the number of dispositive motions and responses."¹⁰² Alaska Op. 93-1 expresses confidence that ghostwriting will not foster unfairness, but is otherwise silent on how the practice will affect the administration of justice.

As noted above, the major defense of attorney ghostwriting is that, despite relatively widespread condemnation by judges, the practice will do no harm and will positively benefit pro se plaintiffs and courts. Proponents offer little evidence of these proposed benefits and usually rest their case on general claims: for example, that ghostwriting will "streamlin[e] the litigation process by clarifying the issues and reducing the number of dispositive motions and responses."¹⁰³ There is preliminary evidence, however, that unbundled legal services provide little benefit to low-income clients.¹⁰⁴ For this reason, proponents of the

97. 768 P.2d 1097 (Alaska 1989).

98. *Id.* at 1099.

99. *Id.*

100. See *Shooshanian v. Dire*, 237 P.3d 618, 622 (Alaska 2010) ("We review for abuse of discretion . . . decisions about guidance to a pro se litigant.").

101. Goldschmidt, *supra* note 41, at 1158.

102. *Id.*

103. *Id.*

104. See Steinberg, *supra* note 10, at 490-95. Steinberg understandably goes to great lengths to emphasize the limitations of her study, and minimize its ultimate significance, but nonetheless concludes by encouraging an increase in full-service representation (or at least new experiments in unbundled services). *Id.* at 496-97, 500.

practice tend to focus their arguments on the idea that the harms of ghostwriting are unfounded.

Alaska Op. 93-1 adopts a view shared by many proponents, which is that ghostwritten filings will be obvious to the judge, who may then adjust his treatment of the pro se litigant accordingly.¹⁰⁵ In a recent opinion, the ABA Standing Committee on Ethics and Professional Responsibility wholeheartedly endorsed this view by incorporating a lengthy passage from an article by one of ghostwriting's principal proponents.¹⁰⁶ The passage is worth quoting at length, both because it is crucial to the ABA's argument and because it expresses the view adopted in part by Alaska Op. 93-1.¹⁰⁷

Practically speaking . . . ghostwriting is obvious from the face of the legal papers filed, a fact that prompts objections to ghostwriting in the first place. . . . Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motions. A court that refuses to dismiss or enter summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error in the same manner as if it refuses to deny such dispositive motions against an attorney-drafted complaint.¹⁰⁸

The ABA's argument is premised on two crucial assumptions. First, it assumes that ghostwriting is always (or at least usually) obvious "from the face of the legal papers."¹⁰⁹ Second, it assumes that a judge will competently manage a case regardless of whether or not she perceives a ghostwritten product.

That ghostwriting is facially obvious is undoubtedly true in most

105. See Goldschmidt, *supra* note 41, at 1157 (suggesting that ghostwriting will be obvious in the higher quality of pleadings, so the court will not have a reason to construe such pleadings liberally).

106. ABA Op. 07-446, *supra* note 39, at 3.

107. See Alaska Op. 93-1, *supra* note 1, at n.2 (The opinion notes "that judges are usually able to discern when a pro se litigant has received the assistance of counsel in preparing or drafting pleadings. In that event, the Committee believes that any preferential treatment otherwise afforded the litigant will likely be tempered, if not overlooked."). Indeed, Goldschmidt cites part of this footnote in support of his view. Goldschmidt, *supra* note 41, at 1157 n.68.

108. Goldschmidt, *supra* note 41, at 1157-58 (citation omitted).

109. ABA Op. 07-446, *supra* note 39, at 3.

cases, especially where the pro se litigant is marginally literate¹¹⁰ or has not availed himself of any technical legal assistance whatsoever. However, an alternative and increasingly likely case is not hard to imagine. If the number of reasonably well-educated pro se litigants who are motivated by beliefs and desires other than the hard necessities of poverty¹¹¹ continues to rise, and they are resourced by increasingly well-funded legal self-help centers and do-it-yourself websites, then these litigants might reasonably produce filings that have the look and feel of a “lawyerly” product.

This possible alternative becomes even more plausible when one considers the relative quality (or lack thereof) of many attorney-produced pleadings. Even a modest amount of experience with the sorts of pleadings often filed with the courts teaches that attorneys often produce pleadings that are confused and confusing.¹¹² Whether due to rushed circumstances or marginal competence, many attorneys produce documents that “on their face” could be mistaken for the products of intelligent non-lawyers who have acquired some rudimentary facility with legal language, probably through the imitation of statements found in similar documents.¹¹³ Against this background, it is not hard to imagine a pro se litigant who is able to feign legal knowledge sufficient to produce a passable brief.¹¹⁴ The significance of this possibility is that it

110. See Alteneider, *supra* note 24, at 5–8 (discussing the challenge of marginal literacy for Alaska courts).

111. See Swank, *supra* note 28, at 1574 (noting various reasons for the growth of pro se litigation, including increased literacy rates and education, mistrust of the legal system, a desire to avoid legal fees, do-it-yourself-ism, and a belief that many forms of litigation have been sufficiently simplified) (citations omitted).

112. What Judge Learned Hand had to say about this matter in 1921 is doubtlessly true today:

I dare say that an ingenious actuary might find upon irrefragable computation that in general loss of time, misprision of judges, consequent appeals, discouragement of suitors and the like, the annual loss to our country through bad pleadings equaled the cost of four new battleships, or complete refashioning of primary education.

GERARD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 123 (2010).

113. A long history of “jailhouse” lawyering has taught that non-lawyers, given time, determination, and some resources, can produce what look like the products of low-level (or even not-so-low-level) lawyers. See *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (recognizing that sometimes pro se litigants who claim complete ignorance of the law present briefs written by someone with legal knowledge but not certified by the bar).

114. See *id.* (“In a growing number of petitions . . . the Petitioner . . . presents a brief which, however insufficient, was manifestly written by someone with some legal knowledge.”). Here, contrary to Goldschmidt’s use of this case, the “someone with some legal knowledge” could easily be a smart pro se litigant who took advantage of the resources in his local court’s litigation self-help center. *But see* Goldschmidt, *supra* note 41, at 1157 n.68 (using the same quote to

makes a competent pro se pleading seem to the judge like it is based on genuine legal understanding when it is not. This misapprehension would then threaten to obfuscate the very basis of the judge's generous treatment of pro se litigants: a recognition of the "categorical disparity between the [unrepresented and represented] parties' abilities to obtain a just resolution to their dispute."¹¹⁵ If the judge determines that she is dealing with a legally sophisticated pro se litigant, then she is potentially going to afford that litigant less leeway later in the litigation process, especially in dispositive motions and responses or in the associated hearings.

This leads to the second major assumption: that a judge's perception of a ghostwritten product will have no adverse effects on the judge's management of the case. Proponents argue that competent, or mostly competent, pleadings will require no special leniency whether they are produced by a pro se litigant or an attorney.¹¹⁶ Professor Jona Goldschmidt, of Loyola University Chicago, defends this argument by interpreting the liberal pleading standard for pro se litigants announced in *Haines v. Kerner*¹¹⁷ as essentially no different than the standard previously announced for represented litigants in *Conley v. Gibson*.¹¹⁸ On this view, despite the plain language in the *Haines* decision that the Court holds the pleadings of pro se litigants "to less stringent standards than formal pleadings drafted by lawyers,"¹¹⁹ the difference in practice between the generosity appropriately extended to inadequate pleadings by represented *or* unrepresented parties is negligible.¹²⁰ Goldschmidt

support the proposition a court can discern a lawyer's hand in drafting legal documents).

115. See *Jacobsen v. Filler*, 790 F.2d 1362, 1369 (9th Cir. 1985) (Reinhardt, J., dissenting) (cited in Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97, 103 n.15 (2007)).

116. See Goldschmidt, *supra* note 41, at 1157 (discussing the lack of necessity for leniency where pleadings are of higher quality).

117. 404 U.S. 519, 520 (1972) (per curiam).

118. See Goldschmidt, *supra* note 41, at 1155 ("[A]ll pleadings, pro se or otherwise, are entitled to the liberal pleading rules of *Conley v. Gibson*"); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (holding a complaint may not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

119. *Haines*, 404 U.S. at 520.

120. Goldschmidt, *supra* note 41, at 1155. There is recent evidence that after the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), there has been a substantial increase in the rate of dismissal of pro se complaints. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 615 (2010) (observing a substantially greater increase in the rate of dismissal of pro se suits than represented suits post-*Iqbal*).

argues:

If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motions. A court that refuses to dismiss or enter summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error¹²¹

The implication of this line of argument is that a judge's duty to extend special consideration to a pro se litigant essentially ends if that litigant's pleadings rise to a certain level of adequacy. An adequately crafted pleading "levels the playing field" such that a judge may withdraw her solicitude for the pro se litigant and adopt a more neutral posture toward the contending litigants.¹²²

This argument is largely persuasive, though it contradicts the plain language (borrowed from *Haines*) that courts use to describe their approach to pro se pleadings.¹²³ The problem, however, is that the argument is excessively confident about a judge's ability to withdraw solicitude at the pleading stage without curtailing the kinds of lenient treatment that pro se litigants will still deserve under the relevant standards of judicial conduct. The Tenth Circuit, in an opinion otherwise critical of ghostwriting, pointed toward this issue when it stated that "the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant."¹²⁴ The Tenth Circuit did not explain what kind of ongoing

This influence of "plausibility pleading" on pro se complaints strikes at least one commentator as a great threat to the *Haines* regime of special consideration for pro se litigants because it opens the gates for lower court judges to dismiss prima facie "conclusory" claims without doing the extra work of seeing whether they nonetheless put a legal matter at issue. See Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 623 (2011). Schneider identifies potential relief from this problem for pro se litigants in *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), where the Court admonished lower courts for dismissing allegations as conclusory when they were adequate to "put the[] matters in issue." Schneider, *supra*, at 625.

121. Goldschmidt, *supra* note 41, at 1157.

122. See *id.* at 1158 (suggesting that ghostwriting puts parties on a level playing field and streamlines litigation "by clarifying issues and reducing the number of dispositive motions").

123. See Schneider, *supra* note 120, at 586–90 (discussing the travails of the court's effort to distinguish between liberal, heightened liberal, and plausibility pleading standards in relation to different classes of litigants and different kinds of cases). One lesson to take away is that such distinctions are extremely complicated to manage in practice.

124. *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001) (per curiam) (citing *Rothermich*, *supra* note 26, at 2712).

lenient treatment would be at issue or how the perception of assistance in drafting would affect it. Perhaps the most important area where pro se litigants will require special treatment is in dispositive motions or hearings after the pleading stage or in preparation for an appeal. It is in these later stages that misperceptions of a pro se litigant's sophistication fostered by attorney ghostwriting may cause potential pitfalls for pro se litigants and the judges who must manage them.

Under Alaska law, a judge's struggle to serve appropriately a pro se litigant only begins with the pleadings. Alaska judges hold "the pleadings of *pro se* litigants . . . to less stringent standards than those of lawyers" but also inform those litigants "of the proper procedure for the action he or she is obviously attempting to accomplish."¹²⁵ However, as the judge moves from construing pleadings to providing procedural guidance, she labors under the danger identified by the Alaska Supreme Court in *Bauman*: "to instruct a pro se litigant as to each step in litigating a claim would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side."¹²⁶ The judge thus shares the predicament of Goldilocks: how to find the amount of solicitude for a pro se litigant that is neither too much, nor too little, but just right. In each case involving a pro se litigant, the judge must consider carefully what the pro se party is attempting to accomplish, why the litigant is failing, and where he is confused or missing the point. The judge must then intervene appropriately (neither too much nor too little). The scope of a judge's duty to provide guidance is a matter of discretion—it changes with every pro se litigant. In each case, a judge must consider the pro se litigant's concrete efforts and actions¹²⁷ as well as his relative ability to know and understand the rules of the game he is playing.¹²⁸ By failing to exercise discretion properly, the judge may commit an injustice against one or the other litigant in the case.¹²⁹

125. *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987).

126. *Bauman v. State*, Div. of Family & Youth Servs., 768 P.2d 1097, 1099 (Alaska 1989).

127. *See, e.g., Kaiser v. Sakata*, 40 P.3d 800, 804 (Alaska 2002) ("Had Kaiser, as a pro se litigant, made a good faith effort to obtain discovery and informed the court of his difficulties, he might have been entitled to greater guidance from the court regarding the mechanics of the discovery process.").

128. *See Noey v. Bledsoe*, 978 P.2d 1264, 1269–70 (Alaska 1999) (finding that the pro se litigant was sufficiently sophisticated to understand the procedural obligations he was under and take appropriate steps to fulfill them without additional judicial solicitude).

129. *See Burks v. State*, 748 P.2d 1178, 1183 (Alaska Ct. App. 1988) (Coats, J., dissenting) (reasoning that a litigant who was found incapable of representing himself at trial, yet was allowed to do so, was an abuse of discretion by the

The desire to minimize the number of conflicting and confusing signals in this effort to manage appropriately pro se litigants may explain why some Florida judges thought that the simple fact of disclosing attorney assistance would be beneficial in their efforts to serve these litigants.¹³⁰ No Alaska case addresses this difficulty directly, but an examination of several instances of the appellate review of a trial judge's discretionary treatment of pro se litigants helps clarify the space of potential problems. Consider first *Collins v. Arctic Builders*,¹³¹ where the Alaska Supreme Court ruled that "the superior court must inform a pro se litigant of the specific defects in his notice of appeal and give him an opportunity to remedy those defects."¹³² In this case, the pro se plaintiff attempted to appeal a worker's compensation claim, but failed to comply with several procedural rules.¹³³ The superior court dismissed the claim and the supreme court reversed, declaring that the failure of the lower court to provide procedural allowances was "manifestly unreasonable and thus constitute[d] an abuse of discretion."¹³⁴ The lower court purportedly dismissed the claim because it believed that to do otherwise would give the pro se litigant an advantage not afforded to the represented party.¹³⁵ In response, the supreme court stated that it was "not concerned that specificity in pointing out the technical defects in pro se pleadings will compromise the superior court's impartiality."¹³⁶

The key to the decision in *Collins* is that a pro se litigant's efforts to comply with procedural requirements triggers the mandated forms of judicial solicitude.¹³⁷ The pro se litigant's effort to comply is important because it indicates good faith,¹³⁸ while the failure on technicalities indicates that the reason for failure was an inadequate understanding of

court).

130. See Florida Op. 79-7, *supra* note 13 (mentioning that judges "believed that disclosure of professional legal assistance would prove beneficial" in cases where a lawyer's help goes beyond merely filling out forms for pro se litigants).

131. 957 P.2d 980 (Alaska 1998) (per curiam).

132. *Id.* at 982. The court in *Collins* made this determination under the rule in *Breck v. Ullmer*, 745 P.2d 66, 75 (Alaska 1987), which incorporated the *Haines* standard into Alaska law.

133. *Collins*, 957 P.2d at 981.

134. *Id.* at 982.

135. *Id.*

136. *Id.*

137. *Id.*

138. In *Coffland v. Coffland*, 4 P.3d 317 (Alaska 2000), the court refused to find an abuse of discretion in the trial court's management of a pro se litigant because the litigant failed "to cooperate with the trial court or to request assistance in complying with its orders. A pro se litigant must make some attempt to comply with the court's procedures before receiving the benefit of the court's leniency." *Id.* at 321.

procedural requirements rather than an attempt to game the system. In more recent opinions, the Alaska Supreme Court has stressed that a pro se litigant “is expected to make a good faith attempt to comply with judicial procedures and to acquire general familiarity with and attempt to comply with the rules of procedure—absent this effort, [the litigant] may be denied the leniency otherwise afforded pro se litigants.”¹³⁹

The judge’s special treatment of pro se litigants is not limited to “pointing out technical defects.” In *Worthington v. Worthington*,¹⁴⁰ the supreme court determined that the trial court judge in a child custody modification suit acted within his discretion by providing (or attempting to provide) substantial assistance to the pro se litigants.¹⁴¹ In *Worthington*, the trial judge confronted a pro se litigant who continually responded to crucial questions with “conclusory statements.”¹⁴² When asked by the litigant what types of evidence the court would like to hear, the judge explained that he required specifics and some statement of relevant facts.¹⁴³ The judge also summarized in clear terms what he understood the plaintiff to be saying (supposedly, clarifying the litigant’s confused claims), provided additional time for testimony, and even asked substantive questions regarding the children’s preferences and other related matters.¹⁴⁴ On review, the supreme court determined that this kind of assistance—extending well beyond procedural technicalities—borders on an improper compromise of impartiality, but remains within the superior court’s appropriate discretion.¹⁴⁵

The easy cases under this rule involve litigants who simply do not make an effort to comply with procedural requirements at all. This was the case in *Bauman*, where the court declined “to extend *Breck* to require judges to warn pro se litigants on aspects of procedure when the pro se litigant has failed to at least file a defective pleading.”¹⁴⁶ The more difficult cases involve a sophisticated litigant whose failure to comply with procedural requirements was actually a combination of foot-dragging and litigation strategy. In *Noey v. Bledsoe*,¹⁴⁷ for example, the court held that Noey, a “sophisticated pro se litigant,”¹⁴⁸ did not deserve

139. *Gilbert v. Nina Plaza Condo Ass’n*, 64 P.3d 126, 129 (Alaska 2003) (citing *Kaiser v. Sakata*, 40 P.3d 800, 803 (Alaska 2002)).

140. No. S-13982, 2011 WL 3795532 (Alaska Aug. 24, 2011).

141. *Id.* at *6.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Bauman v. State, Div. of Family & Youth Servs.*, 768 P.2d 1097, 1099 (Alaska 1989).

147. 978 P.2d 1264 (Alaska 1999).

148. *Id.* at 1269.

procedural leniency for his petition for a stay on the eve of trial. Taken in the abstract, Noey's action seemed paradigmatic of the sort of procedural mishap that the court should accommodate under *Breck*. In this instance, however, the court's judgment of Noey's relative sophistication—exhibited in various ways throughout the litigation process—was influential in determining that he should be held to an appropriately strict procedural standard.¹⁴⁹

Abstracting from the particular facts of *Noey*, one can see the potential for how a judge's mischaracterization of a pro se litigant's sophistication could lead the judge to withdraw leniency when it is truly deserved. Imagine an "educated and articulate" pro se litigant who brings a personal injury suit against the other driver, represented by an attorney, in the wake of a car accident.¹⁵⁰ The judge finds the pro se litigant's pleadings confusing, but suggestive of a modicum of legal knowledge. She suspects that the pleadings are "ghostwritten" by an attorney, but is uncertain based on her experience with intelligent laypersons who acquire rudimentary knowledge of legal claims and language, as well as with the relatively low quality of many lawyers' work. Similarly, at trial, the judge finds that the pro se litigant seems to understand many procedural requirements—enough so that she again suspects he was prepped by an attorney prior to trial—but is clearly confused by others. Mixed signals abound. The judge struggles throughout the trial to balance her obligation to explain procedural requirements and make other allowances for the pro se litigant with her obligation to maintain an impartial forum for both parties. She explains some procedural issues at length (though remains unsure about the extent to which the litigant truly understands), while on others she "tempers or overlooks"¹⁵¹ her preferential treatment of the pro se litigant in an effort to be fair to the opposing party's lawyer. She finds the balancing act unnecessarily irritating. On review, the appellate court determines that while her efforts to guide the pro se litigant do not amount to plain error, she should have provided the litigant a "more

149. *Id.* at 1269–70.

150. The hypothetical that follows is based very loosely on *Azimi v. Johns*, 254 P.3d 1054 (Alaska 2011), where the Alaska Supreme Court reviewed a superior court's decision with respect to whether, *inter alia*, the trial court judge was adequately attentive to the needs of the pro se litigant. The description of the litigant as "educated and articulate"—important at trial for determining the ability of the litigant to understand the procedural requirements he was under—is found at p. 1066.

151. See Alaska Op. 93-1, *supra* note 1, at 2 n.2 for the view that a judge, suspecting undisclosed assistance from an attorney for a pro se litigant, will temper or "overlook[]" any preferential treatment to the pro se party in the interest of fairness.

complete” explanation of the proper procedures.¹⁵²

The burden on judicial discretion in these situations is real enough and cannot be adequately addressed by more explicit guidance from the supreme court. Given differences among individual pro se litigants and the cases they bring, the supreme court seems to have decided that the regime of *Breck* modified by *Bauman* is as clear as the guidance for judicial discretion can become without unduly hampering it with more specific rules.¹⁵³ Much is at stake in the judge’s exercise of discretion, both for the judge’s effort to do justice on the merits and for the pro se litigant. As the foregoing examination has suggested, the first impressions created by a pro se litigant’s ghostwritten pleadings may influence the judge’s efforts throughout the subsequent litigation process. The judge’s potential mischaracterization of the litigant’s sophistication may lead her to draw back the amount of guidance she provides in a way that ultimately harms the litigant’s chances of success.

Requiring attorneys who assist otherwise pro se litigants to disclose their assistance is not a comprehensive solution to the challenges confronting judges managing pro se litigants. Such a disclosure will not, for instance, enable a judge accurately to determine how much a pro se litigant truly understands, and thus to judge whether the litigant’s inadequate efforts and explanations are evasive tactics or good faith failures. Disclosure will, however, ensure that the judge exercises her discretionary effort to balance solicitude and impartiality in a situation where all of the relevant variables are clear. The judge will not be confronted with conflicting signals about a pro se litigant’s actual understanding of his claims and the requirements he is under, nor will the judge be required to guess about the sources of a litigant’s knowledge.

IV. ATTORNEY GHOSTWRITING: HIGH COST, LOW REWARD

One of the most poignant retorts against critics of ghostwriting is that they fail to identify any particular harm that the practice causes to

152. See *Azimi*, 254 P.3d at 1062 (“We agree that the superior court could have provided *Azimi* with a more complete explanation of the proper procedure . . . [but] we hold that any deficiency in the court’s explanation was harmless.”).

153. Though this is speculation, it is reasonable to infer this conclusion from the fact that, in *Tracy v. State, Dept. of Health & Soc. Servs.*, 279 P.3d 613, 617 (Alaska 2012), where the court requested supplemental briefing on the proper extent of a judge’s required solicitude for the needs of a pro se litigant, the court simply reiterated the *Breck* and *Bauman* standards to justify its determination that the lower court did not abuse its discretion by declining to advise plaintiffs on what steps they might have taken to amend their complaint to name a proper defendant.

the legal profession or the administration of justice.¹⁵⁴ The genius of the retort is that it shifts the burden of justification to critics of ghostwriting. For many years, most lawyers have assumed that this kind of disclosure is required by ARPC 3.3 concerning “candor to the tribunal,” or under the duty of honesty imposed by ARPC 1.2(d), 4.1, or 8.4(c).¹⁵⁵ As a more general matter, most lawyers assume that norms of disclosure and transparency are deeply embedded in the practice of law, subject only to the duty of protecting a client’s confidences or secrets.¹⁵⁶ Until recently, few lawyers would have agreed that an attorney’s participation in aspects of an ongoing litigation should be concealed from the court.¹⁵⁷

The previous sections of this Note have attempted to take seriously the demand by proponents of ghostwriting that its critics identify the harms associated with the practice. The argument thus far has suggested that ghostwriting (1) undermines the transparency that allows the courts and other lawyers to monitor for abuses of the rules of professional conduct, and (2) potentially impairs the efforts of judges to address the needs of pro se litigants. The argument is to some extent speculative, concerned with a future in which unbundled services and pro se litigation are an even greater part of legal practice in the United States. In this respect, however, the argument is on par with most defenses of ghostwriting. The suggested benefits of allowing ghostwriting for low-income pro se litigants are also largely speculative.¹⁵⁸ Most defenses of ghostwriting essentially claim that because the practice has not yet produced any real harm, it should be permitted to continue because it

154. See generally Jona Goldschmidt, *An Analysis of Ghostwriting Decisions: Still Searching for the Elusive Harm*, 95 JUDICATURE 78, 10 (2011) (noting “the lack of documented harm to adverse parties in ghostwriting decisions” and the “lack of published cases of documented harm or adversary disadvantage from ghostwriting”).

155. ALASKA R. OF PROF’L CONDUCT R. 3.3. See also ALASKA R. OF PROF’L CONDUCT R. 1.2(d) (“A lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent”); ALASKA R. OF PROF’L CONDUCT R. 4.1 (mandating that a lawyer shall not falsely state material facts or law or “fail to disclose a material fact when disclosure is necessary to avoid assisting” a client’s criminal or fraudulent act); ALASKA R. OF PROF’L CONDUCT R. 8.4(c) (stating that conduct “involving fraud, dishonesty, deceit, or misrepresentation” constitute acts of professional misconduct).

156. See ALASKA R. OF PROF’L CONDUCT R. 1.6 (requiring lawyers to protect client confidences and secrets, unless a client provides informed consent, or the disclosure is necessary to prevent harm, crime, fraud, or injury).

157. But see ABA Op. 07-446, *supra* note 39, at 3 (noting that since no reasonable concern exists that a pro se litigant will receive an unfair advantage from “behind-the-scenes” legal assistance, such aid is “immaterial and need not be disclosed”).

158. See Steinberg, *supra* note 10, at 13 (mentioning evidence that unbundled services in general are providing no demonstrable benefit to pro se litigants).

might improve the prospects of low-income litigants. ABA Op. 07-446 justifies ghostwriting primarily on the idea that it is immaterial to the merits of the litigation and will not provide a pro se litigant an undue advantage.¹⁵⁹ The ABA opinion does not, however, seem concerned—as several of the Florida judges were¹⁶⁰—that ghostwriting will provide cover for incompetent, predatory practices by lawyers who sell their services to low-income individuals and then provide them ineffective assistance.

For the defense of ghostwriting to be fully persuasive, proponents must not simply argue that it is immaterial or innocuous, but actually explain what ghostwriting promises to contribute to the larger aspiration of unbundled services. The defense of ghostwriting can no longer simply be a defense of the basic idea of unbundled services. As noted above, the Alaska debate over unbundled services has been settled in its favor. The question that needs to be addressed is whether ghostwriting adds anything of value to the practice that can outweigh the potential costs. There is no evidence, for instance, that states permitting ghostwriting have a larger number of attorneys providing unbundled or pro bono services. More generally, ghostwriting fosters an atmosphere of suspicious motives. An attorney who refuses to provide limited services unless it is undisclosed would at least seem to be trying to create a situation in which he cannot be held accountable for the quality of his work. Similarly, a client who wants the services of an attorney to remain confidential seems to be trying to game the system by seeking the supposed advantages of proceeding pro se.

Goldschmidt has identified eight reasons why attorneys or their clients may want to conceal their relationship from the court and opposing counsel.¹⁶¹ Framing these concerns in relation to a purported right to confidentiality, he argues that ghostwriting would be appropriate:

- (1) where an attorney is a friend of both the pro se litigant and his divorcing spouse or other adversary in a civil dispute;
- (2) where the attorney may not want the adverse publicity from public knowledge that he represents a particularly unpopular pro se client;
- (3) where the pro se client knows that the judge in the case and his ghostwriting attorney do not have a good relationship, and he does not want the disclosure to adversely

159. ABA Op. 07-446, *supra* note 39, at 3.

160. See Cofer Letter, *supra* note 82 (highlighting the danger of attorneys involving themselves in cases in a limited manner, which can result in pro se litigants misconstruing or misapplying attorney advice).

161. Goldschmidt, *supra* note 41, at 1198.

affect his case; (4) where the attorney who provides ghostwriting services because he is sympathetic to pro se litigants seeks to avoid ostracism for that service by members of his bar association or judges with anti-pro se attitudes; (5) where the attorney wants to assist the pro se client, but does not want to get involved in the matter because opposing counsel is particularly uncivil or a user of hardball tactics that he fears will lengthen the litigation needlessly; (6) where the attorney knows his client will not have the funds to litigate the case fully and he 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; (7) where the attorney is employed by a private company or non-profit organization and wants to assist a pro se friend in a legal matter, but does not want his employer to know that he is representing the pro se litigant on his own time; (8) where the attorney may not desire to appear before the assigned judge because of a problem with him in the past, he knows that if he appears and files a notice of substitution of judge the other side will do the same thing, and the third judge may be worse than the first, so—given the client’s ability to pay—ghostwriting and coaching the litigant may be in the client’s best interest.¹⁶²

All of these reasons are understandable concerns. Some are based on personal conflicts of interest (not amounting to concerns under ARCP 1.7), others on a lawyer’s concern with the public perception of his work. However understandable these reasons are for causing particular lawyers in particular situations to be reticent about becoming involved with a specific pro se client, none of them are adequate justifications for permitting ghostwriting as a general policy. None of these situations—if addressed by a general policy of allowing ghostwriting—promises to increase the number of attorneys providing unbundled or pro bono services.

CONCLUSION

Alaska Op. 93-1 justifies ghostwriting as a way of enabling lawyers to serve more low-income individuals that is harmless for the judiciary’s effort to manage an impartial and effective forum for justice.¹⁶³ There is no evidence that ghostwriting increases the number of attorneys providing unbundled legal services or makes providing those services

162. *Id.*

163. Alaska Op. 93-1, *supra* note 1.

any easier. Similarly, there is no evidence that ghostwriting improves the prospects of pro se litigants once they are in court. This Note has argued that ghostwriting confuses the interaction between pro se litigants and judges in a way that potentially works against the pro se party's interests.

Given the marginal contribution, if any, that ghostwriting makes to legal services, the Alaska Bar Association should revise its ethical guidance to require that any attorney-assisted filing submitted by an otherwise pro se litigant be identified as such. The Alaska Bar Association could follow the Florida Bar Association's lead and require that attorneys who provide such services append "Prepared with the Assistance of Counsel, Alaska Bar No. ____." Requiring attorneys to identify their work products in this manner would neither discourage them from assisting pro se clients nor stifle experimentation in the unbundled services market. What such disclosure would do is incentivize quality legal work because it would preserve and protect crucial forms of oversight and accountability. This disclosure would also help the Alaska legal community monitor for abuses so that the quality of legal representation for low-income, pro se litigants is consistent with that offered to the beneficiaries of more traditional representation.