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Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts

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ARTICLES

Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts

IRA P. ROBBINS*

ABSTRACT

Compared with other litigants, pro se prisoners are at an inherent disadvantage when they try to vindicate their rights. They lack many of the resources enjoyed by non-prisoner litigants. They have limited finances and limited access to legal-research materials. Even if they had such access, their illiteracy would lessen its effectiveness. Moreover, many attorneys are unwilling or unable to undertake full representation of prisoner litigants. As a result, pro se prisoners struggle to navigate the complex legal system, often losing their cases on procedural grounds before ever reaching a decision on the merits.

This Article argues that, in order to provide pro se prisoners with the access to the courts that law and justice require, attorneys (and sometimes non-attorneys) should be permitted to ghostwrite pleadings for them—that is, to draft pleadings that prisoners will then file pro se. Attorneys who may otherwise be reluctant to represent prisoner litigants as counsel of record might still be amenable to providing services in this limited way. Limited-scope representation—or “unbundled legal services”—is not an anomaly. Indeed, most states accept the practice in at least some contexts, and the American Bar Association recently gave its stamp of approval to ghostwriting. Nevertheless, many courts and commentators contend that ghostwriting by attorneys is unethical, that it gives pro se litigants an unfair advantage (because their pleadings are entitled to judicial benevolence), and that it encourages the unauthorized practice of law. Addressing these concerns, this Article considers the various forms that ghostwriting could take—i.e., whether ghostwriting attorneys should be required

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to disclose their names, the fact of their assistance, or the nature of their assistance—and concludes that ghostwriting should be allowed without any disclosure of attorney assistance at all. Indeed, disclosing such assistance may, in some instances, actually violate ethical rules. While ghostwriting likely constitutes the practice of law and might justifiably be rejected in other contexts, this Article recommends that courts and bar associations endorse the practice of ghostwriting for pro se prisoners, to give these disadvantaged litigants a more even playing field on which to challenge alleged violations of their constitutional rights.

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*In a community where illiteracy and mental deficiency [are] notoriously high, it is not enough to ask the prisoner to be his own lawyer.*¹

INTRODUCTION

Compared with other litigants, pro se prisoners are at an inherent disadvantage. They lack many of the resources enjoyed by non-prisoner litigants. They have limited finances and restricted access to libraries, legal materials, computers, the Internet, and even items that the non-incarcerated take for granted—such as paper, pens, and telephones.² In addition, many attorneys are unwilling or unable to take on full representation of prisoner litigants.³ As a result, pro se prisoners struggle to navigate the complex legal system, often losing their cases on procedural grounds before ever reaching a decision on the merits.⁴ These difficulties are of particular concern because the number of pro se prisoner litigants is on the rise.⁵ In the early 1990s, for example, the largest increase in pro se filings was ascribed to pro se prisoner petitions.⁶

This Article argues that, to provide pro se prisoners with the access to the courts that law and justice require, attorneys (and sometimes non-attorneys) should be permitted to ghostwrite pleadings for them—that is, to draft pleadings that prisoners will then file pro se, without disclosing the assistance of counsel. Although this proposal will not solve all of the funding and resource deficiencies currently facing prisoner litigants, allowing lawyers and non-lawyers to ghostwrite prisoners’ pleadings would afford at least a partial solution by providing access to trained,⁷ competent, and capable legal assistants for prisoners who would otherwise have no such access. If authorized to provide legal assistance

1. Johnson v. Avery, 393 U.S. 483, 496 (1969).
 2. See *infra* notes 26-35 and accompanying text (detailing prisoners’ lack of access to resources).
 3. *Id.*
 4. See Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT’L L. 103, 106 (2002).
 5. See CONFERENCE OF STATE COURT ADM’RS, POSITION PAPER ON SELF-REPRESENTED LITIGATION 1 (Gov’t Rel. Office ed. 2000) (“[T]he recent surge in self-represented litigation is unprecedented and shows no signs of abating.”).
 6. See Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 822 n.7 (1997) (noting that, in the Northern District of California alone, pro se prisoners filed 1233 petitions in 1993).
 7. See ABA Section of Litig., Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force 4 n.5 (2003), available at <http://www.abanet.org/litigation/taskforces/modest/report.pdf> (“Limited scope legal assistance is *not* a substitute for adequate funding for indigent legal services programs.”).

without disclosing their identities or becoming the “attorney of record” in a case, attorneys who may otherwise be reluctant or unwilling to represent prisoner litigants might be amenable to ghostwriting their pleadings. Moreover, such limited representation would be less costly and time-consuming for attorneys who often take on prisoner litigation pro bono. Finally, allowing attorneys to ghostwrite pleadings generally would ensure better quality pleadings than are currently produced by pro se prisoner litigants, thus reducing the heavy burden that pro se litigation imposes on courts⁸ and leading to more efficient and effective judicial proceedings than under the current system.

In recent years, it has become increasingly common and accepted for attorneys to limit the scope of their representation.⁹ Such limited representation can take various forms, including self-help guidelines and books, legal advice hotlines, and one-time client interviews in which attorneys offer advice but do not commit to full representation.¹⁰ Limited representation, including ghostwriting, is not an anomaly. Indeed, most states accept the practice in at least some contexts, and the American Bar Association (“ABA”) recently gave its stamp of approval to ghostwriting.¹¹ Nevertheless, many courts and commentators strongly oppose the practice of ghostwriting,¹² contending that it is unethical, gives pro se litigants an unfair advantage, and encourages the unauthorized practice of law.¹³

This Article proceeds in five parts. Part I provides information regarding the current hurdles facing prisoner litigants, as well as the current legal status of ghostwriting. It begins by describing the lack of resources available to prisoners—including the unwillingness of attorneys to represent them—and

8. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 479-80 (2002) (noting that the increase in federal court filings has coincided with an increase in pro se prisoner filings and explaining that “[t]he increase in pro se prisoner petitions puts a greater strain on the court system than would a similar expansion in civil filings by plaintiffs represented by counsel”).

9. See ABA Section of Litig., *supra* note 7, at 93 n.291 (acknowledging the use of limited legal assistance); see also *id.* at 5-6 (stating that many lawyers engage in some form of unbundled legal services regularly, without realizing it).

10. These resources have developed in response to the rapid rise in pro se litigation across the United States. ABA Section of Litig., *supra* note 7, at 8 (noting the increasing trend of pro se litigation); *id.* at 6 n.9 (citing BLACK’S LAW DICTIONARY 1232, 1237 (7th ed. 1999)); see 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, 1539-41 (2005); see also Buxton, *supra* note 4, at 112 (tracing the rise of pro se civil litigation and attributing it both to an increased need to resort to litigation to settle disputes and to a “lack of access to justice through the traditional attorney-client relationship”); Thomas J. Yerbich, *Testing the Limits on Unbundled, Limited Representation*, AM. BANKR. INST. J., Feb. 2004, at 8 (“[A]cceptance of limited representation in litigation is gaining momentum across the country.”).

11. See ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 07-446, 1 (2007) [hereinafter 2007 ABA Ethics Opinion]; see also *infra* notes 86-98 and accompanying text (exploring the ABA’s support of attorneys ghostwriting pleadings for pro se litigants).

12. See *infra* notes 73-78 and accompanying text (describing the federal courts’ criticism of ghostwriting as deception).

13. See *infra* Part V.

contrasts that with the line of cases holding that prisoners have at least a limited constitutional right of access to the courts. This Part continues by analyzing the current status of ghostwriting in federal and state courts, including a recent ABA opinion that suggests that ghostwriting should be allowed. Part II considers the various types of disclosures that could be required—i.e., whether ghostwriting attorneys need to disclose their names, the fact of their assistance, or the nature of their assistance—and argues that ghostwriting should be permitted without any disclosure of attorney assistance at all. Part III explores the ethical and legal issues that ghostwriting without disclosure raises—including whether ghostwriting causes attorneys to violate their duty of candor toward the tribunal, whether the practice interferes with courts’ ability to supervise and sanction pro se prisoner litigants and their ghostwriting attorneys, whether ghostwriting encourages the unauthorized practice of law, and whether ghostwriting is consistent with attorneys’ duty to provide competent representation. This Part argues that undisclosed ghostwriting assistance does not violate any of the ethical, legal, or practical restrictions placed on attorney practice.

Delving deeper into specific ethical concerns, Part IV addresses concerns that ghostwriting without disclosure would encourage incompetent representation and lead to an unfair application of the principle that pro se filings should receive a benevolent reading. This Part concludes that neither of these concerns is well-founded: the risk of incompetent representation is minimal because attorneys who provide ghostwriting assistance remain bound by their ethical duty to provide competent representation, and it is not unfair to grant ghostwritten pleadings a benevolent reading because of the often insurmountable barriers that prisoners face. Part V considers whether allowing ghostwriting without disclosure encourages or allows the unauthorized practice of law. This Part notes that, because ghostwriting is likely the practice of law, and because many jurisdictions would consider non-attorney ghostwriting to be the *unauthorized* practice of law, non-attorneys would be wise to refrain from providing ghostwriting assistance. This Part goes on to argue, however, that the heavy burdens and obstacles that prisoner litigants face may well justify permitting even non-lawyers to provide ghostwriting assistance to at least some prisoner litigants.

I. BACKGROUND

In recent years, the number of pro se litigants has increased dramatically in the United States.¹⁴ Most of these litigants choose to proceed pro se only because they cannot afford full representation.¹⁵ Unfortunately, most pro se litigants also

14. See ABA Section of Litig., *supra* note 7, at 8 n.15 (that “the numbers of pro se litigants have grown considerably during the last 25 years”).

15. See *id.* at 9-10 (explaining that the rise in pro se litigation can be attributed to cutbacks in funding for legal services organizations and the fact that full-fledged legal representation is simply not affordable to most

lack the resources and expertise necessary to succeed in their claims.¹⁶

Advocates for pro se litigants argue that the solution to these problems lies in permitting limited-scope legal representation, or “unbundled legal services,”¹⁷ which gives pro se litigants the opportunity to get help where they most need it, at a price they can afford to pay.¹⁸ Ghostwriting is one form of unbundled legal services. With unbundled legal services, an attorney does not represent a client in every aspect of a matter, but instead agrees to perform specific services for the client.¹⁹ For example, an attorney may agree to appear at a hearing on behalf of a client without providing further representation. Alternatively, an attorney may agree to ghostwrite a pleading or pleadings on behalf of a client.²⁰ The term “ghostwriting” may refer to several different forms of unbundled services, but it generally refers to a situation in which a lawyer drafts a pleading or another court document for a client, who then proceeds to file the document pro se.²¹

Most of the cases that address ghostwriting, and an overwhelming proportion of the academic and practical literature devoted to this topic, have considered the practice in the context of family law and bankruptcy, the areas in which

Americans); see also John P. Flannery & Ira P. Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOK. L. REV. 769, 769 (1975) (“The caveat that one who represents himself as his own attorney has a fool for a client is an acrid admonition to those without alternative.”). But see ABA Section of Litig., *supra* note 7, at 9-10 (noting that technological advances, a desire to control one’s own lawsuit, and cynicism about our adversarial legal system have also sparked the rise in the number of pro se litigants).

16. See *infra* Part I.A (discussing the need for unbundled legal services in prisons).

17. ABA Section of Litig., *supra* note 7, at 4; see also Margaret Martin Barry, *Assessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1926 (1999) (praising law school clinics that provide unbundled legal services and education to pro se litigants); Rochelle Klempner, *Unbundled Legal Services in New York State Litigated Matters: A Proposal to Test the Efficacy Through Law School Clinics*, 30 N.Y.U. REV. L. & SOC. CHANGE 653, 653-54 (2006) (suggesting that ghostwriting should be tested out in a domestic relations clinic because it is “unrealistic to expect any substantial changes in the abilities of our already-overburdened legal service programs and lawyer volunteers to provide full-service legal representation”); Yerbich, *supra* note 10, at 8 (defining “unbundling” as the “concept of limited representation in litigation”).

18. ABA Section of Litig., *supra* note 7, at 11; John T. Broderick, Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, at A21 (Op-Ed by the chief justices of New Hampshire and California supporting the unbundling of legal services and stating, “for those whose only option is to go it alone, at least some limited, affordable time with a lawyer is a valuable option we should all encourage”).

19. See Mary Helen McNeal, *Unbundling and Law School Clinics: Where’s the Pedagogy?*, 7 CLINICAL L. REV. 341, 349 (2001) (“Unbundling is the division of legal assistance into discrete tasks, with an understanding between the lawyer and client that the lawyer will provide only selected legal services that may not address the client’s entire legal problem.”).

20. Although the focus of this Article is on ghostwriting by attorneys on behalf of pro se litigants, ghostwriting may also refer to drafting services provided by non-lawyers. See *infra* Part V.C (discussing the ethical implications of “jailhouse lawyers” and other non-attorneys providing ghostwriting services to inmates).

21. See ABA Section of Litig., *supra* note 7, at 97-98 (using the term “ghostwriting” in this way); John C. Rothermich, Note, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2689 (1999) (explaining that the clients then represent themselves without the assistance of counsel).

ghostwriting occurs most frequently.²² With family law, the expense and routine nature of divorce proceedings, as well as clients' desire for more control over the process, has led an increasing number of litigants to proceed pro se and an increasing number of attorneys to offer limited services like ghostwriting.²³ In the bankruptcy context, filing pro se is allowed but very difficult to do successfully,²⁴ so those bankruptcy petitioners who decide to proceed pro se have an incentive to seek specific services, including document drafting, from attorneys. Like most pro se litigants, many family law and bankruptcy litigants suffer from a lack of resources and expertise; therefore, the attention to ghostwriting in these areas is warranted. But nowhere is the combination of an inability to afford counsel, a deficiency in resources, and a lack of expertise more prevalent than in America's prisons.²⁵ The following section explores the obstacles that pro se prisoner litigants face and argues that ghostwriting, if it is to be allowed in any context, ought to be allowed in the context of prisoner litigation.

A. THE NEED IN PRISONS

Prisoners present a unique set of concerns and needs due to their lack of access to resources and the increasing complexity of prisoner litigation. Most prisoners cannot afford to hire an attorney to represent them.²⁶ Prisoners utilize "unbundled

22. See ABA Section of Litig., *supra* note 7, at 13 (observing that limited-scope representation "occur[s] most often in family law, but also in bankruptcy, housing (transactions and landlord-tenant cases), and community representation"); see also Alicia M. Farley, *Current Development 2006-2007: An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 569 n.45 (2007) (explaining how most state efforts at providing limited legal services have focused on areas such as family and housing law).

23. See generally Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994) (providing an overview of the reasons why unbundled legal services have been popular in family law and describing how these arrangements typically work).

24. See USCourts.gov, *Filing for Bankruptcy Without an Attorney*, <http://www.uscourts.gov/bankruptcycourts/prose.html> (last visited Feb. 17, 2010) (noting that bankruptcy rules are highly technical and mistakes can be damaging, so it is important that cases be handled correctly); see also *Help Offered for Pro Se Filers and Bankruptcy Courts*, THIRD BRANCH, Dec. 2007, at 6, available at <http://www.uscourts.gov/ttb/2007-12/helpoffered/index.html> ("Filing a bankruptcy case pro se—without the assistance of an attorney—is not for the faint of heart.").

25. See *infra* Part II.A (detailing the difficulties of pro se prisoner litigation, particularly the lack of effective access to resources and an increasingly complex legal and procedural landscape facing prisoner litigants).

26. See, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) ("[Filing deadlines] are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim."); *Free v. United States*, 879 F.2d 1535, 1539 (7th Cir. 1989) (Coffey, J., concurring) ("[T]he vast majority of prisoners are indigent, necessitating the filing of their complaints *in forma pauperis* . . ."); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 326 (2002) ("Approximately 95% of inmates [in the case study] filed an *in forma pauperis* application before and after the [Prison Litigation Reform Act of 1995].") *But see* Swank, *supra* note 10, at 1573-74 (asserting that nearly half of pro se litigants could afford legal representation, but instead choose to proceed pro se). Swank's analysis, however, is not limited to prisoner pro se litigants. *Id.* Since prisoners exhibit poverty rates much higher than the population as a whole, it is highly likely that far fewer prisoners can afford legal representation.

services” or “limited scope assistance” not necessarily because they prefer such assistance, but rather because they do not have access to more comprehensive legal services.²⁷ A rational prisoner may decide that some help is better than none.²⁸

Prisoners’ access to telephones, the Internet, and print media is severely limited.²⁹ Thus, many of the extensive websites,³⁰ hotlines,³¹ workshops,³² and

27. See Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 420 n.8 (1993) (“More than 95% of prisoner suits are filed *in forma pauperis*. With rare exceptions, all such cases are filed *pro se*.” (citing William B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 617 (1979))); cf. ABA Section of Litig., *supra* note 7, at 92 (emphasizing that “lawyers and clients make legal service decisions in a real, not ideal, world” and that at times limited representation may be the only option for pursuing a claim); Ariz. State Bar Comm. on R. Prof’l Conduct, Op. 05-06, at 4 (2005), available at <http://www.myazbar.org/Ethics/pdf/05-06.pdf> (“[O]ften the decision to proceed *in propria persona* is influenced by the high cost of retaining an attorney.”).

28. Cf. ABA Section of Litig., *supra* note 7, at 12 (“We believe that in the great majority of situations some legal help is better than none. An informed *pro se* litigant is more capable than an uninformed one. A partially represented litigant is more effective than a wholly unrepresented litigant.”).

29. See, e.g., ELIZABETH GREENBERG ET AL., NAT’L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 64 (2007), available at <http://nces.ed.gov/pubs2007/2007473.pdf> (stating that “access to the Internet is typically prohibited within prisons”); Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 897 (2002) (explaining that, while direct inmate access to the Internet is “basically obsolete,” some prisoners access the Internet through third parties).

In *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009), the prisoner moved for an extension of time in the U.S. Court of Appeals for the Second Circuit to file various pleadings necessary for him to appeal from the district court’s denial of his habeas corpus petition. Lebron complained that he did not have access to several decisions, cited by both the district court and the appellee in its brief in opposition to his habeas petition, because the decisions were “available only on fee-based, electronic databases” or in the *Federal Appendix* that he could not access in prison. *Id.* at 77. The court of appeals—“concerned about the impact on the appearance of justice when *pro se* litigants may not have financial access to case authorities that form the basis of a court’s decision, thereby hampering the litigants’ opportunities to understand and assert their legal rights,” *id.* at 78—granted the extension. The court said that it would send Lebron the relevant opinions, and recommended that the Judicial Council of the Second Circuit “consider [the general] issue in the first instance and determine whether further local rules or other rules should be adopted to address this situation.” *Id.* at 79 (footnote omitted).

30. See, e.g., State of Connecticut Judicial Branch, Self-Help, <http://www.jud.state.ct.us/selfhelp.htm> (last visited Feb. 17, 2010) (providing information about self representation in the Connecticut court systems for landlord/tenant, small claims, and family matters, among others); California Courts, Self-Help Center, <http://www.courtinfo.ca.gov/selfhelp/> (last visited Feb. 17, 2010) (offering information on small claims, family, traffic, and landlord/tenant representation, among others; however, the criminal law section is limited, with little information for prisoners); ABA, *Pro Se/Unbundling Resource Center*, <http://www.abanet.org/legalservices/delivery/delunbundself.html> (last visited Feb. 17, 2010) (collecting resources by state). There are some online resources for prisoners, but it is questionable whether a prisoner would have sufficient Internet access to make use of them. See, e.g., Prison Legal Services of Michigan, Inc., Self-Help Packets, <http://www.plsminc.org/selfhelp/self-help-packets.htm> (last visited Feb. 17, 2010) (providing “self-help packets” to assist prisoners in filing a variety of actions); Prison Law Office, Resources: Self-Help Prisoners Rights Material, <http://www.prisonlaw.com/research.php> (last visited Feb. 17, 2010) (supplying a variety of manuals tailored to *pro se* prisoner litigation in California).

31. See, e.g., Buxton, *supra* note 4, at 124 (describing hotlines operated by Maryland’s Family Law Clinic and the Women’s Law Center); AARP Foundation, Legal Hotlines, http://www.aarp.org/makeadifference/gettinghelp/articles/legal_hotline.html (last visited Feb. 17, 2010) (providing information on legal hotlines resources).

32. See, e.g., DC Bar, Programs and Services, http://www.dcb.org/for_the_public/programs_and_services/index.cfm (last visited Feb. 17, 2010) (listing clinics and workshops on landlord/tenant, custody, and other civil matters available to individuals in the District of Columbia).

books³³ about litigating pro se are not accessible to prisoners or may lack specific information on post-conviction litigation. Further, the limited resources available within prisons themselves are often inadequate to allow prisoners to represent themselves effectively; libraries may have limited hours, for example, or case reporters may be missing key pages.³⁴ Thomas O'Bryant, a Florida prisoner writing in the *Harvard Civil Rights-Civil Liberties Law Review*, describes how the resources provided to pro se prisoners in Florida are typically inadequate for conducting the research necessary to successfully challenge the merits or conditions of one's confinement:

[S]ome prisons in Florida have replaced their hardbound volumes of federal case reporters with a CD-ROM collection of these reporters. In theory, this should benefit the pro se prisoner. In reality, it does not Prisoners in Florida are not allowed to use the computers in the law libraries for research purposes. A pro se prisoner needs to know the name and citation of the case he wants to read. He must then give the case citation to a law clerk. The law clerk, when he gets around to it, will then pull up the case on the computer, and the pro se prisoner may then read the case off the computer screen and take notes. At no time during this process is the pro se prisoner allowed to touch the keyboard; the pro se prisoner must have a law clerk available to scroll the text up or down. The law library may have three or four computers in it, but *only one* is designated for use by the prisoners who do not work in the law library.³⁵

Many prisoners also face greater personal barriers to proceeding pro se than the non-incarcerated population. The Supreme Court commented in *Johnson v. Avery*³⁶ that “[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.”³⁷ Recent statistics support this observation. While only eighteen percent of the general population did not finish high school, forty-one percent of individuals incarcer-

33. See generally PAUL BERGMAN & SARA J. BERMAN-BARRETT, REPRESENT YOURSELF IN COURT: HOW TO PREPARE & TRY A WINNING CASE (Lisa Guerin ed., 4th ed. 2003) (advising individuals on bankruptcy, custody and divorce, personal injury, and small claims suits); JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL (3d ed. 1995) (providing extensive guidance to prisoners proceeding pro se; however, prisoners do not have the same ability to access this resource as members of the general public); M. SUE TALIA, A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES (1997) (providing practical advice for family law litigants).

34. See, e.g., GREENBERG, *supra* note 29, at 62 (reporting results from the 2003 National Assessment of Adult Literacy Prison Survey: while 59% of prisoners wanting to use a library were allowed to do so within two days of requesting access, 22% were required to wait two to six days, 10% had to wait seven to ten days, and 10% had to wait more than ten days).

35. Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation after the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 325-26 (2006) (citations omitted).

36. 393 U.S. 483 (1969).

37. *Id.* at 487.

ated in state and federal prisons and local jails did not complete their secondary education.³⁸ Whether due to this lack of education or the fact that, for many, English is not their first language, prisoners also tend to have lower literacy abilities than the general population.³⁹ In addition, many prisoners have mental health problems⁴⁰ that can impede their ability to represent themselves effectively.⁴¹

Given these obstacles, prisoners have a great need for outside legal assistance; unfortunately, the opportunities for prisoners to receive the pro bono assistance of lawyers are limited. Attorneys who represent prisoners must deal with intrusive searches required to enter the facility, unwanted comments from guards and inmates, extended travel to meet with inmates who are transferred to different facilities, and long waits for inmates to be released from lock-down status. As a result, many lawyers are unable or unwilling to represent prisoners. Lawyers may also be reluctant to shoulder the ethical responsibilities that accompany representation of inmates, particularly given the difficulty of fully investigating

38. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf>; see also BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 511 (Kathleen Maguire & Ann L. Pastore eds., 2003) (noting that more than seventy percent of the individuals entering state prisons had not completed high school and twelve percent had no high school education at all); O'Bryant, *supra* note 35, at 310 (“[T]he average tested prisoner has obtained an education equivalent to a 5.5 grade level [on the Test of Adult Basic Education (TABE)] . . . For an inmate to be considered even functionally literate, he must achieve at least a 6.0 grade level TABE score.”) (footnote omitted); cf. Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000) (“[Owens] proposes that the year to file a federal [habeas corpus] petition begins when a prisoner *actually understands* what legal theories are available. . . . Like most members of street gangs, Owens is young, has a limited education, and knows little about the law. If these considerations delay the period of limitations until the prisoner has spent a few years in the institution’s law library, however, then [the habeas corpus statute of limitations] might as well not exist; few prisoners are lawyers.”) (citations omitted).

39. See GREENBERG, *supra* note 29, at 45 (comparing incarcerated adults and adults living in households on prose, document, and quantitative literacy); KARL O. HAIGLER ET AL., U.S. DEP’T OF EDUC., LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY 17-20 (1994) (performing a similar comparison in 1994, and finding that prisoners scored lower in all three categories than individuals in the general population); see also Hadix v. Johnson, 694 F. Supp. 259, 269 (E.D. Mich. 1988) (“Illiteracy or an inability to use (read and write) and understand the English language precludes twenty to fifty percent of the inmates from using any law library materials.”), *aff’d in part and vacated in part on other grounds*, 977 F.2d 996 (6th Cir. 1992).

40. See DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006) (reporting that an estimated 56% of state prisoners and 45% of federal prisoners had a mental illness as of mid-2005).

41. See, e.g., O'Bryant, *supra* note 35, at 300 (describing his personal experience, the inmate-author writes: “I had to engage in two *extremely* difficult tasks: I had to teach myself the law, and I had to represent myself. I had to perform these tasks using only the limited resources available to me inside the prison walls and while trying to adjust to prison life, overcome mental health issues, such as severe depression, and fight a drug addiction.”). Nor do such mental-health issues provide relaxation of arcane legal rules. See, e.g., Cawley v. DeTella, 71 F.3d 691, 696 (7th Cir. 1995) (“Cawley . . . suggests that his procedural default [in this habeas corpus case] was caused by the fact that the prior proceedings in his case left him ‘listless and depressed.’ . . . Depression, as described herein, . . . fails to qualify as an external impediment. Thus Cawley has not shown cause for his procedural default.”).

prisoners' claims.⁴² Limited-scope representation is one way to encourage the assistance of attorneys who would otherwise be reluctant to assume the burdens associated with full pro bono representation.⁴³

While many courts are making pro se litigation easier for family law cases,⁴⁴ the courts and Congress have increasingly made pro se litigation more difficult for prisoners. Although litigation is the main avenue available to inmates who seek to challenge the existence or conditions of their confinement, Congress erected significant barriers to prisoner litigation with the Prison Litigation Reform Act (PLRA)⁴⁵ and the Antiterrorism and Effective Death Penalty Act (AEDPA).⁴⁶ These Acts, intended to reduce frivolous prisoner litigation and to ensure the finality of prisoners' convictions and sentences, represent the current anti-prisoner sentiment present in the legislature and the courts.⁴⁷ The PLRA and

42. Cf. *Estate of Belbachir v. County of McHenry*, No. 06 C 01392, 2007 U.S. Dist. LEXIS 53727, at *17 (N.D. Ill. July 25, 2007) ("While Defendants' express written policies may be easily discovered through the usual discovery [in a § 1983 claim], the unofficial, de facto practices and customs within the jail are much more difficult to expose.").

43. As one commentator observed:

Probably every lawyer has, at some time, declined to get involved with a prospective client who clearly needs legal help and who just as clearly cannot afford to pay for it because of the fear of getting involved in a seemingly bloomless [sic] morass. That fear was legitimate. Ethically, the rules were not designed to allow lawyers to provide limited legal services.

John M. Burman, *Recent Amendments to the Wyoming Rules of Professional Conduct, Part I: Unbundled Legal Services*, WYO. LAW., Feb. 2003, at 46, 51. Burman added: "With the changes to the Wyoming rules, that fear is no longer legitimate. A lawyer may now ethically provide limited services." *Id.*

44. See, e.g., Baltimore County, Maryland, Welcome to the . . . Circuit Court, <http://www.baltimorecountymd.gov/Agencies/circuit/family/prose.html> (last visit-ed Feb. 17, 2010) (describing services of the Pro Se Office); Florida State Courts Self-Help, http://www.flcourts.org/gen_public/family/forms_rules/index.shtml (last visited, Feb. 17, 2010) (providing forms for pro se litigants "in court matters related to family law"); Wisconsin Court System, <https://prosefamily.wicourts.gov/pages/welcome.html> (last visited Feb. 17, 2010) ("This Web site is designed to guide you through the process of obtaining a divorce or legal separation action."); see also Kathryn Alfisi, *Access to Justice: Helping Litigants Help Themselves*, WASH. LAW., Jan. 2010, at 30 (reporting on the role of self-help centers in the District of Columbia and the gap they need to fill in family law and other matters).

45. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-77 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h (2006)).

46. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2241-2266 (2006)). See, e.g., H.R. Rep. No. 104-518, at 111 (1996) ("This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."); Michael Irvine, *Chapter 17: Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law*, 31 COLUM. HUM. RTS. L. REV. 305, 305 (2000), reprinted from *A JAILHOUSE LAWYER'S MANUAL* (5th ed., Columbia Human Rights Law Review 2000) ("The PLRA was designed to make it more difficult for prisoners to take their complaints to federal court."). See generally Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998) (examining the limits the Supreme Court and Congress have placed on prisoners' rights litigation).

47. See Jessica Feierman, "The Power of the Pen": *Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 381 (2006) (highlighting the focus on the issues of frivolous lawsuits and "abuse" of habeas corpus proceedings in the legislative histories of the PLRA and AEDPA); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death*

AEDPA have made litigating habeas corpus and conditions of confinement claims increasingly difficult.⁴⁸

Filing a habeas corpus petition was difficult even for trained attorneys prior to AEDPA, and has only grown more daunting since its enactment in 1996. For example, for the first time in habeas corpus history, AEDPA imposed a statute of limitations for filing a habeas petition in federal court; an inmate generally is required to file the petition within one year of receiving a final judgment in state court.⁴⁹ AEDPA also bars successive petitions on claims that have already been presented in a prior petition, or could have been presented in a prior petition, but were not. Therefore, prisoners must plead their claims correctly the first time.⁵⁰ AEDPA makes it difficult for even a highly trained attorney to file a successful habeas petition. For an untrained, often uneducated, prisoner litigant, AEDPA may present an insurmountable hurdle in the absence of any assistance.

The PLRA's creation of Draconian sanctions similarly fosters a need for undisclosed ghostwriting. For example, the PLRA has a "three strikes" provision: once a prisoner has three claims dismissed as frivolous, malicious, or failing to state a claim, he is barred from bringing additional civil suits unless he is under imminent danger of serious physical injury.⁵¹ Moreover, the prisoner cannot bring another suit *in forma pauperis* unless it falls under the imminent-danger

Penalty Act and the Prison Litigation Reform Act, 47 DUKE L.J. 1, 71 (1997) (arguing that, although the PLRA and AEDPA are primarily symbolic statutes, they are real laws and "they may produce some freakish results, virtually random impositions of severe harm on individuals, without substantial policy justifications").

48. See JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (2002), at 1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppfusd00.pdf> (reporting that, since the enactment of the PLRA, the number of civil rights petitions filed in U.S. district courts decreased from 41,679 in 1995 (the year before PLRA enactment) to 25,504 in 2000). However, the total number of habeas corpus petitions filed increased following the enactment of AEDPA, from 20,958 in 1995 to 31,556 in 2000. *Id.*

49. 28 U.S.C. § 2244(d) (2006); see O'Bryant, *supra* note 35 (recounting his unsuccessful attempt to adjust to prison life, obtain pertinent resources, and develop the necessary legal skills to file a habeas petition before being time-barred by AEDPA's one-year filing requirement). Aside from the difficulty of preparing a habeas petition within one year, there is regular litigation regarding when the one year begins and when it is tolled, so that it can be difficult, even for a trained lawyer, to determine when the statute of limitations has expired. For an example of the complexities of the statute of limitations under AEDPA, see *Dodd v. U.S.*, 545 U.S. 353 (2005) (applying 28 U.S.C. § 2244(d)(1)(C), which states that a habeas petition may be filed up to one year after a new rule is announced by the Supreme Court, if the rule has been made retroactively applicable to cases on collateral review). See generally IRA P. ROBBINS, HABEAS CORPUS CHECKLISTS § 17:4 (2010) (addressing filing deadlines under AEDPA).

50. See 28 U.S.C. § 2244(b)(1) (2006) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). See generally ROBBINS, *supra* note 49, § 17:11 (addressing successive petitions and abuse of the writ under AEDPA). In addition, AEDPA prevents a federal court from granting habeas to a state prisoner's claim that was "adjudicated on the merits . . . unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . ." § 2254(d)(1). This provision alone can frustrate not only pro se prisoners, but also federal judges. See *Williams v. Taylor*, 529 U.S. 362, 410 (2000) ("[T]he most important point is that an unreasonable application of federal law is different from an incorrect application of federal law."). See generally ROBBINS, *supra* note 49, § 17:5 (addressing the federal courts' adjudication function under AEDPA).

51. See 28 U.S.C. § 1915(g) (2006) ("[A] prisoner who has three strikes cannot proceed *in forma pauperis*.").

exception.⁵² The PLRA also requires prisoners to exhaust all available administrative remedies before filing suit.⁵³ Not only do inmates face procedural difficulties in complying with prison administrative grievance policies, but prisoners may also fear retaliation from prison officials for filing grievances.⁵⁴ The heightened requirements of AEDPA and the PLRA thus create overwhelming barriers for pro se prisoner litigants and further militate in favor of permitting ghostwriting in these contexts.

Although courts have recognized that prisoners have a constitutional right of access to the courts, they have also erected or upheld barriers to prisoner litigation. In 1969, in *Johnson v. Avery*,⁵⁵ the Supreme Court held that prisoners have a constitutional right of access to the courts to petition the government for redress of their grievances.⁵⁶ Eight years later, in *Bounds v. Smith*,⁵⁷ the Court explained that prison officials have the affirmative obligation to provide inmates with “meaningful access” to the courts “to present claimed violations of fundamental constitutional rights.”⁵⁸ The Court asserted that the right of access “requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”⁵⁹

52. *See id.*

53. *See* 42 U.S.C. § 1997e(a) (2006); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (“The PLRA strengthened this exhaustion provision in several ways. Exhaustion is no longer left to the discretion of the district court, but is mandatory. Prisoners must now exhaust all ‘available’ remedies, not just those that meet federal standards. Indeed, . . . a prisoner must now exhaust administrative remedies even where the relief sought—monetary damages—cannot be granted by the administrative process. Finally, exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983.”) (citations omitted).

54. *See* Feierman, *supra* note 47, at 380.

55. 393 U.S. 483 (1969).

56. *Id.* at 488 (stating that a high percentage of functionally illiterate inmates were “in effect[] denied access to the courts”). In *Johnson*, an inmate originally had been disciplined for helping another illiterate inmate write a habeas corpus petition. *See id.* at 484-85. However, the Supreme Court held that, because there were no reasonable alternatives for the inmate to file petitions for post-conviction review, the rule prohibiting jailhouse lawyering was unenforceable. *See id.* at 488-90; *infra* Part V.C (discussing the no-reasonable-alternatives standard).

57. 430 U.S. 817 (1977).

58. *Id.* at 825.

59. *Id.* at 828 (maintaining that adequate law libraries are only one means of assuring access to the courts). The Court left open the possibility for other ways to provide access to the courts and “encourage[d] local experimentation.” *Id.* at 832; *see also* *Holt v. Pitts*, 702 F.2d 639, 640 (6th Cir. 1983) (“The alternative avenues open to state authorities to protect a prisoner’s right of access to the courts are precisely that—alternatives. The choice between alternatives lies with the state.”). The Commonwealth of Virginia, for example, has enacted a statute enabling local courts to appoint attorneys to assist indigent prisoners with their legal matters. *See* VA. CODE ANN. § 53.1-40 (2009) (“The judge of a circuit court in whose county or city a state correctional facility is located shall, on motion of the attorney for the Commonwealth for such county or city, when he is requested so to do by the superintendent or warden of a state correctional facility, appoint, for a period of no less than thirty days nor more than one year, one or more discreet and competent attorneys-at-law to counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration.”). The state bar’s ethics committee has approved of such court-appointed attorneys engaging in undisclosed ghostwriting of pleadings for pro se prisoner litigants. Va. State Bar Standing Comm. on Legal Ethics, Op. 1803 (2005), *available at*

The Court's most recent access-to-the-courts decision, *Lewis v. Casey*,⁶⁰ however, limits an inmate's ability to enforce the right of access to the courts by requiring that the prisoner show actual injury.⁶¹ In issuing a permanent injunction mandating detailed changes with respect to the Arizona prison system's law libraries and legal-assistance programs, the federal district court had noted that a significant number of the prisoners in the class action were functionally illiterate, that "prisoners in lockdown are denied law books unless they can provide an exact citation," and that lockdown prisoners "routinely experience[d] long delays in receiving legal materials."⁶² Despite these findings, the Supreme Court reversed the lower court's order and stated that the inmate must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim."⁶³ Justice Scalia, writing for the Court, maintained that the access-to-the-courts cases "did not create an abstract, freestanding right to a law library or legal assistance."⁶⁴ In addition to the actual-injury requirement, the Court in *Lewis* limited the right of access to the right to file the initial papers, not to "litigate effectively once in court."⁶⁵ The Court also declared that the right of access applies only to direct appeals of criminal convictions, habeas corpus petitions, and civil rights actions challenging conditions of confinement.⁶⁶

Courts have further hindered prisoners by holding that an adequate library satisfies the right of access to the courts—even if the prisoner is illiterate.⁶⁷ Courts and critics have highlighted the absurdity of this standard. As one federal appellate judge explained, "[g]iving an illiterate the run of the stacks is like

<http://www.vacle.org/opinions/1803.htm> (discussing the nature and extent of the attorney-client relationship between an attorney and a prison inmate).

60. 518 U.S. 343 (1996).

61. *Id.* at 349 ("The requirement that an inmate alleging a violation . . . must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches.")

62. *Casey v. Lewis*, 834 F. Supp. 1553, 1566, 1557-58 (D. Ariz. 1992).

63. *Lewis*, 518 U.S. at 351.

64. *Id.*

65. *Id.* at 354 (emphasis removed).

66. *Id.* at 355 ("*Bounds [v. Smith]* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims."); *Bounds v. Smith*, 430 U.S. 817, 827 (1977) ("As this Court has 'constantly emphasized,' habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights.") (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969)); *Carper v. DeLand*, 54 F.3d 613, 616-17 (10th Cir. 1995) ("Other than habeas corpus or civil rights actions regarding current confinement, a state has no affirmative constitutional obligation to assist inmates in general civil matters.")

67. *See Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985) (reversing a district court decision that found that the assistance of counsel was necessary to ensure access to the courts where more than fifty percent of the inmates were illiterate and ruling that access to a law library was adequate); *Jones v. City and County of San Francisco*, 976 F. Supp. 896, 914 (N.D. Cal. 1997) (summarily dismissing a claim that law library materials and assistance were inadequate for non-English speakers because plaintiffs did not demonstrate that any inmate seeking assistance was actually hindered in pursuing a legal claim, as required by *Lewis v. Casey*).

giving an anorexic a free meal at a three-star restaurant.”⁶⁸ A federal district judge made the same point by stating that providing an untrained individual with “[a]ccess to full law libraries makes about as much sense as furnishing medical services through books like: ‘Brain Surgery Self-Taught’, or ‘How to Remove Your Own Appendix’, along with scalpels, drills, hemostats, sponges and sutures.”⁶⁹ Many other decisions echo the obviousness of this point.⁷⁰ One commentator suggests that the ultimate outcome on the issue of prisoners’ meaningful access to the courts will depend on whether the Court actually takes into account the realities of prison litigation.⁷¹ In an era in which the Supreme Court refuses to acknowledge the barriers that prisoners face, ghostwriting is necessary to begin to remedy prisoners’ lack of meaningful access to the courts.⁷²

B. TRENDS IN THE RESPONSE TO GHOSTWRITING

The federal courts have almost universally condemned ghostwriting.⁷³ In

68. *DeMallory v. Cullen*, 855 F.2d 442, 451 (7th Cir. 1988) (Easterbrook, J., dissenting); *see also Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) (“Library books, even if ‘adequate’ in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate.”).

69. *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982).

70. *See, e.g., Knop v. Johnson*, 977 F.2d 996, 1005-06 (6th Cir. 1992) (“Standing alone, law libraries that are adequate for prisoners who know how to use them and who have reasonable physical access to their collections are not adequate for prisoners who cannot read and write English, or who lack the intelligence necessary to prepare coherent pleadings, or who, because of protracted confinement in administrative or punitive segregation or protective custody, may not be able to identify the books they need.”); *Acevedo v. Forcinito*, 820 F. Supp. 886, 888 (D.N.J. 1993) (“[F]or prisoners who cannot read or understand English, the constitutional right of access to the courts cannot be determined solely by the number of volumes in, or size of, a law library.”); *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1106-07 (E.D. Pa. 1987) (holding that an adequate prison library was not sufficient to ensure the rights of functionally illiterate prisoners).

71. *See Joseph L. Gerken, Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 LAW LIBR. J. 491, 494 (2003) (“Supreme Court decisions [after *Bounds v. Smith*] . . . demonstrate that the reality-based approach utilized in *Bounds* was by no means preordained.”).

72. *See Disciplinary Counsel v. Cotton*, 873 N.E.2d 1240, 1245 (Ohio 2007) (Lanzinger, J., concurring in judgment only) (“[W]ithin the prison universe, where the availability of licensed attorneys is generally nonexistent, the [Unauthorized Practice of Law] Board’s interest in regulating the legal profession is overridden by the need for prison inmates to have help in obtaining access to the courts.”).

73. *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 Employees of Merck & Co.*, 2007 U.S. Dist. LEXIS 16643, at *50 (D.N.J. Mar. 5, 2007) (holding that undisclosed ghostwriting violates several ethics rules and the spirit of Fed. R. Civ. P. 11 and should not be permitted in the District of New Jersey); *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 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 County Comm’rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) (“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 to say the least;

Ricotta v. California,⁷⁴ for example, the United States District Court for the Southern District of California warned that “[a]ttorneys cross the line . . . when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court.”⁷⁵ The court continued, “[w]ith such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door.”⁷⁶ To many federal courts, ghostwriting is an act of deception that thwarts their efforts to oversee pro se litigation⁷⁷ and allows attorneys to escape the ethical and legal obligations that normally attach to participation in litigation.⁷⁸

The states are more evenly divided over the propriety of ghostwriting.⁷⁹ Of the twenty-four states that have addressed ghostwriting,⁸⁰ thirteen states explicitly permit ghostwriting of legal pleadings. In ten of these states, attorneys may draft

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) (“[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) (“The act of anonymously drafting pleadings for which a client appears and signs pro se is often termed ‘ghost-writing.’ . . . [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 Ellington)*, 230 B.R. 426, 435 n.12 (Bankr. D. Mont. 1999) (holding that court rules, particularly Fed. R. Civ. P. 11, as well as ABA Standing Committee Opinion 1414, prohibit ghostwriting).

74. 4 F. Supp. 2d 961 (S.D. Cal. 1998).

75. *Id.* at 987.

76. *Id.*

77. *Eleven Vehicles*, 966 F. Supp. at 367 (“[G]host writing arrangements interfere with the Court’s ability to superintend the conduct of counsel and parties during the litigation.”); *Johnson*, 868 F. Supp. at 1231-32 (explaining that ghostwriting for pro se litigants circumvents the obligations of Fed. R. Civ. P. 11, and that “[s]uch an evasion of the obligations imposed upon counsel by statute, code and rule is *ipso facto* lacking in candor”); see also *Laremont-Lopez*, 968 F. Supp. at 1079 (noting that ghostwritten pleadings make it very difficult for courts to punish anyone for frivolous or otherwise improper pleadings, for Rule 11 “prohibits the imposition of monetary sanctions against a represented party for filing legally frivolous claims,” and it is impossible to sanction an anonymous attorney).

78. *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (“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.”).

79. See 2007 ABA Ethics Opinion, *supra* note 11 (citing ethics opinions by different states). Compare WASH. SUPER. CT. R. 11(b) (authorizing ghostwriting by implication by not requiring lawyers to disclose their drafting of documents for pro se litigants), with COLO. R. CIV. P. 11(b) (requiring disclosure of ghostwriting assistance, including the attorney’s name, address, telephone number, and bar registration number).

80. A review of the ethical rules, state bar ethics opinions, and case law of the fifty states and the District of Columbia revealed that twenty-seven states have not expressly dealt with the ethical and legal implications of attorneys’ drafting legal pleadings that clients then file pro se. See MARYLAND LEGAL ASSISTANCE NETWORK, INFORMAL NATIONAL SURVEY OF ETHICAL OPINIONS RELATED TO “DISCRETE TASK LAWYERING” (2003), <http://www.unbundledlaw.org/thinking/ethicsurvey.htm> (last visited Feb. 17, 2010).

pleadings, which their clients will then file pro se, without any indication that an attorney worked on the documents.⁸¹ In the other three states attorneys may prepare pleadings without signing them, but the documents must clearly indicate that they were “prepared with the assistance of counsel.”⁸² On the other side of

81. See Alaska Bar Ass’n, Ethics Op. 93-1 (1993), available at http://www.alaskabar.org/servlet/content/indexes_aeot_93_1.html (“Some jurisdictions require an attorney who prepares pleadings or documents for a pro se litigant to disclose his or her assistance to opposing counsel and the court on the face of the document Upon reflection, the Committee is not certain that this [practice] is well founded.”) (citations omitted); Ariz. State Bar Comm. on R. Prof’l Conduct, Op. 05-06 (2005), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=525> (permitting attorneys to provide unbundled legal services to pro se litigants without disclosing their participation to the relevant tribunals, but encouraging attorneys to check whether local court rules or rules of civil procedure would demand disclosure); CAL. R. CT. 3.37(a), available at http://www.courtinfo.ca.gov/rules/index.cfm?title=three&linkid=rule3_37 (“In a civil proceeding, an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the documents that he or she was involved in preparing the documents.”); Me. State Bar Ass’n, Ethics Op. 89 (1988), available at <http://www.mebaroverseers.org/Ethics%20Opinions/Opinion%2089.htm> (concluding that an attorney who prepared a complaint for a client was not ethically required to sign the document or enter an appearance on behalf of the client); MINN. STATE BAR ASS’N PRO SE IMPLEMENTATION COMMITTEE, FINAL REPORT, available at <http://www.mnbar.org/committees/pro-se/CommitteeFinalReport.pdf> (finding that the Minnesota Rules of Professional Conduct, which largely mirror the ABA *Model Rules*, permit ghostwriting of legal pleadings); N.M. RULES OF PROF’L CONDUCT R. 16-303 cmt. (2008), available at http://www.law.cornell.edu/ethics/nm/code/CRule_3.3.htm (“Attorneys may give technical assistance and, when not prohibited by the rules of the tribunal, may prepare, without attribution, papers for filing by a self-represented litigant without violating the duty of candor.”); N.C. State Bar Ass’n Ethics Comm., Formal Op. 2005-10 (2005), available at <http://www.ncbar.com/ethics/ethics.asp?page=12&from=1/2005&to=1/2006> (finding no ethical violations where inquiring attorneys drafted pleadings that would then be filed pro se); Utah State Bar, Ethics Advisory Op. 74 (1981), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_074.html (“An attorney may give advice to a litigant who is proceeding pro se and may prepare or assist in the preparation of pleadings. But when the attorney gives any additional advice or assistance, he has an obligation to notify the court and opposing counsel of his representation.”); VT. RULES OF PROF’L CONDUCT R. 1.2 cmt. 3 (2008) (“Lawyers may limit the scope of their representation by providing advice and counsel to pro se litigants and assisting with the preparation of pleadings for litigants to sign and file on their own behalf.”); WASH. SUPER. CT. R. 11(b) (authorizing attorneys to assist otherwise self-represented individuals with the drafting of pleadings and other documents to be filed in court and not explicitly requiring them to disclose their assistance); D.C. Bar Ass’n Legal Ethics Comm., Op. 330 (2005), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion330.cfm (finding that the D.C. Rules of Professional Conduct do not require attorneys to disclose their assistance in drafting a pro se litigant’s pleadings, but cautioning that other sources of law may require more candor).

82. FLA. RULES OF PROF’L CONDUCT R. 4-1.2 (2008) (“If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate ‘Prepared with the assistance of counsel’ on the document”); N.H. SUPER. CT. R. 15(f) (“When an attorney provides limited representation to an otherwise unrepresented party, by drafting a document to be filed by such party with the Court in a proceeding in which (1) the attorney is not entering any appearance, or (2) the attorney has entered a limited appearance which does not include representation regarding such document, the attorney is not required to disclose the attorney’s name on such pleading to be used by that party; any pleading drafted by such limited representation attorney, however, must conspicuously contain the statement ‘This pleading was prepared with the assistance of a New Hampshire attorney.’”); Tenn. S. Ct. Bd. of Prof’l Responsibility, Formal Op. 2007-F-153 (2007), available at <http://www.tbpr.org/Attorneys/EthicsOpinions/Pdfs/2007-F-153.pdf> (warning that “[a]n attorney may not prepare pleadings and other legal documents to assist a pro se litigant in the conduct of his or her litigation where doing so creates the false impression that the litigant is without substantial legal assistance,” but observing that the attorney need only ensure that the pleading include the phrase, “Prepared With Assistance of Counsel”).

the debate, ten states expressly forbid ghostwriting.⁸³ In Nevada, the State Bar Association issued an ethics opinion banning ghostwriting,⁸⁴ but recently withdrew this opinion in light of other state bars' concerns about the effect of such a prohibition on the availability of pro bono legal services.⁸⁵

In stark contrast to the federal courts and the states that criticize and prohibit ghostwriting, the ABA issued an opinion in May 2007 that resoundingly endorsed the practice. In Formal Opinion 07-446, the ABA Standing Committee on Ethics and Professional Responsibility stated that "[a] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare

83. COLO. R. CIV. P. 11(b) ("Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number."); Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 98-5 (1998), available at http://www.unbundledlaw.org/thinking/conn_informal98-5.htm (finding that an attorney who prepares and controls the content of a pleading must inform the court that the document was prepared by the lawyer); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994), available at <http://www.dsba.org/PDFs/1994-2.pdf> (providing that a legal services organization may limit its representation to advising and preparing documents for a client, but that the organization must disclose its involvement, if the assistance goes further than merely helping a litigant to fill out an initial pleading and/or providing initial general advice and information); Ill. State Bar Ass'n, Advisory Op. 85-06 (1985) ("It is improper for a lawyer to advise client, prepare pleadings, motions and petitions for client as a pro se litigant, file documents in court on client's behalf, but not appear for and on behalf of client during judicial proceedings."); IOWA R. CIV. P. 1.423 ("Every pleading or paper filed by a pro se party that was prepared with the drafting assistance of an attorney . . . shall state that fact before the signature line at the end of the pleading or paper that was prepared with the attorney's assistance The pleading or paper shall also include the attorney's name, personal identification number, address, telephone number and, if available, facsimile transmission number, but shall not be signed by the attorney."); Ky. Bar Ass'n, Op. KBA E-343 (1991), available at http://www.kybar.org/documents/ethics_opinions/kba_e-343.pdf (concluding that assistance in preparation of pleadings must be disclosed to opposing counsel and the court, and that such disclosure must include the attorney's name—the designation "Prepared by Counsel" is insufficient); Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998), available at <http://www.massbar.org/for-attorneys/publications/ethics-opinions/1990-1999/1998/opinion-no-98-1> (prohibiting the drafting ("ghostwriting") of litigation documents, especially pleadings); N.Y. State Bar Ass'n, Op. 613 (1990) (finding that "the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation"—including the lawyer's name); Va. State Bar Ass'n, Legal Ethics Op. 1592 (1994), available at <http://www.vacle.org/opinions/1592.TXT> (suggesting that it would be a violation of Virginia's ethics rules to fail to disclose the identity of an attorney who prepared a pleading for a pro se litigant); WYO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2008) (finding that attorneys need not sign the pleadings they draft for pro se clients, but these pleadings must "include a statement that the document was prepared with the assistance of counsel and shall include the name and address of the lawyer who provided the assistance").

84. See Nev. State Bar Ass'n Standing Comm. on Ethics and Prof'l Responsibility, Formal Advisory Op. 34 (2006), available at http://www.nvbar.org/ethics/opinion_34.htm ("'Ghost-lawyering' is unethical unless the 'ghost-lawyer's' assistance and identity are disclosed to the court by the signature of the 'ghost-lawyer' under Rule 11 upon every paper filed with the court for which the 'ghost-lawyer' gave 'substantial assistance' to the pro se litigant by drafting or otherwise.").

85. See Nev. State Bar Ass'n Standing Comm. on Ethics and Prof'l Responsibility, Ethics Opinions, http://www.nvbar.org/Ethics/Ethics_Opinions.htm (2007) (marking Opinion 34 as "withdrawn"); Email from Shelley Krohn, Chair, State Bar of Nevada Standing Committee on Ethics and Professional Responsibility (Feb. 4, 2008) (on file with author) ("We have since been asked to continue to keep a hold on the opinion due to other state bar committees' concerns regarding a perceived impact on pro bono services provided by various agencies. As a courtesy, we have tabled this particular opinion until our meeting in May to allow other committee [sic] time to review and comment.").

written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.”⁸⁶ The opinion modified the ABA’s previous position, set out in a 1978 opinion, that found that “[e]xtensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper.”⁸⁷ Although the 1978 opinion went out of its way to note that the ABA did “not intend to suggest that a lawyer may not . . . prepare or assist in the preparation of a pleading for a litigant who is otherwise acting pro se,”⁸⁸ that opinion stood for the proposition that, at the very least, pleadings drafted by attorneys must reveal that they were prepared with the assistance of counsel.⁸⁹ In the May 2007 opinion, however, the committee concluded that even such minimal disclosure is not required by any of the ABA *Model Rules of Professional Conduct* and that ghostwriting is a legitimate way for attorneys to assist pro se litigants.⁹⁰

The ABA’s opinion refuted some of the concerns voiced by critics in those states that have limited the practice of ghostwriting. With regard to the argument that pro se litigants aided by ghostwriters enjoy an unfair advantage, the ABA contended that ghostwritten pleadings will not get a double-bonus: if a ghostwritten pleading is well written, it will not need the liberal construction judges tend to give pro se pleadings;⁹¹ if a ghostwritten pleading is poorly written, the pro se litigant will have earned no additional benefit through the assistance of counsel, so the litigant should still be entitled to the benevolent reading.⁹²

The ABA added that it did not believe ghostwriting violates any of its *Model Rules of Professional Conduct*. Because ghostwriting provides no additional advantage to pro se litigants, the fact that a litigant relied on it is not a material fact such that nondisclosure would violate the ethical rules requiring candor and honesty before a tribunal.⁹³ In addition, “[a]bsent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of

86. 2007 ABA Ethics Opinion, *supra* note 11.

87. ABA Informal Ethics Opinion 1414, “Conduct of Lawyer who Assists Litigant Appearing Pro Se” (June 6, 1978).

88. *Id.*

89. See 2007 ABA Ethics Opinion, *supra* note 11 (summarizing the 1978 opinion).

90. *Id.* (“[M]any authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal.”)

91. See *id.* (“[W]here 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.”) (quoting Jona Goldschmidt, *In Defense of Ghostwriting*, 29 *FORDHAM URB. L.J.* 1145, 1157-58 (2002)). See also *infra* Part IV.B (arguing more broadly that there is no harm in giving even ghostwritten pleadings a benevolent reading).

92. 2007 ABA Ethics Opinion, *supra* note 11.

93. Cf. *infra* notes 134-39 and accompanying text (listing ethical rules, including those that require attorneys to ensure that their clients do not make fraudulent claims before a tribunal).

Rule 8.4(c).⁹⁴ Finally, the ABA Standing Committee on Ethics and Professional Responsibility concluded that ghostwriting cannot be seen as a means of circumventing lawyers' normal obligation to ensure that pleadings are non-frivolous and supported by evidence, because attorneys who have not signed a pleading never had such a duty in the first place.⁹⁵

The ABA's support of ghostwriting is likely to have a great impact on the debate.⁹⁶ Almost all of the federal cases and state ethics opinions opposing ghostwriting⁹⁷ were issued before the May 2007 ABA opinion. 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.⁹⁸

Utah is an example of one state that has already changed its stance on ghostwriting. Early in 2008, the Utah State Bar Ethics Advisory Opinion Committee ("Committee") issued an opinion that concluded, "[i]t is not dishonest conduct to provide *extensive* undisclosed legal help to a pro se party, including the preparation of various pleadings for the client, unless a court rule or ethical rule explicitly requires disclosure."⁹⁹ The Committee considered both the Utah Rules of Professional Conduct and the Utah Rules of Civil Procedure and concluded that neither required a ghostwriting attorney to disclose his or her identity to a court. Citing ABA Formal Opinion 07-446, the Committee agreed that pro se litigants do not have an unfair advantage when they are assisted by undisclosed counsel in drafting their pleadings. Moreover, the Committee found

94. 2007 ABA Ethics Opinion, *supra* note 11. Rule 8.4(c) states: "It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007) [hereinafter "MODEL RULES"].

95. See 2007 ABA Ethics Opinion, *supra* note 11 (reading Rule 11 of the Federal Rules of Civil Procedure as applying only to attorneys who have signed a pleading "and thereby ma[de] an affirmative statement to the tribunal concerning the matter"); see also *infra* Part II (discussing the pros and cons of attorney disclosure in limited legal representation of prisoners).

96. Nev. State Bar Ass'n Standing Comm. on Ethics and Prof'l Responsibility, Formal Advisory Op. 34 (2006), available at http://www.nvbar.org/Ethics/opinion_34.htm (citing Los Angeles County Bar Ass'n Prof'l Responsibility and Formal Ethics Comm., Ethics Op. 502 (Nov. 4, 1999)) ("There is currently a nationwide debate whether 'ghost-lawyering' is ethical.").

97. See *supra* notes 73-85 and accompanying text (summarizing how federal courts and states have responded to ghostwriting).

98. Most of the states' rules of professional conduct are slightly modified versions of the ABA *Model Rules*. As a result, the ABA's ethics opinions, though not binding on the states, are highly persuasive interpretations of lawyers' ethical duties. See ABA Section of Litig., *supra* note 7, at 86 (explaining that the rise in pro se litigation can be attributed to cutbacks in funding for legal services organizations and that full-fledged legal representation is simply not affordable to most Americans); see also ABA, Status of State Review of Prof'l Conduct Rules, Jan. 9, 2008, available at http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (tracking the status of the states in adopting the ABA's changes to its *Model Rules*, "including Ethics 2000 and the Corporate Responsibility Task Force[], the policies of the Multijurisdictional Practice Commission and the Model Code of Judicial Conduct as revised in February 2007").

99. Utah State Bar Ethics Advisory Opinion Comm., Formal Op. 08-01 (2008), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/pdf/08_01.pdf (emphasis added).

that “[u]ndertaking to provide limited legal help does not generally alter any other aspect of the attorney’s professional responsibilities to the client.”¹⁰⁰ Many other states may follow the lead of the ABA and the Utah State Bar Ethics Advisory Opinion Committee in allowing the ghostwriting of briefs for pro se litigants.¹⁰¹

II. THE IMPORTANT ROLE OF GHOSTWRITING

*A lawyer may provide legal assistance to litigants appearing before tribunals “pro se” and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.*¹⁰²

*While there is general agreement that there is no ethical reason precluding an attorney from providing limited representation to a client who agrees to accept services on that basis, the issue of disclosure of the representation to the courts or other tribunals and to opposing parties is more difficult and has produced a broader range of responses from ethics committees and courts.*¹⁰³

100. *Id.* The dissenting opinion, supported by three members of the Committee, relies on the ethics opinion from Nevada that bans ghostwriting. See Utah State Bar Ethics Advisory Opinion Comm., Formal Op. 08-01 (2008) (Miller, dissenting), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/pdf/08_01dissent.pdf. However, Nevada subsequently withdrew this ethics opinion. See *supra* note 85 and accompanying text. Further, the dissenting opinion expresses great concern about the advantage that a pro se litigant receiving undisclosed assistance may have, describing a divorce case in which neither party spoke much English but in which one party was able to secure court orders against the other party because of the assistance of undisclosed counsel when the other party had no counsel. *Id.* Admittedly, both the main and dissenting opinions address the ability of all pro se litigants to seek the assistance of undisclosed counsel in drafting pleadings. In the case of pro se prisoner litigants, however, the disparity in legal services received by each party that the dissenting opinion identified would be significantly reduced because the party opposing a pro se prisoner litigant would likely be a state entity.

101. For example, in January 2009, the North Carolina State Bar issued an ethics opinion in which it held that “a lawyer may assist a pro se litigant without disclosing his participation or ensuring that the litigant discloses his assistance unless the lawyer is required to do so by law or court order.” N.C. State Bar, 2008 Formal Ethics Op. 3 (2009), available at <http://www.ncbar.gov/ethics/printopinion.asp?id=792>. After discussing the ABA’s opinion—and quoting it extensively—the North Carolina opinion noted that “[t]he conclusion that the Model Rules of Professional Conduct do not compel disclosure of a lawyer’s background assistance to a pro se litigant is sound and equally applicable to the North Carolina Rules of Professional Conduct.” *Id.* The authors of the North Carolina opinion further noted that an attorney-client relationship is created when an attorney engages in ghostwriting, that attorneys who ghostwrite remain bound by all of the rules of professional conduct including those that prohibit frivolous pleadings, and that the “[North Carolina] Rules of Professional Conduct and prior ethics opinions recognize the importance of providing assistance to individuals who cannot afford legal representation,” particularly those who “fall outside the economic or subject matter eligibility requirements of legal services organizations.” *Id.*

Effective April 1, 2009, New York adopted a new set of attorney conduct rules, see N.Y. State Unified Court System, Part 1200—Rules of Prof’l Conduct (Apr. 1, 2009), available at http://www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct_09.pdf (based on the ABA *Model Rules*); see also N.Y. State Unified Court System, New Att’y Rules of Prof’l Conduct Announced (Dec. 16, 2008), available at http://www.nycourts.gov/press/pr2008_7.shtml.

102. 2007 ABA Ethics Opinion, *supra* note 11 (discussing the extent to which a lawyer helping a pro se litigant must disclose his involvement).

103. Del. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 1994-2, 6 (1994), available at <http://www.dsba.org/PDFs/1994-2.pdf>.

When an attorney drafts a pleading for a pro se litigant, significant disagreement exists among courts, ethics panels, and other observers regarding whether the attorney must disclose the fact that he or she provided assistance and, if so, what form this disclosure must take.¹⁰⁴ There are at least three possibilities for the extent of disclosure of assistance of counsel in preparing pleadings.¹⁰⁵ First, a pro se litigant could file court documents without any indication that he or she had received legal help (no disclosure).¹⁰⁶ Second, documents filed pro se could disclose that the litigant received legal assistance, without disclosing the identity of the attorney (assistance-of-counsel disclosure).¹⁰⁷ Third, documents filed pro se could include both a statement that the litigant received legal assistance in the preparation of the court documents and the name of the attorney who provided that assistance (full disclosure).¹⁰⁸

Particularly in the context of prisoner litigation, it is important to allow attorneys to provide ghostwriting assistance to litigants without disclosing their identities or the nature of their assistance.¹⁰⁹ Under a rule allowing attorneys to provide drafting services without full disclosure, attorneys could restrict the scope of their representation of prisoners, thus reducing their time commitment, and limiting their exposure to liability and malpractice claims.¹¹⁰ In this way, undisclosed ghostwriting increases prisoners' access to the courts.

104. See *supra* Part I.B (discussing current trends in the approach to ghostwriting among courts, bar associations, and other observers).

105. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 98-5 (1998), available at http://www.unbundledlaw.org/thinking/conn_informal98-5.htm (noting that "a lawyer who prepares and controls the content of a pleading, brief or other document to be filed with a court must, in some form satisfactory to the court, inform the court that the document was prepared by the lawyer") (emphasis added).

106. See, e.g., Alaska Bar Ass'n, Formal Ethics Op. 93-1 (1993), available at https://www.alaskabar.org/servlet/content/indexes_aeot_93_1.html (asserting that attorneys who draft pleadings for pro se litigants need not disclose their assistance "to opposing counsel and the court on the face of the document") (citations omitted).

107. See, e.g., FLA. RULES OF PROF'L CONDUCT R. 4-1.2 cmt. 6 (2008) ("If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate 'Prepared with the assistance of counsel' on the document to avoid misleading the court which otherwise might be under the impression that the person, who appears to be proceeding pro se, has received no assistance from a lawyer.").

108. Ky. Bar Ass'n, Formal Op. KBA E-343 (1991), available at http://www.kybar.org/documents/ethics_opinions/kba_e-343.pdf (stating that the counsel's name must be revealed and that the designation "Prepared by Counsel" is insufficient); N.Y. State Bar Ass'n, Formal Op. 613 (1990), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=5356&TEMPLATE=/CM/ContentDisplay.cfm (citing Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 1987-2 (1987)) ("[T]he endorsement on the pleading 'Prepared by Counsel' is insufficient to fulfill the purposes of the disclosure requirement.").

109. Although nondisclosure is desirable and potentially even necessary in other limited contexts, including helping illiterate, impoverished members of society who, like prisoners, lack access to pro se materials, this Article advances first and foremost that it is critical that prisoners receive ghostwriting assistance. More research into the other limited contexts is encouraged.

110. See *infra* notes 111-27 and accompanying text (examining several reasons that attorneys may be more willing to assist prisoner litigants if they were able to do so without disclosing their role in the proceedings).

Pro se prisoners often lack access to the materials necessary to file their claims effectively and there are not enough lawyers willing to provide them with full pro bono representation.¹¹¹ For a variety of reasons, therefore, it is preferable for all involved that prisoner litigants have the assistance of counsel even if that assistance is limited. The quality of the pleadings will usually be better, which not only will give litigants a greater chance of success than if they were proceeding entirely unassisted, but also will reduce the workload of already overworked judges as well as elbow and pro se law clerks. Lawyers likely will be more willing to provide drafting services if they are not required to put their names on the court documents they prepare.¹¹² Thus, allowing attorneys to ghostwrite pleadings without disclosing their involvement provides a much-needed incentive for attorneys to assist prisoner litigants.

One reason an attorney may not wish to disclose his or her name to a court is fear of being responsible for actions by the litigant that may violate court rules.¹¹³ Even if the lawyer does a thorough and competent job in preparing a pleading, “the client might change the pleading between leaving the attorney’s office and filing the pleading in court.”¹¹⁴ If the attorney is required to be identified on the pleading, that attorney has a legitimate concern about court sanctions, bar discipline, or malpractice liability.¹¹⁵

Attorneys may also be reluctant to sign pleadings for fear that this action will constitute a formal appearance in a case.¹¹⁶ By entering a formal appearance, an attorney may risk becoming “attorney of record” in the matter.¹¹⁷ An attorney of record is defined simply as an “attorney for a party to an action who has appeared for him by a formal appearance, by pleading or making a motion for him, or by an oral statement of appearance in open court, and is in charge of the party’s business and interests in the action.”¹¹⁸ This status carries with it numerous implications. The attorney of record is the person designated to receive service of process on behalf of a client.¹¹⁹ This attorney is the person who must sign a

111. See *supra* Part I.A (describing the barriers prisoners face when attempting to proceed pro se and the lack of pro bono attorney assistance).

112. See ABA Section of Litig., *supra* note 7, at 98 n.305 (summarizing the feedback of a focus group of limited-services attorneys).

113. Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and the Court Personnel*, 42 FAM. CT. REV. 655, 661 (2004) (fearing that an attorney may be held liable for a frivolous lawsuit).

114. ABA Section of Litig., *supra* note 7, at 75.

115. See *id.*

116. See *id.* (explaining that a focus group of limited-service lawyers expressed a “worry that a judicial officer might make [a lawyer] appear in court despite a contractual arrangement with the client limiting the scope of representation”).

117. Schwarz, *supra* note 113, at 661.

118. BALLENTINE’S LAW DICTIONARY 109 (3d ed. 1969).

119. FED. R. CIV. P. 5 (“If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.”).

pleading under Rule 11 of the Federal Rules of Civil Procedure,¹²⁰ and is one of the persons who may be sanctioned pursuant to that rule.¹²¹ The attorney of record also has certain obligations of disclosure and due diligence during the discovery process.¹²² Finally, and perhaps most important to this discussion, the attorney of record retains that status until a court relieves him or her of that responsibility.¹²³

Thus, as the attorney of record, a lawyer may be forced to represent a client through the entirety of a case, even if the attorney does not have the time or the desire to do so—what one commentator has referred to as “[t]he Venus flytrap of the . . . entry of [an] appearance.”¹²⁴ Each of the responsibilities that comes with being an attorney of record takes time and effort and opens the attorney to liability, whether through sanctions in the case, ethical proceedings, or malpractice actions.¹²⁵ Particularly in the context of pro bono prisoner litigation, therefore, many attorneys are unlikely to undertake this responsibility. Presumably, if attorneys who wished only to draft a pleading, or several pleadings, for a prisoner litigant were deemed attorneys of record, this designation would substantially limit the number of qualified attorneys willing to provide this service. Because there can be no attorney of record unless an attorney discloses his or her involvement in the case, attorneys must be permitted to draft pleadings for prisoner litigants without disclosing their involvement. Nondisclosure is necessary to protect these lawyers from the burdens of becoming attorneys of record in protracted litigation, and to encourage them to provide the much-needed service of ghostwriting for disadvantaged prisoner litigants who have no alternative but to proceed pro se.

In other words, by signing a pleading, an attorney may take on the obligation of representing the client through the conclusion of the matter.¹²⁶ In prisoner

120. FED. R. CIV. P. 11 (“Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney’s name . . .”).

121. *Id.* (noting that upon a finding that Rule 11 has been violated, a court may “impose an appropriate sanction on any attorney . . . that violated the rule or is responsible for the violation”).

122. FED. R. CIV. P. 26 (declaring that attorneys of record are responsible for arranging a discovery conference, deciding upon a discovery plan, working in good faith to comply with the discovery plan, and, as with Rule 11, signing all pleadings associated with the discovery process).

123. *See, e.g., Warren v. State*, 97 S.W.3d 386, 387 (Ark. 2003) (“[A]n attorney who has not been relieved as counsel by the trial court must be held responsible for being aware of filings in the case in which he or she has remained the attorney of record.”).

124. Charles F. Luce, Jr., *Unbundled Legal Services: Can the Unseen Hand be Sanctioned?*, <http://www.mgovg.com/ethics/ghostwr1.htm> (last visited Mar. 2, 2010); *see also* Schwarz, *supra* note 113, at 661 (discussing the desirability of unbundled legal services).

125. *See* FED. R. CIV. P. 11, 26 (providing sanctions for attorney misbehavior); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 887 (D. Kan. 1997) (holding that attorneys of record may be subject to disciplinary action under rules of civil procedure and professional responsibility).

126. *See Wesley*, 987 F. Supp. at 887 (stating that an attorney who drafts pleadings needs to “recognize the possibility that he or she may be required to enter appearance as counsel of record and thereby accept accountability for his or her participation, pursuant to Rule 11 and the rules of professional conduct applicable

litigation, this often requires more time and resources than an attorney is able to provide—hence, the reality that few attorneys are willing to represent prisoner litigants pro bono. Nondisclosure therefore provides incentives for attorneys to provide at least limited legal services to prisoners.¹²⁷ Even such limited drafting assistance should improve the quality of legal pleadings filed by pro se prisoner litigants, thus improving their chances of success and easing the burden that pro se litigants place on the judicial system.¹²⁸

Finally, nondisclosure of ghostwriting also allows the client to maintain more control over the litigation.¹²⁹ If disclosure requires the attorney to enter an appearance of record, disclosure may lead a client to lose complete control over the litigation.¹³⁰ Although clients always control the *objectives* of their litigation,¹³¹ many also want to have a major say in the *means* employed. Nondisclosure of ghostwritten assistance enables the client to obtain some legal assistance while remaining in the driver's seat.

Exempting attorneys from the obligation to sign the pleadings they prepare for pro se prisoners thus increases incentives for lawyers to provide this much-needed form of limited legal services. The remainder of this Article addresses prevalent concerns regarding nondisclosure of ghostwritten assistance, ultimately concluding that these concerns do not outweigh the foregoing benefits. Part III discusses the ethical and legal issues raised by ghostwriting, concluding that ghostwriting does not violate attorneys' duty of candor to the court or of competent representation, does not violate procedural rules that require attorneys to sign pleadings so they may be sanctioned for filing frivolous pleadings, and does not encourage the unauthorized practice of law. Part IV then argues that, regardless of whether a pro se prisoner litigant has received assistance from counsel, filings submitted by these litigants deserve the same benevolent reading afforded to all pro se litigants; it concludes that affording this benevolent reading even to pro se documents that have been prepared with the assistance of counsel

to attorneys"). *But see* N.C. State Bar Ass'n Ethics Comm., Op. RPC 114 (1991), available at <http://www.ncbar.com/ethics/ethics.asp?id=114> ("[A]ttorneys may give legal advice and drafting assistance to persons wishing to proceed pro se without appearing as counsel of record").

127. This lower level of responsibility that accompanies undisclosed ghostwriting does not mean less competent representation; rather, it means competent representation in a more limited context. *See infra* Part V.A (discussing the extent to which ghostwriting constitutes the practice of law).

128. *See Swank, supra* note 10, at 1547-49 (observing that pro se litigants burden the judicial system because their inexperience requires courts to spend extra time interpreting poorly framed legal pleadings and explaining complicated procedural requirements).

129. Goldschmidt, *supra* note 91, at 1147 ("Many self-representers . . . are afraid of losing control over their own lives, or believe that lawyers would actually add to their problems.") (quoting Forrest S. Mosten, *Mediation and the Process of Family Law Reform*, 37 *FAM. & CONCILIATION CTS. REV.* 429, 441 (1999)).

130. *See* ABA Section of Litig., *supra* note 7, at 75 (relating some limited-services attorneys' "belief that they are helping the client tell his or her story—and that the client has a right to say things that the attorneys would not include if they were directing the case").

131. *See* MODEL RULES R. 1.2(c).

does not give an unfair advantage to those pro se prisoner litigants who obtain ghostwriting assistance.

III. DO ATTORNEYS HAVE AN ETHICAL OR LEGAL DUTY TO DISCLOSE DRAFTING ASSISTANCE?

As discussed above, courts and ethics panels that have considered ghostwriting have expressed concerns that attorneys who engage in the practice may violate various ethical and legal duties. Specifically, concerns have been raised regarding whether an attorney who engages in ghostwriting violates the ethical duty of candor to the tribunal. Courts have also raised concerns about whether attorneys who engage in ghostwriting violate their duties under Rule 11 of the Federal Rules of Civil Procedure (which requires the attorney's signature on all pleadings), or state equivalents. This Part discusses these concerns and argues that ghostwriting does not violate an attorney's ethical or legal duties;¹³² rather, *disclosure* of an attorney's assistance in some cases may violate the attorney's ethical obligations.

A. ETHICAL DUTY TO DISCLOSE

Opponents of ghostwriting often argue that the practice constitutes "a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."¹³³ There are two main types of ethical rules that ghostwriting calls into question. First, several rules prohibit attorneys from counseling or assisting their *clients* to engage in fraudulent behavior.¹³⁴ Second, some ethical rules place a duty on lawyers to be candid in their own dealings with a tribunal.¹³⁵

132. Although this Article takes the position that ghostwriting is both legal and ethical, it also endorses the ABA's suggestion that states "modify their ethics and civil procedure rules" to endorse the practice more clearly, and thus assuage the concerns of both lawyers and courts. *See* ABA Section of Litig., *supra* note 7, at 75.

133. *In re Mungo*, 305 B.R. 762, 769-70 (Bankr. D.S.C. 2003). *But see* Rothermich, *supra* note 21, at 2711 ("By definition, disclosure is inconsistent with the misrepresentation prohibited by ethics rules.").

134. *See* MODEL RULES R. 1.2(d) (prohibiting attorneys from counseling clients to engage in, or assisting clients to engage in, "conduct that the lawyer knows is criminal or fraudulent"); MODEL RULES R. 3.3(b) (requiring attorneys to take "reasonable remediable measures" to stop clients whom they know are engaging in "criminal or fraudulent conduct related to the proceeding"); MODEL RULES R. 4.1(b) (making it an ethical violation to "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client").

135. MODEL RULES R. 3.3(a) (prohibiting lawyers from making or failing to correct a false statement of material fact or law); MODEL RULES R. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."). The vast majority of states have adopted all of these rules, as well as the rules discussed in the preceding footnote. *See* ABA, Model Rules of Professional Conduct, State Adoption of Model Rules, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Feb. 17, 2010) ("To date, California is the only state[] that do[es] not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct."). Maine (Feb. 26, 2009) and New York (Dec. 16, 2008) are the most recent states to be added to the list. *See* ABA, Model Rules of Professional

The ABA makes a persuasive argument that a pro se litigant's filing of a ghostwritten pleading does not constitute fraudulent conduct, because the fact that a pro se pleading was drafted by counsel is not material.¹³⁶ Who prepared a pleading has no bearing on the merits of a case, so ghostwriting cannot constitute a material misstatement of fact or law.¹³⁷ Further, the assistance of a ghostwriter does not give the pro se litigant an unfair advantage over an opponent and is thus immaterial to a court's decision to give the pleading a beneficial reading.¹³⁸ Indeed, the identity of the drafter arguably is relevant only to the court's general authority to supervise proceedings that come before it. Ghostwriting, however, does not interfere with a court's ability to sanction frivolous or otherwise improper pleadings,¹³⁹ and therefore is also immaterial to the court in its supervisory capacity.

Whether attorneys violate their own *personal* duties of candor and honesty to a tribunal by ghostwriting pleadings is a closer question. According to the ABA, ghostwriting attorneys do not sign the pleadings and therefore make no statement to a tribunal, much less a dishonest one.¹⁴⁰ But the rules of professional responsibility govern from the moment that the attorney-client relationship is formed; the attorney does not have to enter an appearance to trigger his or her ethical obligations.¹⁴¹ Moreover, the ABA's position ignores the fact that one can be dishonest by omission and that attorneys who ghostwrite are not being candid with the court about their participation in the pro se litigant's case.¹⁴²

Despite these concerns, in the context of the rules of professional responsibility as a whole, it is clear that ghostwriting does not violate the duty of candor. The ABA's *Model Rules* put a premium on the client's right to control the objectives of the representation.¹⁴³ A pro se prisoner who enlists the drafting assistance and legal advice of a ghostwriting attorney does so because this may be the best help available, given the scarcity of resources available to prisoner litigants and the

Conduct, Dates of Adoption (Chronological Order), http://www.abanet.org/cpr/mrpc/chron_states.html (last visited Feb. 17, 2010). For a chart summarizing how states have kept up with amendments to the ABA *Model Rules*, see ABA, Status of State Review of Professional Conduct Rules (Dec. 22, 2009), http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf.

136. See 2007 ABA Ethics Opinion, *supra* note 11.

137. See *id.*

138. See *infra* Part IV.B (discussing the benevolent reading that courts owe to pro se pleadings).

139. See *infra* Part III.B (discussing the legal duty to disclose).

140. See 2007 ABA Ethics Opinion, *supra* note 11 ("Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c).").

141. See *infra* Part IV.A (citing state court and ethical decisions finding that an attorney's ethical obligations attach the moment an attorney-client relationship is formed and that ghostwriting attorneys also form such a relationship with their clients).

142. See MODEL RULES R. 3.3(a) cmt. 3 ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.").

143. See MODEL RULES R. 1.2(a).

similar scarcity of attorneys willing to assume full pro bono representation of prisoners.¹⁴⁴ In other words, prisoner litigants must be allowed to set limited objectives for their representation if they reasonably believe this is the only representation they can obtain and if such limited representation is better than no assistance at all.

This sentiment is the precise reason that the ABA drafted Model Rule 1.2(c), allowing for limited-scope representation.¹⁴⁵ As the drafters state in the comments to the rule, lawyers and clients are now free to “exclude specific means that might otherwise be used to accomplish the client’s objectives,” if “the client thinks [that these actions] are too costly or that the lawyer regards [the means] as repugnant or imprudent.”¹⁴⁶ This language seems clearly to endorse a practice in which a pro se prisoner-client agrees that an attorney’s services will be limited to the drafting of a pleading because the provision of full representation would be “too costly” and a burden that the attorney is unwilling to accept.

Finally, Rule 1.6(a) prohibits a lawyer from revealing information about representation absent informed consent.¹⁴⁷ Given this obligation, an attorney who agreed to draft a pro se litigant’s pleading would actually violate the ethical rules by disclosing his or her participation.¹⁴⁸ Therefore, given Rule 1.2(a)’s protection of the client’s right to control the objectives of representation, Rule 1.2(c)’s endorsement of agreements to limit the scope of services that an attorney provides, and Rule 1.6(a)’s prohibition of disclosing information about representation without informed consent, the *Model Rules* set forth a strong presumption in favor of nondisclosure of an attorney’s authorship of a ghostwritten pleading.

To interpret the attorney’s duty of candor in light of the other rules of professional conduct is not unprecedented. Indeed, Rule 1.6, which governs the duty of confidentiality, sets forth a presumption that attorneys will not reveal client information except under several extreme circumstances. The rules requiring candor and honesty before a tribunal must regularly be read in light of this provision. In the same vein, given the presumption created by Rules 1.2(a), 1.2(c), and 1.6(a) in favor of nondisclosure, ghostwriting should not be seen as a violation of the attorney’s duty of candor.

144. See *supra* Part I.A (arguing that the lack of available legal assistance to prisoners effectively prevents them from access to redress in the legal system).

145. See MODEL RULES R. 1.2(c) cmt. 6 (stating that “limited representation may be appropriate because the client has limited objectives for the representation”). The rules thus allow attorneys to maintain ethical standards while providing needed, albeit limited, legal services. MODEL RULES R. 1.2(c) cmt. 6.

146. MODEL RULES R. 1.2(c) cmt. 6.

147. MODEL RULES R. 1.6(a).

148. See Goldschmidt, *supra* note 91, at 1168 (positing that no ethical rules are broken by ghostwriting, but acknowledging the existence of both judicial and ethics opinions finding that nondisclosure of legal assistance is a misrepresentation to the court); see also ABA Section of Litig., *supra* note 7, at 75 (citing a focus group of limited-service lawyers who expressed “concern that they would be violating the client’s right to a confidential relationship with his or her attorney” if they disclosed their assistance in preparing legal pleadings).

B. LEGAL DUTY TO DISCLOSE

For similar reasons, ghostwriting does not violate the obligations that Rule 11 of the Federal Rules of Civil Procedure and its state equivalents impose on lawyers.¹⁴⁹ These rules require attorneys to sign all pleadings that they submit to a court¹⁵⁰ and prohibit the filing of pleadings that are frivolous, fraudulent, misleading, or intended solely for the purposes of frustrating or harassing an opponent.¹⁵¹ In addition, many courts have their own rules that require attorneys to sign pleadings or enter an appearance.¹⁵² Courts impose sanctions on attorneys who violate these rules.¹⁵³ Opponents of ghostwriting claim that, if attorneys are

149. Indeed, many of the state bar ethics opinions finding that ghostwriting poses no ethical problems caution attorneys to consult local court rules to ensure that ghostwriting does not present any legal concerns. *E.g.*, Ariz. State Bar Comm. on R. Prof'l Conduct, Op. 05-06 (2005), available at <http://www.myazbar.org/Ethics/pdf/05-06.pdf>; D.C. Bar Ass'n Legal Ethics Comm., Op. 330 (2005), available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion330.cfm. In its May 2007 opinion, the ABA Standing Committee on Ethics and Professional Responsibility concluded that Fed. R. Civ. P. 11 applies only to attorneys who sign legal pleadings, and not to ghostwriting attorneys. 2007 ABA Ethics Opinion, *supra* note 11. This Article does not go so far. The following section argues that Rule 11 does apply to ghostwriters, but that their actions violate neither the language nor the spirit of Rule 11.

150. *See* FED. R. CIV. P. 11(a) ("Signature") ("Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented . . ."). Most states have adopted a similar rule.

151. Rule 11(b) states:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11(b) ("Representations to the Court"). Most states place a similar burden on attorneys submitting pleadings to a court.

152. *See, e.g.*, E.D. VA. LOCAL R. 83.1(G) (stating that an attorney may withdraw from an appearance only with the permission of the court), *cited in* Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079 (E.D. Va. 1997) ("While the Attorneys in these cases did not initially enter a formal appearance, they did contract with these plaintiffs to provide legal representation directly related to the litigation of these cases [i.e., they drafted pleadings] . . . Had they signed the pleadings, as they should have done, they would not have been permitted to terminate their representation without the Court's permission and adequate notice to the plaintiffs. If the Court permitted Lawyers to provide piecemeal representation to otherwise pro se litigants without entering an appearance, Local Rule 83.1(G) would be circumvented."); NEV. S. CT. R. 46 (requiring court approval for withdrawal); *In re Mungo*, 305 B.R. 762, 768 (Bankr. D.S.C. 2003) (finding ghostwriting to be "a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010-1(d)," which states that an attorney who files pleadings for a party remains responsible until the conclusion of the case or formal withdrawal).

153. *See* FED. R. CIV. P. 11(c). Many, but not all, states have a similar provision for sanctioning attorneys who file frivolous, unsupported, fraudulent, or otherwise improper pleadings.

not required to sign the pleadings that they draft, there may be no way to hold them accountable for violations of these obligations.¹⁵⁴ For this reason, some states explicitly require that ghostwriting attorneys sign the pleadings.¹⁵⁵

To bind lawyers to this duty of responsibility, however, courts and bar associations need not require them to sign the pleadings they draft. Most courts and state bar committees that have addressed the issue have concluded that ghostwriting attorneys are still obligated to ensure that the pleadings they file are not intended for an improper purpose and that the pleadings are based on solid legal and evidentiary grounds.¹⁵⁶ The only exemption granted to ghostwriting

154. See, e.g., *Laremont-Lopez*, 968 F. Supp. at 1079.

Who should the Court sanction if claims in the complaint prove to be legally or factually frivolous, or filed for an improper purpose? . . . [T]he Court could encounter legal and factual obstacles if it attempted to impose sanctions on [ghostwriting] Attorneys [sic] based upon Rule 11 considerations. In the past, this Court has suspected, but has been unable to confirm that some plaintiffs outwardly proceeding pro se were in fact receiving the assistance of trained legal counsel. Even if the Court is able to determine who is responsible for drafting the complaints, the additional inquiry necessitated by the lawyers' failure to sign the pleadings interferes with the 'just, speedy, and inexpensive determination' of those actions.

Id. (citations and footnotes omitted); *Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) ("[G]host-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11 [of the Federal Rules of Civil Procedure]."); Rothermich, *supra* note 21, at 2720 (surveying cases in which pro se litigants filed frivolous ghostwritten claims, and arguing that "these cases illustrate unscrupulous attorneys' ability to knowingly assist in the pursuit of frivolous litigation through the practice of undisclosed ghostwriting without fear of Rule 11 sanctions").

155. See COLO. R. CIV. P. 11(b) ("Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number. The attorney shall advise the pro se party that such pleading or other paper must contain this statement."); IOWA R. CIV. P. 1.423 ("Every pleading or paper filed by a pro se party that was prepared with the drafting assistance of an attorney who contracted with the client to limit the scope of representation pursuant to Iowa R. Prof'l Conduct 32:1.2(c) shall state that fact before the signature line at the end of the pleading or paper that was prepared with the attorney's assistance The pleading or paper shall also include the attorney's name, personal identification number, address, telephone number and, if available, facsimile transmission number, but shall not be signed by the attorney.").

156. See ABA Section of Litig., *supra* note 7, at 77-78 (explaining that the rise in pro se litigation can be attributed to cutbacks in funding for legal services organizations and that full-fledged legal representation is simply not affordable to most Americans); *accord*, e.g., *Ariz. State Bar Comm. on R. Prof'l Conduct*, Op. 91-03 (1991) ("[A]n attorney cannot prepare pleadings for his client, which the client is to file *in propria persona*, that are frivolous[.] . . . [n]or can an attorney advise or assist the client in doing anything else that the Rules of Professional Conduct would prohibit the attorney from doing personally."); *Del. State Bar Ass'n Comm. on Prof'l Ethics*, Op. 1994-2 ("We caution the inquiring attorney that regardless of whether the pleadings are signed by a pro se litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose. If time does not permit a sufficient inquiry into the merits to permit such a determination before the pleading must be filed, the representation should be declined."); *Me. State Bar Ass'n, Ethics Op. 89* (1988), available at <http://www.mebaverseers.org/Ethics%20Opinions/Opinion%2089.htm> (noting that a lawyer who agrees to represent a client in a limited role remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure); *N.H. SUPER. CT. R. 15(f)* (2008) ("Notwithstanding that the identity of the drafting attorney need not be required to be disclosed under this rule, by drafting a pleading to be used in court by an otherwise unrepresented party, the limited representation attorney shall be deemed to have made those same certifications as set forth in [New

attorneys is that, because the scope of their involvement is limited to drafting, attorneys may rely on the pro se client's representation of the facts and do not have to do their own independent factual investigations.¹⁵⁷

Although it would be difficult to sanction attorneys for a practice that is by definition anonymous,¹⁵⁸ a court may be able to pierce the veil of anonymity. In *Ivy v. Merchant*,¹⁵⁹ for example, a court sanctioned a jailhouse lawyer for helping a pro se prisoner file a frivolous claim.¹⁶⁰ Given the extent of the jailhouse lawyer's legal experience¹⁶¹ and his involvement in the case,¹⁶² the court ruled that it was fair to hold him to the standards imposed on certified lawyers and the penalties that accompany their violations.¹⁶³ The opinion in *Ivy* does not make clear how the court knew the identity of the jailhouse lawyer. Nor is it clear whether he signed the pleadings or whether instead he ghostwrote them and the court determined his identity through its own investigation.¹⁶⁴ In true cases of ghostwriting, however, sanctioning the attorney may not be an option.

Hampshire's equivalent to Fed. R. Civ. P. 11] despite the fact the pleading need not be signed by the attorney."); Utah State Bar, Ethics Advisory Op. 02-10 (2002), *available at* http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_10.html ("It is difficult to understand how a lawyer could appropriately assist an individual to file pro se divorce pleadings without advising the party when his claims appear to lack any legal support and without advising the party regarding the evidentiary support the party will need to support certain contentions.").

157. *See* COLO. R. CIV. P. 11(b) (2007) ("The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts."); *accord* WASH. SUPER. CT. R. 11(b) (allowing lawyers to rely on the otherwise self-represented person's representation of facts, "unless the attorney has reason to believe that such representations are false or materially insufficient").

158. *See* *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884, 887 (D. Kan. 1997) ("Both the court and the parties . . . have a legitimate concern that an attorney who substantially participates in a case at least be identified and recognize the possibility that he or she may be required to enter appearance as counsel of record and thereby accept accountability for his or her participation, pursuant to Rule 11 and the rules of professional conduct applicable to attorneys.").

159. 666 So. 2d 445 (Miss. 1995).

160. *See id.* at 452.

161. *Id.* The court explained:

Robert Tubwell has some 20 years of experience as a writwriter in the Mississippi Department of Corrections Legal Assistance Office and stands in the position of an attorney to the inmates at the penitentiary. We are familiar with Tubwell's work and recognize that he is a proficient writwriter and most capable of distinguishing a meritorious claim from a frivolous one, such as this.

Id.

162. *See id.* (noting that the jailhouse lawyer not only had drafted pleadings, but had also controlled the direction of the case and handled all of the pro se litigant's correspondence).

163. *Id.*

164. The idiosyncracies of a particular situation may make it easier to discover this information in context. While Tubwell's identity may not have appeared in the pleadings, it was contained in the prison's records. The court wrote: "The record indicates that Tubwell directed all correspondence to himself care of the Mississippi Department of Corrections Assistance Office. Clearly, Tubwell was in control of the direction of the case. The answers to Ivy's interrogatories were served on Tubwell." *Id.* at 451-52.

Even without the option of sanctioning ghostwriting attorneys directly, courts still have a means to discourage frivolous and improper pro se litigation—by sanctioning the pro se litigants themselves.¹⁶⁵ As previously discussed, the Prison Litigation Reform Act contains a “three strikes” provision that bars prisoners from bringing civil suits once courts dismiss three of their claims as frivolous, malicious, or failing to state a claim.¹⁶⁶ These prisoners are barred from future pro se suits unless the claim falls under the imminent-danger exception.¹⁶⁷ Some states have enacted equivalent statutes.¹⁶⁸ For example, Illinois law provides that pro se prisoner litigants “shall pay all filing fees and court costs in the manner provided in [the Illinois] Code of Civil Procedure” for frivolous pleadings, motions, or other filings.¹⁶⁹ Further, courts do not need statutory permission to sanction pro se litigants.¹⁷⁰ In *Tubwell v. Grant*,¹⁷¹ the Mississippi Supreme Court affirmed a lower court’s imposition of sanctions on a pro se prisoner for filing a frivolous habeas petition. In dismissing the prisoner’s petition, the trial judge observed that he was a repeat offender of filing frivolous claims.¹⁷² The judge thus barred the prisoner from filing any further claims in that court, except those involving his personal safety, until he paid a \$50 fine and court costs from a

165. See L.A. County Bar Ass’n Prof’l Responsibility and Ethics Comm., Op. 502 (1999).

The filing of “ghost drafted” pleadings or documents does not deprive a judge of the ability to control the proceedings before the court or to hold a party responsible for frivolous, misleading or deceit in those pleadings. The *pro per* litigant, not an attorney, makes representations to the court by filing a pleading or document. California Code of Civil Procedure, § 128.7 requires that every pleading, petition, written notice of motion or other similar paper must be signed by one attorney of record or by the pro per party and that by presenting a document to the court, the attorney or the party is certifying that conditions in subdivision (b) are met.

Id.

166. See *supra* notes 51-54 and accompanying text (describing how the PLRA has made prisoner litigation more difficult, among other things by cutting off prisoners’ ability to file petitions after three have been improperly filed). The PLRA effectively prevents prisoners from receiving the legal assistance that is available to them, and punishes them for mistakes that may have been avoided had they received such legal assistance.

167. See *supra* notes 51-52 and accompanying text.

168. See, e.g., ARK. CODE ANN. § 16-68-607 (West 2008); LA. REV. STAT. ANN. § 15:1187 (2008); PA. CONS. STAT. ANN. § 6602(f) (West 2008); WIS. STAT. ANN. § 801.02(7)(d) (West 2008). The Supreme Court of Indiana recently held that state’s three-strikes law unconstitutional. See *Higgason v. Indiana Dep’t of Correction*, 883 N.E.2d 816 (Ind. 2008); *Smith v. Indiana Dep’t of Correction*, 883 N.E.2d 802 (Ind. 2008).

169. 705 ILL. COMP. STAT. ANN. 505/21 (West 2008), applied in *People v. Gale*, 876 N.E.2d 171, 183-85 (Ill. App. Ct. 2007).

170. See MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 16:15 (3d ed. 2007) (noting that courts maintain the power to issue injunctions preventing prisoners from filing further civil suits when they have a history of filing frivolous suits, and explaining that, “to ensure that the right of access to courts is preserved, the injunction must be carefully considered and narrowly tailored to control the abuses that give rise to the need for action without shutting the courthouse door to a potentially valid claim”).

171. 760 So. 2d 687 (Miss. 2000).

172. *Id.* at 688 (“Tubwell had already been barred by the U.S. District Courts from filing any further petitions in the Fifth Circuit Court of Appeals. Tubwell had also been fined and sanctioned in the Sunflower County Circuit Court.”).

prior fine.¹⁷³ The Mississippi Supreme Court upheld the sanctions, noting that the court would not be hesitant to sanction pro se litigants who file frivolous claims:¹⁷⁴ “We cannot allow rampant, frivolous filings to clog up a judicial system replete with meritorious claims. If petitioners . . . abuse the privilege of filing in forma pauperis, then it is quite possible they may lose it altogether for certain filings”¹⁷⁵

It is arguably unfair to sanction prisoners for frivolous pleadings drafted by ghostwriting attorneys. Pro se litigants who do not declare the assistance of counsel, however, take ultimate responsibility for their communications with the court.¹⁷⁶ Ultimately, whether courts choose to sanction these litigants or to allow ghostwriting attorneys suspected of drafting frivolous pleadings to go unpunished, “the benefits of having a pleading, motion or document prepared by a lawyer outweigh the need to know on the face of the document whether lawyer assistance was provided.”¹⁷⁷

IV. DOES UNDISCLOSED GHOSTWRITING IMPLICATE THE ATTORNEY’S DUTY TO PROVIDE COMPETENT REPRESENTATION?

Critics of the practice of undisclosed ghostwriting suggest that the ethical duty of competent representation may be undermined by a policy of anonymity. Moreover, when pro se prisoner litigants receive competent representation in the form of ghostwritten pleadings, it is arguable that they receive an unfair advantage when their pleadings are subsequently given a benevolent reading. This Part argues that, although it is more difficult to sanction attorneys who ghostwrite deficient or improper pleadings, attorneys nevertheless are ethically bound to provide competent representation. To the extent that this duty is fulfilled, the possibility exists that pro se prisoner litigants will have an unfair advantage by filing well-crafted pleadings that may also receive a benevolent reading. However, the benevolent-reading doctrine is designed only to level the playing field; if a ghostwritten pleading serves that function instead, a pro se litigant receives no greater advantage than he or she would have received under a benevolent reading of his or her own pleading.

173. *See id.*

174. *See id.* at 690.

175. *Id.* The United States Supreme Court also has sanctioned abusive pro se litigants and enjoined further in forma pauperis petitions. *See, e.g., In re Whitaker*, 513 U.S. 1, 3-4 (1994); *In re Anderson*, 511 U.S. 364, 364-66 (1994); *Zatko v. California*, 502 U.S. 16, 16-18 (1991); *In re Demos*, 500 U.S. 16, 16-17 (1991); *In re Amendment to Rule 39*, 500 U.S. 13, 13-14 (1991); *In re Sindram*, 498 U.S. 177, 177-80 (1991); *In re McDonald*, 489 U.S. 180 (1989).

176. *See* ABA Section of Litig., *supra* note 7, at 105 (“[A] lawyer likely has no control over the pleading, motion or document once it is given to the client and nothing prevents a client from thereafter modifying the language of the pleading, motion or document.”) (citation and internal quotation marks omitted).

177. *Id.* (citation omitted).

A. COMPETENT PRESENTATION

Some observers have argued that undisclosed ghostwriting will lead to ethically deficient representation, “since the lawyer cannot be subject to sanctions, because his or her name is not associated with the clients.”¹⁷⁸ Ghostwriting, however, does not inherently or necessarily lead to shoddy lawyering. The ABA *Model Rules* and most states’ equivalents caution that attorneys providing limited-scope representation remain bound by the rules of professional conduct.¹⁷⁹ Even in limited representation, an attorney-client relationship is created between the ghostwriting attorney and the client.¹⁸⁰ As the District of Columbia Bar Association recently indicated, “the scope of the

178. Schwarz, *supra* note 113, at 661.

179. See MODEL RULES R. 1.2 cmt. 8 (“All agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct and other law.”). Most states have adopted this Comment verbatim. See, e.g., TENN. S. CT. R. 8-1.2(c) cmt. 9 (2006) (adopting the identical language of the ABA comment to the model rule). States that have not adopted this Comment word-for-word still contain a provision expressing a similar sentiment. See, e.g., FLA. RULES OF PROF’L CONDUCT R. 4-1.2 cmt. (2008) (“Regardless of the circumstances, a lawyer providing limited representation forms an attorney-client relationship with the litigant, and owes the client all attendant ethical obligations and duties imposed by the Rules Regulating The Florida Bar, including, but not limited to, duties of competence, communication, confidentiality and avoidance of conflicts of interest. Although an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); L.A. County Bar Ass’n Prof’l Responsibility and Ethics Comm., Formal Op. 432, *cited in* L.A. County Bar Ass’n Prof’l Responsibility and Ethics Comm., Formal Op. 483 (1995) (“The attorney-client relationship and its ethical duties are triggered by the preparation of an answer for a pro se litigant.”); N.M. RULES OF PROF’L CONDUCT R. 16-303(e) comm. cmt. (2008) (“Even though an attorney’s role may be limited to drafting a single document, the attorney is, however, bound by all of the rules that govern attorney conduct, including, but not limited to Rule 16-303(A)(1) NMRA [stating that an attorney shall not knowingly make a false statement of law or fact to a tribunal.]; see also D.C. Bar Ass’n Legal Ethics Comm., Op. 330 (2005), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion330.cfm (“Not only the duty of competence, but all the duties that generally attach to lawyer-client relationships will apply to such arrangements, including diligence, loyalty, communication, confidentiality and avoidance of conflicts of interest.”).

180. See ABA Section of Litig., *supra* note 7, at 19-20 (explaining that providing legal “advice” in any context creates an attorney-client relationship, whereas providing only legal “information” does not create an attorney-client relationship); see also Alaska Bar Ass’n, Ethics Op. 93-1 (1993), available at http://www.alaskabar.org/servlet/content/indexes_aeot_93_1.html (“When an attorney limits the scope of his representation, an attorney-client relationship is still created between the attorney and the client, with all the attendant duties and responsibilities called out in the Professional Canons.”); N.C. State Bar Ass’n Ethics Comm., Op. RPC 114 (1991), available at <http://www.ncbar.com/ethics/ethics.asp?id=114> (“While it appears ethically permissible for an attorney to volunteer assistance of the sort described above without appearing as counsel of record, it is noted that attorney-client relationships would generally be formed under such circumstances and the Rules of Professional Conduct, particularly those concerning confidentiality and conflict of interest would apply.”); Utah State Bar, Ethics Advisory Op. 02-10 (2002), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_10.html (citation omitted) (“The lawyer cannot disclaim the attorney-client relationship, nor limit the obligation to be ‘competent,’ which includes ‘thoroughness’ and ‘preparation reasonably necessary’ for the representation.”). *But see* Va. State Bar Ass’n, Legal Ethics Op. 1803 (2005), available at <http://www.vacle.org/opinions/1803.htm> (opining that, when an attorney provides limited-scope assistance to prisoners, the question of whether there is an attorney-client relationship should be decided on a case-by-case basis).

services may be limited but their quality may not.”¹⁸¹

The ABA *Model Rules* establish a two-part test to determine whether limited-scope representation is appropriate in each situation.¹⁸² First, the representation must be reasonable.¹⁸³ Pro se prisoner litigants are often in dire need of legal assistance; thus, ghostwriting assistance is reasonable given the circumstances.¹⁸⁴ As long as the attorney acts ethically, the practice should be considered acceptable.¹⁸⁵ Second, an attorney must obtain informed consent from the client to limit the scope of representation after clearly explaining what services are and are not included.¹⁸⁶ Informed consent means that the “client has been [both] fully informed and completely understands” the limitations to the representation.¹⁸⁷ The attorney’s explanation to the client and the client’s consent must be “clear and unequivocal.”¹⁸⁸ Informed consent also involves making the client aware not only that the representation will terminate after the lawyer has drafted the pleadings, but also that the pro se client may subsequently run into legal issues and difficulties that he or she may not understand.¹⁸⁹ Thus, the ABA *Model Rules* provide built-in protections to ensure that limited-scope representation does not constitute ethically deficient representation.

However, the scope of the ethical duties imposed on attorneys providing limited services may be circumscribed depending on the scope of the representation.¹⁹⁰ According to the New Hampshire Rules of Professional Conduct:

181. D.C. Bar Ass’n Legal Ethics Comm., Op. 330 (2005), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion330.cfm; accord MD. LEGAL ASSISTANCE NETWORK, INFORMAL NATIONAL SURVEY OF ETHICAL OPINIONS RELATED TO “DISCRETE TASK LAWYERING” (2003), available at <http://www.unbundledlaw.org/thinking/ethicsurvey.htm> (“Although a lawyer and client may agree to a limited-scope relationship and purpose, the lawyer owes that client the same ethical obligations they would owe any other client.”) (citing Fla. Bar. Ass’n, Op. 79-7 (Reconsideration) (2000), available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+79-7+Reconsideration?opendocument>).

182. See MODEL RULES R. 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”); Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 159 (2004) (“The Model Rules of Professional Conduct allow a lawyer to limit the scope of the representation undertaken on behalf of a client.”); see also John Levin, *Legal Ethics: Unbundling Legal Services*, 20 CBA REC. 59, 59 (2006) (noting that it is permissible, under Illinois Rule 1.2(c), to provide unbundled legal services even if all of a client’s needs are not met, as long as there is the requisite level of disclosure).

183. See MODEL RULES R. 1.2(c).

184. See *supra* Part I.A (explaining the predicament faced by prisoners of having no one to assist them in filing legal documents properly and an inability to obtain any redress because their petitions typically are dismissed as improperly filed).

185. See Yerbich, *supra* note 10, at 8.

186. See *id.* (“Disclosure to a pro se litigant should include a warning that the litigant may be faced with legal matters he or she may not understand.”).

187. Spain, *supra* note 182, at 161.

188. Levin, *supra* note 182, at 59.

189. See Yerbich, *supra* note 10, at 8.

190. See MODEL RULES R. 1.2 cmt. 7 (“Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when

One example of such an obligation could be the duty, under Rule 1.1(c)(3), to “develop a strategy, in collaboration with the client, for solving the legal problems of the client.” A client who retains an attorney for limited purposes may simply want the lawyer to research and provide the applicable law in a specific area, thereby making Rule 1.1(c)(3) inapplicable.¹⁹¹

Similarly, “what constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform.”¹⁹² In addition, most states have adopted a relatively new ABA Model Rule, Rule 6.5, which exempts attorneys providing short-term, limited legal services through a nonprofit or court-sponsored program from the duty to check for conflicts of interest.¹⁹³

With these caveats, the bottom line is that ghostwriting attorneys may limit their representation to the drafting of a pleading, but they must draft that pleading with the same diligence, competence, and zeal with which they would draft the pleading of a client whom they were representing through the conclusion of the matter.¹⁹⁴ It is true that it will be difficult for courts to police ghostwriting attorneys for less-than-competent work, as the attorneys will not sign the pleadings they draft. But clients may report unsatisfactory ghostwriting help. This possibility of sanction, coupled with the obligation imposed by courts’ and state bar associations’ unequivocal position that the rules of professional conduct still apply, should deter ghostwriting attorneys from providing deficient drafting assistance. Moreover, attorneys providing ghostwriting assistance to pro se prisoner litigants will likely do so pro bono—meaning that the only incentive is the satisfaction they will receive from performing this public service. Given that these attorneys have no obligation to undertake this work and are doing so out of their own desire to help an underprivileged litigant, one would hope and trust that these attorneys would already be committed to doing a competent job of drafting.

Indeed, the only detriment suffered by the client of a ghostwriting attorney is that the assistance of counsel is limited to the discrete act of preparing a pleading. Thus, outside of the preparation of the pleading, the pro se litigant will lack the advice and expertise of counsel regarding how to proceed. Most states, however,

determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). Most states have also adopted this Comment verbatim. *See, e.g.*, COLO. RULES OF PROF’L CONDUCT R. 1.2(c) cmt. 7 (2008); INDIANA RULES OF PROF’L CONDUCT R. 1.2 cmt 7. (2008); TENN. SUP. CT. R. 8-1.2(c) cmt. 8 (2006).

191. N.H. RULES OF PROF’L CONDUCT R. 5.5 cmt. 3 (2008).

192. *Lerner v. Laufer*, 819 A.2d 471, 483 (N.J. Super. Ct. App. Div. 2003) (citations and internal quotation marks omitted).

193. MODEL RULES R. 6.5. This rule was added in 2002. ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 6.5 annot. (2009).

194. *See* D.C. Bar Ass’n Legal Ethics Comm., Op. 330 (2005), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion330.cfm (“When hired to diagnose legal problems, an attorney providing services under an unbundling arrangement must be as thorough in identifying legal issues as an attorney who intends to continue with a case through its conclusion.”).

emphasize the need for attorneys to explain these risks to clients clearly and to delineate the boundaries of their representation explicitly.¹⁹⁵ Some states even require that consent to limited representation be in writing.¹⁹⁶ These precautions ensure that the client makes an informed decision about whether it is wise to accept limited representation, given the circumstances of the case. In the context of prisoner litigation, where the choice is typically between limited representation or no representation at all, this decision is usually an easy one.

B. BENEVOLENT READING

The flip-side of the argument that ghostwriting will lead to shoddy lawyering is that, by allowing attorney-produced pleadings to be treated as if they were prepared and filed pro se, ghostwriting provides an unfair advantage to pro se litigants who receive some legal assistance.¹⁹⁷ Pursuant to the Supreme Court's decision in *Haines v. Kerner*,¹⁹⁸ courts hold that the papers submitted by pro se litigants, "however inartfully pleaded," are to be held "to less stringent standards than formal pleadings drafted by lawyers."¹⁹⁹ One concern is that ghostwritten pleadings would also receive this special treatment, even though they had been

195. See, e.g., Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 05-06 (2005), available at <http://www.myazbar.org/Ethics/pdf/05-06.pdf> ("An attorney is required to have sufficient knowledge and skill to provide reliable counsel to the limited scope client as to the advisability of the action requested by the client."); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(b) cmt. 6 (2007), available at http://www.texasbar.com/Content/ContentGroups/Programs_and_Services/Attorney_Assistance/Texas_Lawyers_Assistance/Law_Firms/TexasDisciplinaryRulesofProfessionalConduct.pdf:

[T]he client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

Id.

196. See, e.g., IOWA RULES OF PROF'L CONDUCT R. 1.2 (2008). Rule 1.2 requires that informed consent be in writing unless:

(i) the representation of the client consists solely of telephone consultation; (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit or court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

Id.

197. See, e.g., *Duran v. Carris*, 238 F.3d 1268, 1271-72 (10th Cir. 2001) (noting that, where an attorney provided substantial and undisclosed assistance in drafting a client's pleading, the client unfairly benefits from the court's "liberal construction of pro se pleadings").

198. 404 U.S. 519 (1972).

199. *Id.* at 520; see also MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007) ("It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.").

prepared with the assistance of counsel.²⁰⁰ As one federal district court stated,

such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The *pro se* litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party.²⁰¹

Some observers and courts have gone so far as to call the practice of ghostwriting a fraud on the court.²⁰²

Pro se litigants, prisoner or otherwise, face challenges not encountered by litigants who are represented by counsel.²⁰³ Without legal training, access to resources such as LexisNexis and Westlaw, and experience working within the courts, pro se litigants can hardly be expected to maneuver effectively within the often arcane rules that govern litigation.²⁰⁴ This problem is particularly pronounced in the case of prisoners, both because prisoners have fewer resources available to them than other pro se litigants do and because prisoner litigants face procedural roadblocks beyond those faced by non-prisoner litigants.²⁰⁵

To remedy this disparity, pleadings filed by litigants who are proceeding pro se are to be read benevolently and construed liberally, as compared with pleadings filed by attorneys. The purpose of this relaxed standard is to ensure that courts are able to “assess the nature of the interests at stake in the suit.”²⁰⁶ Procedurally, the benevolent reading granted to pro se pleadings means that, when a pro se litigant’s complaint is met with a motion to dismiss for failure to state a claim under Rule 12(b)(6), the motion is to be granted only where, construing the

200. See, e.g., *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (“[T]he Court believes that this practice . . . unfairly exploits the Fourth Circuit’s mandate that the pleadings of *pro se* parties be held to a less stringent standard than pleadings drafted by lawyers . . .”); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (“[I]t would be unfair to construe a pro se litigant’s pleadings more liberally than the pleadings of a counseled litigant when in reality the pro se litigant has had the benefit of counsel.”) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)); *Johnson v. Bd. of County Comm’rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) (“Such ghostwriting is far more serious than might appear at first blush. It necessarily causes the court to apply the wrong tests in its decisional process and can very well produce unjust results.”).

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

202. See *supra* Part III.A (addressing the criticism that ghostwriting constitutes unethical fraud before a tribunal).

203. See *supra* Part I.A (discussing the need for limited-scope representation in prisons). See generally Flannery & Robbins, *supra* note 15, *passim*; Ira P. Robbins & Susan N. Herman, *Litigating Without Counsel: Faretta or for Worse*, 42 BROOK. L. REV. 629 *passim* (1976).

204. See Rosenbloom, *supra* note 26, at 306 (“Despite the liberal reading granted to pro se litigant pleadings, pro se litigants are almost universally ill-equipped to encounter the complexities of the judicial system.”); Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 661 (1988) (noting the “labyrinthine nature of the court system” and questioning why any litigant would choose to proceed pro se).

205. See *supra* Part I.A (discussing the need for limited-scope representation in prisons).

206. Bradlow, *supra* note 204, at 660.

plaintiff's pleading liberally, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."²⁰⁷ Courts look to the substance of the pleading, rather than to the form or specific language used in the pleading, to determine whether such a set of facts exists.²⁰⁸

The relaxed standard that courts apply to pro se pleadings, however, is not unbounded. In keeping with the spirit of the standard to level the playing field, courts are particularly concerned with ensuring that a benevolent reading does not give any "particular advantage" to the pro se litigant on account of his or her lack of legal training.²⁰⁹ Thus, courts will not read into pleadings facts that are not stated,²¹⁰ use a litigant's pro se status to excuse procedural missteps,²¹¹ or "fill in all the blanks" for pro se litigants.²¹² As one Alaska court has put it:

Although the pleadings of pro se litigants should be held to less stringent standards than those of lawyers, and trial judges should take limited steps to mitigate the difficulty of representing oneself, a trial judge may not compromise his or her impartiality by saving a litigant from his choice of lawyer, including when a litigant chooses himself as legal representative.²¹³

Notwithstanding these limitations, some courts and commentators who oppose the trend toward increased use of ghostwriting argue that the practice "unfairly exploits the . . . mandate that the pleadings of pro se parties be held to a less stringent standard than pleadings drafted by lawyers."²¹⁴ By giving a benevolent reading to pleadings that are drafted by attorneys but submitted pro se, these observers argue, the intent of the benevolent reading—to balance the playing field—is nullified, as the ostensibly pro se party is given an advantage over parties represented by counsel. As one federal judge in the Eastern District of Virginia reasoned:

207. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (internal citation omitted).

208. *See, e.g., Madden v. Jeffes*, 482 A.2d 1162, 1165 (Pa. Commw. Ct. 1984) (holding that the court's role in analyzing pro se complaints is to "examine the substance of the[] complaint to determine if plaintiffs would be entitled to relief if they proved the facts averred"); *Aguilar v. Stone*, 68 S.W.3d 1, 1 (Tex. App. 1997) ("The Supreme Court directs us to seek the substance of a pro se complaint by reviewing it with liberality and patience."); *Mikrut v. State*, 569 N.W.2d 765, 768 (Wis. Ct. App. 1997) ("Courts are instructed to look to the substance rather than the label of a pro se pleading in order to determine if the petitioner may be entitled to relief.")

209. *O'Neill v. Checker Motors Corp.*, 567 A.2d 680, 682 (Pa. Super. Ct. 1989) ("While this court is willing to liberally construe materials filed by a pro se litigant, we note that appellant is not entitled to any particular advantage because she lacks legal training.")

210. *See, e.g., Turner-El v. West*, 811 N.E.2d 728, 733 (Ill. App. Ct. 2004) ("[A] liberal construction will not be utilized to remedy the failure of a complaint to plead sufficient facts to establish a cause of action.")

211. *See, e.g., Smittie v. Lockhart*, 843 F.2d 295, 298 (8th Cir. 1988) (holding, in the context of a federal habeas petition, that petitioner's "pro se status and educational background are not sufficient cause" to excuse the petitioner's failure to exhaust state-court remedies).

212. *Turner-El*, 811 N.E.2d at 733.

213. *Forshee v. Forshee*, 145 P.3d 492, 498 (Alaska 2006) (citations and internal quotation marks omitted).

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

When . . . complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se, the indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it. The pro se plaintiff enjoys the benefit of legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court.²¹⁵

This position reflects a basic misunderstanding of the benevolent reading. The concern is that, if a benevolent reading is granted to a pleading that is not entitled to it²¹⁶ because the pleading was drafted by an attorney, the litigant who has filed the pleading will have an unfair advantage due to the “unseen hand”²¹⁷ guiding the petitioner’s litigation. But this is not the case. The liberal reading given to pro se pleadings does not provide such an undue advantage.²¹⁸ It merely gets beyond the technical niceties and potential ambiguities and joins the issues for the court’s consideration. It does not favor the pro se party in any ultimate decision. Some state rules have gone so far as to state that the leniency given to pro se litigants is the same leniency given to all litigants.²¹⁹ In fact, under *Haines v. Kerner* itself, the standard for a 12(b)(6) motion—that the plaintiff “can prove no set of facts in support of his claim which would entitle him to relief”—is the same standard applied to all 12(b)(6) motions.²²⁰

While a litigant may be afforded leniency for making some errors—for example, failing to assert a cause of action, or failing to plead an element of a cause of action that may be proven based on the facts pled—this relaxation of the usual standards merely ensures that the substance of the pleading is considered by the court.²²¹ If a pleading is competently drafted by an attorney, even if it is submitted pro se, then the benevolent reading would not occur, since such reading is granted only to those pleadings that require it.²²² Because the flexible reading takes place only when a pro se pleading has been inartfully drafted, an artfully

215. *Id.*

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

217. *Johnson v. Bd. of County Comm’rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) (arguing that ghostwriting falls below the level of candor expected of members of the bar).

218. *See Bradlow, supra* note 204, at 660.

219. In New Mexico courts, for example, attorneys and pro se litigants are held to the same lenient standard, so that cases are decided on the merits. N.M. R. PROF’L CONDUCT 16-303(e), Comm. cmt. (2007). Therefore, attorneys “may prepare, without attribution, papers for filing by a self-represented litigant” without giving the pro se litigant an unfair advantage. *Id.*

220. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

221. *See Joseph M. McLaughlin, An Extension of the Right to Access: The Pro Se Litigant’s Right to Notification of the Requirements of the Summary Judgment Rule*, 55 *FORDHAM L. REV.* 1109, 1121 (stating that courts have exercised judicial paternalism toward pro se litigants because to hold their pleadings to the same standards as those prepared by attorneys would frustrate the pro se litigants’ access to the courts).

222. *Cf. Alaska Bar Ass’n, Ethics Op. 93-1* (1993), available at http://www.alaskabar.org/servlet/content/indexes_aeot_93_1.html (believing that the argument that nondisclosure will be misleading is unsubstantiated,

drafted ghostwritten pleading will not receive—because it does not need—a benevolent interpretation.²²³ While some errors that might otherwise have been fatal may be overlooked under a liberal construction, a pleading that is read benevolently will not ultimately succeed simply because of the benevolent reading. Once the court is at the point at which it is considering the substance of the pleadings, the pro se litigant bears the same burden as if he or she were represented by counsel.²²⁴

The cases that have criticized ghostwriting based on the unfairness of the benevolent reading doctrine fail to delineate any specific harm caused by the relaxed pleading standard, or even to articulate a scenario in which a specific harm would result.²²⁵ Nevertheless, one can conceive of a situation in which granting a benevolent reading to a ghostwritten pleading is apparently unfair. Consider a hearing on a summary judgment motion in an action brought by a pro se plaintiff against a defendant who has the assistance of counsel. Suppose that both parties' pleadings state sufficient facts upon which to base their claims (and perhaps meet their burdens at summary judgment), but both parties fail to plead one or more elements of a cause of action (or defense, respectively). If the plaintiff's pleading is granted a benevolent reading and the defendant's is not, then the plaintiff may prevail at summary judgment even if the defense was otherwise valid (and thus the defendant may have prevailed had the defense pleading been read under a relaxed standard).

While this example may present a situation in which a benevolent reading could unfairly benefit a plaintiff who submits a pleading ghostwritten by an attorney, it seems to extend only to those situations in which both the plaintiff's ghostwriting attorney and the defendant's attorney of record provided ineffective, perhaps even incompetent, assistance. It is hard to imagine any situation in which the benevolent reading granted to a ghostwritten pleading would result in an unfair advantage against competent counsel. Where both attorneys are deficient, the beneficial reading granted only to the prisoner's ghostwritten pleading hardly seems unjust, given the vast disparity in power and resources between the prisoner and the government. Moreover, the plaintiff's success at the summary judgment phase merely keeps the case alive; the *Haines v. Kerner* benevolent reading does not assist the pro se litigant at the merits proceeding.

Even assuming that the benevolent reading doctrine actually provides an additional advantage to ghostwritten pleadings, this is not necessarily an unfair

because judges have the ability to tell when a pro se litigant "received the assistance of counsel in preparing or drafting pleadings," and thus "any preferential treatment . . . will likely be tempered, if not overlooked").

223. *See id.* (noting that judges are usually able to discern when a pro se litigant received assistance in preparing court documents).

224. *But see* *Delso v. Trs. for the Ret. Plan for the Hourly Employees of Merck & Co.*, 2007 U.S. Dist. LEXIS 16643, at *42-43 (D.N.J. Mar. 5, 2007) (stating that the rule of law in our system of justice is threatened when a court gives extra latitude to a purported pro se litigant who is receiving "secret professional help").

225. *See generally* Goldschmidt, *supra* note 91, at 1147.

outcome. Ghostwritten pleadings should be granted a benevolent reading because they are more like pro se pleadings than they are like pleadings drafted by a counsel of record. Although attorneys remain bound by their ethical obligations, particularly the duty of competence, the fact is that many attorneys who choose to ghostwrite do so precisely because they do not want to be overwhelmed by other responsibilities to the client.²²⁶ Attorneys who ghostwrite typically spend less time on a case (and on a pleading) than attorneys whose names and professional reputations are associated with the pleading. Attorneys who ghostwrite also may have less intimate knowledge of the litigant or the particular area of law, and thus may not be in a position to recognize and process every possible issue that may arise in the case or the pleading.²²⁷ Further, if a ghostwritten pleading is deficient, then unlike with a pleading drafted by an attorney of record, the attorney who drafted the pleading may not be available (or obligated) to amend the pleading; it may be up to the litigant to do so.²²⁸ In addition, in the prisoner context litigants typically face pre-screening requirements that do not often apply in other types of litigation. For example, inmate litigants will often seek leave to proceed in forma pauperis²²⁹ or discretionary appointment of counsel.²³⁰ Ghostwritten assistance may help prisoners satisfy these screening standards, while not actually directly helping them to win on the merits. For these reasons, failure to give a benevolent reading to pro se prisoners' ghostwritten pleadings is inconsistent with the spirit of *Haines v. Kerner* and would unfairly harm those litigants who utilize counsel solely to assist them in drafting their pleadings.

To take it one step further, it could be argued that *all* pleadings filed by *all* litigants, represented or not, should be afforded a benevolent reading of sorts. To the extent that the above example appears unfair, though limited to situations involving ineffective counsel, perhaps this unfairness results not from the fact that a pleading ghostwritten by one ineffective attorney receives a benevolent reading, but from the fact that a pleading drafted by the other ineffective attorney does not. Until courts amend their rules of civil procedure, however, the tremendous obstacles faced by pro se prisoner litigants demand that courts

226. Cf. Klempner, *supra* note 17, at 658 (“Ghostwriting creates an attorney-client relationship and requires that the attorney act competently, diligently, and zealously, even though the scope of representation is limited.”).

227. See Mosten, *supra* note 23, at 428-30 (listing a range of possible types of assistance that a lawyer might provide to a pro se litigant). This paragraph may seem to suggest that ghostwriting is not consistent with the duty of competence—i.e., if a ghostwritten pleading should receive a benevolent reading, it must not have been drafted competently. The issues of definition and levels of competence for ghostwritten legal assistance are beyond the scope of this Article. Should ghostwriting for prisoners become more widely authorized along the lines I suggest, however, these issues would clearly provide grist for later scholarship.

228. See Lonnie A. Powers, *Pro Bono and Pro Se: Letting Clients Order Off the Menu Without Giving Yourself Indigestion*, BOSTON B.J., May/June 1998, at 10, 22 (discussing a scenario in which a lawyer agrees only to do particular work for a client).

229. See 28 U.S.C. § 1915 (2006).

230. See 18 U.S.C. § 3006A(a)(2)(B); 28 U.S.C. § 1915(e)(1).

continue to construe their pleadings liberally, regardless of whether those pleadings may have been prepared with the assistance of anonymous counsel.

V. DOES UNDISCLOSED GHOSTWRITING ENCOURAGE THE UNAUTHORIZED PRACTICE OF LAW?

Finally, critics of ghostwriting argue that it encourages the unauthorized practice of law.²³¹ These critics believe that, if pro se litigants file under their own names documents that were actually prepared by another individual, a market may arise for the drafting of legal pleadings, and the anonymity of ghostwriting will prevent courts from ever realizing that non-lawyers may be drafting legal documents.²³² This Part addresses this argument by breaking it down into three distinct questions. First, it considers whether ghostwriting is the practice of law, concluding that it likely is. Second, it considers whether ghostwriting, when practiced by a non-lawyer, is the unauthorized practice of law, concluding that, in most circumstances, ghostwriting by non-attorneys *is* the unauthorized practice of law. Finally, it considers whether non-lawyer ghostwriting should ever be authorized, concluding that, at least in the context of pro se prisoner litigation, this question should be answered in the affirmative.

A. DOES GHOSTWRITING CONSTITUTE THE “PRACTICE OF LAW”?

As a foundational matter, non-lawyer ghostwriting can constitute the unauthorized practice of law only if ghostwriting constitutes the practice of law. Each

231. See, e.g., State Bar of Mich., Ethics Op. RI-325 (2001), available at http://www.michbar.org/opinions/ethics/numbered_opinions/RI-325.htm. The opinion states:

A lawyer may not enter into a business arrangement with a company engaged in the business of selling legal documents and “kits” under circumstances where the company’s representatives engage in conduct that is prohibited by the Michigan Rules of Professional Conduct and that conduct can be attributed to the lawyer . . . [T]he lawyer must be wary of engaging in conduct that may be deemed to be assisting another in the unauthorized practice of law.

Id.

232. For examples of non-lawyers and retired/suspended lawyers using the veil of ghostwriting to practice law, see, e.g., *In re Contempt of Mittower*, 693 N.E.2d 555, 556-59 (Ind. 1998) (recounting how an attorney resigned from the bar and then prepared pleadings for other persons and caused them to be filed pro se); *Columbus Bar Ass’n v. Winkfield*, 839 N.E.2d 924, 927, 931-33 (Ohio 2006) (affirming a finding that a suspended attorney engaged in the unauthorized practice of law by representing a client in a “ghost” capacity during his suspension period); *Ohio State Bar Ass’n v. Cohen*, 836 N.E.2d 1219, 1219-20 (Ohio 2005) (describing how a non-lawyer “offered to prepare wills and living trusts, as well as the documents necessary for divorces, name changes, stepparent adoptions, evictions, immigration, and bankruptcies, and to establish corporations, among ‘other uncontested legal procedures’”); *Cuyahoga County Bar Ass’n v. Spurlock*, 770 N.E.2d 568, 568-70 (Ohio 2002) (enjoining non-lawyers with power of attorney from preparing pleadings for a “next friend” habeas corpus petition); N.J. Comm. on the Unauthorized Practice of Law, Op. 41, available at 178 N.J.L.J. 444 (2004) (finding that notary publics engage in the unauthorized practice of law when they prepare “pleadings, affidavits, briefs, and other submissions”).

state regulates the practice of law within its borders.²³³ Although the concept may seem relatively straight-forward, a precise definition of the phrase “practice of law” is hard to come by. The term encompasses diverse activities, which can include drafting documents, preparing or expressing legal opinions, representing a person in a legal matter, or negotiating rights.²³⁴

Although the ABA Task Force on the Model Definition of the Practice of Law has encouraged every state to define “the practice of law,”²³⁵ and although there has been some movement by the states to abide by this recommendation, fewer than half the states currently have an official definition of the term.²³⁶ The majority of states decide whether an action constitutes the practice of law on a case-by-case basis.²³⁷

Of the states that define the practice of law, Connecticut, which adopted a definition in January 2008, provides a typical example: the practice of law is defined as “ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person.”²³⁸ Included among a non-exhaustive list of activities that fall within this broad definition is “[d]rafting any legal document or agreement involving or affecting the legal rights of a person.”²³⁹ This provision is typical: a large majority of states that explicitly define the practice of law consider the drafting of legal documents to fit within the definition. The Nebraska Supreme Court’s Rules Governing the Unauthorized Practice of Law, for example, establish that the “[s]election,

233. See, e.g., John M. Burman, *Defining the Practice of Law: An Update*, WYO. LAW., June 2005, at 38, 38 (“The definition of the practice of law is established by law and varies from one jurisdiction to another.”) (citing WYO. RULES OF PROF’L CONDUCT R. 5.5, cmt. 1 (2004)).

234. See ABA, Appendix A: State Definitions of the Practice of Law 2, available at http://www.abanet.org/cpr/model-def/model_def_statutes.pdf [herein-after State Definitions].

235. See ABA, GUIDELINES FOR THE ADOPTION OF A DEFINITION OF THE PRACTICE OF LAW (2003), available at http://www.abanet.org/cpr/clientpro/Guidelines_PracticeofLaw.pdf [hereinafter ABA GUIDELINES]. These guidelines provide that:

- A. Every jurisdiction should adopt a definition of the practice of law.
- B. Each jurisdiction’s definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.
- C. Each jurisdiction should determine who may provide services that are included within the state’s or territory’s definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.

Id.

236. See State Definitions, *supra* note 234.

237. See Jason Green, *Websites May Create Unauthorized Practice Questions*, LAW. J., July 6, 2007, at 6, 6 (noting that books have come closer to crossing the line into the unauthorized practice of law by offering “forms and providing commentary,” while the Internet continues to be an easy place for the unauthorized practice of law).

238. CONN. RULES OF PROF’L CONDUCT R. 2-44A (effective Jan. 1, 2008), available at <http://www.jud.state.ct.us/Publications/PracticeBook/pb1.pdf#page=9>.

239. *Id.* R. 2-44A(a)(3).

drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person” constitutes the practice of law.²⁴⁰ Similarly, the Utah Supreme Court recently adopted a definition that includes “drafting documents for [a] person through application of the law and associated legal principles to that person’s facts and circumstances.”²⁴¹

In those states in which the highest court defines the practice of law,²⁴² the drafting of legal documents tends to be included in the definition.²⁴³ For example, the Oregon Supreme Court has included in the definition of the practice of law:

appearing on behalf of others in . . . courts and administrative proceedings; . . . drafting or selecting legal documents for another when informed or trained discretion must be exercised to meet the person’s individual needs; . . . advising someone of his or her legal rights in a particular situation; [and] . . . holding oneself out as a lawyer.²⁴⁴

Thus, although most states’ definitions of the practice of law are unavoidably vague,²⁴⁵ drafting pleadings for another is almost universally considered to fall under its scope.

B. DOES GHOSTWRITING BY NON-LAWYERS CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW?

In most jurisdictions, it is illegal for non-lawyers to participate in the practice of law.²⁴⁶ For example, the recently adopted Connecticut practice-of-law definition specifically states: “If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.”²⁴⁷ The Nebraska Supreme Court stated a

240. NEB. CT. RULES § 3-1001 (2008).

241. UTAH RULES OF PROF’L CONDUCT R. 14-802; *see generally* ABA GUIDELINES, *supra* note 235 (compiling some states’ definitions of the “practice of law” or court decisions concerning the topic and finding that there are several similarities).

242. *See* ABA GUIDELINES, *supra* note 235, at 11 (“Many jurisdictions have left the determination as to what constitutes the practice of law to a case-by-case analysis.”); State Definitions, *supra* note 234 (providing state-by-state survey indicating that a majority of the states rely on case law to define the practice of law).

243. A typical catchphrase is “the preparation of legal instruments and contracts by which legal rights are secured.” *See* State Definitions, *supra* note 234.

244. Oregon State Bar, Unlawful Practice of Law, <http://www.osbar.org/upl> (last visited Feb. 17, 2010). The Oregon State Bar has also stated that “[i]t is not necessary that money change hands in order for conduct to be the practice of law.” *Id.*

245. *See* Burman, *supra* note 233, at 42 (explaining that the purpose of limiting non-lawyers from practicing law is to protect the public, so “any activity which so threatens the public is likely to be, and should be, construed to be the practice of law”). Although it is difficult to specify with precision what constitutes the practice of law, the more specific the definition or number of examples, the better. *See id.* (describing Wyoming’s adoption of more specific rules regarding the practice of law).

246. *See* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2242 (1999) (“Most states have statutes imposing civil and criminal penalties on the unauthorized practice of law.”).

247. CONN. SUP. CT. R. 2-44A (effective Jan. 1, 2008).

similar general prohibition: “No nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska”²⁴⁸

Many states, however, do not place an absolute ban on non-lawyers engaging in the practice of law.²⁴⁹ For example, the Utah Code of Judicial Administration allows that, in certain circumstances, non-lawyers may provide limited legal services without engaging in the unauthorized practice of law.²⁵⁰ “Whether or not it constitutes the practice of law,” the Code allows for non-lawyers to provide, among other services, general information about potential legal rights and remedies as well as free clerical assistance in filling out forms.²⁵¹ Although currently there is no exception for ghostwriting pleadings for litigation beyond the very constrained one that exists for jailhouse lawyering,²⁵² the Code does permit non-lawyers to prepare legal documents in certain other limited circumstances—such as a real estate agent’s completion of sales contracts and a health care provider’s assistance to patients in executing power-of-attorney documents.²⁵³ Exceptions like these suggest that non-lawyers may provide legal services when justified by policy or convenience. Still, since no state explicitly authorizes non-lawyers to prepare pleadings or other litigation documents for others, it is likely that, at least as the law currently stands in most jurisdictions, ghostwriting by non-lawyers constitutes the unauthorized practice of law.

C. SHOULD NON-LAWYER GHOSTWRITING BE AUTHORIZED IN CERTAIN CIRCUMSTANCES?

A more interesting question is whether ghostwriting by non-lawyers ought to be permitted, or even encouraged, in certain circumstances, particularly in the context of prisoner litigation. Like the Utah Code discussed above, the ABA Task

248. NEB. REV. STAT. § 3-1003 (2008) (noting several exceptions that do not appear to allow ghostwriting).

249. The ABA Commission on Nonlawyer Practice has divided non-lawyer legal activity into three categories: document preparation, paralegal, and legal technician. See Marcus J. Lock, Comment, *Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, 72 U. COLO. L. REV. 459, 462 n.15 (2001) (citing ABA Comm’n on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations* (1995)). Only the third category, services provided by a legal technician, is considered to constitute the unauthorized practice of law. *Id.* A legal technician, however, is “a person who provides advice or other substantive legal work to the public with regard to a process in which the law is involved, without the supervision of a lawyer and for which no lawyer is accountable.” *Id.* (internal quotation marks omitted). Therefore, a non-lawyer’s legal assistance crosses the line into the unauthorized practice of law only when he or she is providing “advice or other substantive legal work” without any supervision by a licensed attorney. *Id.*

250. UTAH CODE OF JUDICIAL ADMIN. R. 14-802 (2008), available at <http://www.utcourts.gov/resources/rules/ucja/ch14/08%20Special%20Practice/USB14-802.html>.

251. *Id.* R. 14-802(c).

252. See *infra* Part V.C.

253. See UTAH CODE OF JUDICIAL ADMIN. R. 14-802(c) (2008), available at <http://www.utcourts.gov/resources/rules/ucja/ch14/08%20Special%20Practice/USB14-802.html>.

Force on the Model Definition of the Practice of Law also rejects an absolute bar on the provision of legal services by non-lawyers. Instead, the Task Force suggests that states adopt a case-by-case approach to determine whether non-lawyers should be authorized to engage in a particular type of legal practice.²⁵⁴ The Task Force recommends that, in making this decision, states should balance protecting the public from services that do not meet established standards with providing services to people who otherwise would not have any legal assistance.²⁵⁵

In the context of prisoner litigation, the system does not guarantee prisoner litigants access to a lawyer, most litigants are unable to afford a private lawyer, many lawyers are unwilling to provide their services pro bono, and most litigants lack the education and resources necessary to succeed pro se.²⁵⁶ Therefore, non-lawyer assistance is crucial in the context of prisoner litigation.²⁵⁷ Applying the balancing approach suggested by the ABA Task Force, there is a strong interest in enabling access to legal assistance for prisoner litigants, an interest that outweighs the corresponding concern that this assistance may be provided by non-lawyers. Arguably, even if there is a risk that the non-lawyer assistance will be sub-par, as compared with assistance by a trained lawyer, as long as the prisoner is fully aware that the non-lawyer is not qualified to practice law,²⁵⁸ this is a risk that the prisoner should be allowed to take.

To be clear, this Article does not dispute that most areas of law substantially benefit from regulation and a ban on non-lawyers practicing law.²⁵⁹ Prisoner

254. See ABA GUIDELINES, *supra* note 235, at 7 (“Each jurisdiction should weigh concerns for public protection and consumer safety, access to justice, preservation of individual choice, judicial economy, maintenance of professional standards, efficient operation of the marketplace, costs of regulation and implementation of public policy.”).

255. See *id.* at 18 (noting the ABA Task Force’s belief that “defining the practice of law appropriately will improve access to justice”).

256. See *supra* Part I.A (discussing the need for better legal services in prisons).

257. Cf. Hurder, *supra* note 246, at 2242 (describing a New York City program in which non-lawyer volunteers explain legal procedures, the warrant of habitability, and other aspects of landlord-tenant law and arguing that, in a situation such as this, the benefit provided to an underrepresented constituency outweighs the typical reasons for prohibiting non-lawyers from practicing law).

258. See, e.g., UTAH CODE OF JUDICIAL ADMIN. R. 14-802 (2008) (permitting non-lawyers to provide certain legal services, so long as “[they are] not otherwise claiming to be a lawyer or to be able to practice law”); Letter from Maureen K. Ohlhausen, Director, Office of Policy Planning, et al., to Carl E. Testo, Counsel, Rules Comm. of the Conn. Super. Ct. (May 17, 2007), <http://www.ftc.gov/be/V070006.pdf> (“The presumption that one’s engagement in one of the enumerated activities is the ‘practice of law’ may be rebutted by showing that . . . there is no explicit or implicit representation of authority or competence to practice law . . .”) (quoting D.C. Ct. App. R. 49(b)(2) (2004) (commentary)).

259. See Hurder, *supra* note 246, at 2245 (weighing “the state’s interest in the orderly operation of the legal system against the need for accessibility,” and concluding “that some law-related activities would benefit from nonlawyer participation and do not require proscribing or regulating nonlawyer participation” and that “there are strong arguments for regulating, and in some cases prohibiting, nonlawyer participation in other law-related activities”).

litigants, however, face such enormous obstacles²⁶⁰ that justice requires that non-lawyers be permitted to assist them in the litigation process.²⁶¹ Thus, states should consider modifying their rules prohibiting the unauthorized practice of law to recognize an exception for non-lawyers ghostwriting legal documents for prisoners.²⁶²

Explicitly authorizing or encouraging non-lawyer legal services for prisoner litigants may have the greatest impact on a practice known as “jailhouse lawyering.”²⁶³ Many prisoners, lacking in education and resources, turn to their fellow inmates for assistance in filing difficult and confusing legal claims.²⁶⁴ Courts sometimes treat jailhouse lawyering as the unauthorized practice of law. The Indiana Supreme Court, for example, dismissed an appeal that had been written by a jailhouse lawyer.²⁶⁵ The court argued that its position was necessary to “preserve the right of self-representation while guarding against the unauthorized practice of law.”²⁶⁶ Similarly, the Kansas Supreme Court issued a writ of mandamus to prohibit a trial judge from appointing inmates to represent other inmates.²⁶⁷ And in *Maldonado v. New York State Board of*

260. See *supra* Part I.A (discussing the obstacles faced by pro se prisoner litigants).

261. Cf. Lock, *supra* note 249, at 466 (advancing the viable option of allowing non-lawyers to provide practice-of-law services to allow low-income residents adequate representation in the legal system).

262. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2599 (1999) (recognizing that changes to unauthorized-practice-of-law requirements are made on a state-by-state basis, but arguing that, if there are fundamental problems in meeting potential litigants’ needs, then the matter should be addressed at a national level by a large body, such as the ABA). Denckla argues:

Today, there are more lawyers per capita than ever before. However, the legal needs of low- and moderate-income persons remain seriously unmet. As a functional matter, the lawyer monopoly must be responsible to a large degree for the lack of affordable options that might otherwise be made available in a more diversified market for legal services. UPL restrictions appear to be the main barrier blocking the development of affordable legal services options for the public. Thus, UPL laws, rules, and rulings should be eased or undone in order to make way for greater public access to legal services and, hopefully, as a result, greater access to justice for all.

Id. (footnote omitted); cf. Lock, *supra* note 249 (describing the current trend toward increasing reliance on non-lawyer assistance and arguing that states should welcome this assistance).

263. Feerman, *supra* note 47, at 371 (defining jailhouse lawyers broadly to include “all prisoners who submit legal work to the courts on behalf of themselves or other inmates,” and explaining that often jailhouse lawyers have been known to have some competence).

264. See *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the S. Comm. on the Judiciary*, 97th Cong. 105-08 (1982) (statement of Phylis Skloot Bamberger, on behalf of the ABA) (describing how prisoners turn to “whatever haphazard assistance” a jailhouse lawyer may provide).

265. See *Webb v. State*, 412 N.E.2d 790, 792 (Ind. 1980) (holding that, “at the appellate stage, the papers of a pro se defendant must clearly be the work-product of the defendant”).

266. *Id.* The court also held that, although criminal defendants have a constitutional right to proceed pro se, there is no constitutional right to representation by a jailhouse lawyer. *Id.*

267. *State v. O’Keefe*, 686 P.2d 171, 183-84 (Kan. 1984) (“In the interpretation of the laws and administration of justice it is essential that there be members of the bar with ability, adequate learning and sound moral character. One of the important functions of this court is to admit only such persons to the practice of law in the courts of this state. From the facts pled and admitted, the [trial] judge authorized certain individual prisoners to engage in the practice of law without authority to so act.”).

Parole,²⁶⁸ the court refused to grant an inmate's motion to have another inmate represent him because, under state law, "only those persons permitted by law to practice before the courts of this State may act as a legal representative of another person in a courtroom proceeding or fulfill the capacity of a practicing attorney."²⁶⁹

Although inmates do not have an independent right to the legal assistance of other inmates, prison officials may not bar jailhouse lawyering if doing so "interferes with an inmate's ability to present his grievances to a court."²⁷⁰ In *Johnson v. Avery*, the United States Supreme Court held that a jailhouse lawyer's activities may be proscribed only if there are reasonable alternatives for legal help for inmates.²⁷¹ Applying this standard, the Ohio Supreme Court held in 2007 that a prison's law library, open seven days a week, with four law clerks who had little law experience, was not sufficient to provide a serious opportunity to obtain justice.²⁷² The court thus approved the practice of jailhouse lawyering in that particular facility,²⁷³ writing: "Today's decision is not so much an endorsement of respondent's 'right' to be a jailhouse lawyer, but rather an acknowledgement of inmates' rights to meaningful access to the courts."²⁷⁴

In an ideal world, prisoner litigants would not have to turn to jailhouse lawyers; where full representation by a member of the bar was unavailable, the prison would provide legal education sufficient to enable prisoners to proceed *pro se*.²⁷⁵ At least six states already have Inmate Law Clerk programs in their prisons to assist prisoners in becoming effective jailhouse lawyers.²⁷⁶ There are a variety of benefits to the creation of educational programs: they promise to decrease the number of frivolous lawsuits filed by prisoners by training them to recognize which suits lack merit; they promote prisoners' "individual growth";

268. 424 N.Y.S.2d 589 (N.Y. Sup. Ct. 1979).

269. *Id.* at 589-90.

270. *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999) (citing *Gibbs v. Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993)); *see also supra* note 55 and accompanying text (discussing *Johnson v. Avery*, 393 U.S. 483 (1969)); *supra* Part I.A (discussing the difficulties prisoners face when trying to litigate *pro se*).

271. *Johnson v. Avery*, 393 U.S. 483, 488-90 (1969); *see also id.* at 498 (Douglas, J., concurring) ("The cooperation and help of laymen, as well as of lawyers, is necessary if the right of 'reasonable access to the courts' is to be available to the indigents among us.") (footnote omitted).

272. *Disciplinary Counsel v. Cotton*, 873 N.E.2d 1240, 1242-43 & n.5 (Ohio 2007) (noting that, to serve the 2153 inmates at the prison—ninety to ninety-five percent of whom were illiterate—the four law clerks would have to "demonstrate more efficiency and productivity than the clerks, paralegals, and office staff of the most high-powered law and governmental offices if they are able to provide meaningful assistance to these inmates in a six-hour timeframe"). In approving jailhouse lawyering at this facility, the court ruled that it was up to prison authorities to discipline and restrict jailhouse lawyers as they saw fit. *Id.* at 1244.

273. *See id.*

274. *Id.*

275. *See Feierman, supra* note 47, at 384 (encouraging states to create legal training programs within prisons).

276. *See Evan R. Seamone, Fahrenheit 451 on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries*, 24 YALE L. & POL'Y REV. 91, 125 (2006).

and they allow prisoners' voices to be heard.²⁷⁷ Until such education systems become accessible to all prisoners, however, jailhouse lawyering is a necessary alternative to ensure that prisoners have their day in court.

This Part has demonstrated that circumstances control what constitutes the practice of law and that non-lawyer assistance tends to be permitted when it is necessary for the good of society. As stated by the ABA:

Once the practice of law is defined, a jurisdiction must determine who may perform services that are included within the definition and under what circumstances. The scope of permissible conduct of persons who may engage in activities that are included within the definition of the practice of law will vary among jurisdictions, dependent upon the harm and benefit to the public and the requisite qualifications, competence, accountability and other requirements thought necessary to engage in those activities. Thus, in order to determine who may provide services that are included within the definition of the practice of law, jurisdictions must have sufficient information available to predict which nonlawyers, and under what circumstances, may provide a great benefit and which may create harm.²⁷⁸

In the context of pro se prisoner litigation, the needs of prisoners, courts, and society are all better served by granting prisoners access to ghostwriting assistance.²⁷⁹ Thus, although ghostwriting may constitute the practice of law, it should not be considered to be unauthorized, even when the drafting is done by a layperson or jailhouse lawyer.²⁸⁰

CONCLUSION

Ghostwriting attorneys may operate “in the shadows of the Courthouse door”²⁸¹—but at least they are propping the door open. For pro se prisoner litigants, the barriers to filing an adequate legal pleading are too often insurmountable.²⁸² Without the cloak of anonymity that ghostwriting provides, most attorneys simply are unwilling to aid prisoners in drafting legal plead-

277. See Feerman, *supra* note 47, at 386.

278. ABA GUIDELINES, *supra* note 235, at 3.

279. *Cf.* Yerbich, *supra* note 10, at 8 (noting that permitting limited-scope representation in some contexts may be unavoidable).

280. This Article does not address whether a suspended or disbarred attorney should be authorized to assist a prisoner in the limited context of ghostwriting. It would seem, however, that (depending on the reasons for the disbarment) such an attorney who discloses this fact to a prisoner litigant would be just as capable and able to assist as a non-attorney, and perhaps even more so. *But cf.* *supra* note 232 (addressing ghostwriting by retired or suspended attorneys in the non-prison context).

281. Ricotta v. State of California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998).

282. See *supra* Part I.A (explaining that prisoners generally have less education and fewer resources than the typical pro se litigant).

ings.²⁸³ Thus, ghostwriting encourages attorneys to provide the assistance necessary to grant pro se prisoner litigants meaningful access to the courts.²⁸⁴

Permitting attorneys to ghostwrite legal pleadings will not encourage them to act illegally or unethically, nor will it give their pro se prisoner clients an unfair advantage in litigation.²⁸⁵ On the contrary, ghostwriting attorneys are still obligated to file competent, non-frivolous pleadings.²⁸⁶ Although this limited form of assistance rarely will match the quality of work provided by a lawyer who has undertaken full representation,²⁸⁷ it will better ensure that, at the least, prisoners' pleadings meet procedural requirements so that their cases may be decided on the merits. Courts and state bar associations should therefore endorse the practice of ghostwriting for pro se prisoners and give these disadvantaged litigants a ghost of a chance to challenge alleged violations of their constitutional rights.²⁸⁸

283. See *supra* notes 42-43 and accompanying text (summarizing the many reasons attorneys are reluctant to take on full representation of pro se prisoner litigants).

284. See *supra* Part II (discussing the benefits provided by undisclosed drafting assistance).

285. See *supra* Parts III-V (addressing critics' contentions that ghostwriting is illegal, unethical, and unfair).

286. See *supra* Part III (discussing the ethical and legal obligations imposed upon ghostwriting attorneys).

287. See *supra* Part IV.B (using this point to justify the benevolent reading that ghostwritten pro se pleadings will receive, since courts will not know that they were prepared with the assistance of counsel). For an example of a jailhouse lawyer with an impressive track record, see STEPHEN BELLO, *DOING LIFE: THE EXTRAORDINARY SAGA OF AMERICA'S GREATEST JAILHOUSE LAWYER* (1982) (biography of New York State convicted murderer Jerome "Jerry" Rosenberg). "During the Attica uprising in September 1971, which resulted in 43 deaths, Mr. Rosenberg was the chief legal advisor for the uprising's leaders." Sewell Chan, *Jerry Rosenberg, Jailhouse Lawyer, Dies at 72*, N.Y. TIMES, June 2, 2009, at B19 (obituary article). Self-educated Rosenberg won many cases for his fellow inmates, although he was unsuccessful in challenging his own conviction. Until his recent death, Rosenberg, who began serving his prison sentence in 1963, had been New York's longest-serving inmate. See *id.* Actor Tony Danza played Rosenberg in *Doing Life*, the 1986 made-for-TV movie based on Bello's book. See <http://www.imdb.com/title/tt0090954> (last visited Feb. 17, 2010). For a more recent example of a successful jailhouse lawyer, see Adam Liptak, *As a Criminal, Mediocre; As a Jailhouse Lawyer, An Advocate Unmatched*, N.Y. TIMES, Feb. 9, 2010, at A12 (describing the experience of Shon R. Hopwood, a federal prisoner who became "an accomplished [jailhouse] Supreme Court practitioner").

288. Helen B. Kim, Note, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right To Be Heard*, 96 YALE L.J. 1641, 1651 (1987) ("A better-educated pro se litigant may still fare better if she were represented by counsel, but the alternative—leaving the litigant in total ignorance—is clearly much worse, for both the litigant and the court.").