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APRIL 21, 2010

INFORMAL OPINION 2010 - 04

(Replacing Informal Opinion 98-05 in light of ABA Formal Opinion 07-446)

Lawyer Assisting a Pro Se Litigant Is Not Obligated Under the RPC to Disclose Such Assistance to the Court

In 1998, this Committee issued Informal Opinion 98-05, addressing whether a lawyer assisting a pro se litigant by preparing pleadings, briefs and other materials must disclose the lawyer's identity to the court. The inquiring lawyer stated that he had a contract with the State of Connecticut to provide legal services to state prisoners. The contract forbade him or his associates from filing appearances in any lawsuit. The contract provided that the lawyer would prepare briefs, complaints and other documents for submission to the court by prisoners who would proceed pro se. We were informed that the lawyer would "put [the documents] into final form." In its 1998 Informal Opinion, the Committee expressed concern that unless his or her assistance is made known to the court, "[a] lawyer who extensively assists a client proceeding pro se may create, together with the client, a false impression of the real state of affairs." Relying in part on ABA Informal Opinion 1414 (1978), the Committee concluded that a lawyer who prepared and controlled pleadings that would be filed by a pro se litigant "must, in some

form satisfactory to the court, inform the court that the document was prepared by the lawyer."

The ABA has now withdrawn its 1978 Informal Opinion, and issued a new opinion, ABA Formal Opinion 7-446 (2007), concluding that a lawyer is not under an obligation to advise the court of such extensive assistance for a client proceeding pro se. Sua sponte, this Committee has now decided to review its 1998 Informal Opinion, and has decided to replace that Informal Opinion with the present Informal Opinion.

The Comment to Connecticut Rules of Professional Conduct Rule 5.5 provides that "a lawyer may counsel non-lawyers who wish to proceed pro se." The Rules of Professional Conduct describe the counseling function in terms of advising the client. Rule 2.l. The lawyer's role as advocate is treated in Rules 3.1 through 3.9. In the situation described, the lawyer's role is not limited to advising the client concerning the preparation of pleadings, or assisting the client to prepare pleadings. Nor is this a situation in which the lawyer turns over a draft to a client and loses control over its contents. Here the lawyer prepares the final version of documents that the client will file in court.

We agree with ABA Formal Opinion 07-446 that "the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation." Accordingly, nondisclosure of the lawyer's assistance would *not* amount to fraudulent or otherwise dishonest conduct in violation of the Connecticut Rules of Professional Conduct 1.2(d), 3.3(b), .1(b) or 8.4(3).[1]

We also agree with the ABA that pro se litigants acting with undisclosed attorney assistance will not unfairly benefit from the less exacting standards courts often apply to pro se

[1] ABA Formal Opinion 07-446 likewise concludes that Rules 1.2(d), 3.3(b), 4.1(b), and 8.4(c) of the Model Rules of Professional Conduct are not violated by such non-disclosure.

pleadings. As the ABA Formal Opinion explains:

> [We] believe that permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have effectively concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage. As stated by one commentator:
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> > Practically speaking . . . ghostwriting is obvious from the fact of the legal papers. . . . . Thus, when 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.
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> Because there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.

ABA Formal Opinion 07-446 (*quoting* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 Fordham Urb. L.J. 1145, 1157-58 (2002)).

We therefore now conclude that under the Connecticut Rules of Professional Conduct a lawyer who prepares and controls the content of a pleading, brief or other document to be filed with a court is not required to inform the court that the document was prepared by the lawyer. Nor do the Rules require that the lawyer demand that the pro se litigant make such disclosure.

To the extent, however, that a law of the jurisdiction or a tribunal rule requires disclosure

of such assistance, the lawyer must, of course, comply with the law or tribunal rule. [2]

Informal Opinion 98-05 is hereby superseded.

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R. Chambers
Wick R. Chambers, Chair

[2] The ABA, in its Formal Opinion 07-446 "reject[ed] the contention that a lawyer who does not appear in the action circumvents court rules [e.g. Fed. R. Civ. P. Rule 11] requiring the assumption of responsibility for their [sic] pleadings." This Committee does not here address the applicability of Rule 11 or its Connecticut counterpart, Practice Book § 4-2. We note, however, that while there appear to be no pertinent Connecticut or Second Circuit decisions, federal courts in other jurisdictions are generally hostile to ghostwritten pleadings. See e.g. Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001) (participation in drafting pro se appellate brief must be acknowledged by signature); Ellis v. State of Maine, 448 F.2d 1325 (1st Cir. 1971) (in accordance with "the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, . . . of representing to the court that there is good ground to support the assertions made . . . [i]f a brief is prepared in any substantial part by a member of the bar, it must be signed by him.").