GHOSTWRITING—MORE THAN MEETS THE EYE; GHOSTWRITING—ATTORNEYS IN DISGUISE: A PROPOSAL FOR HANDLING *PRO SE* PARTIES WHO SEEK LIMITED REPRESENTATION IN FEDERAL COURT

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ABSTRACT

Attorney ghostwriting occurs when a party appears before a court without disclosing to the court that they have retained counsel, and the retained counsel writes briefs that the court and opposing counsel believe are authored by the apparently pro se *party. This practice has received significant criticism, especially from federal court judges. This criticism arises because the Supreme Court of the United States has directed that* pro se *pleadings should be read "with less stringent standards" than those accorded to pleadings prepared by an attorney, and when an attorney ghostwrites a pleading for a party that appears to be proceeding* pro se*, the court reads these arguments more liberally than it otherwise might. Courts, bar associations, ethics boards, and commentators have taken numerous steps and made multiple recommendations in response to this practice. Some have suggested that attorney ghostwriting be allowed without any regulation, arguing that it does not in fact pose a true problem for the courts. Others have argued that some instances of attorney ghostwriting should be allowed, as long as the court has some notice that a party is receiving the assistance of counsel. And others have maintained that the practice constitutes a form of fraud and should be banned outright.*

This Comment examines the motivations for attorney ghostwriting, and seeks to offer a practical approach to resolving a deepening split in the federal courts concerning the propriety of the practice. This Comment posits that federal courts will continue to hesitate to fully endorse attorney ghostwriting and will require some form of disclosure from any party that

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has retained counsel, even if counsel has been retained for only a limited purpose, like drafting a motion or other pleading. This Comment suggests that courts accord some deference to a party that has retained counsel for a limited purpose, as long as the scope of this limited representation has been disclosed to the court.

This Comment argues that the party receiving limited representation provide notice to the court regarding the nature of the representation he or she has retained, so the court can accord deference throughout the proceeding. This Comment examines how this deference might be applied in practice. In the end, this Comment maintains that encouraging parties to seek counsel, and rewarding them for doing so, would likely resolve the present circuit-split in a way that would be amenable to federal jurists and afford increased opportunities for individuals to receive justice.

I. INTRODUCTION

Judge Olson of the United States Bankruptcy Court for the Southern District of Florida probably thought that John William Hood, Jr., who filed for Chapter 13 bankruptcy protection on February 21, 2012, would be proceeding *pro se*.[1] Looking at the filings Mr. Hood submitted to the court on this day, Judge Olson would have seen a standard "Voluntary Petition," a Power of Attorney form allowing a courier to file the necessary paperwork to initiate a case on Mr. Hood's behalf, and an application to pay the necessary fees to file the petition with the court in installments.[2] The documents did not indicate that Mr. Hood had retained counsel—the Voluntary Petition left blank the portion of the form that called for the signature of Mr. Hood's attorney.[3] Because Mr. Hood successfully docketed these initial bankruptcy pleadings, he was afforded the protections of the Bankruptcy Court's automatic stay, which prevented efforts by Mr. Hood's creditors to foreclose on the property Mr. Hood used as his place of

1. *In re* Hood, No. 12-14092-JKO, slip op. at 2 (Bankr. S.D. Fla. June 7, 2012), ECF No. 39, *aff'd sub nom* Torrens v. Hood (*In re* Hood), No. 0:12-cv-61612-KMW, slip op. (S.D. Fla. Oct. 16, 2012), ECF No. 15, *rev'd*, 727 F.3d 1360 (11th Cir. 2013).

2. *Id.*

3. Petition at 3, *In re* Hood, No. 12-14092-JKO (Bankr. S.D. Fla. June 7, 2012), ECF No. 1.

business.[4] Mr. Hood, however, had in fact retained counsel, who assembled the necessary paperwork that was filed on his behalf.[5]

Attorney ghostwriting occurs when an attorney drafts a document for a client, and the client goes on to use the document without revealing that an attorney has prepared it.[6] Ghostwriting can occur in multiple contexts. For instance, a celebrity may quickly publish a memoir with the assistance of an undisclosed author,[7] or a pharmaceutical company might draft a study and ask a doctor to sign her name to the work even though the doctor took no part in conducting the research reflected in the study.[8] In each of these instances, readers of the works in question mistakenly believe an individual authored a document he or she did not write.

Attorney ghostwriting poses a unique challenge for judges when a party's failure to disclose the assistance of counsel would lead the court to conclude that the party has appeared *pro se*. The Supreme Court of the United States has instructed courts to hold materials filed by *pro se* parties to "less stringent standards than formal pleadings drafted by lawyers."[9] When a party has an attorney ghostwrite the pleadings he or she files in court, and receives favorable treatment from the presiding judge who

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4. *See In re* Hood, slip op. at 2, 3 (noting after the bankruptcy case was filed the foreclosure sale of Mr. Hood's property was postponed); *see also* 11 U.S.C. § 362(a)(1) (2012) (providing in part that filing a bankruptcy petition operates as a stay on the "commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title").

5. *In re* Hood, slip op. at 2–3, 5–7. Whether or not Mr. Hood actually wanted his attorneys to prepare these forms on his behalf is in dispute. Mr. Hood maintained that he had consulted counsel to be relieved from his foreclosure proceedings and that he had no idea that he was filing for bankruptcy, while his former counsel maintained that Mr. Hood knew exactly what he was doing, and knew that he was filing for bankruptcy. *Id.* Additionally, whether or not Mr. Hood's attorneys "drafted" his bankruptcy petition as opposed to have merely "prepared" it without disclosing their involvement to the bankruptcy court, was debated by the United States Court of Appeals for the Eleventh Circuit. *See Torrens*, 727 F.3d at 1364.

6. *See, e.g.*, James M. McCauley, *Unbundling Legal Services: The Ethics of "Ghostwriting" Pleadings for Pro Se Litigants*, 2004 PROF. LAW. (SYMPOSIUM ISSUE) 59, 59 (explaining how an attorney might ghostwrite a complaint or motion by drafting it and giving it to her client to file *pro se*).

7. T.J. Fosko, Note, *Buying a Lie: The Harms and Deceptions of Ghostwriting*, 35 U. ARK. LITTLE ROCK L. REV. 165, 165 & n.2 (2012) (citing Piper Weiss, *Snooki's Better Half: The Ghostwriter Behind "A Shore Thing,"* SHINE, (Jan. 6, 2011, 3:00 AM), http://shine.yahoo.com/channel/life/snookis-better-half-the-ghostwriter-behind-quot-a-shore-thing-quot-2437056/).

8. Jerome P. Kassirer, *Ghostwriters and Ghostbusters*, TRIAL, Sept. 2007, at 38, 38.

9. Haines v. Kerner, 404 U.S. 519, 520 (1972).

believes the party has appeared *pro se*, this provides the party with an "unfair advantage"[10]: the court will have reviewed these filings more deferentially and more forgivingly then they otherwise may have.[11] The federal circuit courts of appeals are split, as these courts have assessed instances of attorney ghostwriting, and have made determinations regarding the practice's propriety. The United States Courts of Appeals for the First and Tenth Circuits have decried all instances of attorney ghostwriting.[12] The Second and Eleventh Circuits, however, have concluded that some select instances of attorney ghostwriting are permissible.[13] The general hostility towards attorney ghostwriting in federal court lies in stark contrast to the approaches that state bar associations and courts have taken towards the issue.[14] This Comment explains the rationales supporting these various approaches to attorney ghostwriting and seeks to offer a solution to resolve the split in the federal circuits concerning the practice that will likely receive support from federal judges.

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10. Michael W. Loudenslager, *Giving Up the Ghost: A Proposal for Dealing with Attorney "Ghostwriting" of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearances for Such Attorneys*, 92 MARQ. L. REV. 103, 115 (2008).

11. *See, e.g.*, Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) ("When, however, 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 the 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.").

12. *See* Duran v. Carris, 238 F.3d 1268, 1273 (10th Cir. 2001) (per curiam) ("[A]ny ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved."); 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.").

13. *See In re* Hood, 727 F.3d 1360, 1364-65 (11th Cir. 2013) (concluding that when an attorney prepares a court form for filing with a court the attorney has not "drafted" the form, and that their assistance need not be disclosed to the court); *In re* Liu, 664 F.3d 367, 373, 381 n.5 (2d Cir. 2011) (per curiam) (concluding that ghostwriting petitions for administrative cases "did not constitute misconduct and therefore [did] not warrant the imposition of discipline").

14. *See* Salman Bhojani, Comment, *Attorney Ghostwriting for Pro Se Litigants—A Practical and Bright-Line Solution to Resolve the Split of Authority Among Federal Circuits and State Bar Associations*, 65 SMU L. REV. 653, 669–71 (2012) (showing through a 50 state survey of attorney ethics rules and state court decisions, the disparate approaches that have been used to address ghostwriting and that many state entities are more allowing of ghostwriting then the federal courts); *see also infra* Part II.

Several factors lead prospective clients to seek out attorneys to ghostwrite documents and lead attorneys to agree to take on this role in an attorney-client relationship. As Part I of this Comment explains, many individuals ask attorneys for limited assistance in the preparation of their legal affairs because while the cost of receiving full-blown legal representation is prohibitively high, individuals still want some legal advice concerning their problems.[15] Other factors, including the frequent portrayal of legal conduct in popular media, often encourage individuals to believe they can handle their own legal affairs at least as competently as an attorney. Frequently, once these individuals consult with an attorney to get a better sense of their problem, they go on to try to resolve it with minimal further assistance from an attorney.[16] Additionally, when attorneys either are allowed to provide, or otherwise don't get caught providing ghostwriting services, these attorneys receive several distinct advantages from providing limited legal services often referred to as "unbundled legal services,"[17] for an individual client.[18] From the attorney's perspective, ghostwriting services are attractive because they allow the attorney various benefits including compensation for low cost legal services and potentially allow their clients' claims to be better received by the court.[19]

The challenge posed by attorney ghostwriting is not a new issue for courts.[20] Accordingly, over time courts and commentators have adopted

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15. *See infra* Part I.

16. *See infra* Part I.

17. As commentator Brenda Star Adams explains: "The term 'unbundled legal services' is based on the idea that legal assistance can be broken down into several discrete tasks, some of which--such as filling out or filing forms--can be done on one's own, and only a few of which--such as appearing in court--require the assistance of an attorney." Brenda Star Adams, *"Unbundled Legal Services": A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts*, 40 NEW ENG. L. REV. 303, 303 n.1 (2005) (citing Elizabeth Amon, *Lawyers Worry a Little Bit of Help Could Mean Liability in Pro Se Cases*, MIAMI DAILY BUS. REV., Aug. 1, 2002, at A9). An attorney who provides unbundled services performs only a few, as opposed to all, of these discrete tasks. *See id.*

18. *See infra* Part I.

19. *See infra* Part I.

20. *See*, *e.g.*, Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) ("[W]e fear . . . 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 . . . of representing to the court that there is good ground to support the assertions made."); *see also* Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) ("Attorneys cross the line, however, 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."), *aff'd*, 173 F.3d 861 (9th Cir. 1999).

and proposed various approaches to address the issue. As Part II of this Comment explains, these approaches can be broken down into three distinct categories.[21] First, bar associations and courts have attempted to regulate counsel who otherwise might feel comfortable ghostwriting a document on behalf of a client by passing ethics rules and imposing sanctions.[22] Second, courts have taken steps to regulate those individuals who would otherwise seek to retain counsel to ghostwrite documents on their behalf.[23] Third, commentators have advocated for holistic approaches for courts to adopt. Specifically, concerning how courts should treat counsel who have ghostwritten court filings, and the parties on whose behalf these filings were written.[24] As this Comment will explore, these efforts have had successes, and some ideas put forward by commentators to regulate ghostwriting look promising but each of these approaches also have drawbacks.[25]

The approach this Comment takes is a practical one. While the debate concerning the propriety of attorney ghostwriting will undoubtedly continue,[26] this Comment will assume that federal courts will continue to disfavor being in the position of trying to guess whether an individual who has appeared before them really has received the assistance of counsel.[27] In Part III, this Comment proposes that judges accord a degree of deference to those who would appear in court pursuant to an unbundled services agreement.[28] According some deference to those who have limited counsel is not a wholly new idea—previous commentators have proposed according

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21. *See infra* Part II.
22. *See infra* Part II.
23. *See infra* Part II.
24. *See infra* Part II.
25. *See infra* Part II.
26. *Compare, e.g.*, Loudenslager, *supra* note 10, at 110–13 (arguing that it is part of an attorney's duty of candor, duty to avoid fraud, and the duties imposed by Rule 11 of the Federal Rules of Civil Procedure to avoid ghostwriting and disclose any assistance provided in drafting a document filed with the court, to the court), *with* Kaitlyn Aitken, Note, *Unbundled Legal Services: Disclosure Is Not the Answer*, 25 GEO. J. LEGAL ETHICS 365 (2012) (arguing that concerns surrounding the practice of ghostwriting are unjustified).
27. *See, e.g.*, *In re* Mungo, 305 B.R. 762, 770 (Bankr. D.S.C. 2003) ("[A]ssisting a litigant to appear *pro se* when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity [which] is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."); Peter M. Cummins, *The Cat-O'-Ten-Tails: Pro Se Litigants Assisted by Ghostwriting Counsel*, FOR DEF., Apr. 2011, at 40, 43–44 (highlighting various federal court opinions condemning ghostwriting).
28. *See infra* Part III.

deference on a document-by-document basis—but, this Comment proposes courts accord deference to parties who are honest with the court about the scope of the limited representation they have retained throughout the entire case.[29]

This Comment's proposal is appropriate for four main reasons. First, federal courts are unlikely to be amenable to the wholesale acceptance of attorney ghostwriting in light of their long-standing opposition to it; even the opinions that have been somewhat favorable towards attorney ghostwriting have not fully endorsed the practice.[30] Second, this proposal would provide an incentive for people seeking to provide, or benefit from, attorney ghostwriting to be honest with the court about the services they are providing, or alternatively, receiving.[31] Third, courts already accord deference to parties who appear in court without counsel, and familiar doctrines exist governing how judges should apply deference in numerous contexts.[32] Fourth, treating parties who have retained counsel on a limited basis radically different from those who appear *pro se* does not make sense for reasons of equity: those who cannot, or choose not, to retain counsel to handle all of their legal affairs, should not be punished by the courts for seeking some legal assistance.[33]

Adopting such an approach would not be a challenge-free endeavor. Part IV of this Comment explores some of the challenges that adopting deference towards those with limited representation would pose.[34] First, this Comment explores how such deference would be accorded in the context of various common pleadings and briefs to demonstrate that according deference is both practical and logical.[35] Next, in order to determine what type of deference to apply to the parties' representations in court, this Comment explores what sort of notice would need to be given to the court and opposing parties by the party who has retained an attorney ghostwriter.[36] Finally, this Comment explores whether such an approach

29. For discussion of document-by-document deference, see Bhojani, *supra* note 14, at 679; *see also infra* Part III (analyzing this proposal in detail).
30. *See infra* Part III.
31. *See infra* Part III.
32. *See infra* Part III.
33. *See infra* Part III.
34. *See infra* Part IV.
35. *See infra* Part IV.
36. *See infra* Part IV.

would be subject to abuse, and what steps would need to be taken to ensure that any deference to parties with limited counsel was accorded fairly.[37]

Ultimately, this Comment contends that this proposal will likely be amenable to federal jurists and if adopted would allow for limited representation to occur in federal court. To the extent that allowing limited representation in court increases "access to justice,"[38] it is worth considering what steps can be taken to ensure that our judicial system is doing all it can so our nation's citizens' legal problems are addressed.

II. WHY DOES ATTORNEY GHOSTWRITING HAPPEN?

This Part explores what factors motivate instances of ghostwriting from the perspective of both the client seeking ghostwriting services and the attorney willing to provide them. From the client's perspective, the cost of legal services, a willingness to take responsibility for one's own legal matters, and impressions of the legal system created by popular media, lead many prospective clients to conclude that only the limited assistance of counsel is required as they pursue a legal claim. From the attorney's perspective, ghostwriting services are attractive because they allow the attorney to be compensated for low-cost legal services, potentially allow the attorney to avoid certain obligations to the court, and allow his or her clients' claims to be better received by the court. Additionally, these services have recently received more tolerance from the legal community.

This Part will first review the factors that contribute to clients' desires for ghostwriting services and will then assess the factors that contribute to attorneys' desires to provide ghostwriting services.

A. Factors Contributing to Clients' Desires for Ghostwriting Services

Commentators have identified three key factors that contribute to an individual's decision to ask for ghostwriting services in pursuit of their legal goals.

First, litigating a case in federal court with the assistance of counsel, from filing the complaint to obtaining and enforcing a judgment, requires

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37. *See infra* Part IV.

38. Jessie M. Brown, Note, *Ghostwriting and the Erie Doctrine: Why Federalism Calls for Respecting States' Ethical Treatment of Ghostwriting*, 2013 J. PROF. LAW. 217, 234.

significant resources.[39] Accessing legal services requires resources that even people with moderate incomes cannot afford.[40] Dennis Archer, the President of the American Bar Association, in remarks at a conference related to civil litigation, estimated that "[s]eventy to eighty percent of the legal needs of poor people in this country go unaddressed" and that this was a result of the high cost of legal services.[41] Additionally, Shon Hopwood related his personal perspective on the barrier imposed by litigation costs and how that motivated ghostwriting, a perspective he gained when he interacted with indigent clients that had retained counsel to ghostwrite appellate briefs[42]: "I have worked with attorneys that regularly provide ghostwriting services to *pro se* parties on appeal. In every one of the cases, the client could not afford the cost of full representation and it was for that reason that they had contacted the attorney about unbundled services."[43]

Second, in light of our nation's relatively well-educated citizenry, many individuals have developed a "do it on your own" attitude towards resolving their legal problems.[44] Stephen Landsman describes this sentiment as the "Home Depot" attitude towards litigation: after consultation with an expert (which is still necessary to get a favorable outcome), a prospective client often determines that he or she can handle

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39. *See* Emery G. Lee, Senior Researcher, Fed. Jud. Ctr. Address at the 5th Annual Judicial Symposium on Civil Justice Issues George Mason Judicial Education Program: Update on the Federal Rules Advisory Committee (Dec. 5-7, 2010), *in* 7 J.L. ECON. & POL'Y 211, 215 (2010) (reporting median cost to litigate to termination in federal court was $15,000, with the average cost to plaintiff $67,000, and the average cost to defend for non-governmental entities is $122,000).

40. Mary Helen McNeal, *Unbundling and Law School Clinics: Where's the Pedagogy?*, 7 CLINICAL L. REV. 341, 350–51 (2001).

41. Dennis Archer, President, Am. Bar Ass'n, Keynote Address at the Georgetown Journal of Legal Ethics 2004 Symposium, Access to Justice: Does It Exist in Civil Cases? (Spring 2004), *in* 17 GEO. J. LEGAL ETHICS 455, 457 (2004); *see also* Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 111 (2002) ("[T]he cost of legal services remains, even today, so prohibitive that even the middle class cannot afford to retain counsel for the smallest legal matters."); Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 721 (2001) ("[T]he majority of Americans live on quite modest incomes and lack the discretionary spending power necessary to purchase expensive legal services in today's market.").

42. Shon R. Hopwood, Note, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229, 1229 n.A1 (2011).

43. *Id.* at 1238.

44. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 445 (2009).

the legal dilemma that they are facing themselves.[45] This analysis is also supported by impressions that commentator Drew Swank has identified as common among individuals who decide to represent themselves in court.[46] These include a belief in one's abilities, a belief that the court will rule favorably on their legal claims, and a belief that by appearing *pro se* the party will illicit sympathy from the court.[47] Swank and Landsman also suggest that many attorneys often recommend to parties, after an initial consultation, that they pursue their legal claims on their own, without the additional assistance of counsel.[48]

Third, popular media depictions of courtrooms and lawyers cause individuals to believe that the practice of law is simple, straightforward, and not necessarily furthered with the assistance of counsel once they secure an understanding of the nature of their legal dilemma. While the popular maxim, "a person who represents themselves has a fool for a client" may persist,[49] daytime television depicts individual courtroom drama in legal forums like "The People's Court," where individuals make and prevail on legal claims without attorneys all the time.[50] Similarly, legal dramas on television like "Law and Order" have a notable impact on how laypersons view the law, and help foster a belief among laypersons that they fully understand the legal system.[51] Additionally, Landsman argues that

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45. *Id.* Today, this idea may be more aptly described as the "Ikea" attitude towards litigation. *See Ikea Reports 8 Percent Rise in Full-Year Profit*, AGENCE FRANCE PRESSE, Jan. 23, 2013, *available at* http://www.businessinsider.com/ikea-reports-8-percent-rise-in-profit-2013-1#ixzz2hXKqDsm9.

46. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378–79 (2005).

47. *Id.*

48. *Id.* at 379 (citing an Idaho survey which found 31 percent of *pro se* litigants decided to proceed *pro se* after consulting counsel); Landsman, *supra* note 44, at 445 (citing the same Idaho survey, and increased availability of "self-help" materials that provide advice on resolving legal issues).

49. *Cf.* 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.").

50. *See* Landsman, *supra* note 44, at 446 ("Counsel is never in evidence on these shows and things still turn out just fine."); *see also* Kimberlianne Podlas, *Broadcast Litigiousness: Syndi-Court's Construction of Legal Consciousness*, 23 CARDOZO ARTS & ENT. L.J. 465, 495 (2005) ("Syndi-court's [television shows like "Judge Judy" and "The People's Court"] norms not only favor litigation and *pro se* representation, but also reduce barriers to litigation and promote certain types of consumer complaining.").

51. Kimberlianne Podlas, *Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 22 (2008) ("[T]he

perceptions of lawyers generated through jokes and general derision towards the profession lead individuals to avoid wanting an attorney to handle all of their legal needs.[52] Other commentators support this conclusion,[53] and go on to argue that some individuals believe based on these depictions of the legal system that the practice of law has been designed to be so simple that attorneys are not required at all.[54]

These factors lead ordinary people to want to interact with attorneys only as much as is absolutely necessary.

B. Factors Contributing to Attorneys Desires for Ghostwriting Services

The perceptions that prospective clients have towards the legal system are not the only factors responsible for the demand for attorney ghostwriting. Attorneys willingly engage in the practice for at least five reasons.

First, ghostwriting allows an attorney to provide his or her services at a lower cost, and to explicitly negotiate the services that he or she will provide, allowing the attorney to represent clients and be compensated for services they may have otherwise only provided on a *pro bono* basis.[55] As some advocates for ghostwriting have noted, "[g]hostwriting allows low- and middle-income clients to get writing and advice assistance at a low cost" because the limited assistance counsel needs to provide in these circumstances will cost less than if he or she provided a more complete form of legal services.[56] Similarly, since ghostwriting provides more options in the scope of a lawyer's representation of a client, an attorney and client can contract on the specific scope of the attorney's involvement in the

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ubiquity of criminal justice programs makes the public so familiar with their themes and tropes that the public believes it understands the [legal] system although it may not.").

52. Landsman, *supra* note 44, at 446–47.

53. Swank, *supra* note 46, at 379 (citing JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 4 (2002), *available at* http://lri.lsc.gov/sites/lsc.gov/files/LRI/pdf/02/020045_selfrep_litigants_whatweknow.pdf; Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 661–62 (1988); Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 132 (1998)).

54. Healey, *supra* note 53, at 132.

55. *See* Robert S. Baker, *Ghostwriting A Needed Service for West Virginians*, W. VA. LAW., Oct.–Dec. 2012, at 24, 24 (citing in part W. VA. RULES OF PROF'L CONDUCT R. 6.1 (governing *pro bono* service)).

56. *Id.*

case.[57] This allows a client access to the representation he or she wants, while also ensuring the attorney is paid for the time he or she devotes to a case.[58]

Second, some attorneys who ghostwrite documents act under the mistaken assumption that doing so relieves them of certain procedural and ethical obligations otherwise required by fully representing a client.[59] Attorneys have ghostwritten on behalf of clients thinking that it would relieve them from adhering to a court's electronic filing requirements, allow the attorney to practice law in a state where they were not licensed to do so (and without seeking admission to the court *pro hac vice*), allow the attorney to avoid a potential conflict of interest, and allow the attorney to avoid making additional appearances in court.[60] In the instances where courts have suspected that attorneys have sought these sorts of advantages, the courts have condemned the behavior,[61] and at times imposed sanctions.[62]

Third, attorneys may also resort to ghostwriting because they believe that by doing so they will be able to preserve the reputation they have with the court and the legal community.[63] This may arise in several circumstances. For instance, an attorney might not want to disclose his or her involvement in a case when he or she represents a particularly unsavory client.[64] Jona Goldschmidt has also noted that because of the personal relationship that an attorney has with either his or her prospective client, the prospective opposing party, or both, disclosing involvement in the case may

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57. *See* J. Vincent Aprile II, *Ghostwriter: A New Legal Superhero?*, CRIM. JUST., Summer 2008, at 44, 45.

58. *Id.*

59. Jeffrey P. Justman, Note, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 MINN. L. REV. 1246, 1254 (2008).

60. *Id.* at 1254–56.

61. *E.g.*, Chaplin v. Du Pont Advance Fiber Sys., 303 F. Supp. 2d 766, 773 (E.D. Va. 2004) ("[A]lthough [the attorney's] actions [ghostwriting documents] were improper, it is the Court's opinion that its public reprimand of [the attorney] was sufficient so as to serve as a future deterrent."), *aff'd*, 124 F. App'x 771 (4th Cir. 2005); *In re* Mungo, 305 B.R. 762, 770–71 (Bankr. D.S.C. 2003) (court "publicly admonished" counsel "for the unethical act of ghost-writing pleadings for a client, for aiding his client with misrepresenting to the Court that such client was acting *pro se*").

62. *E.g.*, *In re* West, 338 B.R. 906, 917 (Bankr. N.D. Okla. 2006) (imposing sanctions of $1,000 on attorney who ghostwrote documents).

63. Justman, *supra* note 59, at 1257 (citing Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1198 (2002)).

64. *Id.*

be detrimental to the attorney who wants to maintain a relationship with all the parties.[65] Additionally, an attorney might have a poor relationship with the judge presiding in the case, and disclosing his or her representation in these instances could disadvantage the client.[66]

Fourth, attorneys believe that if they ghostwrite a brief, the client will gain an advantage with the court, because the Supreme Court of the United States has instructed courts to review the filings of a *pro se* party more liberally.[67] Courts have condemned this practice as an attempt by attorneys to commit fraud on the court.[68] Some commentators, however, believe that ghostwritten documents are easy for courts to detect and do not believe that this is a motivating rationale for providing ghostwriting services.[69]

Fifth, there is a growing acceptance of attorney ghostwriting and other forms of limited representation services. Some state ethics boards and bar associations have issued opinions allowing attorneys to provide ghostwriting services,[70] and some federal courts have allowed certain forms of ghostwriting as well.[71] These findings are a dramatic departure from the near universal condemnation that ghostwriting had received previously by ethics boards and judges.[72] As attorney ghostwriting continues to become

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65. Goldschmidt, *supra* note 63, at 1198 (noting that in a divorce case an attorney might be friends with both their prospective client and their clients soon to be former spouse).

66. *Id.*

67. Justman, *supra* note 59, at 1257 & n.88 (citing federal court opinions that suggest the attorney resorted to ghostwriting for their client in an effort to "gain an advantage for their clients").

68. *See, e.g.*, *In re* Mungo, 305 B.R. 762, 770 (Bankr. D.S.C. 2003) ("[A]ssisting a litigant to appear *pro se* when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity [which] is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar.").

69. *See* Goldschmidt, *supra* note 63, at 1157–59. *But see* Cummins, *supra* note 27, at 42 ("[B]ecause of the advent of online resources, legal hotlines, and other resources that were not widely available in decades past, pleadings filed by today's *pro se* litigants are not always so facially deficient that they could not have possibly been drafted by an attorney.").

70. *E.g.* N.H. RULES OF PROF'L CONDUCT R. 1.2(c), (f), cmt. (2004) (allowing ghostwriting); New Jersey Supreme Court Advisory Comm. on Prof'l Ethics, Formal Op. 713 (2008) (allowing ghostwriting); *see also* Brown, *supra* note 38, at 224–25 (discussing increased acceptance of ghostwriting by state courts and bar associations).

71. *See supra* note 13 and accompanying text.

72. *Compare, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) (interpreting the Model Rules of Professional Conduct to allow ghostwriting), *with* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978) (condemning counsel who provided undisclosed legal assistance). *See also supra* notes 20, 27 and accompanying text.

accepted by these various entities, it is likely an issue that the federal courts will have to continue to confront.

These factors combine to provide an incentive to attorneys to ghostwrite materials even in light of the potential sanctions that a single attorney might face for doing so.

III. CURRENT APPROACHES FOR DEALING WITH GHOSTWRITING IN COURTS

In response to the multiple factors driving prospective clients to seek, and attorneys to provide, ghostwriting services, jurisdictions have taken different approaches, and commentators have made various proposals, to either dissuade or allow the practice in some form. This Part will explore these approaches and proposals, which fall into three categories. First, jurisdictions have taken steps to regulate and provide guidance to ghostwriting attorneys. Second, jurisdictions have made efforts to provide clear guidance to those who seek ghostwriting services. Finally, commentators have made proposals that would holistically regulate courts that seek to govern attorney ghostwriting, and resolve the split in the federal courts concerning how to deal with the practice. This Part will explore each category of approaches and proposals in turn, and will assess the drawbacks of these approaches and proposals.

A. Regulate Attorneys who Consider Providing Ghostwriting Services

Efforts to regulate ghostwriting attorneys have taken two forms: (1) attorney ethics board and bar association regulations, and (2) judicial sanctions and regulations. This section will address each approach in turn.

1. Efforts to Regulate Attorneys Taken by Ethics Boards and Bar Associations

Ethics boards and bar associations have adopted three approaches to dealing with ghostwriting. These efforts include: (1) allowing all forms of ghostwriting, (2) allowing some forms of ghostwriting, and (3) condemning ghostwriting altogether.

All forms of ghostwriting allowed: Some ethics boards and bar associations allow attorneys to ghostwrite all documents that might be filed

in court without disclosure of any kind.[73] Commentators and ethics boards have provided several justifications for allowing ghostwriting outright. These justifications include that ghostwriting allows individuals seeking the service to be treated more fairly by the courts, that those who file ghostwritten documents with courts are not unfairly advantaged in court, and that nothing is inherently unethical about providing ghostwriting services.[74] Indeed, some commentators have suggested that an attorney would be forced to commit an ethical violation if he or she was forced to disclose his or her representation of a particular client. For example, Goldschmidt believes that forcing an attorney to disclose their representation would violate an attorney's duty of confidentiality to his or her client,[75] and potentially require the attorney to breach the attorney–client privilege.[76]

Some forms of ghostwriting allowed: Some ethics boards and bar associations have allowed attorneys to represent individuals to a limited extent and have required attorneys to disclose their limited involvement in the case, but not by necessarily revealing the attorney's name. For example, in Florida, attorneys are required to indicate on a document they prepare that the writing was "prepared with the assistance of counsel," but the attorney is not required to reveal his or her name to the court.[77] Some ethics

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73. *See e.g.*, Goldschmidt, *supra* note 63, at 1166 & n.120 (citing Los Angeles Cnty. Bar Ass'n, Formal Op. 502 (1999) and Alaska Bar Ass'n, Op. 93-1 (1993), which found there was no duty for an attorney to disclose to the court their assistance in preparing a client's briefs, if the client understands the scope of services the attorney will provide, is informed of the risks of proceeding *pro se*, and where applicable ethics and pleadings rules are followed).

74. Aitken, *supra* note 26, at 371–74; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446, at 2 (2007) ("In our opinion, 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."). *But see* Lindsay E. Hogan, Note, *The Ethics of Ghostwriting: The American Bar Association's Formal Opinion 07-446 and Its Effect on Ghostwriting Practices in the American Legal Community*, 21 GEO. J. LEGAL ETHICS 765, 772–77 (2008) (arguing that despite assertions to the contrary, ghostwriting presents significant logistical and ethical issues).

75. Goldschmidt, *supra* note 63, at 1199–1203 (arguing that in absence of any "violations of court rules or other improprieties" a court could not compel an attorney to disclose their representation of a client, without forcing the attorney to violate his or her duty of confidentiality to that client).

76. *Id.* at 1203–05 (arguing that if a client requests a conversation remain confidential, including a conversation about that attorneys representation of that individual, the conversation should be considered privileged).

77. Brown, *supra* note 38, at 237 (citing Amendments to the Rules Regulating the Florida Bar & the Florida Family Law Rules of Procedure (Unbundled Legal Servs.), 860 So. 2d 394, 394–401, 408, 410 (Fla. 2003)).

boards are even more lenient. For instance, the New York County Lawyers Association's Committee on Professional Ethics concluded disclosing counsel's assistance was only required to the extent that disclosure was "necessary," and in these select cases, an attorney must only disclose that the document was "prepared with the assistance of counsel admitted in New York."[78] Other jurisdictions are lenient up to a certain point of attorney involvement in the case. In Delaware, for example, the attorney does not have to disclose to the court the fact that he or she provided drafting assistance to an otherwise *pro se* party, unless the assistance becomes "significant."[79]

Overall, these jurisdictions agree that allowing some form of ghostwriting provides at least three benefits. First, allowing some ghostwriting increases the likelihood that individuals seeking legal services have their legal issues resolved justly.[80] Second, requiring only minimal disclosure from counsel protects the duties attorneys have to their clients where they provide limited representation through ghostwriting.[81] Third, these disclosures make it known to the courts that the document was prepared with the assistance of counsel, thus preventing courts from unduly treating the party with deference that would otherwise be accorded only to a *pro se* party.[82]

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78. New York Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 742, at 6–7 (2010) (defining the situations when disclosure was "necessary" as the situations when disclosure was mandated by a procedural rule, judge rule of practice, court rule, or judge's order in a particular case, is the disclosure of an attorney required).

79. For example, the Delaware State Bar Association's Committee on Professional Ethics requires that an attorney disclose their name to the opposing party and court when the attorney provides "significant assistance," to an otherwise *pro se* client. Delaware State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2, at 9–10 (1994). "Significant assistance" means "representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information." *Id.* The committee also noted that disclosure was required when an attorney provided advice on filings besides the "initial pleading," and provided advice on an "on-going basis." *Id.*

80. *E.g.*, New York Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 742, at 3 (2010) ("[P]ermitting ghostwriting has the advantage of increasing access to justice on behalf of the unrepresented or underrepresented.").

81. Attorneys who are representing a client on a limited basis, and have an engagement agreement outlining the limited scope of this representation, do not want to be haled into court and ordered to provide more services than they initially agreed they would provide. *See* Goldschmidt, *supra* note 63, at 1168 ("[C]ourts may not without cause compel an attorney or client to breach . . . the scope of a representation agreement.").

82. *See* Florida Bar Ass'n Ethics Op. 79-7 (2000) ("[F]ailure to disclose lawyer's active and substantial assistance to *pro se* litigant constituted misrepresentation to the court and opposing counsel and was misleading because *pro se* litigants receive special consideration

Ghostwriting prohibited: Some ethics boards and bar associations have expressly prohibited all forms of attorney ghostwriting.[83] These groups generally agree with commentators like Michael W. Loudenslager that ghostwriting is an unethical practice. Specifically, Loudenslager argues that with respect to the Model Rules of Professional Conduct, ghostwriting violates an attorney's duty of candor to the court[84] and the Model Rules that generally prohibit attorneys from engaging in fraudulent and misleading conduct.[85] Loudenslager also argues that in the context of federal litigation, Rule 11 of the Federal Rules of Civil Procedure prohibits ghostwriting.[86]

These multiple approaches taken by ethics boards and bar associations to address attorney ghostwriting are similar to the various efforts of the federal and state courts, which have also weighed in on the propriety of the practice.

2. Efforts to Regulate Attorneys Taken by Courts

This Comment has explained that multiple federal courts take "a dim view of ghostwriting,"[87] and that these courts have made efforts to curb the practice among attorneys.[88] Courts have expressed the same concerns

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and preferential treatment from the court." (citing New York City Bar Ass'n Ethics Op. 1987-2 (1987)).

83. *E.g.*, Colorado Bar Ass'n Ethics Comm., Formal Op. 101, at 4-301 to 4-302, n.7 (2006) (while noting that ghostwriting is "beyond the scope of this opinion," the ethics committee highlighted that Colorado Rule of Civil Procedure 11(b) requires in pertinent part "[p]leadings 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"); Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998) ("An attorney may provide limited background advice and counseling to *pro se* litigants. However, providing more extensive services, such as drafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.").

84. Loudenslager, *supra* note 10, at 110–11 (arguing that ghostwriting violates Model Rule 3.3 of the Model Rules of Professional Conduct).

85. *Id.* at 111–12 (arguing ghostwriting violates Model Rules 1.2, 1.6, 4.1, and 8.4 of the Model Rules of Professional Conduct); *see also* Hogan, *supra* note 74, at 774 (arguing that ghostwriting violates Model Rule 8.4 of the Model Rules of Professional Conduct).

86. Loudenslager, *supra* note10, at 112–13 (citing cases where courts have concluded that by ghostwriting attorneys have attempted to avoid their obligation to ensure "that a reasonable basis exists for both the facts and legal arguments presented in the document concerned"). Rule 11 of the Federal Rules of Civil Procedure is also another rule that governs attorney conduct.

87. *See In re* Smith, Nos. 12-11603, 12-11857, 2013 WL 1092059, at *15 (Bankr. E.D. Tenn. Jan. 30, 2013).

88. *See supra* notes 61–62, 68 and accompanying text.

regarding ghostwriting as state ethics boards and commentators have: the conduct misleads the court;[89] the conduct misleads other parties;[90] and, in federal court, the conduct "frustrates the application of Federal Rule of Civil Procedure 11."[91]

In addition to writing scathing opinions and imposing sanctions on attorneys to make their stance on attorney ghostwriting clear, when they detect it,[92] judges have broadly interpreted the requirements of the local rules of court practice in an effort to stave off future attorneys from providing ghostwriting services.[93] Similarly, courts have broadly interpreted specific forms of attorney conduct to fall within federal rules of procedure, in order to police attorneys contemplating providing ghostwriting services.[94] Finally, individual courts have modified their rules of procedure governing when and how attorneys must disclose their

89. *See* Evangelist v. Green Tree Servicing, LLC, No. CIV. 12-15687, 2013 WL 2393142, at *3 (E.D. Mich. May 31, 2013).

90. *See* Walker v. Pac. Mar. Assoc., No. C07-3100 BZ, 2008 WL 1734757, at *2 (N.D. Cal. Apr. 14, 2008) (noting that attorney ghostwriting prevented the court and the non-ghostwriting party from effectively examining the arguments made in the ghostwritten briefs).

91. *Id.*

92. As Ms. Hogan has noted, courts are not always able to detect an attorney ghostwriter on their own. *See* Hogan, *supra* note 74, at 775 (citing Ricotta v. California, 4 F. Supp. 2d 961 (S.D. Cal. 1998)); *see also* Loudenslager, *supra* note 10, at 142 ("[C]ourts often have difficulty determining whether an attorney has drafted a document for a *pro se* litigant and are reluctant to conclude that attorney ghostwriting has occurred unless someone with actual knowledge of the attorney's conduct affirmatively states that such conduct actually has taken place.").

93. *See, e.g.*, *In re* Mungo, 305 B.R. 762, 768 (Bankr. D.S.C. 2003) (finding "ghost-writing must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010–1(d)" among other reasons). That bankruptcy courts would have to frequently deal with ghostwritten materials is not surprising: it is in these types of situations, where clients are financially strapped and seek discrete legal services, that ghostwriting occurs very frequently. *See* Brendan Gage, *May Attorneys Ghostwrite Pleadings for* Pro Se *Debtors*, ABI COMM. NEWS (June 2012), http://www.abiworld.org/committees/newsletters/ethics/vol9num5/ghostwrite.html (arguing that in bankruptcy proceedings "attorney ghostwriting is often not driven by sinister motives").

94. *See, e.g.*, *In re* Merriam, 250 B.R. 724, 735 (Bankr. D. Colo. 2000) ("Rule 9011 [of the Federal Rules of Bankruptcy Procedure] requires either an 'attorney of record' or '[a] party who is not represented by an attorney' to sign the petition. Here, the Debtor was represented by [an attorney] in the drafting of her petition, schedules and statement of affairs. She was also represented after the filing as to certain specified matters. She was not by any definition a 'party who is not represented by an attorney.' As between the Debtor and [her attorney], [her attorney] should have signed the petition because he drafted it and is therefore responsible for certifying its compliance with Rule 9011.").

involvement in a case, to ensure attorneys do not engage in ghostwriting. For example, Colorado's Supreme Court amended the State's Rules of Civil Procedure in 2006[95] to require an attorney to disclose his or her name, address, telephone number, and bar registration number to the courts anytime he or she prepares a document for an otherwise *pro se* litigant.[96]

These multiple approaches to dealing with attorney ghostwriting create a confusing world for attorneys to live in. Not only is there a divide between the state ethics panels and bar associations as to how to handle incidents of ghostwriting, but there is a more troubling divide between state courts applying these rules and the federal courts. Multiple approaches to assessing this practice ultimately means that courts confronted with the same legal phenomena are acting in different ways (if at all) in response to the practice. At the very least, these different approaches and opinions concerning the propriety of attorney ghostwriting make it difficult for attorneys to practice and accurately market their services to clients within their geographic area—especially for those attorneys within a federal jurisdiction that embraces a state court where these courts hold different views on the propriety of attorney ghostwriting.[97]

B. Regulate Parties Considering Seeking Ghostwriting Services

In addition to the efforts aimed at governing ghostwriting attorneys, courts have taken at least two steps to govern the individuals (these attorneys' clients) that seek to benefit from ghostwritten documents.

First, courts have made efforts to warn those who appear to have retained an attorney to ghostwrite documents that the court dislikes the practice.[98] These warnings have at times proven to yield the result desired

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95. *See supra* note 83 and accompanying text.

96. Justman, *supra* note 59, at 1278 (citing COLO. R. CIV. P. 11(b)). As Justman notes, the Washington State Superior Courts, the Florida Family Courts, and the 8th Judicial District Court of Nevada have all adopted a similar rule. *Id.* at 1279 (citing WASH. SUPER. CT. CIV. R. 11(b), FLA. FAM. L.R.P. 12.040(a)–(d); 8TH JUD. DIST. CT. NEV. R. 5.28(a)).

97. *Compare, e.g.*, Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971) (expressing fear regarding the implications of allowing ghostwriting, and deciding to disallow the practice), *with* N.H. RULE OF PROF'L CONDUCT R. 1.2(c), (f), cmt. (allowing ghostwriting).

98. *See* Snyder v. Daugherty, 899 F. Supp. 2d 391, 415 (W.D. Pa. 2012) ("[I]f [plaintiff] is in fact receiving the assistance of an attorney, that attorney is required to enter his or her appearance before the Court. Should the Court later determine that [plaintiff] has received the assistance of a lawyer who has failed to enter his appearance before the Court, appropriate sanctions, including contempt against both [plaintiff] and any involved attorney, will be considered at that time.").

by the court: the subsequent appearance of counsel on the record. For example, in *Malibu Media, LLC v. John Does 1-2, 4-8, 10-16, 18-21*,[99] the court warned an apparently *pro se* party the court suspected was receiving the assistance of counsel that "attorney 'ghost writing' was improper," and counsel subsequently entered an appearance for the party.[100]

Second, since courts have the authority to impose sanctions on parties for violations of court rules and ethical practices,[101] courts have imposed sanctions on the parties directly for seeking an attorney ghostwriter.[102] Indeed, Goldschmidt found after conducting a survey of court rulings that considered instances of attorney ghostwriting, four percent of these rulings imposed sanctions directly on the party that received ghostwriting assistance.[103]

Neither of these aforementioned steps, which aim to punish the individual seeking an attorney ghostwriter, deals with attorney ghostwriting on a systematic basis. As one commentator has noted, punishing the individual that sought an attorney ghostwriter only hurts those individuals who seek access to the courts for the just resolution of their legal disputes.[104] Another commentator questioned whether imposing sanctions directly on the party seeking ghostwriting services is an effective remedy to this practice.[105] Whether or not it is effective, punishing the client who sought an attorney ghostwriter only deals with instances of ghostwriting when caught, but it does not prevent future instances of ghostwriting from occurring. To the contrary, evidence suggests that in spite of these sorts of

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99. No. 12-CV-02598-REB-MEH, 2013 WL 1876442 (D. Colo. Feb. 12, 2013), *report and recommendation adopted sub nom.* Malibu Media, LLC v. John Does 5-8, No. 12-CV-02598-WYD-MEH, 2013 WL 1787640 (D. Colo. Apr. 25, 2013).

100. *Id.* at *2.

101. *See* FED. R. CIV. P. 11(c)(1) ("[T]he court may impose an appropriate sanction on any attorney, law firm, or *party* that violated the rule or is responsible for the violation." (emphasis added)).

102. *See, e.g.*, *In re* Burton, No. 03-92191-JB, 2006 WL 6591614, at *1, *3 (Bankr. N.D. Ga. Nov. 28, 2006) (court refused to consider ghostwritten motion, unless and until the name of the attorney was provided to the court, in addition to other information the court deemed necessary to adjudicate the motion).

103. Jona Goldschmidt, *An Analysis of Ghostwriting Decisions: Still Searching for the Elusive Harm*, 95 JUDICATURE 78, 86 (2011).

104. *See id.* at 87 ("[A]ccess to justice [is] made more difficult by courts' disapproval of the practice [and] is further obstructed by their imposition of sanctions against ghostwriters and the [clients] they serve.").

105. *See* Cummins, *supra* note 27, at 44 ("[C]ourts acknowledge that although they can sanction a *pro se* party, sanctions do not provide relief because *pro se* litigants often have nothing to lose by filing frivolous pleadings").

orders aimed at individuals who sought attorney ghostwriters, the practice of attorney ghostwriting is only becoming more prevalent.[106]

C. Holistic Efforts to Regulate the Courts Treatment of Attorney Ghostwriting

As this Comment has explored, commentators and observers have advocated for all of the proposed approaches outlined thus far to dealing with attorney ghostwriting: everything from wholesale acceptance[107] to the outright banning of the practice.[108] Commentators have also advocated for at least two other holistic approaches to the issue that would regulate how most courts, including all federal courts, treat attorney ghostwriting.

First, Jessie Brown argued in a recent Note that the unique approaches taken by each state towards attorneys should be respected by the federal courts, and assessed through the lens of the Supreme Court's decision in *Erie Railroad Co. v. Tompkins* and its progeny.[109] This approach would not affect the multifaceted approaches that state ethics boards and state courts have taken to the issue, but it would resolve how ghostwriting is treated in federal courts. Each district court would look to the ethical standards of conduct of the state in which the district resides, and apply that perspective accordingly.[110] Ultimately, if this approach were adopted, it would produce a consistent frame of analysis in the federal courts on this practice, but would nonetheless result in some federal courts, possibly within the same circuit,[111] treating attorney ghostwriting very differently.

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106. Justman, *supra* note 59, at 1277 ("[I]t is clear that ghostwriting is a much more pervasive issue now than ever."); *see also infra* note 145 and accompanying text.

107. *See, e.g.*, *supra* note 74 and accompanying text.

108. *See, e.g.*, *supra* notes 84–86 and accompanying text; *see also* Justman, *supra* note 59, at 1278–87 (concluding that the language of Rule 11 of the Federal Rules of Civil Procedure should be changed to allow attorneys to provide limited representation, but that disclosure of counsel's involvement in brief writing should be required).

109. Brown, *supra* note 38, at 247 ("[F]ederal courts should defer to states' binding treatment of ghostwriting to uphold the principle of federalism that underlies the *Erie* doctrine."); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding federal courts must look to state law when assessing state claims).

110. Brown, *supra* note 38, at 252 ("[F]ederal courts should defer to states' binding treatment of ghostwriting as substantive law.").

111. For example, practicing in federal courts in the First Circuit could get very complicated if federal courts in that circuit followed the approaches of state courts. *Compare* N.H. RULES OF PROF'L CONDUCT R. 1.2(c), (f), cmt. (allowing ghostwriting), *with* Massachusetts Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998) (banning ghostwriting), *and* R.I. SUPER. R. CIV. P. 11 (same).

Another commentator has advocated for an approach related to what this Comment will argue for: parties that otherwise proceed *pro se* and that recruit counsel to perform a discrete legal task should still be treated with a modicum of deference.[112] Salman Bhojani's argument proceeds in two steps. First, to resolve the different approaches to ghostwriting advocated in the federal courts, the Supreme Court should directly speak to the issue, and direct federal courts to allow attorney ghostwriting in a limited way by requiring partial disclosure of the fact that an attorney was involved in drafting the materials filed with the court.[113] Second, courts should then assess any briefs that were not prepared by counsel with the deference they would normally accord a *pro se* pleading, while reviewing the documents prepared with the assistance of counsel with more scrutiny.[114] According to Bhojani, requiring disclosure and according deference on this document-by-document basis provides courts and attorneys with "a practical and bright-line rule" for dealing with attorney ghostwriting.[115] The upside to this approach is that federal courts would not only have a framework to consistently assess instances of attorney ghostwriting, but this "bright line rule" would, at least in theory, also produce consistent results across federal jurisdictions. State courts and ethics boards could also adopt similar rules requiring disclosure.

Granting parties *pro se* deference on a document-by-document basis, however, is impractical because the actual courtroom logistics of assessing deference in such a fashion would quickly become challenging, if not impossible. How should a court account for an attorney who arrives to a proceeding that has already started, and assists with only one filing that is before the court?[116] Perhaps in this instance some sort of exacting standard could be used to assess the arguments made in the document where attorney assistance is evident. But what happens if a party gets assistance drafting a

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112. Bhojani, *supra* note 14, at 672–81.

113. *Id.* at 672, 679.

114. *Id.* at 679 ("By clarifying whether the document was drafted by the pro se litigant or an attorney, the court can effectively determine whether the lenient pro se standard applies to the document.").

115. *Id.*

116. For example, in *Chriswell v. Big Score Entertainment, LLC*, the court made clear that it "ha[d] . . . suspicions that [plaintiff] enlisted the help of [an undisclosed] lawyer or someone with legal knowledge to draft her response" to a motion to dismiss. No. 11 C 00861, 2013 WL 315743, at *4 (N.D. Ill. Jan. 28, 2013). But neither the court nor the opposing party alleged that the plaintiff received similar assistance to draft and file her initial complaint. *See id.* at *1, *4 (highlighting complaint filed *pro se* and only discussing suspicions of ghostwriting with respect to response to motion to dismiss).

motion, but then no assistance drafting a reply memorandum in support of the motion?[117] What happens if an attorney assists with the drafting of a legal memorandum, and after it is filed, the *pro se* party decides to file a supplemental memorandum on the same legal issue before the court without any assistance of counsel?[118] It is not clear in these contexts how the court could possibly assess the legal arguments before it in a manner that treats the arguments presented by parties with limited representation consistently.

This Comment seeks to provide a new perspective to the practice of attorney ghostwriting that could harmonize how various jurisdictions treat the practice.

IV. A NEW APPROACH: LIMITED REPRESENTATION DEFERENCE

This Comment posits that instead of assessing deference on a document-by-document basis as Bhojani has proposed, courts should accord a degree of deference depending on the involvement of an attorney throughout the case. That is, where it is clear that an attorney has only provided a limited amount of assistance and has been honest to the court about the level of his or her involvement in the case, courts should hold the arguments presented to something akin to the "less stringent standards" typically afforded to *pro se* parties that appear before the court.[119] When counsel is otherwise absent, the court would afford the party the *pro se* deference typically afforded by courts to a *pro se* party. And when counsel enters a general appearance, the court would accord no deference at all.

This proposal has four advantages. First, federal courts' frequent expressions of distaste for attorney ghostwriting suggest that they will continue to be non-amenable to accepting it outright, so this proposal has a chance at receiving these judges' endorsement. Second, this proposal would provide an incentive for attorneys providing ghostwriting services, and parties benefiting from these services, to disclose to the court that they

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117. *Cf.* Klein v. H.N. Whitney, Goadby & Co., 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (court noted that "certain statements" made by plaintiff and "nature of his answering papers," but not all of his pleadings, suggested that plaintiff was "enjoying the assistance of a lawyer or lawyers who have not formally appeared in this case").

118. *Cf.* Amendment to the Objections of the Findings and Recommendations, United States v. Cash, No. 6:11-CR-00057, slip op. (E.D. Okla. Jan. 3, 2012), ECF No. 44 (brief submitted by party in order to present additional arguments in support of motion that was prepared by counsel).

119. Haines v. Kerner, 404 U.S. 519, 520 (1972).

are providing, or alternatively receiving, limited representation, and the extent of it. Third, federal judges are frequently asked to make decisions regarding the amount of deference they should accord to a particular practice, or a particular finding. Therefore, conducting the type of inquiry this Comment proposes would be a familiar process for judges to undertake. Finally, providing this level of deference encourages individuals who believe they have a legal issue to consult with a legal expert to some degree before filing a lawsuit and to receive these attorneys active assistance in the preparation of the pleadings filed in court, rather than punishing them for doing so. This Part assesses each of these advantages of this proposal in turn.

First, it is unlikely that federal judges will allow attorneys to not disclose their involvement in a particular case, or will choose to leave an attorney whom the judge discovered provided ghostwriting services unpunished. Requiring candor, honesty, and disclosure about an attorney's involvement in a case and the scope of the services that he or she provides to the client is important to federal court judges.[120] Judges' views on this matter are unlikely to change dramatically, especially since even the most favorable opinions from federal courts towards ghostwriting still would not allow attorneys to ghostwrite and file a substantive pleading in every circumstance.[121] Furthermore, the only opinions from the Supreme Court of the United States that appear to discuss ghostwriting in any context do not do so favorably.[122] To the extent that the present split in the federal courts regarding the propriety of attorney ghostwriting will ever be resolved, some disclosure from the ghostwriting attorney and party benefiting from these services will likely be required.

Second, this proposal would provide an incentive for parties to deal fairly with the court aside from the potential threat of sanctions. While

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120. *See supra* Part II.B.

121. *See supra* note 13 and accompanying text.

122. *See* Kingsland v. Dorsey, 338 U.S. 318, 324 (1949) (Jackson, J., dissenting) (considering a case of an attorney's disbarment from appearing in patent cases because the attorney ghost wrote an article cited in support of a patent submission, Justice Jackson noted, "[g]host-writing has debased the intellectual currency in circulation here and is a type of counterfeiting which invites no defense"). The Court has spoken, however, in more favorable terms of ghostwriting when considering whether a petitioner was allowed to file writ of habeas corpus even though a fellow inmate prepared the writ. *See* Johnson v. Avery, 393 U.S. 483, 488 (1969). The Court did not express wholehearted support for the practice noting, "prison 'writ writers' like petitioner are sometimes a menace to prison discipline and that their petitioners are often so unskillful as to be a burden on the courts which receive them." *Id.*

courts have been imposing sanctions for instances of attorney ghostwriting, these sanctions and condemnations of the practice have not prevented the practice from continuing.[123] Perhaps this is because attorneys and parties have no attractive incentive to be honest with the court.[124] Providing deference would encourage counsel to provide limited representation services honestly because disclosure of the limited nature of the representation would lead to the court assessing their arguments more liberally.[125]

Third, courts already treat *pro se* parties with deference, and have experience making deference distinctions. Within the specific context of whether to grant deference to a party that appears *pro se*, courts are at least familiar with the distinction between providing no deference to the *pro se* party and the deference the Supreme Court of the United States has instructed should be applied.[126] Other areas of the law require courts to provide varying degrees of deference and scrutiny. For example, in instances where courts must assess administrative agency decisions courts must provide varying levels of deference to the findings and analysis of the agency.[127] When assessing claims concerning Equal Protection violations, courts must apply varying forms of scrutiny depending on the class of individuals affected by the challenged regulation or practice at issue.[128] Similarly, courts assess certain government speech restrictions on

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123. *See supra* note 106 and accompanying text; *see also infra* note 145.

124. *See* Justman, *supra* note 59, at 1267 ("[P]roposals to mandate [attorney] disclosure—at least those that do not specify how attorneys will be compelled to identify themselves—fail to offer ghostwriters incentives to disclose their assistance.").

125. *Cf.* Bhojani, *supra* note 14, at 680 (noting that "if a ghostwriting attorney engages in any misconduct or blatantly violates the duties owed to the court and the opposing litigant" the court would still be able to impose sanctions on "the attorney, thereby safeguarding the court's interest in upholding the ethical and professional standards mandated in its jurisdiction").

126. In fact, some courts have found that even though they were convinced the party before them had benefited from the ghostwriting of an attorney they were compelled nonetheless to review the arguments before them as if the party had appeared *pro se*. *See* Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 343 (S.D.N.Y. 1970) (concluding that even though the court suspected plaintiff was benefiting from the assistance of undisclosed counsel the court concluded it was "constrained to and do measure plaintiff's papers with the same preciseness which we apply to the claims of the most deserving").

127. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (finding that certain administrative decisions should be accorded the type of deference the Supreme Court accorded in *Skidmore* while others should be accorded with a level of deference described in *Chevron*).

128. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1.2 (4th ed. 2011) (describing tiers of Equal Protection scrutiny).

government property with varying degrees of scrutiny depending on the forum in which the speech occurs.[129] In short, judges understand how to accord various degrees of deference and apply varying degrees of scrutiny to the arguments made before them.

Finally, those who cannot, or choose not, to retain counsel to handle *all* of their legal affairs should not be punished by the courts for seeking *some* legal assistance. Judges already face a significant burden assessing *pro se* parties' filings, because these filings are often poorly written and have minimally developed legal arguments.[130] Efforts that individuals take to reduce this burden by presenting the court with better-developed legal arguments and better-written pleadings should be rewarded not sanctioned.[131] Additionally, encouraging individuals to learn about the potential legal remedies available to them, or the lack of legal remedies available, may lead the individual planning to file a lawsuit to realize a solution before entering the courtroom.[132] Providing individuals an

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129. *See, e.g.*, Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2984 n.11 (2010) ("In conducting forum analysis, our decisions have sorted government property into three categories. First, in traditional public forums, such as public streets and parks, any restriction based on the content of speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest. Second, governmental entities create designated public forums when government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose; speech restrictions in such a forum are subject to the same strict scrutiny as restrictions in a traditional public forum. Third, governmental entities establish limited public forums by opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects. . . . [I]n such a forum, a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral." (internal quotations and citations omitted)).

130. *Cf.* Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (noting that in the case of a *pro se* plaintiff the present requirement of *pro se* deference requires that "if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements").

131. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 274 (2010) ("Allowing attorneys to ghostwrite pleadings . . . 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 courts and leading to more efficient and effective judicial proceedings than under the current system."). Allowing limited representation may also increase the likelihood that more documents would be filed with the court electronically, reducing the burden on clerks that presently are responsible for taking the hard-copy versions of the materials *pro se* parties file and uploading these materials to the court's docket.

132. *Cf.* Samuel W. Milkes & Joseph A. Sullivan, *Ghost of A Chance*, PA. LAW., Jan.–Feb. 2013, at 20, 24 (noting that in a limited representation program offered in Philadelphia,

unsanctioned opportunity to have counsel will increase the likelihood that meritorious legal claims will be well developed and heard in court.[133]

To the extent allowing deference will increase the likelihood that parties will seek the advice of counsel and develop arguments that will be more directly on point to the resolution of the dispute before the court, this would be a positive development. Allowing deference would allow judges to quickly dispose of illogical and incoherent legal arguments. Of course, fully licensed attorneys retained to handle all the details of a particular party's case have undertaken certain actions, and presented certain arguments, that have tried federal judges' patience.[134] But certainly those with legal training and a license to practice law have a better chance than most at formulating a coherent legal argument.[135]

For these reasons, at least contemplating the idea of limited representation deference across an entire case is not an idea that, on its face, is wholly irrational or unreasonable. In the next Part, this Comment's exploration of how limited representation might work in practice illustrates that while adopting limited representation deference would not be without

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allowing for limited representation often allowed parties "to reach amicable settlements"). The risk of allowing *pro se* parties without counsel to enter into settlements that significantly harm the *pro se* party, considering the limited level of judicial scrutiny these settlements often receive today, is also quite high. *See* Russell Engler, *And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1989 (1999) (finding that in *pro se* party settlements, the *pro se* party often waives significant rights).

133. *See* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1112 (2002) ("[Allowing for limited representation] may encourage those who would otherwise forego an opportunity to present their claims in court and exercise their right to be heard.").

134. *See, e.g.*, Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001) ("[T]he Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact--complete with hats, handshakes and cryptic words--to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.").

135. At least according to the ABA. *See* Limited Scope Representation Committee of the California Commission on Access to Justice, *20 Things Judicial Officers Can do to Encourage Attorneys to Provide Limited Scope Representation* (Summer 2003) http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/20_things_judicial_officer.authcheckdam.pdf (suggesting judges in favor of increasing attorneys willingness to provide limited representation services should "[t]ell the lawyers that the years they spent sweating through law school do make a difference").

challenges, it is a pragmatic approach to resolving the split in the federal circuits concerning the propriety of attorney ghostwriting.

V. AN EXPLORATION OF HOW LIMITED REPRESENTATION DEFERENCE COULD WORK IN PRACTICE

While allowing for limited representation in federal court and according deference to the arguments made in these circumstances relative to how much involvement the attorney has in the case may be plausible in theory, federal judges will need to be convinced that such an approach would work in practice before allowing for it to happen. First, this Part will analyze how such deference might be accorded in practice—that is, how courts would assess various arguments throughout the course of the proceeding while according appropriate deference. Second, this Part will assess the logistics of providing notice to the court regarding the scope of the limited appearing attorney's services. Finally, this Part will assess how the courts would ensure that attorneys and parties would not try to take undue advantage of the deference the courts would accord them. This assessment reveals that while courts will have to continue to be mindful and attentive to the conduct of those who appear before them, according the proposed deference would prove to be a viable way for federal courts to allow attorneys to provide parties with limited representation.

A. How Courts Might Accord Deference in Practice

This Comment's proposed deference faces three challenges. First, a judge would need to systematically accord deference knowing at the outset of a case that a party has retained counsel to provide limited services. Second, a judge would need to determine how to accord deference when a party appears *pro se*, proceeds *pro se* for a time during the case, and then retains counsel to handle a discrete issue. This problem might arise if a party realized they needed assistance to resolve a discovery request or to draft a motion for summary judgment, but felt comfortable proceeding *pro se* once this task was completed. Third, a judge would need to determine how to accord deference when a party receives the assistance of counsel on multiple occasions. This could arise when a party realizes he or she needs assistance to resolve a discovery request, and then down the road also realizes that they need assistance to handle a separate issue (perhaps a

deposition or a motion for summary judgment). All of these challenges need to be addressed in order to ensure this Comment's proposal is viable.

First—how a judge would accord deference when it is clear at the outset of a case that a party has retained counsel to provide limited services—would not pose as significant of a challenge to a jurist as the latter two problems. In this first instance, when a judge receives notice at the outset of a proceeding of the exact scope of the attorney's services, the judge will know when to expect counsel to be involved. Throughout the case, the judge will be able to accord greater deference to the arguments made at the times they know counsel will not be fully in charge of the submissions the judge might be asked to assess. At times where counsel is present, the court will accord some, but not as much deference to the presented arguments. In these instances, arguments will still be assessed on their face, and the prospect for wholly unintelligible arguments will be diminished. But to the extent that it is reasonable for the court to do so, the court could provide a somewhat more favorable reading of the party's arguments than it otherwise might.[136]

This approach to resolving this first problem, however, provides a three-tiered framework to assess the two larger challenges to according limited representation deference on a systematic basis. First, according any deference presumes that the party that retained limited representation and the counsel providing limited representation are dealing fairly with the court. To the extent any party is revealed to do anything that goes beyond the scope of the limited representation that he or she has properly alerted the court that he or she has retained, the court would not have to accord any deference to these arguments and might impose sanctions.[137] Second, to the extent an individual presents legal arguments without any assistance of counsel in a motion or some other pleading, the court would accord these arguments with the deference traditionally accorded a *pro se* party. Third, when an attorney properly presents arguments pursuant to a limited representation agreement that the court knew about, the court would assess

136. Essentially, the court would strike a balance between conducting the extensive research that it often must undertake in order to "reasonably" read the arguments of a true *pro se* party, and doing no additional research (like it might when assessing the arguments presented by a party that has retained the full assistance of counsel).

137. The Federal Rules of Civil Procedure provide an extensive array of sanctions that the court can impose for attorney/party misconduct. *See, e.g.*, FED. R. CIV. P. 37(b)(2)(A)(i)–(vii) (providing for dismissal of a case with prejudice, adverse jury instructions, and contempt should a court feel it is necessary to do so for party's or counsel's failure to properly respond to discovery requests and make discovery disclosures).

the arguments with some deference (the limited representation deference). The court would assess all the arguments presented when counsel provided the limited representation he or she agreed to provide with this modicum degree of deference. After an attorney completed the limited representation services he or she was retained to provide, the court would resume assessing the arguments made before it as if the party was an ordinary *pro se* party.

This approach would likely limit the potential confusion that according deference on a document-by-document basis might pose. The court in these instances would assess all the arguments made while counsel had been retained with this proposed modicum of deference, regardless of whether the party or counsel authored the argument in a particular document. If the party or attorney's arguments were reasonable, but not fully developed, the court could develop the argument on its own to some extent as if the party were appearing *pro se*. If the arguments were not reasonable, they could be easily dismissed. Regardless, the arguments presented to the court in these instances where counsel is present have a stronger likelihood of being serious and based on a correct understanding of the law than if counsel were not providing any guidance to the party at all.

B. Logistics of Providing Notice of Limited Representation to the Courts

Should federal courts choose to allow attorneys to provide limited representation, judges and other court administrators could look to state courts that allow attorneys to enter limited appearances for guidance to ensure that the court and parties receive adequate notice of the services the attorney has been retained to provide.

As Loundenslager has noted, some state courts have allowed limited appearances for the purposes of arguing a particular matter (e.g. family courts in Florida) and arguing a particular pleading (Colorado).[138] Other state courts have adopted similar rules.[139] Adopting rules similar to those utilized in Florida's Family Court, which require attorneys to enter a notice of limited appearance that provides the court and parties with the attorney's contact information and an explanation of the scope of the services they have been retained to provide, are most likely to gain the approval of federal judges because these notices alert all the interested parties of an

138. Loudenslager, *supra* note 10, at 146–47.
139. *Id.* at 147; *see also supra* note 96 and accompanying text.

attorney's role in the case.[140] What these rules lack, however, is an incentive beyond the potential application of sanctions to ensure that individuals faithfully reveal to the court the scope of services counsel has been retained to provide.[141]

State courts have also made rules that allow the scope of an attorney's representation to change should an attorney's role in the case become increasingly complicated. For example, in New Hampshire, the scope of an attorney's limited representation is considered amended should an attorney sign a motion that is beyond the scope of the limited representation notice.[142] Should an attorney sign a select pleading (a writ, petition, counterclaim, cross-claim, or an amendment to any of these filings), the attorney is considered to have entered a "general appearance," but nothing prevents an attorney from entering multiple limited appearances within the same case.[143] This provides attorneys and parties significant flexibility to assess whether an attorney is necessary to provide only the services initially agreed upon, or additional assistance down the road.

These state court approaches to notice make it clear that federal courts could develop, without much difficulty, processes that allow both the court and any other effected party to fully understand the scope of an attorney's limited representation of a client.

C. Avoiding Abuse Should Courts Accord Limited Representation Deference

Imagine the instance where a party seeks to take advantage of a court's willingness to accord deference to a party with limited assistance from counsel, and retains an attorney to make frequent appearances in court, but maintains the attorney is only providing limited assistance. What should a court do in this instance? Is it enough to trust that a court would recognize

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140. FLA. FAM. CT. R. 12.040; *see also* Amendments to Florida Family Law Rules, 995 So. 2d 407, 408 (Fla. 2008) ("[T]he purpose of [the rule's notice requirement] is to provide notice to the court and to opposing parties of the limited scope of the attorney's representation of the litigant.").

141. As this Comment has noted, the threat of sanctions alone has not persuaded counsel and parties appearing in federal court that the potential benefits of attorney ghostwriting outweighs the potential costs. *See supra* Part II.B. Of course, it is also possible that merely allowing limited representation to occur in federal court would lead attorneys to play by the rules the court sets forth.

142. *See* N.H. SUPER. CT. R. 14(d); N.H. DIST. CT. RULE 1.3(D)(2); N.H. PROBATE CT. R. 14.

143. *Supra* note 142.

a party's obvious efforts to seek an undue advantage and craft an appropriate remedy?[144] Perhaps, but two factors suggest that if deference was accorded, it could be done in a way that promoted good conduct from the parties seeking, and the attorneys willing to provide, limited representation.

First, the arguments from attorneys who enter a limited appearance would get a more favorable review from the court than those attorneys who enter a general appearance, which reduces the potential motivations of those ghostwriting attorneys who presently ghostwrite for clients in an effort to gain an unfair advantage with the court by not entering an appearance. Clients who want attorneys to provide only a limited service would be able to have their attorneys provide the representation that they want, so long as the client and their counsel are honest with the court at the outset about the scope of the representation the client has retained. Similarly, attorneys would be able to provide the limited representation they were retained to provide, and the court would still treat the arguments that the attorney presented on the client's behalf with a modicum of deference. Since both the clients and attorneys before the court would have an incentive to deal honestly with the court, the prospect for abuse is somewhat diminished.

Second, this Comment suggests that the sanctions courts are presently imposing to address attorney ghostwriting have not stemmed the tide of attorneys and parties seeking to take advantage of the court anyway.[145] Should some deference be accorded to those seeking limited representation, the sanctions a court could justifiably impose would be much more severe than the sanctions they impose now.[146] Facing the prospect of severe

144. *Cf.* Carrasquillo v. Aponte Roque, 682 F. Supp. 137, 141 n.1 (D.P.R. 1988) ("[J]udges are not fools required to believe what ordinary citizens do not accept." (internal citation omitted)).

145. For example, in *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, the United States District Court for the Eastern District of Virginia clearly made its hostility to attorney ghostwriting known. 968 F. Supp. 1075 (E.D. Va. 1997). But, this has not prevented instances of attorney ghostwriting from arising since that decision in that court. *See, e.g.*, Chaplin v. Du Pont Advance Fiber Sys., 303 F. Supp. 2d 766, 773 (E.D. Va. 2004), *aff'd*, 124 F. App'x 771 (4th Cir. 2005) (publically reprimanding attorney for providing ghostwriting services); United States v. Salamanca, No. 3:11CR255-HEH, 2014 WL 108899, at *2, *4 (E.D. Va. Jan. 10, 2014) (denying motion in part because it was product of attorney ghostwriting); Greene v. U.S. Dep't of Educ., No. 4:13CV79, 2013 WL 5503086, at *10 & n.2 (E.D. Va. Oct. 2, 2013) (suspecting attorney ghostwriting and warning *pro se* party and suspected attorney of unethical nature of their conduct); Sejas v. MortgageIT, Inc., No. 1:11CV469 JCC, 2011 WL 2471205, at *1 (E.D. Va. June 20, 2011) (same); *see also supra* notes 87–91 and accompanying text.

146. *See supra* notes 61–64 and accompanying text.

monetary fines or other significant punishment—which courts would no longer hesitate to administer since they would accord a substantial benefit to those who were honest with the court—should also serve as a deterrent to abuse.

The point of this proposal is to develop a system which leads parties to deal honestly with the court while improving the quality of the arguments that are presented to the court for the benefit of both the party (on whose behalf the arguments are made), and for the judge (who must assess these arguments). When courts accord some deference, parties have an incentive to be honest, the courts would be free to punish those who are dishonest most severely, and the quality of the arguments before the court would likely be better than if counsel were not involved. If adopted, this proposal would provide a consistent framework for courts to assess the submissions of parties with limited representation, and would do so in a way that did not reward those attorneys and parties that do not deal honestly with the court.

VI. CONCLUSION

It is sometimes said that the perfect is the enemy of the good;[147] the question this Comment sought to answer was not whether one approach to resolving the present split in the federal courts regarding attorney ghostwriting is "best," but rather, whether there is an approach that is likely to receive support from the federal judiciary. This Comment does not presume that the approach it suggests, according some form of deference to parties who retain the limited assistance of counsel throughout the pleadings they submit to the court, will be able to fully resolve the propriety of a practice that has engendered controversy in the federal courts for over forty years. But, this approach has the advantage of providing a consistent framework for judges to assess the arguments of those who seek, or can only afford, the limited assistance of counsel, which will also likely produce consistent results. It is therefore a viable step in the right direction towards resolving this dilemma.

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147. This phrase is attributed to François-Marie Arouet (known more commonly by his "nom du plume" or pen-name: Voltaire) who wrote, "[L]e mieux est l'ennemi du bien." Literally translated the phrase means "The best is the enemy of good," but colloquially it is more often said, "The perfect is the enemy of the good." *See* VOLTAIRE, LA BÉGUEULE,: CONTE MORAL (1772), *available at* http://fr.wikisource.org/wiki/La_B%C3%A9gueule (last visited Feb. 5, 2014).