Gregory Cowan

Heather Caruso

Maria Faltas

Charleston Legal Access

Jennie Clark

Barbara Seymour

Charleston Pro Bono Legal Services

Rachael Dain

From:	Gregory Cowan
To:	limitedscopecomments
Subject:	Response to Request for Written Comments - Rule 11(f)
Date:	Wednesday, September 19, 2018 6:12:18 PM
Attachments:	Westbrook Suite 200_20180919_171043.pdf

Good evening,

In response to the request for written comments, I am submitting this memo to state my support of Option 3 of the proposed amendments to SCRCP, Rule 11. This memo contains my own views on the amendment. The opinions expressed in this memo have not been endorsed or adopted by my firm.

Thank you for the opportunity to comment.

Gregory Cowan
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Gregory Cowan

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To: The South Carolina Access to Justice Commission
From: Gregory Cowan
Date: 09/19/2018
Re: Request for Written Comments

In response to the Request for Written Comments, I am submitting the present memo to comment on the proposed addition to SCRCP, Rule 11(f). I am an attorney licensed in South Carolina, North Carolina and Tennessee.

After reviewing the proposed amendments, I support the third option, which requires that the pleading contain the notation "prepared with the assistance of counsel." This Option also provides a clear statement of the attorney's name and contact information.

As an attorney practicing in consumer law and default servicing, I frequently encounter pleadings from individuals acting *pro se.* While it is appropriate and helpful to the Court's review to have an attorney involved in the careful preparation of pleadings, Option 3 supports accountability for the attorney in keeping with the other provisions of Rule 11. Without the inclusion of the attorney's contact information, an opposing party's sole recourse to determine the attorney's independent reasonable inquiry into the facts would be through discovery propounded to the *pro se* defendant.

Furthermore, providing a name for the attorney who prepares the pleading, motion or other paper will also provide further notice of the attorney's involvement with the case if the attorney later decides to make a full appearance as a matter of record. As stated above, this will insure accountability in line with the doctrine of judicial estoppel for any subsequent representations made in documents filed with the Court.

Respectfully Submitted,

Gregory Cowan
SC Bar #100299
NC Bar #39608
TN BPR #34545

TO: SC Access To Justice Committee

FROM: Heather Caruso

SUBJECT: Limited Scope Comments

DATE: September 19, 2018

Dear Committee Members:

I respectfully submit the following comments regarding the proposed amendments concerning preparation of pleadings in limited scope matters.

I would advocate for Option 1 as the proposed amendment to paragraph (f) to Rule 11 of the South Carolina Rules of Civil Procedure for the following reasons:

I believe this option best represents the core purpose for creating the limited scope representation rules which is to serve the public interest. Limited Scope Representation Rules promote access to justice to people who are not able to afford attorneys. These Rules allow attorneys and clients to craft a division of labor that saves time and expense to both the client and attorney. By unbundling the legal services, a client is able to pay for what they are able to afford; thus avoiding pro se representation. This is turn allows the court system to run more efficiently.

This option also promotes pro bono service because it does not require an attorney to identify themselves. An attorney will be more likely to offer pro bono services if they know they are able to limit their time commitment to reviewing or drafting pleadings for a client without charging the client, signing the pleadings or having to enter into a formal appearance. This would be in line with Rule 6.5 of the Rules of Professional Conduct which allows an attorney to provide advice and assistance with the completion of legal forms without further representation by the attorney. In addition, Rule 11 still holds the attorney responsible for making an independent reasonable inquiry into the facts.

Finally, Options 2 and 3 would be an unnecessary overlap of the proposed Rules. The proposed Limited Scope Appearance Rules make signing the pleadings unnecessary if the attorney is not making an appearance. An attorney that is solely reviewing or drafting a pleading does not need to sign the pleading or make a written appearance. If the attorney is making an appearance under the Limited Scope Representative Rules, they would enter an appearance in accordance with the proposed Limited Scope Appearance Rules.

I greatly appreciate your work drafting the proposed amendments and your careful consideration of all comments submitted. This represents a significant step forward in the effort to foster limited scope representation in South Carolina.

If you have any questions or if I can be of any assistance, please do not hesitate to contact me.

Sincerely,

Heather B. Caruso

Marie Assa'ad-Faltas, MD, MPH
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e-mail: Marie_Faltas@hotmail.com and MarieAssaadFaltas@GMail.com

20 September 2018

To: South Carolina Access to Justice Commission
limitedscopecomments@sccourts.org

Re: Public Comment objecting to the ban on hybrid representation

I support the sensible, realistic, and practical proposed changes which would make access to justice more affordable to clients who can handle parts or most of their own cases, cannot afford a lawyer for the entire case, but need special expertise in one area of the case.

I object only to the senseless continued treatment of "hybrid representation" as if it were the evil of all evils. A brief explanation follows.

At the threshold, all representation by a multi-lawyer firm or by a team of lawyers is essentially "hybrid representation" in that more than one lawyer may and do handle different parts of the case. Indeed, "hybrid representation" is *mandatory* in death penalty cases where two lawyers are guaranteed to the same case.

Equal protection and the rules of ethics giving the client control over the purpose of representation require that hybrid representation not be vilified but be available.

Simply put, if a client may be represented by a team of two lawyers in the same case, why may a client not be represent by a team consisting of one lawyer and one non-lawyer advocate (the client)?

Also, the fact that the Constitution may not *guarantee* hybrid representation by name does not mean that the Constitution bans it. What stands against "hybrid representation in South Carolina is an antiquated tradition as "curious" as the one behind the now-defunct "last argument rule." *See, e.g., State* v. *Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018)

Also, federal courts have consistently approved of hybrid representation and left its use to the discretion of the trial court. *See, e.g., Locks* v. *G.W. Sumner*, 703 F.2d 403 (9th Cir. 1983):

> The Supreme Court and this circuit have recognized the efficacy of hybrid representation to aid pro se defendants and protect the integrity of the trial process. *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 467-68, 91 S. Ct. 499, 505-06, 27 L. Ed. 2d 532, 541 (1971) (Burger, C.J., concurring); *Faretta* v. *California*, 422 U.S. 806, 834-35 n. 46, 95 S. Ct. 2525, 2541 n. 46, 45 L. Ed. 2d 562, 581 (1975); *United States* v. *Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982); *United States* v. *Coupez*, 603 F.2d 1347, 1351 (9th Cir. 1979); see *United States* v. *Odom*, 423 F.2d 875, 876 (9th Cir. 1970). Neither court has decided, though, that a pro se defendant has an absolute right to advisory counsel. The Tenth Circuit has held that the right to "standby" counsel,[footnote 3] a type of advisory counsel, is not absolute, but is within the sound discretion of the trial judge. *United States* v. *Gigax*, 605 F.2d 507, 516-517 (10th Cir. 1979).
>
> [note 3] "Standby" counsel refers to the situation where a pro se defendant is given the assistance of advisory counsel who may take over the defense if for some reason the defendant becomes unable to continue. See Mayberry, supra; United States v. Kelley, 539 F.2d 1199, 1201, n. 3 (9th Cir.), cert. denied, 429 U.S. 963, 97 S. Ct. 393, 50 L. Ed. 2d 332 (1976)

See also *U.S.* v *.Pinkey*, 548 F.2d 305 (10th Cir. 1977) (hybrid representation within court's discretion); *U.S.* v. *Hill,* 526 F.2d 1019 (10th Cir. 1975) (court may allow hybrid representation);

U.S. v. *Bennett*, 539 F.2d 45 (10th Cir.) (court has discretion to permit hybrid); *U.S.* v. *Halbert*, 640 F.2d 1000, 9th Cir. 1981) (hybrid representation may be allowed); *U.S.* v. *Domingo Lopez-Osuna*, 242 F.3d 1191 (9th Cir. 2001) (quoting *Locks, supra,* with approval); and *U.S.* v. *Abrams,* Case No. 3:14-cr-00069-MMD-WGC., United States District Court, D. Nevada, 3 February 2016 ORDER of MIRANDA M. DU, District Judge, allowing hybrid representation and delineating role of stand-by counsel.

Therefore, the proposed language quoted hereunder should be modified as shown by the strike-through:

> [(Rule 1.2 (c)] [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. For example, a lawyer who is appointed as counsel may not seek to limit the scope of representation in that matter~~, and any agreement between the lawyer and the client to provide limited scope representation may not result in hybrid representation in the filing of documents or the conduct of hearings or trials~~.

Thanks for considering my public comment and God bless./S/Marie Assa'ad-Faltas, MD, MPH

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September 19, 2018

The Honorable Justice John Cannon Few
Members of the SC Access to Justice Commission
limitedscopecomments@sccourts.org

Re: Proposed Amended to Court Rules Related to Limited Scope Representation

Dear Justice Few and Members of the Commission:

I write as a member of the South Carolina Bar and on behalf of my organization, Charleston Legal Access (CLA). CLA is a nonprofit law firm that serves the working poor and others of modest means whose limited incomes disqualify them from free legal services but who cannot afford private attorneys. We provide legal services on a sliding scale, meaning that our clients pay something but what they pay is based on ability pay. We provide in-depth, in-person consultations for a flat fee of $50 and offer representation at reduced rates of $50-$100 an hour depending on a client's income and family size.

Limited scope representation is crucial to our work, to encouraging pro bono representation by the private bar, and to access to justice in South Carolina. We support the adoption of the Commission's proposed amendments and the adoption of Option 1 for Rule 11(f).

The rule changes regarding limited court appearances are sorely needed in our state. Limited appearances are effective tools to advance access to justice, but most attorneys, including CLA attorneys, currently do not offer such services because of the uncertainty surrounding limited appearances in South Carolina courts.

To the extent that data exists, it shows that limited appearances are effective at changing outcomes for litigants. For instance, a recent note published in the Yale Law Journal studied over 1,200 foreclosure cases.[1] In some of these cases, homeowners were self-represented throughout the litigation. In other cases, homeowners had an "attorney for the day" who represented them in a single motion hearing. Not surprisingly, represented homeowners fared better in the motions before the court on the day they were represented.[2] However, the effects of

[1] Mandilk, James G., *Attorney for the Day: Measuring the Efficacy of In-Court Limited Scope Representation*, 127 YALE L.J. 1828 (2018), *available at https://www.yalelawjournal.org/pdf/Mandilk_xgtxpspd.pdf*.
[2] *Id.* at 1859, 1864.

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the limited appearances did not end with the motion hearing: homeowners who had an attorney for that single day were nearly twice as likely to ultimately win their case as homeowners who were self-represented throughout the litigation.[3]

The potential for effective limited appearance programs exists in South Carolina. For instance, North Charleston has the highest eviction rate of any city in the country.[4] To help manage this crisis, a group in Charleston County is exploring options to increase access to attorneys in eviction proceedings. One option that the group has discussed is scheduling eviction hearings one day a week and having attorneys available at the courthouse on those days to represent clients, much like in the foreclosure representation program discussed above. But such programs can only exist and be successful in our State if pro bono attorneys feel confident that the South Carolina Courts accept and have adequate procedures in place to govern limited scope appearances.

We often see potential clients who, given their particular financial circumstances, cannot afford even our low-rate fees for the entire course of litigation but who could afford representation for a limited scope. For instance, we have potential clients who could afford our services to represent them through mediation but could not afford legal representation through a full trial in Circuit Court. However, without any confidence that a court will follow a limited appearance representation agreement between us and our client, we do not currently offer to make limited scope appearances. If these rules regarding limited appearances are enacted, we will offer such representation.

As reticent as CLA is, I have found pro bono attorneys even more fearful of accepting limited appearance representation cases. Everyone has heard a horror story where a pro bono attorney agreed to take a matter for limited scope representation and then the court would not allow the attorney to withdraw and/or appointed the attorney for the duration of the case. Often, private attorneys willing to donate their time for several months may not be willing to be on the hook for pro bono cases for years. So, they do not risk it.

From all we know, limited appearance representation benefits litigants and the court. Litigants have better outcomes. Even if the case is not resolved during the limited appearance, the client is

[3] *Id*. at 1867.
[4] Emily Bager and Quoctrung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America,* N.Y. TIMES, Apr. 7, 2018, *available at https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html?smid=pl-share*.

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on better footing than without the limited appearance and advice of counsel. The court has the benefit of pleadings, motions, or other documents drafted by attorneys, rather than having to decipher pro se writings start to finish. Yet, despite the obvious benefits of limited appearance representation and its potential to increase access to justice and encourage pro bono representation, our current rules and practices create uncertainty that discourages the practice. These rule changes are an important step to increasing access to attorneys in South Carolina.

Ghost writing (i.e. limited scope preparation of documents) is another important form of limited scope representation and one we engage in at CLA. Many litigants simply cannot afford legal fees for even limited appearance representations. For these litigants, help drafting initial pleadings is a critical tool for expanding access to justice. Pro se litigants often misinterpret which facts are legally relevant, fail to allege their strongest claims, and do not understand rights that can be waived by silence (like a jury demand). Providing pro se plaintiffs with help appropriately alleging jurisdiction, venue, and causes of action helps the court understand the claims at issue and enables the plaintiffs to get their claims before the court rather than having them dismissed because of inartful pleading. Ghost writing is also extremely important in cases where a person is sued and unable to afford legal representation. Without help drafting an answer, pro se defendants are at risk of having a default judgment entered against them. Even when they do timely file an answer, pro se defendants very frequently fail to allege affirmative defenses (and therefore, unknowingly, waive them), and also often fail to allege counter claims. Numerous defendants have walked in to our office feeling railroaded by the court system and a technical set of rules. Ghost writing provides an important way to provide some, if imperfect, access to justice for these clients.

There are also cases where the amount at issue does not justify paying an attorney for representation even if one could afford it. For example, we see worthy cases worth $1,000 or $1,500. In these cases, it rarely makes sense for an individual to pay even our fees for a trial in small claims court, but these amounts are still significant to our clients. In these cases, we sit down with these clients for ninety minutes to two hours. We explain their claims, explain how small claims court works, and help them with the drafting of their complaint. We have seen such limited legal help result in successful pro se litigation and make low-income families feel like they have access to the courts.

We support the adoption of Option 1 for Rule 11(f) because attorney identification could discourage ghost writing by creating ethical quandaries for the attorneys who engage in it. While the concept of ghost writing seems straight forward—an attorney drafts a pleading for a pro se litigant—in practice ghost writing could potentially encompass a broad range of activities under

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the rule. Does it include instances where an attorney reviews a pro se-drafted pleading and suggests edits? Instances where an attorney provides significant advice and counsel on the drafting of a document but does not physically draft any of it herself?[5] Instances where the attorney helps a pro se litigant fill out the complaint form for small claims court in a consultation but does not do any of the writing himself? Instances where an attorney drafts one portion of a document but the pro se litigant drafts the rest? The rule states "draft or help draft," and it is at least arguable, but not at all clear, whether each of these scenarios would require attorney identification. Any time an attorney gives advice with regard to a pleading or motion, the rule might apply as "helping draft" some document in the litigation—or it might not. Attorneys then have to worry about what level of advice and help requires that they be listed on a filing. This creates uncertainty for practitioners that will deter attorneys from providing such services.

Compounding the problem is that ***the attorney has no control over the document actually filed***. Even where an attorney ghost writes a document in its entirety, the pro se litigant has the ability to take this document from the attorney, edit it, re-type it, add to it, and re-write it before he or she files it. If the pro se litigant adds frivolous claims or arguments, the attorney will now be associated with those frivolous claims or arguments in front of the court, and she will have no knowledge of being so associated. Attorneys will rightfully be reticent to have their name on a document where they do not see the final version. As attorneys, our credibility and integrity in the claims we make are important to our profession and our ability to serve our clients. Identifying attorneys with any document that they "help draft" may severely discourage attorneys from engaging in ghost writing because a pro se litigant ultimately has control over what is filed and can always make changes between the attorney's office and the clerk's office.[6]

We provide a lot of advice and counsel, as does every nonprofit legal organization serving low-income clients. Attorney access through advice and counsel and ghost writing is important for litigants that do not have access to full representation. Consultations where we help pro se litigants with initial pleadings are a significant and meaningful part of our work. We are concerned about the ethical questions raised by Option 3 in our everyday work and concerned that, if enacted, it will significantly curb ghost writing in our state.

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[5] If these last two scenarios do qualify as "helping draft" a document, then if the pro se litigant fails to include the attorney identifying information despite being advised to do so by the attorney, could the attorney still be accused of violating Rule 11(f)?

[6] Private attorneys have also expressed concern that if they were identified on documents they helped draft, courts will appoint them in those cases. Whether this fear is well-founded or not, it will deter attorneys from providing such services.

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We appreciate the opportunity to submit comments as a part of this process and appreciate the work of the Commission in expanding access to justice in South Carolina.

Sincerely,

Adair Boroughs
Executive Director
Charleston Legal Access
adair@charlestonlegalaccess.org

From: Jennie Yarborough
To: limitedscopecomments
Subject: <no subject>
Date: Wednesday, September 19, 2018 4:18:45 PM
Attachments: Limited Scope of Representation.docx

Sincerely,
Jennie Elizabeth Clark
Jennie Elizabeth Clark Attorney at Law LLC
1720 Main Street, Suite 301
Columbia, SC 29201

As a private attorney who recently opened a solo practice with the goal of making a profit but also giving back to the community, I fully support the changes in the current rules that clarify and explain limited scope of representation.

I have already struggled in a short time with the dilemmas of trying to help indigent clients while ethically remaining diligent. I have had several cases where I would have liked to have helped the client navigate a legal process :

1. For example, expungements: I can easily guide indigent clients on how to do it, without charging them a fee or entering into a lawyer-client representation that requires my responsibility for tracking the expungement, etc., which takes time and is burdensome financially if doing this for free, especially because I am just starting out.
2. I have another situation where an indigent elderly person was born at home and has no birth certificate; it would be easy for me to do the research, help her prepare the documents, go down to vital statistics with her, but if the case ends up requiring a court order or administrative law battle, I cannot afford to do this for free and the elderly client cannot afford to pay any money.
3. I have also done some prisoners' rights work pro-bono, where I try to help the prisoners with denial of basic medical needs. Often, I help them fill out requests to staff members to see the doctor or nurse, and I call the prison to follow up, but I cannot afford to front the costs for a 1983 action as a solo practitioner and have had a total of one in-state lawyer provide any guidance for me on how to do this (out of state lawyers have been much more helpful).
4. I have had a case where a single mother who was indigent who was swindled on a lemon car; I spent a lot of time limiting the scope of my representation through a letter and "fee agreement," where I helped her for free go through lemon laws ad discuss options, but she could not afford the filing fees or suing, nor would I be able to pay for them myself. I would like to be able as an attorney to help people navigate legal processes but then amworried about malpractice.

This rule, which is clearly written and if followed as written, will serve to help the indigent community.

CLAWSON AND STAUBES LLC

Barbara M. Seymour
Licensed in SC and GA
bseymour@clawsonandstaubes.com

September 4, 2018

The Honorable Justice John Cannon Few
Members of the SC Access to Justice Commission
limitedscopecomments@sccourts.org

Re: Proposed Amendments to Court Rules

Dear Justice Few and Members of the Commission:

I am a member of the South Carolina Bar with a practice focused on lawyer and judicial ethics writing in support of the proposed amendments to the Rules of Professional Conduct and Rules of Civil Procedure. I have studied issues related to limited scope representation, technological advancements impacting the practice of law, and alternate methods of delivery of legal services. In my work with the South Carolina Bar's Unauthorized Practice of Law Committee and in my former role with the Office of Disciplinary Counsel, I have seen first hand the devastating consequences to people who are unrepresented in legal matters, whether they go it alone or attempt to avail themselves of online legal forms and back-alley nonlawyers. I believe that lawyers have an obligation to utilize the tools available to them under Rule 1.2(c) of the Rules of Professional Conduct, not just to serve the needs of lower-income citizens, but also to help ensure the viability of our profession going forward.

For several years I have traveled the state to talk with lawyers in a variety of practice areas about ways to offer limited scope representation to clients who are unable to afford full legal representation. I have found that many lawyers have embraced limited scope representation to the benefit of their clients. For the most part, however, litigation lawyers have been hesitant to unbundle their services. This hesitation is due primarily to two factors. First, many litigators believe that limited scope representation (such as ghostwriting pleadings or litigation navigation services) are prohibited by Rule 11 or other court and conduct rules. Second, there is a common fear that a judge who discovers that a *pro se* litigant is being assisted by a lawyer behind the scenes will appoint that lawyer to the case, thus requiring the lawyer to provide free services to the client.

I believe that the formal process of allowing a lawyer to make a limited scope appearance for a client, as proposed, would serve to advance the cause of justice, facilitate access to the courts, and diminish the negative impact of self-representation on the judicial process in South Carolina.

I also believe that a lawyer and client should be free to enter into an agreement in which the lawyer will draft pleadings, motions, and other court documents for the client to submit *pro se* without the need to disclose the identity or assistance of the lawyer. I support the adoption of the proposed Rule 11(f) set forth as Option #1 in the Commission's report. I have enclosed a paper that I drafted in support of the concept of "pure" ghostwriting as a function of limited scope representation.

I appreciate the opportunity to submit my comments as part of this important process. My comments are my own and not those of Clawson & Staubes, LLC, or its members.

Very truly yours,

/s Barbara M. Seymour
Barbara M. Seymour

BMS/

The Case for Affirmative Approval of Ghostwriting to Advance Access to Justice in South Carolina

Barbara M. Seymour (06/12/2018)

When it comes to solving the access to justice crisis in our country, the legal profession is at a fork in the road. We can turn left, stubbornly following the path of traditional means of delivering legal services or we can turn right, moving towards innovative solutions that both serve the needs of the public and ensure our survival as a profession. That survival depends on our ability to find ways to deliver legal services to those who are now choosing to rely on Internet resources like cut-rate forms and unregulated "ask-the-expert" advice. Studies have shown that the gap of unmet legal needs of people of low and moderate means may be as high as 80%. One way that the profession can meet those needs is to permit lawyers to limit the scope of representation to drafting pleadings for *pro se* litigants, commonly referred to as 'ghostwriting'.

The trouble is that in many states (including South Carolina) neither the lawyer conduct rules nor the court procedure rules specifically authorize or prohibit the practice. The ABA Model Rules of Professional Conduct provide the authority for a lawyer to limit the scope of the representation of a client, so long as that limitation is reasonable under the circumstances and the client gives informed consent.[1] In addition to adopting the general concept of limited scope representation in Model Rule 1.2, the American Bar Association has taken the position that it is not dishonest or unethical for a lawyer to ghostwrite pleadings for *pro se* litigants.[2] Although the ABA has explicitly approved of the practice in a Formal Opinion, it does not specifically reference ghostwriting in the Comments to the Model Rule.

South Carolina's version of Rule 1.2(c) and its Comments are identical to the Model Rule. Unlike the ABA, however, we do not have an advisory opinion from the SC Bar on the practice. Also, our appellate courts have not yet weighed in on the issue. Complicating matters further, most federal courts expressly prohibit ghostwriting either by court rule or judicial opinion.[3]

In my opinion, now is the time to affirmatively authorize lawyers to ghostwrite pleadings to counter the risks that unregulated resources such as online legal forms and anonymous advice websites present to an unwitting public desperately in need of the competent, skilled counsel only a member of the Bar can provide. The way I see it, there are five options for courts and bar associations grappling with whether to authorize a licensed attorney to limit the scope of representation to drafting pleadings for presentation in court by a *pro se* litigant:

1) Do nothing.
2) Prohibit ghostwriting altogether.
3) Permit "modified" ghostwriting with lawyer identification.
4) Permit "modified" ghostwriting with general disclosure.
5) Permit "pure" ghostwriting.

I am an advocate for permitting "pure" ghostwriting because I believe that it should be left to the client and the lawyer to decide what is in the best interests of the client.

Option #1: Do Nothing.

It could be argued that we should make no change to the current court rules or ethics rules. Perhaps the reason we don't yet have an Ethics Advisory Opinion or a determinative appellate court opinion in South Carolina is because lawyers and judges are happy with the *status quo*. Perhaps we are comfortable with the uncertainty and it would be better not to rock an otherwise seaworthy boat. Experts generally interpret the limited scope provision of Rule 1.2, RPC, to allow for the practice. Some lawyers do it, others don't. *Pro se* litigants are obtaining draft pleadings and other documents for filing from a variety of sources, including licensed lawyers. To date, there appears to have been no circumstances involving the use of ghostwritten pleadings that have become so problematic that disciplinary action or court sanction has been necessary in South Carolina – at least not in state court.[4]

An argument can certainly be made that the *status quo* is working and should be left alone. However, the sense I get from talking to South Carolina lawyers and judges is that the *status quo* is not actually working. Judges are frustrated with *pro se* litigants who file pleadings downloaded from the internet that they don't understand or that might not be appropriate under our state law. They are equally frustrated with those who prepare their own pleadings. The lawyers I talk to who do ghostwrite for financially strapped clients do so with trepidation because they know the law is not yet settled. Other lawyers refuse to do it because they fear the judge will learn of their involvement and rope them into unpaid representation by court appointment. We should do something affirmative to provide some certainty for lawyers, judges, and litigants – whether that is prohibiting the practice of ghostwriting or permitting it.

Option #2: Prohibit Ghostwriting

One regulatory solution is to specifically prohibit a lawyer from including drafting of *pro se* pleadings and other court documents as part of the limited scope representation of a client. Support for this option is found in Rule 11, SCRCP, and Rules 3.3(a)(1) and 8.4(d) of the SC Rules of Professional Conduct.

Rule 11, SCRCP, states that "[e]very pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated."[5] When a lawyer drafts a document for a *pro se* litigant with the understanding that document will be used in court, an attorney-client relationship is established. Therefore, it could be said that the litigant, although appearing *pro se*, is a "party represented by an attorney." Under this interpretation of Rule 11, a ghostwritten pleading would have to be signed by the preparing attorney. The difficulty this presents is that the attorney would, by express terms in the rule, become "attorney of record" thus nullifying the concept of ghostwriting as a limited scope representation option. Some state and federal courts have construed Rule 11 to inherently prohibit ghostwriting. Because the limited scope representation provision of Rule 1.2, RPC, does not specifically authorize ghostwriting, this interpretation of Rule 11 would not be in conflict with the ethical rules. In fact, there is an argument that other provisions of RPC actually prohibit ghostwriting.

Some courts have looked to ABA Model Rule 3.3 for additional support for the proposition that lawyers may not ghostwrite documents to be submitted by *pro se* litigants. Subsection (a)(1) prohibits a lawyer from "knowingly [making] a false statement of fact or law to a tribunal." South Carolina has adopted ABA Model Rule 3.3. The duty of candor is broadly interpreted by the courts, and rightly so. A more conservative approach would reasonably determine that ghostwriting is a "lack of candor" to the court. In addition, Rule 8.4 prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." [6] If one presumes that ghostwriting pleadings for a *pro se* litigant is an intentional failure to disclose a material fact to the court or to the opponent/opposing counsel, it follows that such conduct would also violate Rule 8.4.

Option #3: Permit "Modified" Ghostwriting with Identification

A number of states have elected to permit a "modified" form of ghostwriting in which the *pro se* litigant is required to identify the name, bar number, and other contact information of the lawyer who prepared the document. This approach presumes that the lawyer does not become "attorney of record" and, therefore, Rule 11 of the procedural rules would not apply to the lawyer. However, because this is "representation" of a client, all of the relevant ethics rules would apply, such as the duty of competence, truthfulness, fairness to opposing counsel, candor to the tribunal, etc. This facilitates unbundling of legal services because ghostwriting is expressly permitted. It also alleviates concerns of opponents to ghostwriting who believe that a *pro se* litigant will get an unfair advantage if a lawyer is acting on his behalf without the knowledge of the judge or the opposing party/opposing counsel.

It is official policy in some courts and common practice in others to provide leniency to unrepresented parties by applying a lesser standard to their pleadings, presentations, and arguments. It is a legitimate concern that a purported unrepresented party will get the benefit of the doubt from the court when, in fact, he has the advantage of an attorney assisting him "behind the scenes." States that have adopted the identification requirement also point to the benefit of accountability on the part of the ghostwriting lawyer in the event the pleadings are improper, inadequate, or otherwise problematic. The fact that a judge, disciplinary authority, or malpractice jury can identify the lawyer responsible for preparation of the pleadings and impose a sanction or other remedy is incentive for that lawyer to ensure that ghostwritten documents are done well.

Option #4: Permit "Modified" Ghostwriting with Disclosure

Other states have opted for a form of modified ghostwriting that does not require the drafting lawyer to be specifically identified, but does require disclosure that the document was prepared by a licensed attorney. This approach provides all of the benefits of "modified ghostwriting with identification" described above, while eliminating a significant barrier to limited scope representation.

The primary concern for many lawyers who avoid limited scope representation in litigation matters is the fear that they will be forced into full representation without remuneration. These lawyers believe that a judge who learns they are helping a client in a litigation matter will get them "on the hook" by appointing them to represent the client in the entire case. If the lawyer does not have to be identified on the ghostwritten

document, there is little risk he will be pulled in by the judge.[7] This approach alerts the judge and the opponent that the *pro se* litigant had professional assistance in preparation of the document, assuring that he will not get unwarranted leeway for faulty pleadings or arguments. In addition, if the ghostwritten document is so problematic that it rises to the level of malpractice or unethical conduct, appropriate action can be taken against the offending lawyer, albeit with greater difficulty than with the "modified ghostwriting with identification" model.

Option #5: Permitting "Pure" Ghostwriting

Permitting anonymous ghostwriting with no identification or disclosure of a lawyer's involvement is the option least obstructive to the goal of delivering low-cost, limited scope representation. Anecdotally, South Carolina lawyers have expressed to me an interest in unbundling their legal services, including drafting pleadings and other documents for filing by *pro se* litigants. However, as mentioned previously, their primary concern is being held responsible for representing the client in the entire matter when the client does not have the means to pay for full service representation. In addition, ghostwriting pleadings anonymously and without disclosure is already a common practice, particularly by lawyers working with *pro bono* and legal services organizations. Discouraging lawyers from ghostwriting by requiring identification or disclosure – or prohibiting ghostwriting altogether – would be a step backwards in the progress we are making towards access to justice. In addition, it would further disadvantage the legal profession as it struggles to compete with online document preparation services.

Facilitating and encouraging anonymous ghostwriting also serves to protect the interests of clients who might otherwise fall prey to online scams or who might lose legal protections by relying on nonlawyers or out-of-state lawyers not versed in South Carolina law. The reality is that more and more people are appearing in court without legal representation. They go to the internet for samples, templates, and prepared documents. They have no assurances that the documents they file are appropriate or sufficient to protect their interests. They have no recourse for harm that might result. Even if permitted to prepare pleadings and other court filings completely anonymously, ghostwriting lawyers will still be bound by the Rules of Professional Conduct. They will also still be accountable in civil court for malpractice. In addition, permitting pure ghostwriting alleviates the significant burden on judges who otherwise must deal with the morass created by problematic *pro se* filings prepared by the litigant or downloaded from the internet. While the *pro se* litigant might still create difficulties for the court and the opposing counsel, at least they will be presenting professionally prepared pleadings, motions, and briefs.

I am an advocate for unrestricted ghostwriting. However, I believe that doing anything is better than doing nothing. If it is prohibited, let's expressly prohibit it. If it is permitted, let's definitively set out the requirements and restrictions. Either way, let's solve this problem so that lawyers and judges are free to proceed with clear guidance in helping South Carolinians navigate the civil justice system.

NOTES

[1] See ABA MRPC 1.2(c).

[2] In Formal Opinion 07-446, the ABA also found that a lawyer who anonymously prepares pleadings and other papers for filing are not subject to Rule 11 of the Rules of Civil Procedure.

[3] The practice of ghostwriting has been condemned almost universally in the federal courts, counter to the trend in state court and state bar opinions. The cited basis for the prohibition has been Rule 11 and/or various provisions of the ABA Model Rules, including Rules 1.16, 3.3, and 8.4. For the most part, these court rules and judicial opinions were issued prior to the ABA's adoption of the modern Model Rule 1.2 permitting limited scope representation generally and before the emergence of low-cost, online legal document services for *pro se* litigants. It is yet to be determined whether the position of the federal courts will evolve with these recent developments. Generally, the federal court system is more open to alternative methods of delivery of legal services (e.g. specialty courts such as tax court and Social Security proceedings that permit non-lawyer representation; federal court opinions giving a wide berth to non-lawyers entering the legal services marketplace; and, general disapproval of restrictions on lawyer advertising).

[4] See In re Mungo, 305 B.R. 762 (D.S.C. Bankr. 2003), where a lawyer was publicly admonished by the a South Carolina bankruptcy court judge for drafting motions signed and filed by a *pro se* debtor.

[5] There is a slight difference between the SC version of Rule 11 and the federal version. While the SC version says that "[e]very pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina, and whose address and telephone number shall be stated," the federal version says that "[e]very pleading, written motion and other paper must be signed by at least one attorney of record in the attorney's name – or by a party personally if the party is unrepresented." Note that in both rules, the phrase "attorney of record" is juxtaposed against "unrepresented party." While ghostwriting is "representation" of a client, it falls somewhere between an "unrepresented party" situation and an "attorney of record" situation.

[6] South Carolina's version of Rule 8.4 differs somewhat from the ABA Model Rule. While substantively the rules are the same with regard to conduct involving dishonesty, the Model Rule subsection is 8.4(c), where the SC version is 8.4(d).

[7] Of course, there is always the risk that the judge will ask the *pro se* litigant to identify the ghostwriter, but that is a risk whether disclosure is required or not.

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September 19, 2018

The Honorable Justice John C. Few
Members of the SC Access to Justice Commission
limitedscopecomments@sccourts.org

Re: Proposed Amended Court Rules Related to Limited Scope Representation

Dear Justice Few and Members of the Commission:

Charleston Pro Bono Legal Services (CPBLS) is a nonprofit providing free civil legal aid to low-income residents of Charleston County. Along with its predecessor, Neighborhood Legal Assistance Program, CPBLS has been providing legal counsel, document preparation, and advice on navigating the civil litigation process for over 50 years.

Of the three options for 'pleading preparation representation' proposed for Rule 11, we would ask that Option 1 be implemented.

Part of our service includes advice, counsel, and document preparation. CPBLS counsel has never signed pleadings for cases where counsel was not providing direct representation. To explain the scope of representation and services, our office currently provides a cover letter both to the client and to the Clerk of Court. Additionally, there is a retainer agreement specifying the scope of counsel.

Recently, CPBLS has participated in a pilot program to allow Limited Direct Representation (LDR) of clients in domestic matters. The pilot program requires that the litigants are truly in complete agreement and that the attorney ensures the final hearing can proceed to resolve the case. Otherwise, our concern is that any attorney could become attached to a matter where they were not intending to provide direct representation. It is only after the service and response time has concluded that an attorney will know whether the matter may be eligible for Limited Representation. Requiring a limited representation attorney to sign pleadings, receive service, and not have a reserved right to withdraw should the matter become contested, could financially burden our program to the point of closure.

Specifically considering Family Court, where a previously silent defendant may make first appearance and contest at the Final Hearing, a limited representation attorney may be unable to withdraw and end up committed to a time consuming matter. As a small nonprofit, we are neither funded nor staffed for those legal services.

Charleston Pro Bono is also now partnering with fellow nonprofit groups in Charleston and the magistrate courts in a new initiative relating to evictions. Part of the proposal includes recruiting volunteer attorneys

to assist with only a portion of the legal action. Providing the attorneys with assurances regarding their limited scope would go a long way in creating an effective and efficient program.

Of the proposed rules, it is our position that the Limited Counsel needs to be protected from being forced to remain in a case when the matter changes from uncontested to contested. For the pilot program referenced above, only uncontested cases are eligible for limited direct representation. The program exists, at the request of a currently sitting judge, to help litigants that need an attorney to "walk them through the questions" and establish the grounds for their relief. We have seen matters become contested for the first time at the final hearing. In situations where the scope changes in this way, the limited counsel should be protected by their retainer agreement, allowing them to withdraw.

We ask that the rule change for "(2) Notice of Completion and Withdrawal" include that limited counsel may make a consent agreement for withdrawal when the scope of representation has changed.

More importantly, not allowing withdrawal in these circumstances could have a chilling effect on volunteer attorney services. Additionally, it would decimate the number of clients a legal aid organization could provide with services. As we within the legal community wrestle with how to provide better access to justice, we certainly do not want to implement a rule that would further deter attorneys from providing pro bono assistance.

Thank you for allowing us provide comment on the proposals.

Kindest regards,
Staff at Charleston Pro Bono Legal Services

From: Rachael Dain
To: limitedscopecomments
Subject: Limited Scope Proposed Amendments
Date: Friday, September 7, 2018 2:47:54 PM

I submit the following observations and suggestions regarding the proposed rule changes for limited scope appearances:

New Comment 2 would be added to Rule 4.2, to provide:

> [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates. In cases where a limited scope appearance is made on behalf of a person in a matter where limited scope appearances are permitted under court rules, the person shall be considered represented when the lawyer is provided with written notice of a limited scope appearance in the matter.

New Comment 3 would be added to Rule 4.3, to provide:

> [3] In cases where a limited scope appearance is made on behalf of a person in a matter where limited scope appearances are permitted under court rules, the person shall be considered represented when the lawyer is provided with written notice of a limited scope appearance in the matter.

- In both proposed comments, “when the lawyer is provided with written notice of a limited scope appearance in the matter” could be interpretted to means when the lawyer who is making the limited scope appearance is provided with written notice by the client. To eliminate any confusion I would suggest it be changed to read “when the opposing lawyer is provided with written notice of a limited scope appearance.”

- Would we benefit from something like Rule 8, SCFCR, requiring any lawyer bound to a client via a limited scope appearance to notify the court and opposing parties ASAP?

Amendment 3 would be added to Rule 11, to provide:

> **(3) Hybrid Representation Prohibited.** An attorney making a limited scope appearance pursuant to this rule shall be considered the attorney for that party for all matters and will remain counsel of record until the attorney properly withdraws. The attorney and the party may not divide argument or argue on the same legal issue, and all

documents must be filed by the attorney during the period of the limited appearance.

- In this proposed rule, "An attorney making a limited scope appearance pursuant to this rule shall be considered the attorney for that party for all matters" only makes sense interpretted one way when the appearance is limited to a single hearing and clearly it is a single case. However, a client may have more than one "matter" pending before that court. To eliminate any confusion for clients and attorneys, I would suggest the word "matters" be changed to read "in the case."

Proposed amendment (f) to Rule 11 Option 1:

(f) Limited Scope Preparation of Documents. An attorney may draft or help draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney need not be identified or sign the pleading, motion, or other paper. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which case the attorney must make an independent reasonable inquiry into the facts. Limited scope assistance provided under this rule does not constitute an appearance in the matter.

- I am unsure if the committee is keeping a tally on which paragraph option the Bar membership is supporting. I just want to state I truly believe either of the other two options are likely to lead to the abuse of lawyers by family court judges looking for those upon whom they can inflict the hardships of family court. I have personally seen it happen under the present rule and have heard many stories. I don't see myself wanting to help ghost write documents if I am putting a judge on notice that I did the work.

Sincerely,
Rachael Dain

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