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**Anonymous Assistance:
Ghostwriting in Washington State Courts**

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In 2020, the WSBA released an advisory opinion addressing “ghostwriting” for *pro se* parties in state court civil litigation. Advisory Opinion 202002, which is available on the WSBA web site, is an important resource for lawyers who wish to offer limited services on either a *pro bono* or a task-based fee model.¹ The 2020 advisory opinion, in turn, built on amendments to both the Washington RPCs and the Civil Rules that were enacted 20 years ago to encourage limited-scope representation as an additional tool to help litigants of modest economic means. In this column, we’ll first discuss the parameters of ghostwriting under Advisory Opinion 202002. We’ll then survey the accompanying state court civil rules that facilitate ghostwriting in state civil trial level proceedings.

Before we do, two qualifiers are in order.

First, Advisory Opinion 202002 focuses on Washington state courts only. Federal courts in Washington, like many of their counterparts nationally, have historically disfavored undisclosed attorney ghostwriting for *pro se* litigants as contrary to Federal Rule of Civil Procedure 11.² Therefore, pending further clarification by the federal courts in this regard, Advisory Opinion 202002 limits its analysis to state courts.

Second, Advisory Opinion 202002 is limited to civil proceedings only. For a variety of reasons, ghostwriting in the criminal realm has generally been suggested only for post-conviction settings where public indigent defense is not available.³ Advisory Opinion 202002 implicitly takes this tack by excluding criminal proceedings from its scope.

Advisory Opinion 202002

Advisory Opinion 200202 defines “ghostwriting” as “the undisclosed drafting of pleadings, motions, or other documents for pro se litigants.”⁴ The opinion notes that 20 years ago the Washington Supreme Court specifically authorized limited-scope representation under RPC 1.2(c) as a part of a package of amendments to both the RPCs and the Civil Rules aimed at increasing access to the civil justice system.⁵ Washington’s version of RPC 1.2(c) was then amended in 2006 as a part of the WSBA’s Ethics 2003 review of the RPCs to update and align our rules more closely with a package of amendments to the corresponding Model Rules of Professional Conduct adopted by the ABA in 2002 and 2003.⁶

RPC 1.2(c) in its current form reads:

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Advisory Opinion 202002 concludes that ghostwriting pleadings and other papers for *pro se* litigants is generally a permissible task under RPC 1.2(c). In keeping with an earlier ABA opinion—Formal Opinion 07-446 (2007)—the Washington advisory opinion also concludes that ghostwriting may be done anonymously without violating RPC 3.3, which addresses candor toward tribunals.⁷

Two important subsidiary points follow.

First, on those tasks for which a lawyer has agreed to assist the client—whether *pro bono* or for pay—the lawyer must exercise requisite competence under RPC 1.1 and the associated civil standard of care reflected in Washington Pattern Jury Instruction 107.04. In other words, while the client may be *pro se* before the particular courts involved, an attorney-client relationship exists, and the lawyers remain responsible for the legal services they provide. Prudent risk management practice suggests, therefore, carefully documenting in writing the specific tasks which the lawyer has agreed to assist and ensuring that the lawyer has the appropriate knowledge and skill to accomplish them.

Second, if ghostwriting is done anonymously, the *pro se* litigants for whom the services are performed are treated as unrepresented for purposes of the “no contact” rule—RPC 4.2. Comment 11 to RPC 4.2 underscores this point:

A person not otherwise represented by a lawyer to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.⁸

Washington Civil Rules

Advisory Opinion 202002 notes that the 2002 amendments also included specific changes in the form of CR 11(b) and CRLJ 11(b) to accommodate anonymous ghostwriting at the trial court level.⁹

CR 11(b) reads (and CRLJ 11 (b) mirrors):

In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is well grounded in fact,
- (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law,
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance 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 instance the attorney shall make an independent reasonable inquiry into the facts.¹⁰

Threading a conceptual needle, the drafters of the Washington rule made the ghostwriting lawyer responsible for the papers prepared but did not require the lawyer to sign the papers involved.¹¹ As one of the principal drafters of the rule put it later:

Washington's rule amendment does hold a ghostwriting lawyer is responsible for the pleadings, but it does not require any written certification to that effect. Instead, the lawyer certifies merely by drafting the pleading. The rule recognizes that an objective of limited scope representation is reduced costs and thus allows the lawyer to rely on the client's factual representations, rather than having to independently ascertain the facts, unless the lawyer has reason to believe the client's factual representations are false or materially insufficient.¹²

Summing Up

Washington's approach to ghostwriting for *pro se* civil litigants in state trial courts provides a practical tool for lawyers to assist clients who either do not want or cannot afford traditional "full service" representation by a lawyer.

ABOUT THE AUTHOR

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¹ As noted, this column addresses ghostwriting by lawyers. Under Washington APR 28G(4), "[a] document prepared by an LLLT shall include the LLLT's name, signature, and license number beneath the signature of the client." Therefore, LLLTs are not permitted to ghostwrite pleadings and similar court papers that require a client signature. See Dec. 22, 2016 Letter from LLLT Board Chair to Washington Supreme Court (relating LLLT Board position that LLLTs are not permitted to ghostwrite pleadings) (on file with author).

² See, e.g., *Tift v. Ball*, 2008 WL 701979 at *1 (W.D. Wash. Mar. 12, 2008) (unpublished) ("It is therefore a violation for attorneys to assist *pro se* litigants by preparing their briefs, and thereby escape the obligations imposed on them under Rule 11."); see also *Montgomery v. Rainier Beach Pool*, 2020 WL 1674159 at *1 (W.D. Wash. Apr. 6, 2020) (unpublished) (noting in the context of non-attorney assistance with ghostwriting that "[t]he Court is concerned that Plaintiff has misrepresented his *pro se* status[.]"). See generally Jona Goldschmidt, *Ghosting*:

The Courts' Views on Ghostwriting Ethics Are Wildly Divergent, 102, No. 3 *Judicature* 37 (Dec. 2018) (surveying varying approaches to ghostwriting nationally).

³ See generally Ira R. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 *Geo. J. Legal Ethics* 271 (2010); see also Peter R. Bornstein, *Ghostwriting and the Invisible Lawyer*, 39, No. 3 *Litigation* 36 (Summer 2013).

⁴ WSBA Advisory Op. 202002 at 1 (2020).

⁵ See generally Barrie Althoff, *Ethical Issues Posed by Limited-Scope Representation: The Washington Experience*, 2004 *Prof. Law.* 67 (2004) (Althoff) (chronicling the 2002 amendments). For the earlier version of RPC 1.2(c), see Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 *Wash. L. Rev.* 823, 836 (1986) (discussing the RPCs as originally adopted in Washington). Washington's efforts were undertaken against the backdrop of a national reexamination of these issues at the time. See generally Jona Goldschmidt, *In Defense of Ghostwriting*, 19 *Fordham Urb. L. J.* 1145 (2002) (discussing ghostwriting and associated limited-scope initiatives nationally).

⁶ See generally WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 140-41 (2004) (on file with author).

⁷ WSBA Advisory Opinion 200202 precedes the cite to RPC 3.3 with "including but not limited to." ABA Formal Opinion 07-446 (2007), which the Washington opinion cites, concludes that, in addition to RPC 3.3, ABA Model Rules 4.1(a) and 8.4(c), both of which address misrepresentation, are not violated by anonymous ghostwriting for *pro se* civil litigants either.

⁸ On a related point addressing LLLTs, Comment 5 to RPC 4.4 notes that although a lawyer may communicate with a person being assisted by an LLLT without violating RPC 4.2, the lawyer may not use the contact to intrude into confidential communications between the LLLT and the person being assisted.

⁹ WSBA Advisory Op. 202002, *supra*, at 1; see also Althoff, *supra*, 2004 *Prof. Law.* at 85-86. In *Matter of Leasure*, 2019 WL 2502400 at *2-*3 (Wn. App. June 17, 2019) (unpublished), Division I of the Court of Appeals noted that CR 11(b) only applies to Washington superior courts rather than matters in appellate courts.

¹⁰ Other facets of the 2002 amendments included CR 4.2 and CRLJ 4.2 authorizing limited scope appearances and CR 70.1 addressing notices of appearance. See Althoff, *supra*, 2004 *Prof. Law.* at 85-86.

¹¹ Different states have taken different approaches in this regard. See generally Caitlyn Parsley and Andrea K. Holder, *Could Ghostwriting Come Back to Haunt You? The Ethics of Ghostwriting Pleadings for Pro Se Litigants*, 61, No. 4 *For the Defense* 73 (Apr. 2019) (summarizing disclosure obligations nationally).

¹² Althoff, *supra*, 2004 *Prof. Law.* at 86.