

Ethically Speaking



By Charles Slanina, Esquire

Updates

Attorney Ghostwriters

“**E**thically Speaking” has dealt with the issues arising when attorneys ghostwrite pleadings in three previous columns. In May and June of 2000, a two-part column titled “In Too Deep” and a March 2004 update titled “Ghostbusters: Attorney Obligations and Liability for Assisting ‘Pro Se’ Litigants” addressed the split of authority as to whether such assistance is simply a limited-scope representation providing unbundled legal services, or a fraud on the court and the opposing party.

These issues were a recent hot topic in New Jersey after a U.S. Magistrate Judge, in a case of first impression, barred a lawyer from informally assisting a widow in an ERISA suit, finding that “undisclosed ghostwriting is not permissible under the current form of the Rules of Professional Conduct in New Jersey.” The plaintiff claimed to be proceeding *pro se*. However, the defense pointed out to the court that the plaintiff’s pleadings were too good for a *pro se* litigant. In addition, defense counsel received correspondence from the plaintiff in an envelope bearing the return address of a local law firm.

In a teleconference with the Judge, the plaintiff admitted that she was getting help from a Princeton, New Jersey, solo-practitioner, Richard Shapiro. In response, the Judge ruled that the ghostwriting violated both New Jersey’s Rules of Professional Conduct and the spirit of the Federal Court Rules. The Court noted that *pro se* litigants’ pleadings are construed liberally and afforded greater flexibility in the application of procedural rules to ensure a “fair fight.” The

Court found that this practice created a problem where the Court gave extra latitude to purported *pro se* litigant who was secretly receiving professional help. U.S. Magistrate Judge Tonia Bongiiovanni also found that undisclosed ghostwriting violates the spirit, if not the letter, of Federal Rule of Civil Procedure 11 and Local Civil Rule 11.1 which require attorneys to certify and sign their submissions. While some Federal Courts have found ghostwriting to be a *per se* violation of Rule 11, Judge Bongiiovanni declined to go that far. While noting that unbundled legal services may provide some benefits to the public and the equal administration of justice, she found that under the current rules, ghostwriting is “antithetical to the public interest.” *Delso v. Trustees for the Retirement Plan for the Hourly Employees of Merck & Co., Inc.*, 04-3009.

The issuance of this opinion was quickly followed by New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 713, issued on January 29, 2008, which concluded that an attorney’s limited scope representation of a client, including the ghostwriting of pleadings, is not prohibited if the limited assistance is simply an effort to aid someone who is financially unable to secure an attorney or if it is part of a non-profit program to provide legal assistance to people of limited means. However, the Committee went on to opine that full disclosure is required “where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward *pro se* litigants while reaping the benefits of legal assistance.” The Committee also found that disclosure is required when it is clear from the facts that the lawyer, not the *pro*

se litigant, is “effectively in control of the final form and wording of the pleadings and conduct of the litigation...”

In issuing the opinion, the Committee noted the conflict of authorities on this issue. They cited the New York State Bar Association and the Iowa Supreme Court findings that ghostwriting is unethical *per se* as a fraud on the court. However, they also noted the Los Angeles County Bar and State Bar of Arizona opinions that there is no duty to disclose a limited scope of a representation and participation based on the need to preserve client confidentiality. Conceding that the presence of the undisclosed participation of a lawyer prevents the opposing party from conducting a conflicts check, the Committee nevertheless came down in favor of ghostwriting, stating that it was trying to strike a balance between “the interests of extending legal assistance to the unrepresented, preserving confidentiality and minimizing the cost of legal representation... on one side [and] candor toward the tribunal and fairness toward opposing parties on the other.”

Pretexting

“Ethically Speaking” last dealt with pretexting in an October 2006 column titled “Investigate Your Investigators.” At that time, the hot topic was the Hewlett-Packard scandal in which the company used private investigators to spy on its own Board of Directors to determine which Director was leaking information to the press. The ousted CEO of the company referred the matter to their General Counsel who, in turn, contracted with security experts. Those security experts hired private investigators who engaged in the practice of “pretexting” in which

calls were made to phone companies using the Directors' social security numbers and other personal information to obtain phone records.

Attorney pretexting has recently hit the news again. Two Massachusetts lawyers were disbarred in February 2008 for this practice. Massachusetts attorney Gary C. Crossen was admitted to the Bar in 1977 and worked as an Assistant District Attorney in the Organized Crime Division in Suffolk County. He later joined the New England Organized Crime Drug Enforcement Task Force in the Boston office of the U.S. Attorney where he became Chief of the General Crimes Unit and of the Criminal Division. In that capacity, he handled criminal cases, supervised undercover investigations, court-ordered wire taps and one-party consent tape recordings before leaving for private practice. Kevin P. Curry, also disbarred, was a Boston civil litigator. A third attorney, 80-year-old Richard K. Donahue, a former Chairman of the Board of Bar Overseers, former assistant to President Kennedy and a one-time president of Nike, Inc., accepted a three-year suspension from practicing law.

All three represented unsuccessful litigants in a dispute involving a chain of family supermarkets. In a scathing opinion, the court found that Curry's role was that of instigator of a baseless plan to discredit the presiding judge. He had not represented the unsuccessful litigants. During the litigation, he later insinuated himself into that litigation per the opinion by "positing salacious allegations against Judge Lopez for which he had no support."

Apparently relying on his law enforcement background, attorney Crossen helped set up a complicated sting operation as a "willing participant, and at times a driving force, in a web of false, deceptive, and threatening behavior designed to impugn the integrity of a sitting judge."

In an elaborate subterfuge, attorneys gathered public documents relating to the judge's law clerk, his neighbors, his parents, and their neighbors. They then used the pretext of contacting the law clerk by telephone posing as headhunters wishing to interview him about an "attrac-

tive opportunity" for employment as an attorney. At their first meeting, the private investigator working for the attorneys told the law clerk that he was recruiting for an in-house counsel position for a corporation with offices in Bermuda, New York and Boston. He asked the law clerk for a writing sample, steering him to produce a copy of the judge's decision in the supermarket litigation. The law clerk was queried about his role in drafting that decision and the extent of the judge's reviews and edits of that decision. The law clerk was also questioned about the judge, her husband, and her husband's businesses.

A second interview was set up in Nova Scotia, allegedly because Nova Scotia, unlike Massachusetts, permits one-party consent recordings. At the second meeting, attorney Curry posed as an employee of a fictitious British company offering employment. Business cards were phoned, but reflected working fax and telephone numbers complete with a telephone answerer with a British accent.

At the second interview, the attorney and investigator followed a pre-planned script in which they attempted to elicit from the law clerk the judge's deliberative process in the supermarket litigation and to elicit potentially damaging personal information about her.

According to the testimony of Curry, the law clerk told them that the judge was biased and predisposed to find for the plaintiffs and that she told him before the trial started who "the good guys and the bad guys were" and who the "winner and losers" were going to be. The law clerk, in turn, denied at the attorneys' disciplinary hearings that he had made the statements attributed to him. Nevertheless, the disciplinary hearing officer, while crediting most of the clerk's testimony, did not find his denial of the statements regarding the judge's predisposition to be creditable.

In their defense, the attorneys argued that their investigation of the judge's conduct was "proper and ethical" and that the disciplinary rules do not prohibit "pretextual" interviews as a means of getting at the truth. The Massachusetts Supreme Court, however, found that the attorneys'

conduct raised issues of "dishonesty, fraud, deceit, or misrepresentation" and "false statement[s] of law or fact" to heady levels. The Court also found the attorneys' conduct to be prejudicial to the administration of justice since they were attempting to discredit and disqualify a judge on an ongoing matter even though they had no credible evidence of any kind to suspect the judge of bias or misconduct. The Court found that the efforts to pierce the confidential communications between a former law clerk and a judge in a pending matter for the benefit of a litigant also constituted conduct prejudicial to the administration of justice. *Matter of Gary C. Crossen*, SJC-09905 (February 6, 2008) and *Matter of Kevin P. Curry*, SJC-09904 (February 6, 2008).

**"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. Additional information about the author is available at www.delawgroup.com. ☒*

CLE Videos

In addition to live seminars, the Delaware State Bar Association presents accredited Continuing Legal Education videos every weekday.

Schedule now!

Call the DSBA at (302) 658-5279 for an appointment to view one of the many recorded DSBA seminars.

A complete list of all CLE videos is available on our website at www.dsba.org.

Delaware State Bar Association
301 N. Market Street
Wilmington, DE 19801