UTAH STATE BAR

ETHICS ADVISORY OPINION COMMITTEE

OPINION NO. 08-01

MAIN OPINION

Issued April 8, 2008

1. **Issue:** May an attorney provide legal assistance to litigants appearing before a tribunal *pro se* and prepare written submissions for them without disclosing the nature or extent of such assistance? If so, what are the attorney's obligations when full representation is not undertaken?

2. **Opinion:** Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals *pro se* and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although providing limited legal help does not alter the attorney's professional responsibilities, some aspects of the representation require special attention.

3. **Background:** Our Committee has previously issued three opinions regarding limited-scope legal representation under certain circumstances regarding various aspects of limited-scope legal representation.[1] These opinions were issued under the Utah Code of Professional Responsibility that was superseded by the Utah Rules of Professional Conduct, adopted by the Utah Supreme Court in 1988 and modified in certain respects by amendments that were adopted by the Court in November 2005. A synopsis of those opinions is found in Appendix A to this Opinion. In this opinion, we undertake a more comprehensive analysis of the "behind the scenes" limited representation under the current Utah rules.

4. Recently, the ABA Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 07-446 (May 5, 2007), comprehensively discussing assistance to *pro se* parties and expressly superseding ABA Informal Opinion 1414, which disapproved certain undisclosed assistance of *pro se* litigants under the prior Code of Professional Conduct. ABA Opinion 07-446 concluded that under the Model Rules of Professional Conduct, "a lawyer may provide legal assistance to litigants appearing before tribunals '*pro se*' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance."

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[1] Utah Eth. Adv. Op 47 (Utah St. Bar 1978); Utah Eth. Adv. Op. 53 (Utah St. Bar 1979); Utah Eth. Adv. Op. 74 (Utah St. Bar 1981).

5. **Analysis:** In addressing the issue posed, we begin by recognizing that a new regulatory framework is in place nationally and in Utah that provides directly for limited-scope legal representation of clients who, for various reasons, engage lawyers for narrowly circumscribed participation in their legal affairs.

6. **Rules of Professional Conduct:** Rule 8.4(c) of the Rules of Professional Conduct prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." However, none of the comments to that rule suggest that failure to notify opposing parties and the court of limited assistance to a *pro se* party involves such dishonest conduct.[2] Recently issued ABA Formal Opinion 07-446 expressly concludes that it does not: "[W]e do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c)." Because the Rules of Professional Conduct include comments that explain and illustrate "the meaning and purpose of the rule" and "are intended as guides to interpretation,"[3] and because the ABA drafters certainly knew of Informal Opinion 1414, it would have been obvious to include this example to illustrate dishonest conduct if that had been intended.

7. More significantly, however, is that the Utah and ABA Rules of Professional Conduct include a rule that explicitly addresses the possibility of a lawyer's limiting the scope of representation of a client. Rule 1.2(c) provides: "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." Comments [6], [7] and [8] address such limited-scope representation. None of these comments suggest that "extensive undisclosed assistance" to a *pro se* party is an inappropriate limited-scope representation.

8. Similarly, Rule 1.2(d) also addresses the issue of a lawyer's assisting a client in "criminal or fraudulent" behavior and provides in relevant part: "A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent . . . ." Comments [9] through [14] provide illustrations of Rule 1.2(d) and again fail to identify that providing undisclosed assistance to a *pro se* party is assisting a client's fraud. If the drafters of the Rules of Professional Conduct had intended to impose a prohibition against undisclosed assistance to *pro se* litigants, Rule 1.2 regarding both limited-scope representation and assisting in a client's fraud would have been one place to make this clear.

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[2] Utah Rules of Professional Conduct, Rule 3.3, Candor Toward the Tribunal, addresses related issues and prohibits the lawyer from knowingly (1) making a false statement of fact or law to a tribunal, (2) failing to disclose legal authority directly adverse, and (3) offering evidence the lawyer knows to be false.

[3] *Id.*, Preamble ¶ [21].

9. The Rules of Professional Conduct further signal the appropriateness of limited-scope representation through Rule 6.5, Nonprofit and Court-Annexed Limited Legal Service Programs. This rule addresses conflicts of interest when "a lawyer . . . under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." The comments to Rule 6.5 recount the fact that such limited-scope programs exist and what they do:

> Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services such as advice or the completion of legal forms that will assist persons to address their legal problems without further representation by a lawyer . . . [through] programs, such as legal-advice hotlines, advice-only clinics or *pro se* counseling programs . . . .[4]

Here again, if the drafters of the Rules had wanted to prohibit "substantial professional assistance" that was not disclosed, Rule 6.5 would have been a likely place to include such a provision.

10. Accordingly, given the decision to expressly include and permit limited-scope representation in the Rules of Professional Conduct and the failure of the Rules and comments to state or even suggest that nondisclosure of substantial assistance to *pro se* parties is dishonest conduct, we conclude that the drafters of the current Rules did not intend to prohibit undisclosed, substantial professional assistance to *pro se* parties.

11. **Rules of Civil Procedure:** We also believe that the ethical requirements for limited-scope representation must be put in the wider context of other law and court rules. Some states have adopted rules of procedure that address how a lawyer who is providing limited legal help must act and what must be disclosed to the court. For example, Colorado Rules of Civil Procedure 11(b) provides that pleadings filed by a *pro se* party that were prepared with the drafting assistance of a lawyer must include the lawyer's name and contact information, and the assisting attorney must so advise the *pro se* party. Rule 12.040 of the Florida Family Law Rules of Procedure requires a *pro se* party who has received a lawyer's help to certify that fact in the pleadings. Rule 102(a)(1) of the Wyoming Rules for District Court provides that the appearance of an attorney's name on the pleadings indicates that the attorney assisted in their preparation does not constitute an appearance by the attorney. Utah has no comparable court rules for attorneys who engage in ghost writing for a *pro se* client to notify the court of this assistance.

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[4] *Id.*, Rule 6.5, cmt. [1].

12. **Utah Rules on Disclosure:** Utah has addressed two circumstances in which an attorney must disclose to the tribunal the limited services provided to a client. Rule 2.4(c) of the Utah Rules of Professional Conduct uniquely permits a lawyer mediator to "prepare formal documents that memorialize and implement the agreement reached in mediation" and "with the informed consent of all parties confirmed in writing, may record or may file the documents in court, *informing the court of the mediator's limited representation* of the parties for the sole purpose of obtaining such legal approval as may be necessary."[5]

13. Rule 75 of Utah's Rules of Civil Procedure, "Limited Appearance," provides in relevant part:

> (a) An attorney acting pursuant to an agreement with a party for limited representation . . . may enter an appearance limited to one or more of the following purposes:
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> (1) filing a pleading or other paper;
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> (2) acting as counsel for a specific motion;
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> (3) acting as counsel for a specific discovery procedure;
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> (4) acting as counsel for a specific hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding; or
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> (5) any other purpose with leave of the court.
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> (b) Before commencement of the limited appearance the attorney shall file a Notice of Limited Appearance signed by the attorney and the party. The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically describe in the Notice . . . . The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

Utah Rules of Civil Procedure 74, Withdrawal of Counsel, and 5, Service, both reference and provide further guidance regarding how the "limited appearance" will affect service and withdrawal.

14. The Utah Supreme Court recently approved both of these rules permitting certain limited -scope services by a lawyer and requiring notice to the court in these circumstances. The fact that the Court did not require any disclosure except in these circumstances suggests that assistance short of an actual appearance without disclosure is permitted and is not considered "dishonest conduct."

15. It is also important to consider the requirements imposed by Rule 11 of the Utah Rules of Civil Procedure to understand the context of this issue. Rule 11(a) requires

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[5] *Id.*, Rule 2.4(c) (emphasis added).

that every paper filed with the court be signed by "one attorney of record" or "if the party is not represented by an attorney, . . . by the party." Under Rule 11(b), that signature "is certifying that to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*, (1) it is not being presented for any improper purpose . . . . . (2) the claims . . . are warranted by . . . law, (3) the *allegations* . . . *have evidentiary support* . . . ."[6]

16. If an attorney drafts and appears to argue one motion only, the attorney will appear under Rule 74 and comply with Rule 11 for that portion of the case. The attorney must have performed "reasonable inquiry" to insure that the facts presented (*e.g*., in supporting affidavits) have "evidentiary support." However, where an attorney provides limited -scope representation to assist a party to draft a complaint or answer after the attorney has simply interviewed the party, but is not engaged to appear in court, it is doubtful that the attorney could sign the complaint or answer as part of a limited appearance under Rule 75 and in compliance with Rule 11, since that attorney would have made no "inquiry" beyond talking with the client. In that case, it must be the client who certifies that he has "evidentiary support" as required by Rule 11, since only the client will have investigated the facts. Where the client will alone sign the papers, there is no court rule or procedure that requires the attorney who assists with drafting to notify the court of this assistance, no rule that tells the lawyer how to inform the court of the limited legal help provided, and no rule that tells the client how to inform the court of the limited legal help received. Accordingly, the "nondisclosure" of the assistance could not reasonably be considered "dishonest conduct" prohibited by the Rules of Professional Conduct since there is no procedure provided to disclose.

17. **Other States' Rules:** Both Washington and Colorado have amended their Rule 11 provisions to provide that "in helping to draft" a pleading "the attorney certifies" that it is well-grounded in fact and law and not interposed for any improper purpose. These rules further provide that when an attorney provides drafting assistance the attorney "may rely on the otherwise self-represented persons' 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."[7] Colorado further provides that when an attorney assists a *pro se* party "in filling out pre-printed and electronically published forms that are issued through the judicial branch" the attorney is not subject to the certification or name disclosure requirements. Should the Utah Supreme Court wish to impose some requirement for lawyers who provide drafting assistance to notify the court, we would expect that it would do so by explicitly setting forth the requirement, as has been in certain other states. (We note, as a practical matter, that when attorneys at court-annexed legal clinics provide

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[6] Utah R. Civ. P. 11(b) (emphasis added).

[7] Colo. R. Civ. P. 11(b) and Wash R. Civ. P. 11(b).

advice and drafting assistance under Rule 6.5, it may be impossible for the attorney to insure that the client ultimately provides notice of that assistance to the court on the final draft papers the client eventually files.[8])

18. Moreover, even Opinion 74 approved of the drafting of one document. It was the "extensive undisclosed participation by an attorney that permits the litigant falsely to appear as being without substantial professional assistance" that was identified as improper by Utah Opinion 74 and ABA Informal Opinion 1414. The imprecision of that standard is itself troublesome. In a typical case in which a party obtains assistance in drafting a divorce petition, the party then may obtain brief advice as to service of process. Thereafter the party may need assistance with a motion for temporary orders or information about how to mark the case for a pre-trial hearing. It is not clear to this Committee at what point such a typical *pro se* party needing limited scope legal help has obtained "extensive" or "substantial" help that appears dishonest. Because over 80% of respondents and 49% of petitioners in divorce cases are unrepresented, these are the typical *pro se* parties and needed limited assistance of counsel.[9]

19. Indeed, ABA Informal Opinion 1414 did not closely analyze the Code of Professional Responsibility, but relied instead on two New York cases which "condemned" ghostwriting, both involving the same "habitual litigant who in the past five or six year . . . commenced well over thirty law suits." Various courts have condemned ghost-written pleadings and briefs based on the notion that courts give *pro se* parties greater leeway and that undisclosed legal assistance is therefore an unfair advantage. However, Professor Jona Goldschmidt has rebutted the idea of unfair advantage, noting that courts liberally construe pleadings regardless of who drafted them.[10] Likewise, ABA Formal Opinion 07-446 considered and rejected the notion that *pro se* parties are granted "unwarranted 'special treatment.'"

20. In any event, Utah law provides that "as a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any

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[8] The Utah State Courts website lists many free legal clinics that provide brief advice and help with forms. http://www.utcourts.gov/howto/legalclinics/

[9] Committee on Resources for Self-Represented Parties Strategic Planning Initiative Report to the Judicial Council, p. 5 (July 25, 2006) reporting statistics from 2005.At: http://www.utcourts.gov/resources/reports: 2006 Survey of Self-Represented Parties in the Utah State Courts.pdf

[10] Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URBAN L.J. 1145 (2002).

qualified member of the bar."[11] While a judge may give an unrepresented party leniency, this is not required under Utah law. Therefore, the "unfair advantage" that *pro se* parties ostensibly gain through the court's liberal construction of their pleading—one of the bases for prohibiting "ghost-writing"—does not appear to apply under Utah law.

21. Finally, we note that the Utah State Courts website explicitly describes "limited legal help" on its Self-Help Resources page, indicating that an attorney might "only advise" or "help draft" or "review a draft" or "any combination of these kinds of services."[12]

22. **Judicial Precedent:** The Committee is not aware of any Utah Supreme Court opinion that addresses the questions presented here.

23. It is important, however, to take account of *Duran v. Carris*,[13] a Tenth Circuit opinion. In this case, a New Mexico lawyer who had represented the plaintiff/appellant in the trial court, was criticized for ghost-writing the brief appealing the dismissal of the case for failure to state a claim. This *per curiam* opinion relied on Rule 11 of the Federal Rules of Civil Procedure, which requires pleadings be signed, Rule 3.3 of the Rules of Professional Conduct, which requires candor to the tribunal, Rule 8.4 of the Rules of Professional Conduct, which prohibits conduct involving misrepresentation, and case law that accords *pro se* parties leniency. The Tenth Circuit opinion states:

> [The attorney's] actions in providing substantial legal assistance to [the client] . . . without entering an appearance in this case not only affords [the client] . . . the benefit of this court's liberal construction of *pro se* pleadings . . . but also inappropriately shields [the attorney] . . . from responsibility and accountability for his actions and counsel.[14]

The opinion holds as follows:

> We recognize that, as of yet, we have not defined what kinds of legal advice given by an attorney amounts to "substantial" assistance that must be disclosed to the court. Today, we provide some guidance on the matter. *We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledge by signature*. In fact, we

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[11] *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983).

[12] http://www.utcourts.gov/howto/legalassist/

[13] 238 F.3d 1268 (10th Cir. 2001).

[14] *Id.* at 1271-72.

> agree with the New York City Bar's ethics opinion that "an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing." . . . *We hold today, however, than any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved*.[15]

24. Certainly, Utah lawyers who appear before Tenth Circuit must be aware of this opinion and comply with it. A Utah lawyer who writes a brief for a *pro se* party must acknowledge this participation by signing the brief filed with the Tenth Circuit.

25. However, it is not clear how far the *Duran v. Carris* opinion extends beyond its own rather unusual facts. First, the Tenth Circuit opinion regarding a New Mexico lawyer's failure to comply with ethical rules that apply to him does not bind the Utah Supreme Court in its interpretation of the Utah Rules of Professional Conduct. Second, the lawyer's conduct in failing to sign a brief suggests malfeasance that providing limited legal help in the trial court typically does not. Here, the lawyer wrote a brief for an appeal from a dismissal for failure to state a claim, yet declined to sign the brief. This suggests that the lawyer was intentionally assisting a client to pursue a cause of action knowing it was frivolous, but declining to appear to avoid sanction. In Utah, Rule of Professional Conduct 3.3 requires candor and prohibits a lawyer from failing to disclose to a tribunal legal authority the lawyer knows is directly adverse to his position. And Rule 3.1 prohibits a lawyer from bringing any proceeding "unless there is a basis in law and fact for doing so that is not frivolous." The facts of *Duran v. Carris* suggest that the attorney was avoiding being charged with violating those provisions by declining to sign the brief.

26. There are many reasons other than dishonesty and malfeasance that an attorney might provide extensive assistance with a trial-court matter, yet would not sign a pleading and enter appearance as counsel. Initially, the attorney may interview the client, advise about the claims that are well founded, and draft a complaint. Yet, unless the attorney further investigates the facts and accepts the case for full representation, the attorney would not enter an appearance. The attorney may provide further assistance with service, with discovery, and with trial preparation either on a *pro bono* or reduced-fee basis to permit the client to prosecute his claim without paying for full-service representation. The *Duran v. Carris* case should not be extended to prohibit such assistance in the absence of the attorney's intentionally aiding a client to bring a case the lawyer believes is frivolous or without legal foundation.

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[15] *Id.* at 1273 (emphasis added). The Tenth Circuit court did not, however, sanction the lawyer but resolved that issue as follows: "Therefore, we admonish [the lawyer] . . . that this behavior will not be tolerated by this court, and future violations of this admonition will result in the possible imposition of sanctions."

27. We agree that attorneys who intentionally assist *pro se* parties to file frivolous cases can be sanctioned for this behavior under Rule 8.4. Similarly, an attorney cannot act as a mere scrivener and draft a complaint (or a brief) at the client's behest without forming a professional opinion that a cause of action has a basis in law and fact based on the client's description of the facts. Such negligent conduct could be sanctioned as incompetence in interviewing, analyzing and advising the client. Indeed, both the *Duran v. Carris* case and early New York cases[16] that condemned ghost-writing for a frequent litigant suggest that the misconduct is in helping a litigant bring a frivolous matter, not providing extensive help to a *pro se* litigant who has a meritorious claim. This Committee believes that sanctioning such intentional wrong-doing or negligence is preferable to a sweeping prohibition of extensive assistance to *pro se* parties.

28. For all of the reasons set forth above, in the absence of any court rule addressing the issue, we conclude that it is not dishonest behavior of an attorney to provided limited legal help to a *pro se* litigant, including assistance with drafting of pleadings, without disclosing the fact of that assistance to the court.

29. **Disclosures Required for Limited Legal Help:** As set forth above, we conclude that the only disclosures that an attorney must make to the court (or to other parties) are disclosures expressly required either by court rule or the Rules of Professional Conduct. Disclosure to the court is required where a lawyer-mediator prepares documents to file in court after a successful mediation.[17] Similarly, Rule 75 of the Utah Rules of Civil Procedure sets forth requirements, including that the lawyer enter an appearance in accordance with Rules 11, when the attorney makes a limited appearance.

30. Rule 1.2(c) of the Utah Rules of Professional Conduct does require that the attorney obtain "informed consent" from the client prior to providing a limited scope of representation, and this requires appropriate disclosures to the client. The Rules define "informed consent" as agreement "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[18] Exactly what must be explained to a client prior to providing limited-scope assistance—the information that will permit the client to make an informed decision whether to proceed in this way, including alternative courses the client could consider—is, of necessity, highly fact-intensive and case-specific. Increasingly, books and articles and web-posted reports provide advice and suggested forms for undertaking limited representation.

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[16] See ¶ 41, App. A.

[17] Utah R. Prof. Conduct 2.4(c).

[18] *Id.*, Rule 1.0(f).

31. We note one important limit on securing client agreement to limited representation. It is only permitted "if the limitation is reasonable under the circumstances." A comment illustrates this limitation:

> If . . . a client's objective is limited to securing general information the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.[19]

Obviously there are other circumstances in which a proposed limitation would not be "reasonable" given the nature of the case.

32. Providing unbundled legal services does require particular attention and care to various other ethical rules. Comment [8] to Rule 1.2 instructs that "all agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law.

33. First, Rule 1.1 expressly insists that the legal services be "competent." As Opinion 330 of the District of Columbia Bar states: "In other words, the scope of the services may be limited but their quality may not. When hired to diagnose legal problems, an attorney providing services under an unbundling arrangement must be as thorough in identifying legal issues as an attorney who intends to continue with a case through its conclusion." In providing limited legal help, an attorney must nevertheless alert the client to any legal problem the attorney discovers, even if outside the scope of the representation, according.[20] We have previously opined that an attorney does not perform competently if the lawyer is merely a scrivener.

> Various state bars have addressed the limitation on legal services where the lawyer provides only legal analysis and drafting services. We can find no judicial or ethics opinion that approves drafting services alone; the drafting services are always an adjunct to analysis and advice provided by the lawyer. Finally, best practices in "unbundled" legal services are addressed in various books and articles, and we can find none that suggest drafting services alone are adequate or appropriate . . . . It is difficult to understand how a lawyer could appropriately assist an individual to file *pro se* divorce pleadings without advising the party when his claims appear to lack any legal support and without advising the party regarding the evidentiary

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[19] *Id.*, Rule 1.2(c), cmt. [7].

[20] *See also* Los Angeles Co. Bar Assoc. Eth. Op. 502.

> support the party will need to support certain contentions. In the absence of any court rules that address the propriety of ghostwritten pleadings, this Committee concludes that, at a minimum, a lawyer may not limit her services to conforming a party's pleadings to proper form without providing analysis and advice to the party seeking such advice.[21]

Accordingly, prior to drafting a paper for a client, the lawyer must interview the client sufficiently and know the law adequately to conclude that the paper is warranted based on the facts as reported by the client.

34. Other duties that are not diminished by the limited legal service agreement are the duties of diligence, Rule 1.3, the duty to communicate, Rule 1.4, and the duty of confidentiality, Rules 1.6 and 1.8.

35. Rule 6.5 alters slightly the lawyer's duty of loyalty. It applies when limited legal services are rendered as part of a court-annexed or nonprofit program. In this situation, the lawyer is prohibited from providing the limited legal services only if the lawyer "knows" that there is a personal "conflict of interest" under Rule 1.7 or Rule 1.9(a) or "knows" that another lawyer in the lawyer's firm has a conflict of interest that would disqualify the firm under Rule 1.10.

36. Another aspect of limited representation that warrants comment is Rule 4.2, which prohibits communicating with persons a lawyer "knows" to be represented "in the matter" without that lawyer's permission. When the lawyer has entered a limited appearance in court, Utah Rule of Civil Procedure Rule 75 governs and explicitly provides that "the party remains responsible for all matters not specifically described in the Notice" of limited appearance. When there is no appearance in the court, the matter is less clear. District of Columbia Bar Opinion 330 concludes that:

> Even if the lawyer has reason to know that the *pro se* litigant is receiving some behind-the-scenes legal help, it would be unduly onerous to place the burden on that lawyer to ascertain the scope and nature of that involvement. In such a situation, opposing counsel acts reasonably in proceeding as if the opposing party is not represented, at least until informed otherwise.

This seems a sensible approach.

37. **Conclusion:** It is not dishonest conduct to provide extensive undisclosed legal help to a *pro se* party, including the preparation of various pleadings for the client, unless a court rule or ethical rule explicitly requires disclosure. Undertaking to provide

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[21] Utah Eth. Adv. Op. 02-10, 2002 WL 31922503 (Utah St. Bar) (references omitted).

limited legal help does not generally alter any other aspect of the attorney's professional responsibilities to the client.

38. To the extent that our previous Opinions 47, 53 and 74 are inconsistent with this opinion, they are superseded.

APPENDIX A

1. In 1978, Utah Ethics Opinion 47 dealt with a lawyer's providing "legal advice, consultation, and assistance to inmates regarding the preparation of initial pleadings in civil matters," including preparing "complaints, summons, affidavits of impecuniosity, and motions for leave to proceed in forma pauperis," after which the inmates would proceed *pro se*. The opinion concluded there was "nothing inherent in the proposal that is unethical" and discussed the need fully to inform the inmate of the limited nature of the representation and the need to warn the State of Utah (which would pay for the lawyer's services) that the State could have no influence over the services.

2. A year later, Opinion No. 53 similarly approved of a lawyer's providing "limited legal services to persons wishing to handle their own divorces," where the attorney interviewed the client and provided the client with a manual of instructions and forms to use. The opinion referenced and distinguished this "more limited" involvement of the lawyer from the situation presented and disapproved of in the then recently issued ABA Ethics Committee Informal Opinion 1414 (1978). ABA Opinion 1414 involved a lawyer's assisting in the preparation of jury instructions and memoranda for the client and attending the trial to advise the litigant on procedural matters. The ABA opinion concluded that the litigant was not in fact proceeding *pro se* and, therefore, the lawyer's conduct constituted a misrepresentation as to his undisclosed involvement and ran afoul of the rule prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit of misrepresentation.[22]

3. In 1981, Utah Opinion No. 74 addressed "the propriety of an attorney preparing a responsive pleading showing the party to be appearing *pro se*," where the client was financially unable to pay the lawyer's retainer but wanted to have an answer filed to protect his rights. That opinion again relied on DR 1-102(A)(4) of the old Code, which prohibited "conduct involving dishonesty, fraud, deceit or misrepresentation" and adopted the reasoning and standard set forth in (but did not cite) ABA Informal Opinion No. 1414. Opinion No. 74 holds:

> There is nothing improper in an attorney giving initial advice to a litigant who is proceeding *pro se* nor is it improper for an attorney to prepare or assist in the preparation of pleadings.
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> However, *when the attorney gives any additional assistance* and the litigant continues to inform the court that he is proceeding *pro se*, he has engaged in misrepresentation by professing to be without representation. The

[22] DR 1-102(A)(4) of the ABA Code of Professional Responsibility.

> attorney who engages in this conduct is involved in the litigant's misrepresentation contrary to DR 1-102(A)(4) . . . .[23]

The opinion goes on to advise that determining whether the attorney's conduct is proper or improper "will depend upon the particular facts" and:

> The extent of the attorney's participation . . . is the determining factor. *Minimal participation by the attorney is not improper*. However, *extensive undisclosed participation by an attorney that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above*.[24]

4. Opinion 74 approved of the drafting of one document. It was the "extensive undisclosed participation by an attorney that permits the litigant falsely to appear as being without substantial professional assistance" that was identified as improper this opinion and ABA Informal Opinion 1414. The imprecision of that standard is itself troublesome. In a typical case in which a party obtains assistance in drafting a divorce petition, for example, the party then may obtain brief advice as to service of process. Thereafter, the party may need assistance with a motion for temporary orders or information about how to mark the case for a pre-trial hearing. It is not clear to us at what point such a typical *pro se* party's needing limited-scope legal help has obtained "extensive" or "substantial" help that appears dishonest. Because over 80% of respondents and 49% of petitioners in divorce cases are unrepresented, these are the typical *pro se* parties and needed limited assistance of counsel.[25]

5. Indeed, ABA Informal Opinion 1414 did not closely analyze the Code of Professional Responsibility, but relied instead on two New York cases which "condemned" ghostwriting, both involving the same "habitual litigant who in the past five or six year . . . commenced well over thirty law suits." Various courts have condemned ghost-written pleadings and briefs based on the notion that courts give *pro se* parties greater leeway and that undisclosed legal assistance is therefore an unfair

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[23] Utah Ethics Op. 74, at 1-2 (emphasis added).

[24] *Id.* at 2 (emphasis added). The standards set forth: "extensive undisclosed participation by an attorney that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above." This is an exact, though unattributed quote of ABA Informal Opinion No. 1414.

[25] Committee on Resources for Self-Represented Parties Strategic Planning initiative Report to the Judicial Council, at 5 (July 25, 2006) (reporting statistics from 2004). http://www.utcourts.gov/resources/reports/Self%20Represented%20Litigants%20Strategic%20Plan%202006.pdf

advantage. However, Professor Jona Goldschmidt has rebutted the idea of unfair advantage, noting that courts liberally construe pleadings regardless of who drafted them.[26] Likewise, ABA Formal Opinion 07-446 considered and rejected the notion that *pro se* parties are granted "unwarranted 'special treatment.'"

In 1983 the ABA replaced its Model Code of Professional Responsibility with the entirely re-conceptualized Model Rules of Professional Conduct. In 1988, Utah likewise replaced the Utah Code of Professional Responsibility with the Utah Rules of Professional Conduct based on the 1983 ABA Model Rules. The ABA Model Rules received a comprehensive retooling in the ABA's "Ethics 2000" project, and the Utah Rules were modified in 2005 to adopt many of the changes made to the ABA Model Rules.

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[26] Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URBAN L.J. 1145 (2002).