Utah Ethics Opinions

2008.

08-01d. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 08-01d

DISSENT

Issued April 8, 2008

1. Dissents from a Utah Ethics Advisory Opinion are understandably rare because of the harmonious working relationship among Ethics Committee members and the shared objective: to provide well-researched and analyzed ethics opinions upon which Utah State Bar members can hopefully rely. It is, therefore, with some trepidation that I dissent from the main opinion. In my view, the main opinion is logically inconsistent with a Tenth Circuit decision that binds Utah lawyers in federal court; incompatible with judicial and ethics opinions in other jurisdictions; and potentially harmful to what I think should be the overriding ideal of all ethics opinions - to ensure justice for clients.

2. To begin, I believe the Committee's framing of the issue is overly broad. As the Opinion states the issue: "May an attorney provide legal assistance to litigants appearing before tribunals *pro se* and prepare written submissions for them without disclosing the nature or extent of such assistance?" The Committee's answer to that question is an unqualified "yes." Yet, I believe the Committee's categorical all-or-nothing, black-or-white answer, inclusive of "substantial" with "insubstantial" or quite limited legal services, is ill-advised and contrary to law. To me, the issue is not whether "insubstantial," unbundled legal assistance for *pro se* litigants is permissible and ethical. No one has ever disagreed that such assistance is permissible, ethical and encouraged. In fact, Rule 1.2(c) of the Utah Rules of Professional Conduct provides for this type of limited representation.(fn1) Instead, the issue for me, and most jurisdictions that analyze the issue, is whether undisclosed and "substantial" legal assistance, commonly called ghost-lawyering is ethical. Admittedly, the difference between "substantial and "insubstantial" can, in some circumstances, be ambiguous. Presumably, no one would argue that ghost-written appellate briefs or individualized complaints are "insubstantial" - or, to the contrary, that boiler-plate forms available to anyone on the Utah courts web-site (I assume written by lawyers) run afoul of current prohibitions against ghost-lawyering.

3. As described in Nevada Formal Opinion No. 34, issued in 2006,"Ghost-lawyering occurs when a member of the bar gives *substantial* legal assistance, by drafting or otherwise, to a party ostensibly appearing *pro se*, with the lawyer's actual or constructive knowledge that the legal assistance will not be disclosed to the court."(fn2)

4. Citing the same cases and law review articles as does our Committee in Opinion No. 74, the Nevada Opinion, as initially issued, came to an opposite result, concluding, as do I, that "ghost-lawyering is unethical unless the ghost-lawyer assistance and identity are disclosed to the court by the signature of the ghost-lawyer under Rule 11 [the same as Rule 11 of the Utah Rules of Civil Procedure] upon every paper filed with the court for which the 'ghost-lawyer' gave 'substantial assistance' to the *pro se* litigant by drafting or otherwise."(fn3)

5. From the outset, there appears to be some disparity of perception between the main opinion and me over the potential harm in ghost-lawyering. The Committee writes, "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." The Committee further opines, "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."

6. The underlying rationale for the main opinion from this observation appears to be that needed legal assistance in domestic relations cases will be unavailable if disclosure of ghost-lawyers is ethically mandated; and that Utah law presumes there is no "unfair advantage" to ghost-represented litigants. To me, there are at least two insurmountable difficulties with such rationale. First, the proper answer to an ethical issue is not based upon a result-oriented quantity test. Whether more or fewer indigents will receive legal assistance if ghost-lawyers are disclosed to opposing parties is not determinative of the ethical propriety in failing to disclose. Second, Utah courts, as the opinion notes, may not be "required" to defer to ghost-written pleadings and putatively *pro se* litigants, but that observation does not answer the underlying issue - whether the courts, in fact, do give deference to ghost-written pleadings, or, more fundamentally, whether they should, or if so, under what circumstances. o my knowledge, no court or ethics opinion has ever suggested that the line between "limited" or "substantial" legal

assistance from ghost-lawyers is easily drawn. In fact, the Tenth Circuit in *Duran v. Carris*,(fn4) acknowledges that the difference is problematic. That does not mean, however, there is no difference or that there is no dishonesty or harm in *substantial* legal assistance from undisclosed ghost-lawyers.

7. A case in which I have intimate familiarity solidified my view that *substantial* ghost-lawyering can indeed be harmful, and is unethical. In the case, a *pro se* petition in a domestic-relations matter seeking comprehensive and unusual remedies, inclusive of child custody and relocation for the children, was filed. It would have been obvious to anyone that ghost-lawyering was involved because the petition included statutory citations, sophisticated analysis and legalese, yet the petitioner was not only unsophisticated in legalese, but spoke no English. The respondent was also unsophisticated and only moderately fluent in English. Initially, the respondent was also *pro se*, but fortunately secured the assistance of *pro bono* counsel, who filed an entry of appearance. With the help of respondent's *pro bono* counsel, the identity of petitioner's ghost-lawyers eventually was disclosed. Without respondent's *pro bono* counsel, I doubt if petitioner's "ghost-lawyers" would ever have been disclosed.

8. Yet, by the time respondent secured *pro bono* counsel, rather draconian orders, based upon largely fabricated, ghost-written pleadings, had already been imposed against respondent. Even after respondent secured *pro bono* counsel, attempted communication between respondent's *pro bono* counsel and the fictitious *pro se* litigant to settle, resolve or even identify certain issues was impossible. Letters from respondent's counsel were written to the *pro se* litigant (undoubtedly because the identity of petitioner's ghost-lawyers was then unknown), discussing aspects of the case. But, being unable to read or understand English, much less legal jargon, petitioner did not comprehend the substance or procedure discussed by respondent's counsel in his letters, nor the remedies sought by her ghost-lawyers in the so-called *pro se* petition. Had the respondent, who ultimately prevailed in the matter some years later, not been fortunate enough to secure *pro bono* counsel, he and the parties' children would have been severely and permanently disadvantaged. Such a result would have contravened what the court itself concluded was the just result after a lengthy trial where respondent was represented by his *pro bono* counsel, and petitioner was represented by her formerly undisclosed ghost-lawyers.

9. Some have suggested that legal assistance for indigents would be impaired if ghost-lawyering were not permitted. To me, the dispositive answer to such an assertion is that the legitimate and necessary points of fact and law to be made in litigation can certainly involve indigents on both sides. Facilitating the first indigent-litigant who successfully contacts a ghost-lawyer may indeed provide impetus for more petitions and complaints from the poor in need of legal services, but can be detrimental to justice for all, which should be our overriding concern.

10. I am also troubled by the Committee's analysis of *Duran v. Carris*, the Tenth Circuit case directly on point. The Committee quotes a portion of *Duran*, as follows:

We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we 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.*(fn5)

11. The main opinion acknowledges that in federal court, Utah lawyers must comply with *Duran*. This, in itself, creates a problem for Utah lawyers because the main opinion, presumptively applicable to Utah lawyers in Utah courts, is at odds with federal law. To minimize that conflict, the Committee maintains that it is not clear how far *Duran* extends beyond its facts. The Committee then implies that *Duran* is limited to ghost-written appellate briefs.

12. This is not an accurate reading of *Duran*. Under Federal Rule of Civil Procedure 11(b), the *Duran* Court concluded that applicable "Ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name. Besides the imprimatur of professional competence such a signature carries, its absence *requires* us to construe matters differently for the litigant, as we *give* pro se *litigants liberal treatment, precisely because they do not have lawyers.*"(fn6) Here again, the main opinion appears to conflict with federal law. The main opinion asserts that under Utah law, Utah courts are not required to give deference to *pro se* litigants, even though, in my experience, they do. To the contrary, under federal law, as *Duran* explains, such deference is "required."

13. More significantly, it is beyond dispute that "giving of . . . advice," which the Tenth Circuit condemns when it is "substantial," unless there is a "signing of his [the attorney's] name," is hardly limited to writing appellate briefs. The Tenth Circuit acknowledges that the definition of "substantial" legal assistance that must be disclosed under Rule 11 is problematic. I emphasize, however, that *Duran's* holding does not turn on the fact that the ghost-written document was an appellate brief, rather than some other document. Instead, the Court concluded:

It is disingenuous for Mr. Duran and Mr. Snow to argue that ghost writing [not only of briefs but any substantial submission] represents a positive contribution such as reduced fees or *pro bono* representation. Either of these kinds of professional representation are analogous to the concept of rescue in the field of torts. A lawyer usually has no obligation to provide reduce fee or *pro bono* representation; that is a matter of conscience and professionalism. *Once either kind of representation is undertaken, however, it must be undertaken competently and ethically or liability will attach to its provider*.(fn7)

14. In the Tenth Circuit, the ghost-lawyer violates the ethical test when the ghost-lawyering is "substantial," which is obviously not limited to brief writing. The *Duran* Court highlighted that its decision is consistent with decisions in many other jurisdictions. Such decisions condemn ghost-writing of documents involving *any* substantial attorney assistance, such as "pleadings," "complaints and other documents." *Duran* holds that such ghost-writing "constitutes *a misrepresentation to this court* by litigant and attorney."(fn8)

15. Because *Duran* has not been overturned, the Goldschmidt law review article the main opinion references, which rebuts claimed unfair advantage of ghost-lawyering, is not controlling or even highly relevant. Notwithstanding any law review article, the Tenth Circuit opinion is binding upon Utah lawyers practicing in Utah federal courts. Likewise significant to this dissent, the Tenth Circuit opinion has been followed by other federal courts.

16. The most recent reported federal case on point is *Delso v. Trustees for the Retirement Plan*.(fn9) The *Delso* Court acknowledges that there is currently "a nationwide discussion regarding unbundled legal services, including ghostwriting, [that] has only burgeoned within the past decade."(fn10) The Court further notes that "Proponents of unbundled legal services [such as our Committee] have touted its benefits, including increased access to justice for the poor, efficiency in *pro se* matters, enfranchisement of clients and opportunities for attorneys."(fn11) The Court even acknowledges the Goldschmidt article, as does the main opinion.

17. Nonetheless, the Court explains the significant downsides of "Ghost-lawyering, including unfair advantage to *pro se* litigants." The *Delso* Court examines the public policy of ghost-writing, quoting from other courts that conclude that ghost-writing, even if deemed ethical, "does little for the judicial process, inasmuch as *pro se* litigants are ill equipped to prosecute the complex issues raised without continued legal assistance."(fn12) That observation certainly reflects my experience. Aside from such practical difficulties, the *Delso* Court primarily relies on ethical rules of candor. *Delso* quotes *Duran* that "if neither a ghostwriting attorney nor her *pro se* litigant client disclose the fact that any pleadings ostensibly filed by a self-represented litigant were actually drafted by the attorney, this could itself violate the duty of candor."(fn13) *Delso* then cites to multiple courts that have held "ghostwriting of pleadings was violative of Fed. R. Civ. P. 11."(fn14)

18. I am, therefore, troubled with the anomaly that under the main opinion, ghost-writing would remain unethical for Utah lawyers involving *pro se* litigants in Utah federal courts, yet permissible in Utah state courts. I do not believe such a dichotomy is advisable. The main opinion further notes that Colorado, Florida and Wyoming all have rules mandating disclosure of substantial counsel assistance, but "Utah has no comparable rules for attorneys who engage in ghost-writing for a *pro se* litigant to notify the court of this assistance." From this and similar observations, the main opinion opines that, "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 without disclosing the fact of that assistance to the court."

19. This reasoning runs afoul of a recent Utah Supreme Court decision as well as logical thinking. In *Sorensen v. Barbuto*,(fn15) an attending physician, Dr. Barbuto, claimed that his *ex parte* communications with opposing counsel in plaintiff Sorensen's personal injury actions were permissible because they were not proscribed by an explicit ethical rule. The Utah Supreme Court disagreed and vacated Utah Ethics Advisory Opinion No. 99-03, which had concluded such communication was permissible because, "No ethical rule prohibits *ex parte* contact with plaintiff's treating physician when plaintiff's physical condition is at issue."(fn16) Like the main opinion here, Utah Opinion No. 99-03 was premised on the absence of an explicit ethical rule, concluding that such absence therefore permitted *ex parte* communications between opposing counsel and physicians. Nonetheless, the Supreme Court held: "Because it would be illogical to permit attorneys to lead physicians into breaching their duty of confidentiality, we vacate Utah State Bar Ethics Advisory Opinion Committee Opinion 99-03 and instruct lawyers to confine their contact and communications with a physician or therapist who treated their adversary to formal discovery methods."(fn17)

20. For the Committee to conclude here that Utah lawyers are not precluded under present Rule 11 from ghost-lawyering, irrespective of Utah's lack of explicit rules that parallel those in Colorado, Wyoming and Florida, is illogical, runs afoul of *Sorensen's* analysis and disregards the Tenth Circuit holding in *Duran*. Besides Rule 11, Rule 3.4 of the Utah Rules of Professional Conduct mandates "Fairness to Opposing Party and Counsel." In the Utah

domestic-relations case referenced above, it was hardly "fair" to the ultimately prevailing respondent that he had to endure the barrage and practical adverse impact of ghost-lawyer pleadings ostensibly filed as *pro se*.

21. Nevada Ethics Opinion 34, issued in December 2006, came to the same conclusion as I did. The Nevada opinion acknowledges "differing views" on ghost-lawyering, also citing Jona Goldschmidt, "In Defense of Ghostwriting." That committee nonetheless concluded that "it is unethical to act as a 'ghost-lawyer' unless both the ghost-lawyer assistance and identity are disclosed to the court by the signature of the ghost-lawyer under Rule 11 upon every paper filed with the court for which the ghost-lawyer gave substantial assistance to the *pro se* litigant or otherwise."(fn18)

22. While it remains to be seen whether the Nevada ethics opinion will be revised, the opinion, as issued, cited many other state bar opinions in support of its conclusion, which opinions stand to this day.(fn19) Not all of these opinions were issued before the ABA undertook a comprehensive retooling of its Model Rules in 2000.

23. I believe it also important to acknowledge that the Nevada Ethics Committee, while in agreement with *Duran*, is not bound by a Tenth Circuit decision, nor are Utah lawyers directly affected by a Nevada opinion, because Nevada is a Ninth Circuit state. However, we in Utah do not have the option of disregarding an applicable Tenth Circuit opinion. Consistent with *Duran*, the Nevada Ethics Committee initially concluded that "it is an act of misrepresentation to the court that violates the attorney's duty of candor to the courts as required by the Nevada Rule of Professional Conduct 3.3." This Nevada rule is identical to the Utah Rule of Professional Conduct, 3.3, which states, "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . ."

24. In summary, the main opinion concludes, "It is not dishonest conduct to provide even 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." I disagree. For the reasons explained above, I agree with the Tenth Circuit that ghost-lawyering of *any* substantial work product submitted to a Utah court as *pro se* is dishonest and unethical. No further amendment of Utah's present Rules of Professional Conduct is necessary to preclude such unethical conduct.

This dissent is subscribed to by Committee Member Maxwell A. Miller and two other Committee Members.

Footnotes

1. Rule 1.2(c) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

2. State Bar of Nev., Standing Comm. Ethics & Prof. Resp., Formal Op. 34, at 1 (Dec. 11, 2006) (hereinafter "Nevada Opinion"). On October 24, 2007, the Nevada Standing Committee on Ethics and Professional Responsibility requested that this opinion be noted as "temporarily withdrawn," to permit "further deliberation and possible revision in light of recent developments." The Nevada Opinion includes the ABA references in the Committee's main opinion although, as of March 2008, no changes in the Nevada opinion had been made. Whatever the ultimate revision of the Nevada opinion, if any, I believe the Nevada Ethics Committee "got it right" the first time. The Nevada Opinion as initially written is consistent with what I find is the virtually *unanimous* view of federal courts, significantly including the Tenth Circuit, as discussed in this dissent.

3. Nevada Opinion 34, at 1.

4. 238 F.3d 1268 (10th Cir. 2001).

5. *Id.* at 1273. (emphasis added).

6. *Id.* at 1272 (emphasis added)

7. *Id.* (emphasis added).

8. *Id.* (emphasis added)

9. 2007 U.S. Dist. LEXIS 16643 (Mar. 5, 2007)

10. *Id.* at *37.

11. *Id.* at *38.

12. *Id.* at *52, quoting 2001 U.S. Dist. LEXIS 13269.

13. *Id.* at *45, quoting Duran, 283 F.3d at 1271.

14. *Id.*

15. 2008 UT 8.

16. *Id.* at ¶ 26, citing Utah Ethics Adv. Op. 99-03, 1999 WL 196999 (Utah St. Bar).

17. *Id.* at ¶ 27.

18. Nev. Eth. Op. 34, at 6.

19. *Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971); N.Y.

State Bar Comm. Prof. Ethics, Op. 613 (Sept. 24, 1990); Conn. Ethics Op. 98-5 (Jan. 30, 1998); Iowa Ethics Op. 97-31 (June 5, 1997); Okla. Bar Ethics Op. 2001-4 (2001).