

Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

OPINION 713

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**Duties of Attorneys Providing
Limited Legal Assistance or
“Unbundled” Legal Services to
Pro Se Litigants**

A recent United States Magistrate decision has raised many questions and uncertainties concerning the degree and type of assistance that may be provided to *pro se* litigants by attorneys, and the conditions under which such assistance may be given. *Delso v. Trustees for the Retirement Plan for the Hourly Employees of Merck & Co., Inc.*, 2007 WL 766349 (D.N.J. March 6, 2007) (hereafter “*Delso*”). The decision concerns itself with an attorney’s “ghostwriting” of pleadings for an unrepresented litigant. This Advisory Committee on Professional Ethics Opinion provides clarification of how New Jersey ethical rules relate to the provision of legal assistance to unrepresented litigants.

We note at the outset “ghostwriting” has no precise definition, nor does the word appear anywhere in New Jersey court or ethics rules. Our analysis addresses activities such as drafting of pleadings and other forms of assistance to unrepresented parties.

New Jersey’s *Rules of Professional Conduct* expressly contemplate and authorize legal representation that is limited to a particular activity or group of activities. *RPC* 1.2(c) permits such limited representation if it is “reasonable under the circumstances and the client gives informed consent.” Such limited representation has sometimes been termed “unbundled” legal assistance, connoting the provision of some services but not others.

In its Ethics 2000 process, the American Bar Association (ABA) recommended to the states a variety of changes in the Model Rules of Professional Conduct. *See* www.abanet.org; Ethics 2000 Commission. Of considerable interest to the ABA were modifications with the potential for increasing the amount and forms of assistance available to people of limited means. *Ibid.* New Jersey adopted most of these proposed changes, including an amendment to *RPC* 1.2(c) and a new *RPC* 6.5, the latter expressly embracing “short-term limited legal services” and relaxing the traditional *RPCs* governing conflicts, *RPC* 1.7, *RPC* 1.9 and *RPC* 1.10, essentially stipulating that those provisions apply only when a participating lawyer has actual knowledge of a conflict. These *RPCs* were at the heart of the ABA Ethics 2000 concern for expanding legal assistance to the unrepresented, and there can be no question that the New Jersey Supreme Court intended that they have applicability in New Jersey.

The informed consent requirement of *RPC* 1.2(c) emphasizes the client must understand, and agree to, the extent of the limited assistance. Such limited representation can take many forms: investigation; simple advice; brief service such as the communication of a client’s position to a third party; negotiation; aid in completing court or other forms; suggestions for how to approach pleadings, briefs, or litigation itself; drafting pleadings; and countless other variants. All are permissible under the New Jersey *RPCs*, provided the requirements of *RPC* 1.2(c) are met, and there are no violations of other applicable ethics or court rules. We turn now to analysis of other ethical strictures with some relevance to providing legal assistance to *pro se* litigants.

First, the *Delso* opinion and many ethics and court decisions nationally examine attorney obligations under *RPC* 3.3. The issue is whether, and when, candor toward the

tribunal requires an attorney to disclose the fact and nature of assistance. At the outset, we note the full applicability of *RPC* 1.6(a), the broad duty of confidentiality, to limited representation situations. *See generally In re Advisory Opinion 544*, 103 *N.J.* 399 (1986). A client's entitlement to confidentiality provides an initial thrust against disclosure where an attorney has not been retained to render full, extended representation. Consonant with this obligation to maintain confidentiality, some ethics opinions decline to find such a duty to disclose. *See* Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 502 (1999); Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 483 (1995); State Bar of Arizona Comm. on the Rules of Professional Conduct Op. 05-06 (2005).

At the opposite end of the spectrum are opinions that find that ghostwriting is unethical *per se* as a fraud upon the court, which can only be remedied by advising the court that the submitted document was prepared by or with the assistance of an attorney. *See* Iowa Supreme Court Bd. of Professional Ethics and Conduct Op. 94-35 (1995); Iowa Supreme Court Bd. of Professional Ethics and Conduct Op. 96-31 (1997); *see also* Association of the Bar of the City of New York Comm. on Professional and Judicial Ethics Op. 1987-2 (1987) (requiring disclosure of an attorney's involvement even if the attorney only assists with a one-time simple pleading); New York State Bar Ass'n Comm. on Professional Ethics Op. 613 (1990) (same).

Finally, a number of other states' opinions find a limited duty of disclosure, some using imprecise terms such as "substantial," "significant" or "extensive" to demarcate the requisite quantum of aid which would trigger the duty to disclose. *See* ABA Comm. on Ethics and Professional Responsibility Informal Op. 1414 (1978); Alaska Bar Ass'n Ethics

Comm. Op. 93-1 (1993); Connecticut Bar Ass'n Comm. on Professional Ethics Op. 98-5 (1998); Delaware State Bar Ass'n Comm. on Professional Ethics Op. 1994-2 (1994); Florida State Bar Ass'n Comm. on Professional Ethics Op. 79-7 (2000); Massachusetts Bar Ass'n Comm. on Professional Ethics Op. 98-1 (1998); New Hampshire Bar Ass'n Ethics Comm., *Unbundled Services -- Assisting the Pro se Litigant* (1999); Kentucky Bar Ass'n Op. E-343 (1991); Utah State Bar Ethics Comm. Op. 74 (1981). This view has been repeated in various courts as well. *See, e.g., Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001) (drafting an appellate brief is substantial assistance *per se*); *Ricotta v. State of California*, 4 F.Supp. 2d 961, 987 (S.D. Cal. 1998) (level of attorney's involvement with court filing without disclosure amounted to unprofessional conduct); *Ostevoll v. Ostevoll*, 2000 WL 1611123, at 9 (S.D. Ohio Aug. 16, 2000) (pleading prepared in substantial part by an attorney must be disclosed by attorney's signature).

We are unpersuaded such inexact and subjective terms are helpful. We believe that, given the New Jersey Supreme Court's manifest intent to remove impediments to providing at least some assistance to the unrepresented, the better course is to adopt an approach which examines all of the circumstances. Disclosure is not required if the limited assistance is part of an organized R. 1:21-1(e) non-profit program designed to provide legal assistance to people of limited means. In contrast, 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 still reaping the benefits of legal assistance, there must be full disclosure to the tribunal. Similarly, disclosure is required when, given all the facts, the lawyer, not the *pro se* litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure

situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.

The duty to disclose is rooted in *RPC* 3.3(a) (5) as well as *RPC* 8.4(c) and (d). These ethics rules simply require candor and fairness toward the tribunal. We emphasize that even where disclosure is required, the limited representation itself is fully permissible as long as the requirements of *RPC* 1.2(c) are met. When triggered by the described circumstances, disclosure must include the name of the attorney and the fact that there is a limited scope of representation, not including actual appearance as counsel of record in the proceeding, under *RPC* 1.2(c). The client's involvement in the litigation, and the extent of the attorney's engagement in such circumstances, combined with the duty of candor under *RPC* 3.3(a) (5), support this limited exception to the blanket confidentiality required by *RPC* 1.6(a).

We make no comment concerning the possible applicability of Federal Rule of Civil Procedure 11 to such a situation. This Committee has no jurisdiction over questions of federal civil procedure.

We are aware that these situations present competing interests. The interests of extending legal assistance to the unrepresented, preserving confidentiality and minimizing the cost of legal representation are on one side, versus candor toward the tribunal and fairness toward opposing parties on the other. We believe the balance struck in this Opinion best advances the ethical values applicable to limited legal assistance to unrepresented litigants.