

# A Ghost Story

by Keith A. Call

I have ghosts in my house. They leave empty jugs of milk in the fridge, clog toilets, leave open bags of hot dogs under beds, and have lost, eaten, or ruined thousands of billable hours worth of household goods. I have examined and cross-examined my children, but none of them ever has any knowledge about these mysteries. So we have concluded it has to be ghosts. Of course, no one has ever been able to summon these ghosts, so they always escape liability. *Cf. United States ex rel. Mayo v. Satan & His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971) (dismissing civil rights action against Satan and his servants for lack of personal jurisdiction and failure to provide instructions for service of process).

There is great power in anonymity. Throw a sheet over your head, cut out a couple of eye holes, and you can get away with all sorts of mischief. Or, just do it while nobody's looking.

Like ghostwriting someone else's pleading or brief.

But do Utah rules allow attorneys to hide under a white sheet? More specifically, is ghostwriting for a *pro se* client allowed? If it is, are there any boundaries? Let's briefly examine the rules.

### Utah's Approach to Ghostwriting

According to the Utah Ethics Advisory Opinion Committee, ghosts are allowed in Utah courthouses.

Under the Utah Rules of Professional Conduct, and in the absence of an express 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 of the nature or extent of such assistance.

Utah State Bar Ethics Advisory Op. 08-01, ¶ 2 (Apr. 8, 2008). Proponents of this rule have suggested that ghostwriting promotes access to the courts for middle and lower income litigants.

But lawyer ghosts must still follow the rules of ethics. *See id.* (“[P]roviding limited legal help does not alter the attorney’s professional responsibilities.”). For example, attorneys must obtain informed consent for unbundled services, and any limitation on the scope of representation must be reasonable. *Id.* ¶¶ 30–31. Moreover, the duty of competency still applies. Even if the representation is limited to ghostwriting a single

document, the attorney “must be as thorough in identifying legal issues as an attorney who intends to continue with a case through its conclusion.” *Id.* ¶ 33. Similarly, duties of diligence, communication, and confidentiality are in no way diminished by limited representation. *Id.* ¶ 34.

*“Lawyers, including those acting with anonymity, should at least have a reasonable professional opinion that the cause of action or legal argument has a basis in law and fact...”*

While ghosts at my house get away with various kinds of mischief, lawyer ghosts must not violate Rule 11 or other rules relating to frivolous claims or arguments, such as Utah Rule of Professional Conduct 8.4 (stating that misconduct includes conduct that is dishonest, prejudicial to the administration of justice, etc.). Lawyers, including those acting with anonymity, should at least have a reasonable professional opinion that the cause of action

*KEITH A. CALL is a shareholder at Snow, Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.*



or legal argument has a basis in law and fact, and that they can be sanctioned if they intentionally assist a *pro se* party to file a frivolous case or memorandum. *See* Op. No. 08-01, ¶¶ 15–16, 27.

### Are Ghosts Allowed in Federal Courts?

Be aware that the rules in federal court are different and are not consistent across the circuits. Emphasizing the duty of candor and Rule 11, the Tenth Circuit has held that attorneys must sign ghostwritten appellate briefs. *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001). In contrast, the Second Circuit has determined that ghostwriting does not constitute misconduct. *In re Fengling Liu*, 664 F.3d 367, 373 (2nd Cir. 2011) (noting a division of authority). And the Eleventh Circuit recently reversed a bankruptcy court's ruling that a lawyer had committed fraud on the court and violated Florida's Rules of Professional Conduct by helping a client file an "ostensibly *pro se* bankruptcy petition in bad faith to stall a foreclosure sale." *In re Hood*, 2013 U.S. App. LEXIS18088, at \*1–2 (11th Cir. Aug. 29, 2013).

Note that the rules vary in different courts and even appear to

differ between Utah state and federal courts. Attorneys must therefore acquaint themselves with the rules that apply in each specific court.

### Conclusion

It is worth noting that the Utah Ethics Advisory Opinion provoked a rare dissent. Utah State Bar Ethics Advisory 08-01 Dissent Opinion (April 8, 2008) (noting the rarity of dissents, discussing contrary ethics opinions, adopting a broad reading of *Duran*, and arguing that disclosure should be required for substantial legal services). The dissent and the differences of opinion among various courts underscore the extent to which the ethical dimensions of ghostwriting remain in flux. But it is clear that even lawyer ghosts must adhere to the Rules of Professional Conduct.

*The author gratefully acknowledges the assistance of Nathanael Mitchell, an associate at his firm, who (but for this acknowledgement) ghostwrote portions of this article.*



## 2014 LAWYERS OF THE YEAR

Jones Waldo is pleased to announce **CRAIG R. MARIGER** and **MICHAEL PATRICK O'BRIEN** have been selected by their peers as "Lawyers of the Year" by *Best Lawyers*. Craig in Construction Law and Michael in First Amendment and Labor and Employment.



FIND PERSPECTIVE HERE.

JONESWALDO.COM + 801-521-3200  
SALT LAKE CITY  
PARK CITY  
PROVO  
ST. GEORGE  
CHICAGO METRO



PASSION.  
PERSPECTIVE.  
PEOPLE.