

Second Circuit Allows Undisclosed Ghostwriting

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In re Liu, ___ F.3d ___, 2011 WL 5839658 (2d Cir. 2011) (per curiam)

Brief Summary

The U.S. Court of Appeals for the Second Circuit held that absent a local rule stating otherwise, a lawyer may ghostwrite a brief without disclosing his or her role in such drafting to the court.

Complete Summary

The Second Circuit's Committee on Attorney Admissions and Grievances (Committee) recommended that an attorney be reprimanded for "conduct unbecoming a member of the bar" based on a number of underlying offenses. The court adopted that recommendation based on all but one of the offenses, namely, the attorney's undisclosed drafting of a brief for a *pro se* litigant.

The Second Circuit held that undisclosed ghostwriting did not constitute misconduct. The Committee had found that the attorney violated her duty of candor to the court (i.e., DR 11-102(A)(4)). The Second Circuit disagreed, noting that there was no express rule requiring disclosure of ghostwriting activity. Without such a rule, the court was not willing to conclude that the attorney knew or should have known of a duty of disclosure or of the potential for misleading the court.

Although the court acknowledged prior holdings to the contrary, it cited a trend among ethics committees and courts—especially at the state level—toward allowing undisclosed ghostwriting.

In response to the oft-cited argument that undisclosed ghostwriting gives *pro se* litigants an advantage because courts grant leniency to such litigants, the Second Circuit agreed with American Bar Association (ABA) Formal

Opinion 07-446, in which the ABA Standing Committee on Ethics and Professional Responsibility opined that a lawyer's involvement will generally be evident to the tribunal. That fact also weighed against finding that the nondisclosure was dishonest.

Significance of Opinion

This opinion continues the trend toward allowing undisclosed ghostwriting and may be a significant marker for the federal courts going forward. In its opinion, the court did not purport to decide how it would consider a case in which a party's lawyer ghostwrites an *amicus* brief without disclosure to the court, particularly if the *amicus* application or statement of interest states or suggests a degree of independence that may not exist in fact.

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