STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

(FILED: January 17, 2013)

HSBC BANK NEVADA, N.A.	:	
	:	
v.	:	**C.A. No. PC-11-0194**
	:	
ROBERT L. COURNOYER	:	

DECISION

TAFT-CARTER, J. In this decision, the Court addresses whether an attorney who drafts a pleading for a pro se litigant without disclosing his or her identity or entering an appearance violates Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure.[1] This practice is known as "ghostwriting." Ghostwriting in the present context occurs when pleadings and other court documents are drafted by licensed attorneys for paying clients who then use those documents in litigation, ostensibly representing themselves pro se. For the reasons stated in this Decision, the Court finds that ghostwriting is a violation of Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure. Jurisdiction is based on Super. R. Civ. P. 11 and this Court's inherent authority to protect the integrity of its processes.

I

Facts and Travel

This case arises from Plaintiff HSBC Bank Nevada's ("HSBC") attempts to collect on a debt allegedly owed by Defendant Robert L. Cournoyer (the "Defendant").

[1] This decision is issued in tandem with Discover Bank v. Diana L. Obrien-Auty, C.A. No. PC-2011-0449, (R.I. Super. Ct. filed Jan. 17, 2013).

HSBC filed a complaint against Defendant demanding judgment in the amount of $17,469.28, plus interest and costs. (Complaint at 1.) The claim resulted from "charges and/or cash advances incurred on Defendant's credit account." Id. The Defendant filed his timely Answer to HSBC's Complaint. In his Answer, the Defendant denied HSBC's allegations and asserted three defenses. (Answer at 1.) The Answer was signed by the Defendant as pro se.[2] Id. at 2. On April 20, 2011, HSBC moved for summary judgment pursuant to Rule 56. The Plaintiff filed a memorandum of law and documentation concerning the Defendant's alleged debt, including a credit card statement showing a previous balance of $17,469.28 and an affidavit from an HSBC employee stating the defendant owed the same amount. On May 10, 2011, the Defendant filed an Objection to HSBC's summary judgment motion. In an attached seven-page memorandum in support of his Objection, the Defendant signed the pleading as pro se. (Def.'s Memo at 7.) The Objection stated that "[t]he law firm of Kimberly A. Pisinski, Esq. currently represents [the Defendant] in connection with the consumer debts at issue in this lawsuit," and further that "Kimberly A. Pisinski, Esq. is a law firm that assists consumers with the settlement of their unsecured debt." Id.

The matter came up for a hearing on June 3, 2011, on HSBC's motion for summary judgment. At the June 3, 2011 hearing, the Defendant signed a stipulation consenting to judgment in favor of HSBC in the amount of $17,674.28. As is the customary practice with pro se litigants, the Court questioned the Defendant about the stipulation. During the course of the colloquy, the Defendant stated that for at least one year prior to the hearing, he had been making escrow payments, in the amount of roughly

[2] The term "pro se" is defined as: "One who represents oneself in a court proceeding without the assistance of a lawyer." Black's Law Dictionary (9th ed. 2009).

$575 per month, for the services of a debt settlement company. (June 3 Tr. at 3.) The Defendant stated that the company promised to make him "free and clear" of his debts within two years. Id. Among the services provided by the debt settlement company to the Defendant was legal assistance. The assistance included the drafting of pleadings and other court documents. Id. at 3-4. The Defendant stated that an attorney sent a copy of his paperwork to the Court. Id. at 4. The Defendant acknowledged to the Court that he had not personally prepared his Objection and accompanying memorandum; rather, those documents were prepared by either Wendy Taylor Humphrey ("Taylor Humphrey"), an attorney licensed to practice in Rhode Island, or Kimberly Pisinski ("Pisinski"). Id. at 4-7. Pisinski is not licensed to practice in this State but plays a supervisory role in the debt settlement company with which the Defendant had become engaged. Id. at 5. The Defendant stated that Taylor Humphrey was his lawyer, even though they had never met in person. Id. at 7-8. The Defendant expressed surprise that Attorney Taylor Humphrey had not appeared in court on the day of the hearing. Id. at 8. Before adjourning the June 3, 2011 hearing, the Court continued HSBC's summary judgment motion to June 6, 2011 and made it known that Attorney Taylor Humphrey's presence would be required. Id. at 13-14. The Defendant was also required to appear to meet his attorney, Taylor Humphrey, on June 6, 2011. Id.

Attorney Taylor Humphrey arrived at the Superior Court as requested on June 6, 2011. She entered her appearance for the Defendant at the direction of the Court. (June 6 Tr. at 4-5.) Attorney Taylor Humphrey admitted that she had prepared the Defendant's Answer, Objection, and memorandum regarding HSBC's motion for summary judgment. Id. at 1-2. She also admitted that she was "working for" a debt settlement company based

out of California called Morgan Drexen. Id. Additionally, she claimed that prior to her involvement with Morgan Drexen, she had spoken extensively with Chief Disciplinary Counsel David Curtin, Esq., and that she had expressly "got[ten] his blessing . . . in order to be able to assist these people." Id. at 3-4. Taylor Humphrey acknowledges an attorney-client relationship with the Defendant. (Taylor Humphrey Pre-Hearing Mem. at 2-3.) She also assumes responsibility for the drafting and submission of the Defendant's litigation papers in this case, despite the fact that her name is not on any document. Id.

At the conclusion of the June 6, 2011 hearing, the hearing justice issued an Order finding that Attorney Taylor Humphrey's ghostwriting was unethical, lacking in candor to the Court, and a sanctionable violation of Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure. (June 6 Order at 1.) The hearing justice then sanctioned Attorney Taylor Humphrey in the amount of $750, and ordered that any and all attorney fees she had received from the Defendant were to be refunded to the Defendant's escrow account. Id. at 1-2. On December 19, 2011, Attorney Taylor Humphrey filed a notice of appeal for review of the June 6, 2011 Order by the Rhode Island Supreme Court. On June 13, 2012, the Rhode Island Supreme Court granted Attorney Taylor Humphrey's petition for certiorari and quashed the June 6, 2011 Order, remanding to this Court in order to afford Taylor Humphrey a hearing conducted with adequate notice and opportunity to be heard prior to the imposition of sanctions. See HSBC Bank Nevada, N.A. v. Robert L. Cournoyer, No. 2011-234-M.P., (R.I. filed June 13, 2012). In its Order, the Supreme Court directed this Court to address the applicability of Rule 11 of the Rules of Civil Procedure to the circumstances of this case and to make clear findings as to whether or not Attorney Taylor Humphrey violated Rule 11. Id. Thereafter, this

Court issued a show-cause notice to Attorney Taylor Humphrey, scheduling a hearing for November 2, 2012. Specifically, this Court requested that Attorney Taylor Humphrey address four issues at the November 2, 2012 hearing:

> 1. Whether [her] practice of ghostwriting, which is the drafting of pleadings and other court documents on behalf of the Defendant, who is a self-represented litigant in this matter, is a violation of Rule 11 of the Rhode Island Rules of Civil Procedure;
>
> 2. Whether [her] representation of the Defendant for the sole purpose of preparation of pleadings and [her] failure to disclose such representation of the Defendant to the Court is a violation of Rule 11 of the Rhode Island Rules of Civil Procedure;
>
> 3. Whether [her] failure to sign a pleading, written motion or other papers filed in this case is a violation of Rule 11 of the Rhode Island Rules of Civil Procedure; and
>
> 4. Whether [she] violated Rule 11 of the Rhode Island Rules of Civil Procedure when [she] drafted documents for the Defendant in this action or for [her] client, knowing that they will be eventually filed with this Court.

On October 31, 2012, a pre-hearing memorandum of law was filed on Attorney Taylor Humphrey's behalf that responded to these issues. In addition, Attorney Taylor Humphrey has filed two motions to withdraw her appearance for the Defendant since the June 6, 2011 hearing. Attorney Taylor Humphrey's first motion to withdraw was based on a claim that the hearing justice at the June 6, 2011 hearing improperly required her to enter her appearance. The hearing justice denied this motion on November 30, 2011 and Attorney Taylor Humphrey appealed the decision to the Rhode Island Supreme Court. While that matter was pending appeal, the Defendant filed a bankruptcy petition, automatically staying all proceedings against the Defendant. On September 21, 2012, Attorney Taylor Humphrey moved to have the Rhode Island Supreme Court remand the

pending matter of her withdrawal to this Court, so that this hearing justice would be able to make a decision as to withdrawal on the basis of the Defendant's changed circumstances. (Appellant's Motion for Remand at 2.) On October 11, 2012, the Supreme Court remanded the papers in the case to this Court for Attorney Taylor Humphrey's show cause hearing and on her motion to withdraw, requiring that following the hearing, the papers be returned forthwith. Attorney Taylor Humphrey requests that her motion to withdraw appearance be granted.

II

Arguments

Attorney Taylor Humphrey argues on several fronts that she did not violate Rule 11 of the Rules of Civil Procedure or engage in sanctionable conduct when she prepared pleadings on behalf of her client without disclosing her identity to the Court. As her case was heard concurrently with the show-cause notice issued in Discover Bank v. O'Brien-Auty, C.A. No. PC-2011-0449, (R.I. Super. Ct. filed Aug. 10, 2012), Attorney Taylor Humphrey endorses and incorporates by reference the relevant arguments made on behalf of Attorney Swain. First, she argues that Rhode Island Supreme Court Rule of Professional Conduct 1.2(c), which allows an attorney to limit the scope of her representation "if the limitation is reasonable under the circumstances and the client gives informed consent," permitted her practice of preparing pleadings without disclosing her identity in this case. Attorney Taylor Humphrey stresses that the American Bar Association ("ABA") expressly authorized the practice of ghostwriting in Formal Opinion 07-446, finding that the practice is not unethical or improper. Next, Attorney Taylor Humphrey argues that Rule 11 by its very terms does not apply to a non-signing,

drafting attorney, so as to make her practice of preparing pleadings without disclosing her identity a sanctionable offense. Attorney Taylor Humphrey then contends that even if this Court does deem ghostwriting violative of Rule 11, it would be improper for this Court to impose sanctions because at the time of her activities, she did not have knowledge of the ghostwriting prohibition. To bolster this position, Attorney Taylor Humphrey stresses her view that the practice of ghostwriting has been met with growing acceptance by the ABA and in other jurisdictions. Indeed, Attorney Taylor Humphrey argues that under the prevailing mainstream consensus, she had no obligation to disclose her ghostwriting activities to the Court. Finally, Attorney Taylor Humphrey concludes that all four issues for the November 2, 2012 hearing can be alternatively framed as: "whether to sanction an attorney for following the mainstream in construing Sup. Ct. Prof. Conduct Rule 1.2(c) as permitting the practice of ghostwriting to assist a pro se litigant in accordance with a valid limited scope representation agreement." Accordingly, Attorney Taylor Humphrey concludes that all four arguments should be answered in her favor. This Court disagrees.

III

Ghostwriting in Context

Attorney Taylor Humphrey cites to articles and treatises to support her view that ghostwriting is acceptable. The Court is mindful of the conclusions of those authors with respect to pro bono and prisoner representation cases. However, the present context of ghostwriting is vastly different from the context which she cites as authority to allow ghostwriting. Attorney Taylor Humphrey did not ghostwrite on behalf of a pro se prisoner and she was not working on a pro bono basis. Neither was she "lending some

assistance to friends, family members, [or] others with whom . . . she . . . want[ed] to share specialized knowledge." See Ricotta v. State of Cal., 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998). The context in which Attorney Taylor Humphrey prepared a pleading to be submitted to the Court without her signature was the debt settlement industry, wherein "[d]ebt settlement services providers purport to obtain lump-sum settlements of unsecured debts for consumers in exchange for fees." See Civil Court and Consumer Affairs Committees, N.Y.C. Bar Association, Profiteering From Financial Distress: An Examination of the Debt Settlement Industry 1 (May 2012) [hereinafter NYC Bar Association White Paper].[3] The debt settlement industry manages billions of dollars in consumer debt on a for-profit basis. See Ryan McClune Donovan, Note, The Problem with the Solution: Why West Virginians Shouldn't "Settle" for the Uniform Debt Management Services Act, 113 W. Va. L. Rev. 209, 213 n.7 (2010) (stating that two hundred member companies of a debt settlement trade association "served more than 154,000 active consumer clients and managed more than $4.9 billion in debt" as of mid-2009). The NYC Bar Association White Paper found "conclusively that substantial numbers of [those] involved in debt settlement experienced net financial harm" from enrollment with companies in the debt settlement industry. See NYC Bar Association White Paper at 2 (citing "increased debt, damaged creditworthiness, and stepped up collection efforts on the part of creditors"). The White Paper also makes an express recommendation that the Rules of Professional Conduct "should be enforced against attorneys involved in debt settlement operations who purport to be acting as attorneys."

[3] The NYC Bar Association White Paper is available at: http://www2.nycbar.org/pdf/report/uploads/DebtSettlementWhitePaperCivilCtConsumerAffairsReportFINAL5.11.12.pdf (last visited Jan. 9, 2013).

NYC Bar Association White Paper at 3. Additionally, in 2010, the United States Government Accountability Office concluded a lengthy investigation of the debt settlement industry that "uncovered clear and abundant evidence of fraudulent, deceptive, and abusive practices." Donovan, 113 W. Va. L. Rev. 209, at 229-30 (2010) (citing United States Government Accountability Office, Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers (2010).[4]

Although ghostwriting has become more prevalent over the last decade, see, e.g., Jeffrey P. Justman, Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns With Ghostwriting, 92 Minn. L. Rev. 1246, 1287 (2008), the propriety of this practice in Rhode Island had not been addressed prior to Attorney Taylor Humphrey's actions in this case.[5] There have been relatively few reported cases dealing with ghostwriting for pro se litigants at the state or federal level, and while there is some reason to believe that the practice has gained increasing acceptance, the nationwide discussion is still in its early stages. See Delso v. Trs. for the Ret. Plan for the Hourly Emps. of Merck & Co., Inc., No. 04-3009 (AET), 2007 WL 766349, at *12 (D. N.J Mar. 6, 2007).

Ghostwriting is typically viewed as a subset of "unbundled legal services." Under the "unbundled legal services" model, "the lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation."

[4] The GAO's investigation is available at: http://www.gao.gov/assets/130/124498.pdf (last visited Jan. 9, 2013).

[5] In FIA Card v. Pichette, No. PC 2011-2911, 2012 WL 3113460 (R.I. Super. Ct. July 26, 2012), Justice Van Couyghen found that ghostwriting is unethical and a violation of Rule 11. The actions of Attorney Taylor Humphrey in the present case preceded the decision in Pichette, so Taylor Humphrey argues that she had no way of realizing that her ghostwriting activities in this case could violate Rule 11. For the reasons discussed in this Decision, the Court disagrees.

Hon. Fern Fisher-Brandveen & Rochelle Klempner, Unbundled Legal Services: Untying the Bundle in New York State, 29 Fordham Urb. L.J. 1107, 1108 (2002). Proponents of the unbundled legal services model argue that such à la carte representation "increases access to justice, promotes efficiency in the courtroom, and furthers business opportunities for attorneys." Id. at 1111. Detractors, on the other hand, focus on malpractice and ethical concerns associated with the model. Id.

Rhode Island's Rules of Professional Conduct do permit limited scope representation under appropriate circumstances. See Sup. Ct. R. Prof. Conduct Rule 1.2(c). Rule 1.2(c) states that "[a] lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent."[6] Additionally, Rule 6.5 grants specific ethical leeway to "[a] lawyer who, 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." Sup. Ct. R. Prof. Conduct Rule 6.5 (making Rules 1.7, 1.9(a) and 1.10 of the Rules of Professional Conduct applicable to such an attorney only under certain circumstances).

The issue for this Court is not to determine broadly the ethical implications of "unbundled legal services" as they relate to the practice of law in Rhode Island. Instead, the Court must narrowly construe whether an attorney, here Attorney Taylor Humphrey, is required to disclose his or her identity to the Court when preparing pleadings on behalf

[6] The commentary to Rule 1.2(c) explains: "The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . . A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives."

of a client who submits them as pro se in the context of the litigation. "[C]ourts are duty bound to address ghostwriting within the rubric of existing ethics rules, court rules and professional duties and responsibilities that were drafted and adopted by legislative or governing bodies." Delso, 2007 WL 766349, at *12. Moreover, the overall societal benefits of ghostwriting are not within this Court's purview; rather, this Court specifically limits its decision to the propriety of ghostwriting as it arose in this case.

Attorney Taylor Humphrey's affiliation with Morgan Drexen may provide cause for concern with respect to the societal implications; however, in the context of debt settlement litigation, Attorney Taylor Humphrey's ghostwriting places an especially unfavorable burden on the Court, given that pro se litigants are held to less stringent standards than those represented by lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972). The Court is particularly troubled by the prospect of determining application of the pro se leniency doctrine when the ghostwriting attorney is anonymously affiliated with an industry that has a very poor track record in terms of the benefits it provides to consumers. See Donovan, 113 W. Va. L. Rev. 209, at 227 (2010) (discussing the "disturbingly low success rate" of debt settlement programs). The Better Business Bureau gives Morgan Drexen a rating of "F"[7]. Additionally, Morgan Drexen is mentioned in the NYC Bar Association White Paper on several occasions as an example of the prototypical debt settlement company. See e.g., NYC Bar Association White Paper at 70, 150. In performing the Rule 11 analysis below, the Court is thus mindful of the context in which Attorney Taylor Humphrey's ghostwriting arose.

[7] See Morgan Drexen Business Review, Better Business Bureau, http://www.la.bbb.org/business-reviews/Debt-Relief-Services---non-compliant-with-FTC-Rule/Morgan-Drexen-in-Costa-Mesa-CA-100054427 (last visited Jan. 9, 2013).

IV

An Attorney-Client Relationship Existed

At the outset, this Court finds that an attorney-client relationship exists between the Defendant and Attorney Taylor Humphrey as a matter of law and fact. See DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 766 (R.I. 2000) ("[T]he existence of an attorney-client relationship is a question of fact" and "the creation of a professional relationship between attorneys and their clients is governed by contract law.") Attorney Taylor Humphrey acknowledges that a lawyer-client relationship exists. (Taylor Humphrey Pre-Hearing Memo at 2-3.) Furthermore, it was the Defendant's belief that Attorney Taylor Humphrey was his lawyer, and the Defendant expressed surprise that Taylor Humphrey was not present in court on June 3, 2011 to represent him. Finally, the parties entered into a representation agreement which was signed by the Defendant, and which clearly stated that the Defendant's attorney was Wendy Taylor Humphrey.[8] Moreover, Attorney Taylor Humphrey acknowledged drafting all of the Defendant's litigation paperwork in this case. It is clear to this Court that Attorney Taylor Humphrey represents the Defendant in the current litigation.

V

Rule 11 Analysis

The court begins its analysis of the applicability of Rule 11 to Attorney Taylor Humphrey's practice of failing to disclose her identity when preparing pleadings to be

[8] The terms of this agreement, and in particular, the question of whether it allowed Attorney Taylor Humphrey to unilaterally decide not to appear at the Defendant's court hearings will be discussed later in this Decision.

submitted to this Court. This Court is mindful that in Rhode Island, "trial courts possess the inherent authority to protect their integrity by sanctioning any fraudulent conduct by litigants that is directed toward the court itself or its processes, as informed by the procedures and sanctions available to the court and to the parties under Rules 11 and 37." Lett v. Providence Journal Co., 798 A.2d 355, 365 (R.I. 2002). Therefore, this Court has latitude to impose Rule 11 sanctions pursuant to its inherent authority when the integrity of the court or its processes is put at risk by the deceitful conduct of the litigants before it. "[A] court's authority to disqualify an attorney or craft appropriate relief to punish or deter attorney misconduct derives from the court's equitable powers." UMG Recordings, Inc. v. MySpace, Inc., 526 F. Supp. 2d 1046, 1062 (C.D. Cal. 2007) (quoting Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 4.7, at 4-22 (Aspen, 3d ed. 2007)).

Moreover, Attorney Taylor Humphrey argues that Rule 11 is not unrelated to the Rhode Island Supreme Court Rules of Professional Conduct (the "RPC"). This Court's authority to make rulings on questions that implicate the Rules of Professional Conduct is uncertain. See Sup. Ct. Rules, Art. III (Disciplinary Procedure for Attorneys), Rules 2 and 6 (channeling attorneys' violations of the RPC through Disciplinary Counsel and the Disciplinary Board). However, this Court clearly has the authority to rule on matters pertaining to the Rhode Island Superior Court Rules of Civil Procedure. For this reason, Attorney Taylor Humphrey's argument, that the practice of ghostwriting which is permitted by the Rules of Professional Conduct cannot then be sanctionable under Rule 11, is fundamentally unsound and entirely misplaced. Whether a practice is permitted in the abstract by the RPC, enforcement of which may fall outside the scope of this Court's

authority, has no bearing on whether that practice as applied in an actual litigation setting violates Rule 11 of the Rules of Civil Procedure. This Court finds that Rule 1.2(c), which permits an attorney to limit the scope of representation with the client's informed consent, does not require this Court to conclude that Attorney Taylor Humphrey's practice of preparing pleadings without disclosing her identity in this case did not violate Rule 11 of the Rules of Civil Procedure.

Furthermore, Attorney Taylor Humphrey's representation agreement with the Defendant on its face failed to effectively limit the scope of Attorney Taylor Humphrey's representation so as to permit Attorney Taylor Humphrey to forego courtroom appearances. When the Court is called upon to consider the clarity of such an agreement, "the document must be viewed in its entirety and its language be given its plain, ordinary, and usual meaning." Monahan v. Girouard, 911 A.2d 666, 672 (R.I. 2006). "When ambiguity is present, and the document's language is susceptible to more than one reasonable interpretation, the language will be strictly construed with all ambiguities decided against the drafter." Id. In relevant part, the agreement with Attorney Taylor Humphrey, signed by the Defendant, states:

> "I understand that specific 'Limited Scope of Representation' services provided to me by Wendy Taylor Humphrey, Esq., Rhode Island Counsel may include, but is not limited to, services with the associated fees:
>
> (. . .)
>
> >> Attend Court Hearing – at attorney's discretion and at attorney's regular hourly rate." (emphasis added).

While the agreement does appear to limit the scope of Attorney Taylor Humphrey's representation of the Defendant, and while such a limitation would appear to be

permissible under Rule 1.2(c), the language of the agreement does not exclude the possibility that Attorney Taylor Humphrey would appear in court on the Defendant's behalf. Instead, the agreement provides that attending court hearings is included within the scope of Attorney Taylor Humphrey's representation. Moreover, this Court is doubtful that under Rule 1.2(c), an attorney may unilaterally invoke discretion to choose not to appear on a client's behalf when the client is called to appear in court. Rule 1.2(c) does not excuse an attorney from the duty to provide competent representation. See Comment to Rule 1.2 ("All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.").

While the existence of Rule 1.2(c) does not imply that ghostwriting cannot amount to a violation of Rule 11, this Court does not mean to suggest that the Rules of Professional Conduct are entirely irrelevant to the present Rule 11 inquiry. In fact, it is this Court's opinion that the Rules of Professional Conduct should more broadly inform the Court's judgment as to what types of attorney misconduct are meant to fall within the intended scope of potential Rule 11 sanctions. The most significant flaw in Attorney Taylor Humphrey's argument is not that she looks to the Rules of Professional Conduct to support her position, but rather that she looks to those Rules too narrowly, emphasizing only Rule 1.2(c), which, in any case, does not speak directly to the ethics of "ghostwriting." Indeed, there is no shortage of judicial opinions that use litigation ethics rules as a broad guideline for evaluating the applicability of Rule 11 to instances of alleged attorney misconduct. See, e.g., Glover v. Libman, 578 F. Supp 748, 769 (N.D. Ga. 1983); In re Ronco, Inc., 105 F.R.D. 493, 497 (N.D. Ill. 1985); Fleming Sales Co. v.

Bailey, 611 F. Supp. 507, 519-20 (N.D. Ill. 1985); Pope v. Federal Express Corp., 138 F.R.D. 675, 681-82 (W.D. Mo. 1990).

A

Undue Advantage

In evaluating the applicability of Rule 11 to the practice of ghostwriting in this case, this Court first makes several observations concerning the Court's customary practices and the general ethical obligations of Rhode Island attorneys that Rule 11 is designed to police. See Richard G. Johnson, Integrating Legal Ethics & Professional Responsibility With Federal Rule of Civil Procedure 11, 37 Loy. L. Rev. 819, 914-917 (Winter 2004). First, it is well known and generally accepted in Rhode Island that our courts exhibit leniency and provide assistance to pro se litigants. Gray v. Stillman White Co., Inc., 522 A.2d 737, 741 (R.I. 1987). This is consistent with practices nationwide, see Haines, 404 U.S. at 520-21; U.S. v. Day, 969 F.2d 39, 42 (3d Cir. 1992), and courts finding ghostwriting improper often protest that ostensibly pro se litigants who have benefited from ghostwriting are given an undue advantage. See Delso, 2007 WL 766349, at *13. This Court agrees that such litigants "would be granted greater latitude as a matter of judicial discretion in hearings and trials" and "[t]he entire process would be skewed to the distinct disadvantage of the nonoffending party." Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1999); see also Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997) ("[T]he indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it."); Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 885-87 (D. Kan. 1997) (stating that the advantage to the pro se litigant would skew

the proceedings "to the distinct disadvantage of the nonoffending party"). Moreover, it may also be true that "[s]uch activities negatively taint the Court towards the appearance of well meaning pro se litigants who have no legal guidance at all and rely on the Court's discretionary patience in order to have a level litigating field." In re Mungo, 305 B.R. 762, 769 (Bankr. D. S.C. 2003).

This Court also finds that the assistance afforded ostensibly pro se litigants creates a predicament for both the courts and the adversaries of those pro se litigants. "This dilemma strikes at the heart of our system of justice, to wit, that each matter shall be adjudicated fairly and each party treated as the law requires." Delso, 2007 WL 766349, at *13. A court considering a pleading or other filing seemingly presented by a pro se party will likely be more lenient toward mistakes or inaccuracies. Thus, the unequal treatment of pro se and represented parties is likely to be manifestly unfair given that both have enjoyed the assistance of counsel while one party receives more lenient treatment from the court. Moreover, the adversary of the ostensibly pro se party must contend with Rule 4.2 of the Rhode Island Rules of Professional Conduct, which states that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order." Given that the Defendant's ghostwritten Objection stated only that "[t]he law firm of Kimberly A. Pisinski, Esq. currently represents [the Defendant] in connection with the consumer debts at issue in this lawsuit," the grounds upon which the Plaintiff in this case could ethically communicate with the "pro se" Defendant are unclear. The Defendant's Objection states that he has secured representation while at the

same time the Defendant is appearing as pro se. To complicate matters, the Objection does not provide means for contacting the named law firm.

Attorney Taylor Humphrey's involvement in the Defendant's case has unquestionably detracted from the administration of justice because of her failure to identify herself to the tribunal as the attorney of record. Cf. In re Mungo, 305 B.R. at 770 (finding that ghostwriting frustrates the operation of the court because attorneys of record are not available to perform the ordinary tasks of litigation).

B

Violation of Rules and Ethical Concerns

The Court now moves to a discussion of Rhode Island's Rules of Professional Conduct, which are replete with ethical guidelines and obligations placed upon attorneys that should inform the standard for determining the intended scope of potential Rule 11 sanctions. "Courts and ethics opinions often cite ghostwriting as a breach of ethical duties and prohibitions concerning deception." Jona Goldschmidt, In Defense of Ghostwriting, 29 Fordham Urb. L.J. 1145, 1159 (2002). While Rule 1.2(c), as discussed above, permits an attorney to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent," an attorney must of course act consistently with the remainder of the Rules of Professional Conduct as well. This Court looks to several specific ones. For example, Rule 3.2 of Article V, the Supreme Court Rules of Professional Conduct, mandates that an attorney not unreasonably delay the client's litigation. Rule 3.3 mandates candor toward the tribunal. Rule 8.4(c) prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." The Court finds that all of these factors must be taken into

account when determining whether the practice of preparing pleadings without disclosure of identity, in this case by Attorney Taylor Humphrey, was a sanctionable violation of Rule 11.

Rule 3.2 provides: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." As discussed above, Attorney Taylor Humphrey's involvement in this case has not resulted in expeditious litigation; in fact, her involvement has achieved quite the opposite. While the delays caused by Attorney Taylor Humphrey's ghostwriting have done a disservice to the Plaintiff, this is also not to say they have been consistent with the interests of her client, who has recently filed for bankruptcy. What her ghostwriting practice in the case is consistent with, however, is the debt settlement industry's "primary tactic" of "convincing the creditor that, after a long period of no payment and no contact, some income is better than none." Donovan, 113 W. Va. L. Rev. at 216. Moreover, it is consistent with the industry's reputation for causing net financial harm to its customers. See NYC Bar Association White Paper at 2.

Rule 3.3 defines an attorney's duty of candor to the court, and provides, in relevant part, that:

> "(a) A lawyer shall not knowingly:
>
> > (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal . . . .
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable

> remedial measures, including, if necessary, disclosure to the tribunal."

In Rhode Island, the duty of candor to the tribunal is an affirmative one. See Sup. Ct. R. Prof. Cond. Rule 3.3(c). The duty of candor to the tribunal is "particularly significant to ghostwritten pleadings." Duran v. Carris, 238 F.3d 1268, 1271 (10th Cir. 2001) (quoting John C. Rothermich, Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice, 67 Fordham L. Rev. 2687, 2697 (1999)). In Duran, the court further noted that "[i]f 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." Id. Moreover, "[a] lawyer should not silently acquiesce to such representation . . . [as these] arrangements interfere with the Court's ability to superintend the conduct of counsel and parties during the litigation." U.S. v. Eleven Vehicles, 966 F. Supp. 361, 367 (E.D. Pa. 1997). Ghostwriting in the context of this case "is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor to the Court." In re Mungo, 305 B.R. at 769. As another court put it, "ghostwriting is 'ipso facto lacking in candor.'" Delso, 2007 WL 766 349, at *15.

Rules 8.4(c) and (d) prohibit attorney conduct involving a misrepresentation and conduct that is prejudicial to the administration of justice, respectively:

> "It is professional misconduct for a lawyer to:
>
> > (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
> >
> > (d) engage in conduct that is prejudicial to the administration of justice."

Numerous courts around the nation have found that ghostwriting violates an attorney's ethical duties because it involves misrepresentations to the court and interferes with the administration of justice. See, e.g., Duran, 238 F.3d at 1272 (determining that ghostwriting "constitutes a misrepresentation to this court by litigant and attorney"); In re Mungo, 305 B.R. at 770 ("[T]he effect of ghost-writing on the operation of this Court cannot be overemphasized."). This Court agrees that "[h]aving a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is . . . far below the level of candor which must be met by members of the bar." Johnson, 868 F. Supp. at 1232. As discussed above, the ghostwriting in this case has plainly interfered with the administration of justice and places unreasonable burdens on this Court. The Court therefore finds that Attorney Taylor Humphrey's practice in this context of preparing pleadings for her ostensibly pro se client, without disclosing her own identity, violates Rule 8.4 of Rhode Island's Rules of Professional Conduct.

C

Attorney Taylor Humphrey Violated Rule 11

Rule 11, in relevant part, provides as follows:

> "Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . . A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper

> purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, any appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

The Court finds it manifestly obvious that the concerns addressed by Rules 3.2, 3.3, and 8.4(c) of the Rules of Professional Conduct are closely related to the concerns addressed in Superior Court Rules of Civil Procedure, Rule 11. Like the Rules of Professional Conduct, Rule 11 is intended to ensure that attorneys do not create unnecessary delays in litigation, that attorneys at all times act with candor toward the tribunal, and that attorneys do not engage in conduct that is dishonest, fraudulent, or deceitful. Cf. Laremont-Lopez, 968 F. Supp. at 1078 ("The purpose of Rule 11 is to deter conduct that frustrates the just, speedy, and inexpensive determination of civil actions."). This Court concludes that it is the intent of Rule 11 to enforce the ordinary ethical obligations of Rhode Island attorneys in their interactions with the courts, and to provide for sanctions when attorneys fall short of these standards.

Furthermore, Rule 11 requires that all papers of a party represented by an attorney be signed by an attorney of record in the attorney's name. The purpose of the signature is to act as a certificate by the attorney that she has complied with her ethical obligations. When an attorney drafts her client's litigation papers in this context, refuses to sign them, and instead instructs her client to file the papers as pro se, this Court determines that the papers have been signed "in violation of" Rule 11.

When such papers are signed in violation of Rule 11, Rule 11 further provides that the court "may impose upon the person who signed it, a represented party, or both, any appropriate sanction." While this language might be read to suggest that a non-signing attorney cannot be sanctioned under Rule 11, the Court finds that this reading runs contrary to the clear intent of Rule 11, which is to enforce an attorney's ethical obligations of candor and honesty in interactions with the tribunal. See Laremont-Lopez, 968 F. Supp. at 1077 ("The Court believes that the practice of lawyers ghostwriting legal documents to be filed with the Court by litigants who state they are proceeding pro se is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court."). The text of Rule 11 sets up a clear dichotomy between "the person who signed [the paper]" and "a represented party." It is clear to the Court that in the ghostwriting context, the proper counterpart to Rule 11's "represented party," on whom the court may impose sanctions, is not literally "the person who signed [the paper]," but rather "the represented party's attorney." Otherwise, the clarifying phrase "or both" would be rendered meaningless, referring not to two distinct individuals (attorney and client), but only to one, i.e., the represented party who presents himself in court as pro se. Cf. Laremont-Lopez, 968 F. Supp. at 1078 ("Who should the Court sanction if claims in the complaint prove to be legally or factually frivolous, or filed for an improper purpose?"). In any case, ghostwriting in this context is impermissible because it "effectively nullifies the certification requirement of Rule 11."[9] Laremont-Lopez, 968 F. Supp. at 1078; see also Johnson, 868 F. Supp. at 1231 (calling ghostwriting a "deliberate evasion of the

[9] Likewise, ghostwriting in this context circumvents Rule 1.5 of the Rhode Island Superior Court Rules of Practice governing an attorney's withdrawal of appearance.

responsibilities imposed on counsel by Rule 11"); In re Mungo, 305 B.R. at 768 (stating that ghostwriting "frustrates the application of" Rule 11).

For the reasons above, this Court finds that Attorney Taylor Humphrey did violate Rule 11 when she drafted litigation documents for her client, failed to sign them, and then instructed her client to submit the documents to this Court as if he was pro se. The fact that Rule 1.2(c) of the RPC allows an attorney to limit the scope of representation with the client's informed consent does not absolve Attorney Taylor Humphrey of her failure to be candid with this Court. It was a conscious misrepresentation for Attorney Taylor Humphrey to instruct the Defendant to appear as pro se when the Defendant was in fact her client, and had in fact received substantial legal assistance from her. See Johnson, 868 F. Supp. at 1232 ("Having a litigant appear pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is disingenuous to say the least; it is far below the level of candor which must be met by members of the bar.").

This Court highlights that there was nothing to indicate Attorney Taylor Humphrey's involvement in the Defendant's representation on any of the papers that the Defendant submitted to this Court. Additionally, this Court notes that Attorney Taylor Humphrey's practice of preparing pleadings without disclosing her identity in this case has interfered with the administration of justice, harmed the opposing party, and seemingly accomplished nothing for her client, who has recently filed for bankruptcy. While it appears true that the ABA has endorsed ghostwriting as an ethical legal tactic, and that a number of jurisdictions around the country have agreed with that view, it also cannot be disputed that ABA ethics opinions and the ethics determinations of other states

are not controlling authority in the State of Rhode Island. Given that "10 states expressly forbid ghostwriting," see Taylor Humphrey's Prehearing Memo at 9, this Court struggles to comprehend how Attorney Taylor Humphrey could have considered it prudent to perform legal ghostwriting services without any form of disclosure whatsoever, based solely on the opinion of the ABA and a purported national consensus. Other courts have gone so far as to raise the specter of disbarment for ghostwriting attorneys. See In re Mungo, 305 B.R. at 767. Moreover, there is clear and longstanding federal authority in Rhode Island stating that ghostwriting is a violation of Rule 11. See Ellis v. State of Me., 448 F.2d 1325, 1328 (1st Cir. 1971) ("What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P 11 . . . of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him."). "Ghostwriting is a practice which has been met with universal disfavor in the federal courts." In re Brown, 354 B.R. 535, 541 (Bankr. N.D. Okla. 2006). In this context, when an attorney prepares pleadings on behalf of an ostensibly pro se client without disclosing her own identity, it "places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation to the Court." Laremont-Lopez, 968 F. Supp. at 1078.

As for Attorney Taylor Humphrey's argument, incorporated by reference, that the imposition of sanctions on her would be unfair or unlawful under the United States Constitution, Art. 1, §12 and the Rhode Island Constitution, Art. 1, §§ 2, 12, the Court

disagrees. "The main purpose of the prohibition [on ex post facto laws] is to assure that legislative acts give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." Lerner v. Gill, 751 F.2d 450, 454 (1st Cir. 1985) (citing Weaver v. Graham, 450 U.S. 24, 28 (1981)). "The United States Supreme Court has explained that in order '[t]o fall within the ex post facto prohibition, a law must [1] be retrospective . . . and [2] 'it must disadvantage the offender' . . . by altering the definition of criminal conduct or increasing the punishment for the crime[.]'" State v. Desjarlais, 731 A.2d 716, 717-18 (R.I. 1999) (citing Lynce v. Mathis, 519 U.S. 433, 441 (1997)). "'A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" Id. at 718 (citing Miller v. Florida, 482 U.S. 423, 430 (1987)).

Here, the Court has found that Attorney Taylor Humphrey violated Rule 11 of the Rhode Island Rules of Civil Procedure. Even if sanctions under Rule 11 are considered punitive in nature, Rule 11 does not meet the definition of a "retrospective law." See Desjarlais, 731 A.2d at 718; Miller v. Florida, 482 U.S. at 430. Rule 11 has the same force and effect today as it did at when Attorney Taylor Humphrey prepared pleadings for the Defendant in his debt settlement case, and instructed the Defendant to submit those pleadings to this Court without disclosing her identity. There has been no amendment to Rule 11, or any other legislative change regarding how Rule 11 should be applied under the present circumstances. State v. Borges, 519 A.2d 574, 576 (R.I. 1986) (discussing the passage of new laws as the principal focus of the ex post facto prohibition). Attorney Taylor Humphrey cites by reference Kelly v. Marcantonio, 678 A.2d 873 (R.I. 1996) for the proposition that "the Rhode Island Due Process Clause will preclude retroactive application of new rules of law if the impact would be particularly

unfair under the circumstances." (Swain Pre-Hearing Mem. at 7.) The Court finds that the imposition of sanctions on Attorney Taylor Humphrey under the present circumstances is not unfair. Attorney Taylor Humphrey must have known that her deceitful conduct made Rule 11 sanctions reasonably foreseeable if discovered. The fact that Attorney Taylor Humphrey may have consulted with the Office of Disciplinary Counsel before engaging in ghostwriting in this case is not significant. Also insignificant is the fact that Attorney Taylor Humphrey held the belief that undisclosed preparation of pleadings on behalf of pro se litigants is generally favored or that such practices are universally in the interests of pro se litigants. Violations of Rule 11 are distinctly the province of the Superior Court. An attorney's failure to sign documents she prepared for an ostensibly pro se party is categorically a misrepresentation to the court and the attorney is sanctionable for such misrepresentations under Rule 11. See Duran, 238 F.3d at 1272.

VI

Conclusion

The Court finds that Rule 11 applies to Attorney Taylor Humphrey's practice of preparing pleadings without disclosing her identity as the practice arose in this case. The Court further finds that Attorney Taylor Humphrey's undisclosed preparation of pleadings in this case violated Rule 11. Pursuant to Rule 11 of the Rhode Island Superior Court Rules of Civil Procedure, this Court determines that sanctions must thus be imposed on Attorney Taylor Humphrey in the amount of $750 for her undisclosed preparation of pleadings on behalf of her ostensibly pro se client.