STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

(FILED: January 17, 2013)

DISCOVER BANK	:	
	:	
v.	:	**C.A. No. PC-11-0449**
	:	
DIANA L. OBRIEN-AUTY	:	

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 Discover Bank's ("Discover Bank") attempts to collect on a debt allegedly owed by Defendant Diana O'Brien Auty (the "Defendant").

[1] This decision is issued in tandem with HSBC Bank Nevada, N.A. v. Robert L. Cournoyer, C.A. No. PC-2011-0194, (R.I. Super. Ct. filed Jan. 17, 2013).

Discover Bank demands a judgment against the Defendant in the amount of $11,545.81, 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 her timely Answer to Discover Bank's Complaint. In her Answer, the Defendant denied Discover Bank's allegations in part. (Answer at 1.) The Defendant admitted that she had outstanding debt with Discover Bank, but claimed to lack sufficient information to admit or deny the specific amount claimed by Discover Bank. Id. The Answer indicated that the Defendant was representing herself pro se.[2] Id. at 2. The Answer also contained language in small font appearing two to three inches below the Defendant's signature on page two, stating the following:

> "This document was prepared by, or with the assistance of, an attorney licensed in RI and employed by Consumer Law Associates, LLC / Consumer Law Associates, LLP (CA, MI) / Consumer Law Associates, PLLC (NC) – 972-239-4804." Id.

On April 20, 2011, Discover Bank moved for summary judgment pursuant to Rule 56. The Plaintiff filed a memorandum of law and documentation concerning the Defendant's alleged debt. The documentation included a credit card statement showing a previous balance of $11,545.81, an affidavit from a "Legal Placement Account Manager" employed by Discover Bank's servicing agent, and a photocopy of a Discover Bank "Cardmember Agreement." The affidavit attested to the accuracy of the credit card statement and the applicability of the Cardmember Agreement to the Defendant. On May 3, 2011, the Defendant filed a one-page Objection to Discover Bank's motion for summary judgment, essentially claiming that Discover Bank had not met its burden of

[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).

proof and that genuine issues of material fact remained unresolved. (Def.'s Objection at 1.) As with the Defendant's Answer, her Objection clearly indicated that she was representing herself pro se. Id. Along the bottom of the Objection, the same language quoted above referring to "Consumer Law Associates, LLC" appeared in small font below the Defendant's signature. Id.

The matter came up for a hearing on June 3, 2011, on Discover Bank's motion for summary judgment. At the June 3, 2011 hearing, the Defendant contested the amount of money owed, indicating that the last statement she had received from Discover Bank totaled roughly $9,000. (June 3 Tr. at 1-2.) The Defendant also stated that for a period of roughly one year prior to the June 3, 2011 hearing, she had been making monthly payments of $600 to a debt consolidation company called "Consumer Law Associates," which she had engaged to consolidate her credit cards and pay off her debt. Id. at 4-5. The Defendant testified that her monthly fee to Consumer Law Associates had just recently been reduced to $465 because she had "no income." Id. at 5. The Defendant stated that Consumer Law Associates had promised to consolidate her credit cards and pay off her debts for consideration amounting to 13-30% of her total debt. Id. at 6. She also stated that Consumer Law Associates was required to provide her with a Rhode Island licensed attorney as part of their debt consolidation arrangement. Id. at 7. She stated that the name of her Rhode Island licensed attorney was Michael Swain ("Swain"). Id. at 3. The Defendant stated her belief that Swain was her attorney and that Swain would "represent[] [her] in the cases that come up in Rhode Island and [that] he'd supply [her] with answers." Id. at 7. The Defendant acknowledged that she had not prepared the Answer or Objection that she submitted to the Court; rather, the documents had been

prepared by Attorney Swain and forwarded to her with instructions about how to proceed in litigation. Id. at 3, 7-8. Before adjourning the June 3, 2011 hearing, the Court continued Discover Bank's summary judgment motion to June 6, 2011 and made it known that Attorney Swain's presence would be required. Id. at 9-10. The Defendant was also required to appear to meet her attorney, Attorney Swain, on June 6, 2011. Id.

Attorney Swain arrived at the Superior Court as requested on June 6, 2011. He entered his appearance for the Defendant at the direction of the Court. (June 6 Tr. at 5.) Attorney Swain admitted that he had prepared the Defendant's Answer and that he had prepared and filed the Defendant's Objection to Discover Bank's motion for summary judgment, heard in Atorney Swain's absence on June 6, 2011. Id. at 1, 3. He also admitted that he represents the Defendant, but claimed that the scope of his representation was limited consistent with Rule 1.2 of the Rhode Island Supreme Court Rules of Professional Conduct and the terms of his retainer agreement with the Defendant. Id. Attorney Swain also admitted that he was paid for his role as an advocate in this case by "Persels and Associates," a hybrid Maryland-based law firm that offers "debt settlement services as well [as] unbundled legal help." Id. at 2. Attorney Swain stated that "Consumer Law Associates" also "is a part of the Persels Group." Id. Attorney Swain did not have an address for Persels and Associates available in court, and he was able to provide only a phone number for the firm's "managing partner." Id. at 2-3. Although Attorney Swain acknowledges an attorney-client relationship with the Defendant and that he was responsible for the drafting and submission of the Defendant's litigation papers in this case, Swain's name appeared nowhere on any such document, and his specific

involvement in the case could not have been inferred from those documents in any respect. See id. at 1, 3-4.

At the conclusion of the June 6, 2011 hearing, the hearing justice issued an Order finding that Attorney Swain'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 Swain in the amount of $750, and ordered that any and all attorney fees he had received from the Defendant were to be refunded to the Defendant's account. Id. at 1-2. On June 22, 2011, Attorney Swain 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 vacated the June 6, 2011 Order imposing sanctions and remanded to this Court to afford Attorney Swain with adequate notice and an opportunity to be heard on the imposition of sanctions against him. See Discover Bank v. Diana O'Brien Auty, No. 2011-215-Appeal, (R.I. filed June 13, 2012). In its Order, the Supreme Court directed this Court to address the applicability of Rule 11 to the circumstances of this case and to make findings relative to whether or not Attorney Swain violated Rule 11. Id. Thereafter, this Court issued a show-cause notice to Attorney Swain, scheduling a hearing for November 2, 2012. Specifically, this Court requested that Attorney Swain address four issues at the November 2, 2012 hearing:

> 1. Whether [his] 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 [his] representation of the Defendant for the sole purpose of preparation of pleadings and [his] 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;
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> 3. Whether [his] 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
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> 4. Whether [he] violated Rule 11 of the Rhode Island Rules of Civil Procedure when [he] drafted documents for the Defendant in this action or for [his] 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 Swain's behalf that responded to these issues. In the pre-hearing memorandum, Swain claims that following the June 6, 2011 hearing, he ceased providing "ghostwriting" legal services to pro se litigants. (Swain Pre-Hearing Mem. at 11.)

II

Arguments

Attorney Swain argues on several fronts that he did not violate Rule 11 of the Rules of Civil Procedure or engage in sanctionable conduct when he prepared pleadings on behalf of his client without disclosing his identity to the Court. As his case was heard concurrently with the show-cause notice issued in HSBC Bank v. Cournoyer, C.A. No. PC-2011-0194, (R.I. Super. Ct. filed Aug. 10, 2012), Attorney Swain endorses and incorporates by reference the relevant arguments made on behalf of Attorney Taylor Humphrey. Attorney Swain also complements those arguments with points significant to his own circumstances. First, Attorney Swain argues that Rhode Island Supreme Court Rule of Professional Conduct 1.2(c), which allows an attorney to limit the scope of his representation "if the limitation is reasonable under the circumstances and the client gives informed consent," permitted his practice of preparing pleadings without disclosing his

identity in this case. (Swain Pre-Hearing Mem. at 1-2.) Attorney Swain argues that no Rhode Island court, tribunal, or bar organization had ever addressed the propriety of ghostwriting at the time he engaged in it, and therefore that he should not be sanctioned for preparing pleadings on behalf of an ostensibly pro se litigant without disclosing his identity. Id. at 2. He stresses that the American Bar Association ("ABA") considers ghostwriting ethically permissible even without disclosure to the court, contending that undisclosed preparation of pleadings for pro se litigants is a generally supported practice nationwide. Id. Because the litigation papers he drafted for his client in this case contained a limited disclosure statement, Swain contends that he exceeded any possible disclosure expectations. Id. at 4-6. Moreover, Attorney Swain contends that leading journals of legal ethics generally support the practice of ghostwriting because it makes legal services affordable for a large section of the public that would otherwise be disadvantaged in its access to the courts. Id. at 4-5. Attorney Swain also argues that Rule 11 by its very terms does not apply to a non-signing, drafting attorney, so as to make his practice of preparing pleadings without disclosing his identity a sanctionable offense. Id. at 9-11. Attorney Swain buttresses this argument by contending that no party was misled by his ghostwriting practices in this case, that there was no danger of granting the pro se defendant unwarranted leeway, and that there was little to suggest that his practice of ghostwriting had placed a burden on the Court. Id. at 6. Furthermore, argues Attorney Swain, the prospect that Rule 11 does not apply to him as a non-signatory, drafting counsel does not mean that sanctions would be foreclosed in this case because the Defendant herself signed the litigation papers. Id. at 10-11. Moreover, Swain contends that other avenues for ethical reprimand exist via the Office of Disciplinary Counsel, in

spite of Rule 11, for any conduct he engages in as an attorney. Id. Finally, Swain argues that applying sanctions to his conduct in this case amounts to a constitutionally impermissible retroactive punishment, noting that other courts have been unwilling to impose sanctions on offending attorneys when finding as a matter of first impression that ghostwriting violates Rule 11. Id. at 7-9.

III

Ghostwriting in Context

Attorney Swain cites to articles and treatises to support his 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 he cites as authority to allow ghostwriting. Attorney Swain did not ghostwrite on behalf of a pro se prisoner and he was not working on a pro bono basis. Neither was he "lending some assistance to friends, family members, [or] others with whom . . . [he] . . . 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 Swain prepared a pleading to be submitted to the Court without his 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

[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).

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." 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),

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

the propriety of this practice in Rhode Island had not been addressed prior to Attorney Swain'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." 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

[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 Swain in the present case preceded the decision in Pichette, so Swain argues that he had no way of realizing that his ghostwriting activities in this case could violate Rule 11. For the reasons discussed in this Decision, the Court disagrees.

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 Swain, is required to disclose his or her identity to the Court when preparing pleadings on behalf 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 Swain's affiliation with "Persels and Associates" or "Consumer Law Associates" may provide cause for concern with respect to the societal implications; however, in the context of debt settlement litigation, Attorney Swain's ghostwriting

[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."

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 Consumer Law Associates, LLC a rating of "F"[7]. Additionally, the success rate for clients of Persels and Associates has been described by one court as "dubious at best." In re Kinderknecht, 470 B.R. 149, 159 (Bankr. D. Kan. 2012). In performing the Rule 11 analysis below, the Court is thus mindful of the context in which Attorney Swain's ghostwriting arose.

IV

An Attorney-Client Relationship Existed

At the outset, this Court finds that an attorney-client relationship exists between the Defendant and Attorney Swain 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 Swain acknowledges that a lawyer-client relationship exists. (June 6 Tr. at 1, 3; Swain Pre-Hearing Memo at 1-2.) Furthermore, it was the Defendant's belief that Attorney

[7] See Consumer Law Associates, LLC Business Review, Better Business Bureau, http://www.bbb.org/dallas/business-reviews/attorneys-and-lawyers/consumer-law-associates-in-frisco-tx-90119672 (last visited Jan. 9, 2013).

Swain was her lawyer; moreover, that he would "represent[] [her] in cases that come up in Rhode Island and [that] he'd supply [her] with answers." (June 3 Tr. at 7.) The Defendant also has stated that she paid a fee so that, in part, Attorney Swain could instruct her how to proceed in the litigation. Id. at 7-8. Finally, the parties entered into a retainer agreement which involved legal services. (June 6 Tr. at 3; Swain Pre-Hearing Mem. at 3-4.) Moreover, Attorney Swain acknowledged drafting all of the Defendant's litigation paperwork in this case. (June 6 Tr. at 3.) It is clear to this Court that Attorney Swain entered into an attorney-client relationship with the Defendant.

V

Rule 11 Analysis

The court begins its analysis of the applicability of Rule 11 to Attorney Swain's practice of failing to disclose his identity when preparing pleadings to be 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 Swain 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 Swain'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 Swain's practice of preparing pleadings without disclosing his identity in this case did not violate Rule 11 of the Rules of Civil Procedure. 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 Swain's argument is not that he looks to the Rules of Professional Conduct to support his position, but rather that he 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 it was "prepared by, or with the assistance of, an attorney licensed in RI and employed by Consumer Law Associates, LLC / Consumer Law Associates, LLP (CA, MI) / Consumer Law Associates, PLLC (NC) – 972-239-4804," the grounds upon which the Plaintiff in this case could ethically communicate with the "pro se" Defendant are unclear. The Defendant's Objection suggests that he has secured representation while at the same time the Defendant is appearing as pro se. To complicate matters, it is not clear that Attorney Swain is even employed by Consumer Law Associates, given his June 6, 2011 testimony that he is paid by Persels and Associates, a different law firm based out of Maryland whose relationship to "Consumer Law Associates" is murky. (June 6, 2011 Tr. at 2.)

Attorney Swain's involvement in the Defendant's case has unquestionably detracted from the administration of justice because of his failure to identify himself 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 Swain, 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 Swain's involvement in this case has not resulted in expeditious litigation; in fact, his involvement

has achieved quite the opposite. While the delays caused by Attorney Swain's ghostwriting have done a disservice to the Plaintiff, this is also not to say they have been consistent with the interests of his client, who, presumably, is still making monthly payments for purposes of "debt consolidation" rather than paying back her creditors. What Attorney Swain's ghostwriting practice in this 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 Swain's practice in this context of preparing pleadings for his ostensibly pro se client, without disclosing his own identity, violates Rule 8.4 of Rhode Island's Rules of Professional Conduct.

C

Attorney Swain 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 he has complied with his ethical obligations. When an attorney drafts his client's litigation papers in this context, refuses to sign them, and instead instructs his 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."[8] Laremont-Lopez, 968 F. Supp. at 1078; see also Johnson, 868 F. Supp. at 1231 (calling ghostwriting a "deliberate evasion of the 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 Swain did violate Rule 11 when he drafted litigation documents for his client, failed to sign them, and then instructed his client to submit the documents to this Court as if she 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 Swain of his failure to be candid

[8] 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.

with this Court. It was a conscious misrepresentation for Attorney Swain to instruct the Defendant to appear as pro se when the Defendant was in fact his client, and had in fact received substantial legal assistance from him. 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 Swain's specific involvement in the Defendant's representation on any of the papers that the Defendant submitted to this Court. At the June 6, 2011 hearing, Attorney Swain stated that he was paid for his services by a law firm other than the one which is indicated on the Defendant's ghostwritten pleadings. (June 6, 2011 Tr. at 2.) Additionally, this Court notes that Attorney Swain's practice of preparing pleadings without disclosing his identity in this case has interfered with the administration of justice, harmed the opposing party, and seemingly accomplished nothing for his client, whose "debt consolidation" plan hangs in the balance. 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 "nine states . . . in some measure forbid ghostwriting," see Swain's Pre-Hearing Mem. at 6, this Court struggles to comprehend how Attorney Swain could have considered it prudent to perform legal ghostwriting services without a more concrete form of disclosure, 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 his 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 Swain's argument that the imposition of sanctions on him 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 Swain 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 Swain prepared pleadings for the Defendant in her debt settlement case, and instructed the Defendant to submit those pleadings to this Court without disclosing his 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 Swain cites 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 Swain under the present circumstances is not unfair. Attorney Swain must have known that his deceitful conduct made Rule 11 sanctions reasonably foreseeable if discovered. The fact that Attorney Swain 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 is not significant. Also insignificant is the fact that the documents drafted

by Attorney Swain contained language indicating they were prepared by "an attorney licensed in R.I." Such a disclosure lacks the candor required of Rhode Island attorneys in their interactions with the Courts. Moreover, at the June 6, 2011 hearing, Attorney Swain stated that he was paid by a law firm different from the one indicated on the ghostwritten pleadings. (June 6 Tr. at 2.) Violations of Rule 11 are distinctly the province of the Superior Court. An attorney's failure to sign documents he 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 Swain's practice of preparing pleadings without disclosing his identity as the practice arose in this case. The Court further finds that Attorney Swain'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 Swain in the amount of $750 for his undisclosed preparation of pleadings on behalf of his ostensibly pro se client.