Let Ghosts Be Ghosts

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INTRODUCTION

Not all immigrants subject to removal have unlawfully entered the country, committed crimes, and been caught. Rather, there are immigrants who have entered the United States lawfully with honest intentions, but a series of unforeseen circumstances set the groundwork for a removal proceeding against them. Some immigrants may have entered the United States on student visas but lost their lawful status for failing to maintain a full course load. Some may have entered lawfully on work visas but were fired and could not find substitute employment conforming to the type of work specified in their visas. There may be some immigrants facing removal because they forgot to notify the Attorney General of their changes of address. In extreme situations, immigrants in a removal proceeding may actually be seeking refuge from an oppressive situation.

1 Articles Editor, St. John's Law Review; J.D., 2014, St. John’s University School of Law; B.A., magna cum laude, 2011, Binghamton University. The author would like to thank Professor Harrison for his guidance in writing this Note, as well as the author’s family and friends for their endless support and love over the past three years.


3 See Careen Shannon, Regulating Immigration Legal Service Providers: Inadequate Representation & Notario Fraud, 78 FORDHAM L. REV. 577, 580 (2009) (discussing the possibility that immigrants will face removal after entering the United States lawfully on a work visa).

Yet, regardless of their particular circumstances, these immigrants will face the overwhelming and burdensome task of conveying their legitimate intentions and differentiating themselves from ill-intentioned criminals.

The importance of obtaining legal representation is undeniable. Generally, whether immigrants are granted permission to remain in the United States will turn on whether they have obtained legal representation. Yet, many immigrants cannot obtain the legal representation they need. Legal resources are undersupplied. In addition, many lawyers are reluctant to represent immigrants facing removal due to both time and financial constraints. This has resulted in what is known as the “immigration representation crisis.”

Though traditional legal representation is vastly unavailable to immigrants in immigration proceedings, a recent federal circuit court opinion has highlighted an effective alternative: undisclosed attorney ghostwriting. While civil legal aid service providers do not have the resources to help all of the individuals who need their help, and private lawyers are reluctant to extend the full range of their services to financially unstable immigrants in immigration proceedings, undisclosed ghostwriting strikes a

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6 See Cox v. United States, 332 U.S. 442, 454 (1947) (equating removal to a “loss of all that makes life worth living” (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922))).
7 See Robert A. Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor, 21 GEO. J. LEGAL ETHICS 3, 4 (2008) (noting that immigrants who have lawyers are more successful in immigration proceedings than those who appear pro se).
10 This Note refers to removal proceedings or any related proceedings against an immigrant as immigration proceedings.
11 See In re Liu, 664 F.3d 367, 368–69 (2d Cir. 2011) (per curiam). For a complete discussion, see infra Part II.B.
12 See Markowitz, supra note 8 (describing barriers to representation).
proper balance. All a ghostwriting attorney is required to do is draft court documents that the immigrant will need to submit to the court.\textsuperscript{13} Although ghostwriting will only provide immigrants with limited legal services where so much is at stake, some representation is better than none.

Despite the positive effects ghostwriting could have on immigrants who would otherwise appear pro se, ghostwriting is wrought with legal and ethical controversies. Currently, there is a split among the U.S. federal circuit courts of appeal regarding the use of undisclosed ghostwriting.\textsuperscript{14} However, while the circuit courts may disagree on the legal and ethical validity of undisclosed ghostwriting, it is perhaps indisputable that "[t]he importance of quality representation is especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear."\textsuperscript{15} Thus, given what is at stake for many immigrants in removal proceedings, this Note urges every circuit court to at least permit undisclosed ghostwriting in immigration proceedings.

Part I of this Note discusses the rise of pro se status in civil matters, specifically in immigration proceedings, and how courts and the legal community have responded with limited scope representation, including ghostwriting. Part II discusses in detail the controversy surrounding ghostwriting. It also illustrates how ghostwriting is, fortunately, beginning to gain acceptance. Lastly, Part III urges the acceptance of ghostwriting in immigration proceedings. It explains why ghostwriting is essential to immigrants and how the arguments put forth against the practice are not applicable to immigration proceedings.

\textsuperscript{13} See John C. Rothermich, Note, Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice, 67 FORDHAM L. REV. 2687, 2692 (1992). For a complete discussion, see infra Part I.C.

\textsuperscript{14} See, e.g., In re Liu, 664 F.3d at 369–73; Duran v. Carris, 238 F.3d 1268, 1271–72 (10th Cir. 2001) (per curiam). For a complete discussion, see infra Part II.

\textsuperscript{15} Aris v. Mukasey, 517 F.3d 595, 600 (2d Cir. 2008) (recognizing that immigrants need legal representation because their right to remain in this country is at stake).
I. BACKGROUND

The U.S. Constitution guarantees American citizens certain fundamental protections. The Constitution affords American citizens protection from unreasonable searches and seizures.\textsuperscript{16} The Constitution guarantees American citizens protection against deprivation of life, liberty, or property without due process of law.\textsuperscript{17} The Constitution also affords a right of access to the American legal system.\textsuperscript{18} The Sixth Amendment to the Constitution even affords the right to a speedy and public trial and assistance of counsel to defendants in criminal prosecutions.\textsuperscript{19} The text of the Sixth Amendment does not, however, extend the right to assistance of counsel to civil defendants.\textsuperscript{20} Therefore, individuals involved in a civil suit can either obtain assistance of counsel on their own, or alternatively, appear pro se. Since courts recognize that individuals appearing pro se are disadvantaged from a lack of legal assistance and expertise, courts construe pro se pleadings more liberally.\textsuperscript{21} Courts also provide supplementary materials, such as manuals and interactive online programs, to assist pro se individuals with their cases.\textsuperscript{22}

\textsuperscript{16} U.S. CONST. amend. IV.
\textsuperscript{17} U.S. CONST. amend. V.
\textsuperscript{18} See Rothermich, supra note 13, at 2687 & n.2 (citing Supreme Court cases that "identified reasonable access to the courts as a fundamental constitutional right" in the Privileges and Immunities Clause, the First Amendment right of petition, the Due Process Clause of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment).
\textsuperscript{19} U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (interpreting the Sixth Amendment to mean that "in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived").
\textsuperscript{20} See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26 (1981) ("[T]he Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty.").
\textsuperscript{21} See Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (requiring that pro se pleadings be held "to less stringent standards than formal pleadings drafted by lawyers").
As the costs associated with obtaining legal counsel rise, many low-income individuals have no choice but to appear pro se. While there are legal service providers and pro bono organizations directed towards helping low-income individuals, the number of poor individuals in need of these services exceeds the available supply. This has resulted in what the Legal Services Corporation ("LSC") calls the "justice gap." LSC, which was formed to advance access to justice for low-income Americans, currently turns away at least fifty percent of individuals seeking assistance from the organization. Whether called the "justice gap" or the "immigration representation crisis," this severe shortage of qualified and affordable legal counsel for immigrants seriously impedes their ability to obtain a fair and just result.

A. Immigrants' Plight

In addition to the lack of government-funded legal aid service providers for immigrants, the Sixth Amendment right to government-funded appointed counsel in criminal cases is inapplicable to immigrants in immigration proceedings because immigration proceedings are civil. Thus, while immigrants have an independent right to counsel, the cost of exercising such

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23 See Michele N. Struffolino, Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 166, 201-03 (2012) (noting that the recession has contributed to the decreased availability of legal funding programs).


25 About LSC, LEGAL SERVICES. CORP., http://www.lsc.gov/about/what-is-lsc (last visited Mar. 8, 2015) ("LSC is the single largest funder of civil legal aid for low-income Americans in the nation.").

26 Id.


28 See INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . .").
right will not be funded by the government. The government, however, must inform immigrants of their right to assistance of counsel and the availability of free legal service providers in the district where the removal proceeding is being held. It sounds like a fair substitute, but it is not promising. Legal service providers are turning people away and many lawyers are unwilling or unable to assume responsibility for defending an immigrant in a proceeding where freedom to remain in the United States hangs in the balance.

While the government may not have to bear the expense of appointed counsel in immigration proceedings, it still has an obligation to conduct such proceedings fairly. However, due process will not compensate for the inherent disadvantages to many immigrants who appear pro se. Therefore, in order to appreciate how significant legal representation is for immigrants and why ghostwriting could make a substantial difference, it is important to understand the immigration process and the burden it places on an especially vulnerable group of individuals.

The government serves an immigrant subject to removal with a notice to appear, which states the wrongful acts allegedly committed and informs the immigrant of the right to representation by counsel. At a subsequent proceeding, an immigration judge will decide whether to grant an order for removal or allow the immigrant to remain in the United States. The immigration judge will base the decision on the evidence procured at the hearing. The judge may issue a credibility

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31 See Markowitz, supra note 8, at 549 (noting that lawyers refrain from defending immigrants, particularly in removal proceedings); see also About LSC, supra note 25 and text accompanying notes 24-27; Sam Dolnick, As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions, N.Y. TIMES, May 4, 2011, at A24 (reporting the efforts being made to increase representation for immigrants by federal court judges who have seen first-hand the extent of the situation).
32 Zadvydas v. Davis, 533 U.S. 678, 693-94 (2001) (recognizing that the Fifth Amendment right to due process extends to noncitizens in immigration proceedings).
35 Id.
finding based on the consistency of the information and documentation the immigrant submits to the court with other evidence of record.\textsuperscript{36}

In the event the immigration judge issues an order for removal, the immigrant will have up to thirty days to appeal to the Board of Immigration Appeals ("BIA").\textsuperscript{37} Where the BIA issues an unfavorable decision, the federal circuit court is the next line of review, and the immigrant’s last chance to secure freedom in the United States.\textsuperscript{38} The petition for review must be filed within thirty days after the date of the final order for removal.\textsuperscript{39} On review, the court will look for legal error or a lack of substantial evidence supporting the BIA’s decision.\textsuperscript{40} Absent either one of these findings, the court will uphold the BIA’s decision.\textsuperscript{41} In light of the standard of review and the burden of proof placed on immigrants, it is essential that they maintain a well-developed record.\textsuperscript{42} Further, in order to secure a meaningful review, it is in the immigrants’ best interests that the documents in the record accurately depict the facts and their defenses from the very start of their case.\textsuperscript{43}

Immigrants seeking asylum are required to file an application with the Department of Homeland Security Asylum Office.\textsuperscript{44} An asylum officer assesses the credibility of applicants’ stories, and where necessary, will require applicants to submit corroborating evidence.\textsuperscript{45} At this stage, it is especially pertinent that the application for asylum is consistent with the

\textsuperscript{36} Id. § 1229a(c)(4)(C).


\textsuperscript{39} Id. § 1252(b)(1).

\textsuperscript{40} Id. § 1252(b)(4).

\textsuperscript{41} See id.

\textsuperscript{42} See Katzmann, supra note 7, at 7 (explaining that on review, there is a presumption in favor of the decision).

\textsuperscript{43} See id. ("What record is made by the immigrant, therefore, and what legal points are preserved for review in the record are critical to the outcome, especially where the alien has the burden of coming forward with evidence and the burden of proof of entitlement to status or relief.").

\textsuperscript{44} 8 U.S.C. § 1158 (2012) (listing the requirements for applying for asylum).

\textsuperscript{45} Id. § 1158(b)(1)(B). The process for making a credibility finding is similar to the process used by the immigration judge in non-asylum removal proceedings.
immigrant's testimony.⁴⁶ Omission of material information supporting the case for asylum can provide the basis for an adverse credibility finding.⁴⁷

Though the process preceding an order of removal might satisfy a standard of fairness, the reality is that immigrants unable to secure legal counsel have a very hard time navigating through the process successfully. First, immigrants' natural language and communication barriers will serve as an impediment to an effective defense.⁴⁸ Second, many immigrants fleeing from an oppressive government have an inherent fear and mistrust for government that can create an additional barrier for immigrants and authorities to communicate effectively with each other.⁴⁹ Lastly, many immigrants are unfamiliar with the American legal system, including the laws and processes.⁵⁰ For example, the standard of review for a petition filed to the federal court of appeals constrains the court to two circumstances in which it could reverse an order for removal based on the evidence in the record.⁵¹ Therefore, it is essential that immigrants know from the onset of the proceeding that they must not omit any material information pertaining either to a defense for relief from removal or to a basis for asylum, and instead must include such information in detail.⁵²

B. Effect of Representation

The unique and burdensome process entailed in an immigration proceeding underscores the notion that appearing pro se is not a viable option for the majority of immigrants facing

⁴⁶ See Katzmann, supra note 7, at 9 (explaining that immigration judges will make findings of adverse credibility based on the difference between what is filed in the application and what is said).

⁴⁷ See Dong v. Ashcroft, 406 F.3d 110, 111–12 (2d Cir. 2005) (upholding the immigration judge's decision to deny an application for asylum and for withholding of removal where the record was inconsistent with petitioner's testimony and material information was omitted from the testimony).

⁴⁸ See LaJuana Davis, Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings, 58 Drake L. Rev. 123, 149 (2009) (discussing the impact of language barriers); see also Katzmann, supra note 7, at 9–10 (noting immigrants' limited fluency with the English language).

⁴⁹ See Katzmann, supra note 7, at 8.

⁵⁰ See id. (discussing the importance of legal representation for asylum-seekers who may be unfamiliar with the requirement of expressing a need for political asylum in order to avoid expedited removal without a hearing).

⁵¹ See supra notes 40–41 and accompanying text.

⁵² See id.; see also Dong, 406 F.3d at 111–12.
removal. According to Judge Katzmann of the U.S. Court of Appeals for the Second Circuit, “quality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported.” Judge Katzmann’s observations are alarming in light of the fact that the right to appointed counsel does not extend to immigration proceedings, and a large number of immigrants facing removal do not have the financial ability to afford the costs associated with retaining a legal representative.

While Judge Katzmann can explain the considerable effect representation can have on the outcome of a removal or other immigration proceeding, the numbers speak for themselves. Seventy-four percent of represented immigrants had successful outcomes, while only thirteen percent of unrepresented immigrants had successful outcomes. In 2011, of the removal proceedings actually completed, fifty-one percent of noncitizens were represented. In New York, between October 2005 and July 2010, twenty-seven percent non-detained immigrants appeared without a representative. The percentage is even higher for detained immigrants: sixty percent of immigrants detained in New York appeared without a representative. Seventy-nine percent of immigrants detained outside of New York were unrepresented.

In addition to representation, whether an immigrant is detained is another variable that greatly affects the outcome. Eighteen percent of detained immigrants who were represented had successful outcomes. More startling is that only three percent of immigrants detained and unrepresented had

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52 Katzmann, supra note 7, at 7.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id. at 364.
Detained immigrants are in a particularly disadvantageous position because many legal service providers refrain from representing them out of fear that the immigrants will be transferred to another detention facility. Moreover, withdrawing from the representation of transferred immigrants is especially difficult and not always permissible. Consequently, instead of dealing with what may turn out to be an inconvenient and burdensome representation, many legal service providers actually available to help are more likely to represent non-detained immigrants.

While appearing pro se is not a viable alternative to representation for many of these immigrants, remedying the problem is not as simple as assigning lawyers to individual cases. First, immigration law is one of the most complex areas of the law with its own unique procedures and application of other substantive laws. There are, however, no additional requirements for a lawyer to appear in an immigration court beyond admission to the bar. A lawyer that does not specialize in immigration law but only has an occasional client with an immigration matter may not be cognizant that the immigration code is constantly changing. Though they may have had good intentions, these lawyers will inadvertently put their clients at risk.

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61 Id.
62 See id. at 404 (explaining nonprofit removal defense providers and pro bono counsel refrain from representing detained immigrants because of resource constraints and the threat of a possible transfer).
63 Id. at 405 (stating that withdrawing requires judicial approval).
64 Id. at 404.
65 Ardestani v. INS, 502 U.S. 129, 138 (1991); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (describing immigration law as akin to “King Minos’s labyrinth in ancient Crete”); Kim v. Gonzales, 468 F.3d 58, 63 (1st Cir. 2006) (“The current structure of deportation law, greatly complicated by rapid amendments and loop-hole plugging, is now something closer to a many-layered archeological dig than a rational construct.”); see Jennifer Barnes, The Lawyer-Client Relationship in Immigration Law, 52 EMORY L.J. 1215, 1219 (2003) (explaining that lawyers will often have to know criminal law, family law, and realize that the Federal Rules of Evidence do not apply).
66 Barnes, supra note 65, at 1216.
67 See id. at 1219.
68 See id. (stating that lawyers who do not keep up with changes made to immigration laws will not be able to counsel the client on which forms of relief are available).
Second, lawyers who are actually willing to take on immigration cases already have too many of them.\(^9\) Given the economic pressures encountered by solo and small firm practitioners, many lawyers assume too many cases in an effort to make up for the low fees associated with immigration law.\(^70\) Financial constraints, therefore, preclude lawyers from allocating enough time to each case and, in turn, the overall quality of representation suffers.\(^71\)

While limiting the number of cases lawyers take on may increase quality, it will also have the adverse effect of limiting the number of immigrants who are able to obtain legal representation. A more feasible solution is to permit the relaxation of the duties and obligations that lawyers owe to their clients, thereby increasing both efficiency and accessibility.

C. Ghostwriting: A Solution to the Problem?

The growing number of individuals unable to pay for legal counsel and the dearth in affordable legal services has led to the rise of “unbundled legal services,” also known as “limited scope representation.”\(^72\) Through the unbundled legal services model, a client contracts with a lawyer for only some of the legal services traditionally applied in full-service representation, which may include giving legal advice, conducting research, or drafting pleadings and other court documents.\(^73\) Unbundled legal services facilitate individuals’ access to the justice system in two respects. First, the unbundled legal services model is more affordable than the traditional full-service representation.\(^74\) Second, the

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\(^9\) See Davis, *supra* note 48, at 143 (noting that immigrants are mostly low-income clients and because of their undocumented status, they cannot borrow money from financial institutions to pay for expensive representation).

\(^70\) Id.

\(^71\) See id.

\(^72\) See Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way To Increase Access to Justice for Pro Se Litigants*, 20 GEO J. LEGAL ETHICS 563, 565 (2007); see also Steinberg, *supra* note 27, at 461 (noting that state and federal commissions are now focusing on unbundled legal services as a means to improve access to justice).

\(^73\) Farley, *supra* note 72, at 567-68. “Practitioners often speak about unbundled legal aid as a system in which a client can choose from an ‘a la carte’ menu of attorney services and can hire an attorney to assist with particular elements of a case when full representation is either undesired or unaffordable.” Steinberg, *supra* note 27, at 461.

\(^74\) See Steinberg, *supra* note 27, at 463.
unbundled legal services model gives lawyers the ability to extend their services to even more clients since they are not obligated to oversee any one legal matter throughout its entirety.  

Ghostwriting is an example of an unbundled legal service that can provide immigrants with the help most pertinent to their case. Ghostwriting is the practice in which a lawyer drafts pleadings or other court documents for a pro se litigant without disclosing such help to the court. The practice of ghostwriting is appealing to lawyers because they do not have to appear before the court on behalf of the client, and therefore, upon completion of the services contracted for, they can withdraw from the representation without the court’s permission.

In a typical ghostwriting scenario, after drafting pleadings or other court documents, the lawyer’s involvement ceases and the client is left to file the papers with the court. A lawyer can, however, choose to provide ghostwriting assistance throughout the entire course of the proceedings. In either case, to the court and opposing counsel, the individual before them is appearing pro se and is thus entitled to leniency throughout the course of the proceeding. It is for this reason that ghostwriting has not gained widespread acceptance among the courts. Citing the Model Rules of Professional Conduct (“the Model Rules”), some courts criticize ghostwriting as a violation of a lawyer’s ethical responsibilities and an impediment to the adversarial process.

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76 See Farley, supra note 72, at 565; see also Rothermich, supra note 13, at 2691 (discussing how unbundled legal service increases access to justice for the poor in part because it allows legal service agencies to allocate limited resources to more individuals); MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2011).
77 Rothermich, supra note 13.
78 See Farley, supra note 72, at 570. Full-service representation obligates the lawyer to represent the client until all legal matters are settled, absent the court’s permission to withdraw. Id.
79 See Rothermich, supra note 13.
80 See id.
82 See infra Part II.A.
II. CIRCUIT SPLIT: WHAT’S A GHOST TO DO?

The ethical and legal controversy surrounding undisclosed attorney ghostwriting illustrates how modifications to deep-rooted traditions are rarely embraced wholeheartedly. Not many circuit courts have weighed in on the issue of attorney ghostwriting, but among the ones that have are the First Circuit in *Ellis v. Maine*, the Tenth Circuit in *Duran v. Carris,* and, most recently, the Second Circuit in *In re Liu.* In its opinion, the Second Circuit distinguished itself from the vast majority of federal courts opposing undisclosed ghostwriting, and instead conformed to the American Bar Association’s (“ABA’s”) 2007 opinion validating the practice of undisclosed attorney ghostwriting.85

A. Disclosing the Ghost

The First Circuit recognized the growing trend of ghostwriting, and its opinion captured the heart of the ethical and legal controversy surrounding ghostwriting. In its opinion, the court stated, “the petitioner appears pro se, asserts complete ignorance of the law, and then presents a brief which, however insufficient, was manifestly written by someone with some legal knowledge.” The First Circuit was primarily concerned with lawyers escaping their obligations under the Federal Rules of Civil Procedure (“the Federal Rules”), which control the procedure in all civil actions and proceedings brought in the U.S. district courts. Specifically, the First Circuit was concerned with enforcing Federal Rule of Civil Procedure 11 (“Rule 11”), which imposes on lawyers the obligation “of representing to the court that there is good ground to support the assertions made.”

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82 448 F.2d 1325 (1st Cir. 1971).
83 238 F.3d 1268 (10th Cir. 2001) (per curiam).
84 664 F.3d 367 (2d Cir. 2011).
85 See infra Part II.B.
86 *Ellis*, 448 F.2d at 1328 (requiring a lawyer’s signature where a brief was prepared in substantial part by the lawyer).
87 *Fed. R. Civ. P. 1*.
88 *Ellis*, 448 F.2d at 1328. Rule 11 has since been updated with more focused language replacing the phrase “good ground to support.” *See Fed. R. Civ. P. 11* advisory committee’s note to 1983 amendment.
Accordingly, the First Circuit held that lawyers assisting in preparing briefs for petitioners appearing pro se are required to include their signature. 89

While the Federal Rules provide the legal basis for requiring lawyers to provide their signature on documents they submit to the court, the Tenth Circuit in Duran v. Carris highlighted the strong ethical basis for prohibiting undisclosed ghostwriting, citing the Model Rules of Professional Conduct for support. 90 The Model Rules, adopted by the ABA, are professional guidelines through which the ABA promotes the "highest standards of professional competence and ethical conduct." 91 Unlike the Federal Rules, which govern parties' conduct in all civil actions in federal courts, the Model Rules govern lawyers' professional behavior to the extent a particular state has modeled its ethics rules after them. 92 Further, whether a rule is compulsory is dependent on the inclusion of the terms "shall" or "shall not" in its text. 93 Where such language is included in the text of the rule, failure to comply may provide the basis for disciplinary action. 94

"Model Rule 3.3: Candor Toward the Tribunal" is an example of a compulsory rule. Model Rule 3.3 provides in pertinent part:

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false.... 95

89 Ellis, 448 F.2d at 1328.
90 See Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) (per curiam) (citing Rothermich, supra note 13, at 2697).
92 About the Model Rules, MODEL RULES OF PROF. CONDUCT, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Mar. 8, 2015) (explaining that the Model Rules is a national framework for implementation of standards of professional conduct and anticipating modifications to the Model Rules at the state level). California is the only state that has not adopted the Model Rules as a framework. Id.
93 MODEL RULES OF PROF'L CONDUCT Scope (2012).
94 Id. Conversely, where a rule's text includes the terms "may" or "may not," lawyers may act according to their own discretion. Id.
95 MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2013) (emphasis added).
A lawyer’s duty of candor outlined in Model Rule 3.3 concerns
behavior that would jeopardize the integrity of the adjudicative
process; thus, the rule expressly prohibits lawyers from engaging
in conduct that misleads the court.\footnote{Id. cmt. 2 (forbidding lawyers from misleading the court with false statements
of law or fact).}

Given the Tenth Circuit’s concern that undisclosed
ghostwriting benefitted a pro se litigant to the detriment of the
integrity of the adversarial process and allowed a lawyer who
caused such a result to avoid responsibility, Model Rule 3.3
provided much of the basis for the court’s holding that a lawyer
who ghostwrites a pro se brief must include his or her
signature.\footnote{See Duran v. Carris, 238 F.3d 1268, 1271–73 (10th Cir. 2001) (per curiam); see also
FED. R. CIV. P. 11(c)(1) (“[T]he court may impose an appropriate sanction on any
attorney . . . that violated [Rule 11(b)].”).}

Further, throughout its opinion, the Tenth Circuit
illustrated how lawyers’ ethical obligations under the Model
Rules are not separate and distinct from lawyers’ legal
obligations under the Federal Rules.\footnote{See Duran, 238 F.3d at 1272.}

Pursuant to Rule 11(a), “[e]very pleading, written motion,
and other paper must be signed by at least one attorney of record
in the attorney’s name—or by a party personally if the party is
unrepresented.”\footnote{FED. R. CIV. P. 11(a).}
Pursuant to section (b) of Rule 11, a lawyer’s signature
certifies that to the best of the person’s knowledge, information,
and belief, formed after an inquiry reasonable under the
circumstances: (1) it is not being presented for any improper
purpose . . .; (2) the claims, defenses, and other legal
contentions are warranted by existing law or by a nonfrivolous
argument for extending, modifying, or reversing existing law or
for establishing new law; [and] (3) the factual contentions have
evidentiary support . . . .\footnote{FED. R. CIV. P. 11(b).}

According to the Tenth Circuit, a lawyer is ethically
obligated to provide his signature to inform the court that the pro
se individual has received legal advice.\footnote{Duran, 238 F.3d at 1272.} An attorney’s
signature conveys an “imprimatur of professional competence,”
and in the absence of such a signature, the court will presume an
absence of such professional competence. Accordingly, in an effort to provide an equal opportunity to justice, courts uniformly construe pro se litigants’ pleadings more liberally to compensate for the professional competence a pleading drafted by an attorney would otherwise have. However, if the pro se litigant has really received the benefit of legal counsel, the court will inadvertently put the pro se individual a step ahead of the opposing party, resulting in the very unfairness it meant to prevent.

Based upon the foregoing, the Tenth Circuit held that ghostwriting amounts to a violation of a lawyer’s duty of candor under Model Rule 3.3. A lawyer engaged in ghostwriting allows the court to erroneously presume that the litigant has not had the benefit of professional assistance, despite knowing the implications it will have on the adversarial system. Accordingly, the Tenth Circuit also found that ghostwriting amounts to a misrepresentation to the court—conduct Model Rule 8.4(c) expressly proscribes—as well as conduct that is prejudicial to the administration of justice under Rule 8.4(d).

102 Id. at 1272 (stating that it is competence that necessitates lawyers’ conduct under Rule 11(b)).
103 See Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (requiring pro se pleadings be held “to less stringent standards than formal pleadings drafted by lawyers”).
105 Duran, 238 F.3d at 1271–72.
106 Id. at 1272.
107 MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”).
108 Duran, 238 F.3d at 1272; MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2013) (“It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”).
The Tenth Circuit’s opinion captured the essence of why ghostwriting is viewed as both a legal and an ethical problem. Without anything else lending credence to undisclosed ghostwriting, it is easy to understand why the Tenth Circuit took the position it did. While arguments are still being made against ghostwriting, the latest circuit court to address the issue has taken a different position.

B. Keeping the Ghost . . . a Ghost

Recently, the Second Circuit in In re Liu\textsuperscript{109} dismissed a recommendation from the Court’s Committee on Attorney Admissions and Grievances that Fengling Liu, an attorney practicing in New York, be sanctioned for engaging in undisclosed ghostwriting of petitions for review.\textsuperscript{110} Liu provided ghostwriting services because she did not want her immigrant clients’ current inability to pay to preclude them from meeting the deadline for preserving their right of review.\textsuperscript{111} After acknowledging prior federal court opinions condemning undisclosed ghostwriting, the Second Circuit concluded that undisclosed ghostwriting does not constitute attorney misconduct.\textsuperscript{112}

While the Second Circuit’s opinion regarding the ethical and legal implications of undisclosed ghostwriting created a split among the circuit courts, the Second Circuit grounded its decision on a fundamental source: the ABA Standing Committee on Ethics and Professional Responsibility’s 2007 opinion.\textsuperscript{113} In its 2007 opinion, the ABA held that “[a] lawyer may provide legal assistance to litigants appearing before tribunals ‘pro se’ and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.”\textsuperscript{114} It was the content of this opinion that provided the basis for the Second Circuit’s holding.\textsuperscript{115} Therefore, in order to appreciate the value of the Second Circuit’s holding, it is

\textsuperscript{109} 664 F.3d 367 (2d Cir. 2011) (per curiam).
\textsuperscript{110} Id. at 368–69, 372–73.
\textsuperscript{111} Id. at 381.
\textsuperscript{112} See id. at 369–70, 373.
\textsuperscript{113} See id. at 370–71.
\textsuperscript{115} See In re Liu, 664 F.3d at 370–73.
important to understand how the ABA concluded that undisclosed ghostwriting does not violate a lawyer's legal and ethical duties.

Under Model Rule 1.2(c), "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The ABA acknowledged that it is not uncommon for lawyers to provide limited legal services to pro se litigants, which may include drafting or reviewing documents before the pro se litigant submits the documents to the court. Thus, the central issue for the ABA became whether the Model Rules of Professional Conduct require a lawyer to ensure that the tribunal is made aware of such assistance.

There is no uniform rule among state and local ethics committees regarding a lawyer's duty to disclose the lawyer's identity. In an informal opinion issued in 1978, the ABA did not place a per se ban on lawyers assisting pro se litigants, but instead imposed a duty on lawyers to ensure that disclosure was made where a pro se litigant received substantial assistance. In its 2007 opinion, the ABA reformulated this standard to provide that whether a lawyer is obligated to ensure that the tribunal is made aware of his or her assistance turns on whether "the fact of assistance is material to the matter." The failure to disclose that fact would constitute fraudulent and dishonest conduct that Model Rules 1.2(d), 3.3(b), 4.1(b) or 8.4(c) prohibits.

In applying this standard to a pro se litigant submitting documents to the tribunal after receiving a lawyer's assistance, the ABA opined that it is not material to the merits of the

116 MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013).
118 See id.
119 See Jona Goldschmidt, In Defense of Ghostwriting, 29 FORDHAM URB. L.J. 1145, 1163–65 (citing ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978)) (explaining that whether a lawyer providing legal services to a pro se litigant has violated any Canons of Ethics depends on the circumstances and the extent of the lawyer's participation).
121 See id.
Further, the ABA stated that pro se litigants do not have to disclose that they have received legal assistance in the absence of a law or rule requiring disclosure.

In justifying its position, the ABA responded to long-held concerns that undisclosed ghostwriting does not account for the liberal pleading standard and will give a pro se litigant an unfair advantage. The ABA maintained that when pro se pleadings are the product of a ghostwriter and are actually effective, the court will know and will have no reason to liberally construe the pleadings. In the alternative, when the “pro se” pleadings drafted by a ghostwriter are ineffective, the pro se individual is in the same position the individual would have been had the ghostwriter never been employed. Based upon the foregoing rationale, the ABA concluded that undisclosed ghostwriting does not give a pro se litigant an unfair legal position, and consequently, “the nature or extent of such assistance is immaterial and need not be disclosed.”

Further, the ABA concluded that as long as the pro se litigant does not affirmatively state to the court that the documents were prepared without legal assistance, undisclosed ghostwriting does not constitute misconduct amounting to dishonesty within the meaning of Model Rule 8.4(c). With respect to the argument that ghostwriting enables a lawyer to circumvent Rule 11, the ABA concluded that a lawyer engaged in undisclosed ghostwriting does not circumvent Rule 11 precisely because the lawyer does not include a signature on the

122 See id.
123 See id. The ABA, presumably, did not find that undisclosed legal assistance amounts to fraudulent or dishonest conduct prohibited by Model Rule 1.2(d), 3.3(b), 4.1(b), or 8.4(c). See id.
124 See id.
125 See id. (stating that any pleading missing an essential element or fact, whether it was drafted by an attorney or a pro se litigant alone, will not survive a motion for summary judgment).
126 Id.
127 See id. (stating that whether undisclosed legal assistance to a pro se litigant amounts to dishonest conduct prohibited by Model Rule 8.4(c) depends on “whether the court would be misled by failure to disclose such assistance”).
documents submitted to the court.\textsuperscript{128} Without signing, the lawyer never assumes the duties that would ordinarily subject the lawyer to sanctions under Rule 11.\textsuperscript{129}

Though courts and state ethics committees have yet to uniformly adopt a provision expressly permitting undisclosed ghostwriting, the Second Circuit expressed confidence that in light of the ABA's 2007 opinion, ghostwriting will gain greater acceptance.\textsuperscript{130} Despite continued uncertainty and inconsistency among courts and state ethics opinions regarding the legal and ethical validity of ghostwriting, it remains a valuable alternative to full-service representation. For the pro se immigrant, ghostwriting is even more important, for it may be a valuable alternative to removal.

III. EMBRACING THE GHOST

Relying largely on the Model Rules, the Tenth Circuit found that undisclosed ghostwriting did not allow lawyers to fulfill their ethical duties.\textsuperscript{131} In the time since the Tenth Circuit issued its opinion, the ABA provided a basis grounded in the Model Rules for the validity of undisclosed ghostwriting.\textsuperscript{132} While the Second Circuit's opinion in \textit{In re Liu} may have deepened the tension surrounding the practice of undisclosed ghostwriting, it also highlighted how undisclosed ghostwriting can benefit immigrants who are unable to pay for full-service representation. In light of the representation crisis facing immigrants and the positive impact legal representation has been proven to have, this Note proposes that circuit courts follow the Second Circuit's lead and permit undisclosed ghostwriting in immigration proceedings.

\textsuperscript{128} See id.
\textsuperscript{129} See id. (reasoning that a lawyer's signature amounts to an affirmative statement to the tribunal that the pleadings satisfy Rule 11, and at that point will subject a lawyer to Rule 11 responsibilities).
\textsuperscript{130} See \textit{In re Liu}, 664 F.3d 367, 371 (2d Cir. 2011) (per curiam) (reasoning that most of the federal and state court opinions opposing ghostwriting were issued prior to the ABA's 2007 opinion and viewing that factor as a strong indicator that those same courts will now change their positions).
\textsuperscript{131} See Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) (per curiam).
\textsuperscript{132} See supra Part II.B.
A. **Striking a Balance**

While efforts are being made to increase access to justice for low-income individuals, an overwhelming amount of low-income immigrants are still not receiving the help they need. Either they do not receive representation at all because there are not enough resources available, or they receive representation from a lawyer who is already managing a large case load. Though limiting the amount of immigration cases lawyers are permitted to take on will alleviate the risk of inadequate representation, it will also exacerbate the immigration representation crisis. As this Note suggests, undisclosed ghostwriting will strike a proper balance. It will increase immigrants’ access to legal representation by increasing the number of lawyers willing to help, thereby reducing the risk of overburdened lawyers. Further, in light of the standard of review and the threat of an adverse credibility finding, the ghost-written documents submitted to the court upon the initiation of a removal proceeding can positively influence the rest of immigrants’ cases. Undisclosed ghostwriting, therefore, will help secure a credible defense for immigrants and leave them in a better position to proceed alone upon completion of the lawyer’s services.

Model Rule 1.2(c) permits a lawyer to render limited scope representation under two conditions: (1) limited scope representation is reasonable under the circumstances; and (2) the client gives informed consent. Under the Model Rules, informed consent is defined as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

In the absence of an express agreement, whether an attorney-client relationship has formed is based on the client’s reasonable belief under the circumstances that such a relationship has formed. See supra Part I.A.

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133 Forty-one states have adopted Model Rule 1.2(c) or a similar rule permitting lawyers to unbundle their legal services. See John T. Broderick Jr. & Ronald M. George, Op-Ed., *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, at A21.

134 See supra Part I.A.

135 MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

136 MODEL RULES OF PROF'L CONDUCT R. 1.0(e).
relationship existed. Therefore, in order to avoid entering into a relationship beyond the reach of ghostwriting and fulfill the expectations of immigrant clients, the lawyer must explain that the representation extends only to preparing documents that the immigrant will submit to the court. This includes the documents that the immigration judge will review before determining whether to issue an order for removal.

If an order for removal is issued, the contract for undisclosed ghostwriting will also include preparing the petition for review to the BIA, and in the event that it is necessary, the petition to the federal circuit court. At each stage, the lawyer is responsible for ensuring that all of the documents submitted to the court reflect a complete and accurate depiction of the immigrant’s case and will not later provide a basis for an adverse credibility finding.

Further, the lawyer cannot assume that immigrants understand that they will be responsible for submitting the papers to the court. Instead, the lawyer must explain that the lawyer’s responsibilities do not include appearances on the client’s behalf. While the lawyer and the immigrant can provide for this in a later agreement, the immigrant will be responsible for submitting the documents to the court. To the extent that it is necessary, the lawyer should hire an interpreter who can adequately convey the precise nature of the representation.

Though ghostwriting is a valuable alternative to pro se representation, lawyers should explain alternatives to the type of limited representation they will be rendering, including for example, pro se representation. Additionally, while low-income immigrants in immigration proceedings presumably cannot afford full-service representation, lawyers should explain that another alternative form of representation is full-service representation. Particularly, lawyers rendering full-service

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137 See Ingrid A. Minott, Note, The Attorney-Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation, 86 U. Det. Mercy L. Rev. 269, 278–79 (2009) (discussing the factors relevant to determining whether an attorney-client relationship exists but adding that the existence of a relationship may rest on the client’s understanding and reliance upon the fact that the relationship is created).

138 See Katzmann, supra note 7, at 9 (discussing the importance of maintaining credibility in an immigration proceeding where what is filed could provide the basis for an adverse credibility).

139 See MODEL RULES OF PROF’L CONDUCT R. 1.0(e) cmt. 6 (2013) (stating that ordinarily, a lawyer is required to inform the client of the advantages and disadvantages of the proposed course of conduct and alternatives).
representation should explain that they would appear before the tribunal and provide assistance throughout the entire course of the legal proceedings. Further, to avoid misleading the immigrant client, lawyers must explain the costs associated with full-service representation and make clear that it is not what the client has presently contracted for.

It is essential that ghostwriting remain undisclosed because many lawyers fear that disclosure would require them to assume all matters related to the case. As previously noted, many lawyers shy away from representing detained immigrants out of fear that their clients will be transferred to a detention center across the country. If this were to occur, a lawyer must first find substitute counsel for the immigrant in the transferred jurisdiction and then obtain the consent of the immigration judge to withdraw from representation. Therefore, not many lawyers are willing to forego other fee-generating opportunities and commit all of their time and resources to a representation that will likely yield no financial return. Undisclosed ghostwriting, therefore, allows lawyers to agree only to what they are willing to do wholeheartedly.

Additionally, undisclosed ghostwriting will incentivize lawyers to extend their services, which they would otherwise be unlikely to do if they were required to provide full-service representation. By limiting the scope of the representation to undisclosed ghostwriting, lawyers can protect themselves from an unreasonable financial burden because they can limit the representation to what they are willing to do in light of their respective financial situations. Because a lawyer will already have obtained informed consent to provide ghostwriting services only, in accordance with Model Rule 1.2(c), a lawyer will be assured that such an agreement will be respected.

While there are lawyers who take on too many immigration cases and therefore risk jeopardizing the immigrant’s case, undisclosed ghostwriting will help remedy this problem. Unlike

140 See Loudenslager, supra note 80, at 137–39 (“[R]equiring disclosure when an attorney drafts court documents for an otherwise pro se litigant will act as a disincentive to attorneys providing limited legal services.”).
141 See Accessing Justice, supra note 9, at 404–05.
142 See id. at 405 (citing OFFICE OF THE CHIEF JUDGE, U.S. DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL ch.2.3.(d) (2006)).
143 Markowitz, supra note 8, at 549.
144 See MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2013).
full-service representation, undisclosed ghostwriting will not require a large amount of time or resources and will therefore not present the same financial burden as full-service representation would. Due to the nature of the representation, lawyers will not have to worry about attending hearings, communicating with the government, or incurring the costs associated with traveling to a detention center across the country. Therefore, undisclosed ghostwriting will enable lawyers to extend their services to immigrants and still service clients who are able to pay higher legal fees. This will effectively eliminate lawyers' need to take on an abundance of immigration cases to compensate for low fees.

B. The Reality of the Immigrants' Plight

Even though the ABA has already opined that undisclosed ghostwriting does not violate the Rules of Professional Conduct, it is still important to emphasize that an underrepresented immigrant who has much more to lose than money will not threaten the fair administration of justice by retaining an undisclosed ghostwriter.145 Opponents of ghostwriting argue that ghostwriting will place the pro se litigant at a greater advantage than the opposing party, thereby undermining the purpose of the liberal pleading standard in the process.146 However, arguments of this sort are unconvincing because, in an immigration proceeding, the opposing party is the federal government.147 Thus, at most, undisclosed ghostwriting will attempt to level the playing field. Undisclosed ghostwriting does not guarantee a favorable outcome for immigrants. It will, however, preserve the integrity of the judicial system by ensuring that the administration of justice is fair and well-founded.

Research on asylum applications has revealed that asylum-seekers who are represented have a better chance at a successful outcome than asylum-seekers who are not represented.148 An

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145 Retired Supreme Court Justice, John Paul Stevens, describes immigrants' need for legal representation as "acute" because "the consequences are just so drastic." Sam Dolnick, As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions, N.Y. TIMES, May 4, 2011, at A24 (reporting efforts being made to increase representation for immigrants).

146 See supra Part II.A.

147 See Loudenslager, supra note 80, at 120 (noting that ghostwriting is particularly unfair when the opposing party is proceeding pro se as well).

148 Schoenholtz & Bernstein, supra note 149, at 58 (citing research on asylum applications that found represented asylum-seekers obtained relief in twenty-five
application for asylum or an application pleading relief from removal prepared by a lawyer will typically reflect a more accurate depiction of the facts than it would had a pro se immigrant prepared them. A lawyer can draft an application in a more favorable light and still maintain the integrity of the immigrant’s case. This is especially significant for immigrants eligible for asylum where “legal representation at the asylum interview in preparing the application itself often is critical—incomplete information then provided could later figure prominently in an Immigration Judge’s credibility findings.”

While adherence to the substantive and procedural requirements for an asylum application or an application for relief from removal is crucial to guarding against an adverse credibility finding, some immigrants may not divulge every bit of material and personal information due to their distrust of the government. Undisclosed ghostwriting creates an opportunity for immigrants to develop the trust necessary for a successful defense. An immigrant who forms an attorney-client relationship with a ghostwriting attorney is more likely to divulge very personal and material information that, if kept secret, will serve as the basis for an adverse credibility finding.

CONCLUSION

Given the overwhelming number of immigrants appearing pro se, the intricacy of immigration law, and the cost of losing an immigration proceeding for immigrants, ghostwriting may be immigrants’ last fleeting alternative to retaining counsel, and
more importantly, their last chance at securing freedom. The circuit courts, like the Tenth and First Circuits, may continue to prohibit undisclosed attorney ghostwriting in civil litigation matters. Nevertheless, every circuit should permit immigration lawyers to ghostwrite.