

**(Confidential: For NWU members only)**

# **Guide to the Model Ghostwriting & Collaborations Contract**

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## **Introduction**

Writing is usually a process in which you express your own thoughts, opinions and experiences. Yet there are growing numbers of people who believe they have something to say but lack the ability or inclination to actually put together the words. Many of these people are celebrities, whose byline is regarded by publishers as a major selling point in marketing books. This in turn creates an opportunity for those of us who are adept with language and are willing to put that talent to work to tell someone else's story.

Ghostwriting is not new, but it appears to be an increasingly common method for creating certain categories of books. Phantom writers are being employed not only for celebrity autobiographies, but also for business books, how- to books, cookbooks and even works of fiction and science.

As a result, more and more members of the National Writers Union may find themselves putting words in someone else's mouth. When doing this kind of work, it is essential that you first negotiate and sign a collaboration agreement with the person you will be ghosting for. (Following industry terminology, the person doing the writing will be referred to as the Writer, while the other party will be called the Author.) Do not assume that because you and the Author have a good rapport, a written agreement is unnecessary. Relationships can turn sour overnight, and without a clear contract, you could find yourself ousted without compensation from a project on which you devoted a substantial amount of time and energy.

This Guide and Model Contract are meant to help you negotiate the best possible terms in ghostwriting and collaboration agreements. The focus here is on situations in which you, as a writer, are hired to produce a manuscript about the life or ideas of another party who will present him or herself as the author of that work when it is published. We refer to this as ghostwriting, even though, as discussed below, it is becoming increasingly common for the writers of such works to be acknowledged in some way.

This Guide and the Model Contract can also be used, to a certain extent, in situations in which two or more writers collaborate on a book project. In such cases, the proposed contract language would need to be adjusted to reflect this different division of labor.

Before turning to specific contract issues, there are several general points to consider.

As in any contract negotiation, every provision of a collaboration agreement has to be seen in relation to the whole. For example, the extent to which a less than ideal clause is tolerable will depend on what the other party is willing to offer in other areas.

In the case of ghostwriting agreements, the most common tradeoff of this sort is between credit and money. If the Author wants to do more to preserve the appearance of having actually written the book, he or she should be willing to pay more to you. Similarly, if getting prominent credit is important to you, you may have to settle for less remuneration.

As with book contracts, a proposed collaboration agreement presented to you by the Author or his or her agent should not be regarded as a take-it-or-leave-it proposition; you should never simply sign on the dotted line. Do your best to negotiate improvements in the offer. The Guide below will give you an idea of which changes are realistic and which may be impossible to achieve.

Do not assume that your agent, if you are working with one, will catch every problem. There are many capable and competent agents, but there are also some who focus only on the key money provisions of a collaboration agreement and let the other issues slide. Whatever the competence of your agent, it behooves you to review a proposed agreement and raise questions and concerns. Be even more careful if the same agent is representing both you and the Author. (See below for further discussion of this issue.) Exercise similar diligence even if you decide to use a lawyer to negotiate the agreement.

In some cases, it will be up to you to draft the collaboration agreement. The Model Contract and Guide will enable you to fashion a document that fully protects your rights and interests. Keep in mind, however, that the circumstances of each book are different. You may very well have to adapt the Model Contract language to reflect the exact nature of your project.

Whether you are drafting the collaboration agreement yourself or responding to someone else's proposed language, you should not hesitate to consult an NWU contract advisor after reading the Guide and Model Contract. Union advisors can help you compare the principles presented below to the realities of your project. Also keep in mind that if you have problems in a collaboration after you have signed the agreement, you can call an NWU grievance officer for assistance.

You can get in touch with a contract advisor or a grievance officer by calling your Local or one of the NWU's two national offices: New York (212-254-0279) or the Bay Area (510-839-0110). At-large members can call (800) 417-8114. You can also send an e-mail request to: .

## **Acknowledgements**

The Guide and Model Contract were drafted by NWU Vice President Philip Mattera drawing on material previously prepared by Catherine Revland as well as extensive input by Archie Brodsky. Valuable suggestions were also provided by Mike Bradley, Frank Free, Cem Kaner, George Robinson, Sue Telingator, Steve Turner, and Helena Worthen.



**Preliminaries.** The contract should state the names of the parties and their agents. (See Section 4 below for a discussion of representation issues.) The agreement should also specify the nature of the work (So & So's Autobiography, Dr. So & So's Miracle Cure, etc.) as well as an approximate word length. These specifications can later be crucial if the Author claims you failed to produce a satisfactory manuscript. It should also be stated up front that you and the Author are working exclusively with each other. As long as the agreement is in effect, the Author should not be working with another collaborator. You don't want to be in a position of competing with a rival ghostwriter on the same project.

**1. Preparation of the proposal.** Nearly all of the books you are going to produce as a ghostwriter will be sold to a publisher on the basis of a detailed proposal and perhaps a sample chapter or two. The preparation of this material is an investment of time and energy that you should not subsidize. Insist on reasonable payment for this work while you are doing it. That payment should not be refundable if the book cannot be sold.

Ask for half of the fee when the collaboration agreement is signed, and the remainder when you deliver all the material. Although you should agree to make revisions in the proposal up to a reasonable degree, try to avoid language that makes your final payment contingent on the Author's determination that your work is satisfactory. If the Author and/or the agent asks for major rewrites, you should negotiate an additional fee. This is important if the project does not sell and has to be reconceptualized

Ultimately, you should get paid for the proposal even if your final revised version is not deemed completely satisfactory by the Author. Otherwise, you could get stiffed by an Author who capriciously rejects your work. Also avoid language that makes you wait for payment until the project is sold to a publisher.

In some circumstances, Authors will seek to be reimbursed for your proposal fee out of your share of the money from the publisher. Avoid this arrangement if you can. The fee for preparing the proposal should be regarded as separate from the earnings from the manuscript itself.

Some experienced writers insert escape clauses in their collaboration agreements allowing them to easily end their involvement in the project if it turns out that there is not enough material for a saleable book or if the Author turns out to be unbearable to work with. It should be made clear in such circumstances that you must be paid in full for having written the proposal.

**2. Division of labor.** Obviously, your role as the Writer is to write the manuscript. The agreement should also specify what the Author's responsibilities are. These will include making him/herself available to you for interviews for a reasonable amount of time within a specified time period and/or providing you with written or recorded materials that will assist you in your writing.

It is not uncommon for Authors who are, for example, corporate executives to devote inadequate time to providing Writers with the information needed to produce a manuscript. You may find yourself trapped between an inaccessible Author and an editor who insists that you meet

deadlines nonetheless. Clear contract language on the Author's basic responsibilities will allow you to avoid being scapegoated.

**3. Copyright ownership.** At one time it was unheard of for ghostwriters to have an ownership interest in what they wrote. Instead, they would be forced to accept work-for-hire status, in which their writing was automatically the property of the Author. This arrangement is still quite common, but you should do your best to secure a full partnership role in the project.

This begins with the principle that you and the Author will hold the copyright in the Work jointly. (See, however, Section 15 on what happens if the Work is not sold to a publisher.) Be sure this arrangement is reflected in the book contract and that the publisher registers the copyright for the work accordingly. Copyright establishes your ownership interest in a work that results from your writing efforts. The fact that the book may be about someone else's life or ideas does not change the fact that you did the creative work to make it a reality. A joint copyright gives you and the Author equal rights to the work.

By contrast, in a work-for-hire situation, all rights in the work belong to the Author as the commissioning party. According to the Copyright Act, projects can be works made for hire when the writer is an employee (in the formal sense) of the commissioning party or when the work falls into one of several categories, none of which explicitly includes ghostwriting. The fact that ghostwriting may not be a bona fide work-for-hire situation is another reason to seek joint copyright ownership.

**4. Representation.** Ideally, you and the Author will be represented by different agents. This is to be sure you have someone looking out for your interests alone. It is not uncommon for one agent to represent both Author and Writer (usually it is the Author's agent). This arrangement may seem simpler, but if there is a serious dispute between you and the Author, the agent is invariably going to side with the Author. After all, the Author is indispensable to the project; you can always be replaced by another writer.

When there are two agents, what frequently happens is that the Author's agent will take the lead in negotiations. Your agent will be consulted on possible deals and will keep you informed.

**5. Right of approval.** Assuming you have been able to get full copyright partnership, you should have an equal say as to the acceptability of any proposed deals. What goes along with this is being a signatory to the publishing contract. In other words, the publisher is making the deal with the Author and you, not the Author alone. As a party to the contract, you are entitled to all the rights and benefits that derive from that agreement.

If you've achieved this parity with the Author, there would be no need to specify in the collaboration agreement that you are entitled to copies of the royalty statements and other financial reports. We've put that language in the Model Contract anyway, mainly because so many collaboration agreements do not grant equal status to the Writer. If that's the case for you, be sure that the provision about royalty statements and other reporting is included in your agreement.

**6. Division of proceeds.** Money, of course, is one of the most contentious points in a ghostwriting agreement. The first issue is whether you are going to get a share of the income generated by the project, or simply a flat fee. At one time, the latter was the rule. Ghostwriters who penned books that went on to become best-sellers watched as the purported authors raked in millions while they got nothing more than the fixed amount they initially agreed to.

Today it is much more common for ghostwriters to share in royalties and other revenues, but there is wide variation in how much they get. So much so that it is difficult to present model provisions that can account for all the possibilities. Here, more than in other areas, the language in the Model Contract should be regarded as just one of a number of possible arrangements. If it does not meet your exact needs, consult an NWU Contract Advisor for help in fashioning an appropriate variation.

In keeping with the principle that the Writer should be an equal partner with the Author, the basic model we present is an even 50-50 split, but you will probably have to press hard to achieve that. Expect to see an initial offer that is considerably less and then negotiate up as best you can.

Whatever share of revenues you end up with, you should try to arrange things so that all of the initial advance from the publisher goes to you, so you have money to live on while you write the book. The Author probably has another source of income. (Some arrangement will probably have to be made to prepay the commission due the Author's agent, assuming he or she is not representing you as well.)

This assumes that the portion of the advance that the publisher will pay upon signing the contract (along with any intermediate payments prior to the delivery of the final manuscript) is roughly equal to what you will need to live on while writing the book. Things get more complicated if that payment is much lower or much higher than the amount you need. If the book is getting an initial advance of \$1 million, it is probably not reasonable for you to ask to get all of it. On the other hand, if the initial advance is \$5,000, it is not reasonable for the Author to expect you to live on that amount while writing the book. The Author would have to front you some additional money out of pocket--to be recouped out of any later royalties--or you should have the right to end your involvement in the project at this point.

In the event of a large advance, the fact that you receive something much less than 50 percent of the initial payment from the publisher does not mean that the same percentage has to apply to future income. Consult your NWU Contract Advisor for help in working out the best system for dividing up future income.

If you arrange to get all of the initial advance, the Author would get the remainder paid upon acceptance of the manuscript. Assuming a 50-50 split, you and the Author would be even. Once the book earns out its advance and begins to generate additional income, you and the Author would start getting your respective shares.

Remember that most books do not earn out their advances, so those pre-publication payments may be all the compensation available to you and the Author.

Avoid situations in which the Author agrees to split revenues from the book itself but not subsidiary rights. It is reasonable, however, for the Author to specify that you are not entitled to share in income from his or her lecturing and other activities not directly related to the book. If, however, the Author sells copies of the book at those events, you should receive a share of the income from such sales. The amount of the compensation could be either the royalty you would have received if the copies had been sold in bookstores or a portion of the Author's profits from the sales.

Whatever division of proceeds you agree on with the Author should be reflected in the contract the two of you negotiate with the publisher. If you do not want the publisher to know the exact arrangement between the two of you, be sure that you and the Author both sign a letter indicating to your agent(s) how the money should be apportioned.

You should not rule out a flat fee if the price is right. Some high-powered ghostwriters have been able to command several hundred thousand dollars for writing manuscripts for big-name management consultants or corporate executives. Sometimes they get a minority share of royalties to boot.

**7. Authorship credit.** At one time, ghostwriters were completely invisible. Only the purported author, the agents and the publisher knew who really wrote the manuscript. Sometimes that is still the case, but it is increasingly common for the Writer to be acknowledged in one form or another in the book.

Assuming you want your contribution made public, you should negotiate for the most prominent form of credit possible. The best situation, of course, would be full co-author credit on the title page, the dust jacket and all publicity materials. The credit would thus read something like: by Celia Celebrity and Rita Writer.

The next choice would be secondary credit on the title page and other materials, such as: by Celia Celebrity with Rita Writer. This language is preferable if the book is written in the first person. (The "as told to" formulation is not used much anymore.) You may want to negotiate language specifying the relative type sizes in which the names will be printed.

Publishers--not to mention Authors--often resist making it too obvious that someone other than the Author actually did the writing. They will then seek to make your credit less conspicuous by relegating it to the Acknowledgments. Sometimes the Writer will be explicitly thanked for having done the writing. In other cases there will be oblique references to having provided "invaluable assistance" or some such phrase.

When negotiating credit, the general rule is: the less credit you receive, the more money you should be paid. Ask for more money if the designation is to be "with" rather than "and," and even more if you will not be mentioned on the title page at all.

**8. Creative control.** This is a tricky area. On the one hand, you are the professional writer and are thus better qualified to judge the suitability of the manuscript. On the other hand, you are being paid to tell someone else's story, which they presumably know better than you. It is

virtually impossible--and probably undesirable--for the Writer to get ultimate creative control over the manuscript.

In dealing with this balancing act, it is probably wise to develop a plan by which the Author reviews the manuscript as you write it and provides feedback, perhaps chapter by chapter, so that your approach does not diverge too much from what the Author wants. If there is a serious dispute between the two of you, the publishing house editor may have to intervene.

You should be sure that you have the right to talk directly with the editor and to participate in all editorial conferences with the publishing house, so that you are fully informed about the publisher's reactions to the manuscript. It is also valuable for you to develop direct relationships with editors.

**9. Publisher's Judgment/Termination.** Just about every book contract gives the publisher ultimate control over deciding whether a manuscript is suitable for publication. [See the NWU Guide to Book Contracts for a detailed discussion of the issues surrounding manuscript acceptability.] As a ghostwriter, it is in your interest to affirm the right of the publisher, rather than the Author, to make the final decision on whether the manuscript is satisfactory.

The Author may seek to insert language in the collaboration agreement giving him or her the right to remove you from the project. If you have negotiated equal status with the Author, this language simply won't work. In the event of a dispute, the Author would have to cancel the contract with the publisher and negotiate a settlement in which you are paid to leave the project.

If you end up with status subordinate to that of the Author, the language making the publisher the final arbiter of acceptability would prevent the Author from removing you based on his or her subjective evaluation of your manuscript. If the Author insists on a provision allowing your removal for other reasons, you should in turn insist on language that says that such a step can be taken only for just cause. In addition, before the agreement can be terminated, the Author must negotiate with you and reach agreement on appropriate compensation for the work you have performed and the future income you will be losing. In the event that the parties cannot agree on what amounts to severance pay, then the matter could be referred to an arbitrator (see Section 20).

**10. Expenses.** Particularly with a celebrity Author, you may have to travel quite a bit in order to conduct the interviews and otherwise gather the information you need from the Author to write the book. There may also be substantial expenses for phone calls and transcription of tapes. Ideally, all these expenses should be borne by the Author, who is probably in a better financial position to do so. If the Author insists on your sharing costs, try to arrange it so that your share comes out of future earnings rather than the initial advance you will need to live on while writing.

**11. Author's Warranties and Indemnification.** The Author should make an explicit commitment to cooperating in the project, affirm that he or she has no conflicting obligations, and warrant that the material he or she provides to you does not infringe on anyone else's rights. In addition to these warranties (promises), the Author should indemnify you against the cost of

defending against any legal actions that may be brought in connection with the project. This is because the basic content of the book is the responsibility of the Author.

**12. Writer's Warranties.** It is not unreasonable for the Author to expect you also to make an explicit commitment to working on the project and to promise that you have no conflicting obligations. While noting that the manuscript will be based on material supplied by the Author, you should promise nothing more than that what you write is original and does not knowingly infringe on anyone's copyright or ownership right. Do not make any further warranties, particularly about libel or invasion of privacy.

If such problems arise, it will probably relate to material given to you by the Author, for which you are not responsible. In projects that involve independent information gathering on your part, the Author may want you to assume liability for libel and invasion of privacy. Try to avoid that and instead insert language saying simply that you will cooperate with any legal review of the manuscript requested by the Author or the publisher.

If the other party insists on an indemnification clause relating to your obligations relating to copyright infringement, limit your liability to cases that are "finally sustained in a court of law." This will free you of responsibility for paying the costs of defending against unsuccessful cases and delay your costs relating to successful cases until all appeals have been exhausted.

**13. Survival of Warranties beyond Termination.** The warranties of both parties continue even after the contract has come to an end.

**14. Agent Fees.** Given the possibility that two agents may be involved in the project, it is important to be specific about the total fees to which the agents are entitled. When there are two agents, each gets the standard commission (now usually 15 percent) only on the amounts received by his or her respective client, so the total commission on the entire income from the project is the same 15 percent.

It is customary when foreign rights are sold by an author's agent, rather than the publisher, for the total commission to go as high as 20 percent. This is because the agent must frequently enlist the help of a foreign colleague, who gets a commission of 10 percent. The domestic agent reduces his or her fee on such deals to 10 percent, so the total commission is 20 percent.

**15. Rejected Manuscript.** If the manuscript is found unacceptable by the publisher and remains unsatisfactory even after you have made revisions, then there must be provisions for terminating the collaboration. If the work cannot be sold to another publisher, it is customary for all rights in the work to revert to the Author.

Book publishers frequently insist that authors repay the advance when the manuscript has been found unsatisfactory. See the NWU Guide to Book Contracts for a discussion of how to deal with this problem.

**16. Death of Author or Writer.** If the Author dies before the manuscript is completed, control of his or her rights are transferred to the executor of the estate, who should be obliged to proceed



with the project, so you can enjoy the full benefit of your labors. On the other hand, if the Author dies before supplying essential information, it may be impossible to proceed.

If you, the Writer, die before completing the manuscript, your estate should be able to retain any payments already received, and the Author should have the right to hire someone else to complete the manuscript. The publisher should then be asked to determine what portion of the job you had completed, and your estate should receive that portion of the income from the project after the book is published.

**17. Successors and assigns.** This section relates to what happens if you or the Author dies after the work is completed, or if one of you loses control of your affairs through something such as a personal bankruptcy. While the performance requirements of the agreement are unique to you and the Author, it is possible under such circumstance for your share of the income or that of the Author to go to a third party.

**18. Entire Understanding.** If, after the agreement is signed, you and the Author want to alter the terms, these changes must be done in writing.

**19. Governing law.** This section determines which state's laws will be taken into consideration in the event of a legal dispute over the terms of the agreement. New York and California have the most sophisticated bodies of law relating to publishing matters, so it is safest to specify one of those two states. The choice of law is not the same as the choice of venue. The fact that the agreement specifies New York or California law does not mean that a case needs to be brought in one of those states.

**20. Arbitration.** This section is printed in brackets because arbitration is a mixed blessing. On the plus side, arbitration--i.e., a process in which a third party makes a binding decision when the parties to an agreement have irreconcilable differences--provides dispute resolution that is usually much faster and cheaper than going to court. Given the high cost of most legal actions, writers with a problem often cannot sue and thus lose disputes (especially with publishers) by default. Arbitration--which most often takes place under the auspices of the American Arbitration Association--makes the process much more feasible. The AAA has offices across the country. Fill in a city that is convenient for you.

At the same time, arbitration has various disadvantages. Arbitrators have a tendency to "split the baby" in disputes, giving each side half of what it wants. If you have a very strong case, you can end up with a lot less than what you deserve. In addition, arbitrators are not bound by traditional rules of evidence or precedent, which may work against you.

Unless there is a lot of money involved in the agreement, it is probably better on balance to opt for arbitration rather than the courts.

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**Last Modified: March 26, 1999**