

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 19-16

In the Matter of Amending Wis. Stat.
§ 802.05(2m) relating to Ghostwriting,
a Form of Limited Scope Representation.

FILED

APR 17, 2020

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On May 15, 2019, Attorney James E. Goldschmidt, on behalf of Quarles & Brady, LLP, filed a rule petition asking the court to restore Wis. Stat. § 802.05(2m) to its previous iteration to permit attorneys in limited-scope representations to assist otherwise self-represented persons in drafting a pleading, motion, or other filed document without disclosing their name or state bar number, a practice referred to as "ghostwriting."

At a closed administrative rules conference on September 13, 2019, the court conducted a preliminary discussion and voted to seek written comments and conduct a public hearing. A letter soliciting comment was sent to interested persons on November 4, 2019. The court received 28 comments in support of the petition. The court received one comment in opposition to the petition, which requested the court consider a

different revision to the "ghostwriting" rule. The petitioner responded to the comments by the court ordered response date of December 16, 2019.

Meanwhile, on January 3, 2020, 2019 Wisconsin Assembly Bill 705 (2019 AB 705) was introduced, proposing a different revision of Wis. Stat. § 802.05(2m), also intended to address the issue of ghostwriting. On January 7, 2020, the Committee on Housing and Real Estate conducted a public hearing on the bill.

On January 17, 2020, the court received a letter from State Representative Robert Brooks, the principal author of 2019 AB 705, explaining the goal of the bill and the concerns it was intended to address. He expressed willingness to work with the petitioner on this matter. No action was taken on 2019 AB 705.

The court conducted a public hearing on January 17, 2020. Attorney James E. Goldschmidt on behalf of Quarles & Brady, LLP, presented the petition to the court. The following people spoke in support of the petition: Attorney Dean R. Dietrich, Dietrich VanderWaal, S.C.; Attorney Margaret Niebler-Brown, Legal Action of Wisconsin; Attorney Elizabeth Anne Groeschel, Legal Action of Wisconsin; Attorney Raphael F. Ramos, Legal Action of Wisconsin; Attorney Aaron Thomas Olejniczak, Andrus Intellectual Property Law LLP; Attorney Michael Dwyer, Hansen & Hildebrand, S.C.; Attorney Kyla N. Motz, Milwaukee Justice Center; Attorney Rebecca Emily Rapp, Ascendium Educational Group Inc. and Affiliates; and Attorney Daniel Johann Hoff, Hoff, Bushaw & Matuszak, LLC. Attorney Heiner Giese, Giese Law Offices, spoke in opposition to the petition.

At the ensuing closed administrative rules conference, the court voted to seek supplemental briefing about the respective authority of

the court and the legislature to act in this matter. The court also requested briefing from the petitioner on the question of how the petitioner's alternative suggestion, that the court suspend the existing rule, would be accomplished procedurally. See Wis. Stat. § 751.12(2) ("[a]ll statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section.") The court received supplemental written comments from Attorney Heiner Giese and from Attorney James Goldschmidt, on behalf of the petitioner. The court discussed the matter in a subsequent closed administrative rules conference and voted to grant the petition with the addition of a comment intended to address the concerns identified by Representative Brooks and Attorney Giese. Accordingly,

IT IS ORDERED that effective July 1, 2020:

SECTION 1: 802.05(2m) of the statutes is amended to read:

802.05 (2m) An attorney may draft or assist in drafting a pleading, motion, or document filed by an otherwise self-represented person. The attorney is not required to sign the pleading, motion, or document. Any such document must contain a statement immediately adjacent to the person's signature that "This document was prepared with the assistance of a lawyer," ~~followed by the name of the attorney and the attorney's state bar number.~~ The attorney providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false, or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

IT IS FURTHER ORDERED that a Comment to s. 802.05(2m) is created to read:

A previous version of s. 802.05(2m) required an attorney to include his or her name and state bar number on documents prepared under s. 802.05(2m). This requirement was removed because of its chilling effect on the effectiveness of limited scope representation. However, attorneys are reminded that, even in the context of limited scope representation, all of the rules of professional conduct for attorneys apply, and limited scope cases should be conducted consistent with the attorney's professional obligations, including SCR 20:1.1 (competence) and SCR 20:3.1 (meritorious claims and contentions). Lawyers are reminded to be wary that the client is not using the lawyer's limited assistance to assert meritless claims. Providing limited scope representation will not insulate a lawyer from the potential disciplinary consequences of violation of applicable rules. Sua sponte or on motion to the court, a court may order a litigant to disclose the name of the attorney who assisted with preparation of the document, if known, and may direct the attorney to appear before the court to respond to the concerns raised. This comment is intended as a reminder of the existing ethical obligations imposed on all attorneys and an avenue for relief if a court is confronted with meritless filings submitted under this rule.

IT IS FURTHER ORDERED that the Comment to Wis. Stat. § 802.05(2m) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's website. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 17th day of April, 2020.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 DANIEL KELLY, J. (*dissenting*). I agree that this rule would be beneficial, but I do not believe we have the authority, under Wis. Stat. § 751.12, to adopt it. Therefore, I respectfully dissent.

¶2 I am authorized to state that Justice Rebecca Grassl Bradley joins this dissent.

