STATE OF WISCONSIN

IN SUPREME COURT

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

Rule Petition 19-16

PETITIONER'S RESPONSIVE COMMENTS

Petitioner Quarles & Brady LLP hereby responds to the comments submitted on Rule Petition 19-16 up through and including December 12, 2019. Since the petition was filed on May 15, 2019, it has received overwhelming support from commenting parties, including the following:

- Board of Governors, State Bar of Wisconsin
- Wisconsin Access to Justice Commission
- Wisconsin Justice Initiative
- Legal Action of Wisconsin
- Milwaukee Justice Center
- Pro Bono Institute
- Numerous individual attorneys practicing in Wisconsin.
- Private law firms Borgelt, Powell, Peterson & Frauen, S.C.; Gimbel, Reilly, Guerin & Brown LLP; Godfrey & Kahn, S.C.; and Husch Blackwell LLP; representing (with Petitioner) over 580 Wisconsin attorneys in private practice

The support for Petition 19-16 is *almost* as unanimous as this Court's 2014 decision on Petition 13-10, approving limited scope representation—including ghostwriting—after careful study and significant discussion.

Those commenting in support of Petition 19-16 confirm the following key points, already recognized by this Court in granting Petition 13-10:

First, the former rule permitting ghostwriting encouraged and enhanced the quality and availability of pro bono legal services to the public, benefitting parties and the courts by focusing factual and legal issues and thereby promoting the effective administration of justice.

Second, ghostwriting is integral to limited scope representation, the underlying mechanism for providing brief, pro bono legal advice in clinics around the State. Ghostwriting enabled lawyers to serve clients in need without concerns about potential current conflicts or future complications arising from their brief interaction.

Third, eliminating ghostwriting causes real problems: (1) facial conflicts between the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Rules of Professional Conduct for Attorneys; (2) confusion in the courts when attorneys are identified on limited scope papers but do not actually represent the *pro se* party; (3) concerns among volunteer attorneys that their pro bono work will trigger conflicts, their names will be associated with court filings that they do not control, and their temporary clients will be misled about the scope of their representation—and (4) as the result of all of this, a chilling effect on pro bono participation in limited scope legal work across the State.

This chilling effect is not merely theoretical; numerous individual attorneys commenting in support of the Petition candidly disclosed that their pro bono work has become unnecessarily complicated by the new disclosure requirement; that they are worried about losing control of documents and potential unknown conflicts of interest; and that they have actually been deterred from continuing their pro bono work after the 2018 amendment of Wis. Stat. § 802.05(2m). At the Family Law Clinic of the Marquette Volunteer Legal Clinic, former volunteer attorneys left after the 2018 rule change and have not returned.[1] At the Milwaukee Justice Center, "[s]ome lawyers stopped drafting anything for clients. Others, more than we anticipated, stopped volunteering altogether."[2]

In short, the ghostwriting rule was well studied. It was working as intended. And its removal has jeopardized the availability of free legal services for those who need them most. All of this can be easily corrected by the Court, and the correction requested by Petition 19-16 has garnered overwhelming support. So: what is on the other side of the balance? Until after the eleventh hour, the answer was *nothing*. Then, at 11:37 p.m. on December 2, the final day to submit comments on the Petition, a lobbyist for Milwaukee landlords appeared to oppose it. The opposition lacks any merit.

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[1] Comments from Attorney Kent Tess-Mattner (May 21, 2019).
[2] Comments from Attorney Mary Ferwerda (May 21, 2019).

I. The 2018 amendment solved no problems, but created several.

Mr. Giese's comments in opposition fail to explain why the 2018 amendment was necessary or a good idea. Mr. Giese confirms that the 2018 amendment was sought by the landlords he represents, who apparently were having too much trouble evicting their unrepresented tenants in and around Milwaukee. Never mind that these individuals are already facing a hardship in losing their homes; never mind that they have a hard enough time finding legal assistance in the first place; Mr. Giese's landlord clients were irritated by the brief legal advice being provided to their tenants by volunteer lawyers with the Eviction Defense Project, so ghostwriting had to go.

And what was the particular problem with ghostwriting that so motivated the Milwaukee landlords to eliminate this service for otherwise unrepresented persons throughout Wisconsin? The use of a "check the box" answer form in small claims court. (Giese Comments at 2). But this presentation of the issue utterly fails to justify the new rule.

The "problem" described by Mr. Giese is not one of attorney identification, but of *control over the document*: "landlord plaintiffs or their attorneys considered some of the alleged defenses specious and doubt arose as to whether a particular defense had actually been recommended by the pro bono attorney *or whether the tenant had merely checked some additional boxes 'to make the Answer look good*.'" (*Id.*, emphasis added).

To the extent *pro se* tenants are misusing certain self-help forms after they leave attorneys' hands, requiring attorneys to list their name and state bar number on those documents does nothing to solve that problem. Today, just as before, a *pro se* party can leave the clinic and check additional boxes on the walk to the courtroom, after the document leaves the pro bono attorney's control. And when that happens, the 2018 amendment provides no answer to Mr. Giese's question (who checked this box?) because the attorney, having provided brief legal advice, does not accompany the party to court.

But now, unlike before, the attorney's name will be associated with that document, making her accountable for whatever choices her non-client may make after the document leaves her hands. That is a problem *created by* the 2018 amendment, not a pre-existing problem it somehow solves. And this only creates additional complications for everyone involved: the court, which may mistakenly believe the identified attorney is responsible for the pleading or the representation more generally; the pro bono attorney, as already noted; and *pro se* clients, who may be misperceived as represented by counsel when instead, as *pro se* litigants, they should be given every benefit of the doubt.

If Mr. Giese's comments are intended to suggest that volunteer attorneys are advising their temporary clients to claim "specious" defenses, there is no evidence of that in the record. No wonder: volunteer attorneys in a limited scope representation are bound by the same professional and ethical

rules regardless of whether they are identified on the *pro se* pleading. And most often, they are working under the supervision of a program director who knows who they are and which clients they advise. There is no legitimate suggestion that since 2014, a rash of well-intentioned pro bono attorneys, accountable to no one, have begun offering improper legal advice. No judges have submitted comments complaining about abuse of the ghostwriting option in their courts. So again, the 2018 amendment is not targeted to any actual problem in the "market" for pro bono legal services.

Finally, even if it were truly a problem, the issue raised in Mr. Giese's comments is extraordinarily parochial as compared to the stakes of the ghostwriting rule. That the interests of a small group of landlords in one legal aid clinic in Milwaukee should limit access to justice throughout Wisconsin is simply not a tenable argument. In fact, it is astonishingly myopic.

II. The 2018 amendment received no meaningful study.

The Petition pointed out that unlike the Court, the Legislature barely considered these issues in adopting the 2018 amendment that eliminated ghostwriting. Mr. Giese notes ghostwriting *was* specifically discussed (Giese Comments at 2). But identifying exactly 42 seconds of relevant testimony by one witness at one committee hearing[3] only proves Petitioner's point.

[3] Testimony of Atty. Kuettel at Assembly Committee Hearing (6:02:36-6:03:18), cited in Giese Comments at 2. Mr. Giese also cites his own Assembly Committee testimony, but that did not discuss ghostwriting, and the Senate Committee testimony he cites was on a

And in any case, Petitioner's point was not that ghostwriting was never discussed at the Legislature. It was that the 2018 amendment was adopted "without concern for the Judiciary's careful studies on ghostwriting, the potential effects that revising this statute would have, or the fact that its revision would bring Wis. Stat. § 802.05(2m) into conflict with Wisconsin's Rules of Appellate Procedure and Rules of Professional Conduct for Attorneys." (Pet. Mem. at 16). That is manifestly true.

III. This Court shares co-equal authority to grant the Petition.

Turning to this Court's authority to act, Mr. Giese suggests the Petition cannot be granted because it would cause a "verbatim repeal" of the 2018 amendment, and the Court can only "modify," not "nullify," a rule of civil procedure enacted by the Legislature. That is incorrect.

First, there is no basis for the distinction between "modifying" and "nullifying" the rule. Either this Court can change the rule or it can't. And it can, as Petitioner has already explained. *See* Pet. Mem. at 11–13.

Section 751.12(4), cited by Mr. Giese, is not to the contrary. That provision simply confirms the Legislature's co-equal right to act in this area. The provision specifically states, "*This section* shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to

parallel Senate bill that failed to pass. Mr. Giese has not identified any testimony in favor of eliminating ghostwriting or explaining why this change was needed.

pleading, practice, or procedure." Wis. Stat. § 751.12(4). This is a clarification of the statute's effect; not a limitation on the Court's power to act. It confirms that the Court's authority to "regulate" these matters "in all courts" under Wis. Stat. § 751.12(1) does not preclude the Legislature from doing the same thing via statute. But restoring Wis. Stat. § 802.05(2m) to its former iteration does not "abridge" that legislative "right"; it simply exercises co-equal authority *after* the Legislature has done so. And notably, in all the comments submitted on the Petition, neither the Legislature nor any of its members has appeared to defend the 2018 amendment or ask the Court not to act.

Second, Mr. Giese's comments to the Court on this point conflict with his comments to the Assembly Committee on Housing and Real Estate in connection with another provision of the same bill, concerning how long eviction records should remain on CCAP. On that point, Mr. Giese opined: "I think the Legislature can always tell the Court—or make legal rules that are enforceable, *unless it's something very, very intrinsic to the operation of the Court*."[4] The rule at issue here, governing how Wisconsin attorneys in limited scope representation are to identify themselves in court papers, *is* very, very intrinsic to the operation of the Court—precisely the sort of thing Mr. Giese previously suggested the Legislature should leave to the Court's purview. Mr.

[4] Testimony of Mr. Giese at Assembly Committee Hearing (7:21:25-7:21:57), cited in Giese Comments at 2 (emphasis added).

Giese was right then, and wrong now: in this area of coequal authority, the Court is best situated to decide how to regulate and monitor the members of the Bar as they provide pro bono legal services within Wisconsin's courts.

IV. Mr. Giese's proposal compounds the problems created in 2018.

As an alternative to the Petition, Mr. Giese proposes a "legislative solution," as if the solution to the issues created by the 2018 amendment is *more* legislation. But the "fix" Mr. Giese now proposes is, if possible, even worse than the 2018 amendment.

First, any suggestion that Mr. Giese's proposal was developed in collaboration with Judges Dwyer and Gramling is inaccurate. Mr. Giese developed his proposal alone, apparently in recognition of the flaws inherent in the 2018 amendment. He was not successful in gaining support for his proposal from anyone in the working group behind the Petition because of the multiple problems described below.

Second, any characterization of Mr. Giese's proposal as pending legislation is also inaccurate. It appears Mr. Giese has prevailed on a state senator to ask the Legislative Reference Bureau to place a "preliminary draft" of his proposal on paper. But the paper is clearly marked "Not Ready for Introduction," and indeed it isn't. It is not even clear whether Senator Olsen himself supports Mr. Giese's proposal, having merely requested the LRB draft that is enclosed with Mr. Giese's materials.

Beyond this, Mr. Giese's proposal is ambiguous, one-sided, and internally inconsistent. It would apply the attorney identification requirement only in "contested cases," but "contested" is not defined. All cases filed in court are "contested" until they are resolved, so by its terms this addition does not restrict the scope of the current rule at all. In his comments, Mr. Giese suggests that by "contested" he means "serious, non-routine cases," but that it is a judicially unenforceable standard and it is entirely unclear what it would mean outside of the eviction cases that are the focus of Mr. Giese's comments.

Worse, Mr. Giese's proposed amendment would leave whether to seek a pro bono attorney's identity in the hands of the opposing party, fashioning the statute into a tool of inquisition to be wielded by the party already holding all the cards. This would only exacerbate the existing disparity between *pro se* parties and (say) adequately represented landlords, again with no apparent benefit for Wisconsin's justice system as a whole.

Moreover, as a practical matter, Mr. Giese's proposed approach is unworkable. Pro bono attorneys offer limited scope advice (including potential drafting assistance) at Time A, then the *pro se* party takes any prepared documents to court at Time B. It is only at that point that the opposing party could demand that the pro bono attorney be identified, but by then the document is already drafted and the limited scope representation is

completed. The pro bono attorney is not present to add the language now requested by the opposing party, which shifts the onus to the *pro se* party (now alone in court) to do so. *Pro se* parties may or may not be able to identify the attorney who provided assistance, potentially (and unfairly) placing them in breach of the rule. And over time, placing this burden on *pro se* parties will not just chill *attorney* participation, it will actually discourage *clients* from seeking brief legal advice they are entitled to obtain.

Next, Mr. Giese's proposed amendment *adds* a requirement that the attorney's name and bar number be entered in the clerk's minutes. This only heightens the potential for judicial confusion. At least under the current rule, the disclosure is limited to the face of the document, so any misperceptions regarding the attorney's ongoing involvement are limited to that pleading or other paper. Under Mr. Giese's proposed amendment, pro bono attorneys *who do not represent any party* would be added to the minutes that judges consult to recall who represents parties—again for no apparent purpose.

Finally, and most problematically of all, Mr. Giese's proposed amendment would add the following statement: "The recording of the attorney's name and state bar number does not make the attorney the attorney of record for the otherwise self-represented person." At a minimum, this apparent attempt at clarification would do nothing to dispel the chilling effect of the 2018 amendment. With or without this clarification, confusion

about the absent attorney's role will persist, and pro bono participation will continue to be deterred. By the time an attorney in a particular case can clear up that confusion by pointing to this language, the damage already will have been done.

But more fundamentally, Mr. Giese's proposed clarification reveals the utter pointlessness of the 2018 amendment in the first place: if it is conceded that requiring attorney self-identification has nothing to do with ongoing representation, then what, pray tell, is the purpose of requiring such identification in the first place? There is no good answer to that question.

Again, the lone example highlighted by Mr. Giese illustrates this point. He appends an answer and counterclaim drafted by an Eviction Defense Project volunteer in a commercial eviction in Milwaukee County. He says the plaintiff "was entitled to know the name of counsel who drafted a counterclaim against him." But why? What purpose would it serve? The pro bono counsel did not represent the defendant, and did not file the document with the court. If the defendant had received drafting assistance from her sister or daughter, would the landlord be entitled to know that, too?

Following the hypothetical further, what would Mr. Giese and his colleagues propose to do with this information? He does not contend that any of the defenses or counterclaims in the referenced pleading were without a good faith basis in law or fact. But if they were, again, the volunteer attorney

did not undertake any representations to the contrary because he did not sign the document or file it with the court. Would Mr. Giese nevertheless report the volunteer attorney to the State Bar or the Office of Lawyer Regulation for *drafting* the document poorly? It is difficult to see a legitimate end in any of this. Instead, the 2018 amendment appears to be a barely-concealed effort to dissuade private attorneys from providing brief, pro bono legal advice to *pro se* litigants. No member of this Court should stand behind that.

V. Wisconsin's open records policy is irrelevant to the Petition.

Mr. Giese closes by suggesting that Wis. Stat. § 19.31, Wisconsin's open records policy, has some bearing on the Petition. It does not. By its terms, that statute applies to information regarding the official acts of elected officers and employees in a representative government. Providing undisclosed drafting assistance for court papers has never violated open records law.

CONCLUSION

For the reasons stated in Petitioners' submissions and all of the comments supporting the Petition, the Court should exercise its coequal authority to restore Wis. Stat. § 802.05(2m) to its pre-2018 iteration. Specifically, the Court should strike the mandate that an attorney disclose her name and bar number on documents prepared with limited legal assistance. This will alleviate the problems caused by the Legislature's recent amendment and restore the thoughtful balance struck by this Court.

Dated this 16th day of December, 2019.

Respectfully submitted by:

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