STATE OF WISCONSIN
SUPREME COURT

In the Matter of the Amendment of Wis. Stat. § 807.05 (Stipulations) and Creation of Wis. Stat. § 802.12(5) (Relating to Memorializing Settlements Reached By Way Of Alternative Dispute Resolution)

PETITION FOR SUPREME COURT RULES

To: The Honorable Justices of the Supreme Court of Wisconsin:

Petitioner Attorney Donald Leo Bach of DeForest respectfully petitions the Supreme Court of Wisconsin for an Order, pursuant to Wis. Stat. § 751.12 amending Wis. Stat. § 807.05 and creating Wis. Stat. § 802.12(5) as follows:

Amendment to Wis. Stat. § 807.05

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless (1) made in court or during a proceeding conducted under s. 807.13 or s. 967.08, and entered into the minutes or recorded by the reporter, (2) made during a deposition and recorded by a stenographer or on videotape, or (3) made in writing and subscribed by the party to be bound thereby or the party's attorney.

Creation Of Wis. Stat. § 802.12(5)

> (5) SETTLEMENT FINALIZATION. Any settlement reached as a result of the use of an alternative dispute resolution method shall be reduced to writing, dated, and signed by each settling party prior to concluding the dispute resolution process.

Rationale For The Amendment And Creation Of
Wis. Stat. §§ 807.05 and 802.12(5) Respectively

It is not unusual during a deposition for a party to start a line of questioning on a subject and the counsel for the other party to object or indicate that such line of questions is "irrelevant" or beyond the scope of discovery because the party is not making any claim or taking a position that the questioner seeks to inquire about.

A not uncommon deposition colloquy will go as follows:

Defendant's counsel: "When did you first start having back pain?"

Plaintiff's counsel: "Objection. We are not making any claim for back pain in this case."

Defendant's counsel: "Just so I have this clear, you're stipulating that you are not making any claim for back pain in this case?"

Plaintiff's counsel: "That's correct."

Defendant's counsel: "Okay, counsel, I'm going to rely on that stipulation on the record. Therefore I will refrain from asking the series of questions I had prepared in regard to back pain."

* * *

Defense counsel; "Are you maintaining a permit was needed for Doe Company to construct this boiler?"

Government counsel: "Objection. We are not claiming a permit was needed for any boiler; we are claiming that the installation of the process dryer needed a permit."

Defense counsel: "So will you stipulate that you will not claim at the trial that a permit was needed for the boiler?"

> Government counsel: "Yes, we will stipulate that a permit was not needed."

One would rightfully expect that these stipulations on the record at a deposition are binding and enforceable. Unfortunately, there is a statute that provides a harsh, illogical and unexpected surprise – unless the parties set forth their agreements and stipulations in a separate writing signed by the party (or party's attorney) who is to be bound by the same, they are not binding and the stipulating party can simply unilaterally back out of his or her agreement at their option.

The statute is Wis. Stat. § 807.05. It provides as follows:

> No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under s. 807.13 or s. 967.08, and entered into the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

In *Bertram v. Kilian*, 133 Wis. 2d 202, 394 N.W.2d 773 (Wis. App. 1986), the Court of Appeals ruled that a stipulation made on the record during a deposition was not enforceable because it was not reduced to writing:

> The reporter recorded the stipulation on the record during a deposition in a law office, not in court. The stipulation was not reduced to a writing subscribed by Debra, the party to be bound, or by her attorney. Because the requirements of sec. 807.05, Stats., were not met, the stipulation is unenforceable.

The effect of the statute, and of such rulings, is to hold that attorneys, and/or parties, can make agreements or stipulations on the record in a deposition upon which the other party expects to rely, and which is recorded word for word by the court reporter, and yet have the ability to back out of the agreement or stipulation. This result is unfair and makes no sense. If the concern underlying

the statute is that oral agreements are susceptible to the "he said, she said" syndrome since the matter was not written down or put in a recordable form, then that concern is easily met when the stipulation or agreement is put on the record at a deposition. After all, all other words spoken at a deposition on the record are considered to have such substantial reliability as to allow them to be used directly as evidence, for impeachment purposes, or even for a basis for a perjury prosecution.

The proposed amendment to Wis. Stat. § 807.05 makes representations on the record in a deposition binding and enforceable.

Similarly, based on the wording of Wis. Stat. § 807.05, in *Laska v. Laska*, 255 Wis. 2d 823, 646 N.W.2d 393 (Ct. App. 2002), the Court of Appeals ruled that even an agreement reached as a result of mediation was not enforceable because the agreement was not signed, despite the fact that it was memorialized by the mediator and sent to both parties:

> Wisconsin Stat. § 807.05 is an exception to the usual rule that oral contracts are binding. *Adelmeyer v. WEPCO*, 135 Wis. 2d 367, 400 N.W.2d 473 (Ct. App. 1986). It "seeks to prevent disputes and uncertainties as to what was agreed upon." *Id*. at 372, 400 N.W.2d 473 (citation omitted). The statute adds requirements for enforceability of an otherwise valid oral agreement when the agreement is reached in the course of a claim that is in the process of adjudication. *Kocinski v. Home Ins. Co.*, 154 Wis. 2d 56, 67, 452 N.W.2d 360 (1990). "An oral contract reached by stipulation in the course of court proceedings is unenforceable unless formalized in the way required by sec. 807.05." *Id.* at 67-68, 452, N.W.2d 360.

The creation of Wis. Stat. § 802.12(5) should solve the problem of "backing out" of an agreed-to settlement, as well as resolving disputes and uncertainties as to what was agreed upon.

WHEREFORE, for the above reasons, Petitioner requests the Supreme Court of Wisconsin adopt the respective amendment and creation of the statutes as indicated above.

Respectfully submitted this 15th day of February, 2005.

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