



# GIESE LAW OFFICES

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December 2, 2019

*Sent Via Electronic Mail and Regular Mail*

Clerk of Supreme Court  
Attention: Deputy Clerk-Rules  
P.O. Box 1688  
Madison, WI 53701-1688  
[clerk@wicourts.gov](mailto:clerk@wicourts.gov)

RE: Written Comments Regarding Rule Petition 19-16 - In the Matter of Amending Wis.  
Stat. § 802.05(2m) relating to Ghostwriting, A Form of Limited Scope Representation

Dear Clerk of Supreme Court:

I am legal counsel and a registered lobbyist for the Apartment Association of Southeastern Wisconsin, Inc. I am writing to express opposition to granting of the above Rule Petition 19-16 relating to ghostwriting.

## **I. Introduction**

The petition asks the Supreme Court to repeal and undo a change to s. 802.05(2m), Wis. Stats., which was enacted by the Wisconsin Legislature and the Governor as part of 2017 Wisconsin Act 317 on April 16, 2018. That change, contained in section 53 of Act 317, added a requirement that attorneys providing legal advice to otherwise self-represented persons must add their name and state bar number to any pleading, motion or other document being filed.

Act 317 was an omnibus bill which made many changes to areas of law relating to regulation of rental properties, landlord/tenant matters, and municipal fees and regulations in the area of housing. Lengthy public hearings were held in both the Assembly and the Senate on the precursor bills, 2017 AB 771 and 2017 SB 639. I and many other witnesses presented testimony on these bills, both supportive and in opposition, *including specifically on the proposed change to the ghostwriting statute*, as will be explained below.

## II. The Legislature Did Consider Public Comments before Amending § 802.05

In the first sentence of its Conclusion on p. 17 Petitioner claims

Since 2014, nothing in the judicial system has changed that would have warranted the Legislature's 2018 amendment to Wis. Stat. § 802.05.

However, a big change starting in early 2017 was the implementation of the Eviction Defense Project in Milwaukee County run by Legal Action of Wisconsin. Initially, tenants in court for an eviction case would consult with a pro bono volunteer attorney and would be given a "check-the-box" pro forma "Answer" which contained about 30 possible defenses to the eviction complaint. The tenant would sign that Answer and check various boxes - presumably upon the advice of the volunteer attorney - but 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." It was that practice by the Eviction Defense Project which led property owners to seek the legislative change to require pro bono attorneys to disclose their names on documents drafted for a defendant in an eviction action. Fortunately, this check-the-box defense method was soon abandoned by the Eviction Defense Project.

On p. 16 Petitioner opines that the change to the statute was "simply slipped into an omnibus bill." Petitioner perhaps does not intend to be derisive of how our Wisconsin legislators do their work - after all, one does hear stories that a particular legislative provision somehow got into a bill and later no one can explain its genesis. However, the WisconsinEye coverage of both the Assembly and Senate bills shows there was testimony in opposition and in favor of the amendment to § 802.05(2m) and the legislature's right to regulate court practices. <https://wiseye.org/2018/01/03/assembly-committee-on-housing-and-real-estate-3/> [testimony of Vanessa Kuettel at 6:02] , [testimony of Heiner Giese at 7:21] and <https://wiseye.org/2017/12/13/senate-committee-on-insurance-housing-and-trade/> [question by Sen. Lasee at 3:21].

## III. The Petition Cannot be Granted in its Present Form

The *Proposed Statutory Amendment* advocated by Petitioner calls for a verbatim repeal by the Court of the action taken by the legislature. At page 3 of its Memorandum in Support Petitioner asks that the statute be restored "to its previous iteration." This runs directly afoul of Wis. Stats. § 751.12(4): "This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure." If the Court now takes the exact language of the legislative change, throws it out and replaces it with the exact language of the statute *before* the legislative change, then the Court is nullifying - not just modifying - a legislative act. That should only be permitted if the legislation is unconstitutional or if the legislature has infringed on an exclusive and essential power of the judiciary. However, the ghostwriting rule can be modified, as discussed in the next section.

#### **IV. A Legislative Solution to Concerns of Petitioner and the Many Supporters of the Petition Is Preferable**

After the passage of Act 317 I was approached by Milwaukee Circuit Judge Michael J. Dwyer later in 2018. He had heard that I had been involved in the lobbying efforts on behalf of landlords leading to the change in the ghostwriting statute. That change was prompted only by experiences with eviction cases and did not reflect any wish to hamper the work of pro bono attorneys. I met with Judge Dwyer and retired Judge James Gramling a number of times in succeeding months to craft a change to the ghostwriting rule which would not require attorneys to affix their names to legal documents in *uncontested* cases (for example, helping spouses draft a child custody arrangement in a collaborative divorce or drafting an application for administration in a probate matter). It was my opinion that such a change could easily garner bipartisan approval in the legislature.

My suggested changes were apparently not acceptable to other attorneys working on this issue with Judge Dwyer and the instant Petition was filed by Quarles & Brady LLP. Nevertheless I secured the assistance of State Sen. Luther Olsen and he had the Legislative Reference Bureau prepare a draft to amend § 802.05(2m). LRB-4010/P1 is attached. The relevant paragraph of the LRB analysis is as follows:

**Under this bill, the attorney has to provide his or her name and state bar number only if it is requested by an opposing party in a contested matter, and the clerk of the court must then enter the name and state bar number on the document and enter it in the clerk's minutes. 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.**

It is uncertain if such proposed legislation will be taken up in the current session or if it would be easily adopted. As an alternative, I respectfully suggest that the Court could adopt said proposed legislative draft as a Rule amendment to § 802.05(2m). This would preserve the legislature's intention to have attorneys reveal their involvement in the small percentage of *serious, non-routine cases* (by which I mean *contested* cases) without requiring disclosure in the great majority of pro-bono matters.

I am very familiar with the work of the Eviction Defense Project in Milwaukee County and in a large number of cases the volunteer's legal services to a tenant consists of negotiating a stipulation with a landlord since over 90% of eviction actions are based on nonpayment of rent. For stipulated dismissals there should be no requirement to put the volunteer attorney's name on the document or in the court record unless specifically requested by the opposing party.

As an example of where a pro bono attorney's name *should be and was* disclosed I am attaching an answer and counterclaim filed by an Eviction Defense Project volunteer in Milwaukee County, *Wisniewski vs. Gray, 19-SC-30729*. This was a commercial eviction and the plaintiff, who was initially unrepresented, was entitled to know the name of counsel who drafted a counterclaim against him. [The tenant ultimately failed to comply with a stipulation, a writ was issued and a money judgment for \$3,053 was entered in favor of the landlord].

## V. Wisconsin's Open Records Policy Should be Considered.

As the Court considers the Petition it should be mindful of Wis. Stats § 19.31:

**“Declaration of policy.** In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”

Attorneys are “officers of the court” and when they perform a function in the public sphere, especially in contested matters, not just a litigation opponent but also the media and the general public should be entitled to know their name.

Respectfully submitted,

Heiner Giese

cc: (via email only)

Atty James E. Goldschmidt, Quarles & Brady LLP

Atty Dean R. Dietrich, State Bar Board of Governors

Julie Ann Rich, Supreme Court Commissioner

Lisa Roys, State Bar

MICHAEL S. WISNIEWSKI

Plaintiff,

Case No.: 19-sc-30729

vs.

LETCHIA GRAY  
4431 W. NORTH AVE.  
MILWAUKEE, WI 53208

Defendant

FILED  
CRIMINAL DIVISION

18 AUG 12 2019 18

JOHN BARRETT  
CLERK OF CIRCUIT COURT

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**ANSWER AND COUNTERCLAIM**

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Defendant-Counterclaimant, Letchia Gray, answers Plaintiff's Complaint and makes the following counterclaims against Plaintiff:

**NOTICE DEFECTS**

1. The termination notice was not served upon the Defendant in accordance with Wis. Stat. § 704.21.
2. The termination notice is invalid because it contains a statement of the amount due that is intentionally incorrect. Wis. Stat. § 704.17(4m).

**SUBSTANTIVE DEFENSES**

3. Defendant was deprived of full normal use of the premises by a condition affecting health, safety or tenantability. Wis. Stat. § 704.07(4).

**COUNTERCLAIMS**

1. Breach of Contract – Defendant and Plaintiff entered into a commercial lease agreement for the premises located at 4431 W. North Ave., Milwaukee, WI 53208. Defendant intended to operate a salon out of said premises. Defendant performed extensive renovations to prepare the premises for use as a salon and spent a significant amount of money in the process. Plaintiff promised to rectify numerous deficiencies necessary to obtain an occupancy permit for the premises. Plaintiff failed to rectify the aforementioned deficiencies and City of Milwaukee refused to issue an occupancy permit, thus, preventing Defendant from operating a salon out of the premises.

2. Unjust Enrichment – Defendant performed extensive renovations to prepare the premises for use as a salon and spent a significant amount of money in the process. Plaintiff failed to obtain an occupancy permit for the premises, but still collected rent and enjoys the increased value of the premises due to the significant improvements performed by Defendant. Plaintiff has been unjustly enriched by the improvements performed by Defendant and the rent collected by Plaintiff. Defendant is entitled to reimbursement of the sums expended to perform the renovations at the premises and also the rent she paid while the premises did not have an occupancy permit.

WHEREFORE, Defendant respectfully requests that this Court grant judgment in her favor, dismissing Plaintiff's complaint, and/or awarding Defendant such amount as the proof shall support, along with costs, attorney fees, disbursements, and whatever further relief this Court finds just and proper.

Dated August 9, 2019.

  
*Pro Se Defendant Letchia GRay*

*This document was prepared with the assistance of a lawyer  
Name: David A. Frank II  
Bar No: 1090058*



**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1     **AN ACT to amend** 802.05 (2m) of the statutes; **relating to:** attorney assistance  
2           in the preparation of certain court documents.

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***Analysis by the Legislative Reference Bureau***

Under current law, an attorney who drafts or assists in drafting a pleading, motion, or document for an otherwise self-represented person in a legal action is not required to sign the pleading, motion, or document. However, the document must contain a statement immediately adjacent to the self-represented person's signature that "this document was prepared with the assistance of a lawyer," followed by the attorney's name and state bar number.

Under this bill, the attorney has to provide his or her name and state bar number only if it is requested by an opposing party in a contested matter, and the clerk of the court must then enter the name and state bar number on the document and enter it in the clerk's minutes. 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.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

3           **SECTION 1.** 802.05 (2m) of the statutes is amended to read:  
4           **802.05 (2m)** ADDITIONAL REPRESENTATIONS TO COURT AS TO PREPARATION OF  
5     PLEADINGS OR OTHER DOCUMENTS. An attorney may draft or assist in drafting a

1 pleading, motion, or document filed by an otherwise self-represented person. The  
2 attorney is not required to sign the pleading, motion, or document. Any such  
3 document must contain a statement immediately adjacent to the person's signature  
4 that "This document was prepared with the assistance of a lawyer," followed by  
5 lawyer." If requested by an opposing party in a contested matter, the clerk of the  
6 court shall add the name of the attorney and the attorney's state bar number to the  
7 pleading, motion, or document and enter the attorney's name and state bar number  
8 in the clerk's minutes. Such entry of an attorney's name on any document or in the  
9 court record does not make the attorney the attorney of record for the otherwise  
10 self-represented person. The attorney providing such drafting assistance may rely  
11 on the otherwise self-represented person's representation of facts, unless the  
12 attorney has reason to believe that such representations are false, or materially  
13 insufficient, in which instance the attorney shall make an independent reasonable  
14 inquiry into the facts.

15 (END)