

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-____

MEMORANDUM IN SUPPORT

Quarles & Brady LLP hereby petitions the Court to amend the Rules of Civil Procedure to restore the important role of ghostwriting in limited scope legal representation.

BRIEF BACKGROUND

In June 2014, the Wisconsin Supreme Court adopted Rule Petition 13-10, amending the Rules of Civil Procedure, Rules of Appellate Procedure, and Rules of Professional Conduct for Attorneys to expand limited scope representation and allow attorneys to assist in drafting legal documents without identifying themselves by their names or state bar numbers (a practice known as “ghostwriting”).¹ This Court adopted the 2013 Petition via its formal rulemaking process, soliciting public comment and holding a public hearing. This process lasted about one year and included substantive discussions on the benefits of allowing attorneys to provide limited scope services.

¹ *Order No. 13-10*, 2014 WI 45 (2014) (the “2014 Order”) (eff. Jan. 1, 2015).

Although the 2013 Petition focused more broadly on the important role that limited scope services fulfill within our legal system, it recognized that ghostwriting is an essential component of limited scope representation, and a unanimous Court authorized the practice as part of the suite of amendments promulgated by its 2014 Order. As a result of that order, ghostwriting was permitted under the Rules of Civil Procedure, Rules of Appellate Procedure, and Rules of Professional Conduct for Attorneys.

Unfortunately, a more recent suite of statutory amendments—this time by the Legislature—added a prohibition on ghostwriting, but only to the Rules of Civil Procedure. Specifically, in April 2018, one provision of an omnibus bill aimed at increasing landlords’ rights amended Wis. Stat. § 802.05(2m) to require attorneys assisting an otherwise self-represented litigant in drafting a legal document to *disclose* their name and state bar number following the statement that the document “was prepared with the assistance of a lawyer.”²

Although the Judiciary and Legislature share authority to regulate legal practice and procedure in Wisconsin,³ the Legislature passed the omnibus bill and amended Wis. Stat. § 802.05(2m) with no judicial involvement and no consideration of this Court’s careful study of the benefits

² Wis. Stat. § 802.05(2m) (2018).

³ Wis. Stat. § 751.12 (2015).

of ghostwriting just four years earlier.⁴ It made no findings contravening the numerous public comments offered in favor of the previous rule, and demonstrated no awareness that the amendment conflicts with an existing rule of appellate procedure and this Court's ethical rules for Wisconsin attorneys.⁵

This oversight has already had negative consequences for Wisconsin's judicial system. The new prohibition on ghostwriting has made many lawyers hesitant about providing assistance to otherwise self-represented parties. This risks leaving such parties wholly unrepresented throughout the legal process, which in turn creates delay and inefficiency in the court system as court officials sort through legal documents drafted by *pro se* litigants.⁶ Indeed, the 2013 petitioners warned of these very consequences,⁷ and this Court heeded that warning in *permitting* ghostwriting in 2014.

Because the Legislature and the Judiciary share authority to adopt and amend rules of civil procedure in Wisconsin, this Court should exercise its coequal authority to restore Wis. Stat. § 802.05(2m) to its previous iteration. Specifically, the Court should strike the mandate that an attorney disclose her name and bar number on documents prepared with limited legal

⁴ Wis. Stat. § 802.05(2m) (2018); 2017 WI Act 317.

⁵ See Wis. Stat. § 809.19(1)(h) (2018) and S.C.R. 20:1.2(cm) (2015) (allowing ghostwriting).

⁶ Cf. Conference of State Court Administrators, Position Paper on Self-Represented Litigation, 1 (Gov't Rel. Office ed. 2000).

⁷ 2013 Petition at 10.

assistance. This change will alleviate the problems caused by the Legislature's recent amendment and restore the thoughtful balance struck by this Court.

ARGUMENT

The Court should restore Wis. Stat. § 802.05(2m) to its previous iteration because ghostwriting promotes greater access to justice and judicial efficiency, and because the Court's previous study of the issue places it in a better position than the Legislature to exercise their shared power with respect to this rule.

- I. **Ghostwriting, a form of limited scope representation, promotes greater access to justice.**
 - A. A client who may only be able to afford limited legal services can decide where her resources are best allocated.

Indigent self-represented parties cannot afford to hire attorneys for all (if any) of their legal matters. And while some of these parties may be comfortable in navigating the majority of a proceeding on their own, they may seek discrete, limited legal services from attorneys to maneuver the most challenging aspects of the legal process. Allowing attorneys to provide limited scope representation gives these indigent litigants the ability to focus on and direct their resources to the tasks they need the most assistance completing.

In 2007, the State Bar of Wisconsin's Access to Justice Committee stated: "Limited representation is a key aspect of an efficient program of improving access to justice for the poor by enabling clients with some ability to pay to purchase only those services they need or can afford."⁸ It follows, then, that a client should be empowered to work with an attorney on a limited basis to help her prepare legal documents that she is otherwise unable to complete. This is especially true given that preparing legal documents, such as pleadings and motions, is a particularly challenging aspect of the legal process. Thus, allowing attorneys to ghostwrite documents supplies a much-needed legal service in high demand for indigent clients.

The need for limited scope representation fueled Rule Petition 13-10. The Court's Planning and Policy Advisory Committee ("PPAC") published research recommending limited scope representation, and highlighting the advantages of ghostwriting in particular.⁹ Notably, PPAC's research found that legal professionals thought ghostwriting was the best kind of limited scope representation for the kinds of cases most often brought by self-represented parties: civil, family, small claims, and probate.¹⁰ As discussed

⁸ State Bar of Wisconsin Access to Justice Committee, Bridging the Justice Gap: Wisconsin's Unmet Legal Needs, 16 (Mar. 2007), available at <http://www.wisbar.org/formembers/probono/documents/bridgingthegap.pdf>.

⁹ PPAC Subcommittee on Limited Scope Representation, Feasibility Study and Recommendations (Aug. 2011), available at <http://wicourts.gov/courts/committees/docs/ppaclimitedscopereport.pdf>.

¹⁰ *Id.*

below, this research is substantiated by studies performed by the American Bar Association. So it is critical that self-represented parties continue to have access to this kind of legal representation and attorneys continue to feel comfortable providing it.

- B. A lawyer who can ghostwrite documents without disclosing her name and state bar number will be more likely to take on pro bono matters.

Ghostwriting is the most common form of limited-scope representation in Wisconsin,¹¹ so the rule at issue affects legal services that are in high demand and widely necessary to serve those who most need access to justice. And the prevalence of this service makes clear that there is a relationship between anonymity and willingness to serve. A lawyer who can ghostwrite documents without disclosing her name and state bar number will be more likely to take on pro bono or reduced-fee matters. Most lawyers do not have an abundance of time they can donate to these kinds of projects. Ghostwriting, a discrete and context-bound task, provides attorneys with a manageable way to provide legal services for the needy. It also allows attorneys to provide the kind of assistance that unsophisticated legal parties most need: the knowledge and skills to decode the legal process and present arguments in a manner that is legally cognizable.

¹¹ *Id.*

By contrast, prohibiting ghostwriting deters lawyers from providing this kind of limited scope representation.¹² First, when lawyers are required to affirmatively identify themselves on documents they've ghostwritten, they perceive implications for conflicts and their current clients. Whether or not these rise to the level of actual conflicts, the mere perception of or potential for a conflict will cause many attorneys to refrain from pro bono work. This chilling effect is particularly pronounced at Wisconsin's large law firms—aside from public interest law firms, perhaps the very institutions best suited to offer pro bono legal services of significant scale.

Second, when attorneys turn signed legal documents over to their clients, both the court and the clients may be given the mistaken impression of ongoing representation. Again, attorneys have limited time and resources to devote to pro bono or reduced-fee practice. The risk of confusion and potential for being caught up in ongoing representation beyond the original, limited scope of the engagement is enough to turn some attorneys away. But even if not, the risk extends to legally unsophisticated clients, who may not understand how to answer the court's questions about the scope of the attorney's representation and why the lawyer identified on legal documents is not present in court.

¹² Limited Representation Committee of the California Commission on Access to Justice, Report on Limited Scope Legal Assistance with Initial Recommendations, 2 (Oct. 2001).

Third, lawyers lose control over the form and substance of ghostwritten documents upon termination of their limited scope representation, which is often before those documents are submitted to the court. When clients can modify documents that are identified as the work-product of a certain attorney, lawyers bear the risk of having arguments changed, facts falsified, and copies of their work product made, all in their own name. This potential for serious ethical dilemmas may be enough to deter lawyers from ghostwriting.

Some opponents to ghostwriting argue that it allows lawyers to evade responsibility for frivolous litigation. But ghostwriting attorneys are still bound by their duties of competence, diligence, and candor under Wisconsin Supreme Court Rules 20:1.1, 20:1.3, and 20:3.3, respectively. Ghostwriting is also consistent with the ABA's position that Model Rule 1.2(c) permits ghostwriting as long as a lawyer "does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct."¹³

Attorneys who engage in unethical practice are no more drawn to pro bono endeavors than those who engage in candor and good faith. There is no evidence that lawyers will be more likely to engage in bad practices simply because they are not required to affirmatively identify themselves on documents they have prepared. The client still knows who represented them

¹³ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 446 (2007).

and can report any unethical behavior to the Office of Lawyer Regulation. After all, lawyers who ghostwrite documents are still subject to Wisconsin Supreme Court Rule 20:8.4, which governs attorney misconduct in these settings.

Overall, given the growing population of individuals who need unbundled, limited-scope representation and the ease and convenience offered by ghostwriting as a way for attorneys to provide free or reduced-fee service, Wis. Stat. § 802.05(2m) should be amended to once again permit ghostwriting.

II. Ghostwriting promotes judicial efficiency.

Ghostwritten documents are more likely than documents written by self-represented parties to conform to local and state rules and to present facts and legal issues more clearly. Wholly unrepresented parties have a tangible effect on the administration of justice. In a position paper published in 2000, the Conference of State Court Administrators found that self-represented litigants affect staffing and resources, case management, court efficiency and public confidence in the courts.¹⁴ It comes as no surprise that unsophisticated legal parties struggle to navigate the judicial system efficiently and effectively. Attorneys assisting self-represented parties

¹⁴ Conference of State Court Administrators, Position Paper on Self-Represented Litigation, 1 (Gov't Rel. Office ed. 2000).

through ghostwriting have the ability to provide the court with concise, correct, and cognizable legal arguments that conform to typical court practice.

Given this, self-represented litigants with ghostwritten documents come to court more prepared to address their issues, and rely less on court staff to walk them through their litigation. These parties can focus their efforts on presenting their arguments and explaining the facts of their cases, instead of struggling through legal terminology and opaque judicial procedures. They can appear in court with a cogent argument in hand, resulting in fewer continuances and less congestion for the court system.

Some opponents to ghostwriting argue that self-represented parties may receive an unfair advantage when they present ghostwritten documents that do not identify an attorney. However, regardless of whether attorney identification is mandated, clients who receive the benefit of ghostwritten documents are required to inform the courts that they received legal assistance. Specifically, just as before, Wis. Stat. § 802.05(2m) requires litigants to affirmatively tell the court that their documents were prepared with the assistance of an attorney. This rule petition does not seek to change that requirement, which this Court unanimously found sufficient for disclosure purposes as recently as 2014. Furthermore, even without this requirement, the fact that documents were prepared by a lawyer would likely

be evident to the court, so it is unlikely that any special treatment would be afforded to the self-represented party submitting ghostwritten documents.¹⁵

Ghostwriting is helping the courts and promoting access to justice—or was, until 2018. Petitioner urges the Court to restore Wis. Stat. § 802.05(2m) to its pre-2018 form permitting ghostwriting.

III. This Court and the Legislature share authority over Wis. Stat. § 802.05(2m), and this Court is in the best position to amend it because it has studied the topic more thoroughly and is impacted by it more directly than the Legislature.

A. The Court has authority to amend Wis. Stat. § 802.05(2m).

The Court and the Legislature share authority over rules of court practice and procedure. The Court’s authority derives from Article VII, section 3, clause 1 of the Wisconsin Constitution and Wis. Stat. § 751.12, which states:

- (1) The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant.
- (2) All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section.
- (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.¹⁶

¹⁵ See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 446 (2007).

Because Wis. Stat. § 805.02 governs attorneys’ obligations to sign pleadings, motions, and other representations made to a Wisconsin court, it is a rule of pleading, practice, and procedure that falls under Wis. Stat. § 751.12(1) and (2). The Court may therefore modify this rule and the Legislature may do the same.

Court precedent confirms its co-equal authority with the Legislature over procedural court rules and shows that a rule promulgated by one branch may be modified by the other. In considering the constitutionality of Wis. Stat. § 251.18 (the predecessor to Wis. Stat. § 751.12), the Court determined that the Judiciary is often in a better position than the Legislature to promulgate “rules of court” given that such rules inherently affect the “everyday routine” of the Judiciary.¹⁷ In *Matter of E.B.*, the Court explained its inherent constitutional authority in this area of the law: the Judiciary “has equal power with the legislature to improve practice and procedure” and “should not hesitate to do so in the interest of justice.”¹⁸ And in *In re Grady*,

¹⁶ Wis. Stat. § 751.12 (2015).

¹⁷ *In re Constitutionality of Section 251.18*, 204 Wis. 501, 236 N.W. 717, 721 (1931) (the “Rules of Court Case”).

¹⁸ 111 Wis. 2d 175, 330 N.W.2d 584, 588–89 (1983), citing *Spoos v. State*, 219 Wis. 285, 290, 262 N.W. 696 (1935) (overruled on other grounds, *State v. Lampe*, 26 Wis. 2d 646, 648, 133 N.W.2d 349 (1965)). The Court in *E.B.* noted that it may lack this authority where there is “conflicting legislation,” *i.e.*, legislation expressly restricting the Court’s otherwise co-equal authority in a particular procedural sphere. *Id.* at 589. There is no such conflicting legislation here.

the Court cited the Legislature’s mandate not to “unduly burden” or “substantially interfere with” the judicial branch in areas of shared power.¹⁹

These principles support the Petition. The Judiciary is more familiar with ghostwriting than the Legislature, and restrictions on the practice burden the “everyday routine” of the Judiciary. The Court is therefore in a better position to regulate it than the Legislature.

B. The Judiciary has studied ghostwriting more thoroughly than the Legislature.

Numerous committees in the legal profession had reported on the effects of limited scope representation and ghostwriting before this Court adopted the 2014 iteration of Wis. Stat. § 802.05(2m). This meant the Court was able to consider statistics, empirical evidence, legal analyses, and policy arguments on the potential benefits and drawbacks of ghostwriting before determining that ghostwriting would benefit Wisconsin’s judicial system.

PPAC published a study on the feasibility of, and its recommendation for, limited scope representation in 2011.²⁰ PPAC based its report on the findings of a subcommittee focused on establishing limited scope

¹⁹ 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

²⁰ *Phase I: Feasibility Study and Recommendations*, PPAC SUBCOMM. ON LIMITED SCOPE REPRESENTATION (Aug. 2011), available at <http://wicourts.gov/courts/committees/docs/ppaclimitedscopereport.pdf>.

representation in Wisconsin in collaboration with the Judicial Council.²¹ This research was the driving factor behind Rule Petition 13-10, and PPAC brought its research directly to this Court's and the public's attention through the formal rulemaking process for Petition 13-10.²² Through surveys of circuit court judges, administrative law judges, and court commissioners, the study found that the majority believed ghostwriting to be "the form of limited scope representation that works best for civil, family, small claims, and probate cases."²³

The American Bar Association ("ABA") had also published multiple studies on ghostwriting before 2014. In 2003, the ABA's Modest Means Task Force published a Handbook on Limited Scope Representation Legal Assistance.²⁴ In this study, the task force considered how various forms of limited scope representation affected the legal system and specifically recommended ghostwriting.²⁵ The task force stated that it favored limited scope representation rules that did not require *any* disclosure of an attorney's

²¹ *Id.* at 4–5; *In re amendment of Supreme Court Rule Chapter 20 and Wisconsin Statute Chapters 800, 801, 802, and 809 relating to Limited Scope Representation*, Memorandum in Support of Rule Petition No. 13-10 (July 2013).

²² *In re amendment of Supreme Court Rule Chapter 20 and Wisconsin Statute Chapters 800, 801, 802, and 809 relating to Limited Scope Representation*, Memorandum in Support of Rule Petition No. 13-10 (July 2013); *Order No. 13-10*, 2014 WI 45 (2014).

²³ *Phase I: Feasibility Study and Recommendations*, PPAC SUBCOMM. ON LIMITED SCOPE REPRESENTATION (Aug. 2011), <http://wicourts.gov/courts/committees/docs/ppaclimitedscopereport.pdf>.

²⁴ *Handbook on LSR Legal Assistance*, A Report of the Modest Means Task Force, ABA SEC. OF LITIG. (2003).

²⁵ *Id.*

assistance to a pro se litigant. It further opined that if a disclosure must be made, it should simply be that the litigant received limited scope assistance.²⁶ In other words, the statement that the document “was prepared with the assistance of a lawyer” was sufficient and ghostwriting should be permitted.

By 2007, another ABA committee had studied the impacts of ghostwriting and non-disclosure in limited scope representation agreements. The ABA Standing Committee on Ethics & Professional Responsibility issued a Formal Opinion in 2007 finding immaterial to the merits of litigation “the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes.”²⁷ This ABA committee also interpreted the Model Rules of Professional Conduct to permit ghostwriting.²⁸

In unanimously adopting Rule Petition 13-10 in 2014, this Court showed how persuaded it was that both limited scope representation and ghostwriting would benefit public access to justice.²⁹ The Court’s order also acknowledged that the majority of the public comments it received favored

²⁶ *Id.* at 144–45.

²⁷ *Undisclosed Legal Assistance to Pro Se Litigants*, ABA STANDING COMM. ON ETHICS & PROF’L RESP., Formal Op. 07-446 (2007), https://www.americanbar.org/content/dam/aba/migrated/media/youraba/200707/07_446_2007.authcheckdam.pdf.

²⁸ *Id.* at 4.

²⁹ *Order No. 13-10*, 2014 WI 45 (2014).

the petition.³⁰ Unfortunately, the Legislature did not consider any of these studies or any public comments before it amended Wis. Stat. § 802.05(2m).

Instead, the amendment to Wis. Stat. § 802.05(2m) was part of Assembly Bill 771, a bill that revised landlord-tenant laws by limiting housing inspections, renumbering zoning laws, amending the regulation of property owner licenses, and setting forth rules for emotional support animals in rental units.³¹ The Legislature did not provide any commentary to its reasoning for amending Wis. Stat. § 802.05(2m), but its intent in adopting Assembly Bill 771 is clear. It was focused on revising landlord-tenant laws and not on changing the pro bono legal landscape. The amendment to Wis. Stat. § 802.05(2m) simply slipped into an omnibus bill 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, both of which still allow ghostwriting. The consequences of the Legislature’s action are necessarily unintended because it does not appear the Legislature considered them at all.

C. The “everyday routine” of the Judiciary is directly and negatively impacted by the current prohibition on ghostwriting.

³⁰ *Id.*

³¹ 2017 WI Act 317.

The consequences of the current iteration of Wis. Stat. § 802.05(2m) are negatively affecting the judicial system, most severely for indigent litigants who cannot afford to pay for legal services. As explained above, mandating that lawyers identify themselves on documents they assisted a pro se litigant in drafting makes lawyers hesitant to provide such assistance.³² They worry that tribunals will mistakenly presume they more broadly represent litigants who received their limited scope assistance. This, in turn, causes more self-represented parties to litigate their cases without any legal assistance whatsoever. Judges, court commissioners, and court clerks are then forced to spend time trying to interpret documents drafted by pro se litigants and sort through the accompanying errors.³³ All of this was avoided by the former rule permitting ghostwriting, whereas Wis. Stat. § 802.05(2m)'s current prohibition on ghostwriting wastes tribunals' time and brings about detrimental outcomes for indigent pro se litigants.

CONCLUSION

Since 2014, nothing in the judicial system has changed that would have warranted the Legislature's 2018 amendment to Wis. Stat. § 802.05. Indigent litigants still fail to receive adequate legal assistance and tribunals continue to be plagued with the resulting inefficiencies of directing self-represented

³² Limited Representation Committee of the California Commission on Access to Justice, Report on Limited Scope Legal Assistance with Initial Recommendations, 2 (Oct. 2001).

³³ Conference of State Court Administrators, Position Paper on Self-Represented Litigation, 1 (Gov't Rel. Office ed. 2000).

parties through the legal process. The Court found these consequences persuasive in 2014 when it unanimously adopted Rule Petition 13-10, allowing attorneys to ghostwrite documents and provide otherwise self-represented parties with limited scope representation. The Legislature failed to consider these deleterious effects when it amended Wis. Stat. § 802.05 to prohibit ghostwriting, and it identified no abuse of this tool justifying the change. The Court should exercise its shared power to restore the statute to its previous iteration and allow ghostwriting once again.

Dated this 15th day of May, 2019.

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