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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

RE: Additional 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:

This letter is in response to the Court's invitation to the petitioner and other interested parties for additional comment on the question of the respective authority of the court and legislature to act in this matter.

I. Both the Supreme Court and the Legislature have equal authority to act.

I concur with statements made at the hearing that both the Court and the Legislature have equal authority to "legislate" – either through enacting statutes or by enacting Court Rules. I disagree with the position of some parties that the regulation of ghostwriting is so intrinsic to the role and authority of the courts that the Court has superior authority to act and that its enactments on this issue may not be reversed or modified by the Legislature.

It was not much discussed at the hearing but *the public* as well as parties in contested cases should be able to learn the names of attorneys who have asserted a cause of action, a defense or a counterclaim in documents *filed* in court in a contested matter. It is worth noting that s. 802.05(2m), stats., does not require volunteer attorneys to disclose their names when engaged in ghostwriting unless a particular document is going to be actually filed as part of the public record of a case. This means that ghostwriting has a public interest aspect; it is not merely some "regulation of the bar" issue.

Therefore the Legislature's enactments should be given deference by the Court and not simply be overruled verbatim.

II. On "shared powers" questions the courts should defer to the legislature.

A leading case which considered this entire topic in depth was *Gabler v. Crime Victims Rights Board*, 2017 WI 67. The principle of "exclusive and shared power" was discussed:

When delineating the Wisconsin Constitution's lines of demarcation separating governmental powers, this court has observed that "[t]he constitutional powers of each branch of government fall into two categories: exclusive powers and shared powers. Each branch has exclusive core constitutional powers into which other branches may not intrude." *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999) (citing *State ex rel. Friedrich v. Cir. Ct. for Dane Cty.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995)). "This court is highly mindful of the separation of powers. It does not engage in direct confrontation with another branch of government unless the confrontation is necessary and unavoidable." *State v. Moore*, 2015 WI 54, ¶91, 363 Wis. 2d 376, 864 N.W.2d 827; see also *Integration of Bar Case*, 244 Wis. 8, 48, 11 N.W.2d 604 (1943) ("The state suffers essentially by every . . . assault of one branch of the government upon another; and it is the duty of all the co-ordinate branches scrupulously to avoid even all seeming of such." (quoting *In re Goodell*, 39 Wis. 232, 240 (1875))). At ¶30.

Later, at ¶35, the opinion states:

In its shared powers decisions, this court has acknowledged that some legislative actions affecting the courts do not contravene the separation of powers. But "the legislature is prohibited from unduly burdening or substantially interfering with the judicial branch." *State v. Holmes*, 106 Wis. 2d 31, 68, 315 N.W.2d 703 (1982).

I maintain that 2017 Act 317's modification to the ghostwriting rule was definitely not a "substantial interference" with the judicial branch.

III. The Court can modify a legislative enactment which has had an unforeseen impact on the judicial branch.

In this regard some guidance can be found in Justice Abrahamson's concurring/dissenting opinion in *Gabler*. She makes this observation about the statutes enacted to effectuate the Crime Victims Amendment:

Is the drafting perfect? No. But perfect drafting is rarely the hallmark of any state or federal statute (or opinion of a court). At ¶196.

The interested parties who succeeded in effecting a change to the ghostwriting statute as part of an omnibus bill dealing largely with landlord/tenant issues have conceded that an unforeseen effect may have been to discourage attorneys from performing *pro bono* services in many other areas of law. This led to introduction of 2019 Assembly Bill 705 as a proposed remedy. One of the sponsors of AB 705, Rep. Rob Brooks, has submitted a statement to this Court indicating his outreach to and willingness to work with petitioner to achieve a modification of the ghostwriting statute.

IV. What action should the Court take?

When a court is confronted with the quite difficult question whether legislation action should be overturned it should keep in mind "the cardinal principle of statutory interpretation: Save. Do not destroy." *Gabler*, (Abrahamson, J., concurring/dissenting) at ¶62.

One decision this Court can make is to invite the petitioner to submit a "fix" to the ghostwriting statute to the legislature while the Court holds in abeyance a decision on the Petition. I am puzzled

that petitioner (and supporting legal groups and individuals) did not pursue this course of action initially. Instead, the petition falsely sought to portray the amendment of s. 802.05(2m) as having been somehow unknowingly “slipped in” to a bill. The petitioner’s response of December 16 then maligns and impugns my motives and those of landlords in general by asserting “*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.*”(at p. 4). Petitioner apparently does not understand that evictions are expensive for landlords, that they are a last resort and that when filed by landlords it is definitely not with a feeling of gladness.

Finally, I stated at the January 17 hearing that landlords in Milwaukee were generally accepting and comfortable working with volunteer attorneys of the Eviction Defense Project in negotiating stipulations to resolve eviction actions.

Respectfully submitted,

Heiner Giese

cc: (via email only)
Atty James E. Goldschmidt, Quarles & Brady LLP