

**MARQUETTE VOLUNTEER LEGAL CLINIC
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***Ghostwriting in Clinics and Self-Help Centers:
Not Dead Yet?***

What is “ghostwriting”?

When a lawyer assists a self-represented litigant (“SRL”) in drafting pleadings, briefs, or other documents – including forms ordained by the court – without disclosing the lawyer’s role to the reader

Why permit ghostwriting?

- Ghostwriting expands access to justice, because a lawyer’s assistance is more readily available
 - For example, through limited scope representation; and
 - brief legal assistance in clinics and self-help centers where volunteer lawyers help SRLs fill out court-mandated forms
- Requiring disclosure can be a disincentive to volunteer attorneys
 - For some, disclosure requires a conflict check, which prevents immediate service
 - Even in the absence of a true conflict, some prefer not to take the risk of appearing disloyal if an unknown adversary turns out to be a client or prospective client
 - Some fear that disclosure will lead to a compelled general appearance
- Disclosing the fact that a lawyer has assisted – without disclosing the identity of the lawyer – addresses the main concerns about ghostwriting
 - An SRL suggesting the pleading is his or her own work: an attorney failing to be candid with the court about an attorney’s involvement

Ghostwriting unanimously approved by the Supreme Court in 2014:

- In June 2014, the Court unanimously approved Rules Petition 13-10, which included the following provisions:
 - SCR 20:1.2(cm): A lawyer may ghostwrite as long as the document clearly states “This document was prepared with the assistance of a lawyer”
 - WIS. STAT. § 802.05(2m): “A lawyer may draft or assist in drafting a . . . document filed by an otherwise self-represented person. The attorney is not required to sign the document. The document must contain a statement . . . that “This document was prepared with the assistance of a lawyer”

Attempt to limit ghostwriting by a legislative change in April, 2018:

On April 18, 2018, 2017 WI Act 317 became effective, adding the following requirement to WIS. STAT. § 802.05(2m):

An attorney may draft or assist in drafting a . . . document filed by an otherwise self-represented person. . . Any such document must contain a statement . . . that “This document was prepared with the assistance of a lawyer,” *followed by the name of the attorney and the attorney’s state bar number.*

Two options for volunteer lawyers in the wake of the change:

- More cautious approach: disclose name and bar number
 - In a June 6, 2018 article in *Inside Track*, the biweekly newsletter of the State Bar of Wisconsin, Ethics Counsel Tim Pierce recommends this approach
 - He takes his direction from SCR 20:8.4(f)
 - SCR 20:8.4(f) says it is misconduct for a lawyer to: “violate a *statute*, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers” (emphasis added by Mr. Pierce)

- More intrepid approach: Stick to the simple disclosure approved in the ethics rules by the Supreme Court, and cite SCR 20:1.2(cm):
 - “This document was prepared with the assistance of a lawyer. No further disclosure is required. *See* SCR 20:1.2(cm)”
 - The Legislature changed WIS. STAT. § 802.05(2m), but it did not change the ethics rules, in particular, SCR 20:1.2(cm), which explicitly permits ghostwriting
 - The retort to the State Bar’s advice about ghostwriting:
 - SCR 20:8.4(f)(“tis misconduct to “violate a statute . . .”) is not conclusive; it is a rule that applies generally, but when general and specific laws conflict, the specific should control, absent evidence the Legislature intended the general rule to apply despite the more specific pronouncement; *see, e.g., State v. Wilson*, 2017 WI 63, ¶ 22, 376 Wis. 2d 92 (“where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls”)
 - When the Legislature amended WIS. STAT. § 802.05(2m), it is presumed to have been aware that SCR 20:1.2(cm) explicitly permits ghostwriting and it made no effort to ordain that a lawyer’s failure to disclose his or her identity be considered misconduct