

**STATE OF WISCONSIN
SUPREME COURT**

In the matter of:

**The petition of the State Bar of Wisconsin
proposing revisions to SCR 11.06 concerning
group and prepaid legal services plans**

PETITION FOR REVISION OF SUPREME COURT RULE 11.06

To: The Honorable Justices of the Supreme Court

The State Bar of Wisconsin petitions the Court for a revision to Supreme Court Rule 11.06 governing the participation by State Bar members in group or prepaid legal services plans. The State Bar's Group & Prepaid Legal Services Committee believes that the changes recommended in this petition and endorsed by the State Bar's Board of Governors will streamline the public's access to affordable legal services through these plans and reduce unnecessary administrative requirements that neither protect the interests of consumers nor advance the interests of the legal profession. In light of the recommendations contained in this petition, the State Bar also requests that the Court enter an interim order that holds in abeyance the reporting and registration requirements of SCR 11.06(4) pending the Court's decision on the issues raised in this petition.

1. The Current Rule

SCR 11.06 governs the registration of new group or prepaid legal plans and the participation of Wisconsin lawyers in those plans. Plans must be filed with State Bar prior to operating in Wisconsin. Attorneys may only participate in plans that meet certain disclosure, dispute resolution and independence requirements. Annually, each lawyer participating in such a plan must file an annual report with the State Bar providing information regarding the plan or the lawyer's participations, including the fees charged, the number of clients assisted and the kinds of services provided. Administration of the rule is handled by State Bar staff under the direction of the Group & Prepaid Legal Services Committee. In the event that the committee believes that a practice disclosed by an attorney may violate the rule, it can seek an opinion from the Professional Ethics Committee and, if warranted, file a complaint with the Office of Lawyer Regulation.

Currently, 34 group or prepaid legal plans are registered with the State Bar. For calendar year 2005, 136 Wisconsin attorneys reported serving clients through such plans.

The original rule appears to have been created in 1979 for number of reasons. First, it was intended to give attorneys guidance on when they could participate in what was then a relatively new form of obtaining legal services. Second, the goal was to create a registry of the plans being created for employers, mutual associations and other nonprofit entities. There may also have been a desire to collect information about the usage and extent of what was then a relatively new means of accessing legal assistance. Although the rule did not directly regulate the legal plans themselves, it did so indirectly by restricting Wisconsin lawyers to participation in plans that had certain consumer-friendly features.

2. The Changing Landscape

When the rule was adopted, most plans were locally-based and were being set up by Wisconsin lawyers. The sponsors were mainly unions, trade associations, local companies, churches and credit unions. Since that time, the largest plans serving the most members in Wisconsin and nationally are organized outside Wisconsin as publicly traded companies (Pre-Paid Legal Services, Inc. and Hyatt Legal Plans, a subsidiary of MetLife). Wisconsin attorneys in many cases can no longer report on more than their own participation in the larger plans, because they lack the necessary plan-wide information held by the administrators for the national plans. An attorney may handle one matter referred through the plan but be unable to state what the plan or other attorneys have done. It was this state of affairs that led the committee to adopt a “Plan Administrator’s Annual Report Form” to gather the information that attorneys lacked.

3. How Plans Work

Some plans now back their promises with insurance policies that are overseen by the Office of the Commissioner of Insurance. The policies in turn provide the plan’s agreed upon payment to the attorney when the attorney assists a plan member (the consumer). Others support their promises with membership dues from the association, union or organization.

None of the plans appear to involve long term, binding contracts between clients, plan organizers and/or attorneys. Plans that charge consumers a fee for participation do so through either payroll deduction (e.g. Hyatt Legal Plans) or through direct payment to the plan (Pre-Paid Legal Services, Inc.). The most common arrangement appears to be a monthly recurring charge for plan participation that the consumer can terminate at any time for any reason. Plan services may also be an automatic benefit of membership in a labor union or trade association.

Variegated is the best way to describe the group and prepaid legal plan landscape these days. There are plans that actually contract with Wisconsin law firms to provide certain benefits at no additional cost to plan members. Other plans act merely as a referral source, collecting nothing from the consumer and only a small fee from the attorney, who agrees to offer a discounted fee schedule to referred plan members. Plans also combine a number of different variations on these first two types. Some plans even act as adjuncts to employee assistance plans, referring employees experiencing difficulties to attorneys as they would to any other professional provider like a psychologist or accountant.

4. Changes In The Rule Are Needed

For the reasons stated below, the State Bar recommends that SCR 11.06 be revised as follows to remove the registration and reporting requirements in the current rule but retaining the protections for consumers through limits on attorney participation in these plans:

SCR 11.06 Group or prepaid legal services plans. (1) A "group or prepaid legal services plan" means a plan by which legal services are rendered to a person participating in the plan by an attorney recommended or selected as provided in the plan.

(2) An attorney may furnish legal services in this state pursuant to a group or prepaid legal services plan which complies with the following conditions:

(a) The plan shall be written and provide:

1. The benefits to be provided, including all exclusions and conditions;

2. Procedures for the review and resolution of disputes arising under the plan [but the plan may not require a client to submit to binding arbitration any grievance or dispute related to an attorney's professional services](#);

3. That a person participating in the plan may obtain legal services independently of the plan; [and](#)

4. That an attorney furnishing legal services under the plan is free to exercise independent professional judgment;

(b) A description of the terms of the plan shall be given to each participant.

The committee also believes that it would be advisable to add a comment that notes the role that these plans can play in providing additional access to affordable legal advice and a measure of choice in how a client can access a lawyer. The comment should also alert attorneys to the fee-splitting and professional independence rules in SCR 20:5.4(a) and (c) as well as the advertising restrictions in 20:7.2 and 20:7.3.

5. These Changes Will Protect Consumers And Eliminate Unnecessary Paperwork

In checking with OLR, the State Bar, the Office of Commissioner of Insurance (OCI), the Department of Justice (DOJ) and the Department of Agriculture, Trade and Consumer Protection (DATCP), the committee did not uncover any consumer complaints about group or prepaid legal services plans. Nevertheless, the State Bar believes that the consumer protection elements of the rule are important to the public, attorneys and the plans themselves as a minimum standard of fair behavior. Therefore, the State Bar recommends that the Court retain the elements of the existing rule that limit Wisconsin attorneys to participation in plans that meet certain minimum disclosure, dispute resolution and freedom of choice requirements. Lawyers and clients should be free to participate in plans that fit their needs within a framework that provide adequate and clear disclosure of the terms, but without unnecessary paperwork.

Other elements of the current SCR 11.06 dealing with plan registration, attorney reporting and whether the plan makes a profit, do not appear to serve any continuing purpose that would justify their retention. There has been no measurable benefit to the public or the profession in having the State Bar of Wisconsin act as registrar for group and prepaid legal plans when the rule does

Deleted: and ¶

5. That the sponsoring organization or any person or entity connected with it shall not directly or indirectly derive a profit from or retain any part of the consideration paid for rendering legal services, except those amounts utilized to: ¶

a. Improve the benefits of the plan; ¶
b. Reimburse the plan for its reasonable and necessary administrative expenses; or ¶

c. Refund surpluses to the users of the legal services and enrollees in the plan, but not to members of a sponsoring organization who have not enrolled in or used the plan.

Deleted:

(4) (a) An attorney furnishing legal services pursuant to a plan shall on or before January 31 of each year report to the state bar on forms provided by it a summary of the plan operation or the attorney's participation in it, including but not limited to all relevant fee schedules, the number of persons receiving legal services, and the kinds of benefits provided. ¶

(b) An attorney or sponsoring organization of a proposed plan shall file the plan with the state bar before the plan becomes operative and may inform interested persons that the plan has been registered with the state bar. ¶

(5) All information filed pursuant to this rule is confidential, if so requested in writing at the time of filing, except the name of the plan, the name and address of its sponsoring organization, the fact that it has an arrangement for the provision of legal services, and the names of the attorneys providing the services. Plans and required reports filed pursuant to this rule shall be otherwise open for inspection. All information is available to authorized representatives of the supreme court and the state bar for information purposes and for disciplinary and ethical investigations or proceedings, except as provided in this rule. ¶

(6) An attorney who receives a written notice of objection to an arrangement or practice disclosed by his or her report made pursuant to this rule or the state bar guidelines, shall be afforded a stated reasonable time, as provided by the guidelines and procedures, within which to conform the arrangement or practice to professional ethical standards, this rule and the guidelines or to file an explanation and other supplementary materials. During that period the report is privileged and shall not be used for disciplinary purposes. This privilege does not apply to an attorney who files an intentionally false or fraudulent report. Failure to conform the arrangement or practice to professional ethical standards or to dissociate from an arrangement which continues not to conform, a ... [1]

not contemplate that the Bar will do more than accept any registration that it receives. Registration creates a paper trail but does nothing to enhance consumer protection for those seeking affordable legal services. Although a vigorous plan registration and oversight regime could be created, the marginal benefit of such an effort is likely to be minimal, given the lack of problems experienced with these plans in Wisconsin.

There has also been no measurable benefit from collecting data from attorneys on the services that they provide under such plans. In 2005, the last reporting period, 136 attorneys reported on their activities with these plans. Even if the information filed by plans and attorneys were readily available to the public, knowing how many attorneys work with which plans and how many clients they serve is not what interests consumers.

The committee's sense is that consumers care more about the competence of the attorney, the ease of using the plan, plan cost, protection from plan abuses and similar issues. Attorney competence is handled elsewhere in the rules, while plan cost is readily available to consumers outside the rule. Protecting consumers from potential abuses by plans is a legitimate concern that the committee believes can be addressed by retaining the elements of the rule that restrict attorneys to participation in plans that provide certain basic protections to the public.

The current requirement that attorneys only furnish legal services through plans that are nonprofits seems to reflect a concern that a for-profit plan would be less desirable in some unspecified way. Since there is no general requirement that attorneys operate through nonprofit entities, it seems curious to impose that restriction on this mode of obtaining legal services. If the plan delivers access to legal services in a manner that customers decide has value, then whether the plan is offered by a non-profit or for-profit entity should not matter. The for-profit plans typically offer a monthly payment option, giving consumers the option of avoiding long-term contracts. In sum, the Bar is not aware of any evidence that a for-profit plan structure is harmful per se to consumers or the profession.

The State Bar believes that existing enforcement powers in DATCP, DOJ and OCI are sufficient to deal with any issues with plan misrepresentation, false advertising, improper sales practices or coverage disputes. OLR and this Court provide an effective means of ensuring that attorneys meet their professional responsibilities in providing legal services.

Therefore, the State Bar of Wisconsin respectfully requests that the Court modify SCR 11.06 as indicated above and enter an interim order that holds in abeyance the reporting and registration requirements of SCR 11.06(4) pending the Court's decision on the issues raised in this petition.

Respectfully submitted, this 2nd day of February, 2007.



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(4) (a) An attorney furnishing legal services pursuant to a plan shall on or before January 31 of each year report to the state bar on forms provided by it a summary of the plan operation or the attorney's participation in it, including but not limited to all relevant fee schedules, the number of persons receiving legal services, and the kinds of benefits provided.

(b) An attorney or sponsoring organization of a proposed plan shall file the plan with the state bar before the plan becomes operative and may inform interested persons that the plan has been registered with the state bar.

(5) All information filed pursuant to this rule is confidential, if so requested in writing at the time of filing, except the name of the plan, the name and address of its sponsoring organization, the fact that it has an arrangement for the provision of legal services, and the names of the attorneys providing the services. Plans and required reports filed pursuant to this rule shall be otherwise open for inspection. All information is available to authorized representatives of the supreme court and the state bar for information purposes and for disciplinary and ethical investigations or proceedings, except as provided in this rule.

(6) An attorney who receives a written notice of objection to an arrangement or practice disclosed by his or her report made pursuant to this rule or the state bar guidelines, shall be afforded a stated reasonable time, as provided by the guidelines and procedures, within which to conform the arrangement or practice to professional ethical standards, this rule and the guidelines or to file an explanation and other supplementary materials. During that period the report is privileged and shall not be used for disciplinary purposes. This privilege does not apply to an attorney who files an intentionally false or fraudulent report. Failure to conform the arrangement or practice to professional ethical standards or to dissociate from an arrangement which continues not to conform, after the expiration of the time fixed in the notice of objection, shall terminate the privilege afforded by this rule.

(7) Failure by an attorney to file a timely report required by this section constitutes misconduct.

(8) The board of governors of the state bar of Wisconsin shall adopt guidelines and procedures for the administration of this rule after consultation with representatives of sponsoring organizations and participating attorneys. The guidelines and procedures are effective upon approval by the supreme court.

(9) This subsection constitutes the guidelines and procedures approved by the supreme court pursuant to sub. (8):

(a) Information filed with the state bar is privileged and shall not be used in any disciplinary proceeding, except as provided by this rule, and will be examined for completeness. Incomplete forms will be returned to the registrant with an appropriate explanation.

(b) Each report will be examined for conformity with this rule and professional ethical standards. A registered attorney will be advised, in writing, of any problems found in the report and afforded an opportunity to

respond to questions raised as to the group arrangement or practice disclosed in the report.

(c) The special committee on group and prepaid legal services may conclude that no further action is necessary in the case of an attorney who after receiving a notice of objection files supplementary materials, within the time stated in that notice, which satisfy the committee.

(d) Where an ethics opinion is sought by the special committee on group and prepaid legal services because of uncertainty as to the professional propriety of an arrangement or practice disclosed by a report, and the professional ethics committee concludes that a particular arrangement or practice violates standards of professional conduct, the attorney involved should be advised promptly of the opinion and given a stated reasonable time, not to exceed 90 days, unless extended by the special committee on group and prepaid legal services, for cause, within which to conform the arrangement or practice to professional standards or to dissociate from the arrangement which continues not to conform.

(e) An opinion from the professional ethics committee shall not be a prerequisite to a decision by the special committee on group and prepaid legal services to file a complaint or report with the office of lawyer regulation in a situation in which the committee concludes that such a decision is warranted.

(f) Consultation with representatives of sponsoring organizations prior to the board of governors' adopting guidelines and procedures for the administration of this rule means written communication and does not require a hearing, unless requested in writing by a sponsoring organization or other interested person. The written communication shall be made to all attorneys participating in registered plans and plan administrators, and shall include a request that the attorneys and plan administrators communicate the substance of the written communications in an appropriate manner to their plan participants.