WISCONSIN® LAWYERS
STATE BAR of WISCONSIN | EXPERT ADVISERS. SERVING YOU.

August 5, 2008

Wisconsin Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

RE: Commentary on Petitions 07-09:
In the Matter of the Definition of the Practice of Law and
the Administration of the Rule Defining the Practice of Law

Dear Honorable Justices:

Last April the State Bar requested that the Court delay further consideration of the rule proposed in its petition so that it would have an opportunity to analyze the various changes and additions which the Court might incorporate into a rule, if a rule is adopted by the Court. The Bar has proposed the rule so as to provide consumers with a pragmatic and effective way to process complaints regarding service providers who engage in the practice of law but who are not licensed by the Court to provide such services and to provide an efficient method for terminating unauthorized practice of law activities. Based upon the State Bar's long experience in listening to consumers complaining about actions of certain service providers who rendered services that probably constituted the unauthorized practice of law, it was and is the opinion of the State Bar that the absence of a rule defining the practice of law fosters the unauthorized practice of law which often results in significant harm to consumers.

The rule proposed by the State Bar will not provide a consumer with a direct remedy for any harm which may have been caused to the consumer by a service provider engaging in the unauthorized practice of law. However, the rule would provide some clear-cut guidance as to what constitutes the practice of law, and the administration of the rule will be a vehicle for investigating and terminating activities which constitute the unauthorized practice of law. Thus, even though a consumer complainant may not benefit directly from the administration of the rule proposed by the State Bar, other consumers could be protected from also suffering the consequences of the unauthorized practice of law. Today there is no practical system in place to deal with unauthorized practice of law issues and problems. The void has been frustrating to the State Bar, to many of its members, and all too often to the consuming public.

The consequences of the unauthorized practice of law can be extremely troublesome for consumers. The State Bar has observed over the years that one of the most persistent consumer problems attributable to the unauthorized practice of law involves the sale of revocable living trusts marketed by incompetent and unscrupulous vendors as an estate planning panacea. Some of the unscrupulous peddlers of the device have been connected to the insurance industry. The negative experiences of some consumers who have "purchased" revocable trusts include

State Bar of Wisconsin
5302 Eastpark Blvd. ◆ P.O. Box 7158 ◆ Madison, WI 53707-7158
(800)728-7788 ◆ (608)257-3838 ◆ Fax (608)257-5502 ◆ Internet: www.wisbar.org ◆ Email: service@wisbar.org

exorbitant pricing, poorly drafted documentation, inappropriate documentation, and often (most critically) implementation failure. Of course, the rule proposed by the State Bar would not prevent the distribution by unlicensed lawyers of forms used in estate planning but it would address the problems resulting from the advice, counsel and attempted implementation of estate plans provided by persons engaged in the unauthorized practice of law. The proposed rule would authorize the administrator to investigate and act to terminate conduct which constitutes the practice of law by an unlicensed person.

A typical revocable living trust problem arose recently in Waukesha County. A husband and wife were sold a package of estate planning documents which included a form of revocable trust and so-called pourover Wills. The seller of the package of documents was not a licensed lawyer. The documents provided had no signature lines and were never executed by the couple. The couple did proceed to transfer assets to the revocable trust, but the trust never came into being. The husband died, and it was determined that because of the lack of properly signed documents, he died intestate. The assets did not end up where the couple had intended. The incompetent vendor is left to prey on other consumers.

The revocable trust problem described in the example above is the kind of consumer problem which the State Bar believes can be effectively addressed by the proposed rule and its administration. The State Bar expects the administration of the rule to be reactive and consumer-driven. The State Bar's views about the number of complaints expected to reach the desk of the administrator each year are explained later in this letter. Based upon the State Bar's experience, the complaints to the administrator are most likely to pertain to activities such as the sale of revocable trusts, immigration matters, the activities of notarios (the recent legislation will not solve the problem), paralegals functioning without the supervision of a lawyer, and family matters in connection with independent and unsupervised paralegals.

The Court's draft of the rule, which was to have been discussed at its April 24 administrative conference, incorporated into the State Bar's proposed rule certain language proposed by interested parties, such as a CPA professional organization, the insurance industry, and the banking industry. In addition, the Court's draft incorporated certain provisions which were extracted from the rules defining the practice of law adopted by the courts of other states.

The State Bar has reviewed all of the changes and additions to the proposed rule which may be considered by the Court. Some of the changes are acceptable to the State Bar and others are unacceptable. Those proposed changes which have been determined by the State Bar to be unacceptable are rejected primarily to avoid the dilution of the value of the rule to protect consumers from the significant harm and damage which often results from the unauthorized practice of law. This letter will include explanations as to why the State Bar has deemed certain proposed changes or additions to its proposed rule to be unacceptable and, for the reasons stated, is urging the Court to reject such changes or additions. The last portion of this letter will address the issue of administration of the rule and offer compelling reasons why the administration of the rule should be placed in the Office of Lawyer Regulation.

COMMENTS ON COURT'S APRIL 24 DRAFT

The State Bar has carefully reviewed the various changes and additions which the Court has incorporated into the rule proposed by the State Bar. It is the understanding of the State Bar that the Court has not yet committed itself to adopt any rule defining the practice of law and that the changes and additions to the rule proposed by the State Bar may or may not wind up in a rule, if one is adopted by the Court. The purpose of this section of this letter is to provide the Court with the State Bar's reaction to certain of the possible changes and additions. The comments are as follows:

1. SCR 23.01(1). With respect to the basic definition of the practice of law, the Court (we think at the request of certain interested parties) has proposed incorporating into the definition the phrase "where there is a client relationship of trust or reliance". The State Bar objects to the inclusion of the quoted phrase because, in its opinion, the nature of the relationship between a consumer and a person engaging in the unauthorized practice of law should not be a factor with respect to the administration of the rule defining the practice of law. The proposed phrase is vague, and forcing the administrator of the rule to establish that there was a so-called "client relationship" in existence would unduly complicate the administration of the rule to the detriment of consumers.

2. Section 23.02(2). It has been suggested that the paragraph in the proposed rule which leads into a listing of the exceptions be preceded by the phrase, "regardless whether they constitute the practice of law". We believe the language proposed arose out of a concern by some interested parties that if the excepted conduct did, in fact, constitute the practice of law, it would result in a higher standard of care being imposed upon the service provider. The State Bar does not believe that the rule being proposed by it should be used in any way to establish or disestablish standards of care which the law might apply to activities carried on by various kinds of service providers. The proposed exceptions speak for themselves. The services or conduct represented by the various exceptions should provide enough solace to the interested parties.

3. Section 23.02(2)(k). It has been proposed that this catch-all provision be expanded so that it pertains not only to activities which the Court has determined by rule or opinion to not constitute the unauthorized practice of law, or which the Supreme Court has otherwise been permitted to be carried on, but also to regulatory systems created by statute, administrative rule, or common law. It is the opinion of the State Bar that the expansion proposed represents bad policy and would impinge upon the exclusive authority of the Wisconsin Supreme Court to regulate the practice of law.

Proposed Exceptions for Insurance and Banking

Prior to the Court's initial review of the State Bar's petition, the State Bar, of its own accord, proposed adding an exception for the services provided by persons issued credentials under Wisconsin Statutes, Chapters 440 to 480. Before suggesting such an exemption, the State Bar reviewed the pertinent Wisconsin statutes to determine whether the kinds of services provided by persons issued credential under those statutes could fall within the definition of the practice of

law established by the proposed rule. Following the review of the statutes, the State Bar proposed that so long as the persons credentialed pursuant to Chapters 440 to 480 performed services consistent with their respective credentials as authorized by the statutes, the services they provide should be exempt from the proposed rule defining the practice of law. It was the opinion of the State Bar that the services which could properly and lawfully be provided by those persons subject to Chapter 440 through 480 did not fall within the definition of the practice of law, and therefore it was reasonable to except them. The State Bar has proposed, however, that the Supreme Court could determine in the future, by rule or published opinion, that certain of the activities of persons credentialed under Chapters 440 through 480 do constitute the practice of law and thus are forbidden to the credential holders.

The State Bar's rationale for the exemption proposed for service providers under chapters 440 through 480 has been advanced by two other interested parties, namely, the insurance industry and the banking industry, as a basis for excepting from the proposed rule the services provided to the public by those two industries. Both the insurance industry and the banking industry have also contended that the participants in those industries are highly regulated and, accordingly, the public is already adequately protected by intense regulation. The State Bar has reviewed the Wisconsin statutes and administrative rules which pertain to banking and insurance and which provide a regulatory framework for those two important industries. The rule proposed by the State Bar to define the practice of law and to establish an administrative system is not intended to intrude in either the business of banking or the business of insurance. The sole intent of the proposed rule is to provide guidance as to what constitutes the practice of law and to preclude unauthorized persons from engaging in the practice of law. Just because industries such as insurance and banking are highly regulated does not mean that within those industries the consuming public does not have to be protected from problems arising out of the unauthorized practice of law.

The proposed rule is consistent with existing rules of the Supreme Court which limit the practice of law to those persons duly licensed by the Court. The State Bar has no intention of expanding the kinds of services which constitute the practice of law to include activities and services which are lawfully provided to the consuming public by the banking and insurance industries. The State Bar acknowledges the regulatory schemes which exist under Wisconsin law with respect to those two industries and is in agreement that the rule it is proposing for adoption by the Court be adjusted to make it clear that the rule is not intended to intrude upon the way banking and insurance are currently regulated.

4. Section 23.02(2)(r) The State Bar is of the opinion that the wishes of the insurance industry regarding exemption from the proposed rule can be accommodated by the following language:

> An entity or organization in the business of insurance guaranty or indemnity, or the sale of insurance permitted to be offered by insurance companies, or any employee or contractor of any of the foregoing entities or organizations when conducting their insurance business, which includes: (1) investigating or adjusting claims against it or its insured; (2) negotiating with other persons or entities; (3) conducting loss control

functions; (4) underwriting business; (5) selling insurance permitted to be offered by insurance companies or providing advice and counsel with respect to such insurance; and (6) preparation of releases or settlement agreements; provided that the Supreme Court has not provided by rule or by published opinion that the activity constitutes the unlicensed or unauthorized practice of law.

The foregoing language for the insurance exception is the language proposed by the insurance industry, although not all of the language proposed by the insurance industry was acceptable to the State Bar. The unacceptable features have been excluded from the foregoing exception.

The State Bar is of the opinion that the exception should be limited to the business of insurance and it should not be extended to the sale of "financial products", nor should it be extended to a "self-insured entity or organization". It has been the experience of the State Bar over the years that the sale of so-called "financial products" by persons connected to the insurance industry has too often led to the sale of inappropriate estate planning devices to consumers. The State Bar's acceptance of an exception for the insurance industry is based in part upon the fact that the insurance industry in Wisconsin is regulated by statute and administrative rule. The State Bar does not have the same confidence in regard to protection of the public with respect to the sale of financial products. Excluding "financial products" from the exception to the proposed rule does not in any way preclude the marketing and sale of financial products. The purveyors of those products simply cannot engage in the unauthorized practice of law.

The State Bar does not consider it to be appropriate to include in an exception for the insurance industry a self-insured entity or organization. It is the opinion of the State Bar that an entity or organization which avails itself of a right to self-insure is not subject to the kind of regulation which is generally applicable in the insurance industry.

The State Bar does not see a need for item (7) in the exception language proposed by the insurance industry, which pertains to using a lawyer-employee or captive lawyer to represent an insurance company, an insured person or an non-insured person. With respect to the proviso the State Bar is proposing be added to the exception to the insurance industry, it is considered by the State Bar to be essential that the Supreme Court reserve the right to act in the public interest if circumstances arise in connection with the activities of the insurance industry which conflict with the definition of the practice of law and which result in injury to consumers.

5. Section 23.02(2)(s). The language requested by the accounting industry in this section is not acceptable to the State Bar. Certified public accountants are covered by the exemption provided for in Section 23.02(2)(o) because such accountants are credentialed under Wis. Stats. Chapters 440-480. The administrator of the proposed rule defining the practice of law will cooperate when appropriate with the Accounting Examining Board, but the administrator must be able to handle matters that constitute the unauthorized practice of law. See Section 23.08(3).

6. Section 23.02(2)(x) The State Bar is willing to accept an exception for the banking industry which contains the following language:

> Any state or federally chartered financial institution when engaging in an activity that is within its authority under applicable state or federal law, including any employee providing services for it in connection with that activity; provided that the Supreme Court has not provided by rule or by published opinion that the activity constitutes the unlicensed or unauthorized practice of law.

The exception language stated above, including the proviso regarding the right of the Supreme Court to determine by rule or by published opinion that an activity constitutes the unlicensed or unauthorized practice of law, has been approved by representatives of the banking industry. The State Bar proposes that the exception for the banking industry not include language which pertains to an "affiliate" of a banking institution. The State Bar acknowledges that the business of banking can be carried on through certain authorized affiliates and the authority to do so is implicit in the remaining language of the exception.

7. Section 23.02(2)(u), (v), (y), (z) The State Bar is of the opinion that there is no particularly good reason to include in the exception section of the proposed rule subsections (u), (v), (y), and (z). The kinds of activities referred to in those four subsections are not part of the definition of the practice of law. If the Court wishes to include those four subsections as part of the rule it adopts, the State Bar has no objection except that with respect to subsection (z), it should be made clear that the provision of such general information regarding the law and legal procedures is provided without compensation.

ADMINISTRATION OF THE RULE

Section 23.08 of the proposed rule is entitled "Cooperation with Other Agencies". The State Bar has reviewed the proposed changes to subsection (3) and with one exception is in agreement with the changes. The State Bar is of the opinion that the administrator of the proposed rule should have the option to refer a matter to another regulatory body but should not be required to do so. The administrator must retain the right and authority to deal with situations involving the unauthorized practice of law.

Prior to the submission of the petition to the Supreme Court requesting the adoption of the rule defining the practice of law, the State Bar carefully analyzed various ways in which the rule could be administered. The State Bar has always envisioned that the administrator of the rule would be primarily or entirely reactive to complaints from members of the consuming public. The State Bar's conclusions in this regard are based upon its long experience in fielding complaints from the general public regarding the unauthorized practice of law and in analyzing and observing how the Wisconsin Department of Regulation and Licensing receives and

processes complaints regarding the businesses and occupations which it is responsible for regulating.

The administrative structure which the State Bar has proposed is patterned after the structure which has been installed and operated successfully by the Department of Regulation and Licensing. The State Bar believe that the experience of the Department of Regulation and Licensing over the past seven years is relevant to what the Court can expect an administrator to handle regarding the rule defining the practice of law. During the past seven years the Department of Regulation and Licensing received complaints about unauthorized practice involving 40 different licensed professions or occupations. The average number of complaints received each year regarding all 40 occupations total 182. Of the complaints received, 107 were screened out for various reasons and were not opened for investigation. The Department investigated 75 of the 182 complaints. Except for two occupations, the Department received an average of 10 or fewer complaints a year about each of the licensed professions and occupations. There were 26 complaints regarding real estate operators and 28 complaints regarding barbers and cosmetologists.

It is the considered opinion of the State Bar that the administrator of the rule defining the practice of law can expect to receive somewhere between 10 and 30 complaints each year regarding the unauthorized practice of law.

It is the opinion of the State Bar that the most practical and efficient place to locate the administration of the rule is in the office of OLR. The State Bar is of the opinion that the administration of the rule at the office of OLR will not interfere with other OLR duties and activities and that the full cost of OLR providing the administrative service will be borne by a separate assessment of members of the State Bar of Wisconsin. We estimate the annual assessment to be around $10 per member.

The State Bar anticipates that any new personnel required to be hired by OLR to administer the rule will be paid for in full by the State Bar's assessment process and that there will probably be excess employee time available for use by OLR to carry out its on activities. We strongly urge the Court, if it sees fit to adopt the rule proposed by the State Bar, to locate the administration of the rule within the office of OLR.

For the past 20 years and mostly through volunteer committees, the State Bar has observed the problems experienced by members of the public which have resulted from activities of persons not authorized by the Wisconsin Supreme Court to practice law. The State Bar, again through various voluntary committees, has carefully explored how the unauthorized practice of law has been dealt with in other states. As a result of its studies, the State Bar has concluded that the best way to protect the public from the unauthorized practice of law is through a definition of the practice of law adopted by the Supreme Court and a system installed to administer the rule. The court rules and administrative systems adopted in several states have been successful.

As was stated early on in this letter, the State Bar is absolutely convinced that the absence of a definition of the practice of law fosters the unauthorized practice of law to the detriment of the

consuming public. The State Bar is of the opinion that the rule it is proposing, as modified by this letter, is reasonable and should be adopted by the Court.

Accompanying this letter is a revised draft of the proposed rule. The enclosed draft is based upon the Court's April 24, 2008 draft and is marked to show changes in the Court's draft which are consistent with the contents of this letter.

Respectfully submitted,

STATE BAR OF WISCONSIN

Diane Diel
President, State Bar of Wisconsin

Thomas J. Basting, Sr.
Immediate Past President, State Bar of Wisconsin