



February 16, 2010

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

RE: Supplemental Commentary on Petition 07-09:
In the Matter of the Definition of the Practice of Law and the
Administration of the Rule Defining the Practice of Law (“Petition”)

Dear Honorable Justices:

Petition of State Bar of Wisconsin

The State Bar’s UPL Petition has been pending with the Court since June of 2007, and the Court has scheduled what the Bar hopes will be a final public hearing on the Petition for March 8, 2010. A primary purpose for the Bar requesting the Court to adopt a rule defining the practice of law is to provide a basis and method for dealing with the ever-growing problem for consumers resulting from the unauthorized practice of law (“UPL”) by unqualified persons. For several years before the Petition was filed, the Bar studied the evolution of UPL in Wisconsin, observed the interest of consumers being damaged by UPL, developed conclusions about the ineffectiveness of current laws of the State of Wisconsin to protect consumers from UPL and studied how other states have dealt with the problem of UPL. The Bar concluded that the core of the problem in Wisconsin is the absence of a definition of what kind of activities constitute the practice of law and the provision of legal advice. The Bar patterned its proposed rule defining the practice of law after what it considered to be the best and most pragmatic features of rules adopted in other states. Again, the purpose of the proposed rule is to protect consumers from the damage which can result from persons and entities engaged in the unauthorized practice of law.

State Bar of Wisconsin

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The Bar recognizes that the residents of Wisconsin function in a complex, law-based society and that lawyers are not the only knowledgeable and competent service providers who function in the market place. The Bar's goal in seeking a rule which defines the practice of law is not intended to garner additional work for lawyers, but rather to protect the consuming public from those persons and entities who are not qualified or authorized to provide legal services and advice.

UPL continues to evolve both in the State of Wisconsin and throughout the United States. We will be sending the Court additional examples of possible UPL activities that are taking place today. Unless the Court takes action to provide a basis and a process for effectively dealing with UPL, Wisconsin will continue to see a proliferation of businesses operating under the radar to the detriment of Wisconsin consumers. Sadly, Wisconsin is sorely lagging behind a majority of states that have already adopted a definition of what constitutes the practice of law.

Opponents of the petition will undoubtedly attempt to minimize the extent of the problem. However, the Bar is in the best position to make that assessment. We have received calls and complaints regarding UPL for over twenty years despite the fact that we have never had the authority to process and prosecute complaints. Suffice to say, we are painfully aware how UPL can result in substantial financial harm and personal harm to its victims. Incompetent legal advice like, for example, in the application of immigration law can have a devastating impact on the person receiving such flawed advice. From our experience, the amount of complaints that we have received is the tip of the iceberg. Therefore, we urge the Court to consider the examples that we have been able to provide as a qualitative representation of the UPL problem rather than a quantitative one. It will be of no comfort to that aggrieved person to hear that the petition failed for lack of a certain number of complaints. The fact that only a few Toyota automobiles out of millions sold had sticking accelerators did not diminish the need for Toyota to fix the

problem. UPL can result in substantial financial harm and personal harm to its victims. The recent examples of possible UPL which have come to the attention of the State Bar are being furnished to the Court so as to demonstrate the kind of harmful UPL which the proposed rule is intended to address. There is a clear-cut need in Wisconsin to deal with the problem of UPL. Some of the opponents to the proposed rule have distorted and grossly exaggerated the purpose of the rule and how it would be administered. Assertions that persons who wanted professional assistance to prepare tax returns would be forced to hire a lawyer for the task are frankly absurd. Assertions that surveyors would have to hire a lawyer to guide the surveyor in his or her job are equally absurd.

As a result of listening to the concerns of various opponents to the Bar's Petition expressed during previous public hearings and open administrative conferences held by the Court, the Bar made certain changes to its proposed rule and submitted those changes to the Court in August, 2008. That document was coded as draft #3. The changes made by the Bar which were reflected in draft #3 were intended to accommodate some of the concerns of the Petition's opponents without seriously compromising the objective of the proposed rule to protect consumers. Recently, this committee has had a dialogue with representatives of the Indian Law Section of the State Bar and the Coalition of Wisconsin Aging Groups. These discussions led the State Bar to make certain changes in the proposed rule in order to accommodate certain concerns of those two organizations. A copy of the revised rule currently proposed by the Bar and identified as draft #4 is attached to this letter. Draft #4 represents the rule which the State Bar requests be adopted by the court.

The Court's Study Draft

To facilitate discussion of the rule proposed by the Bar at the public hearing scheduled for March 8, 2010, the Court has prepared and circulated a discussion draft of a proposed rule which includes provisions requested by the Bar and changes or additions suggested by the Court and other parties. The Bar is opposing some of the changes and additions proposed by the Court and by other parties, which are included in the Court's discussion draft. The revised rule submitted by the Bar to the Court in August of 2008, a copy of which is attached, does include some of the changes and additions requested by opponents and by the Court. Proposed changes which were not incorporated into the revised rule were not acceptable to the Bar because in the Bar's opinion the purpose of the rule would not be furthered but hindered. The following is a commentary which is intended to explain the reasons for the Bar's opposition to some of the requested changes and additions.

1. SCR 23 – Preamble. The Court has suggested that the Preamble to the rule contain the following statement: “Nothing in these Rules shall be taken to define or affect standards for civil liability.” The Bar is not certain what the Court intended to accomplish by inserting that sentence. If a person engages in UPL and the other party involved suffers damages, should not the victim be entitled to assert a cause of action against the perpetrator based upon a violation of the Rule? Would not a victim have a course of action based upon a violation of Section 757.30 of the Wisconsin Statutes?

2. SCR 23.01(1) – Definition of Practice of Law. Several parties have requested that the definition of the practice of law include the following qualifying phrase: “Where there is a client relationship of trust or reliance.” The Bar objects to the inclusion of that phrase

in a proposed rule. A principal purpose of the rule proposed by the Bar defining the practice of law is to provide an effective way of dealing with and stopping UPL. The proposed phrase is subject to interpretation and would be an impediment to applying the proposed rule to identify and terminate UPL activity. If this phrase was included in the rule, would it mean that if a UPL perpetrator did not establish a “client” relationship that the perpetrator was not engaging in UPL?

3. SCR 23.02(2)(O) – Exceptions and Exclusions. The Bar has agreed that one of the exclusions to the definition of the practice of law is activity which constitutes practicing within the scope of practice allowed by a current credential issued under Wisconsin Statutes, Chapters 440-480. It has been proposed by certain interested parties that the exclusion be expanded to include the clause “or performing services under the supervision of a professional holding a current credential issued under Wisconsin Statutes 440-480.” The Bar objects to an inclusion in the exclusion of the just quoted clause. The proposed language does not limit the permitted activities of the person helping under supervision to the scope of practice permitted under the Wisconsin Statutes cited.
4. SCR 23.02(2)(S) – Exception and Exclusions. This subsection pertains to the insurance industry. The Bar has agreed to the language included in its proposed revised rule that would exclude certain activities carried on by insurance industry representatives as constituting the practice of law. The insurance industry wishes to expand the exclusion to be applicable to the sale of “financial products”, to the self-insured entity organization, and to a licensed intermediary. The Bar does not believe it is in the public interest to expand the exclusion to include the items described above. The Bar’s acquiescence in a

5. SCR 23.02(S)(S-1) and (U)(U-1). The Bar objects to all language proposed by the CPAs which would require complaints about a CPA engaging in UPL to be referred to the Accounting Examining Board, which exists and functions under Chapter 442 of the Wisconsin Statutes. The Bar has no problem with the rules administrator having the option to communicate with the Accounting Examining Board and to seek its advice and counsel regarding the activities of a CPA, but under the proposed rule the enforcement agency for dealing with UPL must be able to retain jurisdiction to handle the matter in accordance with the rule.

6. SCR 23.08(3) – Cooperation with Other Agencies. Under this section the administrator of the rule defining the practice of law is obliged to cooperate with agencies which provide credentials under Wisconsin Statutes, Chapters 440-480. The Wisconsin Society of Professional Engineers has requested that this particular subsection of the proposed rule be changed so that if the administrator determines that a party regulated by Chapters 440-480 is engaged in UPL then the administrator must defer to the Department of Regulation and Licensing for further investigation and possible action. The purpose of the rule proposed by the Bar is to authorize the administrator to investigate and appropriately deal with instances of UPL. The Wisconsin Supreme Court has the exclusive authority to regulate the practice of law, not the Department of Regulation and Licensing.

Administration of the Rule

The Bar, in its Petition, has provided that the administration of the rule defining the practice of law be housed in the Office of Lawyer Regulation (“OLR”). The Bar obviously understands the importance of OLR in connection with the regulation of lawyers’ activities and the protection of the public from lawyers who do not function as required by the Court’s rules or other applicable laws and regulations. Before the Bar decided to request that the administration of the proposed rule be located in the offices of OLR, it consulted with the administrator of OLR and with OLR’s oversight board. Based upon those discussions, the Bar was convinced that housing the administration of the proposed rule in OLR would not in any way interfere with the operation of OLR or burden the OLR personnel. The Bar, frankly, was surprised when a representative of the oversight board at the initial public hearing on the Bar’s Petition expressed opposition to locating the administrator in the OLR. The cost of administering the rule defining the practice of law would be borne by the members of the State Bar of Wisconsin. Based upon the Bar’s observations regarding UPL, and based upon information about UPL obtained from various states and based upon the experiences of the Wisconsin Department of Regulation and Licensing, the Bar concluded that the administration of the rule could easily be handled on a half-time basis and that, at least in the first few years of operating under the rule, the instances of UPL to be investigated and dealt with would number somewhere between 15 and 25. We do not believe that locating the administrator in OLR would impinge on the budget of OLR because whatever the total cost turned out to be it would be funded entirely by an assessment of the lawyers in Wisconsin. The Bar

believes that there is significant synergy between the intended function of OLR and the intended function of the administrator of the rule defining the practice of law.

If the administrator of the rule cannot be housed in OLR, then we have two alternatives to suggest to the Court to locate the administrator of the rule. We would suggest the Office of the Board of Bar Examiners as a possible location. Although, as indicated above, the Bar feels that locating the administrator in OLR is the best idea, it is satisfied that this could work having the administrator located with the Board of Bar Examiners. The second alternative would be to modify the administration segment of the proposed rule to provide for a new entity created by the Court to be called the “Practice of Law Board” or some other suitable name. The new board would be created pursuant to the authority of the Court to regulate the practice of law. Some of the substance of the rule proposed by the Bar to define the practice of law was taken from the rule defining the practice of law adopted by the Supreme Court of the State of Washington. Exhibit C of the Bar’s Petition contains copies of the rules of the State of Washington defining the practice of law and establishing the Practice of Law Board. If the Court wishes, the Bar is prepared to develop a detailed administration system based upon the Washington model. The Court might speculate that an appropriate administrator of the rule might be the State Bar itself. This Committee has considered the issue and concluded that it is simply not feasible, nor is it a good idea for the State Bar to be the administrator of the rule. It is the Committee’s opinion that to put the State Bar in that position would raise issues of antitrust law violation and conflict of interest. It is simply not appropriate to locate the administrator of the rule with the State Bar.

Conclusion

A longstanding study committee that has spent many years examining the UPL issue has crafted the petition and the revised proposed rule now before the Court. This petition was brought to the Court by the State Bar's Board of Governors, which is elected by State Bar members every year. The duly elected Board of Governors makes all public policy decisions regarding rule-making petitions before this Court.

We look forward to the upcoming hearing and the decision by the Court.

We also submit that over the years, numerous State Bar members have complained about the unauthorized practice of law committed by unqualified individuals, to the harm of the public. We have forwarded many of those complaints to the Court to give a flavor of the scope and breadth of the problem. Unregulated UPL poses a threat not only to the public but to this Court's authority and ability to regulate the practice of law in Wisconsin. Licensed lawyers are, at least, subject to this Court's current oversight and regulation. The same cannot be said of those unlicensed individuals engaging in UPL to the detriment of the public, who are currently unregulated by this Court but can and should be regulated under the Court's inherent authority to regulate the practice of law.

In summary, we hope the Court will not be reluctant to adopt a rule regulating what people who are not licensed as attorneys do when they engage in the practice of law. Other state bar associations that have proposed similar initiatives have received the credence of and serious attention from their state supreme courts and legislatures. The

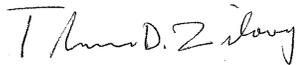
State Bar of Wisconsin's efforts to address the problem of unregulated UPL deserve the same respect and attention from the Wisconsin Supreme Court.

The Petition, the proposed rule, the proposed revised rule and this letter represent the work and unanimous views of the members of the State Bar's Unauthorized Practice of Law Policy Committee. The members include Tom Zilavy, Andrew Chevez, Ross Anderson, Bill Slate, Doug Kammer, Honorable Jon Wilcox, Jack Zweg and Tom Basting. The State Bar's staff liaison is Adam Korbitz.

Respectfully submitted,

UNAUTHORIZED PRACTICE OF
LAW POLICY COMMITTEE,
STATE BAR OF WISCONSIN

By:


Thomas D. Zilavy, Chair