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## REVISED DRAFT BY STATE BAR OF WISCONSIN<sup>1</sup>

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### SCR CHAPTER 23 REGULATION OF UNAUTHORIZED PRACTICE OF LAW

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#### SCR 23 Preamble.

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Every jurisdiction in the United States recognizes the inherent right of individuals to represent themselves in legal matters. In contrast, the privilege of representing others in our system is regulated by law for the protection of the public, to ensure that those who provide legal services to others are qualified to do so by education, training, and experience and that they are held accountable for errors, misrepresentations, and unethical practices.

The following rules are promulgated by the Wisconsin Supreme Court pursuant to its inherent authority to define and regulate the practice of law in this state. The purpose of the rules is to protect the public from potential harm caused by the actions of nonlawyers engaging in the unauthorized practice of law. ~~Nothing in these rules shall be taken to define or affect standards for civil liability.~~

#### SCR 23.01 Definition of practice of law.

(1) The practice of law in Wisconsin is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

- (a) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
- (b) Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
- (c) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- (d) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
- (e) Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

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<sup>1</sup> This draft #5 is a revision of draft #4 which was dated February 10, 2010. Draft #5 is marked to show the changes from Draft #4. This draft represents what is acceptable to the State Bar of Wisconsin with respect to creating a useful and effective rule defining the practice of law. Other changes to the rule proposed by other interested parties which are not incorporated into draft #5 are unacceptable to the State Bar of Wisconsin.

43      **SCR 23.02 License required to practice law; use of titles.**

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 45      **(1) Right of a person to practice law in Wisconsin.** A person who is duly licensed by the  
 46      Wisconsin Supreme Court and who is an active member of the State Bar of Wisconsin may practice  
 47      law in Wisconsin. No person may engage in the practice of law in Wisconsin, or attempt to do so, or  
 48      make a representation that he or she is authorized to do so, unless the person is currently licensed to  
 49      practice law in Wisconsin by the Wisconsin Supreme Court and is an active member of the State Bar  
 50      of Wisconsin.

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52      **(2) Exceptions and exclusions.** A license to practice law and active membership in the State Bar  
 53      of Wisconsin are not required for a person engaged in any of the following activities in Wisconsin:

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- 55      (a) Practicing law by a non-resident counsel or registered in house counsel pursuant to SCR 10.03(4).
- 56      (b) Serving as a courthouse facilitator pursuant to court rule.
- 57      (c) Appearing in a representative capacity before an administrative tribunal or agency to the extent  
 58      permitted by such tribunal or agency.<sup>2</sup>
- 59      (d)     Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.
- 60      (e)     Participation in labor negotiations, arbitrations or conciliations arising under collective  
 61      bargaining rights or agreements.
- 62      (f)     Acting as a lobbyist.
- 63      (g)     Sale of legal forms in any format.
- 64      (h)     Activities which are preempted by federal law.<sup>3</sup>
- 65      (i)     Selection or completion of a legal document, including a legal document created pursuant to  
 66      statute, administrative rule, or Supreme Court Order, where the document may contain various blanks  
 67      and provisions to be filled in or completed and selection or completion of the legal document requires  
 68      only common or transaction-specific knowledge regarding the required information and general  
 69      knowledge of the legal consequences.
- 70      (j)     Serving in a neutral capacity as a clerk or court employee providing information to the public  
 71      pursuant to Supreme Court Order.
- 72      (k)     Such other activities that the Supreme Court has determined by rule or by published opinion  
 73      do not constitute the unlicensed or unauthorized practice of law or which are permitted under a  
 74      regulatory system established by the Supreme Court
- 75      (l)     Acting as a non-lawyer advocate under the direction or supervision of a lawyer.<sup>4</sup>

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<sup>2</sup> COMMENT: Note that a nonlawyer who is an employee, member, or officer of an entity or organization may represent such entity, organization or any corporate affiliate before an administrative tribunal or agency of the State of Wisconsin.

<sup>3</sup> COMMENT: This rule does not apply to tribal courts operated under the jurisdiction of federally recognized Indian tribes.

- 86  
 87 (m) Acting as a non-lawyer assistant under the supervision of a lawyer in compliance with SCR  
 88 20:5.3 of the Wisconsin Rules of Professional Conduct.
- 89  
 90 (n) Governmental agencies, Indian tribes and their employees carrying out responsibilities  
 91 provided by law.
- 92  
 93 (o) Practicing within the scope of practice allowed by a current credential issued under Wis.  
 94 Stats. chs. 440 to 480 or as authorized under sec. 442.025, Stats. provided that the Supreme Court has  
 95 not determined by rule or by published opinion that the activity constitutes the unlicensed or  
 96 unauthorized practice of law.
- 97  
 98 (p) A victim service representative acting in the scope of sec. 895.45, Stats., or a Court Appointed  
 99 Special Advocate (CASA) volunteer or staff member acting within the scope of sec. 48.236, Stats.
- 100  
 101 (q) A nonlawyer entity or organization acting through lawyer employees to the extent such  
 102 lawyers perform pro bono legal services for nonprofit organizations, low-income clients, or otherwise  
 103 in the public interest.
- 104  
 105 (r) An entity or organization in the business of insurance guarantee or indemnity, or the sale of  
 106 insurance permitted to be offered by insurance companies, or any employee or contractor of any of  
 107 the foregoing entities or organizations when conducting their insurance business, which includes :  
 108 (1) investigating or adjusting claims against it or its insured; (2) negotiating with other persons or  
 109 entities; (3) conducting loss control functions; (4) underwriting business; (5) selling insurance  
 110 permitted to be offered by insurance companies or providing advice and counsel with respect to such  
 111 insurance; and (6) the preparation of releases or settlement agreements; provided that the Supreme  
 112 Court has not determined by rule or by published opinion that the activity constitutes the unlicensed  
 113 or unauthorized practice of law.
- 114  
 115 (s) Any state or federally chartered financial institution, when engaging in an activity that is  
 116 within its authority under applicable state or federal law, including any employee providing services  
 117 for it in connection with that activity; provided that the Supreme Court has not determined by rule or  
 by published opinion that the activity constitutes the unlicensed or unauthorized practice of law.
- 118 (u) Nonlawyers making any disclosure or advisement which is required by state or federal law.
- 119 (v) Teaching about the law or providing information about the law including the legal rights or  
 120 responsibilities of persons under the law, in a manner that is not directed at providing specific legal  
 121 advice to a specific individual in the context of a specific matter.
- 122 (w) A benefits specialist acting within the scope of Wis. Stats. §46.81(4) or in the scope of  
 123 §46.283 and Wis. Admin. Code HFS 10.23(2)(ad).

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<sup>4</sup> COMMENT: The phrase “under the direction or supervision of a lawyer” does not contemplate that the non-lawyer advocate would have to be an employee of the lawyer-supervisor. It does contemplate that the non-lawyer advocate would be subject to general supervision by a lawyer so that the client of the non-lawyer advocate received competent direction and advice.

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127       (3) **Use of titles.** Except as permitted by SCR 10.03(4), oOnly a person who is currently licensed  
128 to practice law by the Wisconsin Supreme Court and who is an active member of the State Bar of  
129 Wisconsin may use the title "attorney", "lawyer" or any similar title, or may state or imply that he or  
130 she is licensed to practice law in Wisconsin. Except as permitted by SCR 10.03(4), oOnly a person  
131 who is currently licensed to practice law in Wisconsin and who is an active member of the State Bar  
132 of Wisconsin may represent himself or herself to the public by any description of services  
133 incorporating the words "law" or "legal".<sup>5</sup>

134

135 **SCR 23.03 Duties and powers of the ~~Office of Lawyer Regulation~~ legal services office of  
136 consumer protection.**

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138       The legal services office of consumer protection consists of the administrator and such other staff as  
139 the administrator determines from time to time. Office of Lawyer Regulation, as described in SCR  
140 21.02 through SCR 21.05. The legal services office of consumer protection, shall:

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142       (1) Receive and respond to information, inquiries and complaints relating to persons and entities  
143 alleged to have engaged in the unauthorized practice of law in Wisconsin.

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145       (2) Investigate allegations of unauthorized practice of law.

146

147       (3) Enter into consent and desist agreements with those who have engaged in the unlicensed practice  
148 of law.

149

150       (4) Seek civil action for violations of consent agreements.

151

152       (5) Seek injunctive relief against those who have engaged in the unlicensed practice of law.

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154       (6) Monitor that individuals comply with terms of cease and desist agreements and with orders of  
155 injunction.

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<sup>5</sup> COMMENT: The practice of law requires a skillful practitioner with training in how to find, interpret and apply the law in various circumstances which involve the legal rights and interests of the person(s) being served. Licensure and regulation of the practice of law are necessary to protect the public interest from harm which can result from incompetency, dishonesty and unethical behavior. The regulation of the practice of law in Wisconsin is a judicial power vested in the Wisconsin Supreme Court. Seitzinger v. Community Health Network, 2004 WI 28, par. 31, 270 Wis. 2d 1, 19.

A license to practice law in Wisconsin is a privilege bestowed upon someone who has completed legal training through an accredited law school and who has met the standards prescribed by the Wisconsin Board of Bar Examiners. Once admitted to practice law in Wisconsin, a lawyer must comply with requirements designed to reduce the likelihood of harm to the public. For example, a lawyer must complete a minimum number of hours of continuing legal education every two years and is required to follow a code of professional and ethical conduct. The failure of a lawyer to abide by the required standards may result in discipline, including but not limited to suspension and/or revocation of a lawyer's license to practice law as well as other remedies.

157 **SCR 23.04 Office of Lawyer Regulation – ~~director~~Legal services office of consumer protection –**  
158 **administrator; powers.**

160 ~~(1) The director of the Office of Lawyer Regulation is authorized to: administrator of the legal~~  
161 ~~services office of consumer protection is appointed by and serves at the pleasure of the supreme~~  
162 ~~court.~~

163 ~~(2) The administrator shall be admitted to the practice of law in Wisconsin no later than six months~~  
164 ~~following appointment.~~

167 ~~(3) The administrator may be an employee of the supreme court under the supreme court's ultimate~~  
168 ~~personnel authority and subject to personnel policies and procedures administered by the director of~~  
169 ~~state courts or may be an independent contractor retained by the supreme court.~~

171 **(4) The duties of the administrator are to:**

173 **(a4) Receive, review and direct the investigation of allegations of unauthorized practice of law.**

175 **(b2) Close an inquiry or complaint following preliminary evaluation and to dismiss an inquiry or**  
176 **complaint following investigation when there is insufficient evidence of cause to proceed.**

178 **(c3) Enter into and monitor compliance with consent agreements, as set out in SCR 23.05.**

180 **(d4) File and pursue civil actions for violations of consent agreements.**

182 **(e5) File and pursue injunctive actions against individuals or entities engaging in the unauthorized**  
183 **practice of law.**

185 **(f6) Monitor the compliance of individuals and entities that have been enjoined from engaging in the**  
186 **unauthorized practice of law.**

188 **(g) Employ staff to assist in the performance of the administrator's duties.**

190 **(h) Prepare annually a budget for the operation of the legal services office of consumer protection and**  
191 **to submit it to the supreme court.**

193 **(i) Prepare annually a report of the activities of the legal services office of consumer protection**  
194 **during the preceding year and to submit it to the supreme court.**

196 **(j) Meet with the supreme court annually to discuss the operation of the legal services office of**  
197 **consumer protection and consider improvements in its operation.**

199 **(k7) Delegate the duties specified in this rule to staff and counsel as the ~~director~~administrator may**  
200 **consider advisable.**

202 **SCR 23.05 Consent agreements.**

204 Following investigation, if the ~~director~~administrator concludes a person or entity has engaged in the

205 unauthorized practice of law, the ~~director~~ administrator may enter into a consent agreement with the  
206 person or entity. The agreement:

207 (1) May include admissions that the person or entity engaged in the unauthorized practice of law.

210 (2) Shall include an agreement by the person or entity to refrain from engaging in the conduct in the  
211 future.

213 (3) May include a requirement that the person or entity pay all or a portion of the actual costs of the  
214 legal services office of consumer protection's investigation and proceedings, including attorneys fees,  
215 for that conduct.

217 (4) May include a requirement that the person or entity return to the payer any fees it received.

219 (5) Shall be a contract enforceable in the name of the ~~Office of Lawyer Regulation~~ legal services  
220 office of consumer protection by civil action.

222 (6) May include specific penalties for violation of the agreement.

#### 224 **SCR 23.06 Injunctive actions.**

226 (1) Following investigation, if the ~~director~~ administrator concludes a person or entity has engaged in  
227 the unauthorized practice of law, the ~~director~~ administrator may commence a civil action in the name  
228 of the ~~Office of Lawyer Regulation~~ legal services office of consumer protection seeking to have the  
229 person or entity enjoined from engaging in the unauthorized practice of law.

231 (2) The procedures in chs. 801 to 814 Stats. shall apply in any action brought under this section. In  
232 any action in which the legal services office of consumer protection is a prevailing party, the legal  
233 services office of consumer protection shall be entitled to recover all of its actual costs of the  
234 investigation and proceedings. In this section, "costs" means the compensation and reasonable  
235 expenses of all staff, counsel, retained counsel and expert witnesses, a reasonable disbursement for  
236 the service of process or other papers, amounts actually paid out for certified copies of records in any  
237 public office, postage, telephoning, depositions and copies and other reasonable expenses.

239 (3) Any person or entity found to have engaged in the unauthorized practice of law may be ordered to  
240 return all fees it received for that conduct.

#### 242 **SCR 23.07 Role of legal services office of consumer protection ~~Office of Lawyer Regulation~~ and** 243 **complainant.**

245 In the process of regulating the unauthorized practice of law, the ~~director~~ administrator and staff of  
246 the ~~Office of Lawyer Regulation~~ legal services office of consumer protection do not represent the  
247 complaining person, the person against whom a complaint has been made, the bar generally, or any  
248 other person or group. The ~~director~~ administrator and staff of the ~~Office of Lawyer Regulation~~ legal  
249 services office of consumer protection represent the interests of the Wisconsin Supreme Court and  
250 the public in the integrity of the unauthorized practice of law regulation system in its search for the  
251 truth. A complainant is not a party to an action nor proceeding brought by the ~~Office of Lawyer~~  
252 Regulation legal services office of consumer protection.

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254 **SCR 23.08 Cooperation with other agencies.**

255 (1) The ~~Office of Lawyer Regulation~~ legal services office of consumer protection shall cooperate  
256 with unauthorized practice of law regulatory bodies from other jurisdictions and may share  
257 confidential information with them.

258 (2) The ~~Office of Lawyer Regulation~~ legal services office of consumer protection shall cooperate  
259 with district attorneys in the state of Wisconsin, the Wisconsin Department of Justice and the United  
260 States Department of Justice and may share confidential information with them.

261 (3) The ~~office of lawyer regulation~~ legal services office of consumer protection shall cooperate with  
262 agencies which provide credentials under Wis. Stats. chs. 440 to 480 ~~{and which regulate and~~  
263 ~~examine state and federal financial institutions, as applicable}~~ and other Wisconsin and other state  
264 ~~agencies and federal agencies which regulate the subject of an investigation~~ and may share  
265 confidential information with an agency regarding a credential holder ~~{, a regulated entity or non-~~  
266 ~~lawyer employee of a regulated entity}~~ ~~of~~ or person or entity regulated by that agency. The ~~office of~~  
267 ~~lawyer regulation~~ legal services office of consumer protection, in addition to or in lieu of  
268 investigating an allegation of unauthorized practice of law against a credential holder ~~{a regulated~~  
269 ~~entity or non lawyer employee of a regulated entity}~~ ~~or regulated person or entity~~, may:

270 (a) Refer an allegation of unauthorized practice of law to the agency for possible action  
271 against the credential ~~{the regulated entity or the non lawyer employee of a regulated entity}~~  
272 or regulated person or entity.

273 (b) Ask the agency's position ~~{for authority}~~ on whether the activity is within the scope of  
274 practice allowed by the agency.

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276 **SCR 23.09 Legal services office of consumer protection - staff**

277 Unless the administrator is an independent contractor retained by the supreme court, staff of the legal  
278 services office of consumer protection are permanent supreme court employees supervised by the  
279 director and over whom the director of state courts has ultimate personnel authority. Staff are subject  
280 to personnel policies and procedures administered by the director of state courts. Work assignments  
281 to staff are made in accordance with the chain of command established by pertinent job descriptions.  
282 Annual performance evaluations of staff are conducted by immediate supervisors in the manner  
283 prescribed by the director of state courts.

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285 **SCR 23.10 Legal services office of consumer protection – retained counsel**

286 The administrator may retain attorneys engaged in the practice of law in Wisconsin to assist in the  
287 performance of duties. Retained counsel are independent contractors and serve at the pleasure of the  
288 administrator.

289  
290 **SCR 23.11 Privileges, immunity**

291 Communications with the director, staff of the legal services office of consumer protection or  
292 retained counsel and testimony given in an investigation or action or proceeding under SCR ch. 23  
293 are privileged. No lawsuit predicated on these communications may be instituted against any grievant  
294 or witness. The director, staff of the legal services office of consumer protection and retained counsel

300 shall be immune from suit for any conduct in the course of their official duties.

301

302 **SCR 23.12 Cost of legal services office of consumer protection**

303 The cost of the legal services office of consumer protection and all matters relating to investigation  
 304 and actions taken regarding possible unauthorized practice of law shall be paid from moneys received  
 305 from the State Bar of Wisconsin pursuant to SCR 10.03(5) and any other revenue derived from the  
 306 activities of the legal services office of consumer protection.<sup>6</sup>

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308 **SCR 23.13 Retention of records**

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310 Records of all matters in which a consent agreement is reached or an injunction or other civil remedy  
 311 is sought shall be retained for at least 10 years. Records of all other matters shall be retained for at  
 312 least three years.

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314 **SCR 23.14 Subpoena - investigation**

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316 In any matter under investigation, the administrator may issue subpoenas requiring the attendance of  
 317 witnesses and the production of documents or other materials.

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320 Draft SCR 23 (09-12-06), as revised 11-27-07, as revised 03-03-08, 03-18-08, 4-22-08, 6-6-08, 2-10-10 and 5-17-10.

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<sup>6</sup> Funding of the Legal Services Office of Consumer Protection will require an amendment to SCR 10.03(5):  
**SCR 10.03(5) Membership dues and reduction of dues for certain activities.**

(a) The annual membership dues for state bar operations for an active member shall be established as provided herein. Other classes of members shall pay the fraction of the dues of an active member as follows: Supreme Court Justices, the full amount; inactive member, one-half; judicial members, two-thirds; and members admitted to practice for 3 years or less, one-half. For purposes of determining an active member's dues status based on the number of years admitted, there shall be no proration based on the exact month and year of admission. A fiscal year for which any dues are required to be paid under Bylaw 1, Section 2 shall count as a full year and a fiscal year for which no dues payment is required shall not count as a year. A change in the dues of an active member for state bar operations may be made by the board of governors or as set forth herein. The state bar shall include in the dues statement each year the amount necessary to pay the costs of the Lawyer Regulation System the Legal Services Office of Consumer Protection and of the continuing legal education functions of the Board of Bar Examiners as approved by the Supreme Court. Judicial members other than Supreme Court Justices are not liable to pay the portion for the costs of these boards, as reflected in the dues statement. The state bar shall also include in the dues statement each year an assessment to support the public interest legal services fund, as approved by the supreme court. The state bar shall show separately on its annual dues statement the portion of the total dues for state bar operations, the assessments for each of the boards, the Legal Services Office of Consumer Protection and other assessments imposed by the supreme court.