

07-09 Unauthorized Practice of Law (UPL) Rule

On June 1, 2010, at its open administrative conference, the Wisconsin Supreme Court unanimously approved the State Bar of Wisconsin’s request that the Court adopt an unauthorized practice of law rule. This rule was developed with extensive input and participation from many individuals and organizations over a period of nearly three years. Certain justices dissented from aspects of the rule as reflected herein. It remains subject to the Court’s further review and technical correction. When the technical review is complete and the court has approved the final draft an order will issue with an anticipated effective date of January 1, 2011.

SCR CHAPTER 23

REGULATION OF UNAUTHORIZED PRACTICE OF LAW

SCR 23 Preamble.

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) where there is a client relationship of trust or reliance and¹ 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).

¹ AWB dissents from adoption of this phrase.

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(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.

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

(1) RIGHT OF A PERSON TO PRACTICE LAW IN WISCONSIN. A person who is duly licensed to practice law in this state by the Wisconsin Supreme Court and who is an active member of the State Bar of Wisconsin may practice law in Wisconsin. No person may engage in the practice of law in Wisconsin, or attempt to do so, or make a representation that he or she is authorized to do so, unless the person is currently licensed to practice law in Wisconsin by the Wisconsin Supreme Court and is an active member of the State Bar of Wisconsin.

(2) EXCEPTIONS AND EXCLUSIONS. A license to practice law and active membership in the State Bar of Wisconsin are not required for a person engaged in any of the following activities in Wisconsin, regardless of whether these activities constitute the practice of law:

(a) Practicing law pursuant to SCR 10.03(4) by a non-resident counsel or registered in-house counsel.

(b) Serving as a courthouse facilitator pursuant to court rule.

(c) Appearing in a representative capacity before an administrative tribunal or agency to the extent permitted by such tribunal or agency.

Comment

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.

(d) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.

(e) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.

(f) Acting as a lobbyist.

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(g) Sale of legal forms in any format.

(h) Activities which are preempted by federal law.

(i) Selection or completion of a legal document, including a legal document created pursuant to statute, administrative rule, or Supreme Court Order, where the document may contain various blanks and provisions to be filled in or completed and selection or completion of the legal document requires only common or transaction-specific knowledge regarding the required information and general knowledge of the legal consequences.²

(j) Serving in a neutral capacity as a clerk or court employee providing information to the public pursuant to Supreme Court Order.

(k) Any other activities that the Supreme Court has determined by rule or by published opinion do not constitute the unlicensed or unauthorized practice of law or which are permitted under a regulatory system established by the Supreme Court, Wisconsin Statutes, Administrative Code or common law.

(l) Acting as a non-lawyer advocate under the direction or supervision of a lawyer.

(m) Acting as a non-lawyer assistant under the supervision of a lawyer in compliance with SCR 20:5.3 of the Wisconsin Rules of Professional Conduct.

Comment

This provision encompasses practical training of law students authorized by SCR Ch. 50.

(n) Governmental agencies, Indian tribes and their employees carrying out responsibilities provided by law.³

(o) Practicing within the scope of practice allowed by a current credential issued or authorized⁴ under Wis. Stats. chs. 440 to 480 or performing services under the supervision of a professional holding a current credential issued under Wis. Stats. chs. 440 to 480,⁵ 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.

² The Court voted 4:3 to retain this language on 6/1/10.

³ OK 3/8/10.

⁴ The Court adopted this change on 6/1/10 by a vote of 4:3 (AWB, DTP and PDR dissenting).

⁵ The Court voted 4:3 (AWB, DTP and PDR dissenting) to include this phrase proposed by the Wisconsin Society of Professional Engineers (WSPE) and the American Council of Engineering Companies of Wisconsin (ACEC).

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(p) A victim service representative acting within the scope of sec. 895.45, Stats., or a Court Appointed Special Advocate (CASA) volunteer or staff member acting within the scope of sec. 48.236, Stats.⁶

(q) A nonlawyer entity or organization acting through lawyer employees to the extent such lawyers perform pro bono legal services for nonprofit organizations, low-income clients, or otherwise in the public interest.

(r) An entity or organization in the business of insurance guarantee or indemnity, or the provision, sale or marketing of insurance or financial products or services permitted to be offered by insurance companies under Section Ins. 6.75 of the Wisconsin Administrative Code, or a self-insured entity or organization, or any employee licensed under Chapter 628 of the Wisconsin Statutes, ~~licensed intermediary~~, or contractor of any of the foregoing entities or organizations when conducting their ~~customary~~ insurance business, which includes but is not limited to: (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 or financial products or services permitted to be offered by insurance companies under Section Ins. 6.75 of the Wisconsin Administrative Code or providing advice and counsel with respect to such insurance or financial products or services; (6) the preparation of releases or settlement agreements; (7) using a lawyer employee or captive lawyer admitted to the bar in Wisconsin or otherwise permitted to practice law in Wisconsin to represent its principal or corporate affiliate, or an insured or noninsured for whom a defense is provided; and (8) any act required of an insurer by law, 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.⁷

(s) Professional activities performed by a certified public accountant or by a person working under the direction of a certified public accountant. ~~The Director of the office of lawyer regulation shall forward any complaint received against a certified public accountant or a person working under the direction of a certified public accountant to the Accounting Examining Board for its review and action under Wis. Stats. Ch. 442.~~⁸

(t) Any state or federally chartered financial institution or affiliate of such an institution⁹ 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

⁶ OK 6/1/10.

⁷ On June 1, 2010, the Court adopted a hybrid of the two provisions submitted by the State Bar and the insurance industry, respectively (AWB dissenting). The Court directed the two parties to meet to: (1) develop a definition of “financial products,” (2) to identify the regulatory oversight of such products, self-insured entities, and licensed intermediaries, and (3) to report on any recent federal legislation affecting the sale of marketing of these products. The Wisconsin Insurance Alliance submitted a letter on behalf of representatives of the insurance industry on June 3, 2010 proposing the marked changes. By letter dated June 4, 2010 the State Bar indicated these changes were “a noted improvement.”

⁸ The Court struck the language pertaining to regulatory oversight because it declined to adopt a regulatory enforcement mechanism for the rule at this time.

⁹ OK 6/1/10.

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the Supreme Court has not determined by rule or by published opinion that the activity constitutes the unlicensed or unauthorized practice of law.¹⁰

(u) A benefits specialist acting in the scope of Wis. Stat. § 46.81(4) or in the scope of § 46.283, and Wis. Adm. Code § HFS 10.23(2)(d).

~~(w)~~ (v) Nonlawyers making any disclosure or advisement which is required by state or federal law.

~~(x)~~ (w) Teaching about the law or providing information about the law including the legal rights or responsibilities of persons under the law, in a manner that is not directed at providing specific legal advice to a specific individual in the context of a specific matter.

Comments

The exceptions may also encompass:

Nonlawyer employees of an entity or organization that engage in giving advice or counsel to another entity or person as to the legal rights of that entity or person; selection, drafting, or completion, for another entity or person, of legal documents; or negotiation of legal rights or responsibilities on behalf of another entity or person, where the activities are undertaken for the sole benefit of the entity or organization or any corporate affiliate;

Nonlawyer employees of an entity or organization preparing legal documents that are incidental to the entity's or organization's business and connected with any transaction in which the entity has a direct, primary, and nonfiduciary interest, or a fiduciary interest required by federal law;

A nonlawyer entity or organization which employs lawyer employees to perform the activities described in 23.01(1) for such entity, other entities within the organization, or in the case of privately held entities or organizations, for owners and their families, officers, directors, or employees of the entity or organization;

A nonlawyer entity or organization acting through lawyer employees providing legal services, without direct payment therefor, to a party other than a party described in (j), in a manner consistent with the Wisconsin Rules of Professional Conduct for Attorneys (including, without limitation, the rules relating to conflicts of interest and fee sharing), so long as the entity or organization has a financial interest in the outcome of the legal services, there is a commonality of purpose between the entity or organization and the third party, and the entity or organization is not otherwise in the business of providing legal services except as provided in these rules.

¹⁰ OK 6/1/10.

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[(3) USE OF TITLES.¹¹ Only a person who is currently licensed to practice law by the Wisconsin Supreme Court and who is an active member of the State Bar of Wisconsin or who is otherwise authorized may use the title "attorney", "lawyer" or any similar title, or may state or imply that he or she is licensed to practice law in Wisconsin. Except as permitted by SCR 10.03(4), only a person who is currently licensed to practice law in Wisconsin and who is an active member of the State Bar of Wisconsin may represent himself or herself to the public using the words attorney at law, lawyer, solicitor, counselor, attorney and counselor, proctor, law, law office, or other equivalent words in connection with his or her name or any sign, advertisement, business card, letterhead, circular, notice, or other writing, document or design, the evident purpose of which is to induce others to believe or understand the person to be authorized to practice law in this state or is otherwise qualified to provide professional legal services or advice. services incorporating the words "law" or "legal".

OR

(3) USE OF TITLES. Except as permitted by SCR 10.03(4), only a person who is currently licensed to practice law in Wisconsin and who is an active member of the State Bar of Wisconsin may represent himself or herself to the public using the words attorney at law, lawyer, solicitor, counselor, attorney and counselor, proctor, law, law office, or other equivalent words in connection with his or her name or any sign, advertisement, business card, letterhead, circular, notice, or other writing, document or design, the evident purpose of which is to induce others to believe or understand the person to be authorized to practice law in this state or otherwise qualified to provide professional legal services or advice.]

Proposed Comment to SCR 23.02(3) Use of Titles:

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, ¶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.

¹¹ The Court directed changes to this provision at the OAC on 6/1/10. It remains under advisement.

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SCR 23.03 Duties and powers of the office of lawyer regulation.

The office of lawyer regulation, as described in SCR 21.02 through SCR 21.05, shall:

- ~~(1) Receive and respond to information, inquiries and complaints relating to persons and entities alleged to have engaged in the unauthorized practice of law in Wisconsin.~~
- ~~(2) Investigate allegations of unauthorized practice of law.~~
- ~~(3) Enter into consent and [cease and] desist agreements with those who have engaged in the unlicensed practice of law.~~
- ~~(4) Seek civil action for violations of consent agreements.~~
- ~~(5) Seek injunctive relief against those who have engaged in the unlicensed practice of law.~~
- ~~(6) Monitor that individuals comply with terms of cease and desist agreements and with orders of injunction.~~

SCR 23.04 Office of lawyer regulation — director; powers.

The director of the office of lawyer regulation is authorized to:

- ~~(1) Receive, review and direct the investigation of allegations of unauthorized practice of law in this state.~~
- ~~(2) Close an inquiry or complaint following preliminary evaluation and to dismiss an inquiry or complaint following investigation when there is insufficient evidence of cause to proceed.~~
- ~~(3) Enter into and monitor compliance with consent agreements, as set out in SCR 23.05.~~
- ~~(4) File and pursue civil actions for violations of consent agreements.~~
- ~~(5) File and pursue injunctive actions against individuals or entities engaging in the unauthorized practice of law.~~
- ~~(6) Monitor the compliance of individuals and entities that have been enjoined from engaging in the unauthorized practice of law.~~
- ~~(7) Delegate the duties specified in this rule to staff and counsel as the director may consider advisable.~~

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SCR 23.05 Consent agreements.

~~Following investigation, if the director concludes a person or entity has engaged in the unauthorized practice of law, the director may enter into a consent agreement with the person or entity. The agreement:~~

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

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

~~(3) Shall be a contract enforceable in the name of the office of lawyer regulation by civil action.~~

~~(4) May include specific penalties for violation of the agreement.~~

SCR 23.06 Injunctive actions.

~~Following investigation, if the director concludes a person or entity has engaged in the unauthorized practice of law, the director may commence a civil action in the name of the office of lawyer regulation seeking to have the person or entity enjoined from engaging in the unauthorized practice of law.~~

SCR 23.07 Role of office of lawyer regulation and complainant.

~~In the process of regulating the unauthorized practice of law, the director and staff of the office of lawyer regulation do not represent the complaining person, the person against whom a complaint has been made, the bar generally, or any other person or group. The director and staff of the office of lawyer regulation represent the interests of the Wisconsin Supreme Court and the public in the integrity of the unauthorized practice of law regulation system in its search for the truth. A complainant is not a party to an action or proceeding brought by the office of lawyer regulation.~~

SCR 23.08 Cooperation with other agencies.

~~(1) The office of lawyer regulation shall cooperate with unauthorized practice of law regulatory bodies from other jurisdictions and may share confidential information with them.~~

~~(2) The office of lawyer regulation shall cooperate with district attorneys in the state of Wisconsin and may share confidential information with them.~~

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~~(3) The office of lawyer regulation shall cooperate with agencies which provide credentials under Wis. Stats. chs. 440 to 480 [and which regulate and examine state and federal financial institutions, as applicable] and may share confidential information with an agency regarding a credential holder[, a regulated entity or non lawyer employee of a regulated entity] of that agency. The office of lawyer regulation, in addition to or in lieu of investigating an allegation of unauthorized practice of law against a credential holder[, a regulated entity or non-lawyer employee of a regulated entity] may [shall]:~~

~~(a) Refer an allegation of unauthorized practice of law to the agency for possible action against the credential [the regulated entity or the non lawyer employee of a regulated entity].~~

~~(b) Ask the agency's position [or authority] on whether the activity is within the scope of practice allowed by the agency.~~

ALTERNATIVE 23.08(3):

The Wisconsin Society of Professional Engineers (WSPE) would have the court strike proposed SCR 23.08 (3) and propose the following language instead:

~~(3) The office of lawyer regulation shall cooperate with agencies which provide credentials under Wis. Stats. chs. 440 to 480 and may share confidential information with an agency regarding a credential holder of that agency. The office of lawyer regulation may investigate an allegation of unauthorized practice of law against a credential holder; however, the office of lawyer regulation shall defer to the Department of Regulation and Licensing for further investigation and any possible action against a credential holder. The office of lawyer regulation, in addition to or in lieu of investigating an allegation of unauthorized practice of law against a credential holder, may:~~

~~(a) Refer an allegation of unauthorized practice of law to the agency for possible action against the credential.~~

~~(b) Ask the agency's position on whether the activity is within the scope of practice allowed by the agency.~~

Draft SCR 23 (09/12/06), as revised, 11/27/07, as revised 03/03/08, 03/18/08, 4/22/08; 10/13/08; 12/18/09; 6/8/10.

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