

May 20, 2010

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

RE: Request for Action 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:

The pending Petition requests that the Court exercise its exclusive power and authority to regulate the practice of law in the State of Wisconsin by adopting a rule which defines the kinds of activities which constitute the practice of law and creates a court agency to administer the rule. The State Bar has proposed the creation of the rule to provide a pragmatic and effective vehicle for dealing with the problems that consumers face as a result of the unauthorized practice of law (“UPL”).

UPL has become a societal problem for many reasons. These reasons include (but are not limited to) our complex and fast-paced society and economy, the competitive nature of the economy, the diverse population, the passage of comprehensive laws and regulations, and -- it must be acknowledged -- the cost of services provided by licensed lawyers. The application of laws and regulations to the lives of the citizens of Wisconsin often involves crucial personal and economic issues. Victims of UPL may sometimes be unaware they have been the recipient of wrong or incompetent advice and counsel. All too often the damage resulting from UPL cannot be undone or otherwise remedied.

**State Bar of Wisconsin**

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The State Bar is of the opinion that one of the reasons UPL is able to be carried on in Wisconsin is because there is no reasonable clear cut definition either in statutes or in court decisions as to the range of activities which constitute the practice of law. The State Bar is convinced that the uncertainty which exists today with respect to what constitutes the practice of law encourages UPL practitioners to carry on their UPL activities to the ultimate detriment of consumers. Some of the particular areas where UPL seems to develop and flourish is in matters involving immigration, bankruptcy, divorce and other family matters, criminal matters, and in certain aspects of estate planning. The sale of legal services over the Internet is another burgeoning area of UPL. Incompetent advice and counsel often permanently impacts the consumer. Perpetrators are almost never held accountable for their UPL activities.

#### The Definition

The Petition filed by the State Bar with the Court contains a proposal for a rule which defines the kind of activities which constitute the practice of law. During the process of developing the definition, which was incorporated into the State Bar's Petition, the State Bar conferred with representatives of several other service providers including realtors, insurers, bankers, architects, engineers, surveyors, and non-profit organizations. As a result of the State Bar's discussions with such interested parties, and as a result of concerns expressed by interested parties at one or more of the Court's public hearings on the State Bar's Petition, the State Bar made several modifications to its proposed rule defining the practice of law in an attempt to accommodate some of the concerns of some of the interested parties. Currently there is pending before the Court draft #4 of the proposed rule. Subsequent to the March 8, 2010, public hearing on the Petition, the proposed rule was further modified by the State Bar to recognize that there is now a Supreme Court Rule which provides for the registration of in-house counsel who are not

licensed to practice law in Wisconsin and to expand that part of the proposed rule which pertains to service providers who operate under the authority of the Wisconsin Department of Regulation and Licensing (“Department”) by specifically including in the exemption language of the rule non-resident CPAs who, although not licensed by the Department, can be authorized to provide services in Wisconsin. Certain non-substantive editing of the proposed rule has also been done.

Accordingly, attached to this letter is draft #5 of the proposed rule upon which is marked the changes made by the State Bar to draft #4. In addition to a few minor changes to the preamble and definitional section, draft #5 also contains changes to the administration of the rule to address concerns expressed by some justices. Those changes, also marked, will be identified later on in this letter. We point out that during all of the public hearings on the Petition there was little opposition expressed about the administrative system being proposed by the State Bar.

As described above, the State Bar, through its various drafts, has made what it considers to be reasonable attempts to accommodate the wishes and concerns of other service providers with respect to how the proposed rule might impact on the activities of the other service providers. Draft #5 represents the final position of the State Bar regarding the content of the proposed rule defining the practice of law. The Court’s working draft of the State Bar’s proposed rule includes certain provisions which were either suggested at one time by members of the Court or which were requested by various interested parties during the time that the Petition has been pending with the Court. The Court has access to a comparison chart which is designed to show the differences between the court draft and the State Bar’s preferred version of the rule being requested by the State Bar for adoption by the Court. Those provisions which appear in the court draft but not in draft #5 submitted with this letter are unacceptable to the State Bar primarily because, in the opinion of the State Bar, their inclusion would detract from and dilute

the benefit to the public of the proposed rule. We believe that the comparison chart and the State Bar's letter to the Court of February 16, 2010, explain the State Bar's opposition to certain provisions in the court draft of the rule which provisions the State Bar determined to be unacceptable. Therefore, we urge the Court to adopt a definition of the practice of law which is consistent with the definition incorporated into draft #5 attached to this letter.

#### Administration of the Rule Defining the Practice of Law

The rule proposed by the State Bar calls for the definition of the practice of law to be administered through a new Legal Services Office of Consumer Protection. Draft #5 of the proposed rule no longer provides that the administrative system be installed in the Office of Lawyer Regulation ("OLR"). The State Bar has made this change in its request for a rule because it became apparent to the State Bar after several of the public and administrative hearings regarding the Petition that the Court was not enthusiastic about placing the administrative system in OLR. Draft #5 proposes a stand-alone administrative office with the administrator being appointed by the Supreme Court, and who would directly report to the Supreme Court. Based upon the State Bar's analysis of the volume of work which could be expected to flow to the Legal Services Office of Consumer Protection, the State Bar is of the opinion that the administrator could be a one-half to full-time position. Several states already operate under this model. The State Bar has reviewed the budgets for certain states and is of the opinion that the cost of administering the Wisconsin UPL program will range between \$125,000 and \$150,000.<sup>1</sup> Such costs would result in an assessment of members of the State Bar in the amount ranging from \$6 to \$8 per annum. We have every reason to believe that the rank and file

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<sup>1</sup> The Committee has developed a budget to reflect the likely costs which would be incurred in carrying on an administrative function of the kind contemplated by the proposed rule.

members would support its imposition and payment. Our members have been clamoring for action on UPL for many years now. Throughout this arduous process, our members have had numerous opportunities to register their feelings about the proposed rule. Thus far, response has been overwhelmingly in support of our efforts.

The administrative system provided for in draft #5 contains several new provisions which are a practical necessity. The new provisions are marked in the attached draft. The new provisions address important matters such as subpoena authority, immunity issues and the source of funding. Those additional provisions in the administrative section of the rule were essentially extracted from the Court's rule pertaining to OLR and their purpose and utility is self-explanatory.

The State Bar realizes that the Court may be concerned about the creation of another Court agency and the imposition of another assessment on the lawyers who are required to be members of the State Bar. The State Bar is of the opinion that in order for the proposed rule to be effective in protecting the consuming public from UPL that it is essential that there be some neutral body which can observe and investigate potential instances of UPL, which can receive complaints, and which can take steps through negotiation, cease and desist orders, injunctions, and other pertinent civil remedies to stop UPL in its tracks and prevent damage before it occurs. The State Bar strongly believes that having an administrator with authority to act on behalf of the consuming public will in most cases prevent UPL from causing damage to the consumer.

Therefore, the State Bar urges the Supreme Court to adopt and implement the administrative system incorporated into draft #5.

### Possible Additional Measure of Protection for Consumers

During the several public and administrative hearings on the State Bar's petition, some members of the Court have considered the feasibility of alternative enforcement methods as a way of avoiding the creation of another Court agency and the funding issues associated with the establishment of the proposed administrator model. The State Bar continues to hold a firm belief that the administrator model is the most effective means of protecting the consumer for the reasons discussed herein.

### Creation of Private Right of Action for Victims of UPL

Some members of the Court have suggested that perhaps victims of UPL could be adequately protected if they had the right to bring a private action against the perpetrators of UPL. The State Bar is not opposed to the creation of a private right of action for victims of UPL. The Bar supports an individual's right of access to justice whenever an individual is aggrieved. However, because of the nature of typical instances of UPL and because of the nature of the typical victim of UPL, the State Bar is strongly of the opinion that a private right of action will not be sufficient by itself to adequately control UPL and prevent victims from being damaged. In most cases, a private right of action would only be available to a consumer after harm has occurred. Furthermore, factors such as litigation costs and the likelihood that a lawyer would accept such a case could act as an impediment for the consumer when deciding whether to pursue the private right of action. Perhaps a provision allowing for the recovery of reasonable attorney fees might alleviate this concern. In contrast, an administrator can effectively prevent a wholesale practice by one or more actors and protect a number of consumers across the state

with the sole issuance of a cease and desist order. Also, an administrator would also be equipped to enjoin proactively and thereby prevent the proliferation of a particular unsavory business practice. In our view, a private right of action would be most effective and welcomed by the Bar if it served as one more arrow in the quiver along with administrative enforcement to combat UPL. This approach would mirror current enforcement models employed by Wisconsin consumer protection statutes such as Chapter 100 where the Wisconsin Department of Agriculture, Trade and Consumer Protection is able to investigate consumer complaints and pursue civil enforcement against wrongdoers while also permitting consumers to pursue a private right of action.

A private right of action by itself may be ineffective in cases where a particular activity or practice is sought to be prevented but that it would be difficult to prove a pecuniary loss like, for example, where the harm is latent. The State Bar believes that although a private right of action would provide an effective remedy for some victims of UPL, it would not be as effective as the proposed administrative system to prevent damage from occurring and stopping UPL before it becomes embedded. The State Bar is of the opinion that for the definition of the practice of law to serve the purpose of enabling the control and prevention of the unauthorized practice of law, that there has to be an administrator in place who has the authority to observe, investigate, and seek suitable civil remedies to stop UPL in its tracks and to minimize or avoid damage to consumers. We stand ready to assist the Court in drafting appropriate language if the Court sees fit to create such a private right of action through the promulgation of a Court rule.

## Indiana Supreme Court Rule 24

Since the State Bar first approached the Court about the need to deal with UPL, the Committee has examined alternative methods used by various states to deal with UPL. Recently we became aware of how a Court rule in Indiana was utilized to address a significant UPL problem. The UPL case in Indiana involved an original action brought in the Indiana Supreme Court by the Indiana State Bar Association pursuant to Indiana Admission and Discipline Rule 24<sup>2</sup>. A copy of the Indiana Supreme Court Rule 24 entitled “Rules Governing the Unauthorized Practice of Law” is attached to this letter for the Court’s information.

Notwithstanding the State Bar’s preference for an administrator to oversee the application of a Court rule defining the practice of law for the reasons stated above, the State Bar sees merit in the approach to dealing with UPL which has been taken by the Indiana Supreme Court.

In Wisconsin, the adoption of a rule akin to Indiana Supreme Court Rule 24 in Wisconsin could extend UPL enforcement authority to regulatory authorities such as the Wisconsin Department of Justice, local district attorneys, the Office of Lawyer Regulation, the Bar of Board Examiners and the State Bar of Wisconsin. These entities would, in turn, be free to decide whether to assert this authority and would be responsible for bearing the costs of same. When coupled with an administrator, we would view the Indiana model as a compatible and complementary enhancement to our proposed enforcement scheme.

In our view, actions to deal with UPL would be better brought in Circuit Court rather than in the Supreme Court, which is the process in Indiana. Again, we envision that such a rule

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<sup>2</sup> *State of Indiana ex rel. Indiana State Bar Association v. United Financial Systems Corporation*, No. 94S00-0810-MS-551 (Indiana Supreme Court, April 14, 2010)



would serve as an adjunct to the administrative system provided for in proposed SCR 23. Such a provision could easily be inserted in proposed SCR 23.06 as new subsection (2) and provide as follows:

“Civil actions to restrain or enjoin the unauthorized practice of law in this state may also be brought by district attorneys, the attorney general, the Office of Lawyer Regulation, the Board of Bar Examiners or the State Bar of Wisconsin. The action shall be brought in the name of the State of Wisconsin, on the relation of the authorized person or association or committee.”

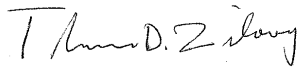
If such a provision was added to proposed SCR 23 then subsections (2) and (3) of Draft # 5 of the proposed rule SCR 23.06 would become subsections (3) and (4) respectively.

The Committee and the State Bar is appreciative of the Court’s consideration of its proposal for dealing with UPL.

Respectfully submitted,

UNAUTHORIZED PRACTICE OF  
LAW POLICY COMMITTEE,  
STATE BAR OF WISCONSIN

By:

  
Thomas D. Zilavy, Chair

\*Current Committee members include:

Tom Zilavy  
Andrew Chevez  
Ross Anderson  
Bill Slate  
Doug Kammer  
Honorable Jon Wilcox  
Jack Zwig  
Tom Basting  
Adam Korbitz – State Bar’s staff liaison

# Indiana Rules of Court

## Rules for Admission to the Bar and the Discipline of Attorneys

### **Rule 24. Rules Governing the Unauthorized Practice of Law**

Original actions, under I.C. 33-24-1-2, to restrain or enjoin the unauthorized practice of law in this state may be brought in this court by the attorney general, the Indiana Supreme Court Disciplinary Commission, the Indiana State Bar Association or any duly authorized committee thereof, without leave of court, and by any duly organized local bar association by leave of court. The action against any person, firm, association or corporation, shall be brought by verified petition, in the name of the state of Indiana, on the relation of the authorized person or association or committee, and shall charge specifically the acts constituting the unauthorized practice.

Within time allowed, a respondent may file a verified return showing any reason in law or fact why an injunction should not issue. No other pleading in behalf of a respondent will be entertained. All allegations of fact in the petition and return shall be specific and not by way of ultimate fact or conclusion. The return shall specifically deny or admit each allegation of fact in the petition, and it may allege new facts in mitigation or avoidance of the causes alleged in the petition.

The parties shall file an original and five [5] copies of all pleadings, including exhibits, plus an additional copy for each adverse party. If any exhibit shall be a matter of public record one [1] certified copy thereof shall be filed with the original petition or return. No pleading or exhibit thereto will be considered which has words or figures on both sides of the same sheet of paper.

No restraining order will issue without notice except upon the filing of an undertaking with conditions and surety to the approval of the court. Notice of the filing of the petition will be given and served upon any respondent as may be directed by the court, such notice to be accompanied by a copy of the petition. The clerk will mail a copy of any return to the relator.

The verified petition and return shall constitute the evidence upon which the issues are decided, unless the court shall deem it necessary to, and shall appoint, a commissioner, in which event such commissioner, who shall have full authority to subpoena witnesses and records, shall hear the evidence and report his findings of fact to the court.

A copy of any pertinent agreement, made by any recognized bar association concerning the unauthorized practice of law, may be attached to and made a part of any pleading and unless denied under oath shall be deemed to be a true copy without further proof of the execution thereof.

The costs and expenses incurred by such hearing shall be borne by the losing party. Briefs need not conform to requirements of Appellate Rules 43-48. Arguments will not be heard as of right.