

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 07-09

In the matter of the Definition of the Practice
of Law and the Administration of a Rule
Defining the Practice of Law.

FILED**JUL 27, 2010**

A. John Voelker
Acting Clerk of
Supreme Court
Madison, WI

On June 19, 2007, the Board of Governors of the State Bar of Wisconsin ("State Bar") filed a petition asking the court to create a court rule to define the practice of law and to create a system to administer the rule, subject to supervision and control by the court. A public hearing and open administrative conference on this matter was conducted on December 10, 2007. Numerous interested persons appeared at the hearing or submitted written comments. The court further discussed the matter at an open administrative conference on March 14, 2008. It bears noting that several organizations representing licensed and/or regulated professionals including certified public accountants, representatives of financial institutions, the insurance industry, the real estate industry, engineers, geologists, victim-witness advocates and others participated throughout this process. Most of the professional organizations opposed

adoption of a rule defining the practice of law expressing concern about duplicative regulation.

On April 23, 2008, the State Bar submitted a letter asking the court to hold this matter in abeyance in order to permit the State Bar to evaluate the various proposals submitted regarding this matter. The court approved the State Bar's request at an open administrative conference on April 24, 2008.

On August 5, 2008 the State Bar filed a revised draft of its proposed rule and renewed its request that the court adopt a rule defining the practice of law and create a system to administer the rule.

The court discussed this matter at its October 28, 2008, open administrative conference. The court concluded that the draft rule had evolved sufficiently to warrant a second public hearing. The court made its working draft of the proposed rule available to the public on December 29, 2009. The second public hearing was scheduled for March 8, 2010.

The State Bar provided the court with a revised draft of the proposed rule on February 16, 2010. A number of documents were filed in connection with the pending second public hearing.

The court conducted its second public hearing on this matter on March 8, 2010. At that hearing there was considerable discussion about an appropriate enforcement mechanism for the proposed rule. The court discussed the draft rule and voted to adopt the rule in concept with the inclusion of a five-year "sunset" provision.

On May 20, 2010, the State Bar filed another draft proposing a different enforcement mechanism for the proposed rule.

On June 1, 2010, at its open administrative conference, the court unanimously approved the State Bar's request that the court adopt an unauthorized practice of law rule. The court directed the representatives of the insurance industry to provide certain additional information and opted to review the section entitled "Use of Titles." The court then adopted the remainder of the rule with an effective date of January 1, 2011. Following the June 1, 2010, open conference representatives of the insurance industry submitted a revised draft which the State Bar deemed an improvement and which the court adopted.

This rule defining the unauthorized practice of law in Wisconsin 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. These dissents are reflected in the records from the court's open administrative conferences and in the court's working draft of the rules available at <http://wicourts.gov/supreme/docs/0709upldraft.pdf>.

Five years after the effective date of this order the petitioner, the State Bar of Wisconsin, shall provide the court with a written report advising the court of the impact of the adoption of SCR Chapter 23 and, upon receipt of this report the court shall schedule a hearing to review these rules. Therefore,

IT IS ORDERED that, effective January 1, 2011, SCR Chapter 23 is created to read:

SCR CHAPTER 23

REGULATION OF UNAUTHORIZED PRACTICE OF LAW

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.

SCR 23.01 Definition of practice of law.

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 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:

(1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.

(2) 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).

(3) 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.

(4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

(5) 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.

(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.

(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 nonlawyer advocate under the direction or supervision of a lawyer.

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

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.

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

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

(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 s. Ins 6.75, Wis. Admin. Code, or a self-insured entity or organization, or any employee licensed under ch. 628, stats., or contractor of any of the foregoing entities or organizations when conducting their 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 s. Ins 6.75, Wis. Admin. 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.

(s) Professional activities performed by a certified public accountant or by a person working under the direction of a certified public accountant.

(t) Any state or federally chartered financial institution or affiliate of such an institution when engaging in an activity that is within its authority under applicable state or federal law, including any person providing services 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.

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

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

(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.

Comment

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;

Nonlawyer entities or organizations which employ 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.

(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.

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, ¶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.

IT IS FURTHER ORDERED that five years after the effective date of this order the petitioner, the State Bar of Wisconsin, shall provide the court with a written report advising the court of the impact of the adoption of SCR Chapter 23 and, upon receipt of this report the court shall schedule a hearing to review the rule.

IT IS FURTHER ORDERED that the Comments to SCR Chapter 23 are not adopted, but will be published and may be consulted for guidance in interpreting and applying SCR Chapter 23.

IT IS FURTHER ORDERED that notice of the creation of SCR Chapter 23 shall be given by a single publication of a copy

of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin. Because of the length of this order, this notice requirement may be satisfied by publication of the Notice of Rule Change attached hereto as Appendix A.

IT IS FURTHER ORDERED that the full text of the order creating SCR Chapter 23 shall be made available on the Website of the Wisconsin Supreme Court, <http://wicourts.gov>, and the Website of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 27th day of July, 2010.

BY THE COURT:

A. John Voelker
Acting Clerk of Supreme Court

SUPREME COURT OF WISCONSIN

No. 07-09

In the matter of the Definition of the Practice
of Law and the Administration of a Rule
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FILED

JUL 27, 2010

NOTICE OF RULE CHANGE

A. John Voelker
Acting Clerk of
Supreme Court
Madison, WI

IT IS ORDERED that effective January 1, 2011, Chapter 23 of the Supreme Court Rules is created to read as set forth in the order of this court dated July 27, 2010.

IT IS FURTHER ORDERED that the full text of the order creating SCR Chapter 23 shall be made available on the Website of the Wisconsin Supreme Court, <http://wicourts.gov>, and the Website of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 27th day of July, 2010.

BY THE COURT:

A. John Voelker
Acting Clerk of Supreme Court

