



DEPARTMENT OF JUSTICE

Antitrust Division

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via email and first-class mail
Clerk of the Supreme Court
Attn: Carrie Janto, Deputy Clerk
P.O. Box 1688
Madison, WI 53701-1688

Re: Comments on Proposed Supreme Court Rule 07-09

Dear Ms. Janto:

Pursuant to Supreme Court Commissioner Julie Anne Rich's August 19, 2008, letter, the Justice Department is pleased to provide comments on the revisions to Supreme Court Rule 07-09 proposed by the State Bar of Wisconsin.

The Department previously commented on Rule 07-09 in letters to the Court dated December 10, 2007, and February 28, 2008. In our letters, the Department expressed concern that the broad, general definition of the practice of law proposed by the State Bar likely would unduly restrict non-lawyers from competing with lawyers to the detriment of consumers. We recommended limiting the proposed definition to services where specialized legal skills are required and an attorney-client relationship is present.

The Court's April 24, 2008 draft of Rule 07-09 limited the proposed definition of the practice of law by incorporating the phrase "where there is a client relationship of trust or reliance." The State Bar objects to this more refined definition as "vague" and contends that enforcing the rule would "unduly complicate the administration of the rule to the detriment of consumers." The phrase is neither vague nor difficult to enforce. We urge the Court to retain the requirement of a relationship of trust or reliance as an essential element of the definition of the practice of law. Other jurisdictions have incorporated this or a similar limiting principle in their definitions of the practice of law, and there is no evidence that these jurisdictions have found the administration of their rules to be unduly complicated.

Wisconsin courts have considerable experience determining when an attorney-client relationship is present. In Wisconsin, whether an attorney-client relationship exists rests upon the intent of the parties and is a question of fact. *Marten Transport v. Hartford Speciality Co.*, 533 N.W. 2d 452 (1995). The State Bar, in a variety of factual settings, appears to have had little difficulty applying this general principle when called upon to give guidance regarding the formation of an attorney-client relationship. See, e.g., Formal Opinion E-07-01 (discussing parameters of the attorney-client relationship with respect to organizations); Formal Opinion E-

95-5 (no attorney-client relationship formed where attorney-volunteer provides information about landlord tenant law); Formal Opinion E-75-19 (attorney-client relationship formed between attorney-police advisor and police chief and potential for additional, and perhaps conflicting, attorney-client relationships with individual police officers). As discussed in our prior letter, the existence, vel non, of such a relationship provides a vital distinction between legal services properly regulated by the court and other services as to which legal training is not essential and for which competition from non-lawyer providers brings important benefits to consumers. Unless consumers have a reasonable expectation that they are receiving professional legal advice that requires legal skills or training, there is no basis for regulating the provision of the services in question as the "practice of law." Whether unauthorized practice of law has occurred cannot be assessed without an inquiry into *both* the nature of the service being provided and the nature of the relationship between the consumer and his or her service provider.

We recognize that determining the existence of a relationship of trust or reliance may impose some burdens on the Office of Lawyer Regulation. However, such burdens are clearly outweighed by the public interest in preserving lawyer/non-lawyer competition.

Thank you for this opportunity to present our views. We would be pleased to address any questions or comments regarding this letter.

Yours sincerely,

A handwritten signature in black ink that reads "Thomas O. Barnett". The signature is written in a cursive style with a prominent horizontal line across the top.

Thomas O. Barnett