



## 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 Exception (o) to Proposed Supreme Court Rule 07-09

Dear Ms. Janto:

Pursuant to Supreme Court Commissioner Julie Anne Rich's January 10, 2008, letter, the Justice Department is pleased to provide comments on proposed exception (o) to Petition for Supreme Court Rule 07-09.

The Department previously commented on the Petition for Supreme Court Rule 07-09 ("the petition") in a letter to the Court dated December 10, 2007. In our letter, the Department expressed concern that the broad, general definition of the practice of law proposed by the State Bar of Wisconsin ("the proposed definition") 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.

In response to concerns raised at the public hearing on the petition, the State Bar proposed exception (o) to the proposed definition. Exception (o) states that service providers credentialed under chapters 440 to 480 of the Wisconsin statutes do not have to be lawyers to engage in an activity for which they are licensed, unless the Court has determined that the activity is the unlicensed or unauthorized practice of law. Exception (o) would be an improvement; however, it does not fully resolve the Department's concerns because it is underinclusive and, even as to the regulated service providers within its scope, it does not provide sufficient clarity about which activities non-lawyers are and are not permitted to undertake.

In our December 10 letter, we provided examples of categories of services for which legal expertise should not be necessary but that the petition likely would force Wisconsinites to hire a lawyer to perform. The categories are listed again here and numbered for ease of reference:

- (1) real estate agents explaining to consumers such things as the (i) ramifications of failing to have the home inspection done on time, (ii) meaning of a mortgage contingency clause, (iii) meaning of an easement, (iv) possible need to lower the

- price of a home because of an unusually restrictive easement, or (v) requirements for lead, smoke detector, and other inspections imposed by state law;
- (2) tenants' associations informing renters of landlords' and tenants' legal rights and responsibilities, often in the context of resolving a particular landlord-tenant dispute;
  - (3) abstractors or title insurance agents, licensed by the State, issuing real estate title opinions and title reports;
  - (4) income tax preparers and accountants interpreting federal and state tax codes, family law code, and general partnership laws, and providing advice to their clients that incorporates this legal information;
  - (5) financial institutions, investment bankers, securities brokers and other business planners or advisors providing advice to their clients that includes information about various laws;
  - (6) lay organizations, advocates, and consumer associations that provide citizens with information about legal rights and issues and help them negotiate solutions to problems; and
  - (7) employees or contractors hired by employers who advise the employer about how to handle employment discrimination and sexual harassment issues, and about what must be done to comply with immigration laws, local zoning laws, state labor laws, and safety regulations.

**Exception (o) appears to be underinclusive.** Chapters 440 to 480 of the Wisconsin statutes do not capture all situations where lawyer/non-lawyer competition would benefit consumers. Chapter 442 arguably permits non-lawyers to perform the sorts of financial planning-related services identified in categories (4) and (5) above. Chapter 452 arguably permits non-lawyers to perform the types of real estate transaction-related services contemplated in category (1) above. However, the services listed in the other categories do not appear to be regulated by the state under Chapters 440 to 480. As a result, exception (o) does not address the Department's concerns that the proposed definition will bar non-lawyers from providing those, and other, services.

**Exception (o) appears to provide insufficient clarity even for service providers within its scope.** Without additional guidance, it is unclear which activities by credentialed service providers are intended to fall within the scope of exception (o). Chapters 440 to 480 of the Wisconsin statutes do not clearly enumerate which activities may be performed by such providers. For example, Chapter 442 governs the licensing and certification of certified public accountants. It defines a certified public accountant as a person who, among other activities, "performs . . . professional services that involve or require an audit of financial transactions and accounting records" or "prepares for clients reports of audits, balance sheets, and other financial, accounting and related schedules, exhibits, statements or reports that are to be used for publication or for credit purposes, or are to be filed with a court of law or with any other governmental agency, or for any other purpose."

This lack of clarity raises two concerns. First, exception (o) could be construed to allow credentialed service providers to perform services that *should* be reserved for lawyers because they require specialized legal skills. For example, under exception (o), the types of accounting

and financial services contemplated in categories (4) and (5) above almost certainly are exempt, but the exception could be broadly construed to allow certified public accountants to perform additional services that require specialized legal skills.

Second, although the first concern is to some extent ameliorated by the proposed exclusion from exception (o) – which excludes activities determined by the Court to be the unauthorized or unlicensed practice of law – this exclusion will itself limit the effectiveness of the exception. Non-lawyer service providers covered by the exception would face the significant burden of researching Court rules and opinions to determine whether a particular activity in which they propose to engage has been held to be the practice of law, and their competitive vigor may be chilled by this burden and its associated legal risk.

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Exception (o) would be a beneficial addition to the proposed definition if it is construed in a manner that preserves the ability of non-lawyers to compete with lawyers in the provision of services that are subject to state regulation. Without further amendments, however, the proposed definition would still prohibit non-lawyers from performing services for which legal expertise is unnecessary and may exempt activities that require specialized legal skills. In our December 10 letter, we proposed that the Court consider adopting language similar to that found in Rule 49 of the District of Columbia Court of Appeals limiting the definition of the practice of law to activities that require specialized legal skills where an attorney-client relationship is present. We renew our recommendation that the Court include such language in any definition of the practice of law it adopts. We believe that this approach will provide guidance to the State Bar and the public and ensure that exception (o) is interpreted to exempt only those activities by credentialed professionals that would harm consumers, while preserving lawyer/non-lawyer competition that benefits consumers.

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

Yours sincerely,



Thomas O. Barnett