Board on the Unauthorized Practice of Law of
The Supreme Court of Ohio
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Advisory Opinion UPL 22-01
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Nonattorneys Prosecuting Delinquent Tax Claims in a Small Claims Court

<u>SYLLABUS</u>: A duly authorized nonattorney employee of a municipal tax department does not engage in the unauthorized practice of law by prosecuting a small claims court case against a taxpayer provided the nonattorney employee does not engage in cross-examination, argument or other acts of advocacy.

<u>OPINION</u>: This opinion addresses a hypothetical question raised by the Ohio Disciplinary Counsel: Does a nonattorney agent/employee appearing in a small claims court on behalf of a municipal tax department engage in the unauthorized practice of law by meeting with taxpayers before cases are called in court, filing motions for continuances, name changes, dismissals, requesting judgments, or initiating garnishment proceedings?

Background:

1. The Ohio legislature has empowered an employee of a political subdivision to prosecute tax claims in a small claims division. **"If taxes are sought to be recovered in the action, an authorized employee of a political subdivision . . . may commence the action."** R.C. 1925.04(B).

2. The Ohio legislature has empowered an employee of a political subdivision to initiate collection proceedings to obtain satisfaction of a judgment to recover taxes. **"If an authorized employee of a political subdivision . . . prevails in an action to recover taxes, the authorized person may use any means provided by law to obtain satisfaction of the judgment . . . ."** R.C. 1925.13(A).

3. Municipalities are "political subdivisions." R.C. 2744.01(F).

4. **"'Employee' means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision."** R.C. 2744.01(B).

5. Disciplinary Counsel has not alleged or presumed that a nonattorney agent/employee of a municipal tax department has or would engage in cross-examination, argument or other acts of advocacy.

Discussion:

The Ohio Supreme Court has original jurisdiction regarding admission to the practice of law. Section 2(B)(1)(g), Article IV, Ohio Constitution. The constitution requires that the court exercise this exclusive jurisdiction. "The Supreme Court . . . ***shall*** make rules governing the admission to the practice of law and discipline of persons so admitted." Section 5(B), Article IV, Ohio Constitution (emphasis added). Concomitantly, it has exclusive jurisdiction over the regulation of the unauthorized practice of law. *Greenspan v. Third Fed. S. & L. Ass'n.,* 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567.

While the term "practice of law" is not defined by statute or rule, the Court long ago observed that it includes, in addition to conducting cases in court,

> the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the duration of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.

Land Title Abstract & Trust Co. Dworkin, (1934), 129 Ohio St. 23, 28, 1 O.O. 313, 193 N.E. 650. This broad definition has been consistently reaffirmed by the Court over the years, and as recently as 2009. *Disciplinary Counsel v. Brown,* 121 Ohio St.3d 423, 2009-Ohio-1152, 905 N.E.2d 163, ¶ 22.

The Rules for the Government of the Bar promulgated by the Court define the term "unauthorized practice of law" as "[t]he rendering of legal services for another by any person not admitted to practice in Ohio . . . ." Gov.Bar R.VII (31)(J)(1)(a). Under this definition, a nonattorney employee of a municipal tax department appearing in a small claims court might appear to be engaged in the unauthorized practice of law. However, beginning at least as early as 1986, the Court has concluded that some activities by nonattorneys that are definitionally "the rendering of legal services to another" nevertheless do not constitute the unauthorized practice of law in limited circumstances.

In *Henize v. Giles,* (1986) 22 Ohio St.3d 213, 490 N.E.2d 585, the Court held that "interested parties or their nonattorney representatives appearing at administrative unemployment compensation hearings before the Ohio Bureau of Employment Services[1] and the Unemployment Compensation Board of Review[2] are not engaged in the unauthorized practice of law." *Id.* at 215. The Court, after noting that federal law mandates that state unemployment programs must provide

[1] The same functions are now handled by the Ohio Department of Jobs and Family Services.

[2] The same functions are now handled by the Ohio Unemployment Compensation Review Commission.

an opportunity for a fair hearing before an impartial tribunal, concluded that the emphasis in state unemployment compensation hearings must be on the "opportunity for a fair hearing." *Id.* The Court recognized that Ohio's legislative scheme had appropriately emphasized the right to a "fair but informal hearing" in which neither the review board nor the referees are bound by the rules of evidence or by technical or formal rules of procedure. "[I]n light of the interest at stake, lay representation does not pose a hazard to the public in this limited setting." *Id.* at 219.

In the years since its *Henize* decision, the Court has approved of nonattorney representations in other similar limited instances. *Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revision*, 111 Ohio St.3d 367, 2006-Ohio-5852, 856 N.E.2d 926, (board of revision proceedings); *Cleveland Bar Ass'n. v. CompManagement, Inc. II*, 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95, (workers' compensation hearings); *Ohio State Bar Ass'n. v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 112 Ohio St.3d 107, 112, 2006-Ohio-6511, 858 N.E.2d 372, (labor negotiations). The Court has further observed that the mere act of representing another is not necessarily considered the practice of law unless it is accompanied by an act that requires or involves legal skills. *CompManagement II* at ¶ 108, citing *Gustafson v. V.C. Taylor & Sons, Inc.* (1941), 138 Ohio St. 392, 397. *See also, Ohio State Bar Ass'n v. Watkins Global Network, L.L.C.,* 159 Ohio St.3d 241, 2020-Ohio-169, 150 N.E.3d 68, at ¶ 12, where, in a case involving a nonattorney assisting individuals in debt negotiations, the Court, citing *CompManagement II,* stated that "whether a person engages in the practice of law . . . depends on whether that person's actions include the rendering of legal services (e.g., giving legal advice, drafting legal documents, raising legal defenses)."

The Court has noted on a number of occasions that the main reason for regulating the unauthorized practice of law is to "protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation." *See, Cleveland Bar Ass'n v. CompManagement, Inc*., 104 Ohio St.3d 168, 2004–Ohio–6506, 818 N.E.2d 1181, ¶ 40. There, the Court recognized that "not all representation requires the level of training and experience that only attorneys can provide, and in certain situations the protective interest is outweighed by other important considerations." *Id.* It further concluded that one of the most important considerations is whether "the public interest is better served by permitting laypersons to engage in conduct that might be viewed as the practice of law." *Id.* at ¶ 39, *cited with approval, Cleveland Bar Ass'n v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107.

In *Pearlman,* the Court was asked to decide whether a nonattorney had engaged in the unauthorized practice of law by prosecuting cases on behalf of two limited liability companies he owned and controlled in the small claims division of the Cleveland Heights Municipal Court pursuant to R.C. 1925.17. It was alleged that respondent Pearlman had engaged in the unauthorized practice of law by filing 13 separate complaints in the small claims division seeking rent monies owed by tenants or former tenants of the apartment buildings owned by his limited liability companies. The parties stipulated that the small claims division magistrates did not permit Pearlman to cross-examine witnesses, but did allow him to testify on behalf of the limited liability companies.

The majority opinion cited the 2004 decision in *CompManagement* holding "that an uncompromising approach to the unauthorized-practice-of-law cases may not always be appropriate." *Pearlman, id.* at ¶ 11. Further, and perhaps most importantly, *Pearlman* held that:

> The power to regulate includes the authority to grant as well as the authority to deny, and in certain limited settings, the public interest is better served by authorizing laypersons to engage in conduct that might be viewed as the practice of law.

Recognizing that the ultimate goal of regulating the practice of law is "to protect the public," the majority pointed to the *CompManagement* observation that "not all representation requires the level of training and experience that only attorneys can provide and in certain situations, the protective interest is outweighed by other important considerations." *Pearlman, id.* at ¶ *12*; *CompManagement, supra* at ¶¶ 39-40. The Court highlighted the fact that the goal of the small claims division is similar to the goals involved in the administrative proceedings discussed in both *CompManagement* and *Henize* – "to provide fast and fair adjudication as an alternative to the traditional judicial proceedings." *Pearlman, supra* at ¶ 15. The Court also noted the limited jurisdictional limit of the small claims division (then $3,000, now $6,000), the fact that punitive and exemplary damages and prejudgment attachment are not permitted, the quick time frames for hearings and the fact that neither the Rules of Evidence nor the Ohio Rules of Civil Procedure apply, allows individuals to "resolve uncomplicated disputes quickly and inexpensively." *Id.* Finally, the Court recognized that the same restrictions on laypersons appearing in administrative proceedings, which the Court approved in the *Henize* and *CompManagement* cases – inability to "engage in cross examination, argument, or other acts of advocacy" - are applicable in small claims division proceedings. *Id.* at ¶ 19. Given those limitations, the Court "recognize[d] an exception, albeit a narrow one, to the general rule that corporations may be represented only by licensed attorneys." *Id.* at ¶ 26.

In 2017, in a case that raised the hypothetical situation as described by Disciplinary Counsel, the Ohio Court of Appeals for the Fifth District, ruled that R.C. 1925.02(a)(2)(a)(ii) and 1925.13 authorized an employee of a political subdivision to both commence a small claims action to recover taxes and use any legal means to obtain satisfaction of the judgment. *Balt v. Ansel,* 5th Dist. No. 17-CA-16, 2017-Ohio-7347. Quoting *Pearlman*, the appellate court stated as follows:

> Though the Ohio Supreme Court has not directly addressed what a non-lawyer employee of a political subdivision who appears in small claims court is permitted to do, the Supreme Court has addressed the limits of a layperson presenting a claim or defense in small claims court on behalf of a corporation or limited liability company in *Cleveland Bar Ass'n. v. Pearlman,* 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193. The Supreme Court noted that the goal of small claims court is to provide fast and fair adjudication as an alternative to judicial proceedings and "by design, proceedings in small claims courts are informal and geared to allowing individuals to resolve uncomplicated disputes quickly and inexpensively" and thus "pro se activity is assumed and encouraged." *Id.* The Supreme Court held that a "layperson who presents a claim or defense and appears in small claims court on behalf of a limited liability corporation as a company officer does not engage in

the unauthorized practice of law, provided that the individual does not engage in cross-examination, argument or other acts of advocacy." *Id.*

Balt v. Ansel, supra at ¶ 19.

In the hypothetical under consideration, the prosecution of small claims division delinquent tax cases by a duly authorized nonattorney employee of a municipal tax department appears to meet the touchpoints outlined by the Ohio Supreme Court in its *Pearlman* decision:

1. The Ohio legislature has specifically empowered nonattorney authorized employees of political subdivisions to prosecute claims in the small claims division.

2. The Ohio legislature has specifically empowered nonattorney authorized employees of political subdivisions to initiate collection efforts on any judgments obtained.

3. The amounts involved in small claims cases, $6,000 or less, are relatively small.

4. Disciplinary Counsel's hypothetical does not suggest that nonattorney employees of political subdivisions commencing tax delinquency cases engage in cross examination of witnesses, argument or other acts of advocacy.

5. Disciplinary Counsel's hypothetical does not presuppose that a special level of training and experience that only attorneys can provide is required when nonattorney employees of political subdivisions:

    (a) meet with taxpayers before cases are called in court;
    (b) request continuances if taxpayers need additional time to provide information to determine (and possibly pay) actual tax amounts;
    (c) request judgments when taxpayers have filed returns but failed to pay taxes due;
    (d) request that cases be dismissed if taxpayers are able to immediately pay the delinquent taxes; and
    (e) initiate garnishment proceedings against taxpayers unable to immediately pay delinquent taxes due.

6. There is no apparent risk to the public (or the municipalities) involved in the questioned activities.

7. The public interest appears to be served in that small claims proceedings are quick and fair for both taxpayers and municipalities – and can be conducted at reduced cost and expense since attorneys are not required to be involved in these simple cut-and-dried matters.

CONCLUSION: It is the board's opinion that a duly authorized nonattorney employee of a municipal tax department who prosecutes a tax delinquency case in a small claims court does not engage in the unauthorized practice of law so long as the nonattorney employee does not engage in cross-examination of witnesses, argument or other acts of advocacy.

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BOARD ON THE UNAUTHORIZED PRACTICE OF LAW

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