

**Board on the Unauthorized Practice of Law of
The Supreme Court of Ohio**

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Advisory Opinion **UPL 2008-01**
Issued: February 7, 2008

***Lawyer and Nonlawyer Representation of Labor Organizations in Collective
Bargaining and Labor Grievance Arbitration***

OPINION: This opinion addresses issues regarding the employment of lawyers and nonlawyers by the state, national or international organization of a union (“labor organization”) to assist and represent local bargaining units (“locals”) during public sector collective bargaining and labor grievance arbitrations.¹

1. Whether a labor organization, employing an in-house lawyer who is admitted to practice law in Ohio as a labor relations consultant to assist locals in the negotiation and drafting of language for collective bargaining agreements, is engaged in the unauthorized practice of law in Ohio.
2. Whether a labor organization engages in the unauthorized practice of law by employing a nonlawyer, or an Ohio licensed lawyer, as a labor relations consultant to represent a local bargaining unit in a labor grievance arbitration. If yes, are there any limitations on what the labor relations consultant may or may not do?

Issue 1: Whether a labor organization, employing an in-house lawyer who is admitted to practice law in Ohio as a labor relations consultant to assist locals in the negotiation and drafting of language for collective bargaining agreements, is engaged in the unauthorized practice of law in Ohio.

Answer: A labor organization comprised of subordinate local bargaining units does not engage in the unauthorized practice of law by employing an in-house lawyer, admitted to practice law in Ohio, to represent or assist its locals in the negotiation and drafting of language for collective bargaining agreements.²

¹ This advisory opinion only addresses public sector unions and their employers subject to the labor laws and regulations of the State of Ohio.

² Whether an out-of-state attorney may represent a local Ohio union is beyond the scope of this opinion. The permissibility of legal services performed in Ohio by an out-of-state attorney licensed in a state other than Ohio is governed by Prof. Cond. Rule 5.5.

Discussion: The unauthorized practice of law is defined by the Supreme Court of Ohio Rules for the Government of the Bar as “the rendering of legal services for another by any person not admitted to practice ... and not granted active status” Gov. Bar R. VII (2)(A). Although the practice of law is not defined by rule or statute in Ohio, it has been addressed in the various decisions of the Supreme Court. Generally, the practice of law has been defined by the Court as not limited to the conduct of cases in court, but also embracing the preparation of pleadings, the management of actions and proceedings before judges and courts, conveyancing, the preparation of legal instruments, advice to clients, and all action taken in matters connected with the law. *Judd v. City Trust & Savings Bank* (1937), 133 Ohio St. 81.

The act of negotiation on behalf of another is generally considered within the ambit of the practice of law and therefore constitutes a legal service. *Land Title Abstract v. Dworken* (1934), 129 Ohio St. 23, 29. However, in the context of labor relations, the negotiation of a collective bargaining agreement is not the practice of law, given the state and federal laws and regulations that govern the mandatory subjects for bargaining between the parties. *Ohio State Bar Association v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 112 Ohio St.3d 107, 2006-Ohio-6511 at ¶ 20. Nevertheless, the drafting of language for the final collective bargaining agreement is considered the practice of law. *Id.* at ¶ 23.

It is well settled in Ohio that a corporation cannot lawfully engage in the practice of law, or do so indirectly through the employment of lawyers. *Dworken* at 29. However, an exception to the general rule is recognized when in-house lawyers perform legal services in matters in which the corporation or legal entity has a direct or primary interest. *Id.* at 24. See, also, *Cincinnati Bar Association v. Allstate* (2003), UPL 02-02 (Oh. Bd. on the Unauth. Prac. of Law, unreported).³ Therefore, the question becomes whether the actions taken by an in-house lawyer of a labor organization when assisting local bargaining units falls within this exception.

An analysis of the issue presented requires a description of the typical relationship between a labor organization and its locals. It is not uncommon for locals to utilize in-house counsel of the labor organization during collective bargaining for the purpose of representing the local and its members. In many instances even a nonlawyer employee of the labor organization is called upon to assist during collective bargaining. Furthermore, in traditional American labor organizations, an individual member is often considered a member of both the local bargaining unit and the larger labor organization, as the labor organization serves as the organizer and governing body of the subordinate local unit. Lastly, in most cases the representatives of both the local and larger labor organization are signatories to the collective bargaining agreement.

More importantly, federal or state labor laws impose upon a union a duty of fair representation on behalf of its members during the collective bargaining process with an employer. Consequently, the employment and placement by a union of an in-house lawyer to assist a local bargaining unit of the union is one way it satisfies its duty of fair representation. In turn, the in-house lawyer is acting for his/her employer and is engaged in acts that are directly connected with the authorized business of the labor organization. Based on the foregoing, a state, national or international labor organization of a union can

³ http://www.sconet.state.oh.us/UPL/reports/UPL_02_02.pdf

be viewed as having a direct and primary interest in the outcome of the collective bargaining between its local bargaining unit and an employer.

In conclusion, it is this Board's opinion that a labor organization, employing lawyers admitted to the practice of law in Ohio for the representation of its local bargaining units during collective bargaining, including the negotiation and drafting of contract language, is not engaged in the unauthorized practice of law. A labor organization is permissibly representing itself during the collective bargaining process, when it directly employs an Ohio lawyer to act as a "labor relations consultant" on behalf of its local bargaining unit.

* * *

Issue 2: Whether a labor organization engages in the unauthorized practice of law by employing a nonlawyer, or an Ohio licensed lawyer, as a labor relations consultant to represent a local bargaining unit in a labor grievance arbitration. If yes, are there any limitations on what the labor relations consultant may or may not do?

Answer: A labor organization does not engage in the unauthorized practice of law by employing an Ohio licensed lawyer to assist a subordinate local in a labor grievance arbitration. A nonlawyer labor consultant, employed by a union, may represent a local bargaining unit in an arbitration process dictated by a collective bargaining agreement, as long as he/she do not engage in those activities that equate to the practice of law.⁴

Discussion: Arbitration is typically viewed as a substitute for traditional litigation. In the context of labor relations, it serves as a private dispute resolution process dictated by the terms of a collective bargaining agreement. The grievance and arbitration process agreed upon between most employers and unions is a form of self-government between the parties and is "a part of the continuous collective bargaining process." *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S.Ct. 1347, 1352. The parties in an arbitration are compelled by their own agreement to accept the decision of the arbitrator as final and binding.

Arbitration is an informal but adversarial process that does not rely on the strict use of formal rules of civil procedure or rules of evidence. The United States Supreme Court has described labor arbitration as "not as complete [as in judicial fact-finding]; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." *Alexander v. Gardner-Denver, Co.* (1974), 415 U.S. 36, 94 S.Ct. 1011. In addition, an arbitrator in a labor grievance arbitration is often a nonlawyer well versed in a particular labor subject matter.

In labor relations, the grievance process typically involves several initial steps before an arbitration is demanded pursuant to the terms of the collective bargaining agreement. During a traditional "step grievance" process the parties are typically represented by nonlawyer management and union officials or stewards in an attempt to resolve or mediate the underlying dispute. The types of issues arising during the initial

⁴ This opinion is limited to public sector employers and unions governed by the labor laws and regulations of the State of Ohio due to federal preemption issues involving private sector unions and employers.

step grievance process are confined to the interpretation and/or application of the collective bargaining agreement between the parties. The issue or issues at arbitration are limited to those issues that were not resolved during the step grievance process.

While not controlling upon this Board or the Supreme Court of Ohio, many private arbitration organizations used by unions and employers, including the American Arbitration Association, permit any person, whether or not a lawyer, to represent a party at arbitration.⁵ In many jurisdictions it is not uncommon for nonlawyers to represent either party during a grievance labor arbitration.^{6,7}

The Board has found no direct authority in Ohio, or in other jurisdictions, limiting representation of a party in a labor grievance arbitration to only lawyers admitted to the practice of law. In addition, no Ohio statute or court rule expressly limits or permits lay representation in a labor grievance arbitration.⁸ Some jurisdictions have specifically restricted nonlawyers from participating in commercial arbitration through the enactment of express rules or statutes. See, e.g., Az. UPL Op. No. 06-04 (April, 2006). Conversely, lay representation in arbitrations has expressly been permitted in some jurisdictions by specific statutes or court rules governing the practice of law. See, e.g., Ut.Gov.Bar R. 14-802(c)(10).

The question of whether labor grievance arbitration requires the skills and training of an attorney, and therefore should only be limited to participation by lawyers, has not generated significant debate in the majority of jurisdictions that regulate the unauthorized practice of law, likely due to the pervasive federal regulatory scheme present in most labor relations contexts. Labor unions have a duty of fair representation imposed by federal, and in some instances, state statutes. See Nat. Labor Rel. Act. §§ 7, 8; Oh.Rev.Code §4117.11(B)(6). In general, these laws have been interpreted as requiring a union, as the exclusive representative of the employer, to fairly and impartially process the grievances of its members. Unions and employers subject to the jurisdiction of the National Labor Relations Board generally have the unfettered ability to secure any representative during the collective bargaining and the grievance arbitration processes.

The Supreme Court of Ohio has original jurisdiction to determine the permissible parameters of lay conduct in Ohio as it relates to the practice of law, particularly in areas not preempted by federal laws or regulations. Consequently, lay representation in labor relations matters involving public agencies and unions, regulated by Ohio's State Employment Relations Board, is subject to the Court's jurisdiction.

⁵ Rule 20 of the American Arbitration Association, Labor Arbitration Rules, provides, "[a]ny party may be represented by counsel or other authorized representative."

⁶ It is a common practice for arbitrations arising under collective bargaining agreements to take place with lay persons presenting the case for both union and management before an arbitrator. *Doctor's Associates, Inc. v. Jamieson, et. al.*, 2006 Conn.Super. LEXIS 2220 (unreported).

⁷ Nonlawyers routinely serve as advocates during labor grievance arbitrations for both the employer and the union. In many cases the union uses nonlawyer staff members as advocates. Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 11 (1998).

⁸ The Board is acutely aware of the fact that a number of jurisdictions, including Ohio, have expressly limited lay representation in securities arbitrations to only licensed lawyers. *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St.3d 52, 2004-Ohio-6901. See also, *Florida Bar v. Rapoport* (2003), 845 So.2d 874. *Alexicole* did not pertain to non-attorney representation in the context of a labor grievance arbitration.

As described above, the practice of law in Ohio is generally defined as representation before courts, the preparation of pleadings and legal documents, the management of legal actions, all advice related to the law, and all actions taken on behalf of clients connected with the law. *Land Title Abstract v. Dworken* (1934), 129 Ohio St. 23; Gov. Bar R. VII(2)(A). However, not all representation of others requires the legal training, skills and experience of a licensed lawyer, and limited lay representation of another may be permitted in certain limited legal or quasi-legal processes as long as the representation remains within the confines of the “rules governing lay conduct.” *Cleveland Bar Association v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108 at ¶23.

Narrow exceptions have been permitted in Ohio to permit laypersons to undertake activities that may fall within a broad definition of the practice of law. The Supreme Court of Ohio has reviewed lay representation in a number of contexts in the last twenty-five years: small claims courts, unemployment hearings, boards of revision, workers compensation hearings, and labor negotiations. The Court generally held that lay representation was permitted in each instance, so long as the representation did not involve those activities normally requiring the legal skill and training of a lawyer. In addition, in Ohio the mere act of representing an entity is not necessarily considered the practice of law unless it is accompanied by an act that requires or involves legal skills. *CompManagement* at ¶108, citing *Gustafson v. V.C. Taylor & Sons, Inc.* (1941), 138 Ohio St. 392, 397.

The practice of law encompasses many activities that may be necessary in an arbitration setting, depending on the complexity of the issues presented and the requisite burden of proof. It is theoretically possible for a nonlawyer, representing another person or entity in a labor grievance arbitration, to impermissibly engage in the practice of law if they give legal advice to the organization or its members about their respective legal rights and duties, engage in legal argument, or engage in the direct or cross-examination of witnesses. *Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revision*, 111 Ohio St.3d 367, 2006-Ohio-5852 at ¶32; *CompManagement* at ¶63-68. In addition, legal analysis, citation or interpretation employed during a grievance arbitration by a nonlawyer would also equate to the practice of law. *CompManagement* at ¶49. Nonlawyers, when actually engaging in these activities, whether in an arbitration, administrative or other quasi-judicial setting, are engaged in the unauthorized practice of law in Ohio.

It is this Board’s opinion that a labor organization may properly be represented by a nonlawyer employee during a grievance labor arbitration, particularly when the individual is a salaried employee or an officer of the union and when the nonlawyer does not engage in acts requiring legal skill and training or otherwise equating to the practice of law. The role of the union in grievance arbitration, when represented by its lay officers or employees, does not present circumstances that require the usual public safeguards against the unauthorized practice of law. The union is essentially representing itself in a process outlined in a private agreement requiring disputes to be resolved through alternative dispute resolution in lieu of traditional litigation. This conclusion would also apply when the local bargaining unit is represented by an employee of the larger labor organization of which it is subordinate.

For the identical reasons stated in Issue 1 of this advisory opinion, it is also the opinion of the Board that a labor organization, employing an attorney admitted to the practice of law in Ohio as a labor relations consultant to assist a local bargaining unit, is not *per se* engaged in the unauthorized practice of law.⁹ There are no limitations imposed upon an Ohio licensed lawyer concerning those acts that he/she may engage in during a labor grievance arbitration.

Advisory opinions of The Supreme Court of Ohio Board on the Unauthorized Practice of Law are informal and nonbinding pursuant to Gov. Bar R. VII (2) in response to prospective or hypothetical questions submitted by unauthorized practice of law committees of local or state bar associations and the Office of Disciplinary Counsel.

⁹ This opinion does not address conflicts of interest, and other issues that may arise under the application of the Ohio Rules of Professional Conduct.

