

ORIGINAL

The Supreme Court of Ohio
THE BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF
THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATION,

Relator,

v.

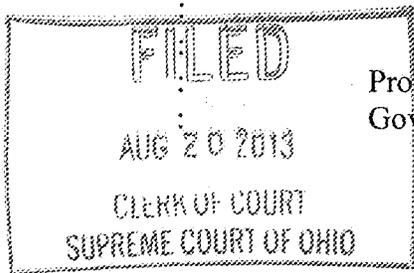
JOHN D. CLEMINSHAW,

Respondent.

13-1346

Case No. UPL 11-06

FINAL REPORT



Proposed Resolution
Gov. Bar R. VII(5b)

I. OVERVIEW

This matter was presented to the Board on the Unauthorized Practice of Law (“Board”) at its regular meeting held on July 11, 2013. The Complaint filed on July 5, 2011, by the Ohio State Bar Association (“OSBA”) alleges that Respondent John D. Cleminshaw engaged in the unauthorized practice of law by cross-examining a witness during a hearing before the Wayne County Board of Revision.

A Proposed Consent Decree was submitted to the Panel for review on September 9, 2011. The commissioners appointed to hear this matter are John Chester, Jr., Scott Potter, and Curt Sybert, Chair. Upon consideration, the Panel found the Proposed Consent Decree was not in compliance with Gov. Bar R. VII, Sec. 5b and directed to the parties to submit a revised consent decree. A revised Proposed Consent Decree (Exhibit A) along with a Memorandum in Support was filed on January 14, 2013, and the required

waiver of notice and hearing was filed on May 3, 2013 (Exhibit B). At the Board meeting, the Panel recommended that the revised Proposed Consent Decree be approved. The Board hereby adopts the Panel's report and recommendation in full.

II. Findings of Fact

- A. Relator is a regularly organized bar association in the State of Ohio whose members include attorneys practicing law in Ohio. Relator has established an Unauthorized Practice of Law Committee in accordance with Gov. Bar R. VII and is authorized to investigate and initiate complaints before the Board regarding the unauthorized practice of law. Gov. Bar R. VII(4)-(5).
- B. Respondent is not an attorney and is not admitted to the practice of law in Ohio under Gov. Bar R. I, or certified or registered to provide legal services under Gov. Bar R. II (legal intern), VI (corporate status), IX (temporary certification to practice law in legal services, public defender, and law school programs), XI (foreign legal consultant), or XII (*pro hac vice* admission). Gov. Bar R. VII(2); Prop. Consent Decree.
- C. Respondent was retained by the Wayne County Board of Revision as a consultant real estate appraiser. Compl. ¶ 3.
- D. During a hearing before the Wayne County Board of Revision, Respondent cross-examined Robert D. Mellinger, who testified as an appraiser for the Orville Shopping Center. Prop. Consent Decree.
- E. Respondent admits that his conduct constituted the unauthorized practice of law. Prop. Consent Decree.

IV. Conclusions of Law

A. The Supreme Court of Ohio has original jurisdiction regarding admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. Section 2(B)(1)(g), Article IV, Ohio Constitution; *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 501 N.E.2d 617; *Judd v. City Trust & Sav. Bank* (1937), 133 Ohio St. 81, 12 N.E.2d 288. Accordingly, the Court has exclusive jurisdiction over the regulation of the unauthorized practice of law in Ohio. *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567, at ¶ 16; *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, at ¶ 16.

B. The Supreme Court of Ohio regulates the unauthorized practice of law in order to “protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.” *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 40.

C. The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice law in Ohio. Gov.Bar R. VII(2)(A).

D. The Court has established that under R.C. 5715.19, a non-attorney does not engage in the unauthorized practice of law by preparing and filing a complaint with the board of revision, but cannot “make legal arguments, examine witnesses, or undertake any other tasks that can be performed only by an attorney”. *Dayton Supply & Tool Co. v. Montgomery County Bd. of Revision*, 111 Ohio St. 3d 367, 375, 2006 Ohio 5852, 856 N.E.2d 926, 2006 Ohio LEXIS 3282 (Ohio 2006). Therefore, Respondent engaged in the unauthorized practice of law by cross-examining a witness before the Wayne County

Board of Revision. Compl. ¶ 5; Proposed Consent Decree. Respondent's admission contains sufficient information to demonstrate the specific activity upon which the conclusions are drawn in compliance with Gov. Bar R. VII(7)(H) and *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95, ¶¶ 24-26.

F. **Analysis**

A. Review of Principal Terms of the Revised Proposed Consent Decree

The Board is responsible for ensuring the proposed consent decree is in compliance with Gov. Bar R. VII(5b). In its review of the proposed consent decree, the Board must consider the following factors:

- (1) The extent the public is protected from future harm and any substantial injury is remedied by the agreement. Respondent has agreed to cease providing legal services. Respondent is enjoined from all activities that constitute the unauthorized the practice of law. Respondent can still attend hearings of the Boards of Revision as a consultant to the members of the Board of Revisions; however, Respondent cannot make legal arguments, examine witnesses, or undertake other tasks that can be performed only by an attorney. *Dayton Supply & Tool Co. v. Montgomery County Board of Revision* (2006), 111 Ohio St. 3d 367, 368.
- (2) The admission of the Respondent to material allegations of the unauthorized practice of law as stated in the complaint. Respondent admits that by cross-examining a witness during a hearing before the Wayne County Board of Revision, he engaged in the unauthorized practice of law.

(3) Respondent has agreed to cease all activities that constitute the unauthorized practice of law. Respondent indicates that as of August 2010, he ceased the activity described in the Complaint. Respondent further agrees not to examine witnesses at hearings before boards of revision and agrees to not engage in any other conduct that constitutes the unauthorized practice of law.

(4) The extent the agreement involves public policy issues or encroaches upon the jurisdiction of the Supreme Court to regulate the practice of law. The parties indicate that the proposed Consent Decree furthers the policy of protecting the public by defining activities that constitute the unauthorized practice of law. Further, nothing in the proposed Consent Decree encroaches on the Court's jurisdiction to regulate the practice of law.

B. Applicability of Civil Penalties Based on Factors in Gov. Bar R. VII(8)(B) and UPL Reg. 400

When determining whether to recommend that the Supreme Court impose civil penalties in an unauthorized practice of law case, the Board is required to base its recommendation on the factors set forth in Gov. Bar R. VII(8)(B) and UPL Reg. 400(F). Additionally, UPL 400(F)(4) specifies mitigating factors the Board may use to justify a recommendation of no civil penalty or a less severe penalty. Because Relator does not recommend a civil penalty in this case, the Board considered both the general civil penalty factors and the mitigating factors and its analysis is described below.

C. Civil Penalty Factors

Applying the mitigating factors of UPL Reg. 400(F)(4)(a)-(g), which are the basis for a recommendation of no civil penalty or a less severe penalty, the Board finds:

- (1) The record fails to indicate that the conduct at issue has continued;
- (2) Respondent admits the allegations stated in the complaint;
- (3) Respondent admits his conduct constitutes the unauthorized practice of law;
- (4) Respondent agrees to the imposition of an injunction against future unauthorized practice of law;
- (5) The record fails to contain any evidence of a dishonest motive by Respondent;
- (6) Respondent has not had other penalties imposed for the conduct at issue.

D. Conclusion Regarding Civil Penalties

In summary, Respondent cooperated throughout the investigation, admitted to the unauthorized practice of law, and agrees to cease the activity. Therefore, the Board agrees with Relator that civil penalties are not warranted in this case.

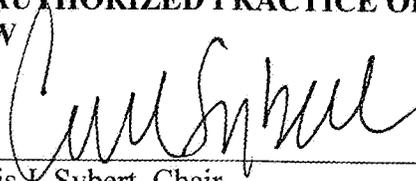
V. Board Recommendation

The Board formally considered this matter on July 11, 2013, unanimously accepted the proposed consent decree. The Board further adopted the Panel's findings of fact, conclusions of law, civil penalty analysis, and recommendation that the proposed consent decree be accepted and submitted to the Supreme Court for approval. Accordingly, the Board hereby recommends that the Supreme Court approve the proposed consent decree and issue the appropriate order as specified in Gov.Bar R. VII(5b)(E)(2).

VI. Statement of Costs

Relator states that no costs have been incurred.

**FOR THE BOARD ON THE
UNAUTHORIZED PRACTICE OF
LAW**



Curtis J. Sybert, Chair

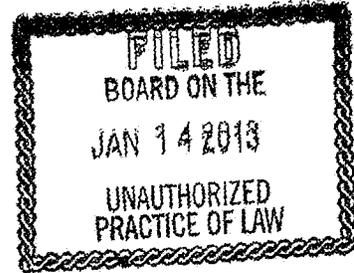
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Final Report was served by certified mail upon the following this 20th day of August 2013: Eugene Whetzel, Ohio State Bar Association, PO Box 16562, Columbus, Ohio 43216; William C. Hicks, Cole Acton Harmon & Dunn, 333 N. Limestone St., PO Box 1687, Springfield, Ohio 45503; John D. Cleminshaw, 234 Oldham Way, Hudson, Ohio 44236; Frank DeSantis/John R. Mitchell, Thompson Hine LLP, 3900 Key Center, 127 Public Square, Cleveland, Ohio 44114.

Minerva B. Elizaga
Minerva B. Elizaga, Secretary

**BEFORE THE BOARD OF COMMISSIONERS
ON THE UNAUTHORIZED PRACTICE OF LAW
SUPREME COURT OF OHIO**

OHIO STATE BAR ASSOCIATION,)	Case No.
)	
Relator,)	
)	
vs.)	
)	
JOHN D. CLEMINSHAW,)	
)	
Respondent.)	



PROPOSED CONSENT DECREE

This Consent Decree is entered into effective this _____ of January 2013, by and between the Ohio State Bar Association and all of its successors, affiliates and related entities (hereinafter referred to as the "OSBA") and John D. Cleminshaw (hereinafter referred to as "Respondent").

WHEREAS, Respondent is not and has never been an attorney admitted to practice, granted active status, certified to practice law in the State of Ohio pursuant to Rules I, II, III, IV or V of the Supreme Court Rules of the Government of the Bar;

WHEREAS, on December 1, 2010, Robert D. Mellinger, filed a complaint with the Ohio State Bar Association Unauthorized Practice of Law Committee alleging that John Cleminshaw engaged in the unauthorized practice of law by cross-examining him while he was a witness in a hearing before the Wayne County Board of Revision as an appraiser for the Orville Shopping Center;

WHEREAS, Respondent admits that while retained as a consultant real estate appraiser by the Wayne County Board of Revision, he questioned Mr. Mellinger, while Mr. Mellinger appeared as a witness;

WHEREAS, Respondent admits that his conduct constituted the unauthorized practice of law;

WHEREAS, Respondent has ceased engaging in the type of conduct described in the complaint and has ceased doing so since August of 2010;

WHEREAS, Respondent agrees not to engage in said conduct or in any other conduct that would constitute the unauthorized practice of law into the future;

NOW, THEREFORE, upon the consent of the parties affixed hereto, it is hereby ordered and decreed as follows:

1. Respondent shall not examine witnesses or otherwise participate in a County Board of Revision hearing through any conduct that would constitute the unauthorized practice of law;

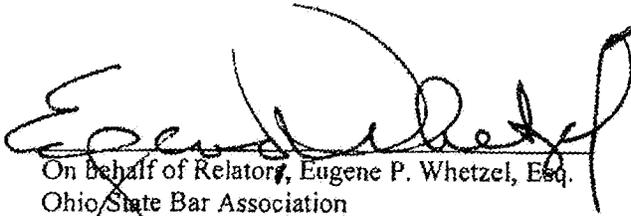
2. This Consent Decree does not prohibit Mr. Cleminshaw from attending hearings of County Boards of Revision as a consultant to, and provide advice to Panel Members of the Board of Revision during said hearings;

3. Based upon the facts: that Respondent was unaware that his conduct constituted the unauthorized practice of law at the time he undertook said activities; that Respondent has ceased and desist said activities and has not engaged in such activities since he was first put on notice of the investigation by the Relator on January 12, 2011; that Respondent completely cooperated with the investigation by the OSBA UPL Committee with respect to the complaint against him; that no harm came to any third-party as a result of his conduct; and that Respondent has agreed to cease and desist said conduct in the future, as well as any conduct that constitutes the unauthorized practice of law, no civil penalty shall be applied.

4. There are no costs that have been incurred

WHEREFORE, and intending to be legally bound, the parties hereto consent to the entry of this Consent Decree.

Respectfully submitted,



On behalf of Relator, Eugene P. Whetzel, Esq.
Ohio State Bar Association
P.O. Box 16562
Columbus, Ohio 43216
Counsel for Relator, The Ohio State Bar
Association



John D. Cleminshaw



Frank R. DeSantis, Esq. (0030954)
John R. Mitchell, Esq. (0066759)
Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
Telephone: (216) 566-5500
Facsimile: (216) 566-5800
frank.desantis@thompsonhine.com
john.mitchell@thompsonhine.com
Counsel for Respondent, John D. Cleminshaw

BEFORE THE BOARD ON
THE UNAUTHORIZED PRACTICE OF LAW
OF THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATION
1700 Lake Shore Drive
Columbus, Ohio 43204,

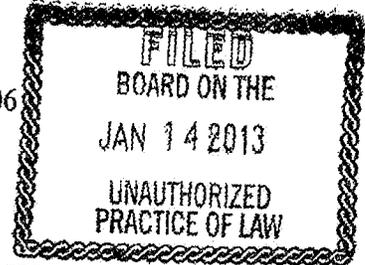
Relator,

v.

JOHN D. CLEMINSHAW,
234 Oldham Way
Hudson, Ohio 44236-2090,

Respondent.

Case No. UPL 11-06



MEMORANDUM IN
SUPPORT OF
MOTION TO APPROVE
CONSENT DECREE

I. INTRODUCTION

Relator, Ohio State Bar Association seeks to enjoin Respondent, John D. Cleminshaw from all activities that constitute the unauthorized practice of law. Respondent while providing services to the Wayne County Board of Revision (the "Board") engaged in the unauthorized practice of law by cross-examining witnesses at hearings of the Board. *See, Ohio State Bar Assoc. v. Appraisal Research Corp.*, 125 Ohio St 3d 508, 2010 Ohio 2204. The Parties have agreed to a Proposed Consent Decree and request its approval by the Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court of Ohio (the "Board").

II. ARGUMENT

Rule VII, Section 5b(C) of the Rules for the Government of the Bar identifies several factors that the Board may consider in determining whether to approve a proposed resolution. Ohio R. Gov't B. VII, §5b(C). Here, several of these factors support the approval of the Proposed Consent Decree:

(1) *The extent the agreement is submitted in the form of a proposed consent decree.* The Parties have submitted their proposed resolution in the form of a proposed consent decree.

(2) *The admission of the respondent to material allegations of the unauthorized practice of law as stated in the complaint.* Respondent admits to the unauthorized practice of law (Proposed Consent Decree) and all material allegations concerning his practice of cross-examining witnesses before the Board.

(3) *The extent the public is protected from future harm and any substantial injury is remedied by the agreement.* Although Respondent ceased providing legal services and advised the Board, the public is further protected from future harm because the Proposed Consent Decree enjoins Respondent from all activities that constitute the unauthorized practice of law. This case, and the relief requested, is similar to the relief granted in *Ohio State Bar Association v. Appraisal Research Corp.*, 125 Ohio St 3d 508, 2010 Ohio 2204.

While the Consent Decree does not prohibit Mr. Cleminshaw from attending hearings of the County Boards of Revision as a consultant to, and to provide advice to Panel Members of the Board of Revisions during said hearings, that conduct, would not constitute the unauthorized practice of law. As the Supreme Court said in *Dayton Supply & Tool Co. v. Montgomery County Board of Revision* (2006), 111 Ohio St 3d 367, in a case involving the unauthorized practice of law by a corporate officer representing an employer in a tax revision case:

The general rule is that a lay person cannot engage in the practice of law. However, public-interest factors persuade us to hold that a corporate officer does not engage in the unauthorized practice of law by preparing and filing a complaint and presenting the claimed value of the property at a hearing before the Board of Revision on behalf of his or her corporation, so long as the officer does not make legal arguments, examine witnesses, or undertake other tasks that can be performed only by an attorney. *Id.* at 368.

In this case, under the proposed Consent Decree, Mr. Cleminshaw would only attend hearings as a consultant, would not engage in any activity that can only be performed by an attorney.

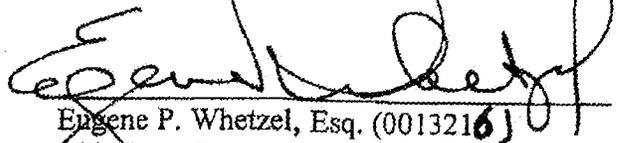
(4) *Any agreement by the respondent to cease and desist the alleged activities.* Respondent has already ceased the activities of which Relator complained.

(5) *The extent the agreement involves public policy issues or encroaches upon the jurisdiction of the Supreme Court to regulate the practice of law.* This case involves how best to protect the public from the unauthorized practice of law. The relief proposed here furthers that policy by enjoining future authorities that involve the unauthorized practice of law. Nothing in the proposed Consent Decree encroaches upon the jurisdiction of the Ohio Supreme Court to regulate the practice of law.

III. CONCLUSION

For the foregoing reasons, the Board should approve the Proposed Consent Decree.

Respectfully submitted,



Eugene P. Whetzel, Esq. (0013216)

Ohio State Bar Association

P.O. Box 16562

Columbus, Ohio 43216

Telephone: (614) 487-2050

Facsimile: (614) 485-3191

gwhetzel@ohiobar.org

Counsel for Relator, Ohio State Bar Association



Frank R. DeSantis, Esq. (0030954)

John R. Mitchell, Esq. (0066759)

Thompson Hine LLP

3900 Key Center

127 Public Square

Cleveland, Ohio 44114

Telephone: (216) 566-5500

Facsimile: (216) 566-5800

frank.desantis@thompsonhine.com

john.mitchell@thompsonhine.com

Counsel for Respondent, John D. Cleminshaw

