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

OHIO STATE BAR ASSOCIATION,

Relator,

v.

BURDZINSKI, BRINKMAN, CZARZASTY & LANDWEHR, INC., et al.,

Respondents.

06-0839

Case No. **UPL 04-05**

FINAL REPORT

I. PROCEDURAL BACKGROUND

This matter was heard on December 1 and 2, 2005 in Cleveland, Ohio before a Panel of the Board on the Unauthorized Practice of Law of the Supreme Court of Ohio ("Board"). Commissioners Judge Michael J. Corrigan, John A. Polito, and James E. Young – Chair, constituted the Panel.

Relator is the Ohio State Bar Association ("OSBA"). On July 6, 2004, the OSBA filed a Complaint alleging that Respondents had engaged in the unauthorized practice of law by giving advice or counsel to persons as to their legal rights and by drafting agreements affecting the legal rights of others.

As framed by the OSBA, the issues in this case are:

A. Is it the practice of law and the rendering of legal services in Ohio for a person to advise and counsel an employer on legal issues in labor election campaigns, or to negotiate and prepare labor agreements on behalf of an employer?

B. If so, does federal preemption prohibit the Supreme Court of Ohio from regulation of such conduct?

II. FINDINGS OF FACT

1. The OSBA is authorized to file a complaint with the Board regarding the unauthorized practice of law. Gov.Bar R. VII(4) and (5).

2. Respondent Burdzinski, Brinkman, Czarzasty & Landwehr, Inc. ("Respondent Corporation") was originally incorporated in 1988 as Burdzinski and Burdzinski, Inc. Stipulation ("Stip.") 1.

3. Respondent Bernard F. Burdzinski II is a shareholder, director and officer of the Respondent Corporation. Stip. 1.

4. Respondent Connie S. Brinkman-Burdzinski is a former shareholder, director and officer of the Respondent Corporation. See Complaint at ¶ 4 and Answer at ¶ 4. See 12/1/05 Tr. at 44 and 104.

5. Neither Bernard F. Burdzinski II nor Connie S. Brinkman-Burdzinski have ever been admitted to practice law in the State of Ohio. Stip. 11.

6. The Respondents are management-side labor consultants that assist employers with employee relations and managing their employees. See Stips. 1 and 2. Respondents are not owners or staff members of the companies they assist. Stip. 15. Respondents charge fees for their services. Stip. 10.

7. Respondents have been in business for almost 20 years, and no evidence was presented of any complaint by a current or former customer. Respondents are outside entities who will not be parties to any resulting election or labor agreement. Respondents do not carry any malpractice insurance. 12/1/05 Tr. at 223.

8. This case does not involve any claim of the unauthorized practice of law by a person acting on behalf of a union or by an officer or an employee acting on behalf of an employer.

9. The National Labor Relations Board ("NLRB") distributes numerous publications, posters and pamphlets that are in laymen's terms designed to explain its rules and regulations to the general public. These publications explain employee rights, employer obligations, and the National Labor Relations Act ("NLRA"). 12/1/05 Tr. at 88-89, 140-141.

Election

10. In any election the employer is required to file a form with the NLRB identifying the person or entity which will serve as the employer's representative for purposes of the election. The NLRB then contacts the designated representative on all issues related to the election. 12/2/05 Tr. at 249, 297-298.

11. On the union side for an election, there is typically a union organizer or a union business agent. In some instances those representatives may not be employees of the local union. 12/1/05 Tr. at 158-159.

12. Evidence presented at the hearing indicates that Respondents' activities relating to union elections can be divided into eight stages: (a) information gathering; (b) strategy development; (c) management coaching; (d) elimination of problems; (e) information dissemination; (f) election arrangements; (g) the election itself; and (h) the aftermath of the election. *Id.* at 145-150.

(a) Information gathering. The first stage in responding to a union organization effort is information gathering. This stage involves gathering

information as to why employees may want a union and what concerns they may have that the employer can address. *Id.* at 145-146.

(b) Strategy development. The next stage is strategy development. The employer considers the information that has been gathered and develops a strategy to respond to that information. The strategy may involve fixing problems, communicating to employees or both. *Id.* at 146-148; 12/2/05 Tr. at 246.

(c) Management coaching. The third stage involves advising employer representatives what they can and cannot say to employees. 12/1/05 Tr. at 148. Management has to be careful how they speak to employees during an election campaign. There can be unfair labor practices resulting from certain types of conduct. 12/2/05 Tr. at 245. Coaching management includes identifying what topics to discuss, what to say on each topic, and the medium through which each communication will occur. 12/1/05 Tr. at 148. Management coaching also involves insuring that management is aware of the general rules governing their conversation. *Id.* at 149-150; 12/2/05 Tr. at 246-247. There is a concept in the industry summarizing management prohibitions known as TIPS. TIPS is a black letter law concept noting that management is prohibited from threatening employees, interrogating employees, making promises to employees, or spying on employees. 12/1/05 Tr. at 62-63; 12/2/05 Tr. at 246-247. The TIPS rules, along with various employee rights and employer obligations, are contained in numerous NLRB publications intended for lay people. 12/1/05 Tr. at 88-89, 140-141. The evidence of record does not establish that Respondents provided advice

to employers beyond that which is contained in the NLRB publications designed for lay consumption or at least that which is commonly known in the industry. *Id.* at 82-83. For more complicated matters, Mr. Burdzinski testified that he would involve an attorney. *Id.* at 63, 149-150.

(d) Elimination of problems. This stage involves actions by management to address the problems identified by the employees as motivating their interest in a union. *Id.* at 146-148; 12/2/05 Tr. at 250-251.

(e) Information dissemination. This stage involves management's dissemination of information to employees. 12/1/05 Tr. at 154-155.

(f) Election arrangements. This step involves logistical issues relating to the election – where and when it will be held and who will be eligible to vote. *Id.* at 150-151; 12/2/05 Tr. at 247-250. These issues may be resolved one of two ways. The union and the employer may negotiate a resolution through an intermediary field agent of the NLRB. 12/1/05 Tr. at 151-153; 12/2/05 Tr. at 248-250. If the parties reach an accord, the NLRB representative prepares a consent agreement for signature by the parties. 12/1/05 Tr. at 151, 153; 12/2/05 Tr. at 249-250. This process is sometimes referred to as negotiating the settlement of an election issue. 12/1/05 Tr. at 151-152. Respondent Bernard F. Burdzinski II testified that he has personally negotiated and settled eight to ten election matters since 1988 and that agents of the Respondent Corporation negotiated and settled election issues at least 40 times. *Id.* at 56-58. Exhibit 13 demonstrates that Respondents were retained to assist employers in, among other things, negotiating the settlement of election issues on nine occasions between 2001 and 2003. If the

negotiations are unsuccessful, the parties argue their relative positions to the NLRB Regional Director, who resolves the dispute. 12/1/05 Tr. at 151, 12/2/05 Tr. at 248-249.

(g) The election. The election is controlled by the NLRB. The parties may send observers who have the right to challenge a ballot. Respondents advise the employer's observers how to challenge a ballot. Asserting a challenge can be as simple as advising the NLRB agent that the ballot is being challenged. 12/1/05 Tr. at 220-221; 12/2/05 Tr. at 291. There is no evidence in the record that Respondents advised the employer's observer as to the proper grounds for a challenge.

(h) The aftermath of the election. After the election, challenges to ballots, objections to the election and unfair labor practices may be considered. 12/1/05 Tr. at 156-157; 12/2/05 Tr. at 251-252. In such situations the NLRB may conduct a hearing. 12/1/05 Tr. at 156-157. Respondents may act as the employer's representative during the hearing. *Id.* at 139-140, 157. Respondents Bernard F. Burdzinski II and Connie S. Brinkman-Burdzinski have represented parties in hearings before the NLRB. *Id.* at 173-174.[1]

Collective Bargaining

13. The parties have stipulated that it is common for both the company and the union to be represented in collective bargaining by negotiators and draftsmen who are not lawyers. Stips. 6 and 8. Employers are usually represented by in-house

[1] The regulations of the NLRB specifically authorize parties at hearings before it to be represented "by counsel, or by other representative." 29 CFR § 102.38. The OSBA does not contend that Respondents have committed the unauthorized practice of law by representing parties before the NLRB. See Relator's Post-Hearing Brief at 3.

staff, few of whom are attorneys. When employers do use outside representation, they frequently employ attorneys and sometimes use nonlawyer consultants. Stip. 7.

14. Each side to a collective bargaining negotiation typically has a committee. 12/2/05 Tr. at 256. The union committee generally includes a business agent or organizer. 12/1/05 Tr. at 165-166. The management side typically includes representatives of upper and lower management and supervisors of the people who voted in the union. Management may also have a lawyer or outside consultant. 12/2/05 Tr. at 256. Typically everyone contributes to the negotiations. 12/1/05 Tr. at 168-170. If the parties reach an impasse, they may seek a mediator from the Federal Mediation and Conciliation Service. *Id.* at 169-171; 12/2/05 Tr. at 259-260.

15. Respondents advertise that they negotiate labor agreements. 12/1/05 Tr. at 182-184. Respondents have negotiated and drafted labor agreements. Stip. 9. Indeed Mr. Burdzinski has often acted as the lead spokesperson for the employer. See Respondents' Post-Hearing Brief at 10-11. Mr. Burdzinski testified that he has negotiated four or five labor agreements since 1988. Mrs. Brinkman-Burdzinski has participated in collective bargaining, but never as the chief spokesperson. 12/1/05 Tr. at 173-174.

16. Mr. Burdzinski and Mrs. Brinkman-Burdzinski have drafted collective bargaining agreements. Stip. 9. Exhibit 11 is an example of a proposed labor agreement drafted by Mr. Burdzinski. Stip. 9. It is a complex document that creates rights and responsibilities for each of the parties. See Exhibit 11 and 12/1/05 Tr. at 60.

17. In drafting labor agreements, Mr. Burdzinski sometimes uses forms from books or other sources as templates for various provisions. *Id.* at 58-59.

Frequently when Mr. Burdzinski uses form books, there are multiple options from which he can choose. *Id.* at 221-223.

18. In the course of labor negotiations or in a change to a labor agreement, Mr. Burdzinski does not consider the legal consequences of the proposals for his client. He does not consider it to be his responsibility to analyze legal issues. *Id.* at 68-69. Mr. Burdzinski does not consider relevant statutes in labor negotiations. He does consider regulatory enactments during such negotiations. Mr. Burdzinski considers such regulations to be the type of information that is widely known by people in his profession. If case law is widely known in his industry, he would be aware of it and try to abide by it. If legal issues become complicated, he would recommend that an attorney be brought in. *Id.* at 62-66. The NLRB publishes a list of mandatory, permissible and prohibited subjects for bargaining. The list is widely circulated. *Id.* at 102.

19. Each party presented expert testimony. Relator called Joel R. Hlavaty, Esq. Mr. Hlavaty is an attorney who has specialized in labor and employment law for approximately 20 years. Mr. Hlavaty opined that the negotiation and drafting of a collective bargaining agreement is the practice of law. Hlavaty Dep. at 15-16. Mistakes can result in labor strife, strikes, and financial harm to the client. *Id.* Negotiation and drafting requires knowledge of the NLRA, the regulations issued under such Act and the application of relevant law to the facts at hand. *Id.* at 12-13, 17. As an example, Mr. Hlavaty explained that an unfair labor practice can be committed by the employer during the course of collective bargaining. If the union goes on strike as a result of such an act, then the strike is deemed an unfair labor practice strike not an economic strike. That

situation could have dire consequences for the employer as it would not have the right to permanently replace workers, only to temporarily replace such workers. *Id.* at 10-11.

20. The Respondents called Richard DeRose, Esq. as an expert witness. Mr. DeRose is a lawyer who has practiced labor law for more than 40 years. Mr. DeRose believes that the NLRA and the regulations issued thereunder permit a nonlawyer to negotiate and draft collective bargaining agreements. He concedes that much of what a nonlawyer does in the labor context would be considered the practice of law in another context. 12/2/05 Tr. at 294-295. Mr. DeRose testified that when he negotiates and drafts an agreement, he brings his judgment, experience and training as a lawyer. He would choose words that are in the best interest of his client. Sometimes even the placement of a comma can be important. *Id.* at 279-280.

21. The Respondents also called James Matheson as an expert. Mr. Matheson is not an attorney. He has spent more than 50 years in labor and labor relations. He has worked as both a union steward and union business agent. Matheson Dep. at 5-11. Mr. Matheson has also worked as an in-house labor relations representative for an employer and as an independent labor relations consultant to employers. *Id.* at 32-35, 37. When he negotiated on behalf of unions, management did not typically have a lawyer representing it. See *Id.* at 47-48, 91-94. Mr. Matheson testified that one of the reasons companies hired nonlawyer labor relations consultants was to save money. *Id.* at 73-74.

III. CONCLUSIONS OF LAW

1. Relator must prove by a preponderance of the evidence that Respondents engaged in the unauthorized practice of law. Gov.Bar R. VII(7)(E). 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.

2. The unauthorized practice of law has been defined for Ohio as "the rendering of legal services for another by any person not admitted to practice in Ohio. . . ." Gov.Bar R. VII(2)(A). The Supreme Court has noted that in practicing law, a licensed attorney generally engages in three principal types of professional activity:

> These types are legal advice and instructions to clients to inform them of their rights and obligations; preparation for clients of documents and papers requiring knowledge of legal principles which is not possessed by an ordinary laymen (sic); and appearance for clients before public tribunals . . . .

Sharon Village Ltd. v. Licking County Bd. of Revision, et al. (1997), 78 Ohio St.3d 479, 481, 678 N.E.2d 932.

3. In *Land Title Abstract & Trust Co. v. Dworken, et al.* (1934), 129 Ohio St. 23, 28, 193 N.E. 650, the Supreme Court of Ohio noted that the practice of law includes "the preparation of legal instruments and contracts by which legal rights are secured . . . ." In *Geauga County Bar Assn. v. Canfield* (2001), 92 Ohio St.3d 15, 748 N.E.2d 23, the Supreme Court held that an individual who had resigned his office as an attorney, engaged in the unauthorized practice of law when he prepared a contract for another.

4. A collective bargaining agreement states the rights and duties of the parties. It is a type of contract. See, *Timken Co. v. Local Union No. 1123, United Steelworkers of America* (1973), 482 F.2d 1012, 1015.

5. In *Cleveland Bar Assn. v. Misch* (1998), 82 Ohio St.3d 256, 258-260, 695 N.E.2d 244, the Court held that an out-of-state attorney not admitted in Ohio committed the unauthorized practice of law by, among other things, negotiating on behalf of a company with labor unions. Similarly, in *Cleveland Bar Assn. v. Henley* (2002), 95 Ohio St.3d 91, 766 N.E.2d 130, the Court found that a nonlawyer had committed the unauthorized practice of law by attempting to negotiate the settlement of discrimination claims with an employer.

6. In *West Coast Industrial Relations Association, Inc. v. Superior Beverage Group* (1998), 127 Ohio App.3d 233, 712 N.E.2d 770, the court held that labor negotiations by an attorney not licensed to practice law in the State of Ohio did not constitute the unauthorized practice of law. That case involved an action to collect damages for services rendered where the unauthorized practice of law was raised as a defense. The appellate court found that there was competent, credible evidence to uphold the trial court's ruling. 127 Ohio App.3d at 240-241.

7. While not controlling in Ohio, the views of other states may be informative. In *Auerbacher v. Wood* (1948), 142 N.J. Eq. 484, 59 A.2d 863, the court found that a labor relations consultant's use of knowledge of the law in his practice does not mean that the consultant is necessarily engaged in the unauthorized practice of law. The court noted: "Where the primary service is nonlegal, the purely incidental use of legal knowledge does not characterize the transaction as the wrongful practice of law." 142 N.J. Eq. at 486. Similarly courts in California and Iowa do not appear to regard collective bargaining as the practice of law. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998), 17 Cal.4th 119, 70 Cal. Rptr.2d 304, 949 P.2d 1

and *Committee on Professional Ethics and Conduct of the Iowa State Bar Assn. v. Mahoney* (1987), 402 N.W.2d 434, 436. By rule, the Supreme Court of the State of Washington has provided that whether or not it constitutes the practice of law, participation in labor negotiations is permitted. Wash. GR 24(b)(5)(2005).

8. Recently the Supreme Court of Ohio held in *Cleveland Bar Assn. v. CompManagement, Inc.* (2004), 104 Ohio St.3d 168, 818 N.E.2d 1181 that nonlawyers may perform certain activities in a representative capacity before the Industrial Commission and the Bureau of Workers' Compensation. In that case the Court noted that it has the exclusive power to regulate, control and define the practice of law in Ohio and therefore determine the qualifications necessary to engage in the practice of law before the Industrial Commission. The Court explained that while it has the power to prohibit lay representation before an administrative agency, it is not always desirable to do so.

> 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.

104 Ohio St.3d at 176. The Court explained that not all representation requires the level of training and experience that only an attorney can provide. The Court looked to public interest factors in determining whether, and to the extent, nonlawyers should be able to practice before the Industrial Commission. Similarly in *Henize v. Giles* (1986), 22 Ohio St.3d 213, 490 N.E.2d 585, the Court authorized lay representation at unemployment compensation hearings even though that activity could be viewed as the practice of law. In both *CompManagement* and *Henize*, the Court relied upon rules by administrative

agencies to define the extent to which nonlawyers were permitted to engage in representative activities.

9. By negotiating the settlement of election issues, the Respondent Corporation and Respondent Bernard F. Burdzinski II engaged in the unauthorized practice of law.

10. Respondents concede that Bernard F. Burdzinski II has acted as the lead negotiator in collective bargaining. By doing so, Mr. Burdzinski, and therefore the Respondent Corporation, have violated long-standing principles of Ohio law on the unauthorized practice of law.[2]

11. Respondents stipulate that they have drafted collective bargaining agreements. Indeed Exhibit 11 is a proposed collective bargaining agreement drafted by Mr. Burdzinski. By drafting contractual agreements on behalf of others, Respondents have engaged in the unauthorized practice of law.

12. Relator has not proven by a preponderance of evidence that Respondents have engaged in the unauthorized practice of law by providing legal advice. The evidence of record indicates that the only legal advice provided by Respondents is of the type contained in NLRB publications designed for lay consumption or at least that which is commonly known in the industry. There was no evidence contradicting Mr. Burdzinski's testimony that for more complicated matters he recommends that an attorney be involved.

13. The Supreme Court considered public interest factors in deciding *CompManagement.* The Board must therefore take note of the long-standing practice of

[2] The only evidence in the record is that Mrs. Brinkman-Burdzinski never acted as lead negotiator.

nonlawyer labor consultants assisting employers in election issues and in collective bargaining. The perception that such consultants are less expensive than lawyers must also be considered. The Board must be cognizant that while Respondents have been in business for almost 20 years, no evidence was presented of a customer complaint.

14. On the other hand, the Board must be mindful of Ohio's long-standing policy of prohibiting the rendering of legal services for another by any person not admitted to practice law in Ohio. Gov.Bar R. VII(2)(A). Mistakes in collective bargaining and labor elections can have dire legal consequences for the client and Respondents do not carry malpractice insurance. Ultimately, however, the biggest distinction between this situation and the situation in *CompManagement* and *Henize* is that no administrative agency has defined the activities which can and cannot be performed by nonlawyer labor relations consultants.

Preemption

15. The power of the United States to legislate in the area of labor relations arises from the commerce clause of the United States Constitution and is long established. Federal power to preempt state law is derived from the supremacy clause of Article VI. Congress, however, has never exercised authority to occupy the entire field in the area of labor relations. *Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 208.

16. In *Gracia v. Volvo Europa Truck, N.V.* (7th Cir. 1997), 112 F.3d 291, the court noted:

> Federal preemption of state law can occur in three circumstances: (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption);

> (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption).

112 F.3d at 294.

17. Here Respondents contend that the State's ability to restrict Respondents' collective bargaining and election campaign activities is preempted under two principles initially articulated by the United States Supreme Court in *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236 and *Machinists v. Wisconsin Employment Relations Comm'n,* (1976), 427 U.S. 132.

18. The Court in *Garmon* focused on:

> [T]he potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes.

359 U.S. at 242. The *Garmon* preemption "is intended to preclude state interference with the National Labor Relations Board's interpretive and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit v. City of Los Angeles* (1986), 475 U.S. 608, 613.

19. Under *Garmon*, state regulation of conduct that is protected by § 7 of the NLRA or prohibited by § 8 of the NLRA or arguably protected or prohibited by those sections, is preempted. The Court recognized that, with due regard to a federal system, Congress did not withdraw "from the States [the] power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. [Citation omitted.] Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," the Court could not infer that Congress had intended to deprive the States of the power to act. 359 U.S. at 243-244.

20. The doctrine in *Machinists* prohibits state and municipal regulation of conduct that has been left to the "free play of economic forces" 427 U.S. at 140, quoting *NLRB v. Nash-Finch Co.* (1971), 404 U.S. 138, 144. It represents Congressional balancing between the uncontrolled power of management and labor to further their respective interests. *Machinists,* 427 U.S. at 146.

21. Federal law authorizes nonlawyers to represent parties in hearings before the NLRB. The Administrative Procedure Act provides in part:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative . . . . This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

5 U.S.C. § 555(b). In furtherance of this provision, the NLRB has provided by rule:

> Any party shall have the right to appear at such hearing in person, by counsel, or by other representative to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence . . . .

29 CFR § 102.38. While Respondents do in fact represent parties before the NLRB, Relator does not contend that such actions constitute the unauthorized practice of law.

22. There does not appear to be any federal statute or rule similar to the NLRB hearing rule regarding services to employers consisting of negotiating and drafting collective bargaining agreements or in negotiating settlements in connection with union elections.

23. Respondents argue that a state's ability to limit the provision of legal services to qualified attorneys in connection with representational elections and collective bargaining is preempted by the Labor Management Reporting and Disclosure

Act ("LMRDA"). That Act defines Labor Relations Consultants as "any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities." 29 U.S.C. § 402(m).[3] The legislative history of the LMRDA suggests that the phrase Labor Relations Consultant includes both lawyers and nonlawyers. See, *e.g.*, *Senate Report No.* 86-187, 1959 U.S.C.C.A.N. 2318, 2356, 2386 and 2406.

24. The LMRDA was enacted in 1959 with a stated purpose of eliminating a Congressional finding of corruption and unethical conduct by labor organizations, employers and labor relations consultants. 29 U.S.C. §§ 401(b) and (c).

25. By defining Labor Relations Consultant in the LMRDA, Congress does not appear to have been granting authorization to engage in certain acts, but to have been defining a group for purposes of setting reporting requirements and standards of conduct. Section 202 of the Act requires every officer and employee of a labor organization to file a report with the Secretary of Labor disclosing, among other things, every payment he or she has received from a Labor Relations Consultant. 29 U.S.C. § 432(a)(6). Section 203(a)(4) of the Act requires employers who enter into an agreement with a Labor Relations Consultant to engage in persuader activities to disclose such agreement in a report filed with the Secretary. 29 U.S.C. § 433(a)(4).[4] Finally,

[3] Similarly the regulations published by the Department of Labor define a Labor Relations Consultant as "any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities." 29 CFR § 401.13.

[4] Section 203(b) requires "every person" entering into an agreement with an employer to engage in persuader activities to also file a report with the Secretary. 29 U.S.C. § 433(b).

§ 504(a) prohibits certain undesirable persons from, among other things, serving as Labor Relations Consultants. 29 U.S.C. § 504(a).

26. Respondents contend that their conduct is at least arguably protected by § 8 of the NLRA and therefore state regulation of such activities is preempted under the *Garmon* doctrine. Respondents note that it is an unfair labor practice under § 8 for a union to refuse to negotiate with the employer's designated representative. See 29 U.S.C. § 158(b)(1)(B). Moreover, Respondents note, policing of unfair labor practices during election campaigns is within the province of the NLRB. 29 U.S.C. § 160(a). Here the State's interest is in protecting the health, safety and welfare of its citizens from the unauthorized practice of law. That interest is wholly dissimilar from a union's obligation to recognize an employer's representative and from the NLRB's interest in addressing unfair labor practices.

27. Respondents argue that the State is preempted from regulating Respondents' conduct because the entire collective bargaining process is governed by a comprehensive federal regulatory scheme. Respondents' argument, however, is clearly inconsistent with numerous cases in which state regulation has been permitted. Indeed the *Garmon* decision itself recognized the right of a state to regulate where the activity was merely a peripheral concern of the Labor Management Relations Act or where it involved interests so deeply rooted in local feeling that the Court could not infer Congressional intent to deprive the states of the power to act. 359 U.S. at 243-244. For example, in *New York Telephone Co. v. New York State Department of Labor* (1979), 440 U.S. 519, 99 S. Ct. 1328, 59 L. Ed.2d 553, the U.S. Supreme Court found no preemption

of a state provision providing unemployment compensation benefits to workers who went on strike in connection with collective bargaining.

28. The Panel concludes that the authority of the Supreme Court of Ohio to regulate the unauthorized practice of law found in this matter has not been preempted by federal law.

Civil Penalties

29. Gov.Bar R. VII(8)(B) provides that the Board may recommend civil penalties of up to $10,000 per offense. Relator has requested that each Respondent be ordered to pay civil penalties of $30,000 to $40,000. In considering potential penalties, the Board is required to consider the following factors:

> (1) The degree of cooperation provided by the respondent in the investigation;
>
> (2) The number of occasions that unauthorized practice of law was committed;
>
> (3) The flagrancy of the violation;
>
> (4) Harm to third parties arising from the offense;
>
> (5) Any other relevant factors.

30. Each case of the unauthorized practice of law involves unique facts and circumstances.

31. Respondents have been in business since 1988. Evidence indicates that since that date they have negotiated and settled election issues on at least 40 occasions. Mr. Burdzinski estimated that since 1998, he was involved in negotiating and settling election issues on eight to ten occasions.

32. The parties have stipulated that Respondents have drafted labor agreements. Mr. Burdzinski has served as lead negotiator in collective bargaining. Mr. Burdzinski believes that he has negotiated four or five labor agreements since 1988 and an example of a labor agreement drafted by Mr. Burdzinski was presented as an exhibit.

33. Although Respondents have been in business for almost 20 years, there was no evidence presented that any third person has been harmed by their conduct.

34. The Respondents have zealously defended themselves against Relator's charges. Nonetheless, Respondents appear to have reasonably cooperated in the investigation. Respondents provided documents requested by Relator in discovery. Mr. Burdzinski testified at deposition and the hearing.

35. Respondents continued to engage in conduct of the type under review even after the Complaint in this matter was filed. Nonetheless, Respondents appear to have been proceeding from a good faith belief that their conduct did not constitute the unauthorized practice of law. For many years nonlawyers have negotiated on behalf of employers. Those nonlawyers have included labor relations consultants who were not employed by the employer. Indeed there seems to be a perception in some circles that federal law allows nonlawyers to negotiate and draft collective bargaining agreements and to represent employers in union election matters.

36. Weighing the factors set forth in Gov.Bar R. VII(8)(B), the Panel concludes that a civil penalty is not warranted in this matter.

IV. PANEL RECOMMENDATIONS

The Panel recommends that the Supreme Court of Ohio issue an Order finding that Respondents Bernard F. Burdzinski II, Connie S. Brinkman-Burdzinski and the

Respondent Corporation have engaged in the unauthorized practice of law by drafting collective bargaining agreements on behalf of others; Respondent Bernard F. Burdzinski II and the Respondent Corporation have engaged in the unauthorized practice of law by acting as lead negotiator in collective bargaining; and Respondent Bernard F. Burdzinski II and the Respondent Corporation have engaged in the unauthorized practice of law by negotiating the settlement of election issues.

The Panel further recommends that the Supreme Court of Ohio issue a further Order enjoining Respondents from engaging in the State of Ohio in the same or similar acts to those acts described above as constituting the unauthorized practice of law and from engaging in any other act in the State of Ohio constituting the practice of law unless and until Respondents Bernard F. Burdzinski II and Connie Brinkman-Burdzinski secure from the Supreme Court of Ohio, or from the highest court of some state, territory or other jurisdictional entity of the United States, a license to practice law and such Respondents register in accordance with the Rules for the Government of the Bar of Ohio.

The Panel further recommends that the Supreme Court of Ohio require the Respondents to reimburse the costs and expenses incurred by the Board and the Relator in this matter.

V. BOARD RECOMMENDATIONS

Pursuant to Gov.Bar R. VII(7)(F), the Board on the Unauthorized Practice of Law of the Supreme Court of Ohio considered this matter on April 19, 2006. The Board adopted the findings, conclusion of law and recommendations of the Panel.

Specifically, and as provided herein, the Board adopts the Panel's recommendation that the Supreme Court issue an Order finding that:

(a) Respondents Bernard F. Burdzinski II, Connie S. Brinkman-Burdzinski and the Respondent Corporation have engaged in the unauthorized practice of law by drafting collective bargaining agreements on behalf of others;

(b) Respondent Bernard F. Burdzinski II and the Respondent Corporation have engaged in the unauthorized practice of law by acting as a lead negotiator in collective bargaining; and

(c) Respondent Bernard F. Burdzinski II and the Respondent Corporation have engaged in the unauthorized practice of law by negotiating the settlement of election issues.

The Board further recommends that the Supreme Court issue an Order enjoining Respondents from engaging in conduct in the same or similar acts as those described herein as the unauthorized practice of law and from engaging in any other act in the State of Ohio constituting the practice of law unless and until Respondents Bernard F. Burdzinski II and Connie Brinkman-Burdzinski secure from the Supreme Court of Ohio, or from the highest court of some state, territory or other jurisdictional entity of the United States, a license to practice law and such Respondents register in accordance with the Rules for the Government of the Bar of Ohio.

The Board does not recommend the imposition of civil penalties under Gov.Bar R. VII(8)(B).

The Board recommends that the costs of these proceedings incurred by the Board and the Relator be taxed to the Respondents jointly and severally in any Order entered, so that execution may issue.

STATEMENT OF COSTS

Attached as Exhibit A is a statement of costs and expenses incurred to date by the Board and Relator in this matter.

James L. Ervin, Jr., Chair of the Board
BOARD ON THE UNAUTHORIZED PRACTICE OF LAW

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

Exhibit "A"

STATEMENT OF COSTS

Ohio State Bar Association v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc. et. al.,
Case No. UPL 04-05

Reimbursement to the Ohio State Bar Association	$4,217.63
Fincun- Mancini 12/1 – 12/2 Hearing and Transcript	$1,845.90
TOTAL	**$6,063.53**

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Final Report was served by certified mail upon the following this 28th day of April, 2006: Ian Robinson, Esq., Fitch, Kendall, Cecil, Robinson & Barry, Co., LPA, 600 East State Street, Salem, OH 44460; Eugene P. Whetzel, Esq., Ohio State Bar Association, P.O. Box 16562, Columbus OH 43216; Thomas P. Whelley II, Esq. and Rachael L. Rodman, Esq., Chernesky, Heyman & Kress, PLL, 10 Courthouse Plaza S.W., Ste. 1100, Dayton OH 45402, Burdzinski, Brinkman, Czarzasty & Landwehr, Inc., P.O. Box 41098, Dayton, OH 45441-0098; Bernard F. Burdzinski, II, P.O. Box 41098, Dayton, OH 45441-0098; Connie S. Brinkman Burdzinski, P.O. Box 41098, Dayton, OH 45441-0098; Dayton Bar Association, 109 N. Main St., Suite 600, Dayton, OH 45402; Ohio State Bar Association, P.O. Box 16562, Columbus, OH 43216; Office of Disciplinary Counsel, 250 Civic Center Drive, Ste. 325, Columbus OH 43215.

D. Allan Asbury, Secretary of the Board