

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

OHIO STATE BAR ASSOCIATION, :

10-0796

Relator, :

FILED
MAY 05 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Case No. UPL 09-03

v. :

FINAL REPORT

LIENGUARD, INC., ET AL., :

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

Respondents. :

I. PROCEDURAL BACKGROUND

This matter was initiated before the Board on the Unauthorized Practice of Law (“Board”) on or about March 31, 2009, when Relator, the Ohio State Bar Association, filed a Complaint alleging the unauthorized practice of law against Respondents Lienguard, Inc., and Allan R. Popper. The Complaint alleges that Respondents engaged in the unauthorized practice of law by preparing a mechanic’s lien and claims letter in a legal dispute involving payment for construction work in Montgomery County, Ohio. The Complaint also states that Respondents operate an online commercial lien filing service and have been filing mechanic’s liens in Ohio for twenty-five years.

On May 21, 2009, the Board Secretary assigned this matter to a hearing panel consisting of Commissioners Mark J. Huller (Chair), C. Lynne Day, and Frank R. DeSantis. Rather than

file an answer to the Complaint, Respondents joined Relator in filing a Motion for Approval of Consent Decree and Proposed Consent Decree on October 16, 2009.

The Panel considered the parties' filings via teleconference on November 9, 2009, and found that the parties' proposed resolution failed to contain sufficient discussion of the civil penalty factors in Gov.Bar R. VII(8)(B) and UPL Reg. 400(F). The Panel also determined that the proposed resolution did not clearly identify the services Respondents agreed to stop providing in Ohio.

In a letter dated November 16, 2009, the Panel asked the parties to file a revised consent decree and a memorandum in support that discusses civil penalties. On December 15, 2009, the parties filed a Motion for Approval of Revised Proposed Consent Decree, Memorandum in Support of Motion to Approve Revised Proposed Consent Decree, and Revised Proposed Consent Decree.

The Panel considered the parties' December 15, 2009, filings via teleconference on January 11, 2010, and agreed to recommend acceptance of the Revised Proposed Consent Decree to the Board. At an April 21, 2010, meeting of the Board, the Panel presented its written report in this matter in accordance with Gov.Bar R. VII(5b)(D)(1). The Panel Report recommended acceptance of the Revised Proposed Consent Decree. After review of the Panel Report and deliberation, the Board voted to recommend that the Supreme Court of Ohio approve the December 15, 2009, Revised Proposed Consent Decree. As required by Gov.Bar R. VII (5b)(D)(1), this Report will set forth the Board's reasons for recommending acceptance of the Revised Proposed Consent Decree.

II. FINDINGS OF FACT

A. Respondents admit the allegations contained in the Complaint in this matter.

(Revised Proposed Consent Decree ¶ 13.)

B. Relator is a bar association whose members include attorneys admitted to the practice of law in Ohio and who practice throughout Ohio. Relator is authorized to pursue this action against Respondents under Gov.Bar R. VII. (Compl. ¶ 1.)

C. Respondent Lienguard, Inc., is a corporation believed to have its principal place of business in Illinois. (Compl. ¶ 4.)

D. Respondent Allan R. Popper is an individual believed to be an employee of Respondent Lienguard and a resident of Illinois. (Compl. ¶ 5.)

E. On or about February 27, 2006, Respondents prepared and filed an Affidavit for Mechanic's Lien on behalf of Plibrico Sales & Service, Inc. The Affidavit is signed by "Allan R. Popper, Agent for Plibrico Sales & Service Inc." (October 16, 2009, Proposed Consent Decree Ex. 2.)

F. On or about October 16, 2006, Respondents prepared and filed an Affidavit for Mechanic's Lien on behalf of Perma Pipe, Inc. The Affidavit is signed by "Allan R. Popper of Lienguard, Inc., Agent for Perma Pipe Inc." (Compl. ¶ 6; Compl. Ex. A.)

G. On or about December 1, 2006, Respondents prepared a letter to Ohio Farmers Insurance Company, stating that "we represent Perma Pipe, Inc. in their claim," and enclosed a copy of the mechanic's lien "previously filed on our client's behalf in the office of the Montgomery County Recorder's Office." In the letter, Respondents state they are providing a

“formal claim against the bond” and request “acknowledgement of our client’s claim.” (Compl. ¶ 7; Compl. Ex. B.)

H. On May 22, 2008, Respondents prepared and mailed a letter to Michael P. Harvey, Esq., stating they “have filed Affidavits for Mechanic’s Liens for 25 years in Ohio strictly adhering to the Ohio code.” (Compl. ¶ 8; Compl. Ex. C.)

I. Respondent Lienguard operates a website at www.lienguardinc.com. At all times relevant in this case, this website stated the following:

1. “Lienguard, Inc. is a commercial lien filing service...we will file the documents necessary to protect our client’s claim and after filing all documentation is returned to the client.”

2. “The company was incorporated in 1984. Nationally, Lienguard files commercial mechanics liens, notices, public and federal bond claims as well as municipal liens.”

3. “All work is done from one office...and no forwarding to local counsel occurs. The staff is fully experienced in the construction industry which offers the highest quality of service to our clients.”

4. “Lienguard prides itself on speed of handling, personal attention to clients, and compliance with all current statutes relative to liens and bonds. Legislative changes in all states are monitored for pending as well as enacted laws.”

(Compl. Ex. D.)

J. Respondent Lienguard’s website also defines legal terms, mentions a “Lienguard Reference Booklet” on state statutes, and lists instructions regarding “time requirements.” Such

instructions include the statements that “many states require a preliminary notice to owner/contractor” and “[n]ote: The state law which applies is always the state where the real estate is located.” The website also gives instructions regarding “how do I prepare a lien.” (Compl. Ex. D.)

K. Respondent Lienguard’s website further lists “Services and Fees,” which include the following categories: Mechanic’s Lien, Demand Notice, Preliminary Notice, Research Where Required, Recorded Notice, Miller Act Claim – Federal, Preliminary Bond Notice, Bond Claim, Bond Claim with Research, Lien on Funds – Public (Municipal), Release, and Additional Reference Books. (Compl. Ex. D.)

L. Respondents are not, and have never been, attorneys admitted to practice, granted active status, or certified to practice law in Ohio pursuant to Gov.Bar R. I, II, VI, IX, or XI. (Compl. ¶ 15.)

III. 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 & Savings 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, at ¶ 16; *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, at ¶ 16.

B. Pursuant to Gov.Bar R. VII(2)(A), the unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice, granted active status, or certified to practice law in Ohio pursuant to Gov.Bar R. I, II, VI, IX, or XI.

C. “Legal services” include the “preparation of legal documents and instruments upon which legal rights are secured and advanced.” *Kocak* at ¶ 17.

D. The preparation of affidavits for mechanic’s liens by nonattorneys constitutes the unauthorized practice of law. *Disciplinary Counsel v. Brown*, 121 Ohio St.3d 423, 2009-Ohio-1152, at ¶ 16.

E. “One who purports to negotiate legal claims on behalf of another and advises persons of their legal rights...engages in the practice of law.” *Id.*, quoting *Cleveland Bar Assn. v. Henley* (2002), 95 Ohio St.3d 91, 92, 766 N.E.2d 130. See, also, *Cincinnati Bar Assn. v. Foreclosure Solutions LLC*, 123 Ohio St.3d 107, 2009-Ohio-4174.

F. With limited exception, a corporation may not give legal advice to another, directly or indirectly, through its employees or attorney employees. *Judd* at 88, 12 N.E.2d at 291-2.

G. “No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which the person is not a party concerned... unless the person has been admitted to the bar by order of the Supreme Court in compliance with its prescribed and published rules.” R.C. 4705.01.

H. Respondents engaged in the unauthorized practice of law by preparing and filing affidavits for mechanic’s liens for Perma Pipe, Inc., and Plibrico Sales Service, Inc.

I. Respondents engaged in the unauthorized practice of law by negotiating a legal claim on behalf of Perma Pipe, Inc., with Ohio Farmers Insurance Company.

IV. PRINCIPAL TERMS OF CONSENT DECREE

A. Respondents are permanently enjoined from preparing, signing, filing, and pursuing affidavits of mechanic's liens in Ohio and from otherwise engaging in the unauthorized practice of law.

B. Respondents shall not be subject to the civil penalties authorized by Gov.Bar R. VII(8)(B).

C. Because Relator did not incur costs in this matter, no assessment of costs is made pursuant to Gov.Bar R. VII(8)(A).

V. ANALYSIS

A. Review of Revised Proposed Consent Decree Using Factors in Gov.Bar R. VII (5b)(C)

Pursuant to Gov.Bar R. VII(5b)(D), both the hearing panel and the Board are required to evaluate the consent decree using the factors set forth in Gov.Bar R. VII(5b)(C). In this instance, the Panel made the following findings:

1. The parties' proposed resolution is submitted in the form of a consent decree;
2. Respondents admit all of the allegations of the unauthorized practice of law as stated in the Complaint;
3. Respondents admit one additional violation of the unauthorized practice of law not stated in the Complaint (see Findings of Fact ¶ E);

4. The public is sufficiently protected from future harm as Respondents have already ceased preparing, signing, filing, and pursuing mechanic's liens in Ohio, and are permanently enjoined from engaging in this conduct in the future;

5. Respondents have agreed to cease and desist all activities that constitute the unauthorized practice of law;

6. The Revised Proposed Consent Decree resolves material allegations of the unauthorized practice of law as it contains detailed admissions by Respondents;

7. As Respondents have agreed to cease the type of activities detailed in the Complaint in Ohio, the Revised Proposed Consent Decree is consistent with public policy and protects consumers;

8. The parties' collaborative efforts to resolve this matter via a consent decree resulted in a cessation of Respondents' unauthorized practice of law and allowed Relator to conserve prosecutorial resources without jeopardizing public protection. This collaboration furthers the purposes of Gov.Bar. R. VII, prevents protracted litigation, and is consistent with the Supreme Court's approach to case resolution set forth in S.Ct.Prac.R. XIV(6).

Based upon the foregoing analysis, the Panel found that the Revised Proposed Consent Decree complies with Gov.Bar R. VII(5b) and recommended that it be accepted by the Board.

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 general factors set forth in Gov.Bar R. VII(8)(B) and UPL Reg. 400(F). UPL Reg. 400(F) also

includes aggravating factors the Board may use to justify a more severe penalty, and mitigating factors the Board may use to justify no civil penalty or a less severe penalty. The Panel conducted the initial analysis of the civil penalty factors as set forth below.

1. General Civil Penalty Factors

Applying the general civil penalty factors listed in Gov.Bar R. VII (8)(B)(1)-(5) and UPL Reg. 400(F)(1) and (2) to the present case, the Panel found:

- a. Respondents cooperated with Relator's investigation in this matter;
- b. Although there is an indication that Respondents have been in the business of preparing mechanic's liens for the past twenty-five years, the Panel in this matter could only consider the three specific unauthorized practice of law violations actually detailed in the record;
- c. Respondents apparently believed their business practices did not constitute the practice of law in Ohio;
- d. Relator has not presented any examples of specific harm to third parties;
- e. Relator has not sought the imposition of a civil penalty;
- f. Because Respondents have ceased the type of business activities in Ohio that are detailed in the Complaint, and there is no evidence that Respondents have resumed these activities, pecuniary punishment contrary to Relator's recommendation is not warranted and would not further the purposes of Gov.Bar R. VII.

2. Aggravating Civil Penalty Factors

Applying the aggravating factors of UPL Reg. 400(F)(3)(a)-(g), which are the basis for a recommendation of a more severe penalty, the Panel found:

- a. Respondents have not been previously ordered to cease engaging in the unauthorized practice of law;
- b. The record fails to indicate that Respondents were informed prior to preparing and filing mechanic's liens in Ohio that this conduct constitutes the unauthorized practice of law;
- c. Because Respondents prepared and filed mechanic's liens as part of a for-profit business, Respondents benefited from their unauthorized practice of law. However, the record fails to contain evidence of the extent of this benefit;
- d. Other than filing mechanic's liens, the record does not indicate that Respondents appeared before a court or tribunal;
- e. Respondents' unauthorized practice of law involved the preparation of legal instruments for filing with a court;
- f. Respondents have not held themselves out as being admitted to practice law in Ohio and the record does not demonstrate that any third parties mistakenly believed Respondents were so admitted.

3. Mitigating 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 Panel found:

- a. Respondents have ceased the conduct at issue;

- b. Respondents admit all of the allegations stated in the Complaint;
- c. Respondents admit their conduct constitutes the unauthorized practice of law;
- d. Respondents agree to the imposition of an injunction against future unauthorized practice of law;
- e. The record fails to contain any evidence of a dishonest motive by Respondents;
- f. Respondents have agreed to rectify their unauthorized practice of law by not preparing or filing any further mechanic's liens on behalf of Ohio consumers;
- g. Respondents have not had other penalties imposed for the conduct at issue.

4. Conclusion Regarding Civil Penalties

Upon evaluation of these findings, the Panel concluded that the mitigating civil penalty factors, which include Respondents' honest motive and cessation of the conduct at issue, the lack of evidence of harm, and the small number of documented occurrences, outweigh the aggravating civil penalty factors of a presumed financial benefit and Respondents' preparation of legal instruments. Accordingly, the Panel agreed with Relator that civil penalties are not warranted in this case. Because there are no costs associated with this case to date, the Revised Proposed Consent Decree does not assess costs to either party.

VI. PANEL RECOMMENDATION

As set forth in the "Analysis" section of this Final Report, the Panel recommended that the Board accept the parties' December 15, 2009, Revised Proposed Consent Decree.

VII. BOARD RECOMMENDATION

The Board formally considered this matter on April 21, 2010. By majority vote, the Board adopted the Panel's findings of fact and conclusions of law, consent decree and civil penalty analysis, and recommendation that the Revised Proposed Consent Decree be accepted and submitted to the Supreme Court for approval. Accordingly, the Board hereby recommends that the Court approve the December 15, 2009, Revised Proposed Consent Decree in the form submitted by the parties ("Exhibit A") and issue the appropriate order as specified in Gov.Bar R. VII(5b)(E)(2).

VIII. STATEMENT OF COSTS

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

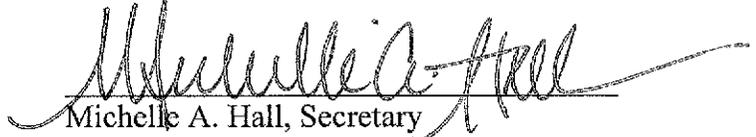
**FOR THE BOARD ON THE UNAUTHORIZED
PRACTICE OF LAW**



Kenneth A. Kraus, 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 5th day of May 2010: Allan R. Popper, 100 Jorie Blvd., Suite 270, Oak Brook, IL 60523; Lienguard, Inc., 100 Jorie Blvd., Suite 270, Oak Brook, IL 60523; Al A. Mokhtari, Plunkett Cooney, 300 East Broad St., Suite 590, Columbus, OH 43215; Eugene Whetzel, Ohio State Bar Association, 1700 Lake Shore Drive, Columbus, Ohio 43216; Office of Disciplinary Counsel, 250 Civic Center Drive, Ste. 325, Columbus, OH 43215.


Michelle A. Hall, Secretary
Board on the Unauthorized Practice of Law

The Supreme Court of Ohio

BEFORE THE BOARD ON THE UNAUTHORIZED PRACTICE OF LAW

FILED
BOARD ON THE
LAW
DEC 15 2009
UNAUTHORIZED
PRACTICE OF LAW

OHIO STATE BAR ASSOCIATION

Relator

vs.

LIENGUARD, INC., ET AL.

Respondents.

Case No. UPL 09-03

REVISED PROPOSED
CONSENT DECREE

Pursuant to Rule VII, Section 5b, Supreme Court Rules for the Government of the Bar of Ohio, Relator Ohio State Bar Association (“Relator”) and Respondents Lienguard, Inc. and Allan R. Popper (“Respondents”) request that the following Revised Proposed Consent Decree be approved by this Board and the Supreme Court of Ohio:

1. 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).
2. With limited exception, a corporation may not give legal advice to another, directly or indirectly, through its employees or attorney employees. *Judd v. City Trust & Savings Bank* (1937), 133 Ohio St. 81, 88.
3. The practice of law encompasses the preparation of legal documents and instruments upon which legal rights are secured and advanced. *Lorain County Bar Association v. Kocak* (2009), 121 Ohio St.3d 396, 399.
4. The practice of law is not limited to the conduct of cases in court, but embraces the preparation of pleadings and other papers incident to actions, the management of such actions, and in general all advice to clients and all action taken for them in

matters connected with the law. *Cincinnati Bar Association v. Foreclosure Solutions, LLC* (2009), 123 Ohio St.3d 107, 110.

5. Nonlawyers engage in the unauthorized practice of law when attempting to represent others' legal interests and advise others of their legal rights during settlement negotiations. *Id.*, at 111.
6. The unauthorized practice of law also occurs when a non-attorney acts as an intermediary to advise, counsel, or negotiate on behalf of an individual or business in an attempt to resolve a collection claim between debtors and creditors. *Id.*
7. Lay persons cannot insulate themselves from responsibility for engaging in the unauthorized practice of law by using powers of attorney executed by customers or by simply informing customers that the layperson is not an attorney and is, therefore, incapable of giving legal advice. *Id.*
8. Thus, a general power of attorney does not grant authority to prepare and file papers in court on another's behalf. *Lorain County Bar Association v. Kocak* (2009), 121 Ohio St.3d 396, 399.
9. Ohio Revised Code § 4705.01 provides: "No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct or defend any action or proceeding in which the person is not a party concerned... unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules".
10. When a person not admitted to the Ohio bar attempts to represent another on the basis of a power of attorney, he is in violation of Ohio Revised Code § 4705.01. *Disciplinary Counsel v. Brown* (2009), 121 Ohio St.3d 423, 425.

11. Preparing an affidavit for mechanic's lien or in satisfaction of mechanic's lien is the unauthorized practice of law. *Id.*, at 426.
12. Thus, advising others of their legal rights and responsibilities is the practice of law, as is the preparation of legal pleadings and other legal papers without the supervision of an attorney licensed in Ohio. *Id.*, at 430-431.
13. Respondents admit the allegations of the Complaint filed in this matter.
14. Respondents further admit that they are not, and have never been, authorized to practice law in the State of Ohio.
15. In addition to the events described in the Complaint, Respondents also prepared and filed an Affidavit for Mechanic's Lien on behalf of Plibrico Sales & Service Inc. against Ohio Valley Aluminum Company, LLC. A true and accurate copy of that lien is attached as EXHIBIT 1.
16. By preparing, signing, filing and pursuing affidavits of mechanic's liens for third-parties in the State of Ohio, Respondents engaged in the unauthorized practice of law.
17. Respondents Lienguard, Inc. and Allan R. Popper, as well as their successors, affiliates, assigns, officers, members, agents, representatives and employees have ceased preparing, signing, filing and pursuing affidavits of mechanic's liens for third-parties in the State of Ohio, and are hereby permanently enjoined from preparing, signing, filing and pursuing affidavits of mechanic's liens in the State of Ohio and from otherwise engaging in the unauthorized practice of law in the State of Ohio.
18. The factors in Gov.Bar R. VII(8)(B) apply, as follows:
 - (a) Respondents have cooperated in the investigation of this matter;

- (b) Respondents engaged in the conduct under review on a number of occasions, but under the mistaken belief that such conduct did not constitute the unauthorized practice of law in Ohio;
- (c) Respondents conduct was flagrant, but again based upon the mistaken belief that such conduct did not constitute the unauthorized practice of law in Ohio;
- and
- (d) Third parties may or may not have suffered harm from such conduct, to the extent that third parties have hired counsel to negotiate or defend against such mechanic's liens.
19. Other relevant factors are set forth in UPL Reg. 400 and Gov.Bar R. VII(8)(B), which allow for consideration of aggravation and mitigating factors. An analysis of the application of the mitigating and aggravating factors is set forth in the Memorandum in Support of the Motion for Approval of Revised Proposed Consent Decree, which is incorporated as if specifically rewritten herein.
20. Based upon a balancing of the aggravating and mitigating factors, the parties agree that a civil penalty should not be imposed.
21. There are no costs incurred by the parties to this action and, therefore, costs shall not be assessed against either party.

RELATOR, OHIO STATE BAR ASSOCIATION



Al A. Mokhtari (0071796)
PLUNKETT COONEY
300 East Broad Street, Suite 590
Columbus, Ohio 43215
(614) 629-3003
Fax: (614) 629-3019
Email: amokhtari@plunkettcooney.com

and

Eugene Whetzel (OH: 0071796)

Eugene Whetzel (0013216)
Ohio State Bar Association
1700 Lake Shore Drive
P.O. Box 16562
Columbus, Ohio 43216-6562
(614) 487-2050
Fax: (614) 485-3191

Counsel for Relator, Ohio State Bar Association

James F. Liengard, President
Liengard, Inc.
100 Jorie Blvd, Suite 270
Oak Brook, Illinois 60523
Respondent, *Pro Se*

Allan R. Popper
Allan R. Popper
100 Jorie Blvd, Suite 270
Oak Brook, Illinois 60523
Respondent, *Pro Se*

**BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
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STATEMENT OF COSTS

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Case No. UPL 09-03

To date, no expenses have been incurred. In accordance with Gov.Bar R. VII(19)(F), there will be publication costs incurred once the Supreme Court enters its order in this case.