

# DOCTORS BEWARE

## *Unauthorized Practice of Law before the Ohio Industrial Commission*

### I. INTRODUCTION

Doctors rightfully invest a great deal of time in patient care. However, a doctor can go too far for his patient if he ventures outside the bounds of his profession. Ohio has strict rules against the unauthorized practice of law. Should a doctor run afoul of those rules, caring for his patient will suddenly become costly.

It is often the case that a doctor will need to testify as a witness on a patient's behalf before the Ohio Industrial Commission so that the worker may receive workers' compensation benefits. During the hearing, the doctor may be tempted to argue strenuously in support of his patient's claims. This article intends to outline just how far a doctor can go in advocating for his patient's rights. We first explore the unauthorized practice of law generally, what constitutes such an unauthorized practice before the Ohio Industrial Commission, and what the penalties exist for a violation.

### II. UNAUTHORIZED PRACTICE OF LAW

The Ohio Constitution gives the Ohio Supreme Court the full power to regulate, control and define the practice of law in Ohio.<sup>1</sup> Generally, the practice of law "includes conducting cases in court, preparing and filing legal pleadings and other papers, appearing in court cases, and managing actions and proceedings on behalf of clients before judges, whether before courts of administrative agencies."<sup>2</sup> These activities constitute a practice of law even before an administrative agency, such as the Industrial Commission of Ohio.<sup>3</sup>

The Ohio Supreme Court has recognized that nonlawyers play a crucial role in workers' compensation hearings.<sup>4</sup> Doctors, union representatives and company employees play a large part in the thousands of hearings each year.<sup>5</sup> With the nonlawyer's role in mind, the Supreme Court has wisely granted some flexibility in the rules, allowing laypeople, doctors included, to do more before the Industrial Commission on behalf of the workers.

### III. WHAT CONSTITUTES AN UNAUTHORIZED PRACTICE OF LAW BEFORE THE INDUSTRIAL COMMISSION

The Supreme Court has held that nonlawyers who act in a representative capacity before the Industrial Commission "do not engage in the unauthorized practice of law as long as their conduct conforms to the standards in Industrial Commission Resolution No. R04-1-01."<sup>6</sup> The first part of the resolution clearly delineates what a lay representative may do.<sup>7</sup> This includes assistance in investigations, help in filing the claims, recording and reporting actions taken at hearings, completing certain records, filing protests and advising the worker to seek legal representation.<sup>8</sup>

More importantly, the resolution defines seven items that a lay representative specifically cannot perform before the commission:

1. *Examine or cross-examine the claimant or any witness, directly or indirectly;*
2. *Cite, file or interpret statutory or administrative provisions, administrative rulings or case law;*

3. *Make and give legal interpretations with respect to testimony, affidavits, medical evidence in the form of reports or testimony, or file any brief, memorandum, reconsideration or other pleading beyond the forms actually provided by the Commission or the Bureau;*

4. *Comment upon or give opinions with respect to the evidence, credibility of witnesses, the nature and weight of the evidence, or the legal significance of the contents of the claims file;*

5. *Provide legal advice to injured workers and employers;*

6. *Give or render legal opinions, or cite case law or statutes to injured workers and employers before, at or after the time when claims are initially certified or denied certification as valid claims by the employer upon the presentation of claim applications by employees;*

7. *Provide stand-alone representation at hearing by charging a fee specifically associated with such hearing representation without providing other services."<sup>9</sup>*

In a recent disciplinary case before the Ohio Supreme Court, *Ohio State Bar Assn. v. Chiofalo*, the court found that the chiropractic doctor had violated the above rules. During a commission hearing, Chiofalo challenged the defense's medical expert, cited and argued legal terms from a legal text and made a closing statement on his patient's behalf.<sup>10</sup> Specifically, Chiofalo stated that the patient's claims "should be allowed as an 'aggravation of a pre-existing condition,' which is a legal term of art in Ohio's Workers' Compensation law."<sup>11</sup>



*Keith Karr* is the Founding principal of Karr & Sherman Co., LPA. Mr. Karr has written articles for the *Ohio Trial* magazine entitled "Is It Worth the Price of the Paper on Which It is Written? The Validity of Medical Providers Assignments" and "Chiropractors as Experts." Karr & Sherman Co. LPA is currently the general counsel for The Ohio State Chiropractic Association. Mr. Karr is a frequent lecturer for the National Business Institute and the Ohio Foundation of Chiropractic. The author would like to personally extend his gratitude to his Senior Law Clerk, **Jim Coutinho**, and attorney, lecturer and author **Rob Sherman**, for their valuable insight in assisting in this article.

**Karr & Sherman Co., L.P.A.**

[www.karrsherman.com](http://www.karrsherman.com)

614.478.6000

[keith@kslpa.com](mailto:keith@kslpa.com)

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The Supreme Court determined that the chiropractic doctor's actions were an unauthorized practice of law.<sup>12</sup> Had Chiofalo followed the outlined rules from the above resolution, he would have had no trouble. Rather, he found himself before the Ohio State Bar Association's Board on the Unauthorized Practice of Law, facing a possible civil penalty.

#### IV. RAMIFICATIONS

The Board on the Unauthorized Practice of Law has broad discretion as to the penalties it recommends the Supreme Court adopt for someone in violation of the rules. For example, in Chiofalo's case, the Board did not recommend any civil penalties due to the chiropractic doctor's cooperation during the investigation and his willingness to learn about and comply with the rules.<sup>13</sup> However, the rules do allow for harsh punishments for those who break them.

Section eight (8) of Gov. Bar R. Rule VII defines the potential penalties for the unauthorized practice of law.<sup>14</sup> The penalties can be levied directly onto the doctor or vicariously onto his employer.<sup>15</sup> At the most basic level, the Board can recommend that the doctor pay for the costs of the proceeding.<sup>16</sup> Civil penalties are also available in an amount up to ten thousand dollars per offense.<sup>17</sup> In choosing whether to impose a civil penalty, the Board will look to the degree of cooperation provided by the respondent in the investigation, the number of occasions that unauthorized practice of law was committed, the flagrancy of the violation, any harm to third parties arising from the offense, and any other factors it deems relevant.<sup>18</sup> Thus, a violation of the practice rules can be costly to a doctor who is not careful.

#### V. CONCLUSION

Doctors play an important role in ensuring the appropriate patient care for injured workers. The Courts recognize the doctor's role and do give the doctors significant leeway to help their patients through the Workers' Compensation process.

However, the doctors need to know their limits. The rules against unauthorized practice of law have been established for a reason: they ensure that clients are given the skilled representation they need from an attorney. Recognizing this, learning the limitations and understanding the doctor's role in this legal process, the physicians will keep out of legal penalties when they overstep their bounds. Doctors should not become an advocate, but instead, become an objective physician in the well-being care of their patients.

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<sup>1</sup> Section 2(B)(1)(g), Article IV, Ohio Constitution; *Cleveland Bas Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181.

<sup>2</sup> *Cleveland Bar Assn. v. Coats*, 98 Ohio St.3d 413, 2003-Ohio-1496, 786 N.E.2d 449.

<sup>3</sup> *Columbus Bas Assn v. Smith*, 100 Ohio St.3d 278, 2003-Ohio-5751, 798 N.E.2d 592.

<sup>4</sup> *CompManagement, supra* note 1 ("Nonlawyer representatives are today more than ever an integral part of Ohio's workers' compensation system").

<sup>5</sup> *Id.*

<sup>6</sup> *Ohio State Bar Assn. v. Chiofalo*, 112 Ohio St.3d 113, 2006-Ohio-6512; *See also CompManagement, supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *CompManagement, supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Chiofalo, supra* note 6.

<sup>11</sup> *Id.*, citing the affidavit of the Employer's Defense Counsel.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Gov. Bar R. Rule VII(8)

<sup>15</sup> *See Chiofalo, supra* note 6.

<sup>16</sup> Gov. Bar R. Rule VII(8)(A)

<sup>17</sup> Gov. Bar R. Rule VII(8)(B)

<sup>18</sup> *Id.*