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

DISCIPLINARY COUNSEL,	:
RELATOR,	: :
V.	: : 13-133
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KIMBERLEY BUKSTEIN,	: Case No. UPL 12-03
RESPONDENT.	
	FILED: FINAL REPORT
Á	UG 19 2013
	ERK OF COURT ME COURT OF OHIO

This matter came before the Board on the Unauthorized Practice of Law ("Board") at a regular meeting on July 11, 2013, on the Panel's report finding that Respondent Kimberley Bukstein had engaged in the unauthorized practice of law and a civil penalty of \$20,000 be imposed on her. Upon consideration, the Board adopted the Panel's report in full.

The Complaint, filed on May 21, 2012, by the Office of Disciplinary Counsel ("ODC" or "Relator"), alleging that respondent Kimberley Bukstein ("Respondent consists of two counts, each describing Respondent's actions in connection with domestic relations cases filed in Clark County and Delaware County. At the time of Respondent's conduct, the divorces in these matters were finalized. Relator seeks injunctive relief and civil penalties against Respondent. The Complaint alleges Respondent performed services including, but not limited to, providing legal advice; drafting a motion for a party

to sign *pro se*; and sending communications on behalf of others wherein she demands discovery and makes legal arguments. The record indicates Respondent's interference in the cases had a negative impact on the parties involved.

II. PROCEDURAL HISTORY

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Respondent was duly served with the Complaint in accordance with Gov. Bar R. VII, Sec. 6, and filed an Answer on June 11, 2011. Thereafter, this matter was assigned to a Hearing Panel consisting of Commissioners Brian L. Katz, Chair, Robert V. Morris, and F. Scott O'Donnell. Due to a scheduling conflict, Mr. O'Donnell was unable to attend the hearing, and alternate panel member John J. Chester, Jr. participated in lieu of Mr. O'Donnell.

A. MOTIONS TO DISMISS AND FILINGS BY RESPONDENT

There were several motions filed by Respondent, including a Motion to Drop UPL Charge Due to Mistaken Ident[it]y and Request for Special Remedy and an Amended Motion to Dismiss and Request for Accommodations, which were both denied by the Panel.

Respondent also filed a Request for Accommodations pursuant to the ADA, and a Request for Accommodations for the pre-hearing conference. The Panel ruled on Respondent's requests without considering whether the Respondent has a qualified disability under the ADA. For example, the Panel permitted the Respondent to allow other individuals to attend the pre-hearing conference, as the proceeding is public under Gov. Bar R. VII(18). However, other accommodations requests appeared to be unsubstantiated, argumentative statements rather than requests. Examples of Respondent's irregular requests under the ADA include the following: "That individuals processing the case refrain from engaging in and/or further engaging in 'misinformation' or 'spin' and/or any other color of law abuses" and "Individuals processing the case refrain from failure to act with reasonable diligence and refrain from acts prejudicial to the administration of justice." By entries, the Panel addressed the Respondent's filings in turn.

Respondent also filed a Motion to Continue the March 11, 2013, "hearing pending the disposition of a Discrimination Complaint Form that Respondent indicates she has submitted to the U.S. Department of Justice." Relator timely filed objections to the motion to continue. The Panel, citing it had not been notified by the U.S. Department of Justice that any investigation in this matter is pending or even been initiated, denied Respondent's motion to continue the hearing.

B. <u>THE HEARING</u>

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The final hearing in this matter was scheduled for March 11, 2013, at 10:00 a.m. The Panel received a fax the morning of March 11 from Jay Bukstein, Respondent's husband, notifying the Panel that Respondent was hospitalized and unable to attend the hearing. Due to Respondent's unavailability, the Panel continued the hearing to April 11, 2013, issuing a Final Amended Case Scheduling Order advising the parties that no further continuances would be granted. The Panel further ordered the parties that any motions in this matter must be submitted in writing and filed on or before March 28, 2013. The record indicates that Respondent received, by certified mail, the Final Amended Case Scheduling Order, which included the date, time, and location of the hearing.

On April 9th, at approximately 4:30 p.m., the Panel again received a fax from Respondent's husband requesting that the hearing be postponed due to "health problems"

and the "stress caused by these legal issues." Respondent also emailed the Panel later that evening (approximately 11:05 p.m.), attaching the request signed by her husband and stating she "was going to bed now and would not be checking email for several days." By Entry dated April 10, 2013, the Panel denied the request submitted by Jay Bukstein, and ordered that any further documents submitted by a non-party would be stricken from the record.

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The Entry denying the request to continue the April 11th hearing was sent to the parties by certified mail and email. The records of the Information Technology Division of the Supreme Court of Ohio indicate that the email containing a copy of the Entry was delivered to Respondent's email address. The record shows that the certified mail of the Entry sent to Respondent by certified mail was returned to the Board as "unclaimed" on May 17, 2013. The Entry was resent to Respondent by regular mail the same day, as evidenced by a Certificate of Mail, which was not returned to the Board. As the record indicates email delivery of the Entry to Respondent, the Board finds service was made upon Respondent.

The hearing in this matter was held on April 11, 2013, at the Moyer Judicial Center and was scheduled to begin at 10 a.m. By 10:15 a.m., the Respondent had not appeared, and a hearing was conducted by the Panel without Respondent. Relator was present and offered the testimony of two live witnesses, the deposition of one witness, and several exhibits.

II. <u>FINDINGS OF FACT</u>

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A. <u>BACKGROUND</u>

1. Relator, the Office of Disciplinary Counsel is duly authorized to investigate and prosecute activities which may constitute the unauthorized practice of law in Ohio. Gov.Bar R. VII(4) and (5).

2. Respondent Kimberley Bukstein is not admitted to the practice of law in Ohio under Gov.Bar R. I, nor registered under Gov.Bar R. VI, or certified under Gov.Bar R. II, Gov.Bar R. IX, or Gov.Bar R. XI. Further, Respondent admits she is not an attorney and describes herself in the following manner:

[A] Civil Rights Advocate from Minnesota that works on cases all over the nation. Ms. Bukstein specializes in ethics issues arising in litigation and government agencies. Finding innovative solutions to complex problems, Ms. Bukstein supports the rights of everyone regardless of position or circumstance and helps legal professionals and public officials identify and repair problems. Answer, p. 3.

B. MELINDA POLEN

3. With respect to Melinda Polen, the Board finds that Respondent assisted Melinda Polen in post-decree divorce proceedings in a matter styled as *Polen v. Herier*, Case No. 00-DR-0023, Clark County Court of Common Pleas.

4. Judge Thomas J. Capper testified that he presided over the case and became aware of Respondent's involvement sometime in March 2011. Tr. of Proceedings at 13-14. Judge Capper indicated that he met Respondent at a hearing in March 2011, and Respondent was sitting at counsel's table with Ms. Polen. Respondent identified herself to the judge as a "civil rights advocate." When asked to move from counsel's table because she was not an attorney, Respondent complied. *Id.* at 14-15.

5. Judge Capper testified that although the pleadings filed by Melinda Polen bore Ms. Polen's signature, when he asked Ms. Polen about the pleadings, she seemed unfamiliar with their content. Tr. of Proceedings at 19. Judge Capper believed that Respondent drafted the pleadings for Ms. Polen or assisted in drafting the pleadings. *Id.*

6. Judge Capper testified that the case took a dramatic turn downward after Respondent began participating in the case. Tr. of Proceedings at 22. He testified that Respondent conducted interviews of Mr. Herier's and Ms. Polen's son, who has special needs. These interviews caused the son to become uncomfortable and distrustful of Ms. Polen. *Id.* at 30. Judge Capper testified that he believes Respondent is a dangerous person who preys upon individuals susceptible to influence and gives people horrible advice. *Id.* at 29 and 31. As a result of Respondent's interference in the case, Ms. Polen's attorney filed a motion to withdraw. *Id.* at 27.

7. The Board finds the testimony of Judge Capper to be credible.

C. <u>CHRISTINE TIBBITTS</u>

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8. With respect to Christine Tibbitts, the Board finds that Respondent assisted Christine Tibbitts in post-decree divorce proceedings in a matter styled as *Glen A*. *Tibbitts v. Christine L. Tibbitts*, Case No. 09-DR- A 12 0625, Delaware County, Ohio Court of Common Pleas.

9. Mr. Tibbitts testified that Respondent communicated with him via email, mail, and phone in May and June 2011 on behalf of Ms. Tibbitts following the trial regarding parenting time as well as financial issues addressed and resolved by the court. Tr. of Proceedings at 36 and 38.

10. Mr. Tibbitts testified the Respondent's communications caused him to believe that she was an attorney and informed him that "what had been ordered by the court could not be done." Tr. of Proceedings at 37.

11. On June 14, 2011, Respondent called Mr. Tibbitts's cell phone. Mr. Tibbitts testified that the focus of Respondent's call was in regard to the court ordered visitation schedule and that she used "legalese." Tr. of Proceedings at 41.

12. Mr. Tibbitts testified that Respondent's emails, letters and phone calls regarding the court ordered marital asset division and minor child visitation schedule caused him anxiety, sleepless nights, nightmares and emotional distress regarding a prospective change of his sole custody of his daughter and he firmly believed Respondent was some sort of civil rights attorney. Tr. of Proceedings at 42.

13. Mr. Tibbitts called his attorney and the Delaware County Prosecutor to attempt to have Respondent's emails, mail and phone regarding the court's decision in his domestic relations case stopped.

14. The Board finds the testimony of Mr. Glen Tibbitts to be credible.

15. At the hearing of this matter, Mr. Tibbitts's domestic attorney William L. Geary's deposition was read into the record. Tr. of Proceedings at 44.

16. Mr. Geary testified that:

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a. He represented Mr. Tibbitts in his divorce;

b. Mrs. Tibbitts was represented by Jim Hanneman;

c. The Tibbitts' minor child was represented by Linda Sheppard;

d. The representation started in 2009 regarding support, asset and debt division, child custody and child support and the case was completely tried and finished in 2009. Tr. of Proceedings at 46.

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17. Mr. Geary further testified that Respondent communicated with him on June 9, 2011, via email regarding Mr. Tibbitts's failure to respond to questions in a previous email from Ms. Tibbitts and to provide discovery requested by Ms. Tibbitts. Tr. of Proceedings at 48.

18. Respondent's email to Mr. Geary advised him that it was important for him to respond to Ms Tibbitts's request because she was "pro se attorney of record" and he had a duty to respond to "opposing counsel" and that his failure to respond could be considered to be ignoring opposing counsel's reasonable inquiries or failure to provide discovery. Tr. of Proceedings at 48.

19. Mr. Geary went on to testify that Respondent wrote that his actions raised an attorney misconduct issue and that as a civil rights advocate, she addresses these issues by filing complaints with bar association presumably on behalf of others. Tr. of Proceedings at 49.

20. Mr. Geary continued his testimony by stating that Respondent wrote to him that she had already filed a complaint against the attorney who was the guardian ad litem of the Tibbitts' minor child. Tr. of Proceedings at 49.

21. Mr. Geary's testimony confirmed that Respondents' emails, mail and phone calls caused Mr. Tibbitts to suffer emotional distress regarding the finality of his divorce decree, marital property division and his status as the sole custodial parent of the Tibbetts' minor child. Tr. of Proceedings at 53.

22. The Board finds the testimony of William L. Geary Esq. to be credible.

III. <u>CONCLUSIONS OF LAW</u>

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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.*, 27 Ohio St. 3d 31, 501 N.E.2d 617 (1986); *Judd v. City Trust & Sav. Bank*, 133 Ohio St. 81, 12 N.E.2d 288 (1937). 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 or otherwise certified to practice law in Ohio. Gov. Bar R. VII(2)(A).

D. The practice of law includes the "preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts." *Land Title Abstract v. Dworken*, 129 Ohio St. 23, 28, 194 N.E. 650, 652 (1934).

E. An individual not licensed to practice law in Ohio who purports to negotiate legal claims on behalf of others, and advises persons of their legal rights, and the terms and conditions of settlement is engaged in the unauthorized practice of law. *Cleveland Bar Assn. v. Henley*, 95 Ohio St.3d 91 (2002); *Cincinnati Bar Assn. v. Cromwell*, 82 Ohio St.3d 259, 695 N.E.2d 243 (1998); *Cleveland Bar Assn. v. Moore*, 87 Ohio St.3d 583, 722 N.E.2d 514 (2000). Moreover, the fact that the non-attorney received no remuneration for his actions is irrelevant to the determination of whether he engaged in the unauthorized practice of law. *Henley* at 92 *Geauga Cty. Bar Assn. v. Canfield*, 92 Ohio St.3d 15, 16, 748 N.E.2d 23 (2001).

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F. It is well-settled that representing to the public that one is not a licensed attorney and is not providing legal advice, will not insulate a non-attorney from the unauthorized practice of law if he is in substance giving legal advice and counsel. *Cincinnati Bar Assn. v. Telford*, 85 Ohio St.3d 111 (1999).

G. The writing and issuance of letters by non-attorneys which purport to affect the legal rights or duties of others such as third-party litigants, constitutes legal advice and advocacy falling squarely within the unauthorized practice of law. *Henley, supra; People v. Shell*, 148 P3d. 162, 171 (2006) (Letters written by a non-attorney to an attorney directing the lawyer to the specific legal actions present only an incidental effect on the exercise of free speech); *In the Disciplinary Matter Involving Burrell*, 882 P.2d 1257 (Alaska 1994). (The Court held that the circumstances of the writing of letters demonstrates that the non-attorney was providing advice or preparing documents for another which affects legal rights or duties.)

H. While it appears no Ohio case has fully explored the interplay between an individual's constitutional right to free speech and the constraints of regulation of the practice of law and actual related conduct, the Ohio Supreme Court has, in fact, briefly commented on the lack of First Amendment implications in UPL cases. In Cincinnati Bar Ass'n. v. Bailey, 110 Ohio St.3d 223 (2006) at 227, the Court stated: "As to the First Amendment, the restrictions on respondent's conduct by prohibiting practicing law without a license do not implicate his right to free speech." Moreover, there can be no doubt that neither the First nor Sixth Amendments to the U.S. Constitution guarantees laymen the right to practice law on behalf of others, any more than a defendant in a criminal proceeding has a right to be represented by unlicensed counsel during legal proceedings. See: People v. Shell; Turner v. American Bar Assn., 407 F. Supp. 451, (N.D. Texas 1975); City of Cleveland v. Cohen, 1987 Ohio App. Lexis 8352; State v. Peterson, 266 N.W.2d 103 (S.D. 1978). Any notion to the contrary would belie the Ohio Constitution's absolute grant and delegation of exclusive, original jurisdiction to the Supreme Court over the regulation of conduct involving the practice of law. Ohio Constitution Article IV, Section 2(B)(1)(g).

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I. Non-attorneys are not permitted to represent others in legal proceedings, nor are they permitted to serve as "co-counsel" with an attorney in a legal matter. *State v. Martin*, 103 Ohio St.3d 385 (2004).

J. Respondent held herself out as an expert characterizing herself as a " civil rights advocate" and as a person worthy of trust on matters of the law. This misrepresentation induced reliance on unauthorized and unqualified legal advice. She assisted domestic relations litigants in very serious personal domestic litigation to their

detriment and the detriment of the other parties to the litigation. The totality of Respondent's advocacy under all of these circumstances crossed the threshold of the unauthorized practice of law.

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K. Therefore, in view of the record and considering the totality of circumstances, the Panel concludes, based upon a preponderance of evidence [Gov. Bar R. VII(7)(E)], that Respondent engaged in the unauthorized practice of law in violation of Gov. Bar R. VII with regard to each of the two counts of the Complaint by engaging in the following conduct: providing legal advice; drafting a motion for a party to sign *pro se*; and sending communications on behalf of another wherein she demanded discovery and making legal arguments. She appeared in Court at Counsel's table in the courtroom and identified herself to the judge as a "civil rights advocate." She identified herself as a "pro se attorney of record" stating that counsel in a divorce proceeding had a duty to respond to her as "opposing counsel." She threatened the filing of disciplinary complaints on behalf of 3^{rd} parties attempting to obtain compliance in a legal matter. She sent numerous correspondences threatening legal action on behalf of individuals other than herself.

L. Respondent's acts found to constitute the unauthorized practice of law are based upon specific evidence or admission that contains sufficient information to demonstrate the specific activities upon which the conclusions are drawn in compliance with Gov. Bar R. VII(7)(H) and *Cleve. Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95, ¶ 24-26.

IV. <u>CIVIL PENALTY ANALYSIS</u>

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The Board has carefully considered the relevant aggravating, and mitigating factors for the imposition of civil penalties in this case pursuant to Gov. Bar R. VII(8)(B) and UPL Reg. 400 and is of the opinion a civil penalty of \$10,000 on each count of the Complaint is warranted in this case. The Board sets forth its reasons below.

The factors to consider when recommending a civil penalty include the following: (1) The degree of cooperation provided by the respondents 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; and (5) any other relevant factors. UPL Reg. 400(F) also details additional considerations, many of which were recently reviewed by the Ohio Supreme Court in *Ohio State Bar Assn. v. Lienguard*, 126 Ohio State St.3d 400, 2010-Ohio-3827.

1. <u>The degree of cooperation provided by the respondent in the</u> investigation.

While the Board recognizes that Respondent corresponded thoroughly with Disciplinary Counsel and the Panel prior to her hearing, along with attempts to respond to Disciplinary Counsel's pleadings, it is noted that Respondent Bukstein chose not to appear at her hearing despite receiving notice and previously being granted a continuance to accommodate her schedule. Further, Ms. Bukstein repeatedly disregarded the Board's instructions regarding filings and communication with the Panel, including but not limited to sending harassing and potentially threatening emails to individual members of the Panel and making threats to file numerous complaints with various government agencies against the individual panel members and disciplinary counsel. Ms. Bukstein has never admitted that her actions constituted the unauthorized practice of law and continues to defiantly challenge the Court's authority to regulate her conduct. Finally, Respondent has not agreed to be enjoined from the unauthorized practice of law.

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2. <u>The number of occasions that unauthorized practice of law was</u> committed.

The Board finds that Bukstein committed UPL in both counts presented by Relator. However, there was substantial evidence of persistent, systematic and continuing occurrences that Respondent also held herself out in these instances and to others as a "civil rights advocate" with a special knowledge of the domestic relations court system and ethics laws regarding attorneys and judges. With that façade, she induced others to retain her services which included, for example, drafting correspondence and placing telephone calls to attorneys, school administrators and opposing parties on behalf of others, as well as preparing Motions for filing. The record further reflects that Respondent spends a considerable amount of time marketing her services and interfering with the judicial process on behalf of others.

3. Flagrancy and harm to third parties

All of Respondent's actions served to undermine public confidence in the judicial system. The harm caused by Bukstein's involvement is irreparable in nature and apparent with each situation in which she attempts to intervene. Bukstein offered legal advice in connection with each count yet refused to acknowledge it is, in fact, legal advice. In both the Tibbitts and Polen cases individuals in need of sound legal advice instead relied on advice given by Ms. Bukstein to their detriment, on occasion rejecting advice from their own licensed counsel. Ms. Bukstein has disrupted divorce agreements, continuously

slowed the judicial process, caused opposing parties serious mental distress, and asked extremely intimate questions of minor children unnecessarily all under the guise of being a "civil rights advocate."

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UPL Reg. 400, lists "other relevant factors" the Board may consider in the recommendation of civil penalties, which include the following:

4. Whether the respondent had been informed prior to engaging in the unauthorized practice of law that the conduct at issue may constitute an act of the unauthorized practice of law

Evidence offered established that Respondent was warned her actions may constitute an act of the unauthorized practice of law by both Judge Thomas J. Capper and attorney William Geary separately, regarding her actions in their respective cases. Ms. Bukstein still denies the Supreme Court's Rules and Regulations apply to her and professes her actions are protected by the First Amendment.

5. <u>Whether respondent's unauthorized practice of law included the preparation of a</u> legal instrument for filing with a court or other governmental entity

Ms. Bukstein assisted in the preparation of legal instruments and filings, but as she failed to appear for her hearing to be questioned on the quantity, the evidence and testimony only substantiated one instance Ms. Bukstein prepared a Motion that was then filed in that matter. That filing was done in the divorce case regarding Melinda Polen.

6. Whether the respondent has held himself or herself out as being admitted to practice law in the State of Ohio, or whether respondent has allowed others to mistakenly believe that he or she was admitted to practice law in the State of Ohio

Although Ms. Bukstein does not specifically say she is a licensed attorney in Ohio, she does routinely refer to herself as a "civil rights advocate" initially in her correspondence as well as in her signature block. Further, Ms. Bukstein asserts legal principals, cites statutes, attempts to interpret legal authority, contacts opposing parties, opposing counsel and court personnel in a representative fashion, as well as openly stating she counsels those she considers clients.

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The Board notes Ms. Bukstein has failed to avail herself of each of the mitigating factors, except:

7. <u>Respondents' conduct appears to have resulted from motives other than</u> <u>dishonesty or personal benefit</u>.

There is no admitted evidence Ms. Bukstein charges a fee for the services she attempts to provide. Further, Ms. Bukstein seems to genuinely believe that she is attempting to help those less experienced in the court system and susceptible to improper influences. Moreover, she passionately and thoroughly expresses her right to exercise her free speech under the Constitution with regard to filing grievances. However, as seen from the evidence and applicable law, her conduct has crossed the threshold into the unauthorized practice of law.

After balancing all of these factors the Board recommends a civil penalty of \$10,000 for each count for a total of \$20,000 against Respondent, Ms. Kimberley Bukstein.

V. <u>CONCLUSION/RECOMMENDATIONS</u>

1. The Board recommends that the Supreme Court of Ohio issue an order finding that Respondent engaged in the unauthorized practice of law.

2. The Board recommends that the Court impose a civil penalty against Respondent in the amount of \$10,000 for each count, for a total penalty of \$20,000 against the Respondent.

3. The Board recommends that the Court issue a further Order prohibiting Respondent from engaging in the unauthorized practice of law in the future.

4. The Board recommends that the Court issue an order requiring Respondent to pay the costs and expenses incurred by the Board and Relator in this matter.

VI. STATEMENT OF COSTS

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1. Relator indicated it incurred no costs in this matter.

2. The following costs were incurred by the Board:

Total	\$390.26
Court reporter fee and Transcript	\$234.00
Postage	\$156.26

FOR THE BOARD OF THE UNAUTHORIZEI PRÁCTICE OF mell Curtis J. Sybert

CERTIFICATE OF SERVICE

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This is to certify that a copy of the foregoing Final Report was served by certified mail upon the following this <u>/9</u>^{-/-} day of August 2013: Stacy Solochek Beckman, Office of Disciplinary Counsel 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411; Kimberley Bukstein, 1039 Barrett Street, Saint Paul, Minnesota 55103; Ohio State Bar Association UPL Committee, P.O. Box 16562, Columbus, Ohio 43216; Delaware County Bar Association, c/o Law Library, 20 W. Central Avenue, Delaware, OH 43015; Clark County Bar Association c/o Pavlatos, Catanzaro & Lancaster, 700 E. High St., Springfield, Ohio 45505.

Minewa B. Elizaga, Secretary