ILLINOIS APPELLATE COURT
FIRST DISTRICT
1-08-1858

ELLEN GRAFNER Petitioner-Appellant	)	
v.	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division
ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW OF ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY,	)	No. 07-L-51018
ST. BARTHOLEMEW PARISH Respondents-Appellees	)	The Honorable Elmer J. Tolmaire III, Judge Presiding

THE ILLINOIS STATE BAR ASSOCIATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER-APPELLANT

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POINTS AND AUTHORITIES

I. INTRODUCTION

This case presents three issues of importance to the Illinois State Bar Association ("ISBA") and the legal profession as a whole. The first relates to whether a nonlawyer appearing and participating at an Illinois Department of Employment Security ("IDES") administrative hearing on behalf of a participant constitutes the practice of law. As recited in Plaintiff-Appellant's Brief ("Pl. Brf."), a nonlawyer "employer representative" attended an IDES administrative hearing on behalf of the employer and examined and cross-examined witnesses (See Pl. Brf. at p. 6). The second issue revolves around the exclusive authority of the Illinois Supreme Court to define and regulate the practice of law. This issue is relevant here because the tribunals below allowed the participation of the nonlawyer "employer representative" under the authority of Section 806 of the Unemployment Insurance Act which purports to allow any person or entity in an IDES proceeding to be represented by a nonlawyer. 820 ILCS 405/806. The third issue identifies the important role of the courts in ensuring that the public is safeguarded from attempts to minimize the protections provided by a well regulated bar.

While the ISBA believes strongly that these issues should be resolved as discussed below, it takes no position on the underlying question of Plaintiff-Appellant's eligibility of services from the IDES.

II. ARGUMENT

A. Illinois Courts Have Found that Nonlawyers Appearing and Participating at Administrative Hearings on Behalf of Others Constitutes the Practice of Law.

The Illinois Supreme Court has repeatedly held that the practice of law defies "mechanistic formulation." E.g. In re Howard, 188 Ill.2d 423, 438, 721 N.E.2d 1126,

1134, 242 Ill.Dec. 595, 603 (1999). Nevertheless, the Court has provided reasonable guidelines on defining the practice of law and, in some cases, identified particular conduct that constitutes the practice of law. Broadly, the Court consistently has determined that an activity involving the "giving of any advice or rendering of any service requiring the use of legal knowledge or skill" is the practice of law. Id. The Court also has found that practicing law "encompasses not only court appearances, but also services rendered out of court." Id., citing People ex rel. Chicago Bar Association v. Barasch, 21 Ill.2d 407, 414, 173 N.E.2d 417 (1961). Such out of court services include a wide range of activities including preparing notes and mortgages, King v. First Capital Financial Services Corp., 215 Ill.2d 1, 828 N.E.2d 1155, 293 Ill.Dec. 657 (2005), deeds and other title related documents, Chicago Bar Association v. Quinlan and Tyson, Inc., 34 Ill.2d 116, 214 N.E.2d 771 (1966), and gathering information from clients and explaining legal process, In re Discipio, 163 Ill.2d 515, 645 N.E.2d 906, 206 Ill.Dec. 654 (1994). These opinions held the above referenced conduct required the use of legal knowledge and skill and therefore constituted the practice of law. In some cases, legal knowledge and skill was inferred from the conduct at issue. Id., 163 Ill.2d at 524, 645 N.E.2d at 911, 206 Ill.Dec. at 659. Knowing what questions to ask, either on direct or cross examination, necessarily implies the use of legal knowledge and skill. Clearly then, appearing on behalf of another in a formal proceeding, such as a court or other tribunal, where legal rights are presented, considered, and decided, and participating in such a hearing by examining and cross-examining witnesses, would fall within this broad definition of the practice of law.

Specifically, the Illinois Supreme Court has found the practice of law when nonlawyers appear and participate at administrative proceedings on behalf of others. Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937). In Goodman, the nonlawyer solicited workers compensation claimants, negotiated settlements, filed petitions, orders, and other pleadings with the administrative tribunal (the Industrial Commission), and eventually brought matters to hearing before the Industrial Commission arbitrator. Id. 366 Ill. at 348, 8 N.E.2d at 943. The Goodman Court analyzed all these various activities and, with respect to participation at hearing, noted the tremendous significance of establishing a record for proper review. As part of establishing a clear record, the Court noted the necessity of a representative to understand and weigh evidence and coordinate testimony. Id. 366 Ill. at 354, 8 N.E.2d at 946. Of importance to this case, the Court noted that "it is immaterial whether the acts which constitute the practice of law are done in an office, before a court, or before an administrative body." Id. 366 Ill. at 357, 8 N.E.2d at 947. These fundamental attributes of legal knowledge and skill are no less required where a nonlawyer appears and participates in eliciting testimony at a proceeding before the IDES as they were when the proceeding was before the Industrial Commission in Goodman. The Goodman opinion stands for the proposition that participation in an IDES administrative hearing is the practice of law.

Finally, there is some guidance from the Appellate Court on the specific question of nonlawyers appearing on behalf of others at IDES administrative hearings. In Perto v. Illinois Department of Employment Security, 274 Ill.App.3d 485, 654 N.E.2d 232, 210 Ill.Dec. 933 (2nd Dist. 1995), the Appellate Court determined that a nonlawyer

representing a claimant before the IDES did not engage in the practice of law. However, the conduct in Perto, did not rise to the level of an actual appearance or participation in an administrative proceeding such as is present in this matter. In Perto, the nonlawyer simply filled out a form and sent one letter to the IDES on behalf of a potential claimant. Perto, 274 Ill.App.3d at 487-88, 654 N.E.2d at 234-35, 210 Ill.Dec. at 935-36. In reviewing this limited involvement, the court noted the "simplicity" of filing out a form and sending a letter and determined that neither of the activities required the use of legal knowledge or skill. Perto, 274 Ill.App.3d at 494, 654 N.E.2d at 239-40, 210 Ill.Dec. at 940-41. Importantly, the court specifically noted that the conduct at issue did not involve participation at the IDES hearing (which is the conduct at issue in this matter). Id. Notwithstanding the ISBA's *amicus* efforts to have the court rule broadly on the issue, the court also specifically left open the question of whether attendance and participation of a nonlawyer on behalf of a claimant at an IDES hearing constituted the practice of law. Perto, 274 Ill.App.3d at 496, 654 N.E.2d at 240, 210 Ill.Dec. at 941 ("we need not determine whether there is a point in the administrative proceedings where participation by a nonattorney constitutes the unauthorized practice of law."). Accordingly, while Perto is not dispositive on the precise issue, its very limited holding is nevertheless consistent with precedent on the practice of law issue. Given that precedent and analysis, it would seem that a nonlawyer's appearance and participation at an IDES hearing on behalf of another is the practice of law.

B. The Judicial Branch of Government Has the Sole Authority to Define and Regulate the Practice of Law.

Determining whether non-lawyer participation in an administrative hearing on behalf of another person is the practice of law does not resolve the dispute pending before

this Court. As referenced in the decisions of the lower tribunals in this case, the Unemployment Insurance Act ("Act") purports to authorize nonlawyers to represent participants in IDES hearings. Section 806 of the Act provides:

> Any individual or entity in any proceeding before the Director or his representative, or the Referee or the Board of Review, may be represented by a union or any duly authorized agent.

820 ILCS 405/806.

In light of this purported authority, the question of significance to the ISBA and the legal profession becomes whether the General Assembly has the authority to permit the practice of law to be carried out by non-lawyers? The answer to that question appears to be well settled and answered in the negative.

The Illinois Supreme Court is the sole and exclusive authority to define the practice of law and to determine who shall be allowed to practice in Illinois. King v. First Capital Financial Services Corp., 215 Ill.2d 1, 12, 828 N.E.2d 1155, 1293, 1162 Ill.Dec. 657, 664 (2005)("The power to regulate and define the practice of law is a prerogative of this court under the Illinois Constitution."). This separation of authority is well ingrained in the law of Illinois. Article II, Section 1 of the Illinois Constitution provides, "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Constitution of the State of Illinois, Article II, Section 1. The General Assembly has no authority to intrude upon this judicial function. In interpreting the authority of the Industrial Commission to allow non-lawyers to practice before it, the Court in the Goodman opinion stated:

> The General Assembly has no authority to grant a layman the right to practice law. (citations omitted.) It follows that any rule adopted by the commission, purporting to bestow such privilege upon one not a duly licensed attorney at law

> is void. Nor can the General Assembly lawfully declare not to be the practice of law, those activities the performance of which the judicial department may determine is the practice of law.

Goodman, 366 Ill. at 352, 8 N.E.2d at 945. This holding has been followed in a number of cases since Goodman and is now well established. See King, 215 Ill.2d at 12, 828 N.E.2d at 1162, 293 Ill.Dec. at 664; Lozoff v. Shore Heights, Ltd., 66 Ill.2d 398, 401, 362 N.E.2d 1047,1048, 6 Ill.Dec. 225, 226 (1977)("It is for this court to determine who shall be permitted to practice law in Illinois.").

Of particular interest in this case is the treatment of the authority issue in Perto, which interpreted Section 806 of the Act. In Perto, the Appellate Court was clear that only the Supreme Court can determine who may represent others when engaging in the practice of law:

> "[I]n Illinois, only licensed attorneys are permitted to practice law. (705 ILCS 205/1 (West 1992).) The legislature has no authority to grant a nonattorney the right to practice law even if limited to practice before an administrative agency. (People ex rel. Chicago Bar Association v. Goodman (1937), 366 Ill. 346, 352, 8 N.E.2d 941.) The ultimate authority to regulate and define the practice of law rests with the supreme court. Goodman, 366 Ill. at 349, 8 N.E.2d 941.

Perto, 274 Ill.App.3d at 493, 654 N.E.2d at 238. (The Perto court's conclusion that Section 806 of the Act was ineffective to authorize nonlawyers to represent others at IDES hearings compelled the court to reach and analyze the issue of whether or not sending a letter and filing out a form by a nonlawyer in an IDES matter was the practice of law.")

The Perto court's conclusion appears to be the correct one, and in fact has been embraced, at least informally, by the Illinois Attorney General's Office ("IAGO"). In an informal letter opinion dated October 8, 2002, the IAGO responded to a question posed by the Illinois Secretary of State's Office inquiring whether Secretary of State hearing

officers could allow, pursuant to an administrative rule, nonlawyers to appear and represent others in pending Secretary of State matters. After discussing cases such as Goodman, Lozoff, and Perto, the IAGO acknowledged the exclusive authority of the Supreme Court to determine who may or may not practice law. The IAGO went on to conclude that Secretary of State hearing officers did not have any authority, notwithstanding the administrative rule to the contrary, to allow nonlawyers to appear and practice law in Secretary of State hearings. (Attorney General informal opinion letter to Nathan Maddox is attached as Exhibit A.)

Under this well established precedent and authority, only the Illinois courts have the authority to define and regulate the practice of law. Section 806 of the Act can not operate to permit nonlawyers to appear and participate on behalf of others in IDES proceedings.

C. The Legal Profession and the Courts Must Guard Against the Practice of Law by Non-Lawyers.

The legal profession has a continuing duty to bring to the attention of the court attempts to redefine and limit the practice of law and to otherwise generally restrict the authority of the judiciary. Adair Architects, Inc. v. Bruggeman et al., No. 3-03-0229 (Ill.App. 2-19-04)(3rd Dist. 2004) (In upholding the primacy of a Supreme Court Rule requiring corporations to be represented in litigation by lawyers notwithstanding conflicting statutory authority, the court noted, "It is the court's solemn duty to protect the judicial power from legislative encroachment and to preserve the integrity and independence of the judiciary." citing People v. Felella, 131 Ill.2d 525, 538-39, 546 N.E.2d 492, 498, 137 Ill.Dec. 547, 553 (1989)). Prohibitions on the practice of law by non-lawyers serve important public purposes, including the avoidance of "irreparable

harm to many citizens as well as to the judicial system itself." Mallen & Associates v. MyInjuryClaim.com Corp., 329 Ill.App.3d 953, 956, 769 N.E.2d 74, 76, 263 Ill.Dec. 872, 874 (1st Dist. 2002); Lawline v. American Bar Association, 956 F.2d 1378, 1385 (7th Cir. 1992) ("The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services"). The importance of protecting the public in legal matters is underscored by the substantial regulation of the legal profession which includes, but is not limited to, educational requirements; a vigorous disciplinary process; mandatory continuing legal education; strict rules of conduct (particularly covering such matters as confidentiality, conflict of interest and competence); and high standards of integrity. These vital public purposes are thwarted where nonlawyers are allowed to appear and participate on behalf of others in administrative hearings where individual rights are presented, considered, and decided. As such, this court has the obligation to protect the public from such improper conduct as well as to preserve the authority of the courts, particularly in cases such as this one where the suspect conduct is carried out under claim of statutory authorization.

III. CONCLUSION

Nonlawyers appearing and participating at administrative hearings on behalf of others are engaging in the practice of law. Because the practice of law is solely defined and regulated by the judicial branch of government, the legislature has no authority to limit, expand, or redefine the practice of law. Because the purpose of prohibitions against nonlawyers practicing law is to protect the public, the courts must be vigilant in ensuring that those prohibitions are evenly and appropriately enforced. The case before

this court presents just such an opportunity for the court to reaffirm these longstanding principles.

WHEREFORE, for the above stated reasons, the ISBA as *Amicus* request that this Court reverse the judgment below.

DATED: November 12, 2008

Respectfully submitted,

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EXHIBIT A

February 2003 - ISBA Government Lawyers Newsletter

Attorney General's office issues opinion regarding appearance of attorneys licensed in other states in Illinois administrative proceedings

[**Editors' note**: In the August 2002 issue of the Committee on Government Lawyer newsletter, we published an article addressing the appearance of non-attorneys in hearings before State administrative bodies. (*See*, "Unauthorized practice of law in administrative hearings" by Claire Manning and Richard R. McGill, Jr.) Subsequently, Attorney General Jim Ryan's office issued an informal opinion regarding the appearance of attorneys licensed in other states in Illinois administrative proceedings. Because of the potential ramifications of the conclusions reached by Attorney General Ryan's office, the complete text of informal opinion No. I-02-049, issued October 8, 2002, to Nathan Maddox of the Office of the Secretary of State is set out below.]

Dear Mr. Maddox:

I have your letter wherein you inquire whether, pursuant to a duly promulgated administrative regulation, administrative hearing officers appointed by the Secretary of State may permit attorneys licensed in States other than Illinois to appear and represent clients in matters pending before them. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the question you have raised.

You have stated that there is currently pending in your office a matter involving litigants from California, Wisconsin and Illinois. Attorneys from California and Wisconsin have sought leave to appear before a hearing officer pursuant to 92 Ill. Adm. Code 1001.30 (Jan. 1, 2002), which provides, in part:

* * *

1) Attorneys admitted to practice in states other than the State of Illinois may appear and be heard by special leave of the Hearing Officer appointed to conduct the hearing, upon the attorney's verbal representations or written documentation as to the attorney's admittance.

* * *

However, questions have been raised regarding the validity of the rule.

The question of whether an administrative agency may authorize a person who is not licensed as an attorney in Illinois to practice law before it was addressed by the Illinois Supreme Court in *People ex rel. The Chicago Bar Ass'n v. Goodman* (1937), 366 Ill. 346,

352, *cert. denied*, 302 U.S. 728, 58 S. Ct. 49 (1937). The defendant in that case engaged in a rather extensive business of assisting injured workers with the adjustment of claims before the Illinois Industrial Commission. The court stated:

* * *

* * * The respondent urges that because the legislative act relating to the Industrial Commission grants to that body the right to promulgate rules governing the procedure before it, and the commission has adopted a rule permitting a party to appear before it by his attorney or 'agent,' that he, as agent of the claimant, may lawfully appear before the commission as the representative of the client and try his claim there. Even though the Industrial Commission is merely an administrative body, yet, if what the respondent did for a fee, in the presentation of and hearing of a petitioner's claim before that body, amounted to the practice of law, a rule of the commission purporting to grant him that privilege is of no avail to him. The General Assembly has no authority to grant a layman the right to practice law. (Citation). It follows that any rule adopted by the commission, purporting to bestow such privilege upon one not a duly licensed attorney at law, is void. Nor can the General Assembly lawfully declare not to be the practice of law, those activities the performance of which the judicial department may determine is the practice of law.

* * *

Our appellate court acknowledged the general rule in *Perto v. Board of Review* (1995), 274 Ill. App. 3d 485, 493, *appeal denied*, 164 Ill. 2d 581 (1995), while holding that a person who responded to factual questions on behalf of an employer in a proceeding before the Department of Employment Security was not engaged in the practice of law. The Illinois Supreme Court reiterated the rule that it has exclusive power to determine who shall be permitted to practice law in Illinois in *Lozoff v. Shore Heights, Ltd.* (1977), 66 Ill. 2d 398, 401. In that case, a Wisconsin attorney arranged a real estate transaction among parties who were residents of Illinois. The court held that the attorney had engaged in the unauthorized practice of law in Illinois and was not entitled to attorney's fees.

It has been suggested that Supreme Court Rule 707 (145 Ill. 2d R. 707) may authorize the Secretary of State (through his hearing officers) to permit the appearance in particular administrative matters of attorneys who are licensed in other States. Rule 707 provides:

"Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he or she is employed."

This is a rule by which the supreme court specifically empowers Illinois courts to permit the participation of attorneys who are licensed in other jurisdictions. The rule does not refer to proceedings held before administrative agencies, or conducted by officers of the

executive branch of government. In no reported case has the rule been applied to administrative hearing officers, who look to the legislature, not to the court, for authority to act. To the contrary, the supreme court has held in *People ex rel. The Chicago Bar Ass'n v. Goodman* and *Lozoff v. Shore Heights, Ltd.* that the General Assembly has no authority to regulate the practice of law.

In this regard, I note that section 12 of the Attorney Act (705 ILCS 201/12 (West 2000)) provides:

"When any counselor or attorney at law, residing in any other state or territory, may desire to practice law in this state, such counselor or attorney shall be allowed to practice in the several courts in this state upon the same terms and in the same manner that counselors and attorneys at law residing in this state now are or hereafter may be admitted to practice law in such other state or territory."

The provision is essentially a reciprocity rule applying only to practice in the courts. In any event, the legislative provision is merely in aid of and does not detract from the power of the supreme court to control the practice of law. (*Lozoff v. Shore Heights, Ltd.* (1977), 66 Ill. 2d 398, 402; *Perto v. Board of Review* (1995), 274 Ill. App. 3d 485, 493, *appeal denied*, 164 Ill. 2d 581 (1995).) The statute does not authorize administrative agencies to permit attorneys licensed in other States to practice law in Illinois.

While not controlling, reported cases from other jurisdictions that have addressed this issue are instructive. For example, in *In re Ferrey* (R.I. 2001), 774 A.2d 62, the Rhode Island Supreme Court entertained the motion of a Massachusetts attorney for admission *pro hac vice* to represent a client in an administrative proceeding before the Rhode Island Energy Facility Siting Board. Holding that the court had exclusive and ultimate authority to determine who may be permitted to practice law in the State, the court granted the petition prospectively. The court refused to grant the petition *nunc pro tunc*, however, because the administrative board clearly did not have the authority to permit the representation, and the court did not wish to affix an *ex post facto* imprimatur of approval on what might be construed as the unauthorized practice of law. Thus, the court held that the attorney's acceptance of fees for past representation would violate Rhode Island statutes prohibiting the receipt of fees for unauthorized practice. Following *In re Ferrey*, the court summarily granted *pro hac vice* petitions in subsequent cases. *In re Soltis* (R.I. 2001), 786 A.2d 1074.

California law similarly prohibits an attorney not admitted to practice by the California courts from collecting fees for representing a petitioner before an administrative body, even though the representation was approved by the administrative hearing officer. In *Z.A. v. San Bruno Park School District* (9th Cir. 1999), 165 F.3d 1273, the plaintiff had prevailed in an administrative proceeding conducted by the California Special Education Office pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. ' 1400 *et seq.*) and related State statutes. The IDEA specifically provides that parents may be assisted at hearings by an attorney or other individual with special knowledge and training in special education issues (20 U.S.C. ' 1414(d)(1)). The plaintiff's attorney was

admitted to practice in the U.S. District Court for the Northern District of California, but was not a member of the California bar. It was held that although he could practice before the Federal court, he was in the same position as a lay person before the State administrative commission and could not receive fees for his appearance there.

The Montana Supreme Court, while denying the motion of an attorney licensed in another State for admission for purposes of participating in an administrative proceeding, held that the motion, if made by a Montana attorney in accordance with the court's rule for admission of non-resident counsel, would be granted. (*Application of American Smelting and Refining Co.* (1973), 164 Mont. 139, 520 P.2d 103.) The Montana rule for admission for a particular case requires that out-of-State counsel be associated with a lawyer admitted to practice in the State. The ruling requires that the motion be made to the court, not to the agency, for permission to practice before an administrative agency.

In contrast to these cases, New Hampshire does not require leave of court for attorneys licensed in other States to appear in particular matters before either its courts or administrative bodies. In *Amy M. v. Timberlane Regional School District*, No. CIV. 99-269-B (D.N.H. August 11, 2000), the respondent school district objected to an award of attorney fees to a prevailing petitioner following a due process hearing held pursuant to the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. ' 1400 *et seq.*) because the attorney representing the petitioner was not licensed in New Hampshire. Based upon the specific wording of the New Hampshire statute (N.H. Rev. Stat. Ann. ' 311:7 (1995)), it was held that in that State a person may appear in court on another's behalf without being admitted to practice in New Hampshire as long as the person is of good character and does not commonly practice law in the State.

In Illinois, as in Rhode Island, California and Montana, the supreme court has been granted the exclusive authority to determine who may, or may not, practice law in the State. The court has not, by rule or otherwise, delegated to the Secretary of State or to hearing officers whom he may appoint the authority to determine who may practice law in administrative proceedings before those hearing officers. It appears, therefore, that a hearing officer cannot permit an attorney who is not licensed in Illinois to appear and represent a client pursuant to an administrative rule. Consequently, attorneys licensed in other States who wish to represent clients in administrative proceedings before hearing officers of the Secretary of State must petition an appropriate court of this State for permission to do so.

Sincerely,

Michael J. Luke

Senior Assistant Attorney General

Chief, Opinions Bureau