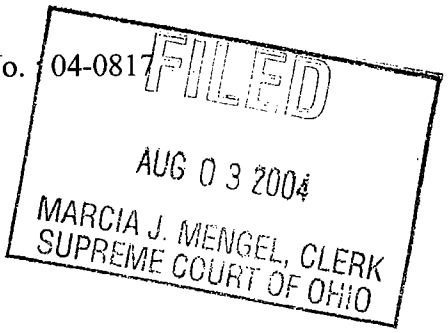
IN THE SUPREME COURT OF OHIO

CLEVELAND BAR ASSOCIATION)
)
Relator,)
)
v.)
)
COMPMANAGEMENT, INC., et al.)
)
Respondents.)
)

Case No. 04-0817



BRIEF OF THE FEDERAL TRADE COMMISSION AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions, Statutes, and Rules

Law Review Articles and Books

Miscellaneous

INTRODUCTION

Competition is the hallmark of America's free market economy. As the United States Supreme Court has observed, "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citation omitted).

The Federal Trade Commission takes no position on the underlying merits of this case. However, we urge this Court to be guided by the public interest when deciding whether Respondents' conduct constitutes the unauthorized practice of law. This Court should balance the benefits that accrue to Ohioans from competition between attorneys and non-attorneys in workers' compensation matters against any harm that results from allowing non-attorneys to practice before the Industrial Commission ("IC"). Absent evidence that employers or claimants are harmed from lay practice before the IC, we respectfully submit that this Court should not deprive Ohioans of the benefits of competition by adopting any rule that would severely restrict or effectively ban such practice.

STATEMENT OF THE CASE

In response to the "expensive and time consuming process" of recovery for workers' injuries under the common law, the Ohio General Assembly amended the Ohio Constitution in 1912 to allow the creation of a workers' compensation system, and in 1913 the General Assembly enacted Ohio's compulsory workers' compensation law. The constitutional and legislative provisions expressed "the public interest" in "affording workers compensation for injuries or death arising out of and in the course of employment without necessity of litigation,

attorneys, and their attendant costs." *In re Unauthorized Practice of Law in Cuyahoga County*, 175 Ohio St. 149, 154 (1963) (Gibson, J., concurring in part) (hereinafter "*Cuyahoga*").

Although this Court from time to time has cautioned that certain practices before the IC may constitute the practice of law, lay representation has played an important role in assuring that the workers' compensation system remains a speedy and inexpensive alternative to judicial proceedings. While prohibiting non-attorneys from engaging in such activities as conducting direct and cross-examination of witnesses or providing legal advice, the IC has allowed non-attorneys to perform a variety of tasks before it for more than thirty years. For example, non-attorneys can represent parties before the IC, investigate claims, discuss "the facts and their relationship to the claim," assist in the administration and filing of claims and appeals, complete and submit to the IC "records and reports" – including "all forms promulgated and adopted by the IC" – file protests with various levels within the IC, and advise clients "to seek legal representation." *See* IC Res. R04-1-01 (A)(1)-(9) (issued June 2, 2004) (hereinafter "R04-1-01"). On June 2, 2004, the IC issued a joint resolution to formalize its long-standing policy regarding non-attorney practice before it. *Id.*

On April 15, 2002, the Cleveland Bar Association filed a complaint with the Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court of Ohio ("UPL Board") alleging that in connection with practice before the IC, CompManagement, Inc. ("CMI") and various individual defendants had engaged in the unauthorized practice of law. On May 18, 2004, the UPL Board issued a Final Report in *Cleveland Bar Ass'n v. CompManagement, Inc.*, Case No.: UPL 02-04 ("Final Report"), finding that the following acts engaged in by the Respondents constituted the unauthorized practice of law: (1) representation of employers' interests before the IC (*id.* at 11); (2) preparing, signing, and filing documents, such

as IC forms, and filing motions, appeals, and client request letters (*id.* at 11-12); (3) filing settlement application forms on behalf of the client, negotiating claims, and advising with regard to settlement amounts (*id.* at 12); (4) engaging in "indirect" examination of witnesses (*id.* at 13); (5) presenting factual issues, documentary proof and arguments in challenging claims, and deciding what information to present and which issues to argue based on legal doctrines such as "causal relationship" and "statute of limitations" (*id.* at 13-14); (6) advising clients whether to settle a claim or take an appeal not solely based on financial considerations (*id.* at 14-15); and (7) recommending that clients hire legal counsel in certain instances (*id.* at 15-16).

The UPL Board's decision appears to bar non-attorneys from performing certain tasks that previously they were able to perform. Indeed, to adopt the full logic of the UPL Board's decision is to risk preventing non-attorney practice before the IC altogether.

ARGUMENT

This Court has exclusive province to determine what activities constitute the practice of law. *Henize v. Giles*, 22 Ohio St. 3d 213 (1986). This power extends to determining the qualifications of those who practice law before the IC. *Cuyahoga*, 175 Ohio St. at 151. And, although it has stated that non-lawyers risk engaging in the unauthorized practice of law when appearing before the IC, this Court has yet to articulate precisely what conduct is proscribed. *See id*; *Cincinnati Bar Ass'n v. Estep*, 74 Ohio St. 3d. 172, 173 (1995); *State ex rel. Nicodemus v. Indus. Comm'n*, 5 Ohio St. 3d 58, 60 (1983).

In determining whether an activity constitutes the practice of law, this Court has looked to whether it requires special legal knowledge or expertise, whether it has the potential to harm the public, and whether the activity is used to create a record for appeal. *See, e.g., Cleveland*

Bar Ass'n v. Woodman, 98 Ohio St. 3d 436, 437 (2003). In making this determination, this Court has also shown concern for the public interest and has recognized that confining the performance of certain tasks to attorneys is likely to increase costs for Ohioans. *See, e.g., Henize v. Giles*, *supra*; *Cleveland Bar Ass'n v. Woodman*, *supra*. Specifically, this Court has observed that requiring parties to hire attorneys may frustrate the goal of Ohio's workers' compensation system of providing a "speedy, simple and inexpensive method to compensate workmen." *Goodman v. Indus. Comm'n*, 130 Ohio St. 427, 429 (1936).

The list of activities that the UPL Board deemed the unauthorized practice of law is extremely broad and may well sweep in activities beyond the types that this Court has deemed to be the practice of law. The UPL Board's broad definition of the practice of law, and the concomitant restriction on lay activities, may not serve the public interest. For example, the conclusion that recommending the retention of an attorney to handle a claim before the IC is the practice of law may have the perverse effect of depriving consumers of information about the need for attorney representation in certain circumstances. Although the UPL Board Final Report may not state that it prohibits lay practice entirely, its sweeping language creates such ambiguity that it is likely to unduly inhibit non-lawyers from competing with lawyers to provide services and may result in an effective ban on lay representation before the IC.

Accordingly, to the extent that adopting the UPL Board's recommendations will ban or unduly restrict the use of lay representation before the IC, it is important to recognize that prohibiting non-attorneys from representing parties before the IC would deprive Ohioans of the benefits of competition between attorneys and non-attorneys, likely leading to reduced choices and higher costs for consumers. The public interest can be served by such a restriction on lay

practice only if the restriction provides countervailing benefits sufficient to justify the increased costs that Ohio consumers would likely bear. Importantly, the UPL Board concedes that it did not consider the public interest in its recommendation to this Court. *See* Final Report at 9-10.

This Court has the power to determine whether preventing non-attorneys from participating in the IC adjudication process serves the public interest. We respectfully submit that banning or unduly restricting non-attorneys from representing parties before the IC is not in the public interest.

I. THIS COURT CONSIDERS THE PUBLIC INTEREST WHEN DETERMINING WHETHER CERTAIN ACTIVITIES CONSTITUTE THE PRACTICE OF LAW

"Unquestionably," the Supreme Court of Ohio "ultimately controls the practice of law in this state." *Henize*, 22 Ohio St. 3d at 217. *See also* OHIO CONST. Art. IV, § 2(B)(1)(g). When determining what constitutes the practice of law, this Court considers whether proscribing lay persons from performing certain tasks is in the public interest. *See Woodman*, 98 Ohio St. 3d at 437.[1] With the "responsibility to protect the public by preventing the unauthorized practice of law" comes a duty not to "exercis[e] this authority so rigidly that the public good suffers." *Henize,* 22 Ohio St. 3d at 217-18; *see also id.* at 218 (the practice of law should not be defined in

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[1] In *Woodman*, this Court also stated that in addition to "the potential for harm to the public," it considers "the nature of the activity, any special skills required, . . . and whether a record is being created for purposes of appeal." 98 Ohio St. 3d at 437. This brief addresses only the public interest aspect of the calculus. However, as discussed *supra*, we note that those activities which IC Res. No. R04-1-01 (2004) allows non-lawyers to perform are reviewed *de novo* by the Common Pleas Court, *see* Brief Amicus Curiae of the State of Ohio at 22, *Cleveland Bar Association v. CompManagement Inc.* (No. 04-0817) (hereinafter "Ohio St. Amicus Br."), and that R04-1-01 already prohibits non-attorneys from performing services that may require "special skills," such as rendering legal advice, legal interpretation of evidence, or cross-examining witnesses. *See* R04-1-01 (B)(1)-(7).

a way that " hamper[s] and burden[s] such [public] interest with impractical technical restraints no matter how well supported such restraint may be from the standpoint of pure logic").[2] As the Supreme Judicial Court of Massachusetts has observed, "[t]he justification for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the *protection of the public* . . . ." *Lowell Bar Ass'n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943) (emphasis added).

In considering the public interest, this Court has recognized that prohibiting non-attorneys from performing certain tasks is likely to result in higher costs for Ohioans. *See Henize,* 22 Ohio St. 3d at 220 (prohibiting lay representation in unemployment compensation hearings would be "a serious detriment to claimants and employers"). In the specific context of workers' compensation, moreover, eliminating the choice to hire a non-attorney is likely to increase parties' costs. *See Cuyahoga*, 175 Ohio St. at 155 (Gibson J., concurring in part) (the public has an interest "as expressed in constitutional and statutory provisions" in being able to secure compensation for workplace injuries "without [the] necessity of litigation, attorneys, and their attendant costs").

When "lay representation does not pose a hazard to the public," imposing such additional

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[2] This public interest approach is consistent with that taken by the courts of other states in determining what constitutes the practice of law. *See Perkins v. CTX Mortg. Co.*, 969 P.2d 93, 99 (Wash. 1999) (resolution "depends on balancing the competing public interests of (1) protecting the public from the harm of the lay exercise of legal discretion and (2) promoting convenience and low cost"); *In re Op. No. 26 of the Comm. on the Unauthorized Practice of Law*, 654 A.2d 1344, 1346 (N.J. 1995) ("We determine the ultimate touchstone – the public interest – through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities."); *Frazee v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778, 782 (Ky. 1964) ("The basic consideration in suits involving unauthorized practice of law is the public interest.").

costs on Ohio consumers cannot serve the public interest. *Henize*, 22 Ohio St. 3d at 219; *accord Unauthorized Practice of Law Committee v. Employers Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986) (finding that because "the amounts involved do not warrant the employment of an attorney . . . [l]ay representation [before the Colorado Department of Labor and Employment] has proven cost effective. As a matter of public policy, the benefits of the present system of lay representation serve the best interests of the public.").

II. WHEN DETERMINING WHETHER RESTRICTING LAY PRACTICE BEFORE THE IC SERVES THE PUBLIC INTEREST, THIS COURT SHOULD BALANCE THE BENEFITS FROM COMPETITION AGAINST ANY HARM THAT RESULTS FROM NON-ATTORNEY REPRESENTATION

The ability of competition to produce lower prices and better goods and services is widely recognized. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 (citation omitted). And the benefits competition brings to consumers of services provided by the "learned professions" are no different from the benefits derived from competition in manufacturing and service industries. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689. When non-lawyers are permitted to compete with lawyers, consumers are able to choose for themselves a service provider that best matches their preferences for price and non-price factors. Indeed,

> [t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 695; *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990). Generally, antitrust laws and competition policy require that a restriction on competition be justified by a valid need for that restriction and that such restriction

be narrowly drawn to minimize its anticompetitive impact. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

In the instant case, the Cleveland Bar Association has neither alleged nor presented any evidence to suggest that Respondents' practice before the IC has harmed consumers. The Cleveland Bar Association, moreover, has failed to present any evidence that non-attorney practice before the IC – under the status quo as it has existed since 1970 – has led employers or claimants to suffer any harm. Additionally, Ohio's workers' compensation legislation, the Court's findings in the analogous context of unemployment compensation hearings, and the fact that Ohio, other states, and the federal government allow lay representation in a host of administrative proceedings, all point to the conclusion that allowing non-attorney representation before the IC is not likely to harm consumers.

If this Court were to adopt the full logic of the Final Report, it could well result in an effective ban on lay representation before the IC. Absent compelling evidence that parties are likely to suffer harm from the employment of non-attorneys to represent them in IC proceedings, the public good cannot be served by denying Ohio consumers the choice between using a non-attorney and using an attorney for representation before the IC.

Of course, some Ohio consumers may prefer to hire an attorney to provide them with legal advice or undertake other legal activities in connection with IC proceedings, and it should unquestionably be their right to do so. However, their right to such a choice does not justify the complete elimination of the choice for consumers who would otherwise prefer lay representation. The consumer deserves the right to evaluate all elements of the bargain and to choose whether to hire a lawyer or a non-lawyer.

A. Prohibiting lay practice before the IC is likely to cause employers and claimants to have less choice and to pay higher prices

In light of the broad sweep of the UPL Board's Final Report, it is likely that employers and employees who would otherwise choose non-attorneys to assist them in the IC adjudication process will be required to hire an attorney. This will have a large impact, given that an overwhelming number of parties before the IC currently choose non-attorney representation.[3] This clear preference provides strong evidence that, in view of the interests at stake and the informality of the process, parties do not find it in their interest to hire attorneys. These parties clearly may be harmed if forcing them to hire an attorney deprives them of the combination of price and quality that they prefer. For example, evidence presented in proceedings before the UPL board suggests that mandatory use of attorneys in Ohio workers' compensation hearings could increase fees for handling claims before the IC by between $83 million and $412 million for claimants and between $66 million and $243 million for employers.[4]

In addition, it is probable that the UPL Board's decision will affect even those parties that otherwise would hire an attorney. The presence of non-attorneys provides a competitive constraint on the rates that attorneys are able to charge for practice before the IC. A ban on non-attorney representation will remove this competitive check and is likely to enable attorneys to charge more for their services. In this way, even parties who would choose an attorney over a

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[3] Non-attorneys represent at least one party in 95 percent of the 190,000 annual hearings before the IC. *See* Ohio St. Amicus Br. at 19.

[4] *See* Expert Report of Daniel E. Ingberman at 21. Dr. Ingberman also estimates that, depending on the level of attorney involvement, contingency fees, and award levels, workers' compensation premiums in the state of Ohio could increase by as much as $1.3 billion, or an additional $237 per Ohio employee. *Id.* at 7.

lay service provider also will likely pay higher prices.[5] As the Kentucky Supreme Court noted in a similar matter, "the presence of title companies encourages attorneys to work more cost-effectively." *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003).

B. Banning non-attorneys from practicing before the IC is not likely to provide employers or claimants with any additional protections

The legislation and regulations implementing the workers' compensation system express a determination that the public interest is served by not requiring parties before the IC to endure "litigation, attorneys, and their attendant costs." *See Cuyahoga*, 175 Ohio St. at 154. For example, Ohio Code § 4123.06 requires the IC to "set reasonable standards for those attorneys, *agents, or representatives* who practice before the bureau, district or staff hearing officers, or the commission." OHIO REV. CODE ANN. § 4123.06 (Anderson 2004) (emphasis added). Likewise, when carrying out its statutory mandate to promulgate rules, the IC contemplated that parties would be able to use non-attorneys. *See* OHIO ADMIN. CODE § 4121-2-01 (A) (setting out rules for the "[s]tandards of practice for attorneys, *agents and representatives* of claimants or employees" before the IC) (emphasis added).[6] Indeed, in adopting rules to govern practice

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[5] *See also In re Op. No. 26*, 654 A.2d at 1349 (real estate attorneys' fees in southern New Jersey, where competition from lay settlements was commonplace, found to be lower than in northern New Jersey, where lawyers conducted almost all settlements).

[6] Similarly, IC brochures provided to the public indicate that representation by a lawyer is not required. "Hearings before the IC are informal in nature and legal representation is not required. However, parties may choose to be represented by an attorney *or other authorized person*." Industrial Commission of Ohio, Your Rights, *available at* http://www.ohioic.com/news/Brochures/rights.pdf (accessed July 11, 2004) (emphasis added); Industrial Commission of Ohio, Hearing Process, *available at* http://www.ohioic.com/news/Brochures/hearingprocess.pdf (accessed July 11, 2004) (emphasis added).

before it, the IC recently reiterated that the IC adjudication process "was designed so that injured workers and employers may participate in the process *without using licensed attorneys*." R04-1-01 (emphasis added).

Such plain language bespeaks a determination by the Ohio legislature and the IC itself that lay representation in IC matters is in the public interest. *See Cuyahoga*, 175 Ohio St. at 159 (Gibson, J., concurring in part) (such language is "[c]onsistent with the purpose" of the workers' compensation scheme "that injured workers should be able to obtain compensation without the necessity of employing an attorney").

Indeed, this Court has noted that one of the "main objects sought to be accomplished by [the Workmen's Compensation Act] was to provide a speedy, simple and inexpensive method to compensate workmen . . . [by] do[ing] away with the vexation and protracted litigation which had proved so costly, exhaustive and unsatisfactory, oftimes [sic] resulting in great injustice." *Goodman*, 130 Ohio St. at 429. As a leading authority on Ohio workers' compensation law has noted, "[t]he purpose of the workers' compensation administrative procedure is to promote informality and to curtail resort to formal rules of pleading and procedure in claims proceedings." PHILIP J. FULTON, OHIO WORKERS' COMPENSATION LAW § 4.1, at 69 (1998). This description of the IC process also comports with that given by IC Commissioner Patrick Gannon in testimony before the UPL Board:

> The Industrial Commission truly is an alternative dispute resolution process, so we would like to believe that coming and having a hearing with us is a whole lot cheaper than going to court, going through that process.

UPL Board hearing tr. (hereinafter "tr.") at 44.[7]

Moreover, as in the case of unemployment compensation hearings, "[a]lthough parties may choose to be represented by lawyers in these proceedings, the hard reality is that few employ legal counsel." *Henize,* 22 Ohio St. 3d at 217. As noted above, non-attorneys represent at least one party in 95 percent of the 190,000 annual hearings before the IC. *See* Ohio St. Amicus Br. at 19. This revealed preference provides strong evidence that parties do not find it in their interest to hire attorneys. *See Henize*, 22 Ohio St. 3d at 217. *Accord Unauthorized Practice of Law Comm.*, 716 P.2d at 465 (Erickson, J., specially concurring) (although technically the practice of law, non-attorney representation involving contested claims for benefits filed by former employees allowed "in view of the small dollar value of the claims, the simple, informal nature of the hearings, the need for speedy an inexpensive adjudications, and the long tradition of lay representation before Division of Employment referees"). Further, this Court has found that the public is not benefitted by requiring parties to hire attorneys for similar proceedings before the Unemployment Compensation Board of Review. As is the case with workers' compensation claims before the IC, Board of Review "proceedings are designed and function as alternatives to judicial dispute resolution so that the services of the a lawyer are not a requisite to receiving a fair hearing and just decision." *Henize*, 22 Ohio St. 3d at 216.

As discussed *supra*, banning non-attorneys from practice before the IC is likely to cause Ohioans to pay higher prices to handle workers' compensation claims. Faced with the prospect of having to hire an attorney, some may decide to go without representation. Empirical evidence

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[7] *See also* tr. at 106 (Gannon) ("I don't think that when the process was started, that there was a desire that lawyers . . . would be the main component to the system.").

suggests that to the extent that small businesses or individual employees opt to represent themselves before the IC because they cannot afford to hire an attorney, those persons are likely to be less successful before the IC than if they had lay representation. For example, one study of proceedings before the Wisconsin Labor and Industry Review Commission found that although the difference between attorney- and lay-represented parties did not differ significantly, "employee appellants win 45 percent of appeals with either a lawyer or agent, but only 33 percent with no representative." HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NON LAWYERS AT WORK 50-51 (1998). Thus, adoption of the UPL Board's Final Report may actually result in worse outcomes for a substantial number of employees and employers.

C. There is no evidence that the current practice of allowing lay representation before the IC has harmed consumers, and lay representation is permitted before many state and federal agencies

Significantly, there is no allegation or evidence that Respondents in the instant case have ever harmed consumers through representation before the IC. In fact, in testimony before the UPL Board, Commissioner Patrick Gannon acknowledged that the IC has never "taken any action to suspend or to investigate" Respondents, and further that the IC has never "had any complaints filed with it by any third party" with respect to Respondents' conduct. Tr. at 63-66. Further, there is evidence in the record that there has not been a complaint against any actuarial firm in at least the past ten years. *Id.* at 66.[8]

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[8] Actuarial firms make up a large proportion of lay representation before the IC. *See* Ohio St. Amicus Br. at 19 (in 47 percent (or 89,300) of the annual hearings "the employer's only representative is an actuary"). Commissioner Gannon testified that since he became a Commissioner in 1994, he can recall only one instance of a "concern" being raised with regard to practice before the IC, and it did not involve an actuarial firm:

> We have had . . . some concerns raised, but I can't say that it was an actuarial firm. I'm

If this Court were to determine that the public is served by allowing non-attorneys to participate in workers' compensation proceedings, it would not be alone. *See, e.g., Henize*, 22 Ohio St. 3d at 218 ("in reaching our decision, we also deem it significant that other states have allowed lay representation at unemployment hearings"). Indeed, seventeen states and the District of Columbia allow lay representation at workers' compensation claim hearings; and of the jurisdictions where the state is the "exclusive provider" of insurance, only West Virginia does not allow laypersons to represent employers. U.S. Dep't of Labor, Office of Workers' Compensation Programs, *Attorney Fees in Workers' Compensation, available at* http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables- pdf/table-18.pdf (accessed July 11, 2004).

Ohio and other states also permit lay participation before a host of other state agencies. *See* Ohio St. Amicus Br. at 18 ("a number of Ohio agencies – including the Unemployment Compensation Review Commission, State Employment Relations Board and Health and Human Services – permit non-lawyers to represent claimants or parties in administrative hearings"); *In re Petition of Burson*, 909 S.W.2d 768 (Tenn. 1995) (statute permitting accountants to represent taxpayers before board of equalization did not constitute the unauthorized practice of law); *Unauthorized Practice of Law Comm., supra* (statute authorizing unlicensed representation before Department of Labor and Employment held to be constitutional); *State Bar v. Galloway*, 369 N.W.2d 839 (Mich. 1985) (upholding statute permitting nonlawyers to appear before the

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> thinking of one case, an individual out of Pittsburgh, but . . . I don't recall complaints filed against the actuarial blanket-wise.

Tr. at 66.

Employment Security System despite existing unauthorized practice statutes).

Empirical scholarship, moreover, suggests that parties who turn to lay providers for assistance in adjudication before these state agencies typically enjoy success rates similar to those enjoyed by parties who hire attorneys. For example, in unemployment compensation appeals before the Wisconsin Labor and Industry Review Commission, "[t]he overall pattern does not show any clear differences between the success of lawyers and agents." *See* KRITZER, *supra*, at 50-51.[9]

Likewise, the federal government allows non-attorney practice before numerous administrative agencies. *See* KRITZER, *supra*, at 11 ("by one count, as of 1994, nonlawyers can appear as advocates before thirty-eight federal agencies"). For example, non-lawyers have practiced before the U.S. Patent and Trademark Office from its inception, with the express approval of the Office and with the knowledge of Congress. *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 383 (1963). The Supreme Court has in fact compelled states to allow non-lawyers registered to practice before the Patent Office to prepare and prosecute patent applications. *Id.* Likewise, accountants may practice in tax matters before the Treasury Department. *Grace v. Allen*, 407 S.W.2d 321 (Tex. Civ. App. 1966) (accountants admitted to practice before Treasury Department in preparation and presentation of client's protest of federal income tax assessment

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[9] In labor grievance arbitration cases decided by staff arbitrators from the Wisconsin Employment Relations Commission, a union is successful 42 percent of the time when it is represented by a lawyer. When represented by a non-lawyer, it is successful 36 percent of the time, a statistically insignificant difference. KRITZER, *supra*, at 171-72. For Social Security disability appeals between 1977 and 1993, "the difference in success rates is very small [between those with an attorney representative and those with a non-attorney representative], typically one or two percentage points, occasionally widening out to as much as six percentage points." *Id.* at 116.

may perform some legal research and provide assistance to tax lawyers).

Finally, state supreme courts have found little evidence of harm from widespread lay involvement in the real estate settlement process. *See Countrywide Home Loans, Inc.*, 113 S.W.3d at 121; *In re Op. No. 26*, 654 A.2d at 1346 ("The record fails to demonstrate that the public interest has been disserved by the South Jersey practice [of allowing non-attorneys to perform settlement services, including title examinations and closings] over the many years it has been in existence."); *State Bar of New Mexico v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978) (in county where title companies handled approximately 90 percent of the real estate closings and had been performing service for 20 years, "[t]here was no convincing evidence that the massive changeover in the performance of this service from attorneys to the title companies during the past several years has been accompanied by any great loss, detriment or inconvenience to the public"). Further, an empirical study found that "the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law." Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!,"* 31 CONN. L. REV. 423, 520 (1999); *accord* Michael Braunstein, *Structural Change & Inter-Prof'l Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 274-75 (1997) (discussing a 1989 Ohio study that "indicate[d] that increased lawyer involvement does not have a beneficial effect on outcomes of home purchase transactions").

III. THERE ARE ALREADY LESS RESTRICTIVE ALTERNATIVES FOR PROTECTING CONSUMERS THAN BANNING OR SEVERELY RESTRICTING NON-ATTORNEY PRACTICE BEFORE THE IC

As a threshold matter it is important to recognize that there already exist safeguards to protect the public from the shoddy or dishonest provision of services designed to assist in the IC adjudication process. IC Rule 4121-2-02 (A), for example, requires that "[t]he commission *shall* suspend from practice before . . . the commission . . . , or reprimand as the nature of the offense warrants, the representatives of claimants or employers who violate any reasonable rules made and promulgated by the commission under authority of law." OHIO ADMIN. CODE § 4121-2-02(A) (emphasis added). Further, just as attorneys are subject to a malpractice claim, which is "nothing more than a legal negligence claim," lay providers are also subject to common law claims if their negligence causes consumer harm. *Countrywide Home Loans, Inc.*, 113 S.W.3d at 121. Likewise, the market process itself acts to assure that lay service providers give consumers the level of quality for which they bargained. As the Supreme Court of Kentucky noted in the case of settlement agreements:

> [T]he nature of our economy is such that incompetent and unethical closing agents, whether attorneys or non-attorneys, will be nudged aside by consumers who will choose the most effective and efficient providers. . . . [W]e recognize that lay closing agents earn their livelihoods from continued business. If they fail to act ethically and professionally, they risk that livelihood.

Id. at 120, 121. The same is true for persons providing assistance in the IC process. Attorneys and non-attorneys who develop reputations for incompetence or unethical behavior are likely to find themselves without clients.

If this Court concludes that Ohio consumers require safeguards beyond what IC Rule 4121-

2-02 (A), the legal system, and the market process already provide, it should consider ways to protect consumers that restrict competition less dramatically than what is likely to result from adoption of the UPL Board's Final Report – the wide restriction or effective ban on lay participation in proceedings before the IC.

Since 1970, actuaries and the Ohio State Bar voluntarily have adhered to an agreement that permits actuaries to perform certain functions before the IC, which the IC recently has adopted formally. IC Res. No. R04-1-01 (2004). R04-1-01 represents an effort by the IC, aided by the views of competing providers of professional services to persons seeking relief before the IC, to strike a balance between (1) the harm to the public that may arise from the unauthorized practice of law and (2) the public's interest in a simple and inexpensive workers' compensation system. Although the Federal Trade Commission takes no position on whether R04-1-01 strikes precisely the right balance, we note that by proscribing non-attorneys from engaging in a number of practices, R04-1-01 represents a less restrictive alternative than the precedent that will be set if this Court adopts the restrictions embodied in the UPL Board's Final Report. As discussed earlier, moreover, the Cleveland Bar Association has neither alleged nor submitted any evidence to indicate that lay practice under R04-1-01 has caused any consumer harm.

CONCLUSION

Although the Federal Trade Commission takes no position on the merits of this case, we respectfully submit that absent any evidence of consumer harm from lay practice before the IC, this Court should not adopt any rule that severely restricts or effectively bans such practice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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