

No. 2011-1681

---

**In the Supreme Court of Ohio**

FROM THE BOARD ON THE  
UNAUTHORIZED PRACTICE OF LAW OF THE SUPREME COURT OF OHIO  
CASE NO. UPL 09-07

CLEVELAND METROPOLITAN BAR ASSOCIATION

*Relator*

v.

MICHAEL D. DAVIE

AND

ALPHA LEGAL SERVICES, INC.

*Respondents.*

---

**RELATOR'S MEMORANDUM IN OPPOSITION TO MOTION TO SUPPLEMENT  
RECORD**

---

Donald R. Murphy (0024068)  
12800 Shaker Boulevard, Suite 208  
Cleveland, Ohio 44120  
Office: (216) 991-4883

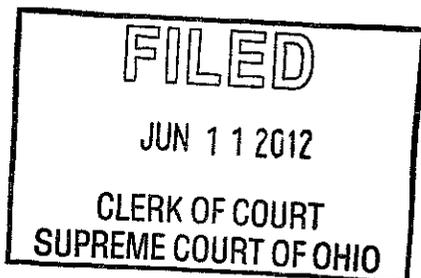
*Attorney for Respondents  
Michael D. Davie and Alpha Legal Services,  
Inc.*

John A. Hallbauer (0001076)  
Counsel of Record  
[hallbauer@buckleyking.com](mailto:hallbauer@buckleyking.com)  
Buckley King  
1400 Fifth Third Center  
600 Superior Avenue, East  
Cleveland, Ohio 44114  
Office: (216) 363-1400  
Fax: (216) 579-1020

and

Heather M. Zirke (0074994)  
[hzirke@clemetrobar.org](mailto:hzirke@clemetrobar.org)  
Cleveland Metropolitan Bar Association  
1301 East Ninth Street, Second Level  
Cleveland, Ohio 44114  
Office: (216) 539-5971  
Fax: (216) 696-2413

*Attorneys for Relator  
Cleveland Metropolitan Bar Association*



IN THE SUPREME COURT OF OHIO

CLEVELAND METROPOLITAN BAR )  
ASSOCIATION, )  
 )  
Relator, )  
 )  
v. )  
 )  
MICHAEL D. DAVIE )  
 )  
- and - )  
 )  
ALPHA LEGAL SERVICES, INC., )  
 )  
Respondents )

CASE NO: 2011-1681

RELATOR’S MEMORANDUM IN  
OPPOSITION TO MOTION TO  
SUPPLEMENT RECORD

**I. INTRODUCTION**

This matter is pending before the Court on Objections of Relator Cleveland Metropolitan Bar Association ( “CMBA”) to the Final Report of the Board of Commissioners on the Unauthorized Practice of Law (“Board”) issued October 4, 2011. Relator filed timely Objections to that Final Report subsequent to this Court’s order to show cause entered October 17, 2011 pursuant to Gov. Bar R.VII (16)(B). The CMBA filed its Objections because the Board did not find unauthorized practice to have occurred with respect to the representation of Cleophus Jones by Respondents Michael D. Davie (“Davie”) and Alpha Legal Services, Inc. (“ALS”) before the Ohio Parole Board, although it did find unauthorized practice by the Respondents in certain other instances. Essentially, the CMBA primarily argued in its objections that the Board totally failed to evaluate the contents of the memorandum submitted to the Parole Board by the Respondents as constituting legal argument, analysis, citation and interpretation

precluded by *Cleveland Bar Assn. v. CompManagement, Inc. (CompManagement II)*, 111 Ohio St. 3d 444, 2006-Ohio-6108, 857 N.E. 2d 95.

Now, after the case has been fully briefed and argued on the merits, the Board has moved to submit its internal Panel Report as an addition to the record. The Panel Report was never seen by the parties and the Realtor had no opportunity to address it in briefing to the Board or in its Objections to the Ohio Supreme Court. Relator could only address in its Objections, the Board Report and, as will be demonstrated, that is all that is provided for in Gov. Bar R. VII. Moreover, it would be fundamentally unfair to change the record in the case without providing for further briefing and argument, especially when the matter can properly be concluded upon the Board Report, the Objections thereto by Realtor, and the record as it exists.

**II. THE FILING OF A MOTION TO SUPPLEMENT RECORD AFTER ORAL ARGUMENT ON THE MERITS IS CONTRARY TO S.CT. PRAC. R. 9.9.**

Ohio Supreme Court Practice Rule 9.9 entitled “Supplemental filings after oral argument” provides in relevant part:

“Unless ordered by the Supreme Court, the parties shall not tender for filing and the Clerk shall not file any additional briefs or other materials relating to the merits of the case after the case has been orally argued.”

The argument in this case was presented to the Court on January 18, 2012. The docket in this case reflects no order by the Supreme Court directed to the Board requesting a motion to supplement the record. The Motion to Supplement Record certainly is not “relevant authority... issued after oral argument” as provided for in the second sentence of S.Ct. Prac. R. 9.9, since the Panel Report mentioned in the Motion to Supplement Record is dated June 27, 2011, long before oral argument and long before the issuance of the Board Report in this matter.

Additionally, S.CT. Prac. R 14.1(A)(1) would appear to preclude the Clerk of the Supreme Court from even accepting the Motion to Supplement Record for filing.

**III. THE PANEL REPORT IS AN INTERNAL DOCUMENT OF THE BOARD AND NOT PART OF THE RECORD BEFORE THE SUPREME COURT.**

Gov. Bar R. VIII (18) provides that all records, documents, proceedings and hearings of the Board relating to investigations and complaints of unauthorized practice of law shall be public, “except that deliberations by a hearing panel and the Board shall not be public.” Reports of the hearing panels are submitted to the Board, but they are not made public or submitted to the parties and their counsel in other matters pending before hearing panels and the Board. When a matter is fully disposed of by a panel and it proceeds to the full Board, the Panel Report is just something that the full Board considers in its deliberations. Of course, the full Board, at that point, also includes the Panel members.

Gov. Bar R. VII (7)(C) gives a hearing panel limited and discretionary authority to dismiss a charge or count of unauthorized practice of law upon unanimous finding “that the evidence is insufficient to support a charge or count.” If that occurs, the panel’s chair directly gives written notice of the panel’s dismissal” to the Board, the respondent, the realtor and all counsel of record, Disciplinary Counsel, the unauthorized practice of law committee of the Ohio State Bar Association, and the bar association serving the county...from which the complaint emanated.” The Panel made no such order as to any count or claim of Realtor’s Complaint and gave no such notices.

The entire matter thus went to the full Board with the finding “by a preponderance of the evidence” that the Respondent had engaged in the unauthorized practice of law. Gov. Bar R. VII (7)(E).

Gov. Bar R. VII(7)(E) requires a hearing panel to file a Report of its proceedings, findings of facts and recommendations with the Secretary for review by the Board. Then, under

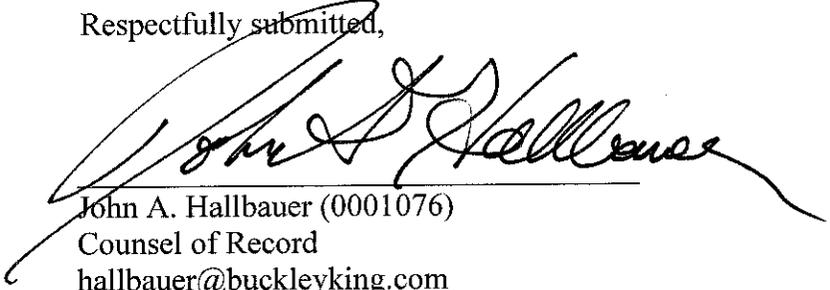
Gov. Bar R. VII(7)(F) the entire matter was reviewed by the entire Board, which issued a finding of the unauthorized practice pursuant to division (G) of the same rule. Under Gov. Bar R. VII (7)(G) the Board's Final Report is to "include the Board's findings, recommendations, a transcript of testimony..." There is no provision for the inclusion of the Panel Report.

It is also significant to note that Gov. Bar R. VIII (7)(C) and (D) relating to findings by the Panel both refer to a possible finding by the Panel that "the evidence is insufficient to support a charge or count of the unauthorized practice of law." Gov. Bar R. VII(7)(E) and (G) as to findings by the Panel and Board, respectively, of the existence of unauthorized practice of law both contain a "preponderance of the evidence" standard. Very recently, in *Eastley v. Volkman*, \_\_ Ohio St.3d \_\_, 2012-Ohio-2179, \_\_ N.E.2d. \_\_, the Ohio Supreme Court made it very clear that "sufficiency" and "weight" of evidence are conceptually different terms and that "[w]hether the evidence is legally sufficient to sustain a verdict is a question of law." *Id.* at ¶11. The nature of the argumentative material contained in the memorandum submitted to the Parole Board by the Respondents as constituting the unauthorized practice of law is a legal issue, not a weight of evidence issue, and is to be determined by the Court from the language used by Respondents in the memorandum. The Panel Report, which is not part of the record, will not aid that determination. Under Ohio Const., Art. IV, §2(B)(1)(9)(g) and §(3), the Supreme Court has original jurisdiction over all matters relating to the practice of law, the invocation of which jurisdiction cannot be prevented by any rule.

**IV. CONCLUSION**

For the foregoing reasons, the Motion to Supplement the Record should be denied. It could only add or reflect procedural confusion. The substance of the matter before the Court is contained in the Board Report and the materials submitted with it by the Board.

Respectfully submitted,



John A. Hallbauer (0001076)  
Counsel of Record  
[hallbauer@buckleyking.com](mailto:hallbauer@buckleyking.com)

Buckley King  
1400 Fifth Third Center  
600 Superior Avenue, East  
Cleveland, Ohio 44114  
Office: (216) 363-1400  
Fax: (216) 579-1020

and

Heather M. Zirke (0074994)  
[hzirke@clemetrobar.org](mailto:hzirke@clemetrobar.org)  
Cleveland Metropolitan Bar Association  
1301 East Ninth Street, Second Level  
Cleveland, Ohio 44114  
Office: (216) 539-5971  
Fax: (216) 696-2413  
*Attorneys for Relator Cleveland Metropolitan Bar Association*

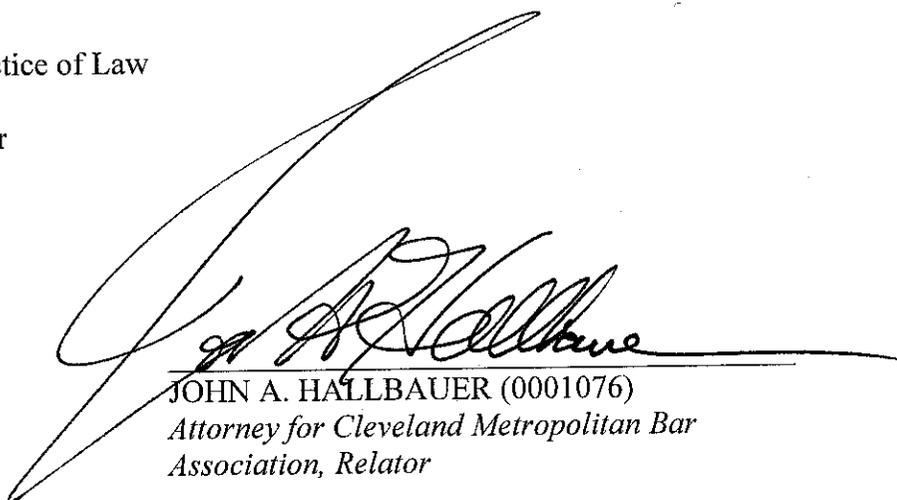
CERTIFICATE OF SERVICE

A copy of the foregoing Realtor's Memorandum in Opposition to Motion to Supplement Record was served this 8<sup>th</sup> day of June, 2012 by United States mail, postage prepaid, upon the following:

Donald R. Murphy, Esq.  
12800 Shaker Blvd.  
Cleveland, Ohio 44120  
*Counsel of Record for Respondents  
Michael D. Davie and Alpha Legal Services, Inc.*

and

Minerva B. Elizanga, Secretary  
Board on the Unauthorized Practice of Law  
The Supreme Court of Ohio  
65 South Front Street – 5<sup>th</sup> Floor  
Columbus, Ohio 43215-3431



JOHN A. HALLBAUER (0001076)  
*Attorney for Cleveland Metropolitan Bar  
Association, Relator*