

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

March 8, 2021

[Cite as *03/08/2021 Case Announcements #2, 2021-Ohio-622.*]

DISCIPLINARY CASES

2020-1572. Mahoning Cty. Bar Assn. v. Amatore.

On Final Report by the Board on the Unauthorized Practice of Law, No. UPL 19-05. Anthony J. Amatore and Amatore & Company enjoined from engaging in the unauthorized practice of law in Ohio.

Fischer, J., concurs, with an opinion joined by O'Connor, C.J., and Brunner, J. DeWine, J., dissents, with an opinion joined by Kennedy, J.

FISCHER, J., concurring.

{¶ 1} I concur in the decision to approve the proposed consent decree reached between relator, Mahoning County Bar Association, and respondents, Anthony J. Amatore and his company, Amatore & Company, L.L.C. (collectively, “Amatore”), as recommended by the Board on the Unauthorized Practice of Law. There is no doubt in my mind that Amatore engaged in the unauthorized practice of law by advertising some services that could be properly performed only by an attorney and when he prepared legal documents on behalf of clients and then filed those documents with the Ohio Secretary of State. I write separately to address some concerns raised by the dissenting opinion.

I. Unauthorized Practice of Law

{¶ 2} This court has sole jurisdiction to determine who may practice law in this state. Article IV, Section 2(B)(1)(g), Ohio Constitution. This jurisdiction includes the regulation of the unauthorized practice of law. *Disciplinary Counsel v. Schwab*, __ Ohio St.3d __, 2021-Ohio-283,

__ N.E.3d __, ¶ 10. The purpose of regulating the unauthorized practice of law is not only to protect those whom have been granted the right to practice law, *see Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 34, 193 N.E. 650 (1934), but much more importantly “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.

{¶ 3} We have defined the practice of law expansively. *Cincinnati Bar Assn. v. Foreclosure Solutions, L.L.C.*, 123 Ohio St.3d 107, 2009-Ohio-4174, 914 N.E.2d 386, ¶ 21. A decision, I believe, that best protects the public. The unauthorized practice of law includes “both the ‘rendering of legal services for another’ and the ‘[h]olding out to the public or otherwise representing oneself as authorized to practice law in Ohio’ by any person who is not authorized to practice law under our rules.” *Schwab* at ¶ 11, quoting Gov.Bar R. VII(2)(A)(1) and (4).

{¶ 4} Nearly 90 years ago in *Dworken*, this court astutely held that “[t]he practice of law is not limited to the conduct of cases in court,” but rather “[i]t embraces * * * the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.” *Id.* at paragraph one of the syllabus. Since that pronouncement, this court has consistently held that the practice of law encompasses “the preparation of legal documents and instruments upon which legal rights are secured or advanced.” *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885, ¶ 17; *see also Schwab* at ¶ 11.

{¶ 5} However, when the preparation of legal documents is merely clerical in nature—i.e., recording basic information not requiring the exercise of legal skill—then no unauthorized practice of law has occurred. *See Gustafson v. V.C. Taylor & Sons*, 138 Ohio St. 392, 397, 35 N.E.2d 435, (1941) (a real-estate broker who filled in blanks on a preprinted form that had been prepared by an admitted attorney for offers to purchase real estate did not engage in the unauthorized practice of law because the “supplying of simple, factual material such as the date, the price, the name of the purchaser, the location of the property, the date of giving possession and the duration of the offer requires ordinary intelligence rather than the skill peculiar to one trained and experienced in the law”).

II. Amatore and His Estate-Planning Services

{¶ 6} The dissenting opinion takes issue with this court’s approval of the proposed consent decree because Amatore is being sanctioned for filling out and filing on behalf of others preprinted forms that are available on the secretary of state’s website. Under a different set of facts, the dissenting opinion may be correct. However, Amatore’s “filling out and filing basic forms,” dissenting opinion at ¶ 18, for someone else constituted the unauthorized practice of law due to his participation in the creation of a corporation.

{¶ 7} Amatore’s website indisputably advertised estate-planning services. Those services included helping individuals define their estate-planning goals; preparing, organizing, and reviewing estate-planning documents; and arranging for the management of the estate. In addition to estate planning, Amatore advertised under the “New Business Formation” page that the company helped “[s]elect a business structure that best fits [the customer’s] needs by evaluating tax advantages, *legal exposures*, ease of operation and portability should [the customer] need to relocate.” (Emphasis added.) Additionally, Amatore advertised that the company would help the customer “[c]omply with employment laws” and “[d]evelop a solid Partnership Agreement” as it “is an extremely important document for all new partnerships * * *.” (Emphasis added.) In fact, in an about-the-author page in a chapter he wrote in a book, Amatore held himself out to be an individual who is “approved to represent clients in the local probate courts.”

{¶ 8} In the current matter, Doris L. Dickerhoof sought out Amatore for his ability to aid her in developing her estate plan. As stated in the consent decree, Amatore “prepared Articles of Organization for a Domestic Limited Liability Company on behalf of Mrs. Dickerhoof, using a form from the Secretary of State’s website. He then filed Articles of Incorporation with the Ohio Secretary of State, thereby creating the Salem Organ Company, LLC.” Amatore issued L.L.C. membership certificates to Mrs. Dickerhoof and her two children. Subsequently, Amatore sold Mrs. Dickerhoof’s son an annuity, which was transferred to Salem Organ Company, L.L.C., the company that Amatore created.

{¶ 9} Indeed, Amatore did more than simply fill out basic forms or complete work that is considered clerical in nature, which would have been permitted under *Gustafson*, 138 Ohio St. at 397, 35 N.E.2d 435. In filling out these forms, Amatore selected the domestic limited-liability form from the secretary of state’s website, specified that the company was a for-profit corporation, and then nominated himself as the statutory agent. It was Amatore’s decision to create Salem

Organ Company, L.L.C., and to select the specific form to create it. As stated by relator in the complaint, Mrs. Dickerhoof “had no knowledge regarding the benefits and risks of limited liability companies” and did not know how to form such a company in Ohio. Further, Amatore’s creation of the company benefitted him, as he sold the annuity that would be placed in the company he created. Amatore’s misconduct is similar to the misconduct at issue in *Miami Cty. Bar Assn. v. Wyandt & Silvers, Inc.*, 107 Ohio St.3d 259, 2005-Ohio-6430, 838 N.E.2d 655, in which we found that the respondent had engaged in the unauthorized practice of law.

{¶ 10} In *Wyandt & Silvers*, an accountant gave legal advice to and prepared legal documents for clients who inquired about setting up various businesses under Ohio law. *Id.* at ¶ 4. For each corporation he assisted, the accountant “filled out and perhaps filed basic forms available from the Ohio Secretary of State to establish articles of incorporation and appoint a statutory agent.” *Id.* This court determined that the accountant had engaged in the unauthorized practice of law by drafting documents to create a business entity for the clients. *Id.* at ¶ 11. We recognized that there are many issues in choosing a business structure, which “ordinarily requires a significant amount of legal judgment” in addition to other considerations. *Id.* at ¶ 12.

{¶ 11} If the record demonstrated that Amatore simply filled out basic forms, as was the situation in *Gustafson*, and thereby performed a purely clerical task, we may be in a different situation. However, the consent decree, though vague, when read in light of the pleadings, illustrates that Amatore’s actions in filling out forms on the secretary of state’s website and filing those forms to create a limited-liability company for Mrs. Dickerhoof’s estate plan constituted the unauthorized practice of law.

III. This Court’s Review of the Consent Decree

{¶ 12} The parties in this case drafted a consent decree for this court’s review. As I stated earlier, I believe that the consent decree is a bit vague and could certainly be clearer. It appears that many of the issues were resolved with Amatore’s modification of the website and that most of the facts and vague references in the consent decree, as agreed to by relator, were heavily negotiated to avoid further damage to Amatore’s reputation and business. Nevertheless, the consent decree is supported by the record.

{¶ 13} I disagree with the dissenting opinion’s assertion that this court’s approval is merely a rubber stamp. Dissenting opinion at ¶ 35. In my experience, each member of this court takes the time to carefully read and review the record, research the relevant law, and make decisions

accordingly. Under these circumstances, the record and law are clear that Amatore engaged in the unauthorized practice of law.

{¶ 14} This type of decision is important to Ohioans. This court has the “unique and complete responsibility, as designated by Article IV, Sections 2(B)(1)(g) and 5(B) of the Ohio Constitution, to regulate all matters related to the practice of law.” *State ex rel. Parisi v. Dayton Bar Assn. Certified Grievance Commt.*, 159 Ohio St.3d 211, 2019-Ohio-5157, 150 N.E.3d 43, ¶ 26. The most important goal in these cases is to ensure that the public is protected from unskilled legal representation. While other professions certainly have knowledge that is relevant to structuring businesses, we cannot ignore the fact that advising a person about such decisions requires a legal knowledge that only an attorney who is admitted to practice law is able to provide. As we said in *Dworken*, the practice of law includes providing “advice to clients and all action taken for them in matters connected with the law.” 129 Ohio St. 23, 193 N.E. 650, at paragraph one of the syllabus. The way we are regulating the practice of law in this case is not an attempt to create a monopoly on the filing of basic forms as the dissenting opinion contends; it is protecting the public from those who do not have the requisite knowledge and education to aid in making such decisions.

{¶ 15} Today’s decision also protects the members of the Ohio bar, not from competition, but from those who damage respect for the rule of law and confuse the public about legal matters. This case does not provide a legitimate foundation to accuse local bar associations of acting to restrain competition. Again, it is this court, not any bar association, that makes the ultimate decisions regarding matters relating to the practice of law. *Parisi* at ¶ 26. The local bar associations are doing a good job with the rules and case law that this court has provided to them. They are working hard to protect the citizens of this state.

{¶ 16} But as for restricting “competition,” this court, since its decision in *Dworken*, has found it necessary to protect the reputation and livelihood of those who have subjected themselves to the rigorous requirements of being admitted to the Ohio bar. In order so that Ohio citizens are protected, not only have Ohio attorneys engaged in the laborious study of the law, they have subjected themselves to an examination of their character, passed an arduous legal examination, expended funds to gain and maintain their licenses, and must take continuing-legal-education courses in order to practice in this state. Amatore has not and is not required to meet any of the

aforementioned requirements. Similar to reasons why only medical professionals are permitted to practice medicine, only individuals who are learned in the law should be able to practice the law.

IV. Conclusion

{¶ 17} I concur in the decision to approve the proposed consent decree reached between the Mahoning County Bar Association and Anthony J. Amatore and his company, Amatore & Company, L.L.C., as recommended by the Board on the Unauthorized Practice of Law.

O’CONNOR, C.J., and BRUNNER, J., concur in the foregoing opinion.

DEWINE, J., dissenting.

{¶ 18} Today, this court enters an order that prohibits an accountant from filling out and filing on behalf of others simple preprinted forms that are available on the Ohio Secretary of State’s website. The court enters this order under color of its authority to regulate the unauthorized practice of law. But entering basic information on a template is a task that can be competently performed by a great many people, not just those with a legal education. Because this court’s order extends well beyond conduct that plausibly may be considered the practice of law, I respectfully dissent.

I. This Court’s Order and Consent Decree

{¶ 19} Today’s order enjoins Anthony J. Amatore and Amatore & Company, L.L.C. (collectively, “Amatore”), from “all activities that constitute the unauthorized practice of law, including filling out and filing basic forms from the Ohio Secretary of State to establish articles of organization and appoint statutory agents on behalf of others.” The order adopts a consent decree entered into by Amatore and the Mahoning County Bar Association (“the bar association”), under which Amatore agrees to stop filling out such forms or to otherwise engage in the unauthorized practice of law and to remove certain statements from his website. In return for Amatore’s agreement to do these things, the consent decree provides that a civil penalty will not be assessed against Amatore.

II. Simply Filling out and Filing Basic Forms Available on the Ohio Secretary of State’s Website Does Not Constitute the Practice of Law

{¶ 20} The consent decree stipulates that “while engaging in the provision of non-legal services, Amatore prepared forms, pulled from the Ohio Secretary of State’s website, on behalf of

clients, and filed those forms with the Ohio Secretary of State, which constitutes the unauthorized practice of the law.”

{¶ 21} Specifically, the consent decree states that Amatore filled out a form titled “Articles of Organization for a Domestic Limited Liability Company” on behalf of a client and filed that form with the Ohio Secretary of State. It’s instructive to see just how basic this form is:

Form 533A Prescribed by:

Frank LaRose
Ohio Secretary of State

Toll Free: 877.767.3453
Central Ohio: 614.466.2910
Columbus: 614.466.2910
business@ohiosos.gov
File online or for more information: OhioBusinessCentral.gov
For screen readers, follow the instructions located at this path.

Mail this form to one of the following:
Regular Filing (non-exempt):
P.O. Box 470
Columbus, OH 43216
Express Filing (non-business day processing fees, requires an additional \$100 fee):
P.O. Box 1000
Columbus, OH 43216

Articles of Organization for a Domestic Limited Liability Company

Filing Fee: \$99
Form Must Be Typed

CHECK ONLY ONE (1) BOX

(1) Articles of Organization for Domestic For-Profit Limited Liability Company (1154.LCA)

(2) Articles of Organization for Domestic Nonprofit Limited Liability Company (1154.NCA)

Name of Limited Liability Company _____
(Name must include one of the following words or abbreviations: "limited liability company", "limited", "LLC", "L.L.C.", "Ltd.", or "Ltd.")

Optional: Effective Date (MM/DD/YYYY) _____ (The legal existence of the corporation begins upon the filing of the articles or on a later date specified that is not more than ninety days after filing.)

Optional: This limited liability company shall exist for _____ Period of Existence

Optional: Purpose

**** Note for Nonprofit LLCs**
The Secretary of State does not grant tax exempt status. Filing with our office is not sufficient to obtain state or federal tax exemptions. Contact the Ohio Department of Taxation and the Internal Revenue Service to ensure that the nonprofit limited liability company secures the proper state and federal tax exemptions. These agencies may require that a purpose clause be provided.**

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Last Revised: 06/2019

Original Appointment of Statutory Agent

The undersigned authorized member(s), manager(s) or representative(s) of _____
(Name of Limited Liability Company)

hereby appoint the following to be Statutory Agent upon whom any process, notice or demand required or permitted by statute to be served upon the corporation may be served. The complete address of the agent is:

(Name of Statutory Agent)

(Mailing Address)

(Mailing City) OH _____
(Mailing State) (Mailing ZIP Code)

Acceptance of Appointment

The Undersigned, _____, named herein as the
(Name of Statutory Agent)

Statutory agent for _____
(Name of Limited Liability Company)

hereby acknowledges and accepts the appointment of statutory agent for said limited liability company.

Statutory Agent Signature _____
(Individual Agent's Signature / Signature on Behalf of Business Serving as Agent)

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See Ohio Secretary of State, *Filing Forms & Fee Schedule*, <https://www.ohiosos.gov/businesses/filing-forms--fee-schedule/#domestic> (accessed Feb. 22, 2021) [<https://perma.cc/J2BP-K7LK>].

{¶ 22} As evidenced above, filling out the form does not take much. Amatore merely had to (1) write down a name for the L.L.C., (2) check a box to designate the L.L.C. as either a nonprofit or for-profit corporation, and (3) supply his name, signature, and address to designate himself as the L.L.C.’s statutory agent. Beyond that, all that is required is the name and signature of the person filling out the form and the contact information for the person who is to receive the approval certificate of the newly formed L.L.C. And helpfully, the form includes two pages of detailed instructions in case there is any question as to what exactly is to be provided.

{¶ 23} Filing the form with the right office is just as straightforward: the form itself provides the mailing address, amount and method for payment, and the available options for processing time. The form also includes contact information for the secretary of state's office along with the office's website.

{¶ 24} In short, there is nothing about filling out or filing the form that requires legal training or legal education; to the contrary, one would expect that most high-school graduates would have little difficulty with the task.

A. Our Caselaw Does Not Compel the Result Reached by the Majority

{¶ 25} One clearly doesn't need any specialized legal training to fill in the form, nor does one exercise any legal judgment while filling in the form, so why does this court say doing so constitutes the practice of law?

{¶ 26} The consent decree cites *Miami Cty. Bar Assn. v. Wyandt & Silvers, Inc.*, 107 Ohio St.3d 259, 2005-Ohio-6430, 838 N.E.2d 655, as support for its supposition that simply filling in the secretary of state's form constitutes the practice of law. But on examination, our caselaw does not dictate the result reached by the majority.

{¶ 27} In the past, we have recognized that simply providing basic information on a form does not constitute the practice of law. In *Gustafson v. V.C. Taylor & Sons, Inc.*, 138 Ohio St. 392, 35 N.E.2d 435 (1941), the question was whether a nonlawyer committed the unauthorized practice of law by "merely filling printed blank forms" for real estate contracts. We boiled the issue down to whether a nonlawyer's act of filling out basic information on contract templates required "the exercise of legal skill" or looked more like clerical activity that merely "require[d] ordinary intelligence." *Id.* at 397. We went with the latter idea, recognizing:

[T]he supplying of simple, factual material such as the date, the price, the name of the purchaser, the location of the property, the date of giving possession and the duration of the offer requires ordinary intelligence rather than the skill peculiar to one trained and experienced in the law.

Id.

{¶ 28} Some of our more recent decisions have deviated from *Gustafson*, despite citing it as support before enjoining a person from preparing basic forms. *See Columbus Bar Assn. v.*

Verne, 99 Ohio St.3d 50, 2003-Ohio-2463, 788 N.E.2d 1064, ¶ 5; *Dayton Bar Assn. v. Stewart*, 116 Ohio St.3d 289, 2007-Ohio-6461, 878 N.E.2d 628, ¶ 8 (following *Verne*); *Wyandt & Silvers* at ¶ 11 (following *Verne*). *Verne* concerned an accountant who had advised clients on particular business structures and filled out and filed articles of organization to form businesses for them. We said an accountant couldn't fill out these forms because choosing the right business structure "ordinarily requires a significant amount of legal judgment in addition to tax and other accounting considerations" and because advice about the ideal business structure is more than the clerical service permitted in *Gustafson*. *Verne* at ¶ 5.

{¶ 29} I question whether *Verne* and the cases that followed were correctly decided. After all, it is well within an accountant's competency to advise a client on the tax implications of different business structures. And there is little reason to think that the public interest is served by prohibiting that accountant from also filling out the basic paperwork necessary to form a business structure chosen by the client. But it is not necessary to revisit our decision in *Verne* to conclude that the conduct detailed in the consent decree in this case does not constitute the unauthorized practice of law.

{¶ 30} The only conduct identified by the consent decree as constituting the unauthorized practice of law is Amatore's filling out the articles-of-organization form and filing it with the secretary of state's office. No legal training was required to fill out the form. And the form did not require the exercise of any type of specialized legal skill or judgment. By no stretch of the imagination can filling out this simple form be said to be the practice of law.

{¶ 31} The concurring opinion purports to agree that "when the preparation of legal documents is merely clerical in nature * * * then no unauthorized practice of law has occurred." Concurring opinion at ¶ 5, citing *Gustafson* 138 Ohio St. at 397, 35 N.E.2d 435. Nevertheless, the concurring opinion approves the consent decree, because, "though vague, when read in light of the pleadings, [it] illustrates that Amatore's actions * * * constituted the unauthorized practice of law." Concurring opinion at ¶ 11. In doing so, it speculates that the reason the consent decree limits its findings of unauthorized practice of law to the conduct relating to the secretary of state's form is that it was "heavily negotiated to avoid further damage to Amatore's reputation and business." Concurring opinion at ¶ 12.

{¶ 32} But, of course, in adopting a consent decree, we must look to the facts contained in the consent decree (the facts that the parties have agreed upon). We cannot rely on our own

unsupported guesses about the parties' motivations, nor on unproven allegations in the pleadings. Indeed, many of the alleged facts in the pleadings that are relied on by the concurring opinion went unproved. For example, Amatore denied the allegation that he "selected the domestic limited-liability form from the secretary of state's website" and that it was his "decision to create Salem Organ Company, L.L.C., and to select the specific form to create it." *See* Concurring opinion at ¶ 9.

{¶ 33} For our purposes, what matters is what the consent decree says, not what the bar association alleged in its complaint. And the consent decree stipulates only that Amatore prepared articles of organization on behalf of others and filed them with the secretary of state's office. The consent decree states, without qualification, that such conduct constitutes the unauthorized practice of law. By approving the consent decree, we not only affirm that such conduct by itself constitutes the unauthorized practice of law in this case, but also create precedent that will be applied in future cases.

{¶ 34} The purported purpose of restricting the unauthorized practice of law is to protect the public. *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 40. But granting attorneys a monopoly over filling out basic forms does nothing to protect the public. To the contrary, forcing the public to pay a lawyer to perform a skill that requires no legal training injures the public.

B. We Shouldn't Rubberstamp Consent Decrees

{¶ 35} It doesn't change matters that this case comes to us by way of a consent decree agreed to by both Amatore and the bar association. A consent decree reflects more than just a proper agreement between disputing parties. It is "the final judgment of the Supreme Court and is enforceable through contempt proceedings before the Court." Gov.Bar R. VII(5b)(A)(2). A consent decree is subject to the constraints applicable to other judgments. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S.Ct. 899, 157 L.E.2d 855 (2004). A proposed consent decree must fall within a court's subject-matter jurisdiction and "further the objectives of the law upon which the complaint is based." *Id.*, citing *Local No. 93, Internatl. Assn. of Firefighters AFL-CIO C.L.C. v. Cleveland*, 478 U.S. 501, 525, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986); *see also United States v. Lexington-Fayette Urban Cty. Govt.*, 591 F.3d 484, 489 (6th Cir.2010).

{¶ 36} Our jurisdiction comes from a provision of the Ohio Constitution empowering us to regulate matters relating to attorney admission, discipline, "and all other matters related to the

practice of law.” Article IV, Section 2(B)(1)(g), Ohio Constitution. This authority “comes with an implicit limitation: what cannot plausibly be considered the practice of law is beyond our authority to proscribe.” *Ohio State Bar Assn. v. Watkins Global Network, L.L.C.*, 159 Ohio St.3d 241, 2020-Ohio-169, 150 N.E.3d 68, ¶ 32 (DeWine, J., concurring in part and dissenting in part). Here, adoption of the proposed consent decree falls outside our authority because it proscribes conduct that goes beyond the practice of law. It also fails to further the objectives of our rule prohibiting the unauthorized practice of law, *see* Gov.Bar R. VII(2)(A), because it restricts more than what fairly may be characterized as practicing law.

{¶ 37} Careful review of a consent decree becomes all the more vital when the agreement is made between a nonlawyer who probably saw little utility in expending time and money fighting a penalty-free injunction and a self-regulating body of lawyers who have every incentive to protect its monopoly to the greatest extent possible. Too cursory of a review of a consent decree and we risk hurting not only the nonlawyer who perhaps saw the agreement as the only practical option, but also the public at large by limiting the types of people who can help them with non-legal activity.

{¶ 38} Accordingly, I dissent with respect to this court’s order that Amatore be permanently enjoined from “filling out and filing basic forms from the Ohio Secretary of State to establish articles of organization and appoint statutory agents on behalf of others.” To restrict Amatore’s activity regarding a basic business form, the bar association should have to show more than the fact that he filled out and filed one.

III. Other Aspects of the Consent Decree

{¶ 39} The consent decree also stipulates that Amatore’s website at times advertised services that constitute the practice of law. The site featured an “Estate Planning” page and a “New Business Formation” page indicating Amatore could, among other things, “[d]raft a working plan for conserving and effectively managing your estate after death,” “[p]repare, organize and review your estate planning documents including current wills, trusts, health care and power of attorney,” “[s]elect a business structure that best fits your needs by evaluating tax advantages [and] legal exposures,” and help clients “[c]omply with employment laws so you don’t get hit with fines and unhappy employees.” The website indicated these services would help clients identify their “legal and financial rights” and aid them in “avoid[ing] the common pitfalls that many new small business owners make when starting their new venture.”

{¶ 40} The consent decree does not specifically conclude that such advertisements constitute the unauthorized practice of law. And this, presumably, is for a good reason: the rule that Amatore is charged with violating prohibits the unauthorized “rendering of legal services” and, by definition, advertising is not rendering.¹

{¶ 41} I agree, though, that the advertising is problematic. When considered as a whole, the advertisements suggest that Amatore would provide services covering both the legal and financial sides of estate and business planning. In conjunction with a proper finding that Amatore had actually engaged in the unlawful practice of law, I would have little trouble concluding that Amatore could be prospectively enjoined from making such statements as part of this court’s remedial authority. But absent a finding of an actual violation of our rules on the unauthorized practice of law, there is no authority by which to order Amatore to remove the statements on his website.

IV. Amatore’s Book Chapter

{¶ 42} Although not part of the consent decree, I also want to touch on a matter that was included in the bar association’s initial complaint against Amatore. In one section of its complaint, the bar association took issue with a book chapter authored by Amatore, titled “The Tax Detective: Uncovering the Mastery of Small Business Tax Planning.” The chapter included a discussion of various types of trusts and their tax-saving benefits.

{¶ 43} Simply writing about a legal topic is not the practice of law. Nonlawyers frequently write books that comment on legal topics. The Apostle Paul’s Epistle to the Galatians contains extensive commentary on the strictures of Mosaic law, but few would say that Paul was engaged in the practice of law. Same with nonlawyer James Madison—though Madison wrote extensively about the meaning of our federal Constitution both before and after its ratification. And the same goes for economist and constitutional theorist Ronald Coase.

{¶ 44} Moreover, the idea that nonlawyers may be prosecuted for writing on topics having legal implications is a troubling affront to First Amendment protections. Even most courts dealing with self-help books *directly* advising readers on how to navigate the law have declined to say

1. Another rule prohibits a nonattorney from holding himself “out to the public or otherwise representing [him]self as authorized to practice law in Ohio.” Gov.Bar R. VII(2)(A)(4). The consent decree does not find a violation of this rule, and it would be a stretch to conclude through the language employed on his website that Amatore held himself out as an attorney.

such books constitute the unauthorized practice of law when no personal relationship exists between the writer and reader. Steve French, *When Policies Collide . . . Legal “Self-Help” Software and the Unauthorized Practice of Law*, 27 Rutgers Computer & Tech.L.J. 93, 101-102 (2001); see also *In re New York Cty. Lawyers’ Assn. v. Dacey*, 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 (1967) (adopting in full the lower court’s dissenting opinion that the author of the book *How to Avoid Probate!* did not engage in the unauthorized practice of law).

{¶ 45} Why bring this matter up? After all, it is not a part of the proposed consent decree. The reason is that we have entrusted the prosecution of the unauthorized practice of law to local bar associations. Such an arrangement raises the possibility of conflicting interests: those charged with enforcing the rules benefit from a broad application of the rules that insulates lawyers from competition. One might think that such an arrangement would run afoul of federal antitrust laws. But, the United States Supreme Court has said that as an aspect of federalism, bodies like the bar association are immune from liability under the antitrust law provided that two conditions are met: (1) any restraint on competition is “‘clearly articulated and affirmatively expressed as state policy’” and (2) the activities of the body are “‘actively supervised’” by a state sovereign authority. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). This requirement of active supervision is necessary “to ensure [that] the States accept political accountability for anticompetitive conduct they permit and control.” *North Carolina State Bd. of Dental Examiners v. Fed. Trade Comm.*, 574 U.S. 494, 505, 135 S.Ct. 1101, 191 L.Ed.2d 35 (2015). It means that this court must “exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick v. Burget*, 486 U. S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

{¶ 46} In attempting to prosecute Amatore for book writing—an activity that does not involve the practice of law and that is protected by the First Amendment of the United States Constitution—the bar association acted outside of any articulable state policy. Moreover, we are the state authority with a duty to actively supervise the bar association’s activity in this area. This means that we cannot sit by silently while the bar association attempts to sanction an individual for activity that does not involve the practice of law and that is also protected under the First Amendment.

V. This Court Should Reject the Proposed Consent Decree and Remand this Matter to the Board on the Unauthorized Practice of Law

{¶ 47} Our rules provide that this court must approve or reject a proposed consent decree. *See* Gov.Bar R. VII(5b)(E)(2). If we choose to reject a consent decree, we are to remand the matter to the Board on the Unauthorized Practice of Law with or without instructions. *See* Gov.Bar R. VII(5b)(F)(1). Accordingly, I would reject the consent decree and remand the matter to the board with an instruction that simply filling out forms that are available on the Ohio Secretary of State’s website does not constitute the unauthorized practice of law. I would also provide specific instructions that Amatore may not be prosecuted for engaging in activity that is protected by the First Amendment, including writing the book chapter mentioned in the bar association’s complaint.

{¶ 48} If, on remand, the board determines that Amatore engaged in other conduct that constitutes the unauthorized practice of law, then it may proceed in an appropriate manner. If not, the board should dismiss the case.

KENNEDY, J., concurs in the foregoing opinion.
