



**MEMORANDUM**

**Re:** Ohio Supreme Court Holdings Regarding the Unauthorized Practice of Law and Debt Settlement  
**From:** Betty Montgomery, Attorney at Law

---

**Issue Presented:**

Is Ohio case law overbroad in its interpretation that certain debt settlement activities constitute the unauthorized practice of law?

**Short Answer:**

Recent developments in case law suggest that Ohio case law is overbroad and certain debt settlement activities should be permitted by non-lawyers.

**Analysis:**

**I. The Ohio Supreme Court's holdings in *Kolodner* and *Jansen* present distinguishable facts from the ordinary activities of debt settlement companies.**

In *Ohio State Bar Association v. Kolodner, et al.* (2004), 103 Ohio St.3d 504, the Ohio Supreme Court held in *dicta* that “[t]he unauthorized practice of law consists of rendering legal services for another by any person not admitted to practice law in Ohio, see Gov.Bar R. VII(2)(A), and includes representation by a nonattorney who advises, counsels, or negotiates on behalf of an individual or business in an attempt to resolve a collection claim between debtors and creditors.” *Ohio State Bar Association v. Kolodner* at ¶15.

The *Kolodner* case involved extreme facts which do not represent the activities of traditional debt settlement companies. Moreover, the facts of the *Kolodner* case are distinguishable from the facts surrounding debt settlement practice. Debt settlement companies limit their activities to those activities which do not require the heightened skill and knowledge of a lawyer. In *Kolodner*, the Court examined facts in which Mr. Kolodner, who never held a license to practice law in Ohio, admitted to engaging in the unauthorized practice of law by accepting a fee to advise, counsel and represent various consumers regarding payments of their debts. When referred to as an attorney in pleadings or correspondence, Mr. Kolodner failed to rectify any misconception. He also held

himself out a debtor's "attorney-in-fact" on at least one occasion. Mr. Kolodner further admitted to engaging in similar, unlawful conduct in Florida for which an injunction was issued against him.

Mr. Kolodner's conduct exceeded mere negotiation and the completion of routine forms. He held himself out as an attorney and offered legal advice to debtors. He drafted agreements and pleadings for debtors. These activities traditionally require the heightened knowledge and education of a licensed attorney.

The Ohio Supreme Court reviews charges of unauthorized practice of law under a comparison standard to determine whether the conduct requires ordinary intelligence as opposed to the particular skill and knowledge possessed by one licensed to practice law. For example, in *Dayton Bar Association v. Lender's Services* (1988), 40 Ohio St.3d 96, the Court determined that the use of legal terms of art as headings on a title abstract by a title searcher does not constitute the unauthorized practice of law. *Id.* at the syllabus. In so holding the Court discussed the simple instrument doctrine and explained:

“[T]his court adopted what has been called the ‘simple instrument’ doctrine in a case approving the practice of real estate brokers filling in preprinted, blank real estate purchase contracts. The court held that ‘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.’”

*Dayton Bar Association v. Lender's Services* at 97, citing *Gustafson v. V. C. Taylor & Sons, Inc.* (1941), 138 Ohio St. 392.

Similarly, the Ohio Supreme Court holds that “a third-party administrator (handling workers’ compensation claims) may make actuarial determinations regarding settlement, act as a messenger for the employer in regard to settlement, and file settlement applications without conducting the unauthorized practice of law, as these activities do not require the specialized training and skill of an attorney and are permitted by Resolution No. R04-1-01.” *Cleveland Bar Association v. CompManagement, Inc.* (2004), 104 Ohio St. 3d 168 at paragraph 2 of the syllabus. In reaching this conclusion, the Court analyzed case law on the unauthorized practice of law and noted such cases rested on factually specific acts or admissions by the charged party. *Id.* at 454.

More significantly, the Court held that a third-party administrator does not engage in the unauthorized practice of law by negotiating settlements and recommending settlements to employers. *Cleveland Bar Association v. CompManagement, Inc.* at 458-459. The Court reasoned that third-party administrators do not undertake a legal analysis but rather relied on the value of the claim and prior experience in dealing with workers’ compensation claimants. *Id.*

Similar to the facts presented in *Cleveland Bar Association v. CompManagement, Inc.*, debt settlement activities by non-lawyers typically involve the negotiation of debts that draw upon the value of the debt and prior experience with collectors and debtors. Debt settlement companies do

not undertake a true legal analysis to determine the value of an outstanding debt or a debtors' ability to repay. For this reason, debt settlement is more analogous to the conduct of third-party administrators and not the unauthorized practice of law. Accordingly, the holding in *Ohio State Bar Association v. Kolodner* is arguably overbroad. By extending its finding that "negotiation" to try to resolve a collection claim is unauthorized practice of law, the Court went beyond the egregious facts of that case and ignored the well-reasoned opinion in *Cleveland Bar Association v. CompManagement, Inc., supra*.

The *Kolodner* decision also appears overbroad in light of the recent holding of the United States Supreme Court in *N.C. State Board of Dental Examiners v. FTC* (2015), 135 S. Ct. 1101. That case involved an antitrust challenge to the actions of the North Carolina Board of Dental Examiners, which issued cease and desist letters to cosmetologists and other non-dentists for performing teeth whitening services. The Board contended that teeth whitening was a procedure that should only be performed by a dentist. The non-dentists largely complied with those cease and desist requests. The FTC filed an administrative charge against the Board alleging violations of the Sherman Act. The FTC ordered the Board to stop sending the case and desist letters and to issue reversal notices as to the ones already sent. The FTC noted that teeth whitening is a safe cosmetic procedure that does not require the skill and training of a dentist. The United States Supreme Court agreed and noted that the Board's cease and desist letters exceeded its authority to regulate dentistry by chilling business competition for a service that does not require the skill of dentist.

This holding suggests that the Court's finding in *Ohio State Bar Association v. Kolodner* is overbroad. Negotiations and debt settlements based on the value of a debt does not require a true legal analysis and the heightened skill and education of a lawyer. Those activities are more akin to those discussed in *Cleveland Bar Association v. CompManagement, Inc.* which were not determined to be the unauthorized practice of law.

Recent opponent testimony to the proposed bill cited the 2014 case of *Cincinnati Bar Association v. Jansen* on this issue. The 2014 *Jansen* case specifically adopts the 2004 *Kolodner* decision at paragraph 2 of the syllabus, which is distinguishable as noted above.

The 2014 *Jansen* case is also distinguishable because it is a ruling adopting a Consent Decree of the parties which resolved a Motion to Show Cause filed by the Cincinnati Bar Association against *Jansen* and his unincorporated business called "American Mediation & Alternative Resolutions". The Motion to Show Cause arose from the Supreme Court's adoption of a Consent Decree in 2010 involving the same parties. In the 2010 Opinion, the Supreme Court adopted a Consent Decree that *Jansen* and his company engaged in the unauthorized practice of law by negotiating debt settlement where *Jansen* specifically tried to dispute the validity of the debt (an attack on the merits of the debt) as opposed to simply trying to negotiate the amount of repayment.

For this reason, the facts in *Jansen* also differ from traditional debt settlement activities that do not encompass challenges to the legitimacy of the underlying debt.

## **II. The Ohio State Bar Association's treatment of debt settlement companies lacks consistency with the manner in which it treats other professions.**

The Ohio Supreme Court grants authority to the Ohio State Bar Association to investigate potential cases involving the unauthorized practice of law. The Ohio State Bar Association specifically identified debt settlement as a possible violation. However, several other professions governed by the Ohio Revised Code engage in activities which, using the arguments they raise against the debt settlement industry, also may be fairly considered as engaging in the unauthorized practice of law, none of which have been singled out.

For example, real estate brokers and agents routinely negotiate the sale, exchange, purchase, rental or leasing of any real estate. Ohio Revised Code §4735.02 limits the broker's authority to engage in legal activities and states in part: "Nothing contained in this chapter shall be construed as authorizing a real estate broker or salesperson to perform any service constituting the practice of law." The Ohio State Bar Association fails to regulate real estate brokers for the unauthorized practice of law in a manner similar to debt settlement providers, despite the legislature's recognition that real estate agents may engage in ancillary legal activities.

In the healthcare setting, non-attorneys routinely make "material amendments" to contracts between healthcare providers and the contracting entity. Ohio Revised Code §3963.01(J) states that a "material amendment" means an amendment to a health care contract that decreases the participating provider's payment or compensation, changes the administrative procedures in a way that may reasonably be expected to significantly increase the provider's administrative expenses, or adds a new product." Substantive changes to healthcare contracts constitute modifications to legal relationships, like the activities of debt settlement providers. But, the Ohio State Bar Association has never pursued such actions as an unauthorized practice of law.

Perhaps most analogous to debt settlement providers are nonprofit consumer credit counseling agencies authorized to do business in Ohio under Ohio Revised Code §4710. Credit counselors routinely work on behalf of their clients to get creditors to waive late fees and/or reduce interest rates on credit accounts. The same Ohio Supreme Court determination that debt settlement constitutes the unauthorized practice of law would apply in this instance as well. Yet, the Ohio State Bar Association has not charged credit counseling agencies for such violations.

The Ohio State Bar Association's determination that debt settlement providers are subject to unauthorized practice of law violations but similar professions are not leads to a confused jurisprudence and unpredictable regulatory environment. The vulnerability of debt settlement providers to unauthorized practice of law claims should be reevaluated in light of the association's disparate treatment of similar professions.

**Conclusion:**

Based on the decisional law discussed in this Memorandum, the breadth of the holding in *Kolodner* and its progeny should be re-evaluated. Debt settlement activities which do not require the skill and education of a lawyer should be permitted by non-lawyers, who may offer valuable services to Ohio citizens at a cost-effective rate, thereby avoiding debtors turning to bankruptcy as an alternative method of debt relief. Additionally, the Ohio State Bar Association's decision to pursue debt settlement providers for the unauthorized practice of law is inconsistent with the association's failure to pursue similar professions for the same violation. Debt settlement providers do not engage in activities requiring a heightened degree of legal analysis and should not be subjected to a higher standard of propriety than other professions engaging in ancillary legal activities.