

December 14, 2015

OFFICIAL OPINION 2015-7

Mr. Brian Poynter
Chairman
Indiana Natural Resources Commission
100 N. Senate Ave., Room N501
Indianapolis, Indiana 46204

RE: Representation in Administrative Hearings

Dear Chairman Poynter:

You requested our opinion on the following questions:

1. Does the Administrative Orders and Procedures Act (AOPA) allow corporations to be represented by non-lawyers in administrative proceedings?
2. Can corporations be represented by non-lawyers in the administrative proceedings of AOPA-exempt agencies?
3. Is it considered the unlicensed practice of law for a non-lawyer to represent a corporation in an administrative proceeding?
4. Can agencies prohibit non-lawyer representation of corporations in administrative proceedings?
5. What process should agencies follow when there is an inappropriate representation of a corporation in an administrative proceeding?

BRIEF ANSWERS

1. Yes, AOPA does allow corporations to be represented by non-lawyers in administrative proceedings governed by AOPA.
2. Yes, unless a statute or rule specifically applicable to such agencies forbids it, corporations can generally be represented by non-lawyers in non-AOPA proceedings.
3. No, it is generally not considered the unlicensed practice of law for a non-lawyer to represent a corporation in an administrative proceeding, but some administrative representations can constitute the practice of law, which must be performed by a lawyer.
4. Yes, agencies can generally pass rules prohibiting certain non-lawyer representations that are otherwise allowed, but agencies subject to AOPA cannot prohibit all such representations.

5. Generally, agencies should allow a party to correct an inappropriate representation before taking other appropriate actions.

INTRODUCTION

This issue arises from the unique attributes of corporations as legal, but not natural, “people.” Corporations are often said to be legal “persons” and, indeed, are often defined as such in Indiana statutes. Relevant to this issue, *see* Ind. Code § 4-21.5-1-11. Of course, in reality, corporations are not people. Corporate persons “exist” only on paper; they are the result of a legal fiction. As such, corporations cannot actually “act” in the way that natural persons can. Corporations can act only through their agents. When it comes to taking action in a court of law, therefore, corporations are treated differently from natural persons.

Theoretically, a natural person could perform a legal act either 1) himself or herself; 2) through a “lay agent”; or 3) through a lawyer. However, while a natural person has a fundamental right to act on his or her own behalf in legal proceedings, “there is no constitutional right to representation by lay counsel.” *Rhines v. Norlarco Credit Union*, 847 N.E.2d 233, 238 (Ind. Ct. App. 2006), quoting *Terpstra v. Farmers & Merchants Bank*, 483 N.E.2d 749, 760 (Ind. Ct. App. 1985). It is well established that only a lawyer may act as the agent of another in a legal proceeding. Natural persons, therefore, can only perform legal actions through the first or third methods listed above.

Theoretically, a corporation could perform a legal act either 1) through an “internal agent” (essentially, the directors or officers of a corporation); 2) through an “external agent” (an agent that is not part of the governing structure of the corporation); or 3) through a lawyer. It has long been established that the internal agents of a corporation do not have a right to perform legal acts on behalf of the corporation in the same way that natural persons are entitled to perform legal acts on their own behalf. *State Bank of Indiana v. Bell*, 5 Blackf. 127 (Ind. 1839) (“a corporation can only appear by attorney”).

Permitting this would allow a non-attorney to act as the agent of another (the corporation) in a legal proceeding. This is proscribed and penalized as the unlicensed “practice of law.” Indeed, “the purpose of requiring a corporation to be represented by legal counsel ... is ‘to curtail unlicensed practice of law, the attendant ills of which can be exacerbated when one of the litigants is a corporation.’” *Stillwell v. Deer Park Management*, 873 N.E.2d 647, 649 (Ind. Ct. App. 2007), quoting *Yogi Bear Membership Corp. v. Stalnakar*, 571 N.E.2d 331, 333 (Ind. Ct. App. 1991). Thus, a corporation can act only through a lawyer in legal proceedings.

This issue poses a more difficult question concerning corporate representation in administrative proceedings, which may or may not be included within the definition of the “practice of law.” In Indiana, most administrative proceedings are governed by AOPA. Ind. Code Art. 4-21.5.¹ This statute, therefore, is the starting point for determining whether a corporation can act through lay agents in administrative proceedings. If the statute proscribes such representation, the analysis is over.

¹ This document does not specifically assess individual statutes that govern proceedings within AOPA-exempt agencies. A general assessment of 1) the sources of law which govern proceedings in these agencies; and 2) how those sources should be interpreted with other bodies of law is provided in Section 2 below.

However, if AOPA purports to allow this representation, this is not the end of the inquiry. The Indiana Supreme Court (ISC) has ultimate authority to define the practice of law in Indiana. Ind. Const. Art. 7, § 4 (the ISC has original jurisdiction over “the unauthorized practice of law”). The Court’s definition of this term is conclusive, even against statutes, as the Court’s power is constitutional. *Id.* Therefore, if representation in an administrative proceeding is within the Court’s definition of the practice of law, then lay agents cannot represent corporations in these proceedings, irrespective of AOPA. Additionally, even if the Court and AOPA allow this representation, there is a question as to whether agencies can prohibit it with regards to their own particular proceedings.

ANALYSIS

1) AOPA allows corporations to be represented by lay agents

Ind. Code § 4-21.5-3-15:

- (a) Any party may participate in a proceeding in person or, if the party is not an individual or is incompetent to participate, by a duly authorized representative.
- (b) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, unless prohibited by law, by another representative.

This section of AOPA discusses representation in administrative proceedings conducted under AOPA. This section speaks of “any party.” Ind. Code § 4-21.5-1-10 defines “party” essentially as any person who qualifies as a party. Ind. Code § 4-21.5-1-11 defines “person” as “an individual, agency, political subdivision, partnership, corporation, limited liability company, association, or other entity of any character.” Clearly, corporations are “persons” under Ind. Code § 4-21.5-1-11 and can be “parties” under Ind. Code § 4-21.5-1-10. This brings corporations within the scope of Ind. Code § 4-21.5-3-15. While this section functions as a whole, its subsections give separate, independent rights of entities to be represented by various agents.

Subsection (a) defines the rights that a “person” has to participate directly. As incompetent people and non-natural people cannot literally participate “in person,” this subsection provides a substitute mechanism through which these entities can participate in their “personal” capacity. They can do so “by a duly authorized representative.” While there is some doubt as to the source of authority for this “due authorization,” the most logical reading of the statute is that it is the represented person who “authorizes” their own “representatives” through whatever process is “due,” which depends on the type of entity using this substitute means of personal participation. For an incompetent person, the authorization that is due would be governed by the law concerning appointment of guardians and the like; for non-natural persons the authorization due is dictated by the entities’ governing structures. For corporations, then, it seems that subsection (a) allows participation by any representative “duly authorized” by the governing rules of the particular corporation.

However, because subsection (a) is focused on providing a substitute means of personal participation, the representatives that can be duly authorized are probably limited to the internal

agents of the corporation. That is to say that the authorization due is the authorization provided by the internal governing mechanisms of the corporation which vest authority in the corporation's directors and officers to act as part of the corporation's governing structure. While a corporation can authorize external agents to act on its behalf, these external agents do not act in the stead of the corporation, in a personal sense, in the way that seems to be the focus of subsection (a). By contrast, subsection (b) is generally concerned with representation by these kinds of external agents. It seems, therefore, that subsection (a) only allows representation by the internal agents of a corporation, as it is only these agents that would really allow the corporation to participate in its personal capacity (if not literally "in person").

Subsection (b) speaks to representation by third parties. These third parties would be agents external to a corporation, distinguishable from the internal agents addressed under subsection (a). Subsection (b) allows representation "by counsel" or "unless prohibited by law, by another representative." Though the statute uses the term "counsel" rather than "attorney" or "lawyer," and despite the fact that "counsel" is, theoretically, a broader term, the most logical reading of this language is to allow representation by a lawyer. In addition to this allowance for representation by a lawyer, the statute also allows for representation by a lay agent "unless prohibited by law." The law that would "prohibit" representation by a lay agent would primarily be the law concerning the practice of law, but it could also include agency rules and regulations, as discussed in Section 4 below.

In total, Ind. Code § 4-21.5-3-15 allows the following people to represent a corporation in administrative proceedings subject to AOPA: 1) an internal agent of a corporation; 2) a lawyer for the corporation; or 3) an external lay agent representing the corporation. Because the permissions in the two subsections are separate, it seems that corporations can be represented by both its internal agent and either 1) a lawyer, or 2) an external lay agent.

Finally, while subsection (b) incorporates any existing prohibitions on the unlicensed practice of law, it seems that subsection (a) makes no such allowance. It is possible, therefore, that AOPA is purporting to grant corporations an unconditional right to be represented by their internal agents in administrative proceedings. Whether AOPA is actually purporting to grant such an unconditional right, this permission would still be subject to the ISC's constitutional authority to define the practice of law, as discussed in Section 3 below.

2) Corporate representation in AOPA-exempt agencies is governed primarily by the specific statutes and rules applicable to those agencies.

Generally speaking, there are three possibilities when dealing with AOPA-exempt agencies. First, an applicable statute could specifically allow non-lawyer representation of corporations (as is the case with AOPA). In these instances, such representation is allowed subject only to the limitations of the ISC's constitutional authority to define the practice of law. Second, an applicable statute could specifically prohibit non-lawyer representations of corporations. As there is no extant right to such representations, *see Rhines*, 847 N.E.2d at 238; *State Bank of Indiana*, 5 Blackf. at 127, such a prohibition would be effective and would govern proceedings subject to it.

The third possibility is that all of the statutes applicable to an AOPA-exempt agency are silent as to lay corporate representation. In these cases, other sources of law would fill the statutory void. This void could be filled by agency rules. If an applicable statute somehow limits an agency's power to pass rules proscribing such representation (as is the case with AOPA; see Section 4 below), then the agency could only pass such rules to the extent allowed by statute. Absent such a limitation, however, it seems that AOPA-exempt agencies are at liberty to pass rules prohibiting lay corporate representation, subject only to any limitations on these agencies' general rulemaking authority.

While AOPA-exempt agencies can pass rules proscribing lay corporate representation, it is unlikely they can establish this prohibition through informal policies. A formal rulemaking process is required whenever an agency action constitutes a "rule," as defined in Ind. Code § 4-22-2-3. Whether an agency action meets the statutory definition of a "rule" is determined by examining the following factors: "[An agency action is a rule if:] (1) it [is] an agency statement of general applicability to a class; (2) it [is] applied prospectively to the class; (3) it [is] applied as though it [has] the effect of law; and (4) it [affects] the substantive rights of the class." *Villegas v. Silverman*, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005) (applying *Blinzinger v. Americana Healthcare Corp*, 466 N.E.2d 1371 (Ind. Ct. App. 1984)).

Absent any statute or rule speaking to the issue, a corporation has the right to appoint a lay agent as its representative so long as such a representation does not constitute the practice of law, as discussed in Section 3 below. Therefore, an agency action generally prohibiting lay corporate representation would substantively and prospectively impact the rights of all corporations. This likely means that such an action constitutes a "rule," which means that a formal rulemaking would be required to validate such an action. Thus, an attempt to establish this prohibition through an agency policy would likely not be effective.

Where all applicable statutes are silent and an AOPA-exempt agency has not passed a rule prohibiting lay corporate representation, the only source of law restricting lay corporate representation is the ISC's definition of the practice of law. Therefore, in the absence of any applicable statute or rule which speaks to the matter, lay corporate representation is allowed to the extent permitted by the ISC, as discussed in Section 3 below. As with AOPA agencies, AOPA-exempt agencies should follow the guidance provided in Section 5 below regarding the process to be followed when an inappropriate corporate representation arises in their proceedings

3) *The Indiana Supreme Court (ISC) has not generally prohibited lay agent representation of corporations in administrative proceedings, but it has prescribed limits for such representations.*

Though this issue has not been addressed very often by the courts, it is clear that the question of representation in a particular type of adjudication is governed by rules of law specific to that type of adjudication. See e.g. *Stillwell*, 873 N.E.2d 647 (analyzing the specific rules applicable in small claims proceedings). Therefore, the fact that lawyers must represent corporations in court proceedings is not determinative of how corporations can be represented in administrative proceedings. The ISC has not made a specific pronouncement regarding corporate representation

in administrative proceedings, so only its general holdings and rules regarding the “practice of law” in administrative contexts bear directly on this issue.

- a) A lay agent may not engage in certain practices that the ISC has defined as constituting the practice of law.

State ex rel. Pearson v. Gould, 437 N.E.2d 41 (Ind. 1982) dealt with a non-lawyer who, in an administrative proceeding, had 1) filed an appearance on behalf of a client; 2) filed requests for issuance of subpoenas; 3) presented evidence and arguments at a hearing; and 4) examined and cross-examined witnesses at a hearing. The Court in this case rejected use of a test that would have defined an act as the practice of law whenever “the services of a lawyer will be most helpful.” *Id.* at 43. Instead, the Court engaged in a multi-factor balancing test. The factors that the Court weighed included: 1) “the character of the tribunal”; 2) “the interests at stake”; and 3) “the potential for ineptness in the representation to create a hazard for the public.” *Id.*

Because “the members of the commission [were] not required to have legal training,” the Court concluded that “legal techniques and legal concepts would have a diminished impact.” *Id.* Thus, the character of the tribunal was such that it weighed against requiring a lawyer. The Court also noted that the interests at stake were not as grave as in a judicial setting because the administrative proceeding was “an intermediate step.” *Id.* (In this case, the final step was binding arbitration, but in other administrative contexts judicial review would play this role.)

Perhaps most importantly, the Court noted that “[t]he subject matter of the rules, regulations, and policies” being applied in the hearing dealt generally with “personnel matters” rather than with particular legal doctrines or rules, such that “in many instances the employee will be in a position to adequately present the basis for his complaint without resort to legal techniques or concepts, and to identify and rebut opposing viewpoints.” *Id.* This led the Court to conclude that “the potential for dire consequences ... from representation and advice of those not skilled in law is ... speculative.” *Id.* The Court held that these actions, performed in this particular administrative context, did not constitute the practice of law.

In *State ex rel. Indiana Bar Association v. Miller*, 770 N.E.2d 328 (Ind. 2002), the Court adopted a somewhat more skeptical view towards lay representation in administrative proceedings. The non-lawyer representative in this case performed many of the same actions as those in *Gould*, but also made an argument about the constitutionality of a tax statute. This case characterizes *Gould* as holding merely that “representation requiring only the use of general knowledge regarding the legal consequences involved does not constitute the practice of law.” *Id.* at 330. This characterization narrows the original holding in *Gould*, indicating that the Court’s modern view of this issue is less permissive than it was in 1982.

The Court in this case analyzed slightly different factors than in *Gould*. The Court did not address “the character of the tribunal” or “the interests at stake” but rather addressed 1) the character of the arguments being made; and 2) the potential damage from non-legal representation. The Court specifically held that raising constitutional arguments constitutes the practice of law. The Court also cited approvingly to a rule passed during this case’s pendency that defined any argument that

a particular action is “illegal as a matter of law” as the practice of law (at least when made in a tax appeal setting).

The court also made much of the need to preserve issues for appeal. The non-lawyer in this case failed to take certain actions that foreclosed his client’s opportunities on appeal. Whereas in *Gould* the fact that the administrative proceeding was “an intermediate step” led the Court to take a permissive stance, the *Miller* Court saw the preservation of issues for appeal as vital in concluding that this case involved the practice of law. This difference might be explained by the fact that the final decision in *Gould* was to be made by binding arbitration, which is not limited by appellate standards of review, while the final decision in *Miller* was judicial.

While it seems clear that the ISC views the definition of the practice of law as a multi-factor, fact-intensive evaluation, performing such an analysis is not necessarily the specialty (or even the right) of administrative agencies. This makes the specific holdings in these cases less than practical in application. Even so, a practical rule of law can be distilled. It seems that “the character of the tribunal” test has given way to a “character of the argument” test. This factor is relatively easy for agencies to apply. If, at some point (hopefully early in a proceeding), it becomes clear that a corporate party is contesting 1) the constitutionality of a law; or 2) an action’s legality “as a matter of law,” that party must be represented by a lawyer.

It also seems clear that the necessity of preserving issues for appeal is an important factor. The application of this factor is somewhat problematic. In the rare instance that a final decision lies with an entity not subject to appellate standards of review, it seems that this factor is not an issue. In most cases, however, judicial review is at least possible, which means that there is almost always at least the potential that a party’s representative might imprudently or accidentally foreclose arguments on appeal. To read *Miller* as holding that, because of this possibility, all administrative proceedings subject to judicial review require representation by lawyers would be an overly broad interpretation. So the question becomes: 1) where is the threshold where preserving issues for appeal becomes sufficiently significant that a lawyer is required; and 2) how can an agency make this determination early enough in a proceeding to avoid delay and prejudice?

Indirectly, *Miller* might provide some guidance on this issue. While citing with approval to a rule passed by the Indiana State Bar Association (ISBA) during this case’s pendency, the court notes that even where representation by a lawyer is not specifically required by the rule, the rule still requires lay agents to inform their clients that 1) they are not attorneys; 2) they cannot make “legal” arguments or address “legal” issues; and 3) issues not raised in the proceeding might be waived. This advanced disclosure mechanism might be useful in determining the appropriate representation for corporate entities.

Where it does not appear that a corporate party intends to raise constitutional challenges or challenges based on the correct “legal” interpretation of a statute or action, it seems that lay agent representation is allowable if some safeguards are used to address the issue of preservation of arguments for appeal. Where a corporation seeks to be represented by an external lay agent, it would be prudent for an agency to require that the agent make a disclosure similar to that described above to the internal agents of the corporation. Additionally, when a corporation seeks to be represented by any non-lawyer, whether internal, external, or both, it would be prudent for an

agency to require the internal agents of a corporation to certify that they understand the elements of a statement similar to that described above.

The key elements of such a statement would include an acknowledgment that the party understands that 1) its current representatives cannot stray into proscribed “legal” areas of argumentation; 2) if the desirability of such arguments becomes apparent later, it may not be allowed, at that point, to raise such arguments if doing so would result in undue delay or prejudice to the opposing party; and 3) failure to raise any arguments could result in them being waived, in the administrative proceeding itself or in a later appeal. Requiring a corporate party’s internal agents to acknowledge that they understand these risks and still wish to be represented by a lay agent would probably be sufficient to satisfy the *Miller* Court’s concern that non-lawyer representation could result in imprudent or unwitting waiver of arguments on appeal.

b) The ISC has passed a rule proscribing lay representation by an agent that is licensed as a lawyer in another state.

In theory, the fact that an agent is licensed as a lawyer does not necessarily mean that such an agent must appear as a “legal” representative. An agent who is licensed as a lawyer could appear before an agency merely as a lay representative. For Indiana lawyers, the ethical rules governing Indiana lawyers would still generally apply to this situation. This means that an agent licensed as an Indiana lawyer is always a “legal” representative by default. However, an agent licensed as a lawyer in a different state who claims to be no more than a lay representative would not automatically be subject to the ethical rules governing lawyers in Indiana.

As of January 1, 2012, however, the ISC has amended Rule 3, sec. 2 of the Indiana Admission and Discipline Rules to require out-of-state lawyers appearing in administrative proceedings to obtain *pro hac vice* admission from the ISC. This admission is required for any out-of-state lawyer appearing in any administrative proceeding. *See* Ind. Admission and Discipline Rule 3(2), as amended. This rule effectively prevents an out-of-state lawyer from appearing as a lay representative. Regardless whether such a lawyer claims to be merely a lay representative, the rule requires the lawyer to be temporarily admitted to practice law in Indiana. Such temporary admission makes any claim of lay representation a nullity: this agent would be entitled to perform any action that a lawyer can perform, but would also be required to comply with Indiana’s ethical rules governing attorneys in such actions. While the ISC allows certain lay corporate representations in administrative proceedings, no person who is licensed to practice law in any state may serve as a lay representative.

In sum: A person attempting to appear as a lay agent representing a corporation does not commit the unlicensed practice of law so long as 1) the agent does not raise constitutional or “legal” arguments; 2) the corporation’s internal agents have been sufficiently informed and have sufficiently acknowledged the potential risks of such representation; and 3) the agent is not licensed to practice law in any state. Any person licensed as a lawyer in any state must be admitted to practice law in Indiana in order to appear in an administrative proceeding, and any person not licensed to practice law in any state cannot stray into “legal” arguments. If a lay agent operates within this definition of the practice of law, ISC holdings and rules allow the lay agent to represent

corporations in administrative proceedings. For most agencies, this means that AOPA, which also allows such representation, governs these proceedings so long as the above criteria are satisfied.

4) *Agencies can prohibit representation by external lay agents, but probably cannot prohibit representation by a corporation's internal agents.*

Under AOPA, agencies can prohibit representation by lay third-parties, including external agents of a corporation. Subsection (b) of Ind. Code § 4-21.5-3-15 makes such representation subject to other “law,” and Ind. Code § 4-21.5-1-7 defines “law” to include “a rule of an agency” whenever that term is used within AOPA. Therefore, it is within an agency’s power to pass a rule prohibiting representation by external lay agents, whether for corporations or for all parties. An agency can only achieve this, however, through formal rulemaking because only agency rules, not agency policies, are considered “law” under AOPA.

However, while subsection (b) allows an agency to prohibit representation by external lay agents, subsection (a) is not explicitly made subject to other “law.” This subsection allows personal representation, which for a corporation means representation by a corporation’s internal agents, as discussed in Section 1 above. Where such representation would constitute the practice of law, as discussed in Section 3 above, this representation is prohibited even though subsection (a) does not contain an explicit subordination clause. Where such representation would not be considered the practice of law, there is a question as to whether an agency could prohibit such representation.

There is an argument that when subsection (a) refers to “duly authorized” representatives, it is indicating that the agency is the entity that provides this “authorization.” This interpretation would allow an agency to prohibit such representation simply by failing to authorize internal lay agents of a corporation. This is probably not the correct interpretation of this phrase, however. Nowhere within the rest of AOPA are agencies provided with 1) standards to use in making such an authorization; 2) a procedure for making such authorizations; or 3) a procedure for challenging such authorizations (or the lack thereof). This indicates that AOPA does not contemplate this authorization as being performed by the agency. Rather, it seems more likely that this language is to be understood as requiring the party itself to “duly authorize” its own representatives. Under this interpretation, there does not appear to be any generally applicable basis for allowing an agency to prohibit corporate clients from being represented by internal lay agents where such representation does not constitute the practice of law.

There is a role for agencies to play, however, in determining when a representation constitutes the practice of law. While defining the legal standards governing the practice of law is the province of the ISC and its delegates, agencies must determine whether a particular factual situation constitutes the practice of law under these standards. To facilitate this determination, it would be within an agency’s power to prescribe 1) the presentation of arguments (to determine whether constitutional or “legal” arguments are likely to be made); 2) procedures documenting a corporate party’s knowledge and acknowledgement of the risks of lay representation; and 3) standards for how to address situations in which a representation that was initially appropriate would now

become inappropriate due to the arguments raised over the course of the proceeding. Agencies might establish such regulations to help ALJs and other decision-makers apply the requisite standards consistently and correctly.

Agencies might be able to regulate these procedural issues through policies in addition to formal rules because such regulations would not deprive parties of the substantive right to lay representation that is granted by AOPA. Such regulations would speak only to the process parties must comply with to access the rights to which they are entitled. In some circumstances, however, these procedural regulations could be said to carry the “force of law,” which would invalidate regulations established only by policy.²

While it might be possible for an agency to establish these regulations through policy, it would be prudent for agencies to establish these regulations 1) through formal rulemaking, to the extent practicable, or 2) as “preferred” or “recommended” processes rather than mandatory processes. By using advisory rather than mandatory policies, an agency could streamline its processes in most cases while still maintaining a case-by-case approach for more stubborn parties. With this approach, a mere procedural defect would not deprive a party of rights to which it is otherwise entitled, meaning that the procedural policies do not carry the force of law. The “law” that could prevent a party from pursuing a particular representation would not be any particular procedural prescription but rather the general body of law that requires a party to establish the validity of a representation through generally applicable procedures. It should also be noted that whether accomplished by rule or policy, any such regulations must be reasonable and must be applied uniformly to pass constitutional muster.

5) *Corporations who appear by lay agents when such an appearance is not allowed should be given an opportunity to obtain appropriate representation before resorting to dismissal or default judgment.*

Rueth Development Company v. Muenich, 816 N.E.2d 880 (Ind. Ct. App. 2004) identifies the appropriate remedy when a corporation attempts to appear through a non-lawyer in a court proceeding (which is generally prohibited). This case states unequivocally that while the court cannot allow a case to go forward under such a circumstance, and must strike the prohibited appearance, “a corporate litigant must be given a fair opportunity to correct its error and retain competent counsel before dismissal is appropriate.” *Id.* at 887. If the rule for judicial proceedings is so permissive, it seems that in an administrative context, where rules of procedure are sometimes less clear and are intended to be more flexible, this rule would certainly apply.

Corporations might appear through inappropriate representation 1) at the outset of a case, or 2) while a case is in progress, when unforeseen “legal” arguments develop. The first situation is relatively easy to deal with. If a corporation appears through a lay agent and an agency, applying the appropriate standards, determines that the case involves 1) constitutional or “legal” arguments (challenges to a statute or action “as a matter of law”); 2) a risk of failing to preserve arguments for appeal (that has not been sufficiently mitigated by appropriate disclosure and acknowledgement); or 3) representation by an external lay agent in violation of ISC rules or agency regulations, the agency should not allow the representation to continue. The agency must 1) strike

² See Section 2 above for a discussion of the legal standards governing when formal rulemaking is required.

the representation, 2) advise the corporate party that it must be represented by a lawyer, and 3) give the corporate party a fair opportunity to comply.

If the corporate party unreasonably fails to comply, then dismissal or default judgment would be appropriate as the agency cannot allow inappropriate representatives to engage in the unlicensed practice of law. The party's unreasonable failure to obtain appropriate representation is essentially a failure to appear and should be treated as such, as appropriate in each case. *Muenich*, however, makes it clear that these remedies are strong medicine that should only be employed when necessary.

A more difficult situation arises when a corporate party appears through lay representation that is appropriate at the outset but then becomes inappropriate as that representative begins to raise constitutional or legal arguments. Agencies cannot allow such a representative to make such arguments, as that would constitute the unlicensed practice of law. The agency should halt the proceeding (but not dismiss it) and provide the party a choice between foregoing those arguments or obtaining appropriate representation through a lawyer.

While *Muenich* requires that the party be given an opportunity to obtain such representation, if it so desires, this does not necessarily require that a party be allowed to make arguments that may have already been waived. If it would cause prejudice or undue delay to the opposing party to allow the introduction of this new line of argument in the middle of the proceeding, it is possible that these arguments would properly be considered waived, even if the party exercises its right to obtain a lawyer capable of making such arguments.

That being said, procedural rules such as waiver are intended to operate with considerable flexibility in administrative contexts, so such arguments should only be considered waived if 1) the party raising the argument should clearly have raised it from the outset; and 2) the prejudice or delay to the opposing party would be substantial. While allowing both a change in representation (which inevitably produces delay) and a new line of argument will often produce inconvenience to the agency and the opposing party, where this is the result of a legitimately unforeseen development in the proceedings, it should be allowed. In cases that are more clearly the result of imprudence or intentional strategy, a party's failure to obtain a lawyer in a situation that probably required one can be held against that party by considering "legal" arguments waived.

In the event that a party does not obtain new representation but the party's representative continues to make "legal" arguments, an agency would be required to take further steps to prevent the unlicensed practice of law. In a worst case scenario, this would require barring the offending representative from continuing to appear in the case. This would force a corporate party to obtain appropriate representation. The party should be given a reasonable opportunity to do so, but if the party fails to comply, then it would again be appropriate to treat such a failure as a failure to appear. The appropriate remedy in such situations might need to be different from those used for a failure to appear that occur at the outset, but dismissal or default judgment may still be appropriate as an ultimate remedy.

Agencies can attempt to minimize the number of cases in which a midstream switch in representation and argumentation becomes necessary by 1) trying to anticipate the kinds of

arguments that might be raised and erring on the side of requiring a lawyer when they could include constitutional or “legal” challenges (even if the parties do not explicitly raise such challenges at the outset); and 2) requiring explicit disclosure and acknowledgement of the risk of waiver (which makes it more fair to charge that risk against a party whose non-lawyer representation later becomes inappropriate). In all cases where an agency must require new representation, and especially in cases either allowing or prohibiting a new line of argument raised midstream, the agency should comply with all of AOPA’s requirements and any of its own rules or policies that might bear on such processes.

Sincerely,

Gregory F. Zoeller
Attorney General