Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 10, 2014 CASE NUMBER: 2014SA169
Original Proceeding in Unauthorized Practice of Law, 14UPL020	
Petitioner: The People of the State of Colorado, **v.** **Respondent:** Leslie Banks, d/b/a Leslie Banks & Associates, LLC.	Supreme Court Case No: 2014SA169
ORDER OF INJUNCTION	

Upon consideration of the Order Granting Petitioner's Motion for Judgment on the Pleadings Under C.R.C.P. 12(c) and Report of Hearing Master Pursuant to C.R.C.P. 236(a) filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that LESLIE BANKS d/b/a LESLIE BANKS & ASSOCIATES, LLC shall be, and the same hereby are, ENJOINED from engaging in the Unauthorized Practice of Law in the State of Colorado.

IT IS FURTHER ORDERED that LESLIE BANKS d/b/a LESLIE BANKS & ASSOCIATES, LLC are assessed costs in the amount of $91.00. Said costs to be paid to the Office of Attorney Regulation Counsel, within (30) days of the date of this order.

IT IS FURTHER ORDERED that the Supreme Court Waive any FINE and RESTITUTION in this matter.

BY THE COURT, NOVEMBER 10, 2014.

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN THE UNAUTHORIZED PRACTICE OF LAW BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203	
Petitioner: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** LESLIE BANKS, d/b/a LESLIE BANKS & ASSOCIATES, LLC	Case Number: **14SA169**
ORDER GRANTING PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS UNDER C.R.C.P. 12(c) AND REPORT OF HEARING MASTER PURSUANT TO C.R.C.P. 236(a)	

This unauthorized practice of law matter is before the Presiding Disciplinary Judge ("the PDJ") on "Petitioner's Motion for Judgment on the Pleadings," filed by Kim E. Ikeler of the Office of Attorney Regulation Counsel ("the People") on August 1, 2014. Leslie Banks, d/b/a Leslie Banks & Associates, LLC ("Respondent"), responded to the motion on August 29, 2014.

I. BACKGROUND AND PROCEDURAL HISTORY

The People filed a "Petition for Injunction" against Respondent on May 12, 2014, alleging she engaged in the unauthorized practice of law. According to the petition, Respondent negotiated with insurance companies to resolve two clients' personal injury claims and held herself out as being authorized to engage in such activities. The Colorado Supreme Court issued an "Order and Rule to Show Cause" on May 16, 2014. On June 18, 2014, the Colorado Supreme Court issued an "Order Appointing Hearing Master," referring this matter to the PDJ for "findings of fact, conclusions of law, and recommendations" pursuant to C.R.C.P. 234(f) and 236(a). Two days later, the PDJ issued an "Order to Show Cause Pursuant to C.R.C.P. 234-236."

On July 24, 2014, the PDJ convened a scheduling conference. At the conference, the parties agreed that the factual allegations in the petition are not in dispute and that this matter can be resolved without a hearing. The PDJ thus continued the scheduling conference.

Respondent filed her answer with the PDJ on July 30, 2014.[1] She admits each of the People's factual allegations (allegations 4-54 of the petition) but denies she engaged in the unauthorized practice of law. Respondent sets forth ten defenses in her answer: (1) she has never claimed to be an attorney or represented anyone's legal interests in legal proceedings; (2) the Equal Protection Clause entitles nonlawyers to defend others' rights; (3) preventing her from operating her business would violate antitrust law and thwart fair competition; (4) her "constitutional rights, all civil rights, unenumerated rights, and all inalienable rights" should be protected; (5) the unauthorized practice of law complaint filed against her amounts to "commercial disparagement"; (6) her clients were family members and were advised that she is not an attorney; (7) laypersons provide many forms of advocacy services; (8) she advertised as a "non-attorney solutions company"; (9) the case law cited by the People involves persons who advertised themselves as lawyers, but she did not do so; and (10) a variety of companies, advocacy groups, consultants, activists, and others—in particular, risk managers and claims adjusters employed by insurers—perform services similar to her own, and "[i]nsurance companies allow claimants . . . to designate non-attorneys by way of written letter and/or power of attorney to assist with claims matters."[2]

In their motion for judgment on the pleadings, the People note that whether a layperson can negotiate with insurance companies over clients' personal injury claims is an issue of first impression in Colorado. The People argue that Respondent acted in a representative capacity with respect to the two clients named in the petition and that she enforced her clients' legal rights by negotiating claims. These acts, the People say, required the exercise of legal discretion. The People also set forth legal authorities countering Respondent's defenses.

In her response to the People's motion, Respondent urges the PDJ to pay careful attention to this matter of first impression. In her view, countless businesses act in a "representative capacity." As an illustration, she says, certified financial planners give legal advice in interpreting estate planning documents. Respondent asserts that if she is barred from negotiating insurance claims, other small businesses like accountancies will also be forced to close their doors, even though they provide valuable services to consumers.

On September 19, 2014, the People filed a statement of costs listing their $91.00 administrative fee. Respondent responded on September 24, 2014. She proposes that she pay the $91.00 in lieu of a fine, arguing that this is a matter of first impression, she has never before been investigated for the unauthorized practice of law, and her clients were family members who suffered no harm.

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[1] Respondent filed answers with the Colorado Supreme Court on July 18, 2014, and July 22, 2014.

[2] Answer at 2-3.

II. UNDISPUTED MATERIAL FACTS

Respondent, who is not licensed to practice law in the State of Colorado or any other state, published a website using the URL http://lesliebanksandassociates.com.[3] She also posted a Facebook page.[4] The website offered services including "personal injury, auto accident, [and] claims management," while the Facebook page offered "non-attorney solutions/insurance claims management: personal injury" and "free injury assessment."[5]

Respondent's website read:

> We have years of experience as the middle-man between insurance companies and injury victims . . . . Were you or someone you know injured in an auto accident recently or a few months ago and you aren't sure if the insurance carrier is being fair? Contact us for a free consultation. We'll settle your case and get you the money you deserve.[6]

Elsewhere, the website asked: "Injured in an auto accident? Call us at 303-550-1383. Don't let an attorney take half of your settlement when 95% of accidents settle out of court."[7]

In addition, Respondent sought patient referrals from medical providers.[8] In her email solicitations, she offered to pay referral fees and said she "specialize[d] in automobile injuries, in particular, instances where attorneys do not feel it worth their while to help clients with pre-existing conditions."[9]

The People's petition focuses on two client matters. The first involves Craig Osmond, whose car was hit from behind by a driver named Marjorie Emmons on June 18, 2013.[10] Osmond's car was damaged and he suffered injuries.[11] Emmons was insured by United Services Automobile Association ("USAA").[12]

After Osmond contacted Respondent about his claim, she wrote to USAA on August 5, 2013, under the letterhead of Leslie Banks & Associates, LLC, saying she would be representing Osmond.[13] She enclosed a "Designation Statement" signed by Osmond, explaining that she "ha[d] been retained and authorized by said client to handle the incident

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[3] Pet. ¶¶ 1, 4; Answer ¶¶ 1, 3.
[4] Pet. ¶ 7; Answer ¶ 3.
[5] Pet. ¶¶ 5, 8; Answer ¶ 3.
[6] Pet. ¶¶ 6, 9; Answer ¶ 3.
[7] Pet. ¶ 10; Answer ¶ 3.
[8] Pet. ¶ 11; Answer ¶ 3.
[9] Pet. ¶¶ 12-13; Answer ¶ 3.
[10] Pet. ¶¶ 14-15; Answer ¶ 3. In her answer filed with the Colorado Supreme Court on July 18, 2014, Respondent states that Osmond is her father-in-law.
[11] Pet. ¶ 16; Answer ¶ 3.
[12] Pet. ¶ 17; Answer ¶ 3.
[13] Pet. ¶¶ 18-20; Answer ¶ 3.

or occurrence, referenced above."[14] She also requested copies of "photographs, property damage documents, and recorded statements."[15] Explaining to USAA that Osmond had "sustained injuries to his head, neck and back," Respondent recounted that his "work and personal life ha[d] been interrupted as a result, and he [was] continuing physical therapy and follow-up with his primary care physician."[16]

On August 8, 2013, USAA acknowledged receipt of Respondent's letter of representation.[17] USAA asked her to complete and return a form entitled "Medicare/Medicaid Required Information."[18] Thereafter, Respondent corresponded with USAA representatives by email.[19] She requested an estimate of repairs, along with photos of the vehicle, and promised to send Osmond's updated medical records.[20]

On August 13, 2013, Respondent returned the completed "Medicare/Medicaid Required Information" form to USAA.[21] On August 30, 2013, USAA sent her a form entitled "Diminution in Value Evaluation," and asked her to complete and return it.[22] USAA sent Respondent an estimate for repair of Osmond's car on September 4, 2013.[23]

Respondent wrote to USAA under the same letterhead on January 4, 2014, enclosing a "settlement demand packet and medical documents to facilitate resolution of this claim."[24] In the letter, she recited the facts of the accident, which caused over $5,000.00 in damages to Osmond's car, and she referred to Osmond's "severe pain and bodily injury."[25] She also stated: "Liability is clear in this case. Your insured was driving in a negligent manner and failed to maintain proper lookout and distance from Mr. Osmond's vehicle."[26] After describing details of Osmond's diagnosis and treatment, she demanded that USAA pay Osmond $110,000.00.[27] On February 6, 2014, Respondent wrote once more to USAA under the same letterhead, enclosing additional medical bills and raising Osmond's settlement demand to $150,000.00.[28]

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[14] Pet. ¶ 21; Answer ¶ 3.
[15] Pet. ¶ 22; Answer ¶ 3.
[16] Pet. ¶¶ 23-24; Answer ¶ 3.
[17] Pet. ¶¶ 25-26; Answer ¶ 3.
[18] Pet. ¶ 27; Answer ¶ 3.
[19] Pet. ¶ 28; Answer ¶ 3.
[20] Pet. ¶¶ 29-30; Answer ¶ 3.
[21] Pet. ¶ 31; Answer ¶ 3.
[22] Pet. ¶ 32; Answer ¶ 3.
[23] Pet. ¶ 33; Answer ¶ 3.
[24] Pet. ¶¶ 34-35; Answer ¶ 3.
[25] Pet. ¶¶ 36-37; Answer ¶ 3.
[26] Pet. ¶ 38; Answer ¶ 3.
[27] Pet. ¶¶ 39-40; Answer ¶ 3.
[28] Pet. ¶ 41; Answer ¶ 3.

After further negotiation, Respondent settled Osmond's claim for $60,000.00.[29] USAA issued a check to Osmond in that amount on February 25, 2014.[30] Respondent received $12,000.00 as her compensation for negotiating the claim.[31]

The second matter addressed in the People's petition involves Jennifer Schmidt, who was injured in an automobile accident on August 27, 2012.[32] Schmidt retained Respondent to negotiate her bodily injury claim.[33] The other driver was insured by State Farm.[34]

On May 30, 2013, using her "Leslie Banks and Associates, LLC" letterhead, Respondent sent State Farm a "Designation Statement" signed by Schmidt, stating that Schmidt had retained her to handle negotiations over the accident.[35] On July 3, 2013, Respondent again wrote to State Farm under the same letterhead, enclosing copies of chiropractic bills and demanding $25,000.00 to settle Schmidt's claims, including those for pain and suffering.[36]

Respondent settled Schmidt's claims for $10,000.00.[37] On July 9, 2013, Schmidt signed a release provided by State Farm.[38] Respondent faxed the release to State Farm with the instruction: "Please remit the payment to: Leslie Banks & Associates aso [sic] Jennifer Schmidt."[39] Respondent received $1,000.00 as compensation for negotiating Schmidt's claims.[40]

III. LEGAL STANDARDS AND ANALYSIS

C.R.C.P. 12(c) allows a party to seek judgment on the pleadings after the pleadings are closed, but within such time as not to delay the trial. In considering a motion for judgment on the pleadings, a court "must construe the allegations of the pleadings strictly against the movant and must consider the allegations of the opposing party's pleadings as true."[41] "A court should not grant such a motion unless the matter can be finally determined on the pleadings."[42] Here, the allegations of the petition are not in dispute, and the matter can be resolved on the pleadings.

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[29] Pet. ¶ 42; Answer ¶ 3.
[30] Pet. ¶ 43; Answer ¶ 3.
[31] Pet. ¶ 44; Answer ¶ 3.
[32] Pet. ¶ 45; Answer ¶ 3. In her answer filed with the Colorado Supreme Court on July 18, 2014, Respondent states that Schmidt is her sister-in-law.
[33] Pet. ¶ 47; Answer ¶ 3.
[34] Pet. ¶ 46; Answer ¶ 3.
[35] Pet. ¶ 48; Answer ¶ 3.
[36] Pet. ¶ 49; Answer ¶ 3.
[37] Pet. ¶ 51; Answer ¶ 3.
[38] Pet. ¶ 52; Answer ¶ 3.
[39] Pet. ¶ 53; Answer ¶ 3.
[40] Pet. ¶ 54; Answer ¶ 3.
[41] *Abts v. Bd. of Educ.*, 622 P.2d 518, 521 (Colo. 1980).
[42] *Smith v. TCI Cmmc'ns, Inc.*, 981 P.2d 690, 695 (Colo. App. 1999).

Unauthorized Practice of Law Claims

The Colorado Supreme Court, which has exclusive jurisdiction to define the practice of law within this state,[43] restricts the practice of law to protect members of the public from receiving incompetent legal advice from unqualified individuals.[44] Colorado Supreme Court case law holds that a layperson who acts "in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting that person in connection with these rights and duties" engages in the unauthorized practice of law.[45]

With these principles in mind, the PDJ turns to the legal landscape of insurance adjusting. The term for Respondent's services is public insurance adjusting, or public adjusting.[46] Public adjusting can encompass varied activities, from filling out paperwork to negotiating claims. These activities can be performed on either a first-party basis or a third-party basis.[47] First-party adjusting takes place when a public adjuster helps an insured client to file a claim of loss with the client's *own* insurance company.[48] Third-party adjusting, meanwhile, takes place when a public adjuster helps an injured client to assert a claim under a liability insurance contract against a third party's insurance company.[49] In this case, Respondent was acting as a third-party adjuster, since she helped her clients to file claims with the insurers of the drivers who allegedly injured her clients.[50]

Like a number of other states, Colorado has a statute and regulations governing public adjusting, but this scheme governs only first-party public adjusters.[51] Colorado law requires first-party public adjusters to obtain a state license and to meet various standards,

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[43] C.R.C.P. 228.

[44] *Unauthorized Practice of Law Comm. v. Grimes*, 654 P.2d 822, 826 (Colo. 1982); *see also Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 605 (Ind. 2007) ("Confining the practice of law to licensed attorneys is designed to protect the public from the potentially severe consequences of following advice on legal matters from unqualified persons."); *In re Baker*, 85 A.2d 505, 514 (N.J. 1952) ("The amateur at law is as dangerous to the community as an amateur surgeon would be.").

[45] *See Denver Bar Ass'n v. Pub. Utils. Cmm'n*, 154 Colo. 273, 279, 391 P.2d 467, 471 (1964); *see also People v. Shell*, 148 P.3d 162, 171 (Colo. 2006) (same); C.R.C.P. 201.3(2)(a)-(f) (defining the practice of law to include "[f]urnishing legal counsel" and "interpreting and giving advice with respect to the law").

[46] *See* James McLoughlin, "Activities of Insurance Adjusters as Unauthorized Practice of Law," 29 A.L.R.4th 1156 § 2 (1984 & supp. 2014) (explaining that "[t]he basic function of an insurance adjuster is to ascertain the amount of value or loss of a claim made against an insurer" and that adjusters may work either for insurance companies or on behalf of insurance claimants).

[47] *Utah State Bar v. Summerhayes & Hayden, Pub. Adjusters*, 905 P.2d 867, 868 (Utah 1995).

[48] *Id.*

[49] *Id.* at 870.

[50] Adjusting by persons employed by insurance companies involves separate legal standards. "[C]ourts have generally rejected the contention that adjusters employed by or representing insurers were engaged in the unauthorized practice of law by undertaking activities closely connected with the determination of value or loss . . . ." McLoughlin, "Activities of Insurance Adjusters as Unauthorized Practice of Law," 29 A.L.R.4th 1156 § 2.

[51] C.R.S. § 10-2-103 (8.5) (defining public adjusters to cover only first-party adjusters).

including securing evidence of financial responsibility and avoiding conflicts of interest.[52] No legal authorities in Colorado appear to govern third-party public adjusting or to address whether any form of public adjusting constitutes the unauthorized practice of law.[53]

Other jurisdictions, however, have considered these issues. In *Linder v. Insurance Claims Consultants*, the South Carolina Supreme Court surveyed relevant case law and enumerated practices that do and do not amount to the unauthorized practice of law.[54] The *Linder* court ruled the following activities permissible:

> A. Providing an estimate of property damage and repair costs, i.e., any purely appraisal-oriented activities by the public adjuster.
> B. Preparing the contents inventory and/or sworn statements on proof of loss.
> C. Presenting the claim to the insurance company, i.e., delivering the necessary paperwork and data to the insurer.
> D. Negotiating with the insurance company, as long as the discussions only involve competing property-damage valuations.[55]

The *Linder* court concluded that laypersons may not:

> A. Advise clients of their rights, duties, or privileges under an insurance policy regarding matters requiring legal skill or knowledge, i.e., interpret the policy for clients.
> B. Advise clients on whether to accept a settlement offer from an insurance company.
> C. Become involved, in any way, with a coverage dispute between the client and the insurance company.
> D. Utilize advertising that would lead clients to believe that public adjusters provide services which require legal skill.[56]

The analysis in *Linder* is largely consistent with case law from other jurisdictions.[57] It is widely agreed that a layperson may perform the basic tasks associated with first-party public

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[52] C.R.S. § 10-2-417; *see also* 3 Colo. Code Regs. § 702-1:1 (setting forth licensure and other regulations governing public adjusters).

[53] Since only the Colorado Supreme Court has authority to define and regulate the practice of law, Colorado's statutory scheme does not bear on whether public adjusting amounts to the unauthorized practice of law. *See Unauthorized Practice of Law Comm. v. Employers Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986) (citing Colo. Const. art. III).

[54] 560 S.E.2d 612, 617-22 (S.C. 2002). The facts in *Linder* involved first-party adjusting, though the court considered case law involving both first-party and third-party adjusting. *Id.* at 616-22.

[55] *Id.* at 621.

[56] *Id.*

[57] *See also La. State Bar Ass'n v. Carr & Assocs., Inc.*, 15 So. 3d 158, 170 (La. App. 2009) (holding that a layperson engaged in the unauthorized practice of law when he advised clients how to redress legal wrongs under their insurance policies, negotiated settlements, and contacted insurers to discuss the merits of clients' claims);

adjusting, which consist simply of determining whether the client's car was insured by the client's insurance company and, if so, the extent of damage suffered by the client.[58] Courts have reasoned that estimating the amount of property damage and filling out forms to present a claim is simply what any insured person does to collect on a policy.[59]

But under the analysis set forth in *Linder* and other cases, third-party adjusting amounts to the unauthorized practice of law.[60] This is because the third party's insurer is responsible for paying a claim only if the third party was legally at fault.[61] So a third-party adjuster "must determine the extent of the liability, rights, and duties of the parties before attempting to resolve the issue of a settlement amount."[62] As the Utah Supreme Court has further explained third-party adjusting,

> [A]fter making an objective valuation of damages, an adjuster, to adequately serve the client's interests, must make a judgment of the extent to which that valuation should be compromised in settlement negotiations. Such a determination necessarily requires legal knowledge and skill and the application of abstract and complex legal principles—such as comparative fault, the elements of negligence, and rules governing liability—to the concrete facts of a particular claim. Even in an uncomplicated case, fair settlement of a claim requires knowledge of the underlying legal principles that reveal the strength of the claimant's bargaining position. It is only after making such legal judgments that an adjuster can attach an educated and fair value to the client's claim and negotiate a fair settlement.
>
> Moreover, in the negotiation of a third-party claim, an adjuster must consider legal principles that may affect a claimant's legal ability to pursue the claim, such as statutes of limitation, jurisdictional issues, and affirmative defenses. Thus, even though adjusters do not perform services for their clients in a court of law, the practice of third-party adjusting requires knowledge and

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Unauthorized Practice of Law Comm. v. Jansen, 816 S.W.2d 813, 816 (Tex. App. 1991) (determining that a first-party public adjuster may provide property damage estimates and submit paperwork to present a claim, and observing that in-house insurance adjusters are likewise tasked with making property damage valuations and offering settlement amounts based on those assessments); *Rhode Island Bar Ass'n v. Lesser*, 26 A.2d 6, 9 (R.I. 1942) (deeming it permissible for an adjuster to appraise property values and damage, to inventory damaged property, and to prepare an itemized statement of value and loss).

[58] Michael C. Jordan, *Comment, Unauthorized Practice of Law by Insurance Claim Adjusters*, 10 J. Legal Prof. 171, 174-75 (1985).

[59] *Jansen*, 816 S.W.2d at 816.

[60] *See, e.g., Cincinnati Bar Ass'n v. Sershion*, 934 N.E.2d 332, 333-34 (Ohio 2010) (holding that it is the unauthorized practice of law to present "claims of bodily injury under liability policies" and to assert "claims for extra-contractual damages under other policies of insurance"); *Dauphin Cnty. Bar Ass'n v. Mazzacaro*, 351 A.2d 229, 234 (Pa. 1976) (holding that third-party representation by lay adjusters is the unauthorized practice of law).

[61] Jordan, Comment, *Unauthorized Practice of Law by Insurance Claim Adjusters*, 10 J. Legal Prof. at 175.

[62] *Summerhayes & Hayden*, 905 P.2d at 868-69.

application of legal principles and involves advising, counseling, and assisting clients in connection with their legal rights and duties. In short, third-party adjusting is the practice of law.[63]

The PDJ finds case law from sister jurisdictions both consistent and well-reasoned. The analysis in these cases makes clear that third-party adjusting involves acting "in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting that person in connection with these rights and duties," as the Colorado Supreme Court has defined the practice of law.[64] This conclusion is bolstered by the Colorado Supreme Court's opinion in *In re Boyer*, where a suspended lawyer was held in contempt for analyzing the value of clients' injuries, making demands on liability insurers, and negotiating with the insurers to settle clients' claims, among other actions.[65] Although the standards governing suspended lawyers may differ somewhat from those governing laypersons, *In re Boyer* supports the determination that third-party adjusting is the practice of law.

In sum, the PDJ concludes that third-party public adjusting by laypersons contravenes Colorado's unauthorized practice of law rules.[66] Here, Respondent acted as a third-party adjuster when she represented Osmond and Schmidt in their negotiations with the companies that insured the other drivers, when she communicated with those companies about her clients' injuries, when she made monetary demands upon the companies, and when she settled her clients' claims. By acting as a third-party adjuster and holding herself out to the public as such through her website and Facebook page, Respondent engaged in the unauthorized practice of law.

Respondent's Defenses

Respondent has advanced multiple defenses to the unauthorized practice of law charge. The first category of defenses involves the nature of her advertising and of her relationship with clients: she argues that she never advertised or otherwise represented herself as an attorney, she did not represent anyone's legal interests in judicial proceedings, and her clients were family members. These defenses fail. A layperson may be deemed to have engaged in the unauthorized practice of law even if the layperson made clear that he

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[63] *Id.* at 870; *see also Mazzacaro*, 351 A.2d at 234 (explaining that to negotiate with a third party over valuation of damages requires an understanding of the likelihood that liability can be established, which in turn requires understanding of tort law principles, evidentiary rules, and the relative merits of a case); *La. Claims Adjustment Bureau, Inc. v. State Farm Ins. Co.*, 877 So. 2d 294, 299 (La. App. 2004) (determining that adjusters engaged in the unauthorized practice of law when they assessed clients' claims and advised clients as to available causes of action, since such advice requires an understanding of whether a case has merit).

[64] *See Pub. Utils. Cmm'n*, 154 Colo. at 279, 391 P.2d at 471; *Shell*, 148 P.3d at 171.

[65] 988 P.2d 625, 626 (Colo. 1999).

[66] This conclusion should not deprive the public of professional assistance in pursuing insurance claims. Lawyers often provide such services on a contingent fee basis. *Bergantzel v. Mlynarik*, 619 N.W.2d 309, 316 (Iowa 2000).

or she lacks a law license.[67] Nor is it determinative that Respondent did not represent her clients in judicial proceedings.[68] Last, a personal relationship between a giver and a recipient of legal advice does not provide license to offer such advice.[69]

Respondent's next set of defenses is constitutional: she argues that the Equal Protection Clause permits nonlawyers to defend others' rights, and she contends that her constitutional rights should otherwise be protected. The PDJ finds no merit in these defenses. The Colorado Supreme Court's authority to regulate the practice of law—including to enjoin the unauthorized practice of law—is well-established.[70] The Equal Protection Clause does not protect Respondent's activities: no fundamental interests are implicated here, public adjusters are not a suspect class, and unauthorized practice of law rules are recognized as reasonable measures to protect the public interest.[71] Respondent does not otherwise elaborate on her constitutional defenses, so the PDJ does not belabor the issue.

Respondent next asserts that restricting her business activities would prevent fair competition and violate antitrust law. Not so. The Colorado Supreme Court is exempt from the Sherman Act in regulating the practice of law.[72] In a somewhat similar vein, Respondent contends that the unauthorized practice of law complaint filed with the People amounts to commercial disparagement. This is not a cognizable defense, as the motives of the person who reported Respondent's activities do not bear on whether the activities were lawful.

In her final set of defenses, Respondent contends that laypersons provide many forms of advocacy services and that a variety of entities operate in a similar capacity to her own, in some instances based upon a power of attorney. But the fact that other laypersons may be violating the unauthorized practice of law rules does not mean Respondent herself

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[67] *People ex rel. Atty. Gen. of Colo. v. Woodall*, 128 Colo. 563, 563-64, 265 P.2d 232, 233 (1954) (holding that a bank cashier engaged in the practice of law when he prepared a will for a member of the public, even though he never represented that he was a lawyer or that he had legal training); *Columbus Bar Ass'n v. Am. Family Prepaid Legal Corp.*, 916 N.E.2d 784, 797 (Ohio 2009) (deciding that disclosure of nonattorney status is no defense to an unauthorized practice of law claim).

[68] *See In re Chavez*, 1 P.3d 417, 424 (N.M. 2000) (noting that the practice of law is not "limited to signing pleadings or appearing in court on another's behalf").

[69] *See Conway-Bogue*, 135 Colo. at 412, 312 P.2d at 1005 (overruling *People ex rel. Attorney Gen. v. Jersin*, 101 Colo. 406, 407-13, 74 P.2d 668, 668-71 (1937), in which the court held that a layperson did not practice law when he acquiesced to the request of an ill and intimate friend that he prepare three deeds and a will); *In re Chavez*, 1 P.3d at 424 (stating that "[o]ne is not authorized to undertake legal representation in any [ ] capacity [other than pro se representation or appearing through licensed counsel of record], regardless of whether one calls oneself a legal assistant, an intermediary, a scrivener, or just a friend").

[70] *See, e.g., Shell*, 148 P.3d at 170.

[71] *Fla. Bar v. Neiman*, 816 So. 2d 587, 597 (Fla. 2002) (rejecting an equal protection defense to unauthorized practice of law charges by holding that regulating the unlicensed practice of law serves an important public purpose and that nonlawyers have no constitutional right to practice law); *see also Coffee Cnty. Abstract & Title Co. v. State ex rel. Norwood*, 445 So. 2d 852, 856 (Ala. 1983); *State ex rel. Baker v. Cnty. Court of Rock Cnty.*, 138 N.W.2d 162, 170 (Wis. 1965).

[72] *See Fla. Bar v. Brumbaugh*, 355 So.2d 1186, 1189 (Fla. 1978)

should be given a free pass. Only in narrow circumstances has the Colorado Supreme Court authorized laypersons to engage in activities constituting the practice of law,[73] and the Colorado Supreme Court has not done so here. Finally, conferral of a power of attorney does not authorize an unlicensed person to practice law.[74] Rather, a power of attorney merely permits an attorney in fact to make decisions regarding litigation, to be implemented by a licensed attorney.[75]

In sum, the PDJ cannot find merit in any of the defenses that Respondent advances.

Costs, Fine, and Restitution

The People ask that Respondent be ordered to pay $91.00 in costs to cover the People's administrative fee. Respondent does not object to paying these costs, but she asks that the costs be imposed in lieu of a fine. Considering both Respondent's position and C.R.C.P. 237(a), the PDJ considers this sum reasonable and therefore recommends that the Colorado Supreme Court assess $91.00 in costs against Respondent.

Turning to the matter of a fine, C.R.C.P. 236(a) provides that if a hearing master finds unauthorized practice of law, the hearing master shall recommend that the Colorado Supreme Court impose a fine ranging from $250.00 to $1,000.00 for each incident of the unauthorized practice of law. The People request that the PDJ recommend the minimum fine of $250.00.

In assessing fines for the unauthorized practice of law, the Colorado Supreme Court previously has examined whether a respondent's actions were "malicious or pursued in bad faith" and whether the respondent engaged in unlawful activities over an extended timeframe despite warnings.[76] In this case, the unauthorized activities took place over a limited timeframe, and Respondent has not previously been enjoined from the practice of law. For these reasons, a fine at the lowest end of the range identified in C.R.C.P. 236(a) is appropriate.

C.R.C.P. 236(a) does not explicitly authorize the PDJ to recommend a waiver of a fine. The Colorado Supreme Court, however, has discretion as to whether to fine a respondent under C.R.C.P. 237(a).[77] For several reasons, the PDJ believes a waiver would be appropriate

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[73] *See, e.g., Employers Unity*, 716 P.2d at 464.

[74] *See, e.g., Christiansen v. Melinda*, 857 P.2d 345, 349 (Alaska 1993) ("A statutory power of attorney does not entitle an agent to appear pro se in his principal's place.") (cited with approval in *People v. Adams*, 243 P.3d 256, 266 (Colo. 2010)); *see also Drake v. Superior Court*, 26 Cal. Rptr. 2d 829, 833 (Cal. App. 1994) (same); *In re Conservatorship of Riebel*, 625 N.W.2d 480, 483 (Minn. 2001) (same).

[75] *Riebel*, 625 N.W.2d at 482.

[76] *Adams*, 243 P.3d at 267-68.

[77] C.R.C.P. 237(a) ("If the Supreme Court finds that the respondent was engaged in the unauthorized practice of law, the Supreme Court may enter an order enjoining the respondent from further conduct found to constitute the unauthorized practice of law, and make such further orders as it *may deem appropriate*, including restitution and the assessment of costs.").

here. First, as the People acknowledge in their petition, whether laypersons may negotiate with insurers on clients' personal injury claims is a matter of first impression in Colorado. Although the PDJ's analysis leads to the conclusion that such actions do amount to the unauthorized practice of law, no existing law in Colorado explicitly says as much. Second, the People's petition provides no reason to believe that Respondent harmed her clients. She secured settlements for Osmond and Schmidt and charged fees representing 20% and 10% of their recoveries, respectively—a smaller fee than most lawyers would charge. Third, Respondent has fully cooperated in this unauthorized practice of law proceeding. The PDJ therefore recommends that the Colorado Supreme Court exercise its discretion to waive a fine.

Finally, the People request an award of $12,000.00 in restitution to Osmond and $1,000.00 to Schmidt. C.R.C.P. 237(a) indicates that restitution *may* be awarded where the Colorado Supreme Court makes a finding of the unauthorized practice of law.[78] The Indiana Supreme Court provided valuable guidance about restitution in a case involving a company that sold customers estate plans without providing adequate attorney oversight.[79] The court found disgorgement to be a "reliable and effective deterrent against the unauthorized practice of law," and to be appropriate even where unauthorized practice of law caused consumers no actual harm.[80] But the court limited the disgorgement order to fees collected after the release of an Indiana Supreme Court decision providing "clear notice" that the company's business model was unlawful; the company was permitted to retain fees collected before issuance of that opinion.[81]

The PDJ finds the Indiana Supreme Court's decision sensible. Requiring Respondent to refund $13,000.00 for services not clearly barred by any Colorado legal authority would impose an unfair financial hardship. The PDJ therefore recommends that the Colorado Supreme Court decline to award restitution to Osmond and Schmidt.

IV. CONCLUSION

The PDJ **GRANTS** the People's motion for judgment on the pleadings. The PDJ **RECOMMENDS** that the Colorado Supreme Court **FIND** Respondent engaged in the unauthorized practice of law and **ENJOIN** her from the unauthorized practice of law. The PDJ further **RECOMMENDS** that the Colorado Supreme Court order Respondent to pay

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[78] *See also People v. Love*, 775 P.2d 26, 27 (Colo. 1989) (ordering a respondent who was found to have engaged in the unauthorized practice of law to "make restitution of the fees received for his unauthorized practice of law"). The PDJ notes that in *In re Boyer*, a contempt case, the Colorado Supreme Court declined to order restitution because the actual damages caused by Boyer's unauthorized practice of law were not in the record. 988 P.2d at 628. Here, likewise, actual damages are not clear from the record.

[79] State ex rel. *Indiana State Bar Ass'n v. United Fin. Sys. Corp.*, 926 N.E.2d 8, 17-18 (Ind. 2010).

[80] *Id.* at 17.

[81] *Id.* at 18.

COSTS in the amount of $91.00. Finally, the PDJ **RECOMMENDS** that the Colorado Supreme Court **WAIVE** a **FINE** and **WAIVE RESTITUTION.**[82]

Either party may file objections to this report with the Colorado Supreme Court as provided in C.R.C.P. 236 **on or before Friday, October 31, 2014.**

DATED THIS 3rd DAY OF OCTOBER, 2014.

WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

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[82] As explained above, should the Colorado Supreme Court elect to impose a fine, the PDJ recommends that the Colorado Supreme Court fine Respondent in the amount of $250.00.