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Representation of Parties in Arbitration By Non-Attorneys

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Cover Page Footnote
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FOREWORD

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The issue of the representation of clients in legal or quasi legal proceedings by non-attorneys has been a troubling one. Not only are such services being offered by non-attorneys in the form of transactional services, *i.e.*, advising, drafting deeds and documents, etc., but has spread to actual representation of parties before administrative agencies. Moreover, as more and more disputes are being resolved through alternative dispute mechanisms, such as arbitration, non-attorneys are also representing clients in such proceedings in civil litigation—often involving complex issues and significant sums of money—against other litigants who are usually represented by skilled attorneys.

In April 1994, the American Bar Association issued a *Discussion Draft for Comment* entitled *Non-Lawyer Practice in the United States: Summary of the Factual Record Before The American Bar Association Commission on Non-Lawyer Practice* (hereinafter the "ABA Draft" or "Draft").[1] The ABA Draft discusses not only *pro se* representation and legal services delivery by traditional paralegals, but also by so-called *legal technicians*, who are identified as someone who: is not a lawyer, is not functioning as a traditional paralegal or a document preparer, and is not working with supervision by or accountability of a lawyer.

As to the competence of the legal technicians, or their supervision in rendering their services to the public, the Draft points out that in certain areas of legal technician practice, such as proceedings before some administrative agencies, there are mechanisms to ensure their competency and accountability.[2] In other areas, over-

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1. DISCUSSION DRAFT FOR COMMENT, NONLAWYER PRACTICE IN THE UNITED STATES: SUMMARY OF THE FACTUAL RECORD BEFORE THE AMERICAN BAR ASSOCIATION COMMISSION ON NONLAWYER PRACTICE, April 1994 [hereinafter ABA DRAFT or DRAFT].

2. *Id.* at 17.

sight mechanisms may arise from statutes and rules unrelated to a tribunal; for example, in many jurisdictions, real estate brokers are permitted to assist consumers in completing standardized residential sales contracts under a scheme of regulation related to brokerage functions.[3]

The Draft goes on to point out, however, that in other situations—such as insurance adjusting and debt counseling—there may be little or no oversight to assure competence.[4] The Draft notes that some legal technicians have been found to be in violation of prohibitions against the unauthorized practice of law, but the enforcement of such prohibitions varies widely across the country.[5] The ABA Draft further notes, however, that "[n]owhere is unauthorized practice of law . . . enforcement given the attention or resources that it received as recently as twenty years ago."[6]

Disputes between the public and the securities industry are generally litigated either in court or by arbitration. Arbitration is designed to be simpler, cheaper and faster than courtroom litigation.[7] Arbitrations between brokers and customers have been held at the New York Stock Exchange since 1872.[8] Since that time, other securities industry self-regulatory organizations ("SROs") have been providing a forum for the arbitration of such disputes. Before 1980, however, the SROs had differing rules for such arbitrations.[9]

In 1977, the Securities Industry Conference on Arbitration ("SICA") was created to develop a Uniform Code to be used by all the SROs.[10] The Uniform Code was largely in place at all the participating SROs by 1980.[11] After the adoption of the Uniform Code, SRO arbitrations grew steadily from 830 in 1980[12] to 6,561 in 1993.[13] Moreover, before 1987, these arbitrations were largely vol-

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3. *Id.*

4. *Id.*

5. *Id. See also* Richard B. Schmitt, *Nevada Bar Offers Pro Bono Plan to Stem Nonlawyer Competition*, WALL ST. J., Jan. 9, 1995 at B3, col 4; *A Bar Association Takes Action on Document Processors*, N.Y. TIMES, Feb. 3, 1995 at 320, col. 3.

6. ABA DRAFT, *supra* note 1, at 17.

7. Constantine N. Katsoris, *The Level Playing Field*, 17 FORDHAM URB. L.J. 419, 421. (1989).

8. PHILIP J. HOBLIN, SECURITIES ARBITRATION PROCEDURES, STRATEGIES, CASES 1-2 (1988).

9. *See* Katsoris, *supra* note 7, at 427.

10. *Id.* at 427-28.

11. *Id.* at 429.

12. EIGHTH REPORT OF THE SECURITIES CONFERENCE ON ARBITRATION 29 (June 1994) (on file with the Fordham Urban Law Journal).

13. *Id.*

untary on the part of the public, but after the United States Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*,[14] they generally became mandatory.[15]

In 1988, the first full year after *McMahon*, SRO arbitrations more than doubled from the year before *McMahon*. In addition to the increase in the number of SRO arbitrations, *McMahon* brought the more difficult cases with it, such as those involving violations of the Racketeer Influenced and Corrupt Organization Act,[16] the Securities Act of 1933[17] and the Securities Exchange Act of 1934,[18] as well as employment and discrimination cases.[19] At that point, arbitration began to look more like the courtroom through the introduction of expanded discovery, prehearing conferences and other procedures intended to provide safeguards to ensure a fair and complete hearing.[20]

In 1991, SICA began to receive complaints that claimants were being represented in SRO arbitrations—not by friends, not by their accountants or business associates, not by their relatives—but by professional groups who were not attorneys.

For a variety of reasons, SICA's initial view was that the subject should be handled at the state level, because attorneys general and bar associations have the responsibility for dealing with questions relating to standards and qualifications to practice law. Thus, they would be better suited to handle this multi-faceted problem at the local level. But the complaints persisted, and they raised questions as to whether customers were adequately represented in SRO arbitrations.

SICA finally decided it had to address this thorny issue.[21] Its motive was to protect the overall interests of the thousands of claimants using the SRO forums annually; and, it did so by thoroughly examining this issue of representation.

Because of the enormous stakes and widely divergent opinions, SICA decided, for the first time, to solicit public comment—like the SEC and other regulatory agencies do prior to adopting a rule—in order to elicit the views of the public and affected parties.

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14. 482 U.S. 220 (1987).
15. *See* Katsoris, *supra* note 7, at 426.
16. 18 U.S.C. § 1961(c); *see* DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO (1991).
17. 15 U.S.C. § 77 (1982).
18. 15 U.S.C. § 78 (1982).
19. *See* Katsoris, *supra* note 7, at 429-31.
20. *Id.*
21. *See* ABA DRAFT, *supra* note 1.

SICA held two special meetings at which numerous individuals and organizations appeared—including organizations of non-attorney representatives.

Initially, SICA received some unfavorable publicity, because some in the press came down *instinctively* on the side of consumerism; that is, that there should be *free access* to the system. There were even suggestions that SICA was controlled by lawyers, and therefore its inquiry sought to protect its own. Those innuendoes, however, were unwarranted. On several occasions, I urged the press to look at this issue fairly, because it would react quite differently when some destitute person wrongly loses all of his or her savings and recovers nothing because of incompetent or unethical representation.

Undaunted, SICA listened carefully and looked at all of the issues honestly and constructively, and issued the Report that follows. Since this Report was issued, the United States Supreme Court rendered its landmark decision, *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[22] which, *inter alia*, upheld arbitrators' authority to award punitive damages. If nothing else, this heightens the concern as to the quality and adequacy of claimants' representation.

22. No. 94-18, 1995 U.S. Lexis 1820 (U.S. Mar. 6, 1995).