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Introductory Remarks

NON-ATTORNEY REPRESENTATION

Introduction

PROF. KATSORIS: The first subject to be discussed today is the issue of non-attorney representation. The sole panelist on this topic is Justin Klein.

Justin was the Director of Consumer Affairs at the Securities and Exchange Commission when the Securities Industry Conference on Arbitration was created. He has been a public member of SICA for the last eleven years and is presently chairing SICA's Subcommittee on Non-attorney Representation.[175] He is a partner at the firm of Ballard Spahr Andrews & Ingersoll.

The subject of non-attorney representation has been discussed at SICA for quite some time. We were hearing complaints about people being represented—not by friends, not by their accountants, not by their relatives—but by professional groups who are not attorneys.

For a variety of reasons, SICA felt it should be left up to the local bar associations because local attorneys general or bar associations from around the country would be better suited to handle this multi-faceted problem. But the complaints kept persisting, particularly from certain areas of the country. Finally, we decided it was our duty to delve into the issue, even though we realized it was really almost a no-win situation because you are virtually entering into a hornet's nest. It is an area that bar associations, including the American Bar Association,[176] have shunned or treaded over very carefully.

But to SICA's credit, we did decide to look at this issue because, after all, we are talking about over six thousand arbitrations a year in which people claim to have lost their money. We really wanted to protect the overall interest of the claimants by examining this issue of representation.

Because of the enormous stakes and widely divergent opinions, SICA decided, for the first time, that it should first solicit public comment, like the SEC often does. We wanted to get everybody's opinion before we made any decisions. Many issues were aired at the meetings SICA conducted, and Justin will talk about that in a minute.

Unfortunately, we did initially get some bad press. Much of the press came down instinctively on the side of consumerism; that is, there should be free access to the system. There were also allegations

175. Mr. Klein's term as public member of SICA expired at the end of 1994. At SICA's quarterly meeting, held on January 27, 1995, Thomas Grady, Esq., of Grady & Associates, was elected to succeed Mr. Klein.

176. *See* Nonlawyer Practice in the United States: Summary of the Factual Record Before the American Bar Association Commission on Nonlawyer Practice, Discussion Draft for Comment (Apr. 1994) (discussing implications of nonlawyer practice in various areas of law throughout the United States).

that SICA was controlled by lawyers, and, therefore, we were protecting our own.

Those were unfair charges. On several occasions, I urged the press to look at this issue fairly because they're not going to write the story the same way when some person loses all of his or her money and does not recover anything because of bad representation. SICA has attempted to look at this issue honestly and constructively.

Without further ado, I would like to turn it over to Justin Klein, who has very ably chaired this most important subcommittee. Justin.

Panelist

MR. KLEIN: Thank you, Gus, and thank you, Professor Coffee.

As Professor Coffee mentioned at the outset, following the *McMahon*[177] decision by the Supreme Court, the number of matters that are arbitrated before the SROs has increased enormously, dramatically, geometrically.

Along with this increase has been the birth and the growth of a group of non-attorneys who seek to represent claimants in arbitration for a fee. These non-attorney representative groups are by no means monolithic. They include some national organizations. They include some franchise organizations. They include one-person operations. Some of them have lawyers appended to them. Some of them retain lawyers as need be. Some of them represent claimants, both in arbitration and throughout the hearing. Others decline to do that and merely represent them in connection with trying to get these disputes resolved. There are all kinds of organizations. There are all kinds of financial arrangements between their clients and these organizations.

Obviously, as Gus mentioned, the reason that we're talking about this is because SICA and the SROs have received complaints about them and the quality of the representation provided by them. SICA first tried to leave the issue to the state bar associations, where SICA believes it really rightfully belongs because so many of the issues relate to whether they are actually practicing law.

However, as the number and the nature of the complaints increased, SICA became concerned about whether investors were really being adequately represented by these non-attorney groups. There was also some concern about whether they constituted a threat to the arbitration process that we all around the table are terribly concerned about and really hold very dear.

As you probably all know, SICA is a rule-writing organization. So, it had the reaction that it has to a lot of situations, and it decided that the way to deal with this situation was to write a new rule or amend an existing rule.

177. Shearson/American Express v. McMahon, 482 U.S. 220 (1987).

Accordingly, the drafting committee of SICA formulated a rule that would have precluded a person from representing a party in arbitration for a fee unless that person was a member of the bar of one of the fifty states or the District of Columbia.

SICA made very clear that there was nothing in that rule change that would preclude a friend or relative or other confidant from representing a party in arbitration, but that friend or relative or confidant could not receive a fee unless they were admitted to the bar.

Prior to actually taking up the rule, SICA became aware that this really was a very important public interest issue. We had on one side a consumer interest and access to the process, and on the other side the integrity of the process and making sure that the people in the process understood how it worked and were adequately representing investors. In order to actually get all of the views of the interested parties, SICA did something that it had never done before, and that was to try to figure out how to get some public comment and get some views of people who were interested in the process.

What SICA did was issue a press release. Also, SICA asked the Securities Arbitration Commentator, which, as you know, is a specialized securities arbitration newsletter, to publish the press release soliciting comments and views. SICA also directly asked the non-attorney representative groups for information: how they functioned, what their fee arrangements were, the kinds of cases that they had, what their success rates were, and how they actually defined success.

As a result of that seeking of information, a lot of non-attorney representatives wanted to meet with SICA so that they also could orally present their views. SICA then did something that it also had never done before, and that is it convened an open meeting.

SICA originally decided to have the meeting in New York, but when it turned out that most, if not all, of these groups seemed to be located in Florida and California, SICA thought that it would be better and we would get more people and more views if SICA actually went to those states. Accordingly, SICA had two meetings earlier this year, one in San Francisco, California, and another in Fort Lauderdale, Florida.

SICA had twenty groups and individuals come to address it. They included non-attorney representatives, some lawyers, a representative of the AARP, and others, and essentially SICA came to understand the arguments in favor of and against non-attorney representatives.

In support of such representation, the non-attorney advocates believe that claimants should be provided freedom of choice; that is, claimants in arbitration should be provided an opportunity to retain lawyers or non-lawyers. They also made the argument that non-attorney representatives provide greater access to the arbitration fora, and their rationale for that was that there were a lot of cases that were

uneconomical for lawyers to take, smaller cases, and that without non-attorney representatives, a lot of these cases would not be brought.

They also took the position that non-attorney representatives took these cases at a cost that was less than that which would be charged by lawyers. They also made the argument that because a number of non-attorney representatives were former securities industry people, they provided a level of expertise that a customer doesn't always get when retaining a lawyer, because sometimes lawyers don't understand how the back office at a broker-dealer works or how the sales practice rules work. Often, lawyers need to retain expert witnesses to understand the issues and to get cases prepared for arbitration. So, they took the position that since they were former securities industry people, they had that expertise that lawyers don't necessarily have.

They also pointed out that arbitrators are not always lawyers, so why should a claimant's representative be required to be a lawyer? And then they also pointed out that arbitration is really a business forum and not a court of law.

On the other hand, SICA had a number of lawyers who came to meet with it both in Florida and California who presented the opposite sides of the argument. They pointed out that there are legal issues in arbitrations. Both Professors Coffee and Katsoris have pointed out that after the *McMahon* decision, arbitration really has taken on a lot of the attributes that are found in a judicial proceeding.

The lawyers also pointed out that the services provided by the non-attorney representatives really constitute the unauthorized practice of law, and there has been some litigation in a couple of the states that really has not been terribly conclusive one way or the other.

Furthermore, the lawyers pointed out that when a customer uses a non-attorney representative, there is no attorney-client privilege and no malpractice insurance. They also point out that non-attorney representatives don't have to adhere to any ethical standards that would ordinarily be required of attorneys.

Another point that they made, which I think is quite significant, is that you can have an adverse legal determination in an arbitration proceeding that not only applies to that particular proceeding but also can have precedential effect in other arbitration proceedings. After considering the information that SICA received both in writing and orally at these meetings, SICA made some tentative findings and some tentative conclusions and recommendations. I would like to share those with you.[178]

It is clear that these non-attorney representatives do provide some access and they do provide a freedom of choice. One of the things SICA found, which we thought to be somewhat disturbing, is that a

178. Subsequent to this Symposium, SICA issued a report on non-attorney representation. 22 Fordham Urb. L.J. 502 (1995).

number of the non-attorney representative organizations have staff members, or are actually managed by people, who have had brushes with the securities industry regulators. Some have been barred, and some have been suspended from association with a broker-dealer.

SICA took a good look at some of the advertising claims that are made by non-attorney representatives and found many of them to be exaggerated in some cases at best, and inaccurate in some cases at worst. It is obvious that there is no attorney-client privilege, that there is no malpractice insurance, and that there is no regulation of these non-attorney representatives.

We did find, however, that a number of them are obviously eager to continue to have their professions intact and are eager to find some solution, whether that be some form of regulation or some kind of organization to set standards for them, so they clearly are receptive to listening to those kinds of suggestions. As I said, we've reached some tentative recommendations. They are nowhere near final, but I will share them with you on that basis.

Based on the fact that there are some securities law violators out there providing these services, we intend to recommend that the SROs consider the adoption of rules that would preclude securities law violators from appearing before the arbitration tribunals. We also believe that there are significant issues regarding the unauthorized practice of law that are raised by the activities of the non-attorney representatives.

Accordingly, we intend to send our final report to the bar associations of the fifty states and the District of Columbia to allow them to have an opportunity to assess for themselves whether or not, under their particular standards, the services provided by the non-attorney representatives constitute the unauthorized practice of law.

We also intend to send a copy of the report to the state attorneys general and other state organizations charged with dealing with advertising claims and also to the Federal Trade Commission, so that there can be an opportunity to determine whether these advertising claims are exaggerated or whether they can be substantiated.

There is a provision in the Arbitration Procedures Pamphlet that we think ought to be made clear; that is, the states have the primary authority to decide who can represent a party in arbitration.

And finally, we believe that the SROs have done a fine job in terms of educating the public about the availability of arbitration and how it works, but, like everything else, we think that there are improvements that can be made to the existing efforts. We suggest that the next time the educational material is amended there be some discussion of the kinds of representatives that are available in arbitration and what the benefits and deficits are of the various modes of representation that an investor can have in arbitration.

I hope that I have articulated all of the arguments in favor of retaining these non-attorney representatives. I think that this is a very important consumer issue. It is a very important access issue.

At the same time, I hope I've also been able to articulate the arguments that lawyers have made. I think the arguments that they have made are very important to the integrity of the arbitration process.

Discussion

PROF. KATSORIS: Your co-panelist was to be someone from the AARP who unfortunately could not be here today. People from the AARP did, however, appear at the SICA subcommittee meeting in California. Their argument basically was one of access, but they didn't rule out some sort of reasonable regulation.

Of course, at SICA, we're kind of powerless on this issue. As a practical matter, SICA could not go over the qualifications of everybody who appears in over six thousand SRO arbitrations throughout the country. Nonetheless, I think SICA's findings could be very, very important to attorneys general throughout the country, to bar associations, and the like, so that they can police the practice of these non-attorneys in arbitrations that occur in their states.

MR. CLOONAN: I'm from the American Association of Individual Investors. Let me congratulate you for a very fair and balanced presentation. I think the concern I had, which is why we are here, is that the outlawing of these organizations, I think, would be a mistake. Regulating them is a good idea.

When arbitration first came out, an awful lot of consumer-oriented people were against it because they thought they would never get as good a deal as they would get under the court system, but, as someone who has seen this from both sides and who has seen things go five and seven years in court, I felt that an efficient arbitration system was much better.

I am all for it being efficient and good and fair, but I don't think we necessarily need attorneys to do this. I think expertise in securities is important, particularly when we get into things like derivatives[179] and very complex types of arguments in terms of violations. Whether you have an attorney that gets a securities expert to support him as he needs it, or whether you get a securities expert who gets an attorney who supports him when he needs legal advice, I don't think that makes a lot of difference. But I certainly agree with you in terms of making sure that we don't get disbarred lawyers and people that have been kicked out of the securities industry.

179. *See, e.g.*, Richard W. Stevenson, *Breaking the Bank—A Special Report*, N.Y. Times, Mar. 3, 1995, at A1 (reporting that a British investment bank collapsed in the wake of a loss of in the range of $1 billion resulting from investments in derivatives).

MR. KLEIN: That's a good point. We don't want disbarred lawyers in the process either.

PROF. KATSORIS: On the issue of weeding out undesirable people, I think almost every one of these non-attorney groups that did appear before SICA did welcome some sort of regulation because they wanted the charlatans in their groups weeded out also. I think that was pretty clear, Justin. Unfortunately, it is easier said than done.

There were instances, for example, of false advertising by people that would claim that they had a very high success rate, but when you look into the facts you see that they considered a claim a success if they got any amount—even less than the up-front deposit. They considered that a victory. That sort of misleading advertising, however, basically falls within the regulation of attorneys general.

MR. RYDER: There are procedures for getting back into the securities industry once you are barred. Will there be separate procedures for people who are subject to securities bar to come back into the practice in arbitration, or will they have to go through the securities bar procedure to get back into the industry before they can practice again in arbitration?

MR. KLEIN: Rick, I think the way we're going to end up framing the recommendation is that if you can't be an arbitrator, then you can't represent somebody in arbitration. So, it really would key off the disqualification criteria for serving as an arbitrator.

PROF. KATSORIS: And I think on the attorney side, Rick, we decided that if that person had been suspended from the practice of law, but is now reinstated somewhere, that they would qualify for the reason that some state now says that they are presently qualified.

MR. KLEIN: Actually, Rick, if you really probe that a little bit, you could have somebody who received a statutory disqualification, later went to law school, and then was admitted to practice law. I think that person probably falls through the crack, and we probably would say that person is an adequate representative in arbitration.

If the highest court in the state says he's okay to practice before the courts, then he ought to be able to practice in arbitration.

PROF. KATSORIS: Justin, I think that's it. Thank you very much.