1995

Representation of Parties in Arbitration By Non-Attorneys

Constantine N. Katsoris
*Fordham University School of Law*, ckatsoris@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/ulj/vol22/iss3/1

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
Representation of Parties in Arbitration By Non-Attorneys

Cover Page Footnote
Justin Klein

This article is available in Fordham Urban Law Journal: https://ir.lawnet.fordham.edu/ulj/vol22/iss3/1
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"). 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. In other areas, over-

---

* Wilkinson Professor of Law at Fordham University School of Law and a Public Member of the Securities Industry Conference on Arbitration (SICA) since its inception in 1977. The author wishes to extend a special thanks to Justin Klein, who chaired the SICA Committee that prepared this Report.

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 situa-
tions—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 viola-
tion of prohibitions against the unauthorized practice of law, but
the enforcement of such prohibitions varies widely across the coun-
try.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 gen-
erally litigated either in court or by arbitration. Arbitration is
designed to be simpler, cheaper and faster than courtroom litiga-
tion.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 par-
ticipating SROs by 1980.11 After the adoption of the Uniform
Code, SRO arbitrations grew steadily from 830 in 198012 to 6,561 in
1993.13 Moreover, before 1987, these arbitrations were largely vol-

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
6. ABA DRAFT, supra note 1, at 17.
7. Constantine N. Katsoris, The Level Playing Field, 17 FORDHAM URB. L.J. 419,
8. PHILIP J. HOBLIN, SECURITIES ARBITRATION PROCEDURES, STRATEGIES,
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
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*, they generally became mandatory.\textsuperscript{14}

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,\textsuperscript{16} the Securities Act of 1933\textsuperscript{17} and the Securities Exchange Act of 1934,\textsuperscript{18} as well as employment and discrimination cases.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{itemize}
  \item \textsuperscript{14} 482 U.S. 220 (1987).
  \item \textsuperscript{15} See Katsoris, supra note 7, at 426.
  \item \textsuperscript{17} 15 U.S.C. § 77 (1982).
  \item \textsuperscript{18} 15 U.S.C. § 78 (1982).
  \item \textsuperscript{19} See Katsoris, supra note 7, at 429-31.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} See ABA DRAFT, supra note 1.
\end{itemize}
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.*, 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.

---