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THE FLORIDA BAR RE:
ADVISORY OPINION --
NONLAWYER REPRESENTATION
IN SECURITIES ARBITRATION
/

CASE NO. 89,140

ANSWER BRIEF OF THE STANDING COMMITTEE ON UNLICENSED PRACTICE OF LAW

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TABLE OF ABBREVIATIONS

The following abbreviations will be used in this brief:

AMEX	=	American Stock Exchange
FAA	=	Federal Arbitration Act
IAC	=	Investment Arbitration Consultants, Inc.
NASD	=	National Association of Securities Dealers
NYSE	=	New York Stock Exchange
Ruder Report	=	***Securities Arbitration Reform, Report of the Arbitration Policy Task Force to the Board of Governors of the National Association of Securities Dealers, Inc.*** (January, 1996)
SEC	=	Securities and Exchange Commission
SICA	=	Securities Industry Conference on Arbitration
SICA Report	=	***Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitrution by Non-Attorneys,*** 22 Fordham Urb. L. J. 507 (1995)
SRO or SROs	=	Self Regulatory Organization(s)
Standing Committee or committee	=	Standing Committee on Unlicensed Practice of Law

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PRELIMINARY STATEMENT

The proposed advisory opinion will be cited herein as **Op., p. ___**. The transcript of the public hearing held before the Standing Committee on Unlicensed Practice of Law June 21, 1996 will be cited as Tr., p.___.

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Chapter 10 of the Rules Regulating The Florida Bar. Petitioner, Robert Pearce, requested a formal advisory opinion on the following question:

> Whether non-attorney companies or individuals who offer advice on securities related matters and represent the public before, during and/or after any NASD, **NYSE,** AMEX or other stock exchange arbitration proceedings for compensation are engaged in the unauthorized practice of law.

Pursuant to Rule 10-9.1(f) of the Rules Regulating The Florida Bar, public notice of the date, time, and place of the meeting, the question presented, and an invitation to provide written comments was published in The Florida Bar ***News*** on May 1, 1996, May 15, 1996 and June 1, 1996 and the *Orlando* ***Sentinel*** on May 20, 1996. Notice was also published on FLABAR ONLINE http://www.flabar.org.

The Standing Committee on Unlicensed Practice of Law (hereinafter "the Standing Committee" or "the committee") held a public hearing on June 21, 1996. Petitioner was present and provided testimony as did several other witnesses. The Standing Committee also received and reviewed written testimony which has been filed with this Court.

At the conclusion of the hearing, the Standing Committee voted to issue a proposed formal advisory opinion finding that nonattorney companies or individuals who offer advice on securities related matters and represent the public before, during and/or after any NASD, **NYSE,** AMEX or other stock exchange arbitration proceedings for compensation are engaged in the unauthorized practice of law. The proposed advisory opinion was filed with this Court on October 16,1996. Four individuals, Robert E. Karoly of Securities Arbitration Specialists, Inc.; Karen F. Klausmeyer of Securities Arbitration Recovery Advisors; Brian J. Sheen, a nonattorney arbitration representative

and Investment Arbitration Consultants, Inc. filed comments objecting to the proposed advisory opinion. No objections were filed by the Petitioner. This brief is filed in response to the objections.

SUMMARY OF THE ARGUMENT

Nonlawyer representation in securities arbitration constitutes the practice of law. The fact that the activity is not taking place in a court of law or before a judicial forum does not render the activity something other than the practice of law, It is the nature of the acts rather than where the acts are taking place that is controlling, As advice and services provided before, during and after securities arbitration affect important rights of a person under the law, the advice and services constitute the practice of law.

Nonlawyer representation in securities arbitration is not authorized. In order for authorization to exist, there must be a specific rule or regulation allowing the activity. No such regulation exists here. There is therefore no express preemption of this Court's inherent authority to prevent the practice of law by those who are not admitted to the practice. Nor is preemption implied as adoption of the proposed advisory opinion in no way affects the enforceability of a contract to arbitrate. As nonlawyer representation before, during and after securities arbitration is not authorized, nonlawyers engaging is this activity are engaging in the unlicensed practice of law.

Adoption of the proposed advisory opinion would result in protection of the public. While regulation may lead to greater access, this Court is not the proper body to propose or oversee regulation. Without adoption of the proposed advisory opinion, the public will continue to be harmed.

ARGUMENT

I. NONATTORNEY COMPANIES OR INDIVIDUALS WHO OFFER ADVICE ON SECURITIES RELATED MATTERS AND REPRESENT THE PUBLIC BEFORE, DURING AND/OR AFTER ANY NASD, NYSE, AMEX OR OTHER STOCK EXCHANGE ARBITRATION PROCEEDINGS FOR COMPENSATION ARE ENGAGED IN THE UNLICENSED PRACTICE OF LAW.

In order to determine whether conduct constitutes the unlicensed practice of law, a two part analysis must be performed. First it must be determined whether the conduct constitutes the practice of law. The Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980). It must then be determined whether the conduct is authorized. Id. It is the opinion of the Standing Committee on Unlicensed Practice of Law that the conduct set forth in the question presented and at issue in this matter is the practice of law and that the conduct is not authorized.

A. NONATTORNEY REPRESENTATION OF A PARTY IN A SECURITIES ARBITRATION PROCEEDING IS THE PRACTICE OF LAW.

As set forth in the proposed advisory opinion, the proposed opinion applies only to securities arbitration before the bodies named in the question presented. Investment Arbitration Consultants, Inc. (hereinafter "IAC") takes exception with this. IAC states that the Standing Committee fails to point to any distinction between securities arbitration and other types of arbitration, and therefore, IAC relies on cases involving other types of arbitration in its brief. The Standing Committee does not point to any distinction as the issue of other types of arbitration was not before the committee. To analyze this matter based on arbitration taking place in other forums or involving other subject matters would be akin to applying principles of tort law to a bankruptcy case. Each involves different rules and different forums. Had the committee discussed different types of arbitration in

its opinion it would have been criticized for opining on matters outside of the record. While the committee agrees that the focus of the proposed advisory opinion is narrow, the committee disagrees that the limited scope somehow invalidates the opinion.

IAC takes exception with the committee's finding that representation in securities arbitration is the practice of law, however, **IAC** fails to point out how the committee's finding is flawed. (It is also interesting to note that none of the other individuals filing objections make this argument.) Instead, **IAC** relies on an out-of-state case involving totally different issues to support its argument. This reliance is misplaced.

The court in Williamson v. John D. Quinn Construction Corp., 537 F.Supp. 613 (S.D.N.Y. 1982) was faced with the issue of whether an out-of-state attorney and law firm could collect attorney's fees for representing a client in a construction arbitration matter. The defendant Quinn had argued that the attorneys were not entitled to their fees as they were not authorized to practice law in New York. Quinn never argued that the activities were *not* the practice of law, merely that the attorneys were not licensed in the state and could not perform the activities. The court therefore did not even address the issue of whether the activities were the practice of law, the precise point on which **IAC** cites this case for authority.

While there is no specific holding on this point, the court must have believed that the representation of Quinn in the arbitration was the practice of law otherwise it would not have awarded attorney's fees to Williamson. This is supported by the fact that the award of attorney's fees was based in part on a finding that the out-of-state attorney could have been granted permission to appear ***pro hac vice*** thereby negating any argument that the activity was not authorized. *Pro **hac vice*** admission allows an attorney from another state to practice law in the state where the action is

pending. See Fla. Rule Jud. Admin. 2.060(b). Therefore, implicit in the court's award of fees was a finding that the attorneys were practicing law in the representation of Quinn in the construction arbitration proceeding.

IAC's reliance on Opinion 28 of the New Jersey Committee on the Unauthorized Practice of Law is similarly misplaced. Again, the issue of whether the activity was the practice of law was not even raised. However, the New Jersey committee relied in part on Opinion 676 of the New Jersey Supreme Court's Advisory Committee on Professional Ethics, 136 N. J.L. J. 1298, 3 N. J.L. 650 (1994) which found that means of alternative dispute resolution such as arbitration have become "part and parcel of the practice of law." Opinion 28 at p. 2, ftn. 1. Therefore, a finding that representation of a third party in an arbitration proceeding is the practice of law is implicit in the opinion.

IAC also argues that the informal nature of a securities arbitration proceeding supports a finding that representation in such a proceeding is not the practice of law. IAC argues that as an arbitration tribunal is not a court of record and does not adhere to the same rules as a court of record, practice before it is not the practice of law.

Notwithstanding the fact that the process is informal in nature [1] and is not taking place in a court of record, the act of representing an individual in a securities arbitration proceeding is the

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The Standing Committee agrees that arbitration was designed to be a relatively simple non-judicial procedure for resolving disputes. However, the process is becoming less formal and more adversarial even with nonlawyer involvement in this area. *Securities Arbitration Reform, Report of the Arbitration Policy Task Force to the Board of Governors of the National Association of Securities Dealers, Inc.*, p. 7, 138-139 (January, 1996) (herein "Ruder Report"). While strides are being made to once again simplify the process, allowing nonlawyer representation will not reverse the trend. See *generally,* Ruder Report (several recommendations are made throughout the report regarding simplification of the arbitration process).

practice of law. Hearings in administrative matters are generally less formal than hearings in court, do not take place in a court of record and are separate and distinct from any judicial proceeding. However, this Court has held that representation before administrative agencies is the practice of law. The Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980). This Court so held even after noting that administrative proceedings are not actions at law in the judiciary, that they are informal and that the rules of evidence are not strictly applied, As held by this Court, it is not the nature of the agency or body before which the acts are done that determines whether the act constitutes the practice of law. The Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962) judg. vacated on other grounds, 373 U.S. 379 (1963). "If they constitute the practice of law the fact that they are done in the private office of the one who performs them or *before a nonjudicial* body in no way changes their character. Sperry, 140 So. 2d at 591 (emphasis supplied). [illegible] be on the character of the services rendered and acts performed rather than the nature of the agency or forum." Moses at 415.

As discussed in the proposed advisory opinion, the character of the acts performed in a securities arbitration matter requires a finding that the acts constitute the practice of law. Op., pp.6-12. Advice given before a securities arbitration proceeding is commenced often involves complex legal issues. The investor relies on this advice in determining whether and how to proceed in the case. See Op., pp. 6-8. During the arbitration, the representative, be it a nonlawyer or lawyer, presents evidence, cross-examines witnesses, argues motions and constructs theories of damages. See Op., pp. 8-11. At the conclusion of the arbitration, decisions must be made whether to confirm or vacate the award. This procedure may only take place in court. See Op., pp. 11-12. The character of the acts fall within the test set forth in Sperry. supra, , and therefore, constitute the practice of

law. [2]

Not only is there authority in Florida for a finding that nonlawyer representation in securities arbitration is the practice of law, there is precedent in at least one other state. Prudential Securities, Inc. v. McOuillan, Case No. 93-19858-CZ (Dec. 2, 1993) involved an action seeking an injunction against a nonlawyer firm to prevent the firm from continuing to represent individuals in securities arbitration matters. (For the convenience of the Court, a copy of McOuillan is attached hereto as Appendix "A.") The defendants in McQuillan argued that they were not engaged in the practice of law in Michigan as they were not bringing their disputes into any judicial forum in the state.

Just as this Court would, the McOuillan court focused on the acts being performed rather than where the acts were performed. In reviewing the acts, the court noted that the nonlawyers had:

> 1) Advertised professional guidance to Prudential customers in the newspaper ads, correspondence and in telephone solicitations,
>
> 2) Called their customers 'clients.'
>
> 3) Had personal conferences, at which they have gathered information to be used in the representation.
>
> 4) Prepared arbitration complaints and signed them on behalf of the clients.
>
> 5) Filed the complaints for the customer.

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[2] The test set forth by this Court in The Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962) is as follows: "in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law." 140 So. 2d at 591.

* * *

6) They have contracted for a contingent fee.

7) [T]hey have selected various legal theories to be used.

8) They have selected the parties to be sued.

> Most importantly, Defendants are indisputably providing legal advice on specific problems to clients. . . . Defendants have admitted giving individualized opinions on statutes of limitations, damages, not suing brokers and branch managers, the VMS settlement, the Energy Income Funds settlement and the overall merits of individual cases. Moreover, the complexity of securities litigation -- the facts and theories to be pleaded -- inevitably involve the provision of legal advice.

McQuillan, Case No. 93-19858-CZ, pp. 3-4 (Dec. 2, 1993). The court found that these activities constituted the practice of law and enjoined the defendants from continuing to represent parties in securities arbitration.

The same activities being performed by the defendants in McQuillan are being performed by nonlawyers in securities arbitration matters in Florida. Testimony at the hearing shows that nonlawyers advertise their services (Tr., p. 21, Request for Formal Advisory Opinion, Tab 1), have conferences at which information is gathered to be used in the representation (Tr., p. 67), prepare statements of claim (Tr., pp. 37-38), enter into contingency fee contracts (Tr., pp. 10, 17-18), select legal theories to use (Tr., pp. 36-37) and generally handle the arbitration by offering legal advice before the arbitration is commenced, during the arbitration and after the arbitration (Tr., pp. 9-10). Just as these activities were found to be the practice of law in Michigan, they must be found to be the practice of law in Florida as well.

TAC argues that the fact that the arbitrators are not required to be attorneys somehow negates the committee's finding that representation in a securities arbitration is the practice of law. Brian

Sheen, a nonlawyer arbitration representative who filed as an interested party in this matter, believes that a finding that nonlawyer representation in securities arbitration is the unlicensed practice of law will force out lay arbitrators. Clearly, nonlawyer representation of an individual in a court of law constitutes the unlicensed practice of law. Sperry. supra; The Florida Bar v. Schramek, 616 So. 2d 979 (Fla. 1993). However, prior to 1972, nonlawyers could serve as county court judges and, under limited circumstances, may still serve today. Art. VI, § 8, Fla. Const. (1968); Fla. Stat. §34.021 (1995). Certainly this has not rendered representation in county court matters something other than the practice of law. The Florida Bar re: Advisor-v Oninion --Nonlawyer Prenaration of and Representation of Landlord in Uncontested Residential Evictions, 605 So. 2d 868 (Fla. 1992). Nor has the finding that representation constitutes the unlicensed practice of law prohibited this Court from adopting rules allowing for lay mediators and arbitrators in cases pending in court. Fla. R. for Certified and Court-Appointed Mediators, 10.010; Fla. R. for Court-Appointed Arbitrators, 11 .010. This red herring advanced by TAC and Mr. Sheen does not change the fact that nonlawyer representation in a securities arbitration is the practice of law.

IAC states that "defining the outer limits of the 'practice of law' is practically impossible." Initial brief of IAC, p. 8. The issue before this Court does not involve the outer limits of the practice of law. It involves what is at the core of the practice of law -- the giving of legal advice and counsel and the representation of a party in a contested proceeding where legal rights are either obtained, secured or given away. Sperry. supra. For the reasons stated in the proposed advisory opinion as well as the reasons stated above, this Court should adopt the Standing Committee's finding that nonattorney companies or individuals who offer advice on securities related matters and represent the public before, during and/or after any NASD, NYSE, AMEX or other stock exchange arbitration

proceedings for compensation are engaged in the practice of law.

B. NONATTORNEY REPRESENTATION IN A SECURITIES ARBITRATION PROCEEDING IS NOT AUTHORIZED, AND THEREFORE, CONSTITUTES THE UNLICENSED PRACTICE OF LAW.

IAC begins its argument regarding preemption by noting that the SEC has board authority to oversee and regulate the rules adopted by the SROs regarding arbitration. The Standing Committee does not dispute this fact. However, the SROs have not adopted a rule allowing for nonlawyer representation although they have had ample opportunity to do so. Moreover, if the SROs disagreed with the findings of the Standing Committee set forth in the proposed advisory opinion, they could have filed objections to the proposed advisory opinion. A copy of the proposed advisory opinion was sent to the Securities and Exchange Commission, the Securities Industry Conference on Arbitration, the Securities Industry Association, the Public Investors Arbitration Bar Association and to all of the SROs -- the New York Stock Exchange, the National Association of Securities Dealers, the American Stock Exchange, the Pacific Stock Exchange, the Philadelphia Stock Exchange, the Chicago Board of Options Exchange, the Chicago Stock Exchange, the Municipal Securities Rulemaking Board, the Boston Stock Exchange and the Cincinnati Stock Exchange. The silence of these organizations speaks volumes as to the validity of the proposed advisory opinion.

IAC uses the argument that there is no rule which prohibits nonlawyer representation in securities arbitration as a basis for allowing nonlawyer representation. IAC states that "[i]f the SEC intended to prohibit non-lawyer representation in securities arbitration proceedings it would have done so." IAC Initial brief, p. 10. Similarity, if the SEC intended to permit nonlawyer

representation in securities arbitration proceedings, it not only would have done so but should have done so. "Florida has a unified bar, and all persons engaged in the practice of law here must be members of that bar." Chandris v. Yanakakis, 668 So. 2d 180, 184 (Fla. 1995). Unless there is a specific exception, this general rule applies. Therefore, unless and until a rule allowing nonlawyer representation is adopted by the SROs and approved by the SEC, this Court may prohibit the unlicensed practice of law in securities arbitration.

The fact that a specific rule rather than silence is required is supported by the Court's decision in Sperry v. The Florida Bar, 373 U.S. 379 (1963) as well as decisions by this Court. Sperry held that Florida could not enjoin an activity as the unlicensed practice of law where a federal rule allowed the activity, Specifically, the Court held:

> A State may not enforce licensing requirements which, *though valid in the absence of federal regulation,* give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.

373 U.S. at 385 (emphasis supplied). The Court also held that "Florida has a substantial interest in regulating the practice of law within the State and that, *in the absence of federal legislation, it could validly prohibit nonlawyers from engaging in this circumscribed form of. . . practice." Id.* at 383 (emphasis supplied).

Sperry requires a specific regulation before preemption will take place. i c regulation does not exist, this Court retains the authority to regulate the practice of law in Florida and to prohibit the unlicensed practice of law. This Court recently found that the Jones Act did not federally preempt Florida regulation of the practice of law as there was no specific authorization in the Jones Act allowing nonlawyers to practice. Chandris, supra. In so holding, this Court found "no

merit to [the] argument that there is a general federal law exception to Florida's bar admission requirement." Chandris, 668 So. 2d at 184. A similar finding was made by this Court in the area of state administrative hearings. In Moses this Court held that "[i]n the absence of legislative authorization for lay representation, there would be no question that conduct which constitutes the practice of law, wherever performed, is subject to our constitutional responsibility to protect the public from the unauthorized practice of law." 380 So. 2d 412,417. As there is no such specific authorization allowing nonlawyer representation in securities arbitration, nonlawyer activity in this area can be found to constitute the unlicensed practice of law.

Just as there is no general federal law exception to Florida's bar admission requirement, there is no preemption of this Court's authority and constitutional responsibility to protect the public from the unlicensed practice of law in securities arbitration. All parties agree that the FAA governs securities arbitration as well as other types of arbitration. [3] The FAA however, does not contain an "express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Volt Information Sciences. Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468,477; 109 S. Ct. 1248, 1255 (1989). The FAA was "designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate' and place such agreements 'upon the same footing as other contracts.'" Volt, 489 U.S. at 474, 109 S. Ct. at 1253 (1989) (citations omitted). "The legislative history of the Act established that the purpose behind its

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[3] Robert Karoly of Securities Arbitration Specialists, Inc., an interested party in this matter, suggests that adoption of the advisory opinion would overrule the FAA by ruling that nonlawyer representation constitutes the unlicensed practice of law. This statement is totally inaccurate as the FAA is silent as to nonlawyer representation and makes no mention of the unlicensed practice of law.

passage was to ensure judicial enforcement of privately made agreements to arbitrate," Dean Witter Revnolds. Inc. v. Byrd, 470 U.S. 213,219; 105 S. Ct. 1238, 1242 (1985). "It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Volt, 489 US, at 478, 109 S. Ct. at 1248. Therefore, the FAA will preempt a state law that prevents the *enforceability* of a contract to arbitrate. Doctor's Associates. Inc. v. Casarotto, ___ U.S. ___, 116 S. Ct. 1652 (1996).

In Volt, supra., the Supreme Court was faced with the issue of whether a California provision allowing a stay of arbitration pending resolution of related litigation was preempted by the FAA. The parties in Volt had entered into a construction contract which contained an arbitration clause. The contract also stated that it would be governed by California law. When a dispute arose, the appellant filed a claim in arbitration. The appellee filed a state court action against appellant and others not parties to the contract and moved to stay the arbitration in accordance with the California Civil Procedure Code. The Code permitted a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties where there is a possibility of conflicting rulings on common issues of law and fact. The trial court granted the stay which was ultimately upheld by the Supreme Court. In holding that the state law was not preempted by the FAA, the Supreme Court first discussed the rationale behind the FAA. While the Supreme Court noted the federal policy favoring arbitration, the Supreme Court held that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." Volt, 489 U.S. at 476, 109 S. Ct. at 1254. Therefore, if a state's rules do not undermine the goals of and policies of the FAA -- enforcement of the arbitration agreement by its terms-- the state rule will not

be preempted.

The proposed advisory opinion in no way affects the enforceability of a contract to arbitrate a securities arbitration claim. Should this Court agree with the proposed opinion and find that nonlawyer representation in securities arbitration is the unlicensed practice of law, contracts to arbitrate will still be enforceable by their terms. Parties will still be compelled to arbitrate those claims set forth in the agreement. Whether and what a party may arbitrate will not change. At most, adoption would require that parties to an arbitration be represented by a lawyer if they choose to be represented. This Court may establish this policy without affecting the enforceability of the contract or violating the intent of the FAA.

The Volt Court also noted that "even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law -- that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress'." 489 U.S. at 477, 109 S. Ct. at 1255. The interested parties seem to argue that adoption of the proposed advisory opinion conflicts with the FAA because adoption would somehow change the character of arbitration which was intended to be informal, more expedient and less costly than litigation. This argument has been rejected by the Supreme Court.

In Dean Witter Revnolds. Inc. v. Bvrd, 470 U.S. 213, 105 S. Ct. 1238 (1985) the Supreme Court held that the FAA was not violated by compelling arbitration of pendent state claims where the federal claims were being litigated in court. Some lower courts had denied motions compelling arbitration of the state law claims arguing that bifurcated proceeding would frustrate the FAA's goal of speedy and efficient decisionmaking. In rejecting this reasoning, the Supreme Court held

> The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.
>
> * * *
>
> We are . . . not persuaded by the argument that the conflict between two goals of the Arbitration Act -- enforcement of private agreements and encouragement of efficient and speedy dispute resolution -- must be resolved in favor of the latter in order to realize the intent of the drafters.

470 U.S. at 219, 221; 105 S. Ct. at 1242. Therefore, assuming that efficiency and speed of the arbitration will be affected by adoption of the proposed opinion (an assumption the Standing Committee does not agree with) as the enforcement of the agreement is not violated, adoption of the proposed opinion is not preempted.

IAC relies on Mastrobuono v. Shearson Lehman Hutton. Inc., U.S. ___, 115 S. Ct. 1212 (1995) for the proposition that arbitrators may decline to follow state law in deference to the rules of an SRO. Mastrobuono does not stand for this proposition at all. Like the other cases in this area, Mastrobuono stands for the proposition that an arbitration agreement should be enforced according to its terms.

The contract at issue in Mastrobuono contained a provision specifying that the contract would be governed by the laws of the State of New York. It also specified that any controversy would be settled by arbitration. New York law prevents the award of punitive damages in arbitration. The NASD Code which governed this arbitration did not have an express provision in this regard although an implication existed that punitive damages would be allowed. There was therefore an ambiguity and conflict within the contract. The Supreme Court applied basic principles of contract interpretation and held that punitive damages should have been allowed. While the

Supreme Court found that the New York rule would not apply, it did so in order to enforce the agreement according to its terms as intended by the parties. It did not do so based on a deference to the rules of the SROs.

The implication that punitive damages would be allowed in an NASD arbitration was arrived at by looking at language in *The Arbitrator's Manual* (hereinafter "Manual"). The Manual was prepared by SICA as an explanation of arbitration procedures and is often, although not always, given to the arbitrators. Mastrobuono, 155 S. Ct. at 1222, As to damages, the Manual states "[t]he issue of punitive damages may arise with great frequency in arbitration. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy." Id, at 1218.

One might attempt to argue that the Manual would also allow nonlawyer representation in securities arbitration. As to representation, the Manual states "[p]arties need not be represented by an attorney in arbitration. They may choose to appear *pro* se (on their own) or be represented by a person who is not an attorney, such as a business associate, friend, or relative." *Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys,* 22 Fordham Urb. L. J. 507, 5 11 (1995) (hereinafter "SICA report"). However, in order for the Manual to form the basis for authorization of nonlawyer representation, the Manual would have to be a rule adopted by the SROs and approved by the SEC. This is not the case.

As noted by the dissent in Mastrobuono, the Manual is not a set of rules of the NASD.

> [T]he manual . . . is not an official NASD document. The manual was not promulgated or adopted by the NASD. Instead, it apparently was compiled by members of. . . SICA as a supplement to the Uniform Code of Arbitration . . . .
>
> * * *
>
> [T]he manual does not provide any 'rules' in the sense contemplated by [the contract];

> instead, it provides general information and advice to the arbitrators, . . The manual is nothing more than a sort of 'how to' guide for the arbitrator.

115 S. Ct. at 1222.

The dissent's interpretation of the Manual is supported by SICA. As discussed in the proposed advisory opinion, SICA was formed in 1977 in conjunction with a review of SRO arbitration procedures. SICA Report, p. 509. As part of the review, SICA prepared the Manual. Id. The Manual was prepared as an explanation of the Code and arbitration procedures. Id. The Manual is not a rule of the SROs. SICA Report, p. 5 11. As it is not a rule, it does not require SEC approval. Most importantly, as it is not a rule, the language in the Manual was not intended to preempt a state's authority regarding the authorization of party representatives or regulation of the unlicensed practice of law. Id.

Even if one were to give weight to the Manual, it was not the intent of the language in the Manual to allow nonlawyers to establish companies to represent individuals in securities arbitration. While the legislative history of the provision in the Manual regarding representation is unclear, "individuals involved in the drafting of these booklets recollect that Non-Attorney Representatives . . . did not exist at the time, and accordingly were not contemplated." SICA Report, p. 5 11. SICA and the SROs view the nonattorney referred to in the Manual "as an extension of the party and for most purposes the party is still in effect acting in a ***pro*** se capacity." Id. As found by the Ruder Report, the statement that the party may be represented by a person who is not an attorney, such as a business associate, friend, or relative "does not indicate whether parties can be represented by nonlawyers for a fee. It is believed that it was meant to refer to individuals who were effectively an extension of the party, and thus included in the definition of pro se." Ruder Report, p. 128 n. 170.

In other words, the language in the Manual was not intended to allow nonattomey companies or individuals to offer advice on securities related matters and represent the public before, during and/or after any NASD, NYSE, AMEX or other stock exchange arbitration proceedings for compensation.

Earlier in its brief, IAC cites to Williamson v. John D. Quinn Construction Corp., 537 F.Supp. 613 (S.D.N.Y. 1982) and Opinion 28 of the New Jersey Committee on the Unauthorized Practice of Law for its argument that representation in a securities arbitration is not the practice of law. As discussed above, this reliance is misplaced as whether the conduct was the practice of law was not at issue. Also misplaced is IAC's reliance on Williamson and Opinion 28 for the proposition that nonlawyer representation in securities arbitration is not unauthorized.

Opinion 28 involved the question of whether an out-of-state attorney could appear before a panel of the American Arbitration Association (hereinafter "AAA") in New Jersey to represent an individual on a breach of employment contract claim. The AAA Commercial Arbitration Rules provided that a party could be represented by counsel or other authorized representative. Without explaining its reasoning, the New Jersey committee concluded that "an out-of-state attorney's representation of a party in an arbitration proceeding conducted under the auspices of the AAA in New Jersey does not constitute the unauthorized practice of law." Opinion 28 of the New Jersey Committee on the Unauthorized Practice of Law, p. 4.

Opinion 28 is clearly distinguishable on two points. First, the proposed advisory opinion is not dealing with out-of-state attorneys. [4] More importantly, the arbitration forum at issue

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[4] IAC takes exception with this point. However, as stated in the proposed advisory opinion, the issue of out-of-state lawyers coming to Florida to represent someone in a securities arbitration proceeding was not before the committee. Had the committee opined on the activities of lawyers from other

had a specific rule allowing nonlawyer representation. No such rule exists here.

Williamson, supra, also involved an out-of-state attorney's representation of a party in arbitration. In determining that the appearance was not the unauthorized practice of law, the court noted the differences between an arbitration tribunal and a court of record. As discussed above, where an activity is taking place is not as important as what is taking place. The Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962), judg. vacated on other grounds, 373 U.S. 379 (1963). To find otherwise would allow nonlawyers to practice law in all areas except court. Certainly, this would not advance the rationale for regulating the practice of law -- protecting the public from incompetent, unethical or irresponsible representation. The Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980).

The Williamson court also notes that there is no case precisely on point to the question of whether nonlawyer representation in arbitration is the unauthorized practice of law. That may have been the case in 1982 when Williamson was decided. It is not the case today. As discussed above, the court in Prudential Securities. Inc. v. McQuillan, Case No. 93-19858-CZ (Dec. 2, 1993) found that the activities of the defendants in representing individuals in securities arbitration matters constituted the unauthorized practice of law. A similar finding is warranted here. Accordingly, this Court should adopt the Standing Committee's finding that nonattorney representation before, during and/or after any NASD, NYSE, AMEX or other stock exchange arbitration proceedings for compensation is not authorized. [5]

(footnote 4 continued)
states, it would have been criticized for going outside of the record.

[5] While the activities set forth in the question presented to the Standing Committee constitute the unlicensed practice of law, some activities of the nonlawyer companies practicing in this area are

II. REGULATION OF THE PRACTICE OF LAW IN SECURITIES ARBITRATION IS IN THE PUBLIC INTEREST.

Mr. Sheen, an interested party, begins his comments to this Court by stating that the proposed advisory opinion is "a veiled effort to eliminate competition." Amended Brief of Brian Sheen, p. 1. This is not the case. As noted by the Standing Committee in the proposed advisory opinion, public harm is occurring as a result of nonlawyer representation is securities arbitration. Op., pp. 18-24. This public harm is noted not only by the Standing Committee, but also by SICA and the Ruder Report. Id. "The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is . . . done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." Sperry, 140 So. 2d at 595. "The single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." The Florida Bar v. Moses, 380 So. 2d 412,

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(footnote 5 continued)
authorized. Securities Arbitration Recovery Advisors, an interested party in this matter, states that one of the functions it performs is educating the public about the options available to them regarding potential disputes with securities firms including their rights and methods to enforce their rights. Nothing in the proposed advisory opinion would prevent this public education from continuing as long as it is done on a general rather than case specific basis. The Florida Bar v. Raymond James & Assoc., Inc., 215 So. 2d 613 (Fla. 1968); The Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). SARA could continue discussing general principles of law as they relate to rights and options available to the investor but could not apply those principles to the particular factual situation of the investor or engage in legal representation. As held by this Court, discussion of "general principles of law in a general manner without applying, directly or indirectly, such general principles to a factual situation" does not constitute the practice of law. Raymond James, 215 So. 2d at 615.

417 (Fla. 1980). Protection of the public is also the single, most important concern of the Standing Committee. The proposed advisory opinion was filed with this objective in mind.

TAC concedes that "[i]f the interest of the committee is to protect the public steps must be taken to assure competent and knowledgeable representation in securities arbitration." Initial Brief of IAC, p. 14. The Standing Committee agrees. However, the committee disagrees with IAC's argument that nonlawyer representatives can provide this competent and knowledgeable representation because of their knowledge of the securities industry. In The Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980) this Court declined to authorize nonlawyer representation on the assumption that the representatives possess the requisite knowledge and skill simply because of their expertise in the area and knowledge of the case. This Court noted that "Respondent was not required by any rule or regulation to demonstrate that his knowledge of [the rules of evidence], or other legal concepts, was any greater than that of the average citizen." Id. at 415.

Unlike lawyers, "[nonattorney representatives] are not required to meet ethical standards. . . ." SICA Report, p. 5 18. "As lawyers, our representation of clients is strictly regulated. We're trained. We're tested. We're licensed. We are supervised. Our trust funds are regulated. . . . [I]f we screw up, we're disciplined by The Florida Bar. None of that exists with respect to the nonattorney firms. The stock brokerage industry arbitration forums have no qualification procedure, has no rules as to what nonlawyer can represent or which nonlawyer can represent. A nonlawyer who may have been barred by the securities industry or censured or suspended can come in and represent the customer before the arbitration forum. There is no oversight of the clients' monies that are on deposit. There is no oversight as to how the settlements are handled, and there is no discipline." Tr., pp. 14-15. This unregulated representation is the type of public harm this Court

spoke of in Sperry, supra and Moses, supra as the rationale for prohibiting the unlicensed practice of law. Adoption of the proposed advisory opinion would prevent this unregulated representation from continuing in Florida.

Mr. Sheen seems to argue that prohibiting nonlawyer representation will not lead to greater protection of the public. He states that "the bar only regulates after the fact. They don't prevent bad attorneys and just because you are an attorney doesn't mean your [sic] competent to practice in securities arbitration." Amended Brief of Brian Sheen, p. 5. While the latter statement is true, the same can be said for a former securities dealer --just because you once sold securities does not mean that you are competent to represent someone in a legal proceeding involving the sale of securities. However, the difference is that the incompetent attorney can be disciplined by The Florida Bar for harm caused as a result of the incompetence. Rule 4-1.1, R. Reg. Fla. Bar. A securities dealer who is incompetent in the representation of an individual in a securities arbitration is not subject to discipline by anyone. Surely, the public will receive greater protection with a regulated group than with totally unregulated individuals.

IAC contends that many of the arguments made against nonlawyer representation would apply to representation by attorneys as well yet only points to one. IAC argues that attorneys are as likely to enter into quick settlement agreements as are nonlawyer representatives. As support, IAC cites to the SICA Report which "notes that attorneys could also be motivated to settle quickly for lower amounts, but are presumably restrained by the ethical obligations imposed upon them by the bar." Initial Brief of IAC, p. 12. This is precisely the point. If the settlement is not within the client's best interest, the attorney may be disciplined whereas the nonlawyer representative may not. Rule 4-1.7(d), R. Reg. Fla. Bar (a lawyer may not act in the lawyer's own best interest rather than

the interest of the client). The ethical obligations imposed on the attorney act as a safeguard. These safeguards do not exist when dealing with conduct of a nonlawyer representative. [6]

This is not to say that nonlawyers should be removed from the process altogether. Adoption of the proposed advisory opinion would not prevent a lawyer from hiring a former securities dealer to assist with the arbitration as long as the attorney is responsible for the representation and the nonlawyer is working under the direction and supervision of the attorney. Rule 4-5.3, R. Reg. Fla. Bar. As stated by Mr. Sheen, this is often the case and benefits the client.

However, a nonlawyer company may not hire a lawyer to represent the client as a means of removing the activities of the nonlawyer company from the unlicensed practice of law, [7] Aside from the ethical concerns raised by such an arrangement, [8] the nonlawyer continues to engage in the unlicensed practice of law by, among other things, initiating and controlling the lawyer-client relationship, setting the fees and paying the lawyer, advertising to the general public that the nonlawyer can and will provide a legal service and causing the customer to place some reliance on

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IAC also seems to argue that the testimony of the witnesses at the hearing should be discounted because the attorney witnesses have an economic interest in the outcome of this matter. The same can be said for IAC and the other individuals filing as interested parties.

Securities Arbitration Recovery Advisors, an interested party appearing in this matter, states that they retain an attorney to represent the client throughout the entire arbitration process.

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In The Florida Bar re: Advisory Opinion -- Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992) this Court recognized the ethical concerns raised when a nonlawyer hires a lawyer to do legal work for a third party. This Court noted that the arrangement presents a potential conflict of interest as the lawyer's duty of loyalty to the client may be compromised. Specifically, this Court noted potential violations of Rules Regulating The Florida Bar 4-1.7(b) (lawyer shall not represent a client if the lawyer's independent professional judgment may be limited) and 4- 1.8(f) (lawyer shall not accept compensation for representing a client from one other than the client).

the nonlawyer to properly prepare and handle their case. The Florida Bar re: Advisory Oninion -- Nonlawver Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992); The Florida Bar v. Consolidated Business and Legal Forms. Inc., 386 So. 2d 797 (Fla. 1980); The Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). Therefore, the hiring of a lawyer does not cure any unlicensed practice of law problems that exist.

Securities Arbitration Recovery Advisors, IAC and Mr. Sheen all seem to argue that they provide an option to investors with smaller claims, and therefore, nonlawyer representation in securities arbitration should not be deemed the unlicensed practice of law. As discussed in the proposed advisory opinion, the Standing Committee is mindful of the need to provide meaningful access to legal services. Op., pp. 24 - 29. However, the Standing Committee also agrees with the witness who stated that "there are creative ways to solve that problem, but having an unregulated group [is not] the answer." Tr., p. 79, Allowing nonlawyers to continue representing individuals in securities arbitration without any regulation or certification will not address the access issue and will not alleviate the public harm.

In those instances where this Court has opened the practice of law to nonlawyers, it has done so only where the need for access to legal services could be balanced with protection of the public. For example, in The Florida Bar v. Brumbaugh, supra this Court authorized the sale of legal forms and kits as a means of providing access while at the same time limiting the advice given and services rendered to protect the public. Similarly, in The Florida Bar re: Advisorv Oninion -- Nonlawver Preparation of and Representation of Landlord in Uncontested Residential Evictions, 605 So. 2d 868 (Fla. 1992), this Court held that property managers could prepare and file uncontested evictions for nonpayment of rent as long as the property manager was using Supreme Court Approved Forms

thereby achieving the balance between access to legal services and protection of the public. This balance is also evident in the area of federal practice. As discussed earlier, this Court's jurisdiction over the practice of law in Florida will only be preempted where a federal rule or regulation specifically allows nonlawyer practice. Sperry v. The Florida Bar, 373 U.S. 379 (1963). The access is balanced by the regulation through the federal agency.

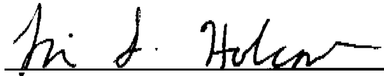
Although regulation in this area might lead to greater access and protection of the public, this Court is not the proper body to propose and oversee the regulation. As discussed in the proposed advisory opinion, the SROs are best able to propose and oversee regulation as the practice is taking place before them. Op., pp. 24-29. In the absence of regulation, the scale must tip in favor of this Court's "constitutional responsibility to protect the public from the unauthorized practice of law." The Florida Bar v. Moses, 380 So. 2d 412,417 (Fla. 1980). To find otherwise will not promote meaningful access and will not protect the public from harm.

CONCLUSION

For the reasons stated above, the Standing Committee on Unlicensed Practice of Law respectfully requests that this Court adopt the proposed advisory opinion and find that non-attorney companies or individuals who offer advice on securities related matters and represent the public before, during and/or after any NASD, NYSE, AMEX or other stock exchange arbitration proceedings for compensation are engaged in the unauthorized practice of law.

Should this Court adopt the proposed advisory opinion, Mr. Karoly, an interested party in this matter, requests a "run off" period of twelve to eighteen months to permit the resolution of existing cases. Mr. Karoly states that he was advised that the Standing Committee on Unlicensed Practice of Law would agree to take a "no position" on a "run off" period. This statement is not entirely accurate. The Standing Committee agreed that it would not take a position on Mr. Karoly's request for a "run off" period as long as the period was for a reasonable time. It was represented to counsel to the Standing Committee that the period would be used to transfer cases to members of The Florida Bar so that the client's of Securities Arbitration Specialists, Inc. could be properly represented. There is precedent for this Court granting such a "run off" period. In The Florida Bar re: Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909 (Fla. 1989) this Court gave HRS a period of approximately seven and one-half months to end the practice of law by its lay counselors. Apparently, this Court felt that this was a reasonable amount of time in which to hire lawyers to take over the cases. Whether twelve to eighteen months is a reasonable period will be decided by this Court. The Standing Committee merely wishes to clarify the conversations with Mr. Karoly's former lawyer.

Respectfully submitted,



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(904) 561-5840
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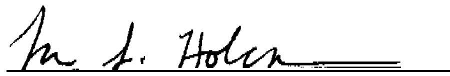
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Pearce, 2888 East Oakland Park Boulevard, Ft. Lauderdale, Florida 33306; Richard A. Greenberg, Post Office Box 925, Tallahassee, Florida 32302; Brian J. Sheen, 2915 Banyan Boulevard Circle Northwest, Boca Raton, Florida 3343 1; Robert E. Karoly, 1845 Fourteenth Avenue, Vero Beach, Florida 32960 and Karen F. Klausmeyer, Post Office Box 2344, Palm City, Florida 34991 this 6th day of January, 1997,



Lori S. Holcomb

Appendix

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PRUDENTIAL SECURITIES, INC.,
a Delaware Corporation,

Plaintiff

File No. 93-19858-CZ

vs.

Judge Duncan M. Beagle

JAMES H. McQUILLAN, J. STEPHEN STOUT and KYLE ANDREWS d/b/a or as General Partners of Partnership Arbitration, and PARTNERSHIP ARBITRATION, a Michigan Co-Partnership, jointly and severally,

Defendants
_____________________________________/

OPINION/ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

At a session of said court held in the City of Flint, Genesee County, Michigan, this 2nd day of December, A.D., 1993.

PRESENT: HONORABLE DUNCAN M. BEAGLE, CIRCUIT JUDGE

Plaintiff, Prudential, has motioned this court for a preliminary injunction enjoining Defendants McQuillan, Stout and Andrews, from continuing in their present endeavors with Partnership Arbitration in representing former clients of plaintiff in various arbitration proceedings because it amounts to the unauthorized practice of law in violation of MCLA 600.916; MSA 27A.916. Defendants contend that they are not engaged in the practice of law because they are not bringing their disputes into any judicial forums in the State of Michigan. Both plaintiff and defendants cite the case of State Bar v Cramer, 399 Mich 116 (1976)

in support of their positions. Defendants argue this case does not apply to them because there the defendants were giving advice to clients to be used in a court of law, not in an arbitration forum. This case will be more fully discussed infra.

I. ISSUES

A. WHAT IS THE PRACTICE OF LAW?

After some long reflection by this court, the simplest answer to this question can be found on some lawyer's letterhead -- John Doe & Associates, Counselors and Advisors At Law. Taking these words at their common sense meaning is that lawyers counsel and advise clients on their problems, remedies that may be available and then recommend a certain plan of action. The very essence of practicing law is not compiling paperwork, filing such documents as coming to court, but rather is giving advice to clients who present problems to you for resolution. MCLA 500.916; MSA 27A 916 states:

> "It is unlawful for any person to practice law, or to engage in law business, or in any manner whatsoever to lead others to believe that he is authorized to practice law or to engage in the law business, or in any manner whatsoever to represent or designate himself as an attorney and counselor, attorney at law, or lawyer, unless the person so doing is regularly licensed and authorized to practice law in this state. Any person who violates the provisions of this section is guilty of contempt of the supreme court and of the circuit court of the county in which the violation occurred, and upon conviction is punishable as provided by law. This section does not apply to a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter."

The statute prohibits, but does not define, the unauthorized practice of law. The courts have recognized that this area is being left to them to regulate. ". . . [T]he legislature has not seen fit to define what constitutes the "practice of law", and accordingly 'the formidable task of constructing a definition of the practice of law has largely been left to the judiciary.'" Cramer, supra.

This court adopts a portion of plaintiff's brief because it is in complete agreement with this court's reasoning. In Cramer, the court addressed a no-fault divorce action. After first noting that the mere provision of forms to the general public without specific advice would not be unauthorized practice, the court stated:

> But defendant goes well beyond merely making available those materials necessary to effect a legal divorce. She advertises "professional guidance" to her "clients". A personal conference is arranged between defendant and her client to discuss the divorce. The complaint and summons are prepared by defendant. Once completed, all documents incident to the divorce proceedings are prepared for the client's or the court's signature. Defendant occasionally files the completed forms in court. And, in most cases, she personally advises her clients as to the proper testimony to provide.

399 Mich, at 137.

Defendants have gone well beyond what the court condemned in Cramer, Defendants have:

1) Advertised professional guidance to Prudential customers in the newspaper ads, correspondence and in telephone solicitations.

2) Called their customers "clients".

3) Had personal conferences, at which they have gathered information to be used in the representation.

4) Prepared arbitration complaints and signed them on behalf of the clients.

5) Filed the complaints for the customers.

However, Defendants have done far more:

6) They have contracted for a contingent fee.

7) Unlike a divorce, they have selected various legal theories to be used.

8) They have selected the parties to be sued.

Most importantly, Defendants are indisputably providing legal advice on specific problems to clients. Provision of personal advice peculiar to a specific legal problem is the unauthorized practice of law. Cramer, supra, 399 Mich, at 138; Michigan Hospital Association v MESC, supra, 123 Mich App, at 571. In Cramer and Michigan Hospital, the Defendants denied providing legal advice, requiring the court to look at the other factors to find unauthorized practice. There is no such problem here -- Defendants have admitted giving individualized opinions on statutes of limitations, damages, not suing brokers and branch managers, the VMS settlement, the Energy Income Funds settlement and the overall merits of individual cases. Moreover, the complexity of securities litigation -- the facts and theories to be pleaded -- inevitably involve the provision of legal advice.

Therefore, it is this court's opinion that Defendants, McQuillen, Stout and Andrews, have been engaged in the unauthorized practice of law. However, even so, defendants argue that plaintiff lacks standing regarding this issue, therefore, their motion for a preliminary injunction must fail.

B. DOES PRUDENTIAL HAVE STANDING?

At common law, standing would be met if the plaintiff could demonstrate -- (1) a substantial interest and (2) a personal stake in the outcome of the controversy. Rogan v Martan, 167 Mich

App 483 (1988). Plaintiff appears to be the sole target of defendants' actions, which will result in substantial legal fees to plaintiff over cases filed in the wrong arbitration forum, over a misleading signature or which are time barred. Plaintiff also stands to suffer future losses. Defendants' advice, misrepresentations and omissions in advertisements, correspondence and meetings threaten plaintiff with loss of business, damage to customer goodwill, additional legal expenses, and other damages not ascertainable at this time.

Plaintiff's standing is not abrogated by a contrary statute or court rule. The unauthorized practice of law statute, MCLA 600.916; MSA 27A.916 is silent on standing as set forth above. However, State Bar Rule 16 provides:

> "The State Bar of Michigan is hereby authorized and empowered to investigate matters pertaining to the unauthorized practice of law and, with the authority of its Board of Commissioners, to file and prosecute actions and proceedings with regard to such matters by which the Supreme Court allows the State Bar of Michigan to file and prosecute such actions."

The Rule gives the State Bar standing; it does not take standing away from others. Therefore, based on the foregoing, it appears to this court that plaintiff has standing to bring its motion for a preliminary injunction against the defendants. The court, at this point, will not address the alleged violation of the Michigan Consumer Protection Act because plaintiff has met its burden in citing to this court the necessity in getting a preliminary injunction issued. Rather, this issue and any others will be

adjudicated at a hearing to be scheduled by this court in the near future.

II. BASIS FOR GRANTING PRELIMINARY INJUNCTION

A. LAW

To prevail in a request for a preliminary injunction four factors must be demonstrated:

1. Probability that the plaintiff will succeed on the merits;

2. Irreparable harm to the plaintiff if the request is not granted;

3. Balance of the harm and possible injury to the defendant if the requested injunction is issued; and

4. The public interest.

See *Michigan State Employees' Association v Department of Mental Health*, 421 Mich 152, 157-58; 365 NW 2d 93 (1984).

B. FACTUAL INFORMATION FROM DISCOVERY

These are just some of the facts taken from the answer to the complaint filed April 2, 1993, and the depositions of Stout and Andrews on April 2, 1993, and April 5, 1993, respectively:

1. Beginning on October 18, 1992, defendants placed an advertisement in the Flint Journal soliciting Prudential direct investment clients to contact them about recovering their losses, and they returned the call.

2. Clients signed one of three fee agreements offering advice.

3. The agreements offered opinions as to applicable statute of limitations.

4. In meetings with clients that last 1 1/2 hours or more, Stout and Andrews advised clients not to sue their individual brokers, and further that the branch manager should not be sued.

5. Stout and Andrews wrote a letter to clients calling a proposed class action settlement on Prudential energy investments a "lousy deal", recommending its rejection and offering their services. They admit to telephoning customers urging them to reject the settlement.

6. As to the issue of damages, Stout and Andrews told customers that they would negotiate settlements with Prudential and that in their experience, settlements range from 30 cents to 120 cents on the dollar.

7. Stout admits to drafting statements of claim based on client interviews which recited their version of the facts, identified the parties and the legal theory under which they sued. Stout concluded Prudential was liable under each pleaded legal theory.

8. The retainer agreements evidence attorney-client terminology, a contingent fee, an assignment of a portion of the claim and the hiring of counsel.

III. SUBJECT MATTER OF PRELIMINARY INJUNCTION

This preliminary injunction shall enjoin the defendants, their partners, employees, agents, representatives and others from acting in concert or in participation with them, specifically including the American Arbitration Association, New York Stock Exchange, Inc., National Association of Securities Dealers, Inc.,

or any other arbitration tribunal from activities which constitute the unauthorized practice of law which have been somewhat highlighted above. This preliminary injunction shall enjoin these persons from:

1. Holding themselves out to the public as qualified to render advice and service to persons interested in pursuing claims against Prudential;

2. Rendering counsel and a service to persons seeking to pursue claims against Prudential;

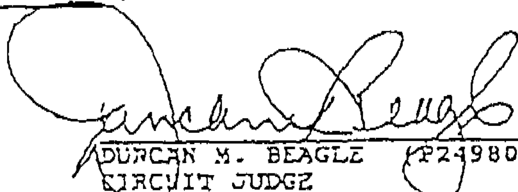
3. Furnishing or offering to furnish forms and documents with assistance in their completion to persons seeking to pursue claims against Prudential;

4. Representing parties in the initiation or prosecution of new and pending arbitration proceedings before the American Arbitration Association, New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., or any other arbitration tribunal; and

5. Continuing to represent parties in the prosecution of arbitration proceedings before the American Arbitration Association, New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., or any other arbitration tribunal.

For all of the foregoing findings and reasons, this preliminary injunction shall issue and take effect on 12. 3. 93

IT IS SO ORDERED.



DUNCAN M. BEAGLE (P24980)
CIRCUIT JUDGE

DATED: 12. 3. 93