IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE: ADVISORY OPINION - NONLAWYER REPRESENTATION IN SECURITIES ARBITRATION	CASE NO. 89,140

INITIAL BRIEF OF INVESTMENT ARBITRATION CONSULTANTS, INC.

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C. PRELIMINARY STATEMENT

References to the transcript of the public hearing held before the Standing Committee on Unlicensed Practice of Law on June 21, 1996, will be by the designation Tr., p.____.

D. *ARGUMENT* AND CITATIONS OF AUTHORITY

1. 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.

A. The representation of a party in securities arbitration proceedings is not the practice of law.

The proposed advisory opinion issued by The Florida Bar Standing Committee on Unlicensed Practice of Law (hereinafter "the committee") conducted a two part analysis of the issue of whether the representation of individuals in securities arbitration proceedings is the unauthorized practice of law. The analysis first asks whether the conduct constitutes the practice of law. The second issue is whether the conduct is authorized. For purposes of this brief, both issues will be addressed separately.

The committee concluded the representation of individuals in securities arbitration proceedings constitutes the practice of law. The committee's conclusion in this regard is erroneous.

A preliminary statement set forth in the proposed advisory opinion states the opinion does not address the issue of arbitration in general. The committee attempts to limit its opinion to the field of securities arbitration. Despite this attempt, the proposed advisory opinion fails to point to any distinction between arbitration in the securities field and any

other subject of arbitration. Therefore, this brief will discuss general principles of arbitration.

The proposed advisory opinion relies heavily on the Report of the Securities Industry Conference on Arbitration (SICA) on Representation of Parties in Arbitration by Non-Attorneys. 22 Fordham Urb.L.J. 507 (1995) (hereinafter "SICA Report"). The SICA Report concluded that activities by non-attorney representatives constitutes the practice of law. Id. at 515. The proposed advisory opinion then turns to a discussion of the test set forth by this Court in The *Florida* Bar *v. Sperry*, 140 So.2d. 587 (Fla. 1962), judg. vacated on other grounds, 373 U.S.379 (1963). The committee concluded the steps taken by non-lawyer representatives in securities arbitration proceedings constitute the practice of law. The committee pointed to testimony from the public hearing held in this matter in support of this conclusion.

After reviewing the *Sperry* test and the testimony at the public hearing, the proposed advisory opinion states "it is clear that the advice affects an individual's important legal rights as it will determine whether to bring an arbitration, what type of claims to raise and how to proceed. For example, one non-lawyer firm advertises that it can assist in claims regarding fraud and misrepresentation." The committee's reliance upon this example is unpersuasive.

The arbitrators in securities arbitration proceedings do not have to be attorneys. Nevertheless, the arbitrators often must decide complex legal issues and must interpret

both statutes and caselaw. Despite the fact that arbitrators are often not attorneys, they are permitted to decide legal issues such as claims alleging unconscionability, coercion or confusion in signing the agreement to arbitrate. ***Coleman v. Prudential Bache Securities, Inc. 802*** F.2d 1350, 1352 (11th Cir. 1986). In doing so, however, arbitrators are not bound by precedents as would be a court of law. Arbitrators are more often guided by principles of equity in reaching their conclusions.

The proposed advisory opinion takes the position that representation in an arbitration proceeding "clearly" constitutes the practice of law. Investment Arbitration Consultants, Inc., submits this conclusion is not as clear cut as the committee would believe. For example, at least one United States District Court and one committee on the unauthorized practice of law have reached contrary conclusions.

In ***Williamson v. John D. Quinn Construction Corp., 537*** F.Supp. 613 (S.D.N.Y. 1982), the court was confronted with the issue of whether an out-of-state attorney who represented a party in an arbitration proceeding was engaged in the unauthorized practice of law, While the court did not expressly state that representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law, the court cited this holding with approval. *Id.* at 616.

The court in ***Williamson*** first pointed out several matters which are germane to the present case. The court noted that an arbitration tribunal is not a court of record; its rules of evidence and procedure differ from those of courts of record; its fact finding process

is not equivalent to judicial fact finding; and it has no provision for the admission pro *hac* vice of local or out-of-state attorneys. Id. at **616.** See also ***Alexander v. Gardner-Denver Company*, 415 U.S. 36, 57-58, 94 S.Ct. 1011, 1024,** 39 L.Ed.2d **147 (1973).**

The court in *Williamson* then **stated as** follows:

> While no case precisely in point has been found either under New York or New Jersey law, the issue has been addressed by the Association of the **Bar** of The City of New York. (Footnote omitted).
>
> Although the report focused on labor arbitration, it considered generally the issue of legal representation before arbitration tribunals. The report states "[i]t should be noted that no support has to date been found in judicial decision, statutes or ethical code for the proposition that representation of a party ***in any kind of*** arbitration amounts to the practice of law." The report concludes "**the** Committee is of the opinion that representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not **the** unauthorized practice of law." Williamson ***v. John D. Quinn Construction Cop.*** *537* F.Supp. at 616 (Emphasis added).

The New Jersey Committee on the Unauthorized Practice of Law reached a similar conclusion in its Opinion 28. The **Committee** was addressing the issue of whether an out-of-state attorney may appear before a panel of the American Arbitration Association in New Jersey to present evidence **and** argue questions of substantive law on behalf of a client with **a** claim against a former employer for breach ***of*** an employment contract. The Committee concluded that an out-of-state attorney may represent a party under these

circumstances. 138 N.J.L.J. 1558 (Dec. 12, 1994).

Although the rule under consideration in Opinion 28 provided for representation "by counsel or other authorized representative," the Committee cited the *Williamson* case in support of its conclusion.

The proposed advisory opinion discusses how parties to arbitration sometimes must resort to the courts before, during or after the arbitration proceeding. As noted in the SICA Report, non-attorney representatives often retain attorneys when needed at no additional charge to their clients. SICA Report at 517.

Throughout the proposed advisory opinion, the Committee attempts to equate representation in arbitration proceedings with representation in a court of law. Arbitration is clearly designed to be separate and distinct from any judicial proceeding. The Federal Arbitration Act provides that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement to arbitrate. 9 U.S.C. §3.

The Arbitration Act thus establishes a "federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 941, 74 L.Ed.2d. 765 (1983), requiring that "we rigorously enforce agreements to arbitrate." Dean *Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242 (1985). *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337 (1987).

The informal nature of arbitration proceedings is well-recognized. Petitioner himself acknowledged "the rules of evidence are not rigorously adhered to in arbitration." Tr., p. 28. (See also Frankhauser, *Arbitration: The Altemative to Securities and Employment Litigation, 50* Bus.Law. 1333, 1368 (Aug. 1995) (arbitrators are permitted to determine the "materiality and relevance of any evidence that is proffered and are *not* bound by any formal rules governing the admissibility of evidence.") (Emphasis in original) (Citation omitted).

In addition, the arbitration award itself need not contain any conclusions of law or even explain the arbitrator's decision. The rules of the SROs simply mandate that the award shall contain the name of the parties, the name(s) of counsel, if any, a summary of the issues, including type(s) of any security product, in controversy, the damages and/or other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award. NASD Code of Arbitration Procedure, §41(e); see also NYSE Arbitration Rule 627(e).

Petitioner and other attorneys testified at the public hearing as to the way in which securities arbitration has become increasingly more complex and more litigious. Tr., pp. 9, 13-14, 27, 79. This is unfortunate. Arbitration was designed to be a relatively simple non-judicial procedure for resolving disputes. As in many areas of

commerce, however, attorneys have attempted to make it difficult to maneuver through the process without the aid of an attorney. In short, attorneys have attempted to elevate a simple arbitration proceeding into a complex legal proceeding. If anything, this fact weighs in favor of allowing non-lawyer representation in securities arbitration proceedings in order to return arbitration to its original purposes.

The United States Supreme Court has recognized that arbitral tribunals are capable of handling the factual and legal complexities of anti-trust claims, notwithstanding the absence of judicial instruction and supervision. ***See Mitsubishi Motors Cop. v. Sobr Chrysler-Plymouth, Inc., 473*** U.S. 614, 633-634, 105 S.Ct. 3346, 3357-3358 (1985).

As previously noted, the committee made the clear cut finding that representation in securities arbitration proceedings constitutes the practice of law. As numerous courts and leading commentators have noted, however, defining the outer limits of the "practice of law" is practically impossible. In our law-dominated society, almost every significant financial decision has at least some legal element to it, and legal elements predominate in many other common transactions. Two examples will make the point. If a stockbroker urges a client to buy certain municipal bonds because they are income tax exempt, he could be said to be giving legal advice And if a police officer reads a suspect his post-arrest rights, she too could be said to be giving advice on a legal matter of some significance. Geoffrey C. Hazard, Jr. and W. William

Hodes, *The* Law of *Lawyering*, Volume 2, §5.5:103, p. 814 (1996 Supp.).

B. The committee's conclusion non-lawyer representation in securities arbitration is not authorized is erroneous.

After concluding the representation of consumers in securities arbitration proceedings constitutes the practice of law, the committee then opined this activity is not authorized. The committee's conclusion in this regard is erroneous.

The proposed advisory opinion first discusses the issue of federal peremption. The proposed advisory opinion notes that the self-regulatory organizations (SRO) are private bodies. Nevertheless, the SROs are private bodies whose rules are approved by the Securities Exchange Commission (SEC), a federal agency. Not only does the SEC approve the SROs rules, the SEC has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights. *Shearson/American Express, Inc. v. McMahon*, *482* U.S. 220, 233- 234, 107 S.Ct. 2332, 2341 (1987).

The proposed advisory opinion concludes there is no preemption because there is no rule which allows non-lawyer representation. At the same time, it is clear there is no rule which *prohibits* non-lawyer representation in securities arbitration proceedings. In fact, as noted in the SICA Report, the arbitrator's manual provides that parties may "be represented by a person who is not an attorney, such as a business associate, friend,

or relative." SICA Report p. 511. The proposed advisory opinion then goes on to note the arbitrator's manual is not a rule of the SROs and was not intended to preempt a state's authority regarding the authorization of party representatives or regulation of the unlicensed practice of law. Investment Arbitration Consultants, Inc., submits the analysis should not end at that point.

The proposed advisory opinion asserts ***The Florida Bar v. Moses,*** 380 So.2d. 412 **(Fla. 1980),** does not apply because "security arbitration does not involve a legislative matter or a hearing before a state administrative agency." For this exact reason, Investment Arbitration Consultants, Inc., submits preemption does apply.

Securities arbitration is a creature of federal law. Congress has committed to the SEC the task of ensuring that the federal rights established by the Securities Act are not compromised by inadequate arbitration procedures. ***Cohen v. Wedbush, Noble, Cooke,*** Inc., 841 F.2d. 282, 286 (9th Cir. 1988). If the SEC intended to prohibit non-lawyer representation in securities arbitration proceedings it would have done so.

Securities arbitration proceedings would not exist were it not for federal law. ***Mastrobuono v. Shearson Lehman Hutton, Inc.,*** made it clear the rules of the SRO may permit arbitrators to enforce the terms of an arbitration agreement even if a rule of state law would otherwise exclude such claims from arbitration. ____U . S . - , 115 S.Ct. 1212, 1216, 131 L.Ed.2d. *76* (1995). As noted in ***Mastrobuono, the*** rules of the NASD allowing arbitrators to award "damages and other relief' will include punitive

damages even if state law will not, *Id.* at 1218 - 1219. *See Davis v. Prudential Securities, Inc.*, *59* F.3rd 1186 (11th Cir. 1995).

If arbitrators may decline to follow state law in deference to the rules of an SRO, it seems only reasonable to conclude the state does not have the power to prohibit something which was not expressly prohibited by the SROs.

The state of Florida is generally only involved in an arbitration proceeding as the location of the hearing. The arbitrators are appointed by the SROs and the rules are promulgated by the SROs. The SROs themselves are governed by the Securities Exchange Commission. For these reasons it is clear there is preemption. As one witness pointed out at the public hearing, eligibility contests are often litigated in federal court. Tr., p. 37.

The basis for securities arbitration is federal in nature. The United States Supreme Court has "firmly established arbitration as the primary dispute resolution mechanism between brokerage firms and their customers. Frankhauser, *Arbitration,* p. 1334. In addition, it has been held that pursuant to the Federal Arbitration Act alleged violations of state securities laws are arbitrable. Frankhauser, *Arbitration,* p. 1337.

As part of its justification for concluding non-lawyer representation is prohibited in securities arbitration proceedings, the committee listed a litany of self-serving statements made by attorney witnesses at the public hearing. This court should not overlook the fact the statements were made without any documentary support by

witnesses who all have an economic interest in the outcome of this matter. Also, many of the arguments made against non-lawyer representation would apply to attorney representation. For example, there is no question attorneys are as likely to enter into quick settlement of claims as are non-lawyer representatives. In fact, the SICA Report notes 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. SICA Report at 521.

The SICA Report, however, also contains an observation which appears to be naive at best. The report notes "attorneys are also restrained by the fact that their business generally does not come from extensive advertising but rather from referrals and their reputations." *Id.* at 521. The authors of the SICA Report must not have looked in the yellow pages of a phone book lately.

The proposed advisory opinion also briefly discusses the issue of meaningful access to legal services. As noted by the committee, there are only thirty (30) attorneys who regularly practice in the area of securities litigation. For this reason, many clients with smaller claims are unable to obtain legal representation. On the other hand, a non-lawyer representative who testified at the public hearing made it clear he handles cases as low as twenty-five hundred dollars. Tr., p. 60. It has been noted that many of the claims investors bring against their brokers involve relatively small amounts of money. These claimants are obviously better off arbitrating their disputes where time

and expense are less of an obstacle to recovery. W. Gregory and W. Schneider, *Securities Arbitration: A Need for Continued Reform, 17* Nova **L.Rev.** 1223, 1225 **(1993).**

The proposed advisory opinion also notes that SICA and the **SROs** are best able to oversee regulation in the securities arbitration area. The opinion even states the committee does not agree that the states should propose and oversee the regulation. The proposed advisory opinion then notes "the SRO is best able to oversee the representation just as this Court is best able to oversee the representation in actions brought before the Florida courts." This statement overlooks one important point. Arbitration is not conducted in the courts of the state of Florida. This provides another reason for concluding representation in securities arbitration proceedings is not the unauthorized practice of law.

Despite its conclusion the representation of parties in securities arbitration proceedings is the unauthorized practice of law, the committee appears to concede that with certain safeguards in place the public would be protected by non-lawyer representation in security arbitration proceedings. Based upon this acknowledgment, it is clear non-lawyers have the ability to represent claimants in security arbitration. This is especially true in light of the fact non-lawyers serve as arbitrators in the proceedings.

Although the committee avoided the issue of out-of-state attorneys representing parties in securities arbitration in the state of Florida, this issue can not be overlooked.

Any actions taken by an attorney who is not a member of The Florida Bar must be viewed in the same light as those steps taken by an non-lawyer.

Both *Williamson* and the New Jersey Committee on the Unauthorized Practice of Law Opinion 28 hold out-of-state attorneys to the same standard as non-lawyers. Even a representative from the NASD who testified at the public hearing acknowledged that attorneys not admitted to practice in Florida come to Florida to argue the arbitration cases. Tr., p. 92.

If the proposed advisory opinion is upheld a double standard will exist. Out-of-state attorneys will still be able to come to the state of Florida to represent their clients in securities arbitration proceedings while members of the public in Florida will be unable to have non-lawyer representation. If the interest of the committee is to protect the public steps must be taken to assure competent and knowledgeable representation in securities arbitration matters.

The exclusion of non-lawyers will not accomplish this result. This is especially true when considering the fact that knowledge of the industry is so essential to adequate representation. To loosely paraphrase one United States District Court Judge, a non-lawyer steeped in the practice of a given trade may be better equipped than an attorney to represent consumers in arbitration proceedings arising from that trade. See *Willoughby Roofing and Supply Company, Inc. v. Kajima* Int *'l.,* 598 F.Supp. 353, 363 (N.D. Ala. 1984), *aff'd.,* 776 F.2d. 269 (1 lth Cir. 1985).

The upholding of the proposed advisory opinion will be a disservice to the public. By approving the opinion, this Court will only increase the cost of arbitration, will shut out those members of the public who have small cases and will increase the amount of litigation arising out of securities arbitration proceedings.

E. CONCLUSION

The proposed advisory opinion should be rejected. The SEC, the SROs and SICA should decide whether non-lawyer representation is appropriate in the security arbitration field.

Respectfully submitted,

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F. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished by hand delivery to Lori S. Holcomb, Assistant UPL Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and John A. Yanchunis, Chair, Standing Committee on Unlicensed Practice of Law, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 16th day of December, 1996.

RAG

RICHARD A. GREENBERG