

Considerations of the Unauthorized Practice of Law in the ADR Process

Samuel S. Woodhouse, Esquire

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Businesses have increased their use of arbitration provisions leading to an ever-increasing number of claims ultimately resolved through arbitration. This increase is due in large part to the relative speed and costs savings of arbitration when compared to traditional litigation. As always, changes from traditional to modern paradigms bring with them new considerations. ADR is no different. One of the major considerations centers on just who can advocate on behalf of the parties. There is a question as to whether parties seeking to arbitrate their civil dispute will need legal counsel to present their case in an arbitration forum properly.

This article will address the unauthorized practice of law in arbitrations. The statutes and case law related to the unauthorized practice of law are designed to answer the question of who can advocate on behalf of the parties in arbitration. Specifically, the cases and statutes set the boundaries with respect to whether one must in fact be a lawyer to represent parties or whether lawyers can cross state lines and represent parties in states in which the lawyer is not a member of that state's bar.

We will explore and address the following issues as they relate to the unauthorized practice of law in arbitration proceedings: can a nonlawyer represent a party in an

arbitration, can an in-house lawyer, who is not licensed in the state where the arbitration is taking place, represent her company in an arbitration, and can an out-of-state lawyer represent a party in an arbitration action pending in a state in which the lawyer is not licensed to practice law. Though the questions hold differing implications, each requires that counsel for the parties evaluate the guiding law in their respective jurisdiction.

These issues have achieved elevated status since it is commonplace for law firms to have national practices and multiple offices. As ADR becomes more mainstream, concerns may arise about the potential impact on party representation during the arbitration process. For example, if an arbitration is pending in Pennsylvania, where the law firm has a Pennsylvania office, but they assign the matter to a partner with subject matter expertise in the law firm's Texas office, can the Texas lawyer (who is not licensed in Pennsylvania) handle the arbitration in Pennsylvania without engaging in the unauthorized practice of law? In some jurisdictions, this issue is resolved by simply having local counsel present at the proceedings, and in some instances a formal motion for pro hac vice admission may be required.

The answers to the issues raised in this article will vary from jurisdiction to jurisdiction, and may be dependent on the subject matter and forum of the claims. To be clear, the issue of the unauthorized practice of law rarely raises its head until a party suffers a significant loss in arbitration and is looking for any reason to attempt to have the award vacated.

To illustrate, take the 1982 U.S. District Court for the Southern District of New York case. There, a professional association of the state of New Jersey sought to recover from a New York corporation payment for legal services and disbursements related to an arbitration proceeding. The defendant, John D. Quinn Construction Corp., asserted among other things a defense that the attorney who conducted the arbitration was not licensed to practice law in the state of New York and that the law firm was not authorized to practice law in New York. Ultimately, the court found that the New Jersey law firm was not engaged in the unauthorized practice of law by representing a client

in an arbitration proceeding in New York. See generally *Williamson v. John D. Quinn Construction*, 537 F. Supp. 613 (S.D.N.Y. 1982). See also *Prudential Equity Group v. Ajamie*, 538 F. Supp. 2d 605 (S.D.N.Y. 2008)(a Texas lawyer was found eligible to lawfully arbitrate and collect agreed-upon fees from an arbitration conducted in New York).

The opposite result was reached in a 2003 Florida case. In that case, the question was raised concerning whether Albert A. Rapoport engaged in the unlicensed practice of law in Florida. Rapoport was licensed to practice law in Washington, D.C., and was a member in good standing of the bars of the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia. However, he was not a member of the Florida bar. The court held that an attorney who is not a member of The Florida bar may not practice law in Florida by representing parties in securities arbitration proceedings. See *Florida Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003).

Generally speaking, it is problematic for a nonlawyer to represent a party in a commercial arbitration matter. For instance, under the Georgia Rules of Civil Procedure, all pleadings must be signed by an attorney if the filing party is represented by counsel, or by the pro se party himself or herself. See O.C.G.A. Section 9-11-11. Additionally, O.C.G.A. Section 15-19-51(a) prohibits a nonattorney from practicing or appearing in court on behalf of anyone other than himself or herself. Where the party is a corporation, it must be represented by a licensed attorney; to permit otherwise would encourage nonattorney agents of the corporation to engage in the unauthorized practice of law prohibited by O.C.G.A. Section 15-19-51(a). See *Eckles v. Atlanta Technology Group*, 267 Ga. 801, 805 (Ga. 1997). Does this extend to arbitration actions? In Arkansas, the answer is yes.

To this end, the Arkansas Supreme Court held that a nonlawyer representing a corporation in an arbitration constitutes the unauthorized practice of law. See generally *NISHA v. TriBuilt Construction Group*, 388 S.W. 3d 444 (2012). The issue in that case was whether a corporate officer, director, or employee, who is not a licensed

attorney, engaged in the unauthorized practice of law by representing the corporation in arbitration proceedings.

There may be a different result in specialty arbitrations like labor arbitrations involving unions. Unions generally serve as exclusive representatives in arbitrations initiated by their members. See *McCluskey v. Com. Department of Transportation*, 391 A.2d 45 (Pa. Commw. Ct. 1978)(overruled on other grounds). “Union” is commonly recognized as an “exclusive collective bargaining representative” of a united employee membership. See *Fraternal Order of Police, Lodge #5 v. Pennsylvania*, Cmwlt. Ct. of Pa., 182 A.3d 1076,1079 (Pa. Commw. Ct. 2018). The arbitration itself is ordinarily controlled exclusively by a collective bargaining agreement. See *McDonald v. City of West Branch*, 466 U.S. 284 (U.S. 1984). It is an ordinary course of events for nonlawyers to represent union members in labor arbitrations. See generally *Town of Little Compton*, 37 A.3d 85 (R.I. 2012).

Regarding the commonwealth of Pennsylvania’s unauthorized practice of law, Rule 5.5 of Pennsylvania’s Civil Code governs Pennsylvania’s multijurisdictional and unauthorized practice of law. Unlawful behavior concerning out-of-state attorneys is openly discouraged. See 204 Pa. Code Rule Section 5.5(c). Out-of-state and foreign attorneys cannot establish a continuous practicing presence or suggest they are admitted attorneys in the state. See 204 Pa. Code Rule Section 5.5(b).

Still, an attorney admitted outside of Pennsylvania can represent a client in an arbitration action. The attorney’s services must be: “in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.”

In closing, Pennsylvania attorneys who practice outside the state are encouraged to research the laws of the outside jurisdiction. See 204 Pa. Code Rule §8.5. This is extremely important because an attorney who violates the arbitration rules of another

jurisdiction may be subject to that jurisdiction's disciplinary action and Pennsylvania's. See 204 Pa. Code Rule Section 8.5(a). This issue could be germane in Pennsylvania in particular, given that Pennsylvania centers on the eastern regional areas: Pennsylvania, New Jersey, New York, Delaware and Maryland.

Moreover, this issue is noteworthy because several arbitration provisions designate New York as the applicable law and the location of the arbitration, even though the transaction originated in a jurisdiction other than New York.

Samuel S. Woodhouse is a neutral mediator and arbitrator on the roster of ADR Options, Inc. Mr. Woodhouse is a trial attorney, having tried jury trials and nonjury trials to verdict in federal and state courts, as well as commercial arbitrations. In addition, he serves as a Judge Pro Tem for the Philadelphia Court of Common Pleas in its mandatory settlement program. He also has extensive formal mediation and arbitration training. To schedule your matter for mediation/arbitration with Sam Woodhouse contact ADR Options at 215-564-1775 or email contact@adroptions.com.

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