BY ADAM J. GANA AND ALEXANDER A. TRUITT

Should Non-Attorneys Represent Parties in FINRA Arbitration for Compensation?

Introduction

New York Judiciary Law § 484 governs the unauthorized practice of law; it holds the formidable title: "None but Attorneys to Practice in the State."[1] The statute's legislative intent is to protect the public and promote New York's policy against the unlicensed practice of law within the state.[2] Together, Judiciary Law §§ 478 and 484 prevent non-attorneys from among other legal and quasi-legal services: performing closing services for real estate transactions;[3] prosecuting minor, non-jury criminal cases;[4] marketing and selling do-it-yourself divorce kits;[5] advising debtors during bankruptcy;[6] and giving tax advice outside of preparing a tax return.[7] The Judiciary Law, however, does not actually define the "practice of law" and thus does not prohibit non-attorneys from charging fees to represent parties in Financial Industry Regulatory Authority (FINRA) arbitration.[8]

First, we address whether representation of parties in FINRA arbitration involves significant legal practice. Then we look at how the N.Y. Rules govern non-attorney conduct. Third, we look at how other states address the issue. Finally, we discuss what measures New York can take to resolve the issue of non-attorney representation in FINRA arbitrations.

FINRA Arbitration and the Practice of Law

At its most basic level, arbitration is similar to litigation in that both enlist uninterested third parties to resolve a dispute between two or more parties. FINRA operates

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the largest arbitration forum in the United States, resolving disputes between customers and member firms, as well as between employees and their brokerage firms. The 60-page FINRA Code of Arbitration for Customer Disputes contains more than 80 rules, each with numerous subparts.[9] Many of these rules have been frequently amended and contain further advisory notices. And the FINRA guidelines describe motion practice and discovery as "often complicated."[10]

Aside from the complex nature of many FINRA arbitrations, non-attorneys representing parties in FINRA arbitration are not bound by the New York Rules of Professional Conduct (N.Y. Rules).[11] Other states with statutes similar to Judiciary Law §§ 478 and 484, relating to the unauthorized practice of law, prohibit non-attorneys from representing parties in FINRA arbitration for compensation.

In 1997, for example, the Florida Bar found that compensated non-attorney representation of investors in securities arbitration constitutes the unauthorized practice of law and enjoined non-attorneys from representing investors for compensation in securities arbitration proceedings.[12] The injunctive order applied to people who were not licensed to practice law in any jurisdiction and represented investors in securities arbitration for compensation. The Florida Bar decision was narrowly crafted to eliminate non-attorney companies from soliciting and practicing in the state, while keeping in line with the public policy supporting arbitration as an efficient means to resolve commercial disputes. As the panel noted, "the services provided by nonlawyer representatives in the alternative but still adversarial context of securities arbitration constitutes the practice of law."[13] The Florida Bar found that non-attorneys committed the unlicensed practice of law in at least 12 different areas during securities arbitrations.[14]

Supporting that decision, the Florida Bar followed *State ex rel. Florida Bar v. Sperry*, and found

> 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.[15]

The *Sperry* decision reflects the opinion that defining what constitutes "legal practice" requires examining the relationship between the attorney, the client and the matter at issue, instead of the forum where the attorney practices.

In order to ensure that the Florida Bar's ruling is followed, FINRA Dispute Resolution requires that persons representing investors in Florida affirm in writing that they are duly licensed to practice law or, alternatively, that they are not receiving compensation for their services. Additionally, FINRA requires that those affirming they are lawyers provide their state bar identification number.

The N.Y. Rules Do Not Govern Non-Attorneys

The N.Y. Rules establish "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action" and are designed to "further the public's understanding and confidence in the rule of law."[16] Failure to meet these responsibilities "compromises the independence of the profession and the public interest that it serves."[17]

Aside from the complex nature of many FINRA arbitrations, non-attorneys representing parties in FINRA arbitration are not bound by the New York Rules of Professional Conduct.

However, the N.Y. Rules govern only the conduct of attorneys and have no bearing on non-attorneys representing parties in FINRA arbitration for compensation. In a 2010 article titled "Swatting at Wall St. From a Bunker in Brooklyn," the *New York Times* investigated the business practices of non-attorney companies that represent claimants for compensation in FINRA arbitration.[18] The article revealed a litany of practices, which – if done by an attorney – would constitute a violation of the N.Y. Rules; however, for a non-attorney these abusive practices go unregulated.[19] The most significant and systemic of these activities spanned the gamut from deceptive advertising practices to charging excessive contingency fee contracts for services and last-minute withdrawal of representation. While the N.Y. Rules protect attorneys' clients from this practice, it cannot protect clients of non-attorneys from this conduct.[20]

How Other States Look at the Issue

Judiciary Law §§ 478 and 484 do not explicitly allow non-attorneys to represent claimants in FINRA arbitration for compensation; neither do they expressly prohibit the practice. While it may seem logical that FINRA arbitration

involves the practice of the law, another interpretation allows non-attorneys to practice in FINRA arbitration for compensation because of the Judiciary Law's failure to explicitly include the practice under its construction of "legal services."[21]

Yet, the language of Judiciary Law §§ 478 and 484 is not significantly different from the corresponding laws of other states. The highest courts in Ohio, Arizona and Arkansas have all ruled that non-attorney representation in arbitration constitutes the unlicensed practice of law.[22] As in New York, the Ohio law prohibits anyone who is not licensed in the state from providing legal services.[23] However, in Ohio, legal services include representing individuals in discovery, settlement negotiations and pre-hearing conferences to resolve claims of legal liability, regardless of the forum.[24] In this respect, Ohio is different from New York in that it recognizes that dispute resolution before an arbitral forum, like FINRA, is the practice of law and as such should be regulated in such forums, as well as in state and federal courts.

In Arizona, the Law on the Regulation of the Legal Practices defines the practice of law as "representing another in a judicial, quasi-judicial, or administrative proceeding or other formal dispute resolution proceeding such as arbitration and mediation," among other practices.[25] In Arizona, the judiciary explicitly stated that legal practice includes representation of parties before *any* arbitral forums. As such, Arizona regulates the unauthorized practice of law in arbitration, which likely applies to FINRA arbitration as well.

New York's Judiciary Law §§ 478 and 484 are most similar to the Arkansas Code Annotated § 16-22-211(a), which has been applied by the Arkansas Supreme Court to prevent non-attorney officers from representing corporations as *pro se* litigants in any "any court in this state or before any judicial body."[26] Even without clear textual guidance, the Supreme Court of Arkansas in *NISHA* held that arbitration proceedings bore "significant indicia" of legal proceedings and, as such, found a corporation could not represent itself, *pro se*, through non-attorney officers in an arbitral proceeding.

All three state courts found, as did the Florida Bar, that of the representative activities necessary to competent advocacy in FINRA arbitrations, including negotiating settlements, conducting discovery and drafting statements of claim, each constitutes legal services and involves the significant practice of the law. These rulings represent a growing understanding that arbitration necessarily involves the practice of law. As such, the practice of non-attorneys representing claimants in FINRA arbitration for compensation appears to abrogate the legislative intent behind Judiciary Law §§ 478 and 484.

How to Resolve the Issue in New York

The issue of whether non-attorney representation of parties in FINRA arbitration for compensation constitutes the unauthorized practice of law would be an issue of first impression for New York state courts.[27] This issue could come to the attention of the courts in four different ways.

First, the New York State Legislature could amend the language of Judiciary Law § 484 to include FINRA arbitration proceedings. Second, the Legislature could draft a more concrete definition of what constitutes legal services that includes representing parties in arbitration for compensation. Third, counsel facing a non-attorney in FINRA arbitration could move by order to show cause to enjoin the unauthorized practice of law by the non-attorney adversary. Finally, a party could challenge a contingent retainer fee with a non-attorney on the grounds that the contract is unconscionable.

Conclusion

Adequate representation in FINRA arbitration involves legal practices that a growing number of states have expressly recognized as legal in nature. While arbitration is viewed as a private dispute resolution mechanism, the power that state courts have to confirm or vacate awards makes arbitration minimally a quasi-legal proceeding. New York's legislature drafted Judiciary Law §§ 478 and 484 to protect the public from unscrupulous business practices by unskilled persons performing legal services for pay. While New York State has a strong public policy against interfering with parties' ability to decide their preferred forum for resolving conflicts, New York also has a strong public policy against the unlicensed practice of law. Preventing non-attorneys from representing parties in FINRA arbitration for compensation will not place these two policies in conflict with each other. ■

1. *See* N.Y. Judiciary Law § 484 (Jud. Law).

2. *Spivak v. Sachs*, 16 N.Y.2d 163, 168 (1965); *Jemzura v. McCue*, 357 N.Y.S.2d 167, 168 (3d Dep't 1974); *Dacey v. New York County Lawyers' Ass'n*, 290 F. Supp. 835 (S.D.N.Y. 1968); *People v. Black*,156 Misc. 516 (N.Y. Co. Ct., Otsego Co. 1935).

3. *Garas v. Grievance Comm. of the Eighth Jud. Dist.*, 65 A.D.3d 164 (4th Dep't 2009).

4. *People v. Wood*, 151 Misc. 66 (Co. Ct., Broome Co. 1934).

5. *Roschko v. Roschko*, 130 Misc. 2d 827, 829 (Sup. Ct. N.Y. Co. 1985).

6. *In re McDonald*, 318 B.R. 37 (Bankr. E.D.N.Y. 2004).

7. *Application of N.Y. Cnty. Lawyers Ass'n*, 273 A.D. 524 (1st Dep't 1948), *aff'd*, *In re Bercu*, 299 N.Y. 728 (1949).

8. *See* Jud. Law § 484; Jud. Law § 478 (practicing or appearing as attorney-at-law without being admitted and registered).

9. *See* FINRA Rule 12000, *et seq*. Code of Arbitration for Customer Disputes (2007), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096&.

10. *See* FINRA Dispute Resolution Arbitrator's Guide at 27, 40 (2014), http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p009424.pdf .

11. *See* 22 N.Y.C.R.R. pt 1200 *et seq*.

12. *Fla. Bar Re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1180 (Fla. 1997).

13. *Id*. at 1183.

14. Those areas are: (1) advising investors as to whether or not they are compelled to arbitrate under their investor-broker agreement; (2) advising investors of the eligibility rules and statute of limitations for any potential claims; (3) advising investors as to the scope of the arbitrators authority; (4) advising investors whether to settle the dispute before filing a claim; (5) advising investors as to the merits of specific claims and defenses; (6) advising investors whether attorneys or expert witnesses should be hired; (7) advising investors whether a petition to stay the arbitration should be filed; (8) advising investors on the possibility and merits of related or alternative civil actions; (9) conducting discovery including depositions; (10) oral advocacy including; presenting evidence, raising objections, examining witnesses and voir dire of experts, preparing opening and closing arguments; (11) written advocacy including preparing and filing the initial written states of claims, answers, counter-claims, motions, and legal memoranda; (12) confirming, collecting or vacating and arbitral award. *Id*. at 1180–81.

15. *Id*. at 1182.

16. *See* N.Y. Rules pmbl. (Apr. 2009), http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671 (last visited Oct. 16, 2014).

17. *Id*.

18. Ariel Kaminer, *Swatting at Wall St. From a Bunker in Brooklyn*, N.Y. Times (May 21, 2010), http://www.nytimes.com/2010/05/23/nyregion/23critic.html.

19. In our opinion, the article suggested that two non-attorneys – one of which alleged that he was a former trader, but had no corresponding CRD indicating he was ever registered with FINRA; and the other, with a previous fraud conviction – had, in the past, misrepresented themselves as lawyers to at least one client. Additionally, in our reading, the article seemed to suggest that the non-attorneys took on the representation of claimants in FINRA arbitration without the intent to zealously prosecute their claims and, instead, sought to barter claims with opposing counsel for sub-nuisance-value settlements. The non-attorneys explicitly stated that they took half of any client recovery. Furthermore, they utilized a trade name for their business and made further guarantees about future performance through the use of unverified statistics. Finally, they cited to their complete lack of any legal training as the reason why they were more suited than attorneys to represent claimants in FINRA arbitration.

20. Rule 7.1 of the N.Y. Rules prohibits attorneys from making statements that are false, deceptive, or misleading. Even a truthful statement can be misleading when it omits necessary information. *See* N.Y. Rules 7.1 (2009). Comment 3 to Rule 7.1 gives an example where the phrase: "I have never lost a case" may be simultaneously truthful and misleading when every case that attorney litigated has ended through a settlement. *See* N.Y. Rules 7.1, cmt. [3] (2009). Rule 1.5 of the N.Y. Rules governs attorney fees and prohibits attorneys from charging excessive fees for their services. *See* N.Y. Rules 1.5. Finally, N.Y. Rules Rule 1.16 prohibits attorneys from withdrawing from a case when their withdrawal will have a materially adverse effect on their client without first showing good cause. *See* N.Y. Rules 1.16; *see also J.M. Heinike Assocs., Inc. v. Liberty Nat'l Bank*, 142 A.D.2d 929 (4th Dep't 1988).

21. Jud. Law §§ 478, 484.

22. *See NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130 (Ark. 2012) (a non-lawyer employee's representation of a corporation in an AAA arbitration proceedings constitutes the unauthorized practice of law); *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52 (Ohio 2004) (neither a corporation, nor its non-attorney representative may represent individuals in securities arbitration); *In re Creasy*, 198 Ariz. 539 (Ariz. 2000) (a disbarred attorney's representation of his client in an arbitration with an insurer constituted the unlicensed practice of law).

23. *See* Ohio Gov. Bar. Rule VII § 2(A)(1).

24. *Ohio State Bar Ass'n v. Kolodner*, 103 Ohio St. 3d 504 (Ohio 2004).

25. *See* Ariz. Sup. Ct. R. 31A(3).

26. Ark. Code Ann. § 16-22-211(a) (Supp. 2011).

> It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney at law for any person in any court in this state or before any judicial body, to make it a business to practice as an attorney at law for any person in any of the courts, to hold itself out to the public as being entitled to practice law, to tender or furnish legal services or advice, to furnish attorneys or counsel, to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume or advertise the title of lawyer or attorney, attorney at law, or equivalent terms in any language in such a manner as to convey the impression that it is entitled to practice law or to furnish legal advice, service, or counsel to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts, or maintains a law office or any office for the practice of law or for furnishing legal advice, services, or counsel.

27. In *Prudential Equity Grp., LLC v. Ajamie*, 538 F. Supp. 2d 605, 612 (S.D.N.Y. 2008), the Southern District found that non-New York State licensed attorney did not commit the unauthorized practice of law by representing a party in FINRA arbitration. That decision has since been interpreted as covering non-attorney representation as well in dicta to a holding that arbitral immunity applies to allegedly libelous statements made by non-attorneys in FINRA arbitration. *See Depalo v. Lapin*, No. 114656/2008, 2009 N.Y. Misc. LEXIS 5963, *6 (Sup. Ct., N.Y. Co. June 30, 2009) (New York has no prohibition preventing non-attorneys from representing parties in FINRA arbitration). However, the significant difference between the holding in *Ajamie* and the dicta in *Depalo* is that the *Depalo* court failed to recognize that all admitted attorneys are subject to the regulation of the bar they associate with and that regulation extends to their out-of-state activities.