



ISBA Professional Conduct Advisory Opinion

Opinion No. 13-03
January 2013

Subject: Arbitration and Mediation; and Unauthorized Practice of Law

Digest: A nonlawyer's representation of parties to a FINRA arbitration generally constitutes the unauthorized practice of law.

References: RPC 5.5(a), (c)(3); RPC 1.0(m)

In re Howard, 188 Ill. 2d 423, 721 N.E.2d 1126 (1976);

Lozoff v. Shore Heights, Ltd., 35 Ill. App. 3d 694, 342 N.E.2d 475 (2d Dist. 1976);

King v. First Capital Financial Services Corp., 215 Ill. 2d 1, 828 N.E.2d 155 (2005);

Illinois State Bar Assn. v. United Mine Workers of America, 35 Ill. 2d 112, 219 N.E.2d 503 (1966);

Chicago Bar Assn. v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E. 2d 771 (1966)

People ex rel Chicago Bar Assn. v. Goodman, 366 Ill. 346, 8 N.E.2d 991 (1937);

Sudzus v. Dept. of Employment Security, 393 Ill. App. 3d 814, 914 N.E.2d 208 (1st Dist. 2009);

Colmar, Ltd. v. Fremantlemedia North America, Inc., 344 Ill. App. 3d 977, 801 N.E.2d 1017 (1st Dist. 2003);

Downtown Disposal Services, Inc. v. City of Chicago, 407 Ill. App. 3d 822, 943 N.E.2d 185 (1st Dist. 2011), *aff'd*, No. 112040 (2012);

ISBA Opinion 91-10 (October 1991);

ISBA Opinion 90-20 (January 1991);

ISBA Opinion 90-19 (January 1991);

ISBA Opinion 94-01 (July 1994);

ISBA Opinion 93-15 (March 1994).

FACTS

The inquiring attorney serves as an arbitrator for the Financial Industry Regulatory Authority (“FINRA”). FINRA is a private not-for-profit corporation which regulates all companies in the United States that do business in the securities industry. Its activities are overseen by the Securities and Exchange Commission, and one of its principal functions is to arbitrate disputes between securities firms and their customers.

FINRA publishes a detailed Code of Arbitration Procedure for Customer Disputes. The Code consists of eighty-five paragraphs covering such aspects of the process as the submission of pleadings, the taking of discovery (documents and other information are to be exchanged, but depositions and interrogatories are discouraged, only to be permitted in limited circumstances or upon agreement of the parties), the bringing of motions, the conducting of and presentation of evidence at the hearing (the rules of evidence are not required to be followed), the submission of legal briefs, and the issuance of awards, which may then be entered in a court of competent jurisdiction.

The inquiring attorney is the chair of an arbitration panel in a dispute between a securities dealer and three of its customers. At an initial pre-hearing conference held for scheduling and procedural purposes, the arbitrators learned that the claimants’ representative is a nonlawyer employee of a company, not a law firm, which regularly represents customers in FINRA arbitrations. Such representative undertook at the preliminary hearing to submit, if necessary, a brief on legal issues involved in the proceeding, and recognized that if the brief submitted on behalf of the claimants was not persuasive, the arbitrators would assume that the law was adverse to the claimants. The inquiring attorney does not further specify the nature or extent of the pleadings submitted, the level of discovery or motion practice involved in the proceeding, or the amount involved. An evidentiary hearing is to be held.

Rule 12208 of FINRA’s Code of Arbitration Procedure for Customer Disputes provides that parties to a FINRA arbitration may be represented by counsel, may represent themselves, or may be represented by a nonlawyer “unless state law prohibits such representation.” The “Frequently Asked Questions” section of the FINRA website, in advising as to the Rule for possible nonlawyer representation, states that one should “[p]lease be aware that representation by a non-attorney might be considered to be the unauthorized practice of law in some jurisdictions, so please check with the relevant State Bar (or similar organization) for more information.”

QUESTIONS PRESENTED

The inquiring attorney/arbitrator asks whether a nonlawyer's representation of parties to the FINRA arbitration constitutes the unauthorized practice of law in the State of Illinois and, if so, what are the inquiring attorney's ethical obligations.

OPINION

In *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, 344 Ill. App. 3d 977, 801 N.E.2d 1017 (1st Dist. 2003), the Illinois Appellate Court determined that, with certain exceptions, an out-of-state attorney's representation of a party to an Illinois arbitration did not constitute the unauthorized practice of law in Illinois. Such decision is consistent with subsequently adopted RPC 5.5, which is entitled "Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law," and provides, in part, that:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any other jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

* * *

(3) are 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.

It is thus clear that an out-of-state attorney complying with the provisions of RPC 5.5(c)(3) may represent parties to an Illinois arbitration. The more difficult question, however, is whether the representation by a *nonlawyer*, who is not licensed to practice in any jurisdiction, of parties to an Illinois FINRA arbitration constitutes the unauthorized practice of law in Illinois.¹

Rule 12208 of the FINRA Code of Arbitration Procedure provides that a party to a FINRA arbitration may be represented by a nonlawyer "unless state law prohibits such

¹ Our discussion of nonlawyer representation in a FINRA arbitration may or may not be applicable to arbitrations conducted by other agencies or entities, depending on the nature of the proceedings there involved and the extent to which a party representative's actions therein may be said to constitute the practice of law. Accordingly, our Opinion here, while possibly relevant to arbitrations conducted by other entities, is based solely upon proceedings involved in a FINRA arbitration.

representation.” Rules of various other public agencies or private bodies provide even more broadly that parties to arbitrations held before them may be represented by nonlawyers, without reference to whether such is consistent with State law. *See* the Rules of the Illinois Board of Review of the Department of Employment Security, the Illinois Labor Relations Board, the Illinois Educational Labor Relations Board, the Illinois State Universities Retirement System, and the American Arbitration Association. However, while possibly relevant as a factor to be considered in determining whether a nonlawyer’s conduct in an arbitration constitutes the practice of law, such is not determinative of the issue inasmuch as Illinois law recognizes that an individual may not engage in the unauthorized practice of law regardless of the existence of a rule of the governing body permitting a party to act through a nonlawyer. To the contrary, only the Supreme Court has the authority to define and regulate the practice of law, and no other body, whether it be the General Assembly, another public or administrative agency, or a private body has the authority to grant a laymen the right to practice law. *Downtown Disposal Services, Inc. v. City of Chicago*, 407 Ill. App. 3d 822, 943 N.E. 2d 185 (1st Dist. 2011), *aff’d*, No. 112040 (2012); *Sudzus v. Dept. of Employment Security*, 393 Ill. App. 3d 814, 914 N.E. 2d 208 (1st Dist. 2009). Thus, whether an agency’s rules provide generally for representation by a nonlawyer, or instead, as in the case of FINRA, that such nonlawyer representation may occur only where not prohibited by state law, our inquiry remains the same; i.e., whether, under Illinois law, a nonlawyer’s representation of parties to a FINRA arbitration constitutes the practice of law.

Nonlawyer representation of parties to an arbitration has been the subject of discussion in several jurisdictions and by legal commentators. In summary, reasons given in support of allowing such nonlawyer representation are: (1) that the rules of the governing body may provide for it; (2) that it is common for parties in certain kinds of arbitrations, such as labor-management dispute arbitrations, construction-dispute arbitrations, and franchising agreement arbitrations, to be represented by nonlawyers; (3) that parties may prefer the use of nonlawyer representatives for purposes of economy, efficiency, and specialized knowledge; (4) that depending on the body conducting the arbitration and the amount involved, nonlawyers may provide the only affordable representation available; (5) that in many instances the issues involved do not require the expertise of a lawyer; and (6) that the proceedings may be conducted more informally instead of being like a litigation.

Conversely, jurisdictions and commentators supporting a prohibition of nonlawyer representation in arbitrations as constituting the unauthorized practice of law discuss such factors as: (1) that public agencies and private bodies cannot themselves decide to allow the unauthorized practice of law before them; (2) that nonlawyers are not subject to ethical codes or discipline; (3) are not required to carry malpractice insurance; and (4) that nonlawyer representatives will be preparing pleadings, conducting discovery, submitting legal briefs and position papers, examining and cross-examining witnesses, advising clients as to legal issues, and otherwise performing tasks which constitute the practice of law; and (5) that it is not the nature of the body before which the acts are done which determines whether they constitute the practice of law, but rather whether the

giving of advice and performance of services affects important legal rights requiring a knowledge of the law greater than that possessed by the average citizen.

In fact, the issue of nonlawyer representation arose in a previous FINRA arbitration. *In re the Matter of the FINRA Arbitration Between Robert W. Ralston and Susan B. Ralston, Claimants v. Syndicated Capital, Inc. and Paul H. Heckle d/b/a Yosemite Capital Management, Respondents* (FINRA Arbitration 10-02276, July 7, 2011). There, the arbitrators learned at the commencement of an evidentiary hearing that the Claimant's representative was a nonlawyer. The panel recognized that such nonlawyer representation was not uncommon to a FINRA arbitration, but that it nonetheless raised the issue of unauthorized practice. The panel reached the somewhat unusual conclusion that the Claimant's nonlawyer representative could examine the Claimant's witnesses, but would not be allowed to examine the Respondent or the Respondent's witnesses.

A. Nonlawyer Representation at FINRA as the Unauthorized Practice of Law

We turn now to a review of Illinois law as relevant to determining whether a nonlawyer's representation of a party to a FINRA arbitration is the unauthorized practice of law.

While acknowledging that what constitutes the practice of law defies mechanical formulation, Illinois law recognizes that it encompasses not only court appearances but also services rendered out of court which include the giving of legal advice or requiring the use of any degree of legal knowledge or skill. *In re Howard*, 188 Ill. 2d 423, 721 N.E. 2d 1126 (1999); *Lozoff v. Shore Heights, Ltd.*, 35 Ill. App. 3d 694, 342 N.E.2d 475 (2d Dist. 1976). Activities recognized as constituting the practice of law include: a mortgagee's preparation of promissory notes and mortgages, *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 828 N.E.2d 1155 (2005); services rendered by union members in handling workman's compensation claims, *Illinois State Bar Ass'n. v. United Mine Workers of America*, 35 Ill. 2d 112, 219 N.E.2d 503 (1966); and the drafting and attending to the execution of instruments relating to real estate titles, *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 214 N.E.2d 771 (1966).

In the Supreme Court's oft-cited case of *People ex rel Chicago Bar Ass'n. v. Goodman*, 366 Ill. 346, 8 N.E.2d 991 (1937), a nonlawyer who regularly solicited clients for the handling of workman's compensation claims provided advice concerning potential recoveries, negotiated settlements with insurance carriers, maintained actions before an administrative body, and secured orders approving settlements. He was held to be engaged in the unauthorized practice of law. The Court further supported this conclusion by recognizing that the worker's compensation practice required a trained legal mind to intellectually grasp the substantive provisions of the Workman's Compensation Act, the Federal Employer's Liability Act, and the common law as related to liability for damages for traumatic injuries. The Court went on to state that:

It is immaterial whether the acts which constitute the practice of law are done in an office, before a court or before an administrative body. The character of the act done, not the place where it is committed, is the factor which is decisive of whether it constitutes the practice of law.

The *Goodman* decision was subsequently distinguished by the Appellate Court in *Sudzus v. Dept. of Employment Security*, 393 Ill. App. 3d 814, 914 N.E.2d 208 (1st Dist 2009), where the Court permitted a nonlawyer to represent a party in a proceeding for job benefits before the Board of Review of the Illinois Department of Employment Security. The Court termed the Supreme Court's rationale in *Goodman* as being rooted in a recognition that the legal ramifications of the worker's compensation practice were pervasive, and noted that the nonlawyer's activities in *Goodman* routinely involved the solicitation of clients, the providing of legal advice to clients, the negotiation of settlements, the maintaining of claims before the Industrial Commission, and the securing of orders approving settlements, all of which, in their totality, clearly involved the practice of law. In the matter before it, however, the Court viewed the character of the activities involved in representing a person seeking to obtain unemployment benefits, coupled with the informal nature of the proceedings, the minimal amount involved and the long history of participation by nonlawyer representatives in such Board of Review proceedings, to justify the conclusion that the public does not require the protection that serves as the basis for classifying certain activities to constitute the practice of law.

We also inquire as to whether arbitration generally, by its nature, has been viewed by Illinois law as not involving the practice of law. Such would seem inconsistent with the Supreme Court's recognition in *Goodman* that it is the character of the acts done, as opposed to the place where they are committed, that is determinative of whether such acts constitute the practice of law. However, we would be remiss in not noting that the *Colmar* case, in determining that an out-of-state attorney's representation of parties in an Illinois arbitration did not constitute the unauthorized practice of law, the Court placed substantial reliance on the nature of an arbitration itself, and the differences between an arbitration and a judicial proceeding. The Court recited that arbitration is not a judicial proceeding, but is rather an alternative to such a proceeding, given that judicial fact finding, court procedures, evidentiary rules and other characteristics of the judicial process do not apply in arbitration. It stated further that the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination and testimony under oath are often limited or unavailable in arbitration; that arbitration does not rely on legal precedent, but instead provides for questions of law and fact to be determined by the arbitrator; and that arbitration provides no appellate procedure. Finally, the Court agreed with the statement that "to hold that arbitration was equivalent to a trial or hearing would extend the meaning of those terms beyond their intended meaning and would be contrary to the purpose of arbitration." These and other factors more closely related to the nature of the services being provided were relied upon by the Court in determining that an out-of-state attorney's representation of parties to an Illinois arbitration did not constitute the unauthorized practice of law in the State. Query, however, whether such factors relating to the nature of an arbitration would have been

given the same emphasis by the Court had it been deciding the propriety of a *nonlawyer*, as opposed to an *out-of-state attorney*, to represent parties to an arbitration in Illinois.

In any event, the Rules of Professional Conduct as adopted in Illinois effective in 2010 seem clearly at odds with any suggestion that arbitrations are themselves so nonlegal in nature as to render appropriate the representation of parties thereto by nonlawyers.

To this effect, RPC 5.5, which is the newly-enacted Rule on the subject of Multi-Jurisdictional Practice and the Unauthorized Practice of Law, speaks to the representation by out-of-state lawyers of parties to an Illinois arbitration, mediation, or alternative dispute resolution proceeding, and permits such representation in the circumstances set forth in section (c)(3) thereof. The Rule does not, however, provide either an unlimited right by out-of-state attorneys to represent parties to an Illinois arbitration, or provide any circumstances in which a non-lawyer, not licensed to practice in any jurisdiction, may represent parties to an Illinois arbitration. It would be incongruous to read RPC 5.5(c)(3) as setting forth guidelines specifying the circumstances in which an out-of-state attorney may represent parties to an Illinois arbitration, but at the same time view the Rule as permitting, without limitation, the representation of parties by nonlawyers in such arbitrations as not constituting the practice of law.

Moreover, the definition of a “tribunal” as is contained in RPC 1.0(m) recognizes that such term denotes a court, “an arbitrator in a binding arbitration proceeding” or a legislative body, administrative agency or other body acting in an adjudicative capacity. It goes on to state that a “body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interest in a particular manner.” It is clear that a binding FINRA arbitration proceeding constitutes a tribunal as defined in the Rules of Professional Conduct, and that such proceedings are within the purview of further Rules pertaining to conduct before a tribunal. Such would seemingly be inconsistent with any contention seeking to view a binding arbitration as, by its nature, not including the practice of law by a party representative therein.

We thus arrive at the first question for which our opinion was requested; i.e., whether the acts and services provided by a party representative at a FINRA arbitration constitute the practice of law, thus rendering a nonlawyer’s representation of a party therein as the unauthorized practice of law. We recognize that such a proceeding does not involve the same degree of legal complexities and formality as may be involved in a court proceeding, and that the issues and procedures involved even in two FINRA arbitrations may differ, making it difficult to make a blanket determination applicable to all FINRA arbitrations. We nonetheless are of the strong belief that the actions of a party representative in a typical FINRA proceeding as foreseen by the FINRA Code of Arbitration Procedure involves the giving of legal advice and the rendering of services requiring the use of legal knowledge or skill as to constitute the practice of law. Such belief is based both on the subject matter involved, which requires a knowledge of securities laws, as well as the fact that a typical FINRA proceeding is adversarial in

nature and includes the filing of pleadings, the exchange of documents and other information, the possible taking of discovery, although discouraged, the making of motions, the submission of legal briefs, and the conduct of an evidentiary hearing including the examination and cross-examination of witnesses. Thus, a nonlawyer representing a party to such a proceeding would constitute the unauthorized practice of law.

B. Ethical Obligations to Address the Unauthorized Practice of Law at a FINRA Arbitration

Presuming that such is the nature of the proceeding here involved, which appears to be the case, we are faced with the inquiring attorney's second question; i.e., what are his ethical obligations when he knows that representation of a party to the arbitration by a nonlawyer would constitute unauthorized practice under Illinois law? Such involves the effect to be given to RPC 5.5(a), which provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, *or assist another in doing so.*"

We have found little direct authority on the question of whether an attorney/arbitrator would be assisting in the unauthorized practice of law by not taking steps to prevent the nonlawyer representation from continuing. The most direct authority we have found on such issue comes from our earlier Opinion No. 93-15, in which we concluded, without analysis, that while a nonlawyer's representation of a party to an Illinois Department of Employment Security hearing constituted the unauthorized practice of law, an attorney's participation in the process, either as a hearing officer or as another party's representative, is not aiding in the unauthorized practice of law. We stated:

Involvement in a matter where some other party violates the law or rules does not necessarily become an activity in aid of the unauthorized practice of law.

Other ISBA Opinions on the subject of assisting the unauthorized practice of law are of little guidance because in each the attorney's participation in aid of the unauthorized practice was substantially more direct than is the situation here. Thus, in ISBA Opinion No. 90-20, we concluded that a private institution's preparation of trust documents for consumers constituted the unauthorized practice of law, and that an attorney's assisting the institution in preparing the documents violated Rule 5.5; in ISBA Opinion No. 91-10, we deemed an attorney to be aiding the unauthorized practice of law by participating in a financial planning company's preparation of estate planning documents (similarly, *see* ISBA Opinion No. 90-19); and in ISBA Opinion No. 94-01, we said that a lawyer aids the unauthorized practice of law by limiting his role in a real estate transaction to the drafting of documents and delegating the gathering and dissemination of information, the resolution of problems arising from the documents drafted, and other problems which may arise at the closing, to the real estate broker.

Unlike the above-referenced matters, the attorney/arbitrator here has up to now had no hand in causing or furthering the unlawful practice by the nonlawyer party representative. This arguably changed, however, upon the arbitrator's becoming aware of the nonlawyer's representation of a party, and the fact that such representation would constitute the unauthorized practice of law. At that point in time, we believe that some duty evolves on the part of the attorney/arbitrator, as the person in control of the proceedings (subject to the authority of FINRA), to do more than merely allow the arbitration to go forward without taking further action on his part, notwithstanding the language of our previously referenced ISBA Opinion No. 93-15.

Accordingly, while we are not prepared to impose upon the attorney/arbitrator responsibility for preventing unauthorized practice, we believe that an arbitrator faced with such a situation should inform FINRA and, if necessary, notify the ARDC, the agency that has jurisdiction to investigate unauthorized practice pursuant to authority newly granted by Illinois Supreme Court Rule 752. It is not our view, however, that an attorney having taken such steps could be said to be assisting the unauthorized practice should he or she not withdraw as an arbitrator in the event that the steps taken do not result in the discontinuation of the nonlawyer representation.

CONCLUSION

The nonlawyer's representation of the claimants in the FINRA arbitration under the circumstances here present would appear to constitute the unauthorized practice of law. In such instance, the inquiring attorney should take available steps as discussed herein so as not to aid the unauthorized practice by the nonlawyer representative.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

© Copyright 2013 Illinois State Bar Association