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TESTIMONY OF HOUSTON PUTNAM LOWRY¹ SUPPORTING RCB-5216 AN ACT CONCERNING REPRESENTATION OF A PARTY IN AN ARBITRATION PROCEEDING

I have been a practicing lawyer, arbitrator and mediator for more than twenty years. I have repeatedly appeared before this General Assembly and the United States Congress on arbitration issues. It was one of my cases, *In re The Application to Admit James W. Glatthaar, Pro Hac Vice*, Judicial District of Hartford at Hartford, CV 05-4015630 (October 24, 2005), that supposedly provoked this legislation (copy attached). I have written on this topic previously.²

This has been a hot topic for the past several years. Different states have considered the issue and reached different conclusions.

Connecticut seems to have adopted the position that non-lawyers may represent parties in an arbitration.³ This is common in labor arbitration where unions often represent union members.

However, any attorney must be a Connecticut qualified attorney in a domestic arbitration. The Connecticut Bar Association's Unauthorized Practice of Law Committee's informal opinion 2002-02 supports this argument (see attached). A recent case made it clear the Superior Court could not admit an attorney *pro hac vice* for the purposes of conducting an arbitration. There is at least one unpublished case involving Jerry Fishman where the Statewide Grievance Committee impliedly held representing a

¹ A member of Brown & Welsh, P.C. and a Fellow of the Chartered Institute of Arbitrators.

² "*Recent Developments in International Commercial Arbitration*," 10 ILSA Journal of International and Comparative Law 335 (2004).

³ American Arbitration Association Commercial Arbitration Rule 24. **Representation**
Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

party to an arbitration did not constitute the practice of law. In short, the law is unsettled even though the unauthorized practice of law is a criminal offense.⁴

The following states have adopted the position representing a party to an arbitration does not constitute the practice of law:

1. Illinois - Illinois Appellate Court ruled that representing a party to an arbitration does not constitute the practice of law, *Colmar, Ltd. v.*

⁴ Connecticut General Statutes §51-88. Practice of law by persons not attorneys

(a) A person who has not been admitted as an attorney under the provisions of section 51-80 shall not:

- (1) Practice law or appear as an attorney-at-law for another, in any court of record in this state,
- (2) make it a business to practice law, or appear as an attorney-at-law for another in any such court,
- (3) make it a business to solicit employment for an attorney-at-law,
- (4) hold himself out to the public as being entitled to practice law,
- (5) assume to be an attorney-at-law,
- (6) assume, use or advertise the title of lawyer, attorney and counselor-at-law, attorney-at-law, counselor-at-law, attorney, counselor, attorney and counselor, or an equivalent term, in such manner as to convey the impression that he is a legal practitioner of law, or
- (7) advertise that he, either alone or with others, owns, conducts or maintains a law office, or office or place of business of any kind for the practice of law.

(b) Any person who violates any provision of this section shall be fined not more than two hundred and fifty dollars or imprisoned not more than two months or both. The provisions of this subsection shall not apply to any employee in this state of a stock or nonstock corporation, partnership, limited liability company or other business entity who, within the scope of his employment, renders legal advice to his employer or its corporate affiliate and who is admitted to practice law before the highest court of original jurisdiction in any state, the District of Columbia, the Commonwealth of Puerto Rico or a territory of the United States or in a district court of the United States and is a member in good standing of such bar. For the purposes of this subsection, "employee" means any person engaged in service to an employer in the business of his employer, but does not include an independent contractor.

(c) Any person who violates any provision of this section shall be deemed in contempt of court, and the Superior Court shall have jurisdiction in equity upon the petition of any member of the bar of this state in good standing or upon its own motion to restrain such violation.

(d) The provisions of this section shall not be construed as prohibiting:

- (1) A town clerk from preparing or drawing deeds, mortgages, releases, certificates of change of name and trade name certificates which are to be recorded or filed in the town clerk's office in the town in which the town clerk holds office;
- (2) any person from practicing law or pleading at the bar of any court of this state in his own cause;
- (3) any person from acting as an agent or representative for a party in an international arbitration, as defined in subsection (3) of section 50a-101; or
- (4) any attorney admitted to practice law in any other state or the District of Columbia from practicing law in relation to an impeachment proceeding pursuant to Article Ninth of the Connecticut Constitution, including an impeachment inquiry or investigation, if the attorney is retained by
 - a. the General Assembly, the House of Representatives, the Senate, a committee of the House of Representatives or the Senate, or the presiding officer at a Senate trial, or
 - b. an officer subject to impeachment pursuant to said Article Ninth.

Fremantlemedia North America, Inc., 2003 Ill. App. LEXIS 1410
(12/4/2003).

2. **New Jersey** - In an informal opinion, the New Jersey Committee On The Unauthorized Practice Of Law appointed by the Superior Court determined an out of state attorney may represent a party to an American Arbitration Association arbitration, *Opinion 30*, 138 N.J.L.J. 1558, December 12, 1994.
3. **New York** - representing a party to an arbitration does not constitute the practice of law, *Williamson v. John D. Quinn*, 537 F. Supp. 613 (SDNY 1982).
4. **Washington DC** - allowed the American Arbitration Association's local affiliate to represent members regarding auto accidents claims against other members, *American Automobile Association v. Merrick*, 117 F.2d 23 (DC Cir. 1940).

Representing a party to an international commercial arbitration has not been considered the practice of law in Connecticut since 1991, without any negative repercussions.

In some kinds of arbitrations (such as Uniform Dispute Resolution Procedure proceedings, which involve internet domain name disputes) do not have any kind of hearing at all. The party representatives do not know in advance where the arbitrator will be from because the arbitrator is appointed after each side has submitted its papers. Some arbitrations take place over telephone or by teleconferencing. The dispute may have occurred in New York, the plaintiff is from Delaware, the defendant is from New Jersey and the hearing takes place in Connecticut.

This change would be the better public policy and would be in conformity with various arbitration rules (such as the American Arbitration Association commercial arbitration rules) which allow anyone to represent a party to an arbitration. Some other states have adopted a contrary position, which would seem to be a poor public policy choice because it makes lawyers look as though they are being protectionist about their trade.

I further suggest the language be expanded to explicitly include mediations:

(3) any person from acting as an agent or representative for a party in **a mediation or an arbitration, including** an international arbitration, as defined in subsection (3) of section 50a-101...

When the California court courts held in *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1 (Cal. 1998) that representing a party in an arbitration constituted the unauthorized practice of law, the California legislature passed legislation that overturned that decision. When the Florida bar held representing a party in an arbitration constituted the unauthorized practice of law, the Florida legislature passed legislation that overturned that decision.⁵ I respectfully urge the Connecticut General Assembly to do the same.

⁵ *Florida Bar v. Rapoport*, 845 So.2d 874 (Fla. 2003) and *The Florida Bar Re: Advisory Opinion On Non-lawyer Representation In Securities Arbitration*, No. 89-140 (July 3, 1997).

DOCKET NO. CV 05-4015630 : SUPERIOR COURT
IN RE: THE APPLICATION : JUDICIAL DISTRICT OF HARTFORD
TO ADMIT ATTORNEY JAMES W. :
GLATTHAAR *PRO HAC VICE* :
: AT HARTFORD
: OCTOBER 18, 2005

MEMORANDUM OF DECISION

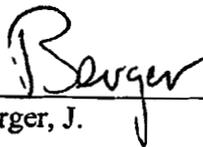
The present application seeks permission for James W. Glatthaar, a member of the bar of the state of New York, to appear pro hac vice in a Connecticut arbitration. The application was filed pursuant to Practice Book § 2-16. An objection has been filed to the application on several grounds but mainly because Practice Book § 2-16 does not apply to arbitrations.

Practice Book § 2-16 states, in relevant part, “[a]n attorney who is in good standing at the bar of another state, the District of Columbia, or the commonwealth of Puerto Rico, may, upon special and infrequent occasion and for good cause shown upon written application presented by a member of the bar of this state, be permitted in the discretion of the court to participate to such extent as the court may prescribe in the presentation of a cause or appeal in any court of this state . . .” (Emphasis supplied.) This section clearly only mentions matters in court; it makes no reference to arbitrations outside court.

*1/5/10/24/05
Zlackley + Schmidt
Brown + Wilsh, P.C.
Sept. 9, 2005
JWS*

OFFICE OF THE CLERK
SUPERIOR COURT
HARTFORD, CT
2005 OCT 24 P 2:42
FILED

Practice Book § 2-2 states: “[n]o person shall be admitted as an attorney except as herein provided.” Notwithstanding the credentials of the applicant, or the appropriateness of his request, (or even the fact that he could seek this pro hac vice permission to have the arbitration decision confirmed or vacated), Chapter two of the Practice Book contains no provision which would authorize this court to allow Attorney Glatthaar to represent his clients in a Connecticut arbitration independent of the Superior Court. Accordingly, the objection is sustained.



Berger, J.

UNAUTHORIZED PRACTICE OF LAW COMMITTEE

Informal Opinion 2002-02
Representation Before AAA Arbitration Panel

We are requested to opine on the propriety of a lawyer representing a corporation pursuing two claims against the State of Connecticut in an arbitration in Connecticut administered by the American Arbitration Association. Damages claimed are in excess of \$50 million. We are asked to assume that the dispute is governed by Connecticut law and that questions of state law are critical to the resolution of the matter. We are also asked to assume that the lawyer will advise his Connecticut client in settlement discussions. The lawyer is admitted in New York but not in Connecticut. The lawyer does not appear with local counsel. The lawyer may claim to act under a power of attorney as an attorney in fact. Does the lawyer's conduct as described in the inquiry constitute the unauthorized practice of law?

"[T]he decisive question is whether the acts performed [are] such as are commonly understood to be the practice of law." *In Re Darlene C.*, 247 Conn. 1, 15 (1998)(Borden, J. concurring) quoting from *Statewide Grievance Committee v. Patton*, 239 Conn. 251, 254 (1996). The courts articulate "that understanding on a case by case basis." *In Re Darlene C. supra*, at 15. "Because the language of the definition offers little guidance as applied to any particular set of facts, we are required to give content to the definition in each case based on our knowledge of the history, tradition, and experience of the practice of law - and what has commonly been considered to be the practice of law - in this state." *Id.* at 15-16.

Though there is no Connecticut authority on the question, courts in other states have held that a lawyer not admitted in the jurisdiction may not represent persons before arbitrators within the state. *The Florida Bar Re Advisory Opinion on Nonlawyer Representation In Securities Arbitration*, 696 So.2d 1178 (Fla. 1997) [securities arbitration]; *In The Matter of Creasy*, 198 Ariz. 539, 12 P.3d 215 (Ariz. 2000) [auto insurance claim arbitration]. *Birbower v. Superior Court*, 70 Cal. Rptr. 304 (1998) [Unauthorized practice statute applies to arbitration except for international commercial disputes and collective bargaining agreement disputes]. By statute and court rule California now permits arbitrators to admit out-of-state lawyers pro hac vice. Cal. Code Civ. P. § 1282.4; Cal. Supreme Court Rule 983.4.

The rules of the American Arbitration Assoc. do not govern a party's right to chose a representative. In Connecticut it is common for parties in labor-management dispute arbitrations, construction dispute arbitrations, and franchising agreement arbitrations to be represented by non-lawyers. Often the representation is provided by an officer or employee of a party, or by a union agent. The identity of the representative may be relevant to an analysis. Parties may prefer to use non-lawyers for reason of economy, efficiency, and specialized knowledge. Issues of facts and trade usage may be at the core of many disputes for which arbitration may have evolved as part of the structure used by members of a particular industry to govern conflicts. The matters may be conducted informally rather than as litigation which may involve discovery, pre-hearing issues, and extensive testimony. The traditional practices of parties in arbitration may also be relevant. See, *Pioneers in Dispute Resolution, A History of the American Arbitration Association*. Arbitration has been enshrined in Connecticut law for many years. See, "An Act for the more easy and effectually finishing of

controversies by Arbitration" (1753) incorporated in General Statutes of Connecticut Title XII, sec. 1 (1808) See also, Mediation Practice Book 3 (Harry N. Mazadoorian, ed. 2002)

The New York lawyer is not an employee or officer of the party he represents and does not play a role similar to a union representative. He has been engaged because of his experience and legal knowledge. It is inevitable that he will be called upon to advise his client on issues of Connecticut law as the client advances its legal arguments and considers settlement prospects. The proceeding is not likely to be informal and we are informed that the proceeding will involve discovery, depositions, and briefing, as well as a trial of issues of fact. We think it likely, given the amount of money at stake, that the case will be litigated to the same extent that it would be in a trial court. In this context, it appears to us that the lawyer is engaged in the practice of law in Connecticut.

We do not have the authority to make binding factual or legal decisions. These decisions are best made by a court on an adequate record presented by the interested parties. We limit our role to a statement that in our opinion the New York lawyer is practicing law in Connecticut.

We are also asked if a person who holds a power of attorney may represent a person in an arbitration proceeding. It has been held that a person acting under a power of attorney is not thereby authorized by law to represent his principal as an attorney-at-law. *Long v. Delarosa*, 1995 WL 50275 (Conn. Super. 1995, Silbert, J.); *Drake v. Superior Court*, 26 Cal. Rptr. 2d 829, 21 Cal.App.4th 1826 (1994); *Christiansen v. Melina*, 857 P.2d 345 (Alaska 1993).