

**CONTACT**

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | [mcilenti@nycbar.org](mailto:mcilenti@nycbar.org)

ELIZABETH KOCIENDA

212.382.4788 | [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)

**REPORT ON NON-LAWYERS REPRESENTING CUSTOMERS IN  
FINRA DISPUTE RESOLUTION ARBITRATIONS  
BY THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY**

**I. SUMMARY**

Virtually all disputes between broker-dealers and their customers are adjudicated in arbitrations held under the auspices of the Dispute Resolution Department of the Financial Industry Regulatory Authority (“FINRA<sup>1</sup> Customer Arbitrations”). Under FINRA rules, non-lawyers may represent parties in FINRA Customer Arbitrations if permitted by the law of the state where the arbitration is held. 16% of all FINRA Customer Arbitrations are held in New York.<sup>2</sup> Arbitration practice in New York is not considered the exclusive province of lawyers. This has given rise to so-called asset recovery companies—firms that are not law firms or lawyers, but that sell services to recover investment losses, including non-lawyer advocacy in FINRA Customer Arbitrations.

In the past several years, both FINRA and the United States Securities and Exchange Commission (“SEC”) have warned investors against dealing with these non-lawyer firms. FINRA warned, “In addition to the original money you lost, you now may lose more money at the hands of professional con artists.”<sup>3</sup> The SEC likewise urged investors to “think carefully before paying money for asset recovery services that may be fruitless.”<sup>4</sup>

---

<sup>1</sup> FINRA was formed in 2007, merging the member regulation, enforcement and arbitration operations of the New York Stock Exchange and the National Association of Securities Dealers, Inc. Today, FINRA provides the venue for virtually all securities arbitrations involving securities broker-dealers.

<sup>2</sup> In 2016, Florida, New York, California, and Illinois accounted for about 48% of FINRA arbitrations. New York ranked second with 16%. (These tallies exclude San Juan, Puerto Rico, which, as the venue for close to a thousand cases involving defaulting Puerto Rican bonds, currently but anomalously holds first place.)

<sup>3</sup> FINRA Investor Alert, *It Can Be Hard to Recover from “Recovery” Scams* (updated Sept. 19, 2016), <http://www.finra.org/investors/alerts/it-can-be-hard-to-recover-from-recovery-scams>. (All websites cited in this report were last visited on November 27, 2018.)

<sup>4</sup> SEC Investor Alert, *What You Should Know About Asset Recovery Companies* (Aug. 9, 2016), [https://www.sec.gov/oiea/investor-alerts-bulletins/ia\\_assetrecovery.html](https://www.sec.gov/oiea/investor-alerts-bulletins/ia_assetrecovery.html).

Last year, FINRA issued a Regulatory Notice soliciting comments on whether it should amend its own Rules to limit non-attorney advocates in arbitrations.<sup>5</sup> The comments that FINRA received split along predictable lines. Many comments described the dangers to consumers of permitting non-lawyers to act as arbitration advocates. Those dangers included issues of competence and professionalism. One commenter noted that, based on FINRA arbitration award records, one firm of non-attorney representatives had 72% of its cases dismissed, with 32% of those resulting in expungement of the case from the broker's record.<sup>6</sup> Other commenters noted that non-attorney representatives have been discourteous, presented poorly drafted pleadings, made baseless objections and raised irrelevant arguments.<sup>7</sup>

On the other hand, other comments favored permitting non-attorney representatives, almost exclusively because they expand access to justice. One firm of non-attorney representatives had fourteen customers report positive experiences and affirm that they could not have pursued their claims otherwise.<sup>8</sup> Others also noted that many FINRA customer arbitrations involved amounts too small for any lawyer to accept, and such cases would be unrepresented without non-attorney advocates.<sup>9</sup>

FINRA is currently studying the matter.<sup>10</sup>

In light of FINRA's and the SEC's experiences, the Committee has considered what position, if any, it should take towards these non-attorney asset recovery firms.

We conclude that New York's present rule approving the private governance of arbitration well suits New York's unique position as a *situs* of choice for many arbitrations involving interstate and international parties and issues. The Committee believes that arbitrations

---

<sup>5</sup> *Non-Attorney Representatives in Arbitration*, FINRA Reg. Notice 17-34 (Oct. 18, 2017), <http://www.finra.org/sites/default/files/Regulatory-Notice-17-34.pdf>.

<sup>6</sup> Comment Letter of Wexler Burkhart Hirschberg & Unger LLP (Dec. 14, 2017) <http://www.finra.org/industry/notices/17-34>.

<sup>7</sup> Comment Letters of Micalyn S. Harris (Nov. 6, 2017); Leonard A. Nelson (Dec. 1, 2017); and Phillip Cottone (Dec. 16, 2017) <http://www.finra.org/industry/notices/17-34>.

<sup>8</sup> Comment Letters of Thomas Flack (Nov. 24, 2017); Michael J. Stott (Dec. 1, 2017); Mary Inglis (Dec. 5, 2017); Ronnie Bartness (Dec. 6, 2017); Roger Hambricht (Dec. 6, 2017); Russell Wilson (Dec. 6, 2017); Donnie Pate (Dec. 6, 2017); Stephen Mitchell (Dec. 7, 2017); Wilton Scrone (Dec. 7, 2017); Alvin Lincoln (Dec. 12, 2017); Robert Abrahamson (Dec. 15, 2017); Leon Kuefler (Dec. 15, 2017); Jonathan Byrd (Dec. 15, 2017); Frank Mulligan (Dec. 18, 2017); and Thaddeus Kabat (Dec. 19, 2017) <http://www.finra.org/industry/notices/17-34>.

<sup>9</sup> Comment Letters of Georgia State University College of Law (Dec. 18, 2017); John Jay Legal Services, Inc. (Dec. 18, 2017); and Financial Services Institute (Dec. 18, 2017) <http://www.finra.org/industry/notices/17-34>.

<sup>10</sup> As reported by Kenneth L. Andrichik, Senior Vice President and Chief Counsel, FINRA Office of Dispute Resolution, on June 6, 2018.

in New York largely should be left to the control of the parties to the arbitration agreement and the authority providing the arbitration services.

However, the Committee also recognizes that virtually all securities customer claims arise out of federal and state statutes and other public law that is historically the province of legal practice. That New York's law does not require advocacy in such arbitrations to be regulated as legal practice does not mean that such advocacy should be entirely unregulated. In the absence of state regulation, the provider of the arbitration services should take primary responsibility for protecting vulnerable parties who are required to arbitrate under its auspices.

Therefore, it is the Committee's view that if FINRA finds that some customers would be better served by licensed attorneys in particular cases, it should assert its authority as the arbitration sponsor and amend its rules to provide the consumer protection that it deems appropriate. As described further below, we recommend that FINRA consider amending its rules in one or more of the following ways:

1. Require parties in all FINRA Customer Arbitrations, except those to be decided by a single arbitrator under Rule 12401 or designated a Simplified Arbitration under Rule 12800, to be represented by licensed attorneys legally permitted to practice in arbitration under the law of the hearing location.
2. Empower arbitrators to regulate or prohibit non-attorney party representatives who the arbitrators determine are not qualified or are abusing the arbitration process.
3. Prohibit non-attorneys from representing customers for compensation, even when otherwise permitted by FINRA Rules, unless they have been trained in the proper conduct of arbitration advocacy, whether through FINRA or another entity, in such ways as FINRA deems appropriate.

## **II. CURRENT NEW YORK LAW**

The line of New York cases holding that arbitration advocacy is not "the practice of law" begins with *Williamson, P.A. v. John D. Quinn Constr. Corp.*<sup>11</sup> In *Williamson*, Judge Weinfeld held that a New Jersey attorney not admitted in New York could recover fees for conducting an arbitration in New York. The court reasoned that because arbitration is not a court proceeding, the New Jersey attorney was not engaged in the unauthorized practice of law. Most importantly, Judge Weinfeld wrote:

While no case precisely in point has been found under New York or New Jersey law, the issue has been addressed by the Association of the Bar of the City of

---

<sup>11</sup> *Williamson, P.A. v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982) (Weinfeld, J.)

New York. Although the report focused on labor arbitration, it considered generally the issue of legal representation before arbitration tribunals. The report states “[it] should be noted that no support has to date been found in judicial decision, statute 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.” Quinn has cited no case nor has the Court’s independent research disclosed any to the contrary.<sup>12</sup>

Three later Southern District decisions followed *Williamson* and cited the 1975 Report in support of awarding fees to non-New York attorneys engaged in non-labor arbitration practice. To be sure, all of them involved attorneys admitted *somewhere*. Two cases involved attorneys, licensed or admitted *pro hac vice* in New York, conducting arbitrations out of state.<sup>13</sup> The most recent case involved a fee dispute among attorneys who had arbitrated in New York, one of whom was only admitted in Texas.<sup>14</sup>

There does not seem to be any New York case expressly authorizing a *non-lawyer* to represent a party in a FINRA arbitration.<sup>15</sup> The cases hold only that one need not be a lawyer admitted in New York to collect legal fees for arbitration work performed in New York. However, the cases have been interpreted to permit non-lawyers to represent parties in FINRA Customer Arbitrations held in New York. That certainly has been FINRA’s understanding now for many decades.

### III. THE ASSOCIATION’S PRIOR POSITIONS

The 1975 Report was issued by the Association’s Committee on Labor and Social Security Legislation, and dealt specifically with whether there should be any restrictions on who could represent parties in *labor* arbitrations. The Committee’s full conclusion was 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. Even if it is held to be the practice of law, there are sound and overriding policy reasons for permitting such non-lawyer representation in

---

<sup>12</sup> 537 F. Supp. at 616, *citing and quoting* Committee Report, *Labor Arbitration and the Unauthorized Practice of Law*, 30 The Record 416 (1975) (the “1975 Report”).

<sup>13</sup> *Siegel v. Bidas Sociedad Anonima Perolera Industrial Y Comercial*, 1991 U.S. Dist. LEXIS 11455 (S.D.N.Y. 1991)(arbitration in Mexico); *Johnson v. Nextel Communs., Inc.*, 2009 U.S. Dist. LEXIS 35137 (S.D.N.Y. 2009)(arbitration in New Jersey).

<sup>14</sup> *Prudential Equity Group, LLC v. Ajamie*, 538 F. Supp. 2d 605 (S.D.N.Y. 2008) (Rakoff, J.)

<sup>15</sup> We found one New York State case that dealt with a non-lawyer representing a party in arbitration. *Depalo v. Lapin*, 2009 N.Y. Misc. LEXIS 5963 (Sup. Ct. N.Y. County 2009). However, *Depalo* only held that arbitration pleadings drafted by a non-lawyer representative were entitled to the same absolute privilege against libel as those drafted by attorneys. Since the privilege protects the party, the status of the party’s representative was irrelevant.

the labor arbitration field.” 1975 Report at 428. Those policy reasons formed the core of 1975 Report’s discussion and clearly drove its conclusion.

After Judge Weinfeld—whom Judge Rakoff called “perhaps the greatest judge ever to sit in this District,” 538 F. Supp. 2d at 607—enshrined the 1975 Report as authoritative, various Association committees over the past 40 years declined to revisit whether non-lawyers are engaged in the unauthorized practice of law when they represent parties in arbitrations.

In 1991, the Committee on Arbitration and Alternative Dispute Resolution issued a *Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York*. 49 The Record 47 (1991). In that Report, the Committee expressly reexamined the issue of non-New York lawyers representing parties in New York arbitrations and concluded that “parties to international or interstate arbitration proceedings conducted in New York may be represented . . . by persons of their own choosing, including lawyers not admitted to practice in New York.” While “persons of their own choosing” could include non-lawyers, the committee did not highlight them beyond stating that various arbitration *fora* did not require party representatives to be members of a bar. Rather, the Committee’s principal concern was that *lawyers* admitted in other jurisdictions be free to arbitrate cases in the state. We see no reason to disturb the conclusions of the 1991 Report.

In 2008, the Arbitration Committee revisited the question in a comprehensive report entitled *Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York*.<sup>16</sup> That report, too, dealt only with non-New York *lawyers* in New York arbitrations.<sup>17</sup> In fact, the 2008 Report expressly excluded the question “should the position of the 1975 Committee Report as it applies to laypersons continue, or should any exception [to New York bar admission] be limited to lawyers?”<sup>18</sup> No other Association Committee has addressed that question since then.<sup>19</sup>

---

<sup>16</sup> 63 The Record 700 (2008)

<sup>17</sup> The concerns expressed in the Arbitration Committee’s two reports were addressed by the adoption in 2015 of Part 523 of the Rules of the Court of Appeals dealing with the temporary practice of law in New York. Under those Rules, a lawyer admitted in another jurisdiction may, with certain qualifications, “provide legal services on a temporary basis in this State . . . in or reasonably related to a pending or potential arbitration, mediation or other dispute resolution proceeding held or to be held in this or another jurisdiction. . . .” *Id.* § 523.2(a)(3)(iii). The Committee expressly endorses the goals of Part 523 in permitting non-New York counsel to arbitrate cases in New York without significant impediment.

<sup>18</sup> *Id.* at 704n.20

<sup>19</sup> The Professional Responsibility Committee issued a Report in 1995 entitled *Prohibitions on Nonlawyer Practice: An Overview and Preliminary Assessment*. (50 The Record 190 (1995)). That report noted that it was common practice for non-lawyers to represent parties in securities arbitrations, but did not take a position on whether it was the practice of law. *Id.* at 199. Rather, that Report surveyed the expanding role of paralegals and storefront law offices and law school clinics, with a sensitivity to making legal services more affordable and more widely available

#### IV. OTHER STATES' POSITIONS

The Supreme Courts of Arkansas, Arizona and California have held that the representation of a party in an arbitration was the practice of law in their respective States.<sup>20</sup> The Florida Bar has ruled that representing parties in FINRA arbitrations specifically was practicing law in Florida.<sup>21</sup> Likewise, the Illinois State Bar Association has opined that non-lawyers representing parties in FINRA arbitrations engage in the unauthorized practice of law in Illinois.<sup>22</sup>

However, most states have not expressly ruled on whether non-lawyers may represent clients in FINRA arbitrations. Nineteen states have defined the “practice of law” by statute in ways that could apply to arbitrations. Other states have statutes, caselaw and/or conduct rules that, if specifically applied, could be read to encompass advocacy in arbitrations within “the practice of law.” But most states, like New York, leave “the practice of law” undefined, to be determined by courts on a case-by-case basis.<sup>23</sup>

---

to under-served populations. The Professional Responsibility Committee has not previously addressed whether non-attorney arbitration advocates in FINRA arbitrations are in fact practicing law.

<sup>20</sup> *NISHA, LLC v. Tribuilt Const. Group, LLC*, 388 S.W.3d 444 (Ark. 2012); *In re Creasy*, 12 P.3d 214 (Ariz. 2000); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998)

<sup>21</sup> *Fla. Bar re Advisory Op. on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1180 (Fla. 1997)

<sup>22</sup> ISBA Op. 13-03 (Jan. 2013)

<sup>23</sup> Judiciary Law § 478 makes it unlawful to practice law without being properly admitted as an attorney, but it does not define what the practice of law actually entails. The last attempt at a definition was in 2001, when the New York State Bar Association proposed this:

1. “Practice of Law” means the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person. The practice of law includes, but is not limited to: a. the provision of advice involving the application of legal principles to specific facts or purposes; b. the preparation of legal instruments of any character, including but not limited to pleadings and other papers incident to actions or proceedings, deeds, mortgages, assignments, discharges, leases, or other instruments affecting real estate, wills, codicils, trusts, or other instruments affecting the disposition of property after death; and documents or agreements which affect the legal rights of an entity or person; and c. except as otherwise authorized by law, the representation of the interest of another before any judicial, executive, or administrative tribunal.

*See generally*, Report of the ABA Task Force on the Model Definition of the Practice of Law, Appendix A - State Law Definitions of the Practice of Law (Aug. 2003).

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model-def\\_migrated/model\\_def\\_statutes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.authcheckdam.pdf). For an example of a judicial interpretation, in *Spivak v. Sachs*, 16 N.Y.2d 163 (1965), the New York Court of Appeals found that a California lawyer was “practicing law” when he came to New York “to advise directly with a New York resident as to most important marital rights and problems. . . [giving] her legal counsel as to those matters, . . . [providing] his opinion as to New York’s being the proper jurisdiction for litigation concerning the marital res and as to related alimony and custody issues, and even . . . [urging] a change in New York counsel.” 16 N.Y.2d at 167.

New York has not adopted ABA Model Rule 5.5(c)(3) either. However, Part 523 of the Rules of the Court of Appeals, *supra* note 17, provides much the same result. Indeed, as a Court Rule, it may carry more weight than

## V. FINRA CUSTOMER ARBITRATIONS

The 1975 Report primarily set forth the “policy reasons for permitting persons not admitted to the bar to represent parties at a labor arbitration regardless of whether it constitutes the practice of law.” The Committee detailed the law and historical practice of grievance proceedings under collective bargaining agreements and argued that labor disputants ought to be treated analogously to those who appear before the Interstate Commerce Commission, the Patent Office or the Tax Court—who by statute or regulation need not be represented by licensed attorneys. The Committee found supporting authority in the National Labor Relations Act and the Labor Management Relations Act, both of which give parties to collective bargaining agreements wide latitude to choose representatives and methods of private adjudication. The facts on the ground also supported the Committee’s conclusion: An American Arbitration Association survey reported that in 1974 non-lawyers represented one or both parties in over 70% of labor arbitrations.<sup>24</sup>

The Committee relied heavily on the then-recent U.S. Supreme Court decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974), to describe how labor arbitrations differed from lawsuits. In delineating those differences, the Committee highlighted how labor arbitrations focused on fact-finding more than legal principles, and were less comprehensive than trials even as to fact-finding. Quoting liberally from *Gardner-Denver*, the Committee noted that in an arbitration the record is not as complete, that rules of evidence need not apply, and that discovery, compulsory process, cross-examination and testimony under oath “are often severely limited or unavailable.” The 1975 Report stated:

Both the character of labor arbitration and its actual practice confirm the view that it is just as much the domain of industrial relations experts as that of lawyers. Unlike commercial arbitration—which has been called the “substitute for litigation”—where, once the dispute is resolved, the parties are free to separate, the parties to a collective bargaining agreement continue to be bound together; arbitration then becomes a “substitute for industrial strife.” The collective bargaining agreement is “more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.” It is “negotiated against a background of ongoing practices and traditions . . . to be changed consensually, not unilaterally.” It provides for a grievance machinery in which

---

would a Conduct Rule. These Rules, applicable on their face only to attorneys, compel the conclusion that arbitration practice is “the practice of law” in New York, at least when lawyers do so. But they do not address the concern here over the conduct of non-lawyers.

<sup>24</sup> 1975 Report at 424n.3. That “sound and overriding policy reasons” justify non-lawyer representatives in labor arbitrations has also been judicially recognized. The Rhode Island Supreme Court considered the issue at length and concluded that non-lawyers should not be deemed to be practicing law when appearing in labor arbitrations. *In re Town of Little Compton*, 37 A.3d 85 (R.I. 2012).

arbitration is the final step, and the whole is part of a continuous collective bargaining process. It is for this reason that the “specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”

That being so, persons who are most familiar with “ongoing practices and traditions” of the shop as well as the day-to-day tensions and irritations of the plant are equipped to expound the “law of the shop” to the arbitrator who must apply it. Those persons are very often nonlawyers; acting on behalf of the union and the employees it serves, they are usually union officials, such as the business agent, the international representative or local officer and—for the company—a personnel or labor relations officer.

1975 Report at 423-24 (citations, all to *Gardner-Denver*, omitted).

The 1975 Report’s overarching dichotomy—the “law of the shop” versus the “law of the land”—came directly from *Gardner-Denver*. In *Gardner-Denver*, the Court held that labor arbitrators could not decide a racial discrimination claim so as to divest the employee of the ability to bring that claim in federal court. The Court found that arbitrators’ limited role in enforcing collective bargaining agreements made them unsuitable to determine statutory discrimination claims. “[The labor arbitrator’s] source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.”<sup>25</sup> The Court highlighted among its reasons for concluding that labor arbitrators could not decide discrimination claims that “the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”<sup>26</sup>

The idea of a “law of the shop” that governs the denizens of a common enterprise harks back to the origins of arbitration as an expeditious way to resolve disputes between traveling merchants at medieval trade fairs, using the customs and practices of merchants rather than the public law to decide cases.<sup>27</sup> Historically, arbitrations were considered to be businessmen’s forums. They lacked the procedural formalities and safeguards that had evolved in common law trials. This naturally resulted in a higher probability of unfair results, but that was acceptable because participating merchants tended to be “repeat players” who would arbitrate a number of cases over their careers. Relying on the law of large numbers, a merchant could fairly expect that an unjust loss in one case would be made up for by better results in other cases. By the same token, however, arbitration came to be seen as a less serious method of adjudication that did not require resort, generally, to the “law of the land.” That historical development led to this

---

<sup>25</sup> 415 U.S. at 53

<sup>26</sup> *Id.* at 57

<sup>27</sup> Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?* 48 U. CAL. DAVIS LAW REV. 921, 939-41 (2015)



argument evident in the older caselaw: Because arbitrations lacked the legal competence of judges and the procedural safeguards of law courts, they were not suitable for enforcing statutory claims grounded in the “law of the land.” Inasmuch as arbitrations did not adjudicate legal claims, those representing parties in arbitrations did not “practice law.”

However, this old dichotomy between the “law of the shop” and the “law of the land” is difficult to reconcile with the realities of modern commercial arbitration. Commercial arbitration today bears little resemblance to the union labor disputes with which *Gardner-Denver* and the 1975 Report dealt. Commercial cases often involve disputes about complex statutory and case law as well as facts. This is especially so of FINRA Customer Arbitrations. In cases alleging securities law violations, the “law of the land” is always implicated. This had always been true, and for that reason claims based on violations of the federal securities laws for a long time could not be arbitrated.<sup>28</sup> However, in *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987), the Supreme Court held those statutory claims arbitrable as well, dismissing concerns that arbitrators were unqualified to determine statutory claims.

[T]he reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals. . . . [T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. This is especially so in light of the intervening changes in the regulatory structure of the securities laws. Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority.<sup>29</sup>

And so, modern FINRA Customer Arbitrations routinely apply federal and state law. Indeed, a “law of the shop” would have very limited applicability to FINRA Customer Arbitrations. Retail customers especially are rarely subject to the customs and usages of brokers. Their rights are primarily grounded in the anti-fraud provisions of the federal securities laws, analogous state laws, and common law principles of fraud, negligence, contract and fiduciary duty. These are all elements of public law—the “law of the land.”

Modern FINRA Customer Arbitrations are also procedurally more akin to trial practice than were the labor arbitrations of forty years ago as described in *Gardner-Denver* and in the 1975 Report. FINRA arbitration is governed by a written Code of Arbitration Procedure that is

---

<sup>28</sup> *Wilko v. Swan*, 346 U.S. 427 (1953)

<sup>29</sup> *Id.* at 231-33. More recent Supreme Court decisions have thoroughly rejected *Gardner-Denver*'s underlying assumption that arbitrators are not competent to resolve statutory claims, including discrimination claims. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998); *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991).

quite detailed.<sup>30</sup> There is a prescribed filing system through FINRA’s DR Portal that mimics in important ways the electronic filing systems now used in federal and state practice. FINRA Rule 12300. These rules require written statements of claims, answers, counterclaims, cross-claims and replies. FINRA Rules 12302-12306. There are procedures for amending claims, and for responding to amended pleadings. FINRA Rules 12309-12311. Defenses may be lost if not properly alleged. FINRA Rule 12308. Parties are required to make appearances, attend prehearing conferences, and comply with arbitrators’ orders. FINRA Rule 12500-12502. They may make motions, take discovery, and have recourse to compulsory process. FINRA Rule 12505-12514; *see also* CPLR Art. 75. Even if the arbitrators are not strictly bound to apply rules of evidence, parties are still entitled to present evidence in trial-like fashion, using properly authenticated exhibits, direct testimony and cross-examination of witnesses under oath. FINRA Rule 12604-12608. There is always a full formal record in the form of an audio recording, and parties often engage a court reporter to produce a written transcript as well. FINRA Rule 12606. In practice under these rules, parties to a FINRA arbitration plead, present evidence, and argue points of law very much like they would in a court of law.

Also, customers are asymmetrically arrayed against firms. Unions, employers, and disputing merchants were all repeat players in labor and merchant arbitrations. But a brokerage customer may arbitrate only one case in a lifetime. For the most part, only broker-dealer firms are repeat players in FINRA Customer Arbitrations. Therefore, broker-dealers are better able to weather unfair arbitration results than are customers. If a firm suffers an unjust result in one case, it can reasonably expect to make up for it in future cases. However, an unfair loss by a customer is irredeemable, because arbitration awards are rarely vacated.

All these factors show FINRA Customer Arbitrations to be riskier and more complex endeavors than the shop-floor labor disputes described in *Gardner-Denver* and the 1975 Report. They argue in favor of safeguards to protect customers from unscrupulous advocates, as both FINRA and the SEC have recognized.

## **VI. FINRA’S ROLE AS AN ARBITRATION VENUE**

The stock exchanges historically treated arbitrations exclusively as a way to quickly resolve disputes between their members. The New York Stock Exchange first began offering arbitration services in 1817, but did not permit customer access to them until 1872.<sup>31</sup> Thus, securities arbitrations were from inception typical of merchant disputes among repeat players.

---

<sup>30</sup> *See generally* FINRA Rules 12000 *et seq.* In addition to these Rules governing customer disputes, FINRA provides a set of rules to govern intra-industry disputes. FINRA Rule 13000 *et seq.* Because arbitrations between broker-dealers on purely business issues are more akin to traditional labor and merchant arbitrations, we do not address them in this Report.

<sup>31</sup> Securities Industry Conference on Arbitration, *Report on Representation of Parties in Arbitration by Non-attorneys*, 22 FORDHAM URB. L.J. 507, 508 (1995) [the “1995 SICA Report”]

That changed when the Supreme Court's *McMahon* decision permitted arbitration of federal securities law claims. Today, there are almost twice as many FINRA customer cases as there are industry disputes.

Taking advantage of the prevailing view at the time that arbitration practice was not the practice of law, non-lawyers began to hold themselves out to customers as arbitration advocates. These lay advocates raised quality concerns from the very start. The Securities Industry Conference on Arbitration ("SICA") reported receiving complaints as early as 1991 (five years after *McMahon*) about non-lawyer advocates filing frivolous claims and engaging in unethical practices that "raised questions about the adequacy of the representation provided by [non-lawyers], an issue vital to the integrity of the arbitration process."<sup>32</sup>

As a result of its fact-finding, SICA concluded that non-lawyer advocates were probably engaged in the unauthorized practice of law, engaged in misleading advertising, did not generally charge less than attorneys, did not offer the protections of attorney-client privilege, malpractice insurance and professional ethical constraints, and were often persons barred from the securities industry or from practicing law. "SICA is concerned about the adequacy of such representation and the integrity of the SRO<sup>33</sup> [arbitration] process. As a practical matter, however, because of the large number of arbitration cases filed with the SROs each year, the SROs are not equipped to police or review the quality of such representation." SICA therefore recommended a rule that permitted non-lawyer advocacy unless prohibited by state law, or if the non-lawyer was suspended or barred from the industry or from practicing law.<sup>34</sup> That recommendation eventually became current FINRA Rule 12208.

FINRA Rule 12208 allows non-lawyers to represent parties in FINRA arbitrations if permitted by state law. That rule prohibits arbitrators from disqualifying a non-lawyer, or even from staying an arbitration while such a challenge is litigated in the courts. FINRA Rule 12208(c). Two consequences have followed: *First*, whether a representative of a party to a FINRA arbitration must be an attorney differs from state to state. Parties must be represented by attorneys in Florida, California and Illinois, but not in New York. *Second*, non-attorney representations are the *status quo* in all those states that have not specifically ruled on the issue. In any arbitration in any such state in which a party, generally a customer, is represented by a non-lawyer, the other party, generally the broker-dealer, must commence a court action to challenge that representation. There is no record of any broker-dealer ever having done so, which

---

<sup>32</sup> 1995 SICA Report at 512

<sup>33</sup> The stock exchanges and, at the time, the National Association of Securities Dealers, Inc. ("NASD") are known in the rubric of the Securities Exchange Act of 1934 as "self-regulatory organizations," or "SROs." Each SRO used to provide its own arbitration facilities. All those disparate facilities have been unified under FINRA.

<sup>34</sup> *Id.* at 522-24

suggests that the *status quo* favors firms who are, as noted above, repeat players of the arbitration game.

SICA in 1996 asserted authority to impose uniform advocacy requirements. It did not do so only because of practical concerns over its ability to enforce any such requirements. FINRA today likewise acknowledges its power to act.

We believe FINRA not only has the power to act, it also has a responsibility to do so in its role as a provider of arbitration venues. To the extent that arbitration succeeds as a private dispute resolution system outside the traditional court system, it must be seen as fundamentally fair, and especially as regards its more vulnerable participants. When private parties agree to arbitrate in arms-length agreements, then those concerns are properly relegated to the good judgment of the parties. However, when arbitration agreements are imposed as contracts of adhesion upon parties of unequal bargaining power, as they often are in FINRA Customer Arbitrations, then we believe the provider of arbitration services has a greater responsibility to ensure vulnerable parties are not taken advantage of. That responsibility extends beyond the selection of unbiased arbitrators; it may also require rules to ensure that customers are not victimized by unscrupulous non-attorney advocates.

## VII. CONCLUSION

Based on the foregoing, the Committee concludes as follows:

1. The 1975 Report and the 1991 and 2008 Reports of the Arbitration Committee are hereby reaffirmed.
2. Arbitration generally should be left to the control of the parties and their selected arbitration venue. The broad brush of state-wide regulation or rule should be avoided. In particular, the Committee agrees with and endorses the *Report on Legislation of the Arbitration Committee and the International Commercial Disputes Committee* (March 2018)<sup>35</sup> opposing amended standards of judicial review, requirements of written finding of fact and law, and limitations on who may serve as arbitrators in commercial disputes, for the reasons therein stated.
3. In the absence of state regulation of its processes, FINRA has the primary responsibility to enact appropriate rules to protect parties in FINRA Customer Disputes. In furtherance of that responsibility, FINRA should enact rules to limit the ability of non-attorney advocates to appear for customers in such cases as

---

<sup>35</sup> <https://s3.amazonaws.com/documents.nycbar.org/files/2017358-ArbitrationAgreementsBudget.pdf>.

FINRA deems appropriate. At a minimum, the Committee recommends that FINRA consider one or more of the following measures:

- a. Amending its Rule 12208(c) to require parties, in all FINRA Customer Arbitrations except those to be decided by a single arbitrator under Rule 12401 or designated a Simplified Arbitration under Rule 12800, to be represented by licensed attorneys legally permitted to practice in arbitration under the law of the hearing location.
- b. Amending its Rule 12208(d) to empower arbitrators to regulate or prohibit non-attorney party representatives who the arbitrators determine are not qualified or are abusing the arbitration process.
- c. Prohibiting non-attorneys from representing customers for compensation, even when otherwise permitted by FINRA Rules, unless they have been trained in the proper conduct of arbitration advocacy, whether through FINRA or another entity, in such ways as FINRA deems appropriate.

The Committee presents these recommendations without suggesting that FINRA's ultimate discretion in formulating its own Rules is or should be in any way infringed.

Professional Responsibility Committee  
Wallace Lee Larson, Jr., Chair

November 2018