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).