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Acts Like a Lawyer, Talks Like a Lawyer...Non-Lawyer Advocates Representing Parties in Dispute Resolution

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Acts Like a Lawyer, Talks Like a Lawyer…Non-Lawyer Advocates Representing Parties in Dispute Resolution

By Professor Elayne E. Greenberg

The Ethical Issue:

What are the ethical implications for lawyer mediators, arbitrators and dispute resolution providers when the lines between the roles of lawyers and the non-lawyers who are representing clients in dispute resolution become blurry? Traditionally, non-lawyer advocates (hereinafter NARs) have represented clients in the negotiations, mediation and arbitration of legal matters without cause for concern. Yes, labor union representatives, sports agents, and special education advocates are three familiar examples of non-lawyers who represent clients in negotiations, mediations and arbitrations, informing clients of their legal rights. Routinely, the lawyers and neutrals presiding over the dispute resolution procedure have warmly welcomed these non-lawyers, viewing these non-lawyers as valued participants who provide their clients beneficial subject matter expertise to help resolve the legal dispute at hand. However, that welcome has now turned tepid and tentative as FINRA and its neutrals question the ethics of some of those non-lawyers who are representing clients in FINRA arbitration.

The Immediate Problem That Re-ignited the Controversy

The FINRA Codes of Arbitration and Mediation Procedures provides in relevant part that parties in securities arbitrations and mediations may be represented by NAR so long as such representation does not conflict with state law proscribing such representation.[1] Thus, pursuant to the FINRA code, aggrieved investors have opted to be represented in their settlement talks and dispute resolution procedures not only by lawyers but also by family, friends, law school clinics and NAR firms. NAR firms have proliferated, ostensibly to offer public investors an alternative representation to lawyers in FINRA securities mediations and arbitration.

However, FINRA had been receiving complaints from lawyers and neutrals who question the ethics of a small number of these NAR firms and have requested that FINRA take steps to address these concerns.[2] Included among the complaints of unethical behavior were allegations that some NAR firms required the aggrieved investor to sign a retainer agreement to pay the firm a $25,000 non-refundable fee for representation; some NAR firms advocated frivolous or stale claims as leverage to elicit settlements; some NAR firms have misused FINRA dispute resolution procedures by "employing inappropriate business practices," and some NAR firms posted photos of settlement checks in violation of confidentiality agreement to help market the firm's value.[3]

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In response to these complaints, on October 18, 2017 FINRA issued regulatory notice 17–34 inviting FINRA forum users to comment on their experiences with NAR firms.[4] In this notice, FINRA acknowledged that although some NAR firms offer a valuable service to some aggrieved investors, NAR firms are unregulated.[5] FINRA also recognized the impact of any restrictions on NAR firms will ultimately have a cost and benefit to investors.[6] For example, although the implementation of practice restriction on NAR firms might serve to protect aggrieved investors from the cost of NAR firms' misconduct, these restrictions might also serve to incentivize aggrieved investors to instead retain lawyers at an additional expense.[7]

The Broader Ethical Issue

The FINRA-NAR issue is actually a reflection of a broader problem: How do we ensure access to justice for all? For many, the escalating costs of retaining lawyers presents a barrier in their quest to access justice. In lieu of lawyers, some are seeking a more affordable alternative and are turning to NARs. As one familiar example, the New York Unified Court System provides funding to Community Mediation Centers who use NARs to provide those unrepresented with legal advice.[8] Some embrace the use of NARs in this context while others argue that NARs are just providing basement justice for the have-nots.

Adding to the challenge of this problem, there is no consensus on whether lawyer representation as opposed to representation by NARs will actually provide individuals with a better outcome. It may be a fantasy that any lawyer will provide the client with a better outcome than a NAR. Our respected colleague Jean Sternlight states that whether legal representation is actually a benefit compared to NAR representation is not easily proven by the research.[9] Sternlight notes, and this author agrees, that all legal counsel is not alike. While we have great pride in observing skilled lawyers advance their clients' interests, we have also cringed when observing lawyers who do not know the law and misguide their clients to unfortunate outcomes.

Another respected colleague, Sarah Cole, looks at the access to justice issue from a different vantage point and provokes us to consider whether there are some types of cases where NAR representation is actually the unauthorized practice of law and should not be allowed.[10] Cole explains that during the past three decades arbitration practice has evolved and is now used to resolve an increasing number of statutory claims.[11] While arbitration was initially created to resolve routine contractual business disputes by applying business customs and norms, now arbitration is also used to resolve statutory claims by applying the law.[12] Cole asserts that whether or not we classify the representation clients by non-lawyers in statutory arbitrations as the unauthorized practice of law, clients need lawyers to represent them in the arbitration of these statutory claims to protect these clients from harm.[13]

The Ethical Codes Maintain the Blurry Lines

How should lawyer arbitrators and mediators ethically respond to non-lawyer advocates who represent parties in mediation or arbitration? Lawyer mediators and arbitrators may turn to both the New York Rules of Professional Conduct and the relevant neutral ethical codes for guidance and still remain unsure of how to proceed ethically. These ethical codes don't explicitly clarify what constitutes the unethical practice of law, or advise neutrals about what to do when a neutral believes that a NAR has crossed the blurry line into the unauthorized practice of law. For example, the ethical codes for mediators[14] and arbitrators[15] explicitly advise that neutrals should uphold the integrity of their respective dispute resolution procedures. Are arbitrators and mediators upholding the integrity of the process if they encourage or discourage the participation of NAR? Should NAR participation be permitted in some disputes and not others?

We could also look at New York Rule 5.5 that addresses unauthorized practice of law. Rule 5.5 explicitly provides that:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. (b) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.[16]

However Rule 5.5 does not help the lawyer mediator and arbitrator differentiate between permitted subject matter support and the unauthorized practice of law.

For this writer, New York Rule 2.4, Lawyer Serving as Third-Party Neutral reinforces a practice boundary that may be tested when there is a NAR supporting a party in mediation or arbitration. Explicitly Rule 2.4 provides that:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter. (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

This rule recognizes the mistaken belief held by many unrepresented participants that their arbitrator or mediator who is also a lawyer, despite statements to the contrary, will protect the unrepresented participant from legal harm or mistakes. Two for the price of one.

This rule also reminds lawyers serving as a neutral of their ethical obligation to remain anchored in their neutral role, and not be pulled to take a more legal representational role by providing legal advice to an unrepresented party. However, practicing lawyer mediators and arbitrators often confess how challenging it is not to correct an unrepresented parties' faulty legal reasoning. Moreover, lawyer arbitrators and mediators find themselves in an ethical quagmire when lawyers representing parties just got the relevant law wrong. Might this challenge for lawyer mediators and arbitrators be exacerbated when parties are represented by NARs? Depending on the lawyer mediator and arbitrator, the neutral might feel even more pulled to provide legal advice if the neutral doesn't consider NAR as a representative or if the NAR gets the law wrong.

Some readers may be more dizzied after reading these rules and remain unsure about how to proceed if a NAR is engaging in the unauthorized practice of law in a dispute resolution procedure in which you are a neutral. You are not alone. However, we can always take solace in the knowledge that neutrals always retain the right

to withdraw from a dispute resolution procedure if the neutral does not believe they can carry on their neutral role. For some, the right to withdraw is a welcome escape hatch. For others, the right to withdraw is a punt that fails to address the more nuanced issue: how should neutrals ethically proceed when a party is represented by a NAR?

Conclusion

As I write this column, I am coming to the sobering reality that this problem raises questions with no simple answers. This topic calls into question whether we truly believe in the clients' right to self-determination in which they are free to choose their own representative when participating in a dispute resolution procedure or whether we adopt a more maternalistic stance, believing clients need to be protected when selecting a representative. We are also forced to confront the limitations of access to justice for all and the remedies we are willing to support to right this egregious wrong. Yes, this problem is also entrenched in the politics of maintaining the exclusivity of the legal profession. Ultimately, however, this issue forces us to personally consider as lawyer mediators and arbitrators what it means to us to maintain a dispute resolution procedure of integrity.

Endnotes

1. *See* http://www.finra.org/sites/default/files/Regulatory-Notice-17-34.pdf.
2. *Id.*
3. *Id.*
4. *Id.* The deadline for the comment period was December 18, 2017.
5. *Id.*
6. *Id.*
7. *Id.*
8. https://www.nycourts.gov/ip/adr/cdrc.shtml.
9. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 Fordham Urban L. J. at 391 (2009).
10. Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U. of Calif. Davis 921 (2015).
11. *Id.* at 925.
12. *Id.*
13. *Id.* at 960.
14. https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf.
15. https://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf.
16. NY Rules of Professional Conduct Rule 5.5 (2017) at http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf.

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