
Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?

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Over the last thirty years, businesses have increased their use of arbitration, while, at the same time, expanding the types of disputes that are subject to arbitration. As statutory claims are routinely moved to arbitral forums, concerns may arise about the potential impact on party representation. Historically, parties in arbitration did not need and were not required to utilize legal representation in arbitration because arbitrators used customs and norms to evaluate and resolve parties' claims. Today, arbitration differs considerably from this model. In addition to evaluating statutory claims, modern arbitrators often assist the parties in conducting expansive discovery, rule on motions and preside over pretrial hearings. If, as a practical matter, the majority of consumer and employee claims against businesses will be heard in arbitration, representation of parties in arbitration is likely to require considerably greater legal knowledge and expertise than it has in the past. Disputants attempting to arbitrate statutory claims will need legal counsel to properly present their cases in the arbitration forum.

The need for more frequent legal representation in arbitration likely extends to all forms of arbitration, including consumer, labor, securities, and employment arbitration. While critics focus on whether arbitrators are capable of adjudicating such claims, scant attention has been paid to

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whether non-lawyer representatives, who commonly appear in these kinds of arbitral proceedings, can properly traverse the increasingly complex landscape of legal claims at issue in arbitration. As statutory claims become increasingly prevalent in arbitration, concern and focus on who is representing parties in arbitration must change. The current practice of permitting non-lawyer representation in arbitrations involving statutory claims is sanctioning the unauthorized practice of law.

This burgeoning problem, perhaps unlike those that have come before it, may provide the impetus needed for Congress to consider realistic reform of the Federal Arbitration Act to ensure that arbitration agreements do not become a mechanism by which vulnerable populations are further harmed. This Article explores the problem, evaluating the consequences of non-legal representation for parties in arbitration and considers what steps legislatures, courts, lawyers and bar associations might take to address this growing concern.

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INTRODUCTION

Over the past two terms, the Supreme Court effectively privatized consumer and employment dispute resolution. The Court's *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant* decisions held that courts must enforce class arbitration waivers contained in contracts between repeat and one-shot players and that such waivers are neither unconscionable nor an unwarranted suppression of the individual's ability to vindicate his or her statutory rights.¹ As a result of these two decisions, businesses and employers have the ability to avoid class actions in court as well as arbitration with impunity. Moreover, these holdings create the opportunity for businesses to dramatically increase their use of arbitration clauses in agreements with employees² and consumers and include class arbitration waivers in those arbitration clauses.

At least one consequence of these decisions is that some consumers and employees simply will conclude that they do not have sufficient resources to bring claims against businesses. Should this occur, an effective mechanism for addressing widespread corporate wrongs against one-shot players³ may no longer be available. Recent studies confirm the

¹ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-12 (2013) (holding that a contractual waiver of the right to class arbitration is not invalid even if the ability to pursue the claim individually in arbitration is prohibitively expensive); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (holding that the Federal Arbitration Act ("FAA") does not require the availability of class arbitration in a consumer contract).

² Although *Concepcion* and *Italian Colors* involved consumers and merchants rather than employees, the reasoning of both decisions would easily extend to the employment context. If courts cannot declare a class action waiver in a consumer contract to be per se unconscionable, it is unlikely that courts would be permitted to do so in the employment context. Opponents of arbitration agreements in the employment context might cite the NLRB's decision in *D.R. Horton* as a basis for distinguishing employment from consumer arbitration. However, the U.S. Court of Appeals for the Fifth Circuit rejected the NLRB's ruling, deciding instead that employers may condition employment on a non-unionized employee's willingness to waive the right to bring a class action in any forum. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359-60 (5th Cir. 2013). Two circuits have also rejected the NLRB's reasoning in dicta. Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of D.R. Horton and Concepcion*, 35 *BERKELEY J. EMP. & LAB. L.* 175, 177-78 (2014). In addition, the NLRB's original decision in *D.R. Horton* may be invalid because one member of the Board at the time of the decision may have been an unconstitutional recess appointment. *Horton*, 737 F.3d at 350-53. The issue may be moot, however, because on October 28, 2014, the NLRB affirmed its *D.R. Horton* ruling. *Murphy Oil USA, Inc. and Sheila M. Hobson*, 361 N.L.R.B. No. 72, at 2 (October 28, 2014).

³ A "one-shot" player is at a systematic disadvantage in an arbitration against a "repeat" player. Repeat players have advantages in drafting arbitration agreements,

possibility⁴ that the systematic increase in the use of arbitration agreements containing class arbitration waivers results in suppression of employee and consumer claims.⁵

Even if the one-shot player files a claim, additional important protections may be lost when disputes are moved from a public arena to a private one. One overlooked consequence of the movement of claims

selecting arbitrators, and the arbitration itself. See Sarah R. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U. MO. KAN. CITY L. REV. 449, 472-79 (1996).

⁴ See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704-05 (2012) (discussing whether *Concepcion* heralds end for the legal claims of many potential plaintiffs); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?* Stolt-Nielsen, AT&T and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 246 (2012) (considering the nature and implications of class arbitration); Sarah R. Cole, *Continuing the Discussion of the AT&T v. Concepcion Decision: Implications for the Future*, ADR PROF BLOG (Apr. 27, 2011), <http://www.indisputably.org/?p=2312> (“It would thus appear that the era of class arbitration is over before it really ever began — unless Congress can be persuaded to amend the FAA to permit class arbitration, at least in cases involving low value claims, where consumers are unlikely to have practical recourse to a remedy through traditional bilateral arbitration.”).

⁵ In *Concepcion*, Justice Breyer, in dissent, made clear that only a fool would bring a lawsuit to recover thirty dollars:

In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. . . . What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim? . . . “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”

Concepcion, 131 S. Ct. at 1760-61 (Breyer, J., dissenting) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)). In *Italian Colors*, Justice Kagan noted: “In the hands of today’s majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.” *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting); see also Jean R. Sternlight, Professor, Univ. of Nev., Las Vegas Boyd Sch. of Law, Testimony to the United States Senate Judiciary Committee: Forced Arbitration Undermines Enforcement of Federal Laws by Suppressing Consumers’ and Employees’ Ability to Bring Claims (Dec. 17, 2013), available at <http://scholars.law.unlv.edu/congtestimony/1> (arguing that arbitration suppresses one-shot players’ ability to bring claims). The preliminary report from the Consumer Financial Protection Bureau (“CFPB”), which is studying the impact of consumer arbitration, found that few consumers are filing arbitration claims. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE 13 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. From 2010 to 2012, consumers filed an average of just 300 arbitrations per year with the American Arbitration Association (“AAA”) regarding credit cards, checking accounts, payday loans, or prepaid cards. *Id.*

from a public forum to a private one is the potential impact on party representation. Historically, parties in arbitration did not need and were not required to utilize representation in arbitration because arbitrators used customs and norms to evaluate and resolve parties' claims.⁶ Modern arbitration differs considerably from this model. Over the last thirty years, businesses have increased their use of arbitration, while, at the same time, expanding the types of disputes that are subject to arbitration.⁷ At one time, arbitrators primarily resolved contractual interpretation disputes.⁸ Today, however, arbitration agreements routinely cover a wide variety of statutory claims including Title VII,⁹ the Family and Medical Leave Act ("FMLA"),¹⁰ the Age Discrimination in Employment Act ("ADEA"),¹¹ the

⁶ ROGER I. ABRAMS, *INSIDE ARBITRATION: HOW AN ARBITRATOR DECIDES LABOR AND EMPLOYMENT CASES* 142 (2013) ("Many parties are represented in [labor] arbitration by non lawyers."); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NON LAWYERS AT WORK* 151 (1998) (non-lawyer advocates frequently oppose experienced lawyer advocates in grievance arbitration).

⁷ See Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 273 n.10 (2013).

⁸ See, e.g., Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 803 (2013) ("Unions and labor arbitrators are considered experts in contract interpretation . . ."); Dennis R. Nolan & Roger I. Abrams, *The Labor Arbitrator's Several Roles*, 44 MD. L. REV. 873, 893 (1985) ("Every arbitrator is a creature of a contract, and the contract creating his office may and usually does limit his power to interpretation."); James Gilbert Rappis, *The Use of Contract Interpretation by Professional Sports Arbitrators*, 3 MARQ. SPORTS L.J. 215, 235 (1993) ("As arbitrators, their primary objective is to interpret the contract provision in question and produce a result that is equitable and just.").

⁹ Civil Rights Act of 1964, tit. VII, Pub. L. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

¹⁰ Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. § 2601 (1994)). The Family and Medical Leave Act ("FMLA") plays a major role in many labor arbitration decisions. Because many labor arbitrations address discipline and discharge issues, and those arbitrations often involve grievants who have used or are using FMLA leave, arbitrators must frequently interpret and apply FMLA law and regulations. See Martin H. Malin, *The Evolving Schizophrenic Nature of Labor Arbitration*, 2010 J. DISP. RESOL. 57, 78 (noting that in many discharge and discipline cases involving the FMLA, arbitrators must interpret and apply public law in order to determine whether the employer's actions satisfied the just cause provision of the CBA). Malin further notes that the leading labor arbitration treatise, FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 520 (Alan Miles Ruben ed., 6th ed. 2003), states that labor arbitrators rely on FMLA provisions and Department of Labor regulations when confronted with cases involving FMLA issues. *Id.*

¹¹ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

Americans with Disabilities Act (“ADA”),¹² the Truth in Lending Act,¹³ and many more.¹⁴ Moreover, many modern arbitration hearings involve expansive discovery.¹⁵ The rules businesses typically utilize in arbitration also anticipate the use of motions and pre-trial hearings, as well as extensive examination and cross-examination of witnesses.¹⁶ If, as a

¹² Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2010)).

¹³ Truth in Lending Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified at 15 U.S.C. §§ 1601–1681 (1970)).

¹⁴ Malin describes the influx of public law claims into labor arbitration as a “flood.” Malin, *supra* note 10, at 85. Alexander Colvin and Kelly Pike’s review of AAA’s 2008 employment arbitration database supports this contention. Their study revealed that 48.4% of 293 claims brought by employees arose under employer-promulgated procedures, included a claim of some form of employment discrimination. Alexander Colvin & Kelly Pike, *The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes* 14, 16 (June 1, 2012) (unpublished manuscript), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1022&context=conference>. The CFPB’s preliminary study established that many of the claims in consumer arbitration require interpretation of federal or state statutory schemes. See CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 86-87. As the Supreme Court itself noted in *Alexander v. Gardner-Denver, Inc.*, a labor arbitrator focuses on whether the collective bargaining agreement’s provisions have been satisfied while a court’s analysis of a claim brought under Title VII would focus on whether the statute’s requirements are violated. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-57 (1974).

¹⁵ Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 12 (“Arbitration hearings are now often preceded by extensive discovery . . .”). Christine D. Ver Ploeg noted that the adoption of the RUAA in Minnesota, with its broad discovery and remedy provisions, would likely preclude non-lawyers from participating in future labor arbitrations because it would be hard to “imagine a nonattorney feeling anything other than disadvantaged in a proceeding in which others who are attorneys know the legal rules of the game and play them aggressively.” Christine D. Ver Ploeg, *Minnesota’s Revised Uniform Arbitration Act: Unintended Consequences for Minnesota Labor Relations*, BENCH & B. MINN., Nov. 2012, at 16, 18. The RUAA has been adopted in seventeen states and the District of Columbia. See *Arbitration Act (2000)*, UNIF. LAW COMM’N, [http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000)) (last visited Oct. 3, 2014).

¹⁶ See, e.g., COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 5, 21, 22, 32 (Am. Arbitration Ass’n 2013), available at https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130 (arbitration rules for answers and counterclaims, preliminary hearing, pre-hearing exchange and production of information, and conduct of proceedings); JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 19–23 (JAMS 2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration/> (arbitration rules for scheduling and location of hearing, pre-hearing submissions, securing witnesses and documents for arbitration hearing, the arbitration hearing, and waiver of hearing); NON-ADMINISTERED ARBITRATION RULES R. 9, 12 (Int’l Inst. for Conflict Prevention & Resolution 2007), available at <http://www.cpradr.org/RulesCaseServices/CPRRules/2007CPRNon-AdministeredArbitrationRules.aspx> (arbitration rules for conduct of proceedings and evidence and hearings).

practical matter, the majority of consumer and employee claims against businesses will now be removed to arbitration,¹⁷ representation of parties in arbitration is likely to require considerably greater legal knowledge and expertise than it has in the past.¹⁸ Disputants attempting to arbitrate statutory claims will need legal counsel to properly present their cases in the arbitration forum.¹⁹

The need for more frequent legal representation in arbitration likely extends to all forms of arbitration, including consumer, labor, securities, and employment arbitration.²⁰ While critics focus on whether arbitrators are capable of adjudicating such claims,²¹ scant

¹⁷ Commentators, including this author, predict that eventually most businesses, at least those that deal directly with consumers, will adopt arbitration agreements with class arbitration and action waiver provisions. See generally Cole, *supra* note 7, at 273 (citing a study being undertaken which could provide empirical evidence that business will adopt arbitration agreements with class waiver provisions). Although wholesale adoption of these agreements with waiver language has not occurred since *Concepcion* was decided two years ago, see Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 987-1001 (2014), it still seems highly likely that businesses will eventually turn to arbitration if for no other reason than to avoid class processes. But see *id.* (finding that franchisors did not dramatically increase their use of class arbitration waivers two years post-*Concepcion*, theorizing that businesses may not be enamored with everything arbitration has to offer and/or because arbitration agreements and contracts generally are “sticky”).

¹⁸ ABRAMS, *supra* note 6, at 346-47 (employment arbitration mirrors legal proceedings and the arbitrator’s job in the arbitration is to apply statutory law).

¹⁹ The arbitrator’s role in the resolution of a contract interpretation dispute is considerably different than her role in a dispute involving statutory interpretation. Arbitrators interpreting contractual language attempt to determine what the parties meant when they negotiated the language. The arbitrator acts as the agent of the parties, trying to implement the choice the parties would have made, had they negotiated the language themselves. When addressing statutory disputes, by contrast, the arbitrator is not the parties’ agent, attempting to resolve issues the parties could have negotiated themselves. Instead, she is applying public law to facts. This action impacts both the parties to the arbitration but also the public interest in ensuring the correct interpretation and application of federal and state laws. See *supra* notes 8–10 and accompanying text.

²⁰ In a recent news article, Paul Bland of Public Justice emphasized the importance of retaining a lawyer in a consumer arbitration: “Particularly in a larger case, you should try to get a lawyer to go with you and represent you. When one side has a lawyer and the other doesn’t, there is a huge disadvantage to the side that doesn’t.” Marcie Geffner, *Arbitration: Strategies for Fighting It*, BANKRATE.COM (May 1, 2013), <http://www.bankrate.com/finance/banking/arbitration-strategies.aspx>.

²¹ See, e.g., Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199, 200-01, 238-39 (2005) (noting that labor arbitrators have evolved from the purely private interpreter of the parties’ CBA to a quasi-public adjudicator, interpreting and applying the public law); Alexandra Meaker, Note, *Revisiting Arbitrator Certification in a Post-Penn Plaza World: An Analysis of the*

attention has been paid to whether non-lawyer representatives, who commonly appear in these kinds of arbitral proceedings, can properly traverse the increasingly complex landscape of legal claims at issue in arbitration.²² As statutory claims become increasingly prevalent in arbitration, concern and focus on *who* is representing parties in arbitration must change.²³ If the vast majority of consumer, employee, and investor claims are to be arbitrated, and the subject matter of arbitration involves statutory, as well as contract, interpretation,²⁴ it may be that lawyers, not lay advocates, are necessary to provide adequate representation to arbitration disputants. While this change runs counter to traditional arbitration practice, which routinely permitted party representation by non-lawyer advocates, modern arbitration practice demands that advocates be able to understand and

Problems in Arbitration Today, 26 GEO. J. LEGAL ETHICS 895, 895-96 (2013) (focusing on whether arbitrators are competent to hear disputes involving statutory claims). *But see* W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1139 (2012) (arguing that fears that arbitrators do not apply or interact with judicial precedent are overblown).

²² The Securities Industry Conference on Arbitration (“SICA”) analyzed this question when non-attorney representatives began to represent investors in securities arbitration and ultimately issued a report and recommendations. Constantine N. Katsoris, *Foreword: Representation of Parties in Arbitration by Non-Attorneys*, 22 FORDHAM URB. L.J. 503, 505-06 (1995). Authors mention the issue in passing. Ver Ploeg, *supra* note 15, at 18-19 (noting the RUAA’s provisions addressing discovery, remedies and court proceedings, will likely preclude non-lawyers from participating in labor arbitration); Meaker, *supra* note 21, at 909 (“In a post-*Penn Plaza* world, grievants [with federal and state anti-discrimination claims] . . . do not have legal representation in the arbitral forum and are represented by a non-attorney union leader, whereas employers almost always have a company attorney who is well versed in the law presenting their case.”).

²³ The CFPB’s study of consumer arbitration revealed that 59% of consumer claims in non-collection credit card arbitrations from 2010–2012 involved federal statutory claims. CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 86. Many claims also included fair credit billing act, fair credit reporting act, fair debt collection practices act, and truth-in-lending act claims. *Id.* at 95. The study revealed that federal and state statutory claims were fairly common in non-collection checking account arbitrations over the same period and that state statutory claims were very common in non-collection payday arbitrations over the same period (90% of claims included state statutory claims). *Id.* at 87.

²⁴ The increasing number of statutory claims in arbitration calls for greater legal representation in consumer and employment arbitration. Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1141-44. This conclusion runs counter to the trend among commentators to relax UPL rules in divorce, foreclosure and other credit related matters where pro se representation has become more common. While it might be helpful to some consumers to use lay advocates in arbitration of statutory claims, that use would be flatly inconsistent with our current unauthorized practice of law (“UPL”) rules, which require legal representation when the representation requires the understanding and application of the law. *See infra* text accompanying note 25.

apply the law. Continuing to permit non-lawyer representation in arbitration is sanctioning the unauthorized practice of law (“UPL”).²⁵

But addressing this issue may raise a variety of concerns. First, if lawyers are necessary to the arbitration process, undoubtedly the cost of arbitration will increase for the vast majority of one-shot player litigants, such as consumers and employees.²⁶ Second, if a state acknowledged that lawyers were necessary to the arbitration process, and enacted legislation to require the presence of lawyers in arbitration, the state legislation would likely be subject to challenge on preemption grounds.²⁷ The Supreme Court interprets the Federal Arbitration Act

²⁵ Many states recognize that non-lawyer representation in securities arbitration is the unauthorized practice of law because representation in a securities dispute requires an understanding of securities law. See, e.g., Fla. Bar *re* Advisory Op. on Nonlawyer Representation in Sec. Arbitration, 696 So. 2d 1178, 1182-84 (Fla. 1997) (“[I]f the giving of such advice and performance of such services affect important rights of a person under the law . . . and . . . requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.”). One state opined that non-lawyer representation in court-ordered arbitration was the practice of law. Ala. State Bar Office of Gen. Counsel Disciplinary Comm’n, Formal Op. R0 2014-01, at 1 (2014), available at <https://www.alabar.org/assets/uploads/2014/08/2014-01.pdf>. Other states, such as Arizona, Arkansas, Louisiana, and Washington, maintain rules prohibiting non-lawyer representation of parties in arbitration because it is the practice of law. ARIZ. SUP. CT. R. 31(a)(2)(A)(3) (stating that representing another in a formal dispute resolution process such as arbitration and mediation is the practice of law); ARK. CODE ANN. § 16-22-211 (2011) (prohibiting corporate employee from representing corporation in arbitration); LA. RULES OF PROF’L CONDUCT R. 5.5(e)(3)(iii) (appearing on behalf of a client in any hearing in front of an arbitrator is the practice of law); WASH. GEN. R. 24(a)(3) (representation of another entity or person in a formal dispute resolution process, where pleadings are filed or record established for judicial review, is the practice of law). Many other jurisdictions do not define the practice of law this specifically but define the practice of law in a way that would encompass typical representation in arbitration. For example, the District of Columbia Court of Appeals Rule 49 classifies as the practice of law as “appearing or acting as an attorney in any tribunal [or] preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal.” D.C. CT. APP. R. 49(b)(2). For more definitions of practice of law, see AM. BAR ASS’N, APPENDIX A: STATE DEFINITIONS OF THE PRACTICE OF LAW 7, available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf (last visited Oct. 5, 2014).

²⁶ At least one commentator advocated the increased use of non-lawyer advocates in arbitration to reduce costs in arbitration because the *Concepcion* decision will incentivize business use of arbitration agreements. See Ruan, *supra* note 24, at 1141-42 (advocating changes to arbitration post-*Concepcion*, including greater use of non-lawyer advocates and the liberalization of state UPL rules, that would make arbitration more cost-friendly to those who will be required to use it).

²⁷ Arizona, for example, has a supreme court rule prohibiting non-lawyers from

(“FAA”) to preempt state legislation or judicial decisions that alter fundamental attributes of arbitration. Thus, the Court in *Concepcion* held that the FAA preempted a California Supreme Court decision that conditioned enforceability of an arbitration agreement between a consumer and a business on the availability of class arbitration.²⁸ The *Concepcion* Court concluded that class arbitration interferes with fundamental attributes of arbitration such as lower expected costs and higher efficiency.²⁹ If, in the instant case, the Court determined that the possibility of non-lawyer representation in arbitration is a fundamental aspect of arbitration, then state legislative or judicial attempts to limit this fundamental attribute would be subject to a challenge on preemption grounds.³⁰ Given the track record for preemption challenges in the Supreme Court, it seems likely that attempts to alter a fundamental attribute of arbitration through state legislation or judicial decision would fail. This conclusion would leave states unable to implement their view of appropriate public policy through state legislation or judicial decisions. The states would be forced to wait for Congress to amend the FAA to require legal representation in disputes involving statutory claims.³¹ The states would likely wait a long time for

representing parties in mediation and arbitration. See ARIZ. SUP. CT. R. 31(a)(2)(A)(3) (representing another in a formal dispute resolution process such as arbitration and mediation is the practice of law).

²⁸ AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011).

²⁹ *Id.* at 1750-52.

³⁰ The FAA preempts state laws that interfere with the “fundamental attributes of arbitration.” *Id.* at 1748.

³¹ Congress has shown little interest in amending the FAA. Congressional attempts to amend the FAA to make pre-dispute arbitration agreements unenforceable in employment, consumer, and civil rights contexts have repeatedly failed. See Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Civil Rights Act of 2008, H.R. 5129, 110th Cong. (2008); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); Preservation of Civil Rights Protections Act of 2005, H.R. 2969, 109th Cong. (2005); Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2004); Preservation of Civil Rights Protections Act of 2002, S. 2435, 107th Cong. (2002); Preservation of Civil Rights Protections Act of 2001, H.R. 2282, 107th Cong. (2001); H.R. 815, 107th Cong. (2001). Although some of the early bills were responses to the use of arbitration to resolve statutory employment discrimination claims, drafters offered protection from arbitration to consumers as well. See, e.g., H.R. 1873 (offering protection to consumers and employees). In addition, legislators proposed amendments to various statutes, such as the Consumer Credit Protection Act, that would have had the same effect. See, e.g., Consumer Fairness Act of 2003, H.R. 1887, 108th Cong. (2003) (offering protection to consumers and employees). Almost none of these bills were reported out of committee, and those that survived the committee step of the legislative process were not voted on by the House or Senate.

such action, since Congress has routinely rejected attempts to amend the FAA.³² Alternatively, non-lawyers might work within the existing system, avoiding unauthorized practice of law charges by representing clients in the arbitration of statutory disputes under the guidance of an experienced lawyer.

Interestingly, if the possibility of non-lawyer representation in arbitration is a fundamental attribute of arbitration, neither state legislatures nor state courts could legislate or decide that non-lawyers were engaged in the unauthorized practice of law during arbitration. If that is so, states would be unable to address the potential harm to consumers from incompetent non-lawyer representation in arbitration of statutory claims using existing state UPL laws. Federal attention to this issue, if this prediction is correct, would then be the only possible solution available to address this growing problem. If non-lawyers conclude that states are unable to prosecute them, they would have little incentive to join with lawyers, who might be able to provide appropriate supervision for them in cases involving statutory claims.

This burgeoning problem, perhaps unlike those that have come before it, may provide the impetus needed for Congress to consider realistic reform of the Federal Arbitration Act to ensure that arbitration agreements do not become a mechanism by which vulnerable populations are further harmed. This Article explores the problem, first examining what constitutes the unauthorized practice of law.³³ Next, this Article will briefly review the evolution of arbitration as a process in which legal representation was initially unnecessary and consider how bar associations, legislatures and courts have handled unauthorized practice of law issues in arbitration.³⁴ Finally, this Article will evaluate the consequences of non-legal representation for parties to arbitration and consider what steps legislatures, courts, and bar associations might take to address this growing concern.³⁵

I. HOW TO DEFINE THE UNAUTHORIZED PRACTICE OF LAW

UPL statutes exist to prevent non-lawyers from practicing law and lawyers from practicing in jurisdictions where they are not licensed.³⁶

³² See sources cited *supra* note 31 and accompanying text.

³³ See *infra* Part I.

³⁴ See *infra* Part II.

³⁵ See *infra* Part III.

³⁶ The primary purpose for UPL rules and enforcement was to protect the public from harm that could result from the activities of dishonest, unethical, and incompetent providers. AM. BAR ASS'N, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW

Every state maintains statutes that prohibit non-lawyers from practicing law.³⁷ Some statutes create exceptions to these rules, permitting non-lawyers to represent disputants in certain administrative proceedings. These proceedings include unemployment compensation appeals,³⁸ tax appeals, and social security appeals.³⁹ Some jurisdictions, although not many, specifically permit non-lawyers to represent parties in labor

REPORT TO THE HOUSE OF DELEGATES REPORT 5 (2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_328.pdf.

³⁷ See Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 *FORDHAM L. REV.* 2761, 2761, 2773 (2014) (“[The ABA] simply recommended that each state adopt its own definition of the practice of law based on its own understanding of its citizens’ needs and the available state protections.”); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 14 (1981) (tabulating the fifty-five jurisdictions that have UPL statutes, including the fifty states — forty-five included in a final sample regarding enforcement). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2011) (“A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so.”); George C. Leef, *Lawyer Fees to High? The Case for Repealing Unauthorized Practice of Law Statutes*, *CATO INST.*, <http://www.cato.org/sites/cato.org/files/serials/files/regulation/1991/1/reg20n1c.html> (last visited Oct. 6, 2014) (“Every state except Arizona has an ‘unauthorized practice of law’ (UPL) statute that makes it illegal for anyone who does not meet the requirements set by state bars to render legal assistance.”).

³⁸ See, e.g., *Perto v. Bd. of Review, Ill. Dep’t of Emp’t Sec.*, 654 N.E.2d 232 (Ill. 1995) (holding that employer’s authorized agent’s non-attorney representation of employee before the Board of Review of the Illinois Department of Employment Security did not constitute unauthorized practice of law); *State Bar of Mich. v. Galloway*, 369 N.W.2d 839 (Mich. 1985) (holding that a “statute which provides that employer may be represented in any proceeding before the Employment Security Commission by counsel or other duly authorized agent permits non-attorneys to appear at Commission referee hearings as representatives of their employer clients”); *Henize v. Giles*, 490 N.E.2d 585 (Ohio 1986) (holding that, under Ohio statute, “non-lawyer representatives appearing at administrative unemployment compensation hearings . . . are not engaged in unauthorized practice of law”); *Harkness v. Unemp’t Comp. Bd. of Review*, 920 A.2d 162 (Pa. 2007) (holding that “a non-attorney representative representing an employer before a referee of the Board is not engaging in the practice of law”); see also *KAN. ADMIN. REGS.* § 48-3-2(c) (2014) (permitting “duly authorized representatives,” including union representatives, employees of a corporate employer, or employees of employer’s cost control firm, to represent parties in unemployment compensation appeals); *WASH. ADMIN. CODE* § 192-04-110 (2014) (permitting non-lawyer representatives in unemployment compensation appeals).

³⁹ Mitchell H. Rubinstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 *BERKELEY J. EMP. & LAB. L.* 221, 223-33 (2008); see *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 384-85, 401-02 (1963) (holding that the United States Patent Office by Congressional authority may permit non-lawyer representation in preparing and prosecuting patent applications which preempts inconsistent state law).

arbitration.⁴⁰ Others preclude or authorize representation in alternative dispute resolution proceedings, such as arbitration and mediation.⁴¹

Not all states define the unauthorized practice of law, but, in general, courts and legislatures treat a person who relates law to specific facts as engaging in the practice of law.⁴² If the requested service requires a lawyer's professional judgment, which is to analyze the law and apply it to a particular set of facts, it is likely to constitute the practice of law.⁴³ Other tests courts use to evaluate whether a particular activity constitutes the practice of law include whether the activity is commonly understood to be a part of the practice of law in the community,⁴⁴ whether a client would believe he was receiving legal services,⁴⁵ whether the activity affects the client's legal rights,⁴⁶ and whether the

⁴⁰ See, e.g., CAL. CIV. PROC. CODE § 1282.4(h) (West 2014) (permitting non-lawyer representation in labor arbitration); NEB. SUP. CT. R. 3-1004(E) (permitting non-lawyers to represent parties in labor negotiation or arbitration if the Nebraska and Federal Rules of Evidence do not apply); WIS. SUP. CT. R. 23.02 (2)(e) (permitting non-lawyer representation in labor arbitration arising out of a collective bargaining agreement); RULES GOVERNING THE WYO. STATE BAR & THE AUTHORIZED PRACTICE OF LAW R. 7(c)(9) (2014) (permitting non-lawyer representation in labor arbitration if rules of evidence do not apply).

⁴¹ See, e.g., 17A ARIZ. REV. STAT. SUP. CT. R. 31(a)(2)(A) (“Practice of law’ means providing legal advice or services to or for another by . . . (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation . . . or (5) negotiating legal rights or responsibilities for a specific person or entity.”).

⁴² RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.5-3(b) (2013). According to a 2012 survey on unlicensed practice of law programs conducted by the American Bar Association, the majority of the responding states have created definitions for both the “practice of law” and the “unauthorized practice of law.” AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., 2012 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES 1 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_introduction.authcheckdam.pdf.

⁴³ ROTUNDA & DZIENKOWSKI, *supra* note 42; see Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595, 605-06 (2000) (stating the unauthorized practice of law exists if the non-lawyer's actions require familiarity with legal principles beyond that possessed by the average person).

⁴⁴ See *Bysiewicz v. Dinardo*, 6 A.3d 726, 768 (Conn. 2010); *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 413 (Nev. 1958); *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 186 (1943); *People v. Lawyers Title Corp.*, 282 N.Y. 513, 519 (1940).

⁴⁵ Cf. *Strong v. State*, 773 S.W.2d 543, 549 (Tx. Crim. App. 1989) (en banc) (interpreting Texas Rule 503(a)(3) to require a reasonable belief that the client is consulting with an attorney as part of definition for “lawyer” within attorney-client privilege context).

⁴⁶ *Stark Cnty. Bar Ass'n. v. Beaman*, 574 N.E.2d 599, 600 (Ohio 1990) (holding respondents' actions constituted the unauthorized practice of law because “[t]he trust agreements prepared by respondents, for a fee, significantly affect the legal rights of

relationship between the non-lawyer and client is tantamount to a lawyer-client relationship.⁴⁷ UPL statutes are designed to protect the public from substandard service by non-lawyers attempting to represent parties.⁴⁸ By protecting consumers from incompetent representatives, UPL statutes also serve to protect the integrity of the judicial system.⁴⁹

Access to justice and the high cost of lawyers are two reasons courts offer to justify permitting non-lawyers to represent parties.⁵⁰ For

their clients . . .”); *State v. Buyers Serv. Co.*, 357 S.E.2d 15, 19 (S.C. 1987) (holding non-lawyer engaged in unauthorized practice of law when mailing or physically transporting documents to court house in real estate transfer because activities affected legal rights); *State Bar of N.M. v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978) (holding activity is practice of law if it effects a person’s substantial rights and above-average legal skill and knowledge is required to protect those rights).

⁴⁷ D.C. CT. APP. R. 49 (b)(2) (“Practice of Law’ means the provision of professional legal advice or services where there is a client relationship of trust or reliance.”); *State ex rel. Ind. State Bar Ass’n v. Diaz*, 838 N.E.2d 433, 444 (Ind. 2005) (entering into relationship with client constitutes the practice of law); see *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 366 P.2d 1, 9 (Ariz. 1961) (stating that “reliance by the client on advice or services rendered” is important in determining whether conduct amounts to the practice of law).

⁴⁸ See, e.g., *In re Burson*, 909 S.W.2d 768, 776-77 (Tenn. 1995). UPL statutes also exist to protect the public from lawyers not licensed in the jurisdiction where they are practicing. Donald T. Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649, 664 (1978) (“In the United States, each state regulates admission to law practice within its own jurisdiction. Thus, a lawyer admitted to practice in Utah is not necessarily entitled to practice law in Nevada.”); *State Bar of Ariz., Unauthorized Practice of Law Advisory Op. 10-02* (Feb. 2010) (“No person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar Until s/he is admitted to practice law in Arizona, an out-of-state lawyer is a non-lawyer in Arizona”). The goal with this regulation is to protect consumers from unregulated and, presumably, ill-prepared out-of-state lawyers. *Id.*

⁴⁹ See AM. BAR ASS’N, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW REPORT 4-5 (Aug. 2003), available at http://www.abanet.org/cpt/model-def/taskforce_rpt_803.pdf (definition of the practice of law should focus on protecting the public and weighing benefits and drawbacks of non-lawyers performing service); see also *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 605, 607 (Ind. 2007); *Palmer v. Ernst & Young, LLP*, No. 97747, 2007 Mass. Super. Ct. LEXIS 109, at *9 (Apr. 11, 2007) (noting that UPL rules intended to protect public “from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control” (quoting *Lowell Bar Ass’n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943)); *State Bar v. Cramer*, 249 N.W.2d 1, 7 (Mich. 1976), *abrogated on other grounds by Dressel v. Ameribank*, 664 N.W.2d 151, 154-55 (2003); *Gardner v. Conway*, 48 N.W.2d 788, 797 (Minn. 1951); *In re N.J. Soc’y of Cert. Pub. Accountants*, 507 A.2d 711, 714 (N.J. 1986); *State v. Niska*, 380 N.W.2d 646, 649 (N.D. 1986); *State v. Despain*, 460 S.E.2d 576, 578 (S.C. 1995).

⁵⁰ See generally *State Unauthorized Practice of Law Comm. v. Paul Mason & Assocs., Inc.*, 46 F.3d 469, 470 (5th Cir. 1995) (stating how non-lawyers should be able

example, a real estate broker who can find a house and help draft a purchase offer provides economies of scale to the consumer that might outweigh concerns about unauthorized practice of law. Citing the cost concern, the Ohio Supreme Court permitted non-lawyer assistance for unemployment compensation claimants because parties with unemployment claims often cannot afford a lawyer.⁵¹ Concerns about the difficulty of obtaining a lawyer in a small community may also impact courts' decisions. In an Arkansas case, for example, a court permitted permit real estate brokers to draft property sale documents for this reason.⁵²

Courts weigh the benefit of lawyers' presumably better legal advice and drafting assistance against consumer access to redress for harms they have suffered. Lawyers have skill and knowledge in law, technical and ethical training, the ability to converse with clients under the protection of the attorney-client privilege, a prohibition against interests in conflict with their service to clients, and are subject to discipline for unethical conduct.⁵³ Courts rarely consider whether the public actually suffers harm from non-lawyer representation, but rather presume that harm occurs.⁵⁴

to file proofs of claim in bankruptcy proceedings and negotiate reaffirmation agreements with debtors' counsel without running afoul of practice of law regulations because "[t]he average amount of each claim is small and effectively precludes economically efficient management by the creditor or an attorney"); *In re Buck*, 219 B.R. 996, 1001 (Bankr. W.D. Tenn. 1998) (holding that a non-lawyer's request for copies of pleadings was not the practice of law because district court's local bankruptcy rules should not impose financial burden on non-lawyers seeking such copies); *Condra*, 865 N.E.2d at 607 (redirecting objections to court's definition of practice of law on economic grounds to the legislature).

⁵¹ *Henize v. Giles*, 490 N.E.2d 585, 591 n.10 (Ohio 1986) (noting that, because of restrictive intake guidelines, legal aid lawyers were not often available to represent unemployment compensation claimants).

⁵² *Creekmore v. Izard*, 367 S.W.2d 419, 422-23 (Ark. 1963) (allowing real estate brokers to draft property sale documents, after considering effect of contrary ruling on residents of small towns without attorneys).

⁵³ *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 366 P.2d 1, 8, 10 (Ariz. 1962); *Bump v. Dist. Court*, 5 N.W.2d 914, 922 (Iowa 1942); see *State ex rel. Ind. State Bar Ass'n v. Diaz*, 838 N.E.2d 433, 445-46 (Ind. 2005); *Harkness v. Unemp't Comp. Bd. of Review*, 920 A.2d 162, 166-67 (Pa. 2007).

⁵⁴ Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbor — Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 203; Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 358 (2004). See generally Rhode, *supra* note 37, at 37 (reporting 59% of forty-one bar enforcement officials responding to survey believed that unauthorized practice poses a threat to the public; 33% disagreed. Of those characterizing lay activities as harmful, almost a third (7/23; 30%) also acknowledged that some lay practitioners performed as well as or better than attorneys). *But see Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*,

Courts also consider whether the consumer is charged for the non-lawyer's services. In a few jurisdictions, a non-lawyer's legal advice given outside the litigation or administrative process constitutes a transgression only if the non-lawyer charges or stands to obtain business benefits by providing the service.⁵⁵ The Missouri Supreme Court, however, held that charging fees for a law-related service is only evidence that the non-lawyer has "held himself out" as in the law business.⁵⁶ In Ohio, the free provision of service did not absolve the non-lawyer from liability but was weighed heavily.⁵⁷ The consumer saves money and the non-lawyer has no pecuniary motive to mislead the consumer and is therefore less likely to do so.

With even more frequency, courts focus on the charge for the specific service alleged to constitute the practice of law.⁵⁸ Thus, the non-lawyer who charges separately for legal advice or drafting is more likely to be found to practice law than the one who incorporates the charge into a general fee. Although hidden charges are also inconvenient for consumers, some argue that consumers are apt to rely more heavily on specifically purchased services.⁵⁹ Non-profit services — even those

113 S.W.3d 105, 119-121 (Ky. 2003) (discussing evidence that suggests that the public is not harmed by lay closing agents); *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 860-63 (Mo. 1996) (en banc) (listing examples of harm caused by incompetent or biased advice regarding living trusts).

⁵⁵ See, e.g., LA. REV. STAT. ANN. § 37:212(A) (2013) (defining practice of law, outside the context of litigation, to remuneration or other consideration for legal services); MISS. CODE ANN. § 73-3-55 (West 2014) (any person who, "for fee or reward or promise, directly or indirectly," engages in certain activities is practicing law); N.J. STAT. ANN. § 2C:21-22 (West 2014) (deriving a benefit from unauthorized practice constitutes crime of the fourth degree, rather than disorderly persons offense).

⁵⁶ *In re Mid-Am. Living Trust Assocs.*, 927 S.W.2d at 859.

⁵⁷ *In re Unauthorized Practice of Law in Cuyahoga Cnty.*, 192 N.E.2d 54, 57 (Ohio 1963).

⁵⁸ See generally *Pope Cnty. Bar Ass'n v. Suggs*, 624 S.W.2d 828, 829 (Ark. 1981) (permitting real estate agents to provide certain assistance if the client was not separately charged for it); *Agran v. Shapiro*, 273 P.2d 619 (Cal. App. Dep't Super. Ct. 1954) (same with respect to tax accountants); *In re First Escrow, Inc.*, 840 S.W.2d 839, 848 (Mo. 1992) (finding that escrow companies may not charge a separate fee for document preparation). *But see* *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 607 (Ind. 2007) ("[I]f the completion of legal documents is ordinarily incident to a lender's financing activities, it is generally not the practice of law, whether or not a fee is charged.").

⁵⁹ *Lawson v. First Union Mortg. Co.*, 786 N.E.2d 279, 283 (Ind. Ct. App. 2003) (holding that bank may not charge separately for preparation of mortgage instrument); *In re First Escrow*, 840 S.W.2d at 843 n.7 (finding that filling in blanks on real estate documents is practice of law and noting that whether it is unauthorized when performed by a layman turns on the issue of compensation); *State Bar of N.M. v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978); see also *Gardner v.*

charging a fee for non-legal services — have fared better than their profit-making counterparts in avoiding unauthorized practice problems.⁶⁰ One might argue that non-profit ventures, such as those who do not charge a fee for any services, are less likely to defraud consumers regarding their abilities in order to increase business, and, therefore inadequate service is less likely.⁶¹ When weighing consumer convenience against the likelihood of inadequate services, the courts also focus on whether the type of service provided by a non-lawyer requires broad training and experience in law.⁶² For example, if the non-lawyer's drafting consists of filling in blanks according to a manual, the courts sometimes construe this as the act of a mere "scrivener" and not the practice of law because legal training and experience are not necessary to accomplish the task.⁶³

Some courts permit non-lawyers to provide general information on the law because broad understanding and experience in application is

Conway, 48 N.W.2d 788, 795-97 (Minn. 1951); *In re Unauthorized Practice of Law*, 192 N.E.2d at 57; Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 586 P.2d 870, 874 (Wash. 1978) (en banc).

⁶⁰ These non-profit services are exempted from New York's unauthorized practice prohibitions in N.Y. JUD. CT. ACTS §§ 495(7), 496 (McKinney 2013). Compare Sup. Ct. of Tenn. Bd. of Prof'l Responsibility, Formal Ethics Op. 83-F-39, at 1-2, (Jan. 25, 1983), 1983 WL 189631 (disapproving for-profit divorce mediation service by non-lawyers), with Sup. Ct. of Tenn. Bd. of Prof'l Responsibility, Formal Ethics Op. 85-F-98, at 1-3, (Aug. 22, 1985), 1985 WL 285087 (approving nonprofit mediation service by religious group). *But see* Sup. Ct. of Tenn. Bd. of Prof'l Responsibility, Formal Ethics Op. 90-F-124, at 3 (Dec. 14, 1990), 1990 WL 640006 (discussing Ops. 83-F-39 and 85-F-98 and applying the same standards to for-profit and not-for-profit, religious and non-religious mediation programs).

⁶¹ For a general discussion of unauthorized practice as professional self-protection, see Jacqueline Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 268-69 (2002); Rhode, *supra* note 37, at 37.

⁶² See, e.g., *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 (1985) (noting that trained lay persons may perform as well as lawyers in informal veterans' benefits claims proceedings); *Cleveland Bar Ass'n v. CompManagement, Inc.*, 857 N.E.2d 95, 126 (Ohio 2006) (considering experience necessary in workers' compensation proceedings in determining violation of practice of law rules).

⁶³ *Hulse v. Criger*, 247 S.W.2d 855, 861-62 (Mo. 1952) (en banc) (describing drafting which was so standardized that no legal training was required); *Cleveland Bar Ass'n v. Pearlman*, 832 N.E.2d 1193, 1197 (Ohio 2005); *R.J. Edwards, Inc. v. Hert*, 504 P.2d 407, 419 (Okla. 1972) (permitting non-lawyer bond marketers to fill out forms for bond issuance, based on manual written by Attorney General). *But see* *State v. Buyers Serv. Co.*, 357 S.E.2d 15, 17-18 (S.C. 1987) (citing *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408 (Nev. 1958)) (filling in blanks constitutes practice of law where, by necessity, drafters were passing on legal sufficiency).

unnecessary simply to rephrase legal provisions accurately.⁶⁴ In contrast, the non-lawyer who applies general principles of law to specific factual situations is more often found to be practicing law.⁶⁵ Like advice or drafting that involves resolution of difficult or doubtful legal questions,⁶⁶ this type of non-lawyer service is presumed to be inadequate.

Ultimately, then, the question whether a non-lawyer engages in the unauthorized practice of law turns on the resolution of three issues. First, a court may consider whether the consumer pays for the non-lawyer's service. Second, a court will examine how much the services serve the consumer's interests (i.e., access to justice, convenience, and cost). Finally, a court will evaluate how close to the actual practice of law the non-lawyer's actions come.⁶⁷

Historically, representation by non-lawyers in arbitration was not considered the practice of law.⁶⁸ Modern arbitration practice, which

⁶⁴ State supreme court cases distinguishing between giving information and individualized advice are listed in *In re Thompson*, 574 S.W.2d 365, 367-69 (Mo. 1978).

⁶⁵ See Fla. Bar v. Furman, 451 So. 2d 808, 812-14 (Fla. 1984) (affirming a rule that a legal secretary engaged in the unauthorized practice of law by construing statutes and applying her interpretation in drafting divorce kit forms); State Bar v. Cramer, 249 N.W.2d 1, 8-9 (Mich. 1976) (permitting publication of "divorce kit" but not individualized advice on use), *abrogated on other grounds* by Dressel v. Ameribank, 664 N.W.2d 151 (Mich. 2003); *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 865 (Mo. 1996) (holding that advising clients on their individual rights and responsibilities in trust, estate, and tax matters is the practice of law); *In re Thompson*, 574 S.W.2d at 369 (permitting publication of "divorce kit" but not individualized advice on use); N.Y. Cnty. Lawyers' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967) (reversing order granting injunction against author and publishers of book providing probate advice); Westmoreland Cnty. v. RTA Grp., Inc., 767 A.2d 1144, 1150-51 (Pa. Commw. Ct. 2001) (prohibiting real estate consulting company from assisting property owners in tax assessment appeals); State v. Despain, 460 S.E.2d 576, 578 (S.C. 1995) (finding that preparing documents and instructing on how to execute documents for family court is the practice of law).

⁶⁶ See Gardner v. Conway, 48 N.W.2d 788, 796-98 (Minn. 1951).

⁶⁷ See MISS. CODE ANN. § 73-3-55 (West 2014) (stating any person who, "for free or reward or promise, directly or indirectly," engages in certain activities is practicing law); Creekmore v. Izard, 367 S.W.2d 419, 422-23 (Ark. 1963) (allowing real estate brokers to draft property sale documents given the potential effect of a contrary ruling on residents of small towns without attorneys); *In re First Escrow, Inc.*, 840 S.W.2d 839, 843 n.7 (Mo. 1992); Henize v. Giles, 490 N.E.2d 585, 590 n.10 (Ohio 1986) (permitting non-lawyer assistance for employment compensation claims because parties often could not afford a lawyer); SARAH R. COLE ET. AL., *MEDIATION: LAW, POLICY AND PRACTICE* § 10.11 (2013) (citing cases where courts evaluate whether non-lawyers are practicing law).

⁶⁸ See *In re Town of Little Compton*, 37 A.3d 85, 92 (R.I. 2012) (stating it is commonplace for non-lawyer's representation of unionized employee in grievance arbitration); Bd. on the Unauthorized Practice of Law of The Sup. Ct. of Ohio, Advisory

routinely requires application of federal and state statutes to facts, very much mirrors what happens in court cases.⁶⁹ While it is important to ensure that one-shot players have access to a dispute resolution process, current UPL definitions likely preclude non-lawyers from representing parties in arbitration because so much of what the representatives do, at least in cases involving statutory claims, is interpret and argue for a particular application of the law. The next sections will explore the evolution of arbitration from its historical roots, where non-lawyer representation was routine, to its modern iteration, where the increased inclusion of legal issues in arbitration prompted a number of jurisdictions, by rule, decision, or ethics opinion, to declare that representation in arbitration is the practice of law.

II. TRADITIONAL ARBITRATION PRACTICE DID NOT RAISE UNAUTHORIZED PRACTICE OF LAW ISSUES

Arbitration has been an informal alternative to litigation for hundreds of years. Historically, merchants in France, England, and Germany conducted the majority of their business at trade fairs.⁷⁰ Disputes between buyers and sellers at these temporary fairs had to be resolved quickly and finally so that the parties could depart for home. In addition, standards for resolution were necessary so that all disputants would accept the outcome. As a result, trades and industry began

Op. 2008-01, at 4 (2008), *available at* http://www.supremecourtsohio.gov/Boards/UPL/advisory_opinions/UPLAdvOp_08_01.pdf (holding non-lawyer representative in labor arbitration not engaged in the practice of law).

⁶⁹ See Fla. Bar *re* Advisory Op. on Nonlawyer Representation in Sec. Arbitration, 696 So. 2d 1178, 1180 (Fla. 1997) (describing representation activities in arbitration as virtually identical to those occurring in judicial proceedings); Ill. State Bar Ass'n Standing Comm. on Prof'l Conduct, Advisory Op. 13-03, at 7-8 (2013), *available at* <http://www.isba.org/sites/default/files/ethicsopinions/13-03.pdf> (stating FINRA proceedings require pleadings, document exchange, possible discovery, motions, briefs and direct and cross-examination, just as would occur in traditional litigation processes); CONSUMER ARBITRATION R. 25 (Am. Arbitration Ass'n 2014), *available at* <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased> (following the historic practice of permitting non-lawyer representatives in consumer arbitration); COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R. 26 (Am. Arbitration Ass'n 2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 ("Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law."). These widely adopted rules suggest that non-lawyer representation in arbitration is expected.

⁷⁰ See LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 7-21 (1980). Trading often went on for several weeks. It is not surprising, therefore, that disputes would arise as well as the need for a means to adjudicate these disputes. *See id.*

maintaining arbitration tribunals with elected arbitrators to resolve these disputes.⁷¹ Arbitrators or merchant judges were to decide cases by applying custom and usage norms of the parties rather than the law of the land.⁷² By the early seventeenth century, arbitration was the preferred mechanism for resolving these kinds of disputes.⁷³

Merchants brought the arbitration process to the pre-Revolution American colonies.⁷⁴ Merchants served as arbitrators and chambers of commerce developed in part to ensure the institutionalization of the arbitration process.⁷⁵ As communities grew larger and reputation within a particular industry became less important, however, merchants turned to state legislatures and to Congress to ensure enforcement of their arbitration agreements and awards.⁷⁶ Once Congress enacted the 1925 Federal Arbitration Act — which ensured enforcement of arbitration agreements and awards — the use of commercial arbitration increased dramatically.⁷⁷ A short time later, in the 1940s, labor arbitration became

⁷¹ MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 2:4 (Gabriel Wilner ed., 1990).

⁷² See Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON & ORG. 479, 482 (1995) (stating arbitrators were “chosen on the basis of their expertise in matters pertinent to specific disputes”).

⁷³ See *id.* at 481-82. Domke reports that in both Greece and Rome, “agents” represented parties in arbitration proceedings. DOMKE, *supra* note 71, § 2.2. In the early colonial period in America, lawyers were virtually excluded from the arbitration process. Domke refers to rules excluding attorney participation because it “would be fatal to the efficacy of arbitration.” *Id.* § 2.6.

⁷⁴ See 1 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW, AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 4.3.1 (Little, Brown & Co. 1994) (noting that, while colonial America practiced arbitration, it did not have the support of similar statutes and jurisdiction as English arbitration); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 469-71 (1984) (describing colonial merchant arbitration).

⁷⁵ See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 855 (1961).

⁷⁶ Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91, 104. Professor Amy J. Cohen explained that merchants preferred informal procedures because they could bring “a range of social experience and social expertise to bear on legal disputes.” *Id.* Merchants preferred arbitration because it permitted them to “adjust their own economic relations in the marketplace.” *Id.* at 105. The FAA was necessary, though, in order to ensure that agreements to arbitrate and arbitration awards would be honored. *Id.* at 104.

⁷⁷ The Supreme Court has emphasized that the FAA was “designed to promote arbitration.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 (1985) (following the passage of the FAA in 1925, “arbitration was in vogue”); Mentschikoff, *supra* note 75 at 858 (discussing increased use of

popular and remains popular today.⁷⁸ Modern collective bargaining agreements virtually always contain a provision for final and binding arbitration.⁷⁹

Even with the passage of the FAA, commercial and labor arbitration cases rarely reached the courts.⁸⁰ This result is unsurprising for at least two reasons. First, courts continued to show hostility toward arbitration agreements and awards.⁸¹ Thus, few parties expended resources challenging either arbitration agreements or awards in court. Second, disputants participating in labor or commercial arbitration cases had little interest in challenging the enforceability of arbitration agreements or awards. After all, repeat players, like merchants and labor unions, chose arbitration as their primary dispute resolution mechanism because they considered the courts an inadequate forum for the resolution of their disputes.⁸² Repeat player disputants select arbitration

commercial arbitration in the twentieth century).

⁷⁸ ABRAMS, *supra* note 6, at 12-13 (noting arbitration received a boost during World War II when the War Labor Board wrote arbitration clauses into collective bargaining agreements to avoid work stoppages that might have adversely impacted the war efforts and that Congress assisted development as well when, in 1947, it enacted the LMRA, which supported increased use of dispute resolution in labor relations); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 783 (2000) (“Labor arbitration was in general use and became a central feature of labor-management relations in the United States some forty years before the widespread emergence of commercial arbitration during the 1980s.”).

⁷⁹ ABRAMS, *supra* note 6, at 12-13.

⁸⁰ Hayford, *supra* note 78, at 784-85. The FAA’s impact during its first thirty-five years was minimal. Professor Hayford believes this limited usage was due in part to the “prevailing judicial hostility toward commercial arbitration” even after the FAA’s enactment. *Id.*

⁸¹ See, e.g., Shirley A. Wiegand, *Arbitration Clauses: The Good, The Bad, The Ugly*, 47 OKLA. L. REV. 619, 628-36 (1994) (examining the Oklahoma Supreme Court’s resistance to arbitration in the 1970s).

⁸² Even today, entire industries opt out of the traditional legal system, choosing instead to resolve disputes using arbitration. Examples include the cotton, grain and feed, and diamond industries. Each of these industries maintains an internal appeals process. See RULES GOVERNING ARBITRATIONS R. 10 § 3 (W. Cotton Shipper Ass’n 2010), available at <http://www.westerncotton.com/website/wcsa.nsf/pages/4C48BBC246985DFC8625748D007152CA?OpenDocument>; Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Imminent Business Norms*, 144 U. PA. L. REV. 1765, 1771-72 (1996) [hereinafter *Merchant Law*] (showing that National Grain and Feed Association members agree to use arbitration as means to resolve disputes); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 119-20 (1992) [hereinafter *Diamond Industry*] (demonstrating that the diamond industry resolves disputes using arbitration only); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001) [hereinafter *Cotton Industry*] (“Most contracts for the purchase and sale of

because they want a decision maker with expertise in industry custom and norms to resolve their dispute with reference to those norms and customs rather than legal rules.⁸³ Thus, it would be unusual for a disputant to try to avoid arbitration initially or, upon losing, to contest the results in court. Until (and even after) the Court decided the *Steelworkers Trilogy*⁸⁴ of cases in the 1960s, cases related to arbitration rarely made it into court.

For most of the twentieth century, then, arbitration was an informal dispute resolution mechanism providing speedy, cheap, private, and final decisions issued by a decision-maker with expertise in the subject matter of the parties' disputes. Rules of evidence and procedure rarely applied.⁸⁵ As noted above, parties typically represented themselves, and the arbitrators were not always lawyers. Even those disputants who chose to be represented typically selected a non-lawyer. After all, it was *norms and customs*, not *laws* controlling the outcome. Thus, a representative with a reputation for knowledge in the industry offered far more value than a specialist in legal reasoning. The general consensus regarding arbitration, which the Supreme Court articulated in the seminal *Alexander v. Gardner-Denver* case decided in 1974, was that arbitration was "not as complete [as judicial fact-finding]; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination,

domestic cotton, between merchants or between merchants and mills, are neither consummated under the Uniform Commercial Code ("Code") nor interpreted and enforced in court when disputes arise. Rather, most such contracts are concluded under one of several privately drafted sets of contract default rules and are subject to arbitration in one of several merchant tribunals."). None of the rules address party representation during arbitration.

⁸³ See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1015-17 (1999) (noting that in specialized industries, expertise is extremely helpful, but that expertise may create unjustifiable bias when it is not required for the arbitration).

⁸⁴ The *Steelworkers' Trilogy* of cases, which established a legal framework for labor arbitration, include: *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566-69 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-85 (1960); and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596-99 (1960).

⁸⁵ *In re Town of Little Compton*, 37 A.3d 85, 90 (R.I. 2012) (stating that arbitration does not rely on strict use of formal rules of civil procedure or evidence); 3 COMMERCIAL ARBITRATION § 92:1 (2014) ("However, absent a specific agreement, the Federal Rules of Evidence (or state court rules of evidence) are inapplicable"); J.S. Christie, Jr., *Preparing for and Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADVOC. 265, 296 (2008) ("[W]hile arbitration's procedural and evidentiary rules may be relaxed, the absence of an appeal increases the importance of what happens at the arbitration hearing."); see also *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 351-52 (1854); *Brotherhood of R.R. Trainmen v. St. Louis Sw. Ry. Co.*, 380 F.2d 603, 604 (D.C. Cir. 1967).

and testimony under oath, are often severely limited or unavailable.”⁸⁶ Moreover, parties could not and should not ask arbitrators to decide legal questions — after all, arbitrators were experts in the “law of the shop” not the “law of the land.”⁸⁷

The Supreme Court’s description of arbitration in *Gardner-Denver* certainly reflected existing labor arbitration practice — less is known about commercial arbitration during that time period because, unlike labor arbitration, a commercial arbitrator typically does not write a reasoned opinion reflecting what transpired during the arbitration hearing.⁸⁸ Certainly, this description reflected the kind of arbitration taking place in the diamond, cotton, and grain and feed industries where arbitrators were to engage solely in contract interpretation.⁸⁹

Using labor arbitration as a basis for understanding why lawyers may now be necessary in arbitration makes sense because, over the last thirty years, labor has seen dramatic changes in the subject matter of arbitrated disputes.⁹⁰ In traditional labor relations, the “arbitration” process took place as the culmination of several steps. Most collective bargaining agreements outlined a grievance process that first requires the grievant to file a claim identifying a term of the collective bargaining agreement that he believes has been violated.⁹¹ For example, if the company terminated the grievant, the grievant’s initial claim would

⁸⁶ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974).

⁸⁷ *Id.* at 57.

⁸⁸ Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 104-05 (1999) (detailing AAA’s ongoing hostility to written opinions in commercial arbitrations).

⁸⁹ See Bernstein, *Cotton Industry*, *supra* note 82, at 1724 (stating that merchant tribunals charged with resolving disputes in arbitration); Bernstein, *Diamond Industry*, *supra* note 82, at 119-22 (demonstrating that the diamond industry resolves disputes using arbitration only and in accord with industry norms); Bernstein, *Merchant Law*, *supra* note 82, at 1771-72 (showing that the National Grain and Feed Association members agree to use arbitration as means to resolve disputes applying industry norms). See generally Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2351-55 (2008) (noting that the diamond industry has consistently rejected courts in favor of a private monitoring system).

⁹⁰ Labor arbitration has evolved from its original conception as an alternative to strikes to a forum that is a substitute for litigation. See Malin, *supra* note 10, at 87. As Malin notes, “Arbitrators can no longer apply the contract and ignore the law.” *Id.*

⁹¹ 13 EMP’T COORDINATOR PERS. MANUAL § 7:47 (2014). A grievance claim should include, “general facts, such as identification of the union, the name of the union representative, a grievance case number, and the date the grievance was submitted; the aggrieved employee’s name and address, employee number, department, shift, supervisor, union ledger or card number, and similar information; a statement of the grievance; the contract clause that is alleged to have been violated, if applicable” *Id.*

likely be that the termination did not satisfy the collective bargaining agreement's requirement that termination occur only where there is "just cause." Thus, the grievance arbitration, as well as the steps leading up to the arbitration, would consider whether the employer's actions satisfied the contractual just cause standard. During the step grievance process, as well as during the arbitration hearing, non-lawyer management and union officials routinely represented the parties.⁹²

Representation in traditional labor grievance arbitration has always shared some attributes of legal representation in courts. In a typical grievance hearing, advocates presented evidence, offered advice about settlement, cross-examined witnesses, and wrote post-hearing briefs to the arbitrator.⁹³ Yet, historically, this type of non-lawyer representation did not trouble most courts and state ethics committees because labor arbitrators were limited to interpreting and applying the parties' collective bargaining agreement, and were not charged with interpreting or applying statutory law.⁹⁴ Some legislatures grew sufficiently

⁹² In the labor arbitration context, non-lawyers are those individuals who are not licensed to practice law in any jurisdiction. It was and is commonplace for non-lawyers to represent parties in the labor arbitration process. In securities and other types of arbitration, non-lawyers often represent parties in the arbitration process. In fact a task force on alternative dispute resolution in employment adopted a rule that employees using arbitration "should have the right to be represented by a spokesperson of their own choosing." A DUE PROCESS PROTOCOL FOR MEDIATION & ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMP'T RELATIONSHIP B(1) (Nat'l Acad. Arbitrators 1995). Subsequently drafted protocols related to consumer and health care disputes maintain similar provisions. Neither AAA nor JAMS, two of the major arbitration services providers, will accept a claim for arbitration if the company involved in the arbitration does not follow the various due process protocols. Thus, non-lawyer representation in arbitration is not only expected, it is planned for by the organizations administering the arbitration process. Principle 9 of the Consumer Due Process Protocol is virtually identical to B(1) in the Employment Protocol: "All parties participating in processes in ADR programs have the right, at their own expense, to be represented by a spokesperson of their own choosing." CONSUMER DUE PROCESS PROTOCOL princ. 9 (Am. Arbitration Ass'n 1998). DUE PROCESS PROTOCOL ON HEALTHCARE DISPUTES princ. 6 (Am. Arbitration Ass'n 1998) is also virtually identical. Other organizations adopting the right be counseled by a non-lawyer of the party's choosing include: RULES OF CONDITIONALLY BINDING ARBITRATION 9 (Council of Better Bus. Bureaus 2014); COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R. 26 (Am. Arbitration Ass'n 2013); and NASD R. 10316, *superseded by* CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES R. 12208(c) (Fin. Indus. Regulatory Auth. 2008). Interestingly, the drafters of the Consumer Due Process Protocol acknowledged that the use of non-lawyer representatives in arbitration has raised concerns about unauthorized practice of law but declined to take a position on that issue. CONSUMER DUE PROCESS PROTOCOL princ. 9 cmt.

⁹³ For more on labor arbitration hearings, see generally ABRAMS, *supra* note 6, at 127-54.

⁹⁴ *In re Town of Little Compton*, 37 A.3d 85, 90 (R.I. 2012) (stating while "most

concerned about the issue of non-lawyer representatives in the collective bargaining process that they enacted statutes to address the question. For example, Nebraska explicitly exempted non-lawyers practicing in grievance arbitration from unauthorized practice of law prosecution, stating that “non-lawyers participating in labor . . . arbitrations . . . arising under collective bargaining rights or agreements or state or federal law” is not the unauthorized practice of law as long as state or federal evidence rules do not apply.⁹⁵ Another statutory approach did not define unauthorized practice of law, but provided an exception for those non-lawyers participating in labor arbitrations arising under collective bargaining rights or agreements.⁹⁶ California, taking another approach, did not assess whether non-lawyers participating in labor arbitrations engaged in the unauthorized practice of law; rather it simply permitted non-lawyers to represent parties in labor arbitrations.⁹⁷ California’s singular approach failed to define unauthorized practice of law, but stated that representation of a party to an arbitration arising under a collective bargaining agreement is permissible “whether [or not] that person is licensed to practice law” in California.⁹⁸

In the 1980s, however, the type of disputes subject to arbitration began to change. Employers began drafting agreements to arbitrate all kinds of statutory discrimination claims in an effort to reduce litigation costs and ensure quick and efficient resolution of these disputes. Although it was initially unclear whether courts would enforce these agreements, once the Court concluded that one-shot players could vindicate their statutory rights in arbitration, as it did in *Gilmer v. Interstate Johnson Lane Corp.*,⁹⁹ the imposition of arbitration agreements by repeat players on employees grew dramatically.¹⁰⁰ As a result, parties

other states have not considered whether non-lawyer representation in labor arbitration is the unauthorized practice of law,” those that have, permitted it, because the representation was not viewed as the practice of law).

⁹⁵ NEB. CT. R. § 3-1004(E).

⁹⁶ CONN. GEN. STAT. ANN. § 2-44a (West 2014); UTAH SUP. CT R. PROF’L PRACTICE R. 14-802 (“Whether or not it constitutes the practice of law, the following activity by a non lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted: . . . (c)(10) Participating in labor . . . arbitrations . . . arising under collective bargaining rights or agreements as otherwise allowed by law.”); WASH. R. CT. GEN. R. 24(b)(5).

⁹⁷ CAL. CIV. PROC. CODE §§ 1282.4(a), (h) (West 2014), amended by S.B. 1304, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

⁹⁸ *Id.*

⁹⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 35 (1991).

¹⁰⁰ Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative)*

began routinely asking that arbitrators interpret and apply the law of Title VII, the ADEA, the Civil Rights Act of 1991 and other statutes.¹⁰¹ Eventually businesses caught on and began imposing arbitration agreements on consumers. The Court viewed these agreements with favor as well, enforcing arbitration agreements involving, among other statutes, the Truth in Lending Act.¹⁰² The Court expressed a high level of comfort with arbitrators adjudicating statutory discrimination claims, as well as other statutory claims. In *Gilmer*, for example, the Court reiterated that *Gardner-Denver's* view of arbitration "has been undermined by [the Court's] recent arbitration decisions."¹⁰³ In *Wright v. Universal Maritime Service Corp.*, decided in 1998, the Court rejected reliance on any decision that expressed hostility toward the enforcement of arbitration agreements, stating that, over the past two decades, the Court's attitude toward arbitration had undergone "radical change."¹⁰⁴

More recently, the Court broadened its receptivity to the use of arbitration in the unionized workplace to resolve statutory claims. In *14 Penn Plaza LLC v. Pyett*, the Court held that a collectively bargained arbitration clause requiring arbitration of statutory claims should be enforced if the clause clearly and unmistakably identified the claims that were to be arbitrated.¹⁰⁵ Although *Pyett* did not overturn *Gardner-Denver* because the arbitration clause in *Gardner-Denver* did not specifically encompass statutory claims, the Court absolutely rejected

Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 591-92; Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?*, DISP. RESOL. J., Nov. 1998, at 40, 42; Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 899-900 (2004) (reporting that "the American Arbitration Association (AAA) has claimed that between 1997 and 2002, the number of employees covered by AAA employment arbitration plans grew from 3 million to 6 million").

¹⁰¹ *Gilmer*, 500 U.S. at 35 (holding that an employment discrimination claim under the ADEA is arbitrable); *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 563 (6th Cir. 2008) (finding Uniformed Services Employment and Reemployment Rights Act claim arbitrable); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (concluding that allegations of employment discrimination under Title VII are arbitrable).

¹⁰² *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 83, 92 (2000) (concluding that TILA claim must be arbitrated); *Gilmer*, 500 U.S. at 30-35 (concluding that ADEA claim must be arbitrated); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744, 752 (9th Cir. 2003) (holding that statutory discrimination claims could be arbitrated).

¹⁰³ *Gilmer*, 500 U.S. at 34 n.5.

¹⁰⁴ *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 77 (1998).

¹⁰⁵ *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009).

the outdated views of arbitration that the *Gardner-Denver* Court espoused.¹⁰⁶ According to the *Pyett* Court, *Gardner-Denver* perpetuated a number of misconceptions about arbitration including that the fact-finding in arbitration is not equivalent to judicial fact-finding, that arbitrators are incompetent to decide federal statutory claims and that the resolution of statutory or constitutional issues is “a primary responsibility of the courts.”¹⁰⁷ Now, the *Pyett* Court reiterated, “arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision” and that “there is no reason to assume at the outset that arbitrators will not follow the law.”¹⁰⁸ Moreover, “[a]n arbitrator’s capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA.”¹⁰⁹ The Court’s view of arbitration, following *Pyett*, appears to have come full circle — to the point where arbitrators are considered well-suited to resolving complex statutory interpretation and legal questions, appropriately examining and then applying legal principles to the facts presented in the arbitration process.¹¹⁰

¹⁰⁶ The Court stated, “We recognize that apart from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta that were highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.” *Id.* at 265.

¹⁰⁷ *Id.* at 268.

¹⁰⁸ *Id.* (citing *Shearson v. McMahon*, 482 U.S. 220, 232 (1987) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 634 (1985)).

¹⁰⁹ *Shearson v. McMahon*, 482 U.S. 220, 269 (1987).

¹¹⁰ Following *Wright* and *Pyett*, courts examine grievance arbitration and non-discrimination clauses in collective bargaining agreements to determine whether those clauses “clearly and unmistakably” waive the employee’s right to pursue statutory claims in court. If the court determines that the union and employer clearly and unmistakably intended arbitration of statutory claims, the court orders the parties to arbitrate, as long as the union does not block the employee from proceeding on his own in arbitration if the union does not wish to pursue the claim. *See Thompson v. Air Transp. Int’l Liab. Co.*, 664 F.3d 723, 727 (8th Cir. 2011) (requiring arbitration of unionized employee’s FMLA claims); *Acevedo v. Tishman Speyer Props. LP*, No. 12 Civ. 1624(LTS)(AJP), 2013 WL 1234953, at *2 (S.D.N.Y. March 26, 2013); *Duraku v. Tishman Speyer Props. Inc.*, 714 F. Supp. 2d 470, 473 (S.D.N.Y. 2010) (requiring arbitration of statutory discrimination claims); *Barnica v. Kenai Peninsula Borough Sch. Dist.*, 46 P.3d 974, 977-78 (Ala. 2002) (holding that grievant must arbitrate state statutory discrimination claim pursuant to CBA’s grievance and arbitration procedure). Professor Martin Malin attempts to explain the Court’s *Pyett* ruling as the culmination of labor arbitration’s “schizophrenic existence.” According to Malin, labor arbitration continues to be the substitute for strikes and other workplace disputes “while accommodating an additional role as a substitute for litigation of public law claims.” Malin, *supra* note 10, at 59.

Perhaps surprisingly, not one of the cases permitting arbitrators to adjudicate statutory and legal claims, as distinguished from contractual interpretation claims, raised a concern about who would be representing parties in these arbitrations. Although the nature of the arbitration changed as parties were compelled to raise more legal questions in arbitration, and the nature of the parties changed from repeat players to one-shot players, neither the parties nor the courts raised questions about whether the new arbitration practice, now requiring knowledge of the law, was the practice of law.

III. THE LAW AND NON-LAWYER REPRESENTATION IN ARBITRATION

How could this new type of arbitration not require representatives to engage in the practice of law? While initially most jurisdictions paid little attention to the question, some ethics committees and courts have addressed it. Applying state UPL laws, some jurisdictions have found that non-lawyers representing clients in arbitration are engaged in the unauthorized practice of law,¹¹¹ while others have concluded that such representation is not an unauthorized practice of law.¹¹² An examination of the courts' reasoning in these cases offers a basis for

¹¹¹ E.g., *NISHA, LLC v. Tribuilt Constr. Grp., LLC*, 2012 Ark. 130, at 12-13, 388 S.W.3d 444, 451 (holding a non-lawyer representing a corporation in an arbitration constitutes the unauthorized practice of law); Ala. State Bar Office of Gen. Counsel Disciplinary Comm'n, Formal Op. R0 2014-01, at 1 (2014) (stating that non-lawyer representing client in court-ordered arbitration is engaging in the unauthorized practice of law). The Arizona Bar issued an opinion interpreting Arizona Supreme Court Rule 31a to prohibit a non-lawyer from representing a party in an arbitration in Arizona. State Bar of Ariz., *Unauthorized Practice of Law Advisory Op. 04-03*, at 5-6 (2004), available at <http://www.azbar.org/media/75247/uplaa0403.pdf>. Responding to the question whether a non-lawyer may represent a party in an AAA administered arbitration proceeding, the Arizona UPL Committee stated,

[T]he representation of another in a legal proceeding is one of the most fundamental elements of practicing law. Only representation by a lawyer is authorized for representation before a tribunal so as to assure that the client is afforded all of the protections of the Rules of Professional Conduct, as well as the evidentiary privileges of attorney/client and work product. None of those essential safeguards are available if a non-lawyer were to represent a client in a legal proceeding. Balancing the need for access to justice with assuring competent representation, the Arizona Supreme Court has not granted blanket authority to any non-lawyers to represent clients in legal proceedings.

Id.

¹¹² See, e.g., *In re Town of Little Compton*, 37 A.3d 85, 95 (R.I. 2012) (concluding a non-lawyer representing a union in a grievance arbitration does not constitute the unauthorized practice of law).

reconciling seemingly inconsistent conclusions. Those courts concluding that a non-lawyer is not practicing law when representing a client in arbitration rely on an outdated description of arbitration to justify their conclusion. By contrast, courts finding non-lawyers liable for unauthorized practice of law when representing parties in arbitration appear to critically assess the substance of the arbitration proceeding to determine whether the representative is engaging in the practice of law rather than relying on outdated descriptions of the grievance arbitration process. A few examples from the various states are illustrative.

Florida, Illinois, Virginia, Alabama, and Arkansas carefully scrutinized the arbitration process to determine whether a non-lawyer engages in the unauthorized practice of law when representing a party in arbitration. The Florida Bar Standing Committee on the Unauthorized Practice of Law issued an opinion that non-lawyers (i.e., persons who are not licensed to practice law in any jurisdiction) retained for compensation to represent investors in securities arbitrations are engaged in the unauthorized practice of law.¹¹³ The Committee found that the non-lawyer's activities in this type of representation constitute the practice of law because the non-lawyer must engage in substantial legal analysis.¹¹⁴ Moreover, the non-lawyer would engage in the unauthorized practice of law by engaging in discovery, including depositions; presenting opening and closing arguments, as well as presenting and objecting to evidence; examining witnesses; and filing claims, answers, and counterclaims.¹¹⁵ Perhaps most significantly, the Committee worried that the non-lawyer would

¹¹³ Fla. Bar *re* Advisory Op. on Nonlawyer Representation in Sec. Arbitration, 696 So. 2d 1178, 1180 (Fla. 1997); *see also* AM. BAR ASS'N, COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 67-70 (1995).

¹¹⁴ This analysis would include determining:

- (1) [W]hether the investor is compelled to arbitrate under any investor-broker agreement;
- (2) the effect of eligibility rules and statutes of limitations;
- (3) the scope of the arbitrator's authority;
- (4) whether to arbitrate or settle the dispute before filing a claim;
- (5) the merits of specific claims or defenses;
- (6) whether attorneys or expert witnesses should be hired to assist in the arbitration;
- (7) whether the investor should file a petition to stay the arbitration; and
- (8) the possibility of related or alternative civil actions.

Fla. Bar re Advisory Op., 696 So. 2d at 1180.

¹¹⁵ The Committee also found that the non-lawyer would be engaging in the unauthorized practice of law because, even after the arbitration concluded, the non-lawyer might be expected to confirm, vacate or obtain modification of the arbitration award through a court, rather than an arbitral, proceeding. *Id.*

be engaging in the unauthorized practice of law because “the investor places great reliance on the representative to properly prepare and present his or her case.”¹¹⁶ The Committee stated that the non-lawyer’s performance of legal tasks, which are unregulated, must be enjoined because of the potential harm from “incompetent and unethical representation by compensated non-lawyers which cannot otherwise be remedied.”¹¹⁷ Taken together, the Committee easily concluded that a non-lawyer representing an investor in a securities arbitration involving claims against a broker would be engaging in the unauthorized practice of law.¹¹⁸

Similarly, in Illinois, the State Bar Association Commission on Professional Ethics opined that, while a typical Financial Industry Regulatory Authority (“FINRA”) securities arbitration proceeding may not involve the same degree of legal complexity and formality as litigation, it nevertheless requires a representative in the proceeding to use the kind of legal knowledge or skill that would constitute the practice of law.¹¹⁹ According to the Commission, a FINRA proceeding requires legal expertise because it is adversarial and requires pleadings, document exchange, possible discovery, motions, briefs, and direct and cross-examination. In addition, because FINRA proceedings typically involve securities laws, a representative must understand such laws in order to represent a disputant in a FINRA proceeding.¹²⁰ In Virginia, the

¹¹⁶ *Id.* The Committee noted that lack of recourse against substandard non-lawyer practice is also problematic. *Id.* at 1181.

¹¹⁷ *Id.* at 1183.

¹¹⁸ *Id.* at 1184 (“Accordingly, we enjoin non-lawyers from representing investors in securities arbitration proceedings for compensation.”).

¹¹⁹ Ill. State Bar Ass’n Standing Comm. on Prof’l Conduct, Advisory Op. 13-03, at 7 (2013), available at <http://www.isba.org/sites/default/files/ethicsopinions/13-03.pdf>. This decision was consistent with previous Commission statements. In a response to a request by the Securities Industry Conference on Arbitration for input on the use of non-attorney representatives in securities arbitration, the Illinois State Bar Association stated that “non-attorney representation constitutes the unauthorized practice of law.” See *Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-attorneys*, 22 FORDHAM URB. L.J. 507, 553-54 ex. 6 (1995) [hereinafter *SICA Report*].

¹²⁰ Advisory Op. 13-03, at 7-8. The Commission distinguished an Illinois Appellate Court decision in *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, 801 N.E.2d 1017, 1029 (Ill. App. Ct. 2003), stating that an out-of-state attorney could represent a party in an Illinois arbitration. The Commission emphasized that the court’s decision not to find an unauthorized practice of law, while relying to some degree on the differences between arbitration and litigation, also decided only whether an out-of-state lawyer engaged in an unauthorized practice of law, a matter the rules of professional conduct explicitly addresses, not whether a non-lawyer would be engaging in an unauthorized practice of law for the same behavior. The Commission also noted that the rule

State Bar's unauthorized practice of law committee concluded that an accountant who is not licensed to practice law cannot represent a party in a securities arbitration proceeding for similar reasons.¹²¹ In Alabama, the State Bar found that a non-lawyer engaged in the unauthorized practice of law when representing a party in arbitration.¹²² The State Bar reached this conclusion after reviewing what arbitration representation required: introducing exhibits, conducting witness examination, making legal arguments, and giving legal advice.¹²³ These activities constitute the practice of law, said the Bar, because they "generally require the skill and judgment of a licensed attorney."¹²⁴

Recently, the Arkansas Supreme Court weighed in on the issue, finding that a corporate officer, who was not a licensed lawyer, engaged in the unauthorized practice of law when he represented a corporation in arbitration proceedings.¹²⁵ The Arkansas Supreme Court found that the arbitration process bears significant indicia of legal proceedings, with its right to be heard, present evidence, and cross-examine witnesses at the hearing.¹²⁶ When considered together with the finality of the arbitration award and that in Arkansas, as other places, a corporation cannot appear in proceedings without representation, the Court concluded that non-lawyer corporate employees, officers, or directors engage in the unauthorized practice of law if they represent a corporation in an arbitration.¹²⁷

In addition to these bar committee opinions, the Securities Industry Conference on Arbitration ("SICA"),¹²⁸ which prepared a report on non-

governing out-of-state lawyer behavior *limited* the right of that lawyer to engage in arbitral practice in Illinois. It would be anomalous to read the rule to limit out-of-state attorney behavior but "at the same time view the Rule as permitting, without limitation, the representation of parties by non-lawyers in such arbitrations as not constituting the practice of law." Advisory Op. 13-03, at 6-7.

¹²¹ Va. State Bar Standing Comm. on Unauthorized Practice, Unauthorized Practice of Law Op. 214 (2009), available at <http://www.vsb.org/site/regulation/upl-opinion-214> (emphasizing that the need for the accountant to apply law to the facts in this kind of representation rendered the representation the unauthorized practice of law).

¹²² Ala. State Bar Office of Gen. Counsel Disciplinary Comm'n, Formal Op. R0 2014-01 (2014), available at <https://www.alabar.org/assets/uploads/2014/08/2014-01.pdf>.

¹²³ *Id.* at 4.

¹²⁴ *Id.*

¹²⁵ NISHA, LLC v. TriBuilt Constr. Grp., LLC, 2012 Ark. 130, at 12-13, 388 S.W.3d 444, 451.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ SICA was formed to review securities industry self-regulatory organizations ("SROs") arbitration procedures and develop a code of arbitration procedures for securities disputes. After the SROs adopted the code, SICA continues to meet to review

lawyer representation in arbitration following a two-year study of the question, concluded that non-lawyers engage in the unauthorized practice of law when they represent parties in securities arbitration.¹²⁹ In the 1980s and 1990s, the Code of Arbitration Procedure permitted parties to use the representative of their choice to advocate on their behalf in arbitration.¹³⁰ As a result, a number of non-lawyer representative firms (“NARs”) formed.¹³¹ In 1991, the lawyers and brokerage firms began to complain to SICA that the NARs were engaging in the unauthorized practice of law.¹³² SICA examined the NAR firms’ activities to determine the accuracy of the complaining parties’ accusations.¹³³

SICA ultimately concluded that, for several reasons, NARs engaged in the unauthorized practice of law.¹³⁴ First, while acknowledging that NARs might increase access to arbitration by advertising to prospective clients and accepting smaller cases, SICA concluded that NAR advertising was ultimately problematic because it was misleading.¹³⁵ Among other things, some NARs represented that their organizations included lawyers, when they did not; collected non-negotiable up-front fees, which lawyers stated they would not do; and entered settlements to obtain fees, even when settlements were not in the client’s best interests.¹³⁶ Moreover, SICA had ethical concerns about the NARs operations. SICA concluded that the lack of attorney-client privilege, liability insurance, and ethical standards governing NAR behavior could harm consumers.¹³⁷ Finally, SICA concluded that modern securities arbitration practice requires “many legal judgments,” including motions to vacate arbitration awards, analysis of complex legal issues like application of statutes of limitations, admissibility of client income tax forms, and issues of relevance or

and evaluate how the Code operates in practice. SICA is composed of representatives of all SROs that sponsor customer/broker-dealer arbitration programs, the Securities Industry Association (“SIA”), and four public representatives who have staggered four-year terms. See *SICA Report*, *supra* note 119, at 509-10.

¹²⁹ *Id.* at 522 (“[S]olicitation of clients for representation in arbitration . . . preparing claims in arbitration, and appearing on behalf of a party at a hearing . . . constitute the practice of law. The performance of these functions by [non-attorney representatives] . . . may constitute the unauthorized practice of law.”).

¹³⁰ See NAT’L ASS’N OF SEC. DEALERS, INC., CODE OF ARBITRATION PROCEDURE § 27 (1995) (“All parties shall have the right to representation by counsel at any stage of the proceedings.”).

¹³¹ See *SICA Report*, *supra* note 119, at 512 (discussing rise in the number of NARs).

¹³² *Id.*

¹³³ See *id.*

¹³⁴ *Id.* at 522.

¹³⁵ See *id.*

¹³⁶ *Id.* at 517-18.

¹³⁷ *Id.* at 518-22.

privilege.¹³⁸ Thus, SICA concluded that securities arbitration practice is the practice of law.¹³⁹ SICA ultimately recommended a rule that permitted non-lawyers to represent clients in securities arbitration only if the state in which the non-lawyer engaged in the representation permitted such representation. FINRA adopted the rule and it remains the rule today.¹⁴⁰

A. Non-lawyer Representatives Held Not To Engage in the Practice of Law

By contrast, jurisdictions finding that non-lawyer representatives do not engage in the unauthorized practice of law when representing a party in an arbitration when they use an outdated understanding of the arbitration process to reach that conclusion. For example, the Rhode Island Supreme Court recently held in *In re Town of Little Compton* that a union's non-lawyer agent, an individual not licensed to practice law in any jurisdiction, did not engage in the unauthorized practice of law when he represented the union in a labor arbitration hearing even though he engaged in many activities, such as direct and cross-examination of witnesses, that could be considered the practice of law.¹⁴¹ Like the jurisdictions that have enacted statutes to exclude non-lawyers in labor arbitrations from UPL prosecution, the Rhode Island Supreme Court emphasized that its holding was limited only to the question of whether a non-lawyer public labor union employee's representation of a union in a grievance arbitration constituted the unauthorized practice of law "when a collective-bargaining agreement is the governing document dictating arbitration as the mechanism for conflict resolution."¹⁴² The court reviewed the history of labor arbitration and the findings of other courts that previously examined the question. Acknowledging that few courts and legislatures have addressed the question, the Court ultimately concluded that the non-lawyer's representation was not an unauthorized practice of law because non-lawyer representation in labor arbitrations is commonplace in Rhode Island.¹⁴³ Moreover, the Court emphasized that a UPL finding is unnecessary in this case because "labor disputes are unique in that the

¹³⁸ *Id.* at 521.

¹³⁹ *Id.* at 524.

¹⁴⁰ CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES R. 12208(c) (Fin. Indus. Regulatory Auth. 2008), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4114.

¹⁴¹ *In re Town of Little Compton*, 37 A.3d 85, 94-95 (R.I. 2012).

¹⁴² *Id.* at 88.

¹⁴³ *Id.* at 92.

'law of the shop' rather than strict adherence to legal principles typically controls."¹⁴⁴ Citing *Gardner-Denver*, the court emphasized that the rules of procedure and evidence typically do not apply and that grievance arbitration fact-finding is different than judicial fact-finding.¹⁴⁵ The court also speculated that requiring both sides to obtain legal representation would increase costs and would also diminish the informality and flexibility of the arbitration process.¹⁴⁶ Finally, the court emphasized that the Rhode Island legislature has permitted non-lawyer representation in other settings, such as workers' compensation and unfair labor practice proceedings.¹⁴⁷ Acknowledging that the union agent's activities during the arbitral hearing were of the type that would normally be considered the practice of law, the court nevertheless concluded that, given the weight of the other factors, on balance, the union agent's actions should not be considered the practice of law.¹⁴⁸

The *Compton* decision relies heavily on the traditional view of labor arbitration — the kind of labor arbitration that was routine in the 1960s or 1970s. The citations to *Gardner-Denver* and the *Steelworkers' Trilogy* and the recitation of the outmoded view that arbitrators know and apply the "law of the shop" not the "law of the land" clearly support the court's decision but seem misplaced given the Supreme Court's subsequent rejection of those principles as outdated.¹⁴⁹ The *Compton* decision rests on principles that modern courts have abandoned and the decision works hard to avoid a conclusion that the non-lawyers' activities are not the practice of law because the opposite result would turn traditional labor arbitration practice on its head.¹⁵⁰

Interestingly, the Rhode Island Bar Association, which filed an amicus brief, raised the concern identified in this Article — that non-lawyer union representatives should not be permitted to represent a party in an arbitral proceeding if that party's claim involved claims regarding individual rights, such as employment discrimination claims. The Bar Association stated:

¹⁴⁴ *Id.* at 93.

¹⁴⁵ *Id.* at 92-93 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)).

¹⁴⁶ *Id.* at 93.

¹⁴⁷ *Id.* at 93-94.

¹⁴⁸ *Id.* at 95. Note that the court reserved the right to decide in the future the general issue of whether or not non-lawyers may participate in public grievance arbitration. *Id.*

¹⁴⁹ See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009).

¹⁵⁰ Compare *Compton*, 37 A.3d at 94-95 (taking the outdated view that labor arbitration resolves contractual rather than statutory issues and thus does not require legal expertise), with *Pyett*, 556 U.S. at 268 (describing modern labor arbitration as requiring an arbitrator to interpret and apply statutes).

RIBA is aware of precedent from the United States Supreme Court [*Pyett*] that permits a collective bargaining agreement between union and employer to require union members to pursue as grievances claims that would otherwise have validity in formal legal proceedings (age discrimination claims, for example). While RIBA acknowledges that a lay representative may generally represent the interests of a union in a grievance arbitration proceeding, RIBA is concerned with non-lawyers being given the right to “litigate” such claims on behalf of individual union members in the context of a grievance arbitration proceeding when individual rights may be affected by the proceeding.¹⁵¹

While the Bar Association was not sure where to draw the line between “run-of-the-mill” union-management issues, such as the one at issue in this case, and cases involving the individual rights of the grievant, it cautioned the court to rule as narrowly as possible so as to leave open future UPL claims, should they be necessary. The Bar Association stated that the decision should not permit “a non-attorney to essentially litigate an individual’s statutorily protected rights. RIBA’s view is that non-attorneys are not, and cannot be, qualified to litigate such claims; this work must be performed by a licensed attorney.”¹⁵²

The Board on the Unauthorized Practice of Law of the Supreme Court of Ohio issued an advisory opinion along the lines of the *Compton* decision. The Ohio opinion stated that a non-lawyer labor representative may represent a union in an arbitration process “as long as he/she do[es] not engage in those activities that equate to the practice of law.”¹⁵³ Like the Rhode Island Supreme Court, the Ohio Board cited decades old labor arbitration cases, including one of the *Steelworkers’ Trilogy* cases, as well as *Gardner-Denver*.¹⁵⁴ The Board also described the traditional labor arbitration process — incomplete fact-finding, limited

¹⁵¹ Amicus Brief of the Rhode Island Bar Association at 2-3, *Compton*, 37 A.3d. 85 (No. SU-2011-101), 2011 WL 9557939, at *2-3.

¹⁵² *Id.* at 12.

¹⁵³ Bd. on the Unauthorized Practice of Law of The Sup. Ct. of Ohio, Advisory Op. 2008-01, at 3 (2008), available at http://www.supremecourtofohio.gov/Boards/UPL/advisory_opinions/UPLAdvOp_08_01.pdf. Note that in a prior opinion, however, the Ohio Supreme Court concluded that drafting collective bargaining agreements was the practice of law and, therefore, could not be handled by a non-lawyer but that federal labor laws did not preempt state efforts to prosecute UPL violations. *Ohio State Bar Ass’n v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 112 Ohio St. 3d 107, 112, 2006-Ohio-6511, 858 N.E.2d 372, 377.

¹⁵⁴ Advisory Op. 2008-01 at 3.

use of evidence and procedural rules, and other limitations on due process.¹⁵⁵ Ultimately describing the grievance arbitration process as a mere extension of the collective bargaining agreement, the Board concluded that it was proper to permit a non-lawyer union agent to represent a party in arbitration.¹⁵⁶ Like the Rhode Island Supreme Court, the Ohio Board may have permitted the possible problematic consequences of reaching a different conclusion to impact its ruling. Analyzing the issue disingenuously may put off the problem to another day, but certainly in no way serves the interests of the parties to the arbitration process, who may well need legal representation in order to succeed or, at the least, receive a fair hearing on their claim.

B. Out-of-State Lawyer Representation of Arbitration Party Found to Be the Practice of Law

Courts in other jurisdictions have weighed in on whether representation of clients in arbitration is the practice of law when considering whether an out-of-state lawyer has engaged in the unauthorized practice of law by representing a party to an arbitration in another state.¹⁵⁷ While not directly relevant because the unlicensed representatives are licensed lawyers in other states and thus more likely to possess the kind of legal knowledge necessary to represent a party in arbitration, these cases nevertheless shed some light on whether ethics boards view arbitration representation as the practice of law. As with the cases involving non-lawyers representing parties in arbitration, those courts using a modern understanding of arbitration routinely held that the out-of-state lawyer engaged in the unauthorized practice of law when representing a party in an out-of-state arbitration because

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 5 (“The union is essentially representing itself in a process outlined in a private agreement requiring disputes to be resolved through alternative dispute resolution in lieu of litigation.”).

¹⁵⁷ See, e.g., *Williamson, P.A. v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982) (finding New Jersey law firm was not engaged in unauthorized practice of law representing a client in arbitration proceedings in New York); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (finding attorneys licensed in New York engaged in unauthorized practice of law in California in preparing client for arbitration); *Fla. Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003) (finding attorney who was not member of state bar engaged in unauthorized practice of law in representing client in securities arbitration proceedings); *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52, 2004-Ohio-6901, 822 N.E.2d 348 (holding attorney not licensed in Ohio engaged in unauthorized practice of law by representing Ohio clients in securities arbitration proceedings).

representation of a party to an arbitration requires understanding the law of the jurisdiction in which the lawyer practiced.¹⁵⁸

Whether an out-of-state lawyer's representation of a client in arbitration in another state might be the unauthorized practice of law first arose in *Birbrower v. Superior Court*.¹⁵⁹ In this seminal case, the California Supreme Court held that two New York lawyers engaged in the unauthorized practice of law when they prepared a California client for an arbitration that would take place in California.¹⁶⁰ Reasoning that negotiation and preparation for arbitration involve strategizing and providing legal advice about California law, the Court concluded that preparation for arbitration was the practice of law.¹⁶¹ The California legislature eventually reversed *Birbrower* by enacting legislation that permits a lawyer not licensed in California to represent a client in a California arbitration if the lawyer submits credentials to the parties and the arbitrator and maintains local counsel. The case, nevertheless, is relevant because it provides guidance for evaluating whether the actual representation during an arbitration hearing constitutes the practice of law.¹⁶²

Other jurisdictions followed the original *Birbrower* holding. In Ohio, the Supreme Court held that out-of-state lawyers representing clients in arbitration engage in the unauthorized practice of law.¹⁶³ In *Disciplinary Counsel v. Alexicole, Inc.*, the lawyer was charged with the unauthorized practice of law when he provided legal advice to an Ohio client about filing a claim for a violation of securities law.¹⁶⁴ The Court found that an unlicensed lawyer who offers such advice or provides "legal services, including representation on another's behalf during discovery, settlement negotiations, and pretrial conferences to resolve claims of legal liability," engages in the unauthorized practice of law.¹⁶⁵ Moreover, the Court stated, prohibitions against representation extend not only to arbitration, but also to any "other legal or quasi-legal

¹⁵⁸ *Birbrower*, 949 P.2d at 7 (finding that New York law firm engaged in the unauthorized practice of law by extensive participation in arbitration proceedings in California); *Rapoport*, 845 So. 2d at 877 (concluding that an attorney licensed in Washington D.C. engaged in the unauthorized practice of law when he performed the traditional tasks of the lawyer in arbitration proceedings in Florida).

¹⁵⁹ *Birbrower*, 949 P.2d at 2.

¹⁶⁰ *Id.* at 1-2.

¹⁶¹ *Id.* at 7.

¹⁶² CAL. CIV. PROC. CODE § 1282.4 (West 2014).

¹⁶³ *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52, 53, 2004-Ohio-6901, 822 N.E.2d 348, 350.

¹⁶⁴ *Id.* at 52.

¹⁶⁵ *Id.* at 53.

proceeding, including any terms and conditions of a settlement of any dispute.”¹⁶⁶

Similarly, in *Florida Bar v. Rapoport*, a securities arbitration lawyer who gave legal advice, prepared and submitted claims, represented clients and advertised his ability to represent clients in arbitral proceedings was engaged in the “traditional tasks of the lawyer” and, therefore, was liable for engaging in the unauthorized practice of law.¹⁶⁷

C. *Out-of-State Lawyer’s Representation of Arbitration Party Found Not to Be the Practice of Law*

Yet three courts found that an out-of-state lawyer’s representation of a party in arbitration is not a UPL violation.¹⁶⁸ Applying an outdated view of arbitration, the court in *Williamson, P.A. v. John D. Quinn Construction Corp.* rejected the UPL charge against the out-of-state lawyer, asserting that because arbitration is “not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state lawyers,” representing a client during arbitration is not the unauthorized practice of law.¹⁶⁹ A Massachusetts appellate court followed suit, but offered little explanation. According to the court, the unauthorized practice of law did not occur because “nothing in Massachusetts requires that a party representative in arbitration proceedings be admitted to practice in Massachusetts.”¹⁷⁰

¹⁶⁶ *Id.* at 54.

¹⁶⁷ *Fla. Bar v. Rapoport*, 845 So. 2d 874, 877 (Fla. 2003). That *Rapoport* challenged the UPL prosecution seems surprising because the Florida Bar issued an advisory opinion in 1995, advising that an out-of-state attorney’s involvement in a corporation that represents clients in securities arbitration would be unethical because, among other reasons, the attorney might be assisting the unauthorized practice of law. *Fla. State Bar., Ethics Op. 95-2* (1995). *Rapoport* based his argument that he had not engaged in the unauthorized practice of law on the ground that the Federal Arbitration Act preempted state law and that, therefore, Florida has no authority to forbid an attorney from acting in Florida for parties in federal securities matters. *Rapoport*, 845 So. 2d at 876.

¹⁶⁸ *Williamson, P.A. v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982); *Colmar, Ltd. v. Fremantlemedia N. Am., Inc.*, 801 N.E.2d 1017, 1029 (Ill. App. Ct. 2003); *Superadio Ltd. P’ship v. Walt Baby Love Prods., Inc.*, 818 N.E.2d 589, 593 n.5 (Mass. App. Ct. 2004), *judgment rev’d on other grounds*, 844 N.E.2d 246 (Mass. 2006) (holding that a party representative in a Massachusetts arbitration need not be admitted to practice law in Massachusetts).

¹⁶⁹ *Williamson*, 537 F. Supp. at 616.

¹⁷⁰ *Superadio*, 818 N.E.2d at 593 n.5.

An Illinois court of appeals offered a more fulsome explanation for its finding that an unlicensed lawyer representing a client in arbitration was not the unauthorized practice of law, but focused more on concerns about the consumer's access to his own representative than on whether the lawyer's actions in arbitration are the practice of law. First, the court noted, the arbitration was connected to the lawyer's regular representation of the client in the lawyer's home state.¹⁷¹ Second, the arbitration did not involve questions of Illinois law.¹⁷² Third, the applicable arbitration rules permitted non-lawyers to represent parties in arbitration.¹⁷³ Because the out-of-state lawyer satisfied the requirement of a "non-lawyer," the court reasoned, he should be able to represent his client in the arbitration. The court found that the lawyer should be permitted to represent his client in the arbitration because the client would lack representation otherwise.¹⁷⁴ Finally, the court was concerned that because arbitration has no procedure for admission of out-of-state lawyers, prohibiting the representation would be unfair.¹⁷⁵ Ultimately, the court's holding focused on the underlying problem of representation in out-of-state dispute resolution proceedings — that existing UPL laws do not fit well when the process is not litigation.¹⁷⁶

Like the cases involving non-lawyers representing parties in arbitration, courts applying a modern understanding of the arbitration process conclude that representation in arbitration is the practice of law. Like the court in *Compton*, the *Williamson* court relied on an outdated

¹⁷¹ *Colmar*, 801 N.E.2d at 1025.

¹⁷² *Id.*

¹⁷³ *Id.* at 1023.

¹⁷⁴ *Id.* at 1027.

¹⁷⁵ *Id.* at 1024.

¹⁷⁶ In 2002, the ABA Report on the Commission on Multijurisdictional Practice drafted a rule permitting out-of-state lawyers to represent clients in ADR proceedings. MODEL RULES OF PROF'L CONDUCT R. 5.5(C)(3) (Discussion Draft 2002). In adopting a rule that permits a lawyer licensed in one jurisdiction to represent a client in a dispute resolution proceeding that is reasonably related to the lawyer's representation of the client in his own jurisdiction, the ABA reasoned that knowledge of jurisdictional law is less important in ADR proceedings because state and local law play a lesser role in arbitration and mediation than in litigation. *Id.* R. 5.5(c)(3) cmt. Moreover, the ABA believed conducting the ADR process in a particular jurisdiction may have nothing to do with a desire to apply that jurisdiction's law. *Id.* Instead, it may be the most convenient location for multiple parties from different states or it may be the location of the parties' chosen arbitrator or mediator. *Id.* In those circumstances, the ABA concluded, the state's need to control who practices law in a particular jurisdiction in order to protect citizens from counsel unfamiliar with the jurisdiction's laws is not very strong and should yield to the parties' interests in choosing their own counsel and/or neutral. *Id.*

understanding of arbitration as a process that is primarily about fact finding and contract interpretation. Should courts begin to analyze arbitration as it is today, with its greater complexity in fact-finding and need for statutory interpretation, the outcome would likely be quite different.

IV. EVEN IF REPRESENTATION IN ARBITRATION BY NON-LAWYERS IS NOT THE UNAUTHORIZED PRACTICE OF LAW, IT SHOULD NOT BE PERMITTED

Non-lawyer representation of a party with a statutory claim in arbitration is the practice of law. Courts and bar committees confronting this question typically agree that when non-lawyers engage in this type of arbitration representation, they have engaged in the unauthorized practice of law.¹⁷⁷ Even if this kind of representation did not satisfy existing definitions of the unauthorized practice of law, however, it should not be permitted because of the potential harm to the parties participating in the arbitration process.¹⁷⁸

Yet, a number of academics have called for more non-lawyer representation in arbitration and in other processes to preserve consumer resources, provide affordable representation, or to break the monopoly lawyers have on providing representation. Such non-lawyer representation makes sense, say the commentators, because researchers

¹⁷⁷ Courts and bar committees from Florida, Illinois, Virginia, Alabama, and Arkansas agree that non-lawyer representation in arbitration is the unauthorized practice of law. See *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130, at 13, 388 S.W.3d 444, 451; *Fla. Bar v. Rapoport*, 845 So. 2d 874, 877 (Fla. 2003); *Colmar*, 801 N.E.2d at 1022; Ala. State Bar Office of Gen. Counsel Disciplinary Comm'n, Formal Op. R0 2014-01, at 1 (2014), available at <https://www.alabar.org/assets/uploads/2014/08/2014-01.pdf>; Va. State Bar Standing Comm. on Unauthorized Practice, Unauthorized Practice of Law Op. 214 (2009), available at <http://www.vsb.org/site/regulation/upl-opinion-214>. Ohio and Rhode Island have held that it is not. See *Ohio State Bar Ass'n v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 112 Ohio St. 3d 107, 112, 2006-Ohio-6511, 858 N.E.2d 372, 377; *In re Town of Little Compton*, 37 A.3d 85, 95 (R.I. 2012). It is worth noting again that in both Ohio and Rhode Island, the board and court used a 1970s version of arbitration to justify their conclusion. See *Compton*, 37 A.3d at 91-92; Bd. on the Unauthorized Practice of Law of The Sup. Ct. of Ohio, Advisory Op. 2008-01, at 3 (2008), available at http://www.supremecourtfohio.gov/Boards/UPL/advisory_opinions/UPLAdvOp_08_01.pdf.

¹⁷⁸ Commentators recognize that who should represent a party in arbitration changes with the complexity of the case. According to one prominent arbitrator, "Some cases will require a highly trained and skilled professional to represent parties. Other cases may permit the parties to effectively represent themselves." Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 180 (2002).

have found little empirical support for the need for UPL prosecutions.¹⁷⁹ These commentators fail to see, however, that the trade-off between affordability and skill may be too great, at least in cases involving the arbitration of statutory claims.¹⁸⁰

Of course, the possibility of non-lawyer representation may be appropriate in simpler transactions. For example, non-lawyers represent parties successfully in a limited number of litigation-like processes — unemployment compensation appeals, tax appeals, and social security appeals.¹⁸¹ But such representation is problematic in the more complex practice now expected in many labor, employment, securities, and consumer arbitrations.¹⁸² Arbitration hearings involving

¹⁷⁹ See Deborah J. Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal Education and the Legal Profession*, 26 GEO. J. LEGAL ETHICS 367, 369 (2013); Ruan, *supra* note 24, at 1142 (advocating non-lawyer advocacy in arbitration because it may be successful and would be more cost-friendly but cautioning that it may be “outside the capabilities of many low-wage workers”); Jean Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 411 (2010) [hereinafter *Lawyerless Dispute Resolution*] (“The rules restricting non-lawyers from providing legal assistance, though perhaps often well-intended as a means to protect the public from bad legal advice, at times may deprive persons of the only help they can afford . . . [but that] it would be a mistake to accept the idea that non-legal representation necessarily makes more sense in ADR processes than it does in litigation. There is no reason to believe that . . . arbitration require[s] fewer legal skills and knowledge than litigation.”). Most prominent among UPL critics is Herb Kritzer. See KRITZER, *supra* note 6.

¹⁸⁰ Kritzer’s study of labor grievance arbitration is problematic because he presumes that the law “governing the arbitrator’s decision is a combination of the contract itself and past practices.” KRITZER, *supra* note 6, at 153. While this description of labor arbitration made sense in the 1970s, it no longer accurately describes the current practice of labor arbitration. Of course, it may be that UPL laws could be restructured to permit non-lawyer advocates to represent parties in the arbitration of statutory claims. Safeguards, such as attorney supervision of law advocates, may be necessary for such a system to provide adequate representation of one-shot players. See *infra* p. 971 and note 223.

¹⁸¹ Professor Nantiya Ruan proposes using arbitration with non-lawyer representatives advocating on behalf of low wage workers as a solution to problems of wage theft. Professor Ruan emphasizes that wage claims are relatively straightforward so the lack of legal expertise would not prove problematic. See Ruan, *supra* note 24, at 1141-42.

¹⁸² Courts and UPL committees struggle with the question in cases involving more complex legal issues. In due process hearings to determine the propriety of particular accommodations for students with disabilities, for example, there is a split in authority as to whether lay advocates may represent parents in actions against school districts for accommodation of their children. Compare *In re Arons*, 756 A.2d 867, 874 (Del. 2000) (stating non-lawyers providing counseling, advice, and advocacy services to parents of children with disabilities before a state administrative agency in a due process hearing engage in the unauthorized practice of law), and Miss. Att’y Gen. Op. 2012-00370 (2012), 2012 WL 3611755, at *4 (stating non-lawyer advocates engage in the

these disputes look much like trials, albeit with relaxed rules of procedure and evidence. Arbitrators typically expect parties to present opening statements, introduce documentary evidence, examine and cross-examine witnesses, and provide closing arguments.¹⁸³ Moreover, arbitrators frequently resolve issues based on the *legal* arguments the parties' representatives make. For example, arbitrators decide issues of relevance, privilege, statutes of limitations, arbitrability, and unconscionability, among other legal issues.¹⁸⁴ In addition, as more and more arbitration claims involve statutory disputes, party representatives will be compelled to engage in complex legal analysis and answer difficult legal questions arbitrators pose during the hearing. There is really little argument that representation of a party in the arbitration of a statutory dispute is not the practice of law.

That non-lawyer representatives must know how to practice the law in order to represent an arbitration party is not the only concern about non-lawyer representatives in these types of proceedings.¹⁸⁵ Attorney-client privilege rules do not protect the communications of consumers or employees and their non-lawyer representatives.¹⁸⁶ Should a dispute

unauthorized practice of law when representing parents of children with disabilities in due process hearings), with N.J. ADMIN. CODE § 1:1-5.4(a)(7) (2014) (authorizing lay person to represent families in special education proceedings), and *Tyler L. v. Poway Unified Sch. Dist.*, No. D037558, 2002 WL 423467, at *3-4 (Cal. Ct. App. 2002) (stating non-attorney may represent school district in due process hearing).

¹⁸³ See 4 AM. JUR. 2D ALTERNATIVE DISPUTE RESOLUTION § 162 (2014) ("The Uniform Arbitration Act (UAA) provides that when a hearing is ordered by an arbitrator, a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.")

¹⁸⁴ See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013) (holding that an arbitrator may decide whether silent arbitration agreement requires class arbitration); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71-73 (2010) (holding that arbitration clause requires arbitrator to determine if arbitration agreement was unconscionable); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002) (holding that arbitrator must decide questions such as applicability of statute of limitations).

¹⁸⁵ Lack of a malpractice insurance requirement and binding ethical guidelines for non-attorney representatives might also create problems for parties. As Alexandra Meaker noted, "[M]any grievants are also not afforded legal representation, as unions often appoint non-attorney representatives to arbitration disputes; these non-attorney representatives are not bound by any ethical code, nor do they have a responsibility to adequately defend a grievant's discrimination claim." Meaker, *supra* note 21, at 895.

¹⁸⁶ Courts typically do not extend attorney-client privilege to non-lawyer union representatives, even though some collective bargaining agreements require employees to begin the grievance process by working with lay union advocates. Rubinstein, *supra* note 39, at 224, 237. Rules prohibiting attorneys from having conflicts of interest with their clients also would not apply to non-lawyers, thus making it problematic to protect client interests.

arise between an employee and a non-lawyer representative, the other party's lawyer could call the non-lawyer representative as a witness. While an arbitrator might honor a non-lawyer's request for an extension of the privilege to preclude his testimony, the arbitrator would not be required to do so, as she would be if the representative was a lawyer. In the securities industry, lawyers who attended the SICA meetings addressing the NAR issue stated unequivocally that they would put non-lawyer representatives on the witness stand to question them about their communications with the customer and would question the customer about his or her communications with the non-lawyer.¹⁸⁷

Available empirical evidence offers limited support for the thesis that non-lawyers provide inadequate representation in complex cases involving statutory claims, particularly in the employment setting. Although parties do not have to be represented in labor and employment arbitration, many are.¹⁸⁸ Professor Alexander J.S. Colvin examined the use of lawyers in employment arbitration and found that counsel represented approximately three-quarters of employees appearing in arbitration.¹⁸⁹ The study suggests that the remaining employees represented themselves. Professor Elizabeth Hill, reviewing 200 American Arbitration Association ("AAA") employment arbitration

¹⁸⁷ SICA Report, *supra* note 119, at 520. The respondents' attorneys also stated that they would request documents the customer provided to the non-attorney as well as correspondence between the customer and the non-attorney. *Id.*

¹⁸⁸ See CONSTRUCTION ARBITRATION RULES & MEDIATION PROCEDURES M-4 (Am. Arbitration Ass'n 2014) ("Any party may participate without representation (pro-se), or by any representative of that party's choosing, or by counsel."); EMP'T ARBITRATION RULES & MEDIATION PROCEDURES R. 19 (Am. Arbitration Ass'n 2013) ("Any party may be represented by counsel or other authorized representatives."). The rules of several trade associations are similar. See N.Y.C.P.L.R. 7506(d) (Mckinney 2014) (providing that a party may be represented by an attorney). Attorney representation in employment arbitration is more common than it is in labor arbitration. See Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 543 (1987) ("[A] 1983-84 American Arbitration Association survey found that employers used attorneys in 73.4 percent [of arbitrations] and unions in 50.9 percent of over 4,900 cases.").

¹⁸⁹ Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 407-08, 432 (2007) (finding that in a study of 2763 employment arbitration cases administered by the AAA from 2003 to 2006 employees were represented in 74.9% of the cases). In a subsequent study of 217 AAA employment cases, Professor Colvin found that, "[a]s in litigation those employees who were able to secure attorney representation did far better than those who did not." *The Realities of Employment Arbitration*, DESERT TALKING PIECE, Fall 2013, at 8, available at http://www.law.unlv.edu/sites/default/files/SaltmanNewsletter_2013_Web.pdf.

awards from 1999 and 2000, found similar results.¹⁹⁰ Colvin's study showed statistically significant higher win rates and recoveries for represented parties. Colvin found that represented employees won almost ten percent more of the time than did unrepresented employees.¹⁹¹ Studies of success in securities arbitration revealed similar results. A survey of approximately 8,100 awards between 1991 and 1996 showed that represented investors win more frequently than unrepresented investors and also have a higher recovery rate.¹⁹² Lawyer representation is somewhat less common in consumer arbitration. In a study of 301 AAA consumer arbitrations resulting in an award in 2007, Professor Christopher Drahozal and Samantha Zyontz found that consumers did not have a lawyer in almost half of the cases.¹⁹³ The study also found a lower win rate for pro se consumers than consumers represented by an attorney.¹⁹⁴ Drahozal and Zyontz offered two possible

¹⁹⁰ Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 792, 821 (2003) (examining 200 awards randomly selected from AAA Employment Arbitration Dispute awards initiated during 1999 and 2000 and finding that two-thirds of complainants arbitrating pursuant to promulgated cases were represented by attorneys). Note that both Colvin and Hill's data may suffer from selection bias. It may be that lawyers have greater expertise in case selection than do non-lawyers or parties. If lawyers only take cases that they think they will win, and they have expertise in making that selection, it is less surprising that they are more successful than lay persons in the subsequent arbitration process.

¹⁹¹ Colvin, *supra* note 189, at 433 (finding represented employees won 22.6% of the time as compared to 13.7% for unrepresented employees with mean damage award for represented employees of \$28,009 as compared to \$13,222 for self-represented employees); *see also* Block & Stieber, *supra* note 188, at 552-54 (finding empirical research supports belief that parties in labor arbitration achieve better results when represented by counsel when their opponent was not). Jean Sternlight reported that empirical studies in the United Kingdom revealed that tribunal applicants are more likely to succeed than unrepresented parties. *See* Sternlight, *Lawyerless Dispute Resolution*, *supra* note 179, at 391 (citing Hazel Genn, *Tribunals and Informal Justice*, 56 MOD. L. REV. 396, 398 (1993)). *But see* Hill, *supra* note 190, at 792, 820 (reviewing 200 randomly chosen awards from AAA Employment Arbitration Disputes from 1999 and 2000 and finding that representation did not appear to contribute to success rates of claimants in arbitration).

¹⁹² Barbara Black, *Establishing a Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35, 36 (2000) (comparing unrepresented investors with investors represented by attorneys, not investors represented by attorneys compared to investors represented by non-lawyers).

¹⁹³ Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 902-04 (2010) (showing 55.4% of consumers retained counsel when they were the claimant in arbitration).

¹⁹⁴ *Id.* at 905 (showing 44.9% of pro se consumers succeeded compared to 60.2% of represented consumers).

explanations for these results. Either an attorney's skill increases the likelihood of success of the claim or the attorney screens out less meritorious cases and chooses to represent only those consumers likely to prevail.¹⁹⁵

While these studies are of limited value because they compare win rates of unrepresented parties in arbitration to represented parties in arbitration,¹⁹⁶ they suggest that competent representation in the arbitration process affects the outcome. This prediction may become even more accurate over time as, increasingly, the vast majority of arbitrators are also lawyers or judges.¹⁹⁷ A lawyer-arbitrator may find a case presentation that tracks court proceedings more appealing and may expect advocates to understand evidence rules and to use them correctly during the arbitration process. The predisposition of the lawyer-arbitrator to hear a case presented as though the case were in court may aggravate the disadvantages of self-representation or representation by a lay advocate.

Even if that were not the case, one would nevertheless expect studies of parties represented by lay advocates in arbitrations involving statutory claims to show that parties with legal representation achieve better outcomes than would those parties represented by non-lawyers. Certainly the series of complaints SICA received about the performance of non-lawyer representatives in securities arbitration suggests that NARs were not as capable as lawyers at presenting cases in the securities arbitration fora.¹⁹⁸

¹⁹⁵ *Id.* at 905-06.

¹⁹⁶ Jean Sternlight, in her article *Lawyerless Dispute Resolution: Rethinking a Paradigm*, cites a study (on file with Professor Sternlight) by sociologist Rebecca Sandefur, which compared the outcome of disputes based on whether the representative was an attorney or a lay advocate. Sternlight, *Lawyerless Dispute Resolution*, *supra* note 179, at 401-02. According to Sternlight, Sandefur found that lawyers outperformed non-attorney representatives in cases that were procedurally or substantively complex, as opposed to a procedurally or substantively simple case. *Id.* at 402.

¹⁹⁷ JAMS, the second largest provider of arbitration services and headquartered in California, employs former judges almost exclusively. Former judges comprise the entirety of JAMS California arbitrator corp. Daniel Briscoe, *Judging Lite — All the Experience, Half the Cost: An Empirical Comparison Between California Neutrals and California Appellate Judges 12* (Dec. 16, 2013) (unpublished manuscript) (on file with author).

¹⁹⁸ Justine P. Klein, *Non-Attorney Representation*, 63 *FORDHAM L. REV.* 1605, 1606 (1995) ("SICA and the SROs have received complaints about them (NARs) and the quality of representation provided by them. . . . [A]s the number and the nature of complaints increased, SICA became concerned about whether investors were really being adequately represented by these non-attorney groups."). Problems with non-lawyer representation in other fields are also common. For example, notary publics often hold themselves out as capable of representing clients in immigration proceedings.

Additional empirical research comparing the success of lawyers to non-lawyer advocates in arbitration would certainly be useful to shed light on the need for lawyers in the arbitration process. This Article does not suggest that lawyers are necessary in all forms of arbitration. When confronted with complex legal questions or statutory claims, however, lawyers may be necessary to provide superior representation. Continuing to turn a blind eye to the problems of non-lawyer representation in arbitration is not an appropriate way to address this growing problem. But, how to address the problem? Solutions to this issue may be particularly complicated because of the FAA's broad preemptive impact.

V. ADDRESSING NON-LAWYER REPRESENTATION IN ARBITRATION

A. Bar Association Action

One mechanism to protect consumers and others from ineffective representation in arbitrations of statutory claims would be more vigorous enforcement of UPL laws by bar committees and courts.¹⁹⁹ To discourage non-lawyers from engaging in the unauthorized practice of law, bar associations and local prosecutors typically select one of the following approaches to punish and discourage the person from continuing to engage in the unauthorized practice of law: injunction, criminal prosecution, or criminal contempt.²⁰⁰ Most states have the power to enforce UPL rules and most frequently seek an injunction to preclude further unauthorized practice of law.²⁰¹ Criminal prosecutions

See Charles H. Kuck & Olesia Gorinshteyn, *Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in Sperry v. Florida*, 35 WM. MITCHELL L. REV. 340, 347 (2008). These non-lawyers are typically paralegals or have familiarity with the immigration law system. Unfortunately, though, they are frequently the subject of complaints to state bar ethics committees on UPL grounds and may frequently be exploiting the vulnerable populations they purport to assist. *Id.*

¹⁹⁹ Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773, 775-76 (2002) (attempting to prosecute UPL actions on a large scale "risk(s) failure due to the relative lack of resources available to prosecute them."). UPL laws are largely ineffective due to lack of enforcement. Susan D. Hoppock, Recent Development, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 720-21 (2007).

²⁰⁰ AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., *supra* note 42, at 1 (noting twenty-nine jurisdictions responded to survey).

²⁰¹ Vallario, *supra* note 43, at 618-19 (showing over thirty jurisdictions permit the use of injunctions to curtail non-lawyers from engaging in the unauthorized practice of law).

of the unauthorized practice of law are also possible, but less common.²⁰²

Currently, enforcement of UPL rules against non-lawyers is infrequent, rendering relatively ineffective this method for protecting consumers and other one-shot players likely to have statutory claims. In difficult economic times, it may be unrealistic to expect bar associations and local prosecutors to devote additional resources to attack this growing problem.²⁰³ Given the lack of resources, though, a bar association might consider making an example of prosecuting a non-lawyer, theorizing that imposition of a large fine in one case will discourage others from engaging in similar behavior. The Ohio Supreme Court may have engaged in this type of behavior when it imposed a \$1,027,260 fine against non-lawyers from Nevada who, by selling living trust and estate plans to Ohio residents, engaged in the unauthorized practice of law.²⁰⁴ A high civil fine imposed against a non-lawyer representing a party in the arbitration of a statutory claim might have the desired impact of discouraging other non-lawyers from engaging in the same behavior.

These proposed solutions, though, would only be workable if the FAA does not preempt state prosecution of non-lawyers engaging in the unauthorized practice of law. This matter will be discussed more fully in the next section.

B. State Regulation

At first glance, a promising method to address non-lawyer representation in arbitration might be for the states to enact legislation prohibiting the possibility of non-lawyer representatives in arbitrations where the one-shot player's claim is based on a statute.²⁰⁵ The problem with this approach, however, is that it is quite likely that federal courts

²⁰² See ABA/BNA LAWYERS MANUAL ON PROF'L CONDUCT 21:8001 (2014).

²⁰³ See AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., *supra* note 42, at 1 (indicating that twenty-three of twenty-nine jurisdictions responding to the survey report that they actively enforce their UPL regulations against non-lawyers but that insufficient funding or resources makes such efforts challenging).

²⁰⁴ *Cleveland Bar Ass'n v. Sharp Estate Servs., Inc.*, 837 N.E.2d 1183, 1187-88 (Ohio 2005).

²⁰⁵ Interestingly, some states define representation of another in an alternative dispute resolution proceeding such as arbitration or mediation, as the practice of law. See, e.g., ARIZ. SUP. CT. R. 31(a)(2A) ("Practice of law' means providing legal advice or services to or for another by . . . (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation . . . or (5) negotiating legal rights or responsibilities for a specific person or entity.").

would conclude that the possibility of non-lawyer representation is a fundamental attribute of arbitration practice.²⁰⁶ As a result, the FAA would preempt state attempts to preclude that practice, either through legislation or prosecution.

The Supreme Court has repeatedly held that the FAA preempts state efforts to regulate the enforceability of arbitration agreements or review of arbitration awards in a way that is inconsistent with FAA language.²⁰⁷ In particular, in *Concepcion*, the Court stated that the FAA preempts state efforts to interfere with the “fundamental attributes of arbitration.”²⁰⁸ If the availability of non-lawyer representation in arbitration is a fundamental attribute of arbitration, then the Court would find that the FAA preempted state attempts to regulate that practice. Thus, whether states can preclude non-lawyers from representing parties, or prosecute them if they attempt to represent parties, depends on whether non-lawyer representation is a fundamental attribute of arbitration.

When Congress enacted the FAA, it declined to imbue the statutory term “arbitration” with any specific meaning.²⁰⁹ And, while the Court states that state courts and legislatures may not interfere with the fundamental attributes of arbitration, it offers little guidance as to what these characteristics are. In *Concepcion*, the Court hinted at a platonic arbitration ideal:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is

²⁰⁶ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011).

²⁰⁷ See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding FAA preempts Montana law requiring arbitration clause to be typed in underlined capital letters on the first page of the contract); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding FAA preempts Alabama law rendering predispute arbitration agreements unenforceable); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding FAA preempts California franchise law).

²⁰⁸ *Concepcion*, 131 S. Ct. at 1748.

²⁰⁹ As a result, the federal circuit courts disagree as to how to define arbitration and what source, federal common or state law, should be used to define it. The Court has yet to provide guidance on this matter. See *Petition for Writ of Certiorari at 7-9, Bakoss v. Certain Underwriters at Lloyd's, London Subscribing to Policy No. 0510135*, 134 S. Ct. 155 (2013) (No. 12-1429), 2013 WL 2637604.

manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.²¹⁰

In its opinion, the Court seemed to be homing in on an essential nature of arbitration that state courts and legislatures alter at their peril. That essential nature includes confidentiality of the proceedings, all parties present, knowledgeable arbitrators, lower costs, speed, efficiency, limited judicial review, and limited “procedural rigor.”²¹¹ To offer some elucidation, *Concepcion* provided examples of the kinds of laws that might interfere with arbitration’s essential nature: a law requiring the arbitrator to follow the Federal Rules of Evidence, a law requiring a judge to monitor discovery in arbitration, or a law requiring that the arbitration award be rendered by a panel of twelve lay arbitrators.²¹²

With this limited guidance, several federal courts have applied *Concepcion* to determine whether the FAA preempts state legislation altering the arbitration process.²¹³ *Newton v. American Debt Services, Inc.* provides an example of the current judicial approach to interpreting this language.²¹⁴ In the case, the Northern District of California applied *Concepcion* to hold that the fundamental attributes of arbitration include speed, low cost, and informality: “None of the provisions [challenged by the consumer — limitations on liability and lawyers’ fees] compromise

²¹⁰ *Concepcion*, 131 S. Ct. at 1750-51. This decision followed closely on the heels of the Court’s *Stolt-Nielsen* decision in which the Court explained that class action and bilateral (traditional) arbitration are wholly different: “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” *Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.*, 559 U.S. 662, 685 (2010).

²¹¹ See *Concepcion*, 131 S. Ct. at 1751 (citing *Stolt-Nielsen*, 559 U.S. at 685).

²¹² *Id.* at 1747.

²¹³ *Newton v. Am. Debt Servs., Inc.*, 854 F. Supp. 2d 712, 728 (N.D. Cal. 2012); see also *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1167 (10th Cir. 2014) (explaining that fundamental attributes of arbitration include “informal, streamlined procedures”); *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 612 (4th Cir. 2013) (stating that if rule interferes with informality of arbitration or increases risks to the defendant, it is preempted); *Trompeter v. Ally Fin., Inc.*, 914 F. Supp. 2d 1067, 1077 (N.D. Cal. 2012) (identifying arbitration’s fundamental attributes include that it is speedy, informal and economical). An arbitration agreement’s failure to offer an effective opportunity for a consumer to seek a fee waiver also does not interfere with the fundamental attributes of arbitration. *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1164 (N.D. Cal. 2012) (restating that informality, speed, efficiency and relative inexpensiveness are fundamental attributes of arbitration).

²¹⁴ See *Newton*, 854 F. Supp. 2d at 728 (holding that application of *Concepcion* did not require preemption when the essential components of arbitration are not affected).

the informality, expeditiousness, or inexpensiveness of arbitration.”²¹⁵ As a result, the challenged provisions did not impact fundamental attributes of arbitration and were, therefore, not preempted.²¹⁶ Although other federal courts may ultimately develop different approaches to this question, this current approach views as problematic contractual provisions that increase the cost of the arbitration process, increase procedural formality, or decrease efficiency.

Historical use of arbitration may be another lens through which courts might examine the language the Court used in *Concepcion*. Certainly, the possibility of non-lawyer representation has always been an attribute of arbitration. Because parties used arbitration to resolve disputes in accordance with norms and customs, rather than by law, non-lawyer representation was quite common.²¹⁷ In fact, until recently, non-lawyer representation was viewed as a basic aspect of arbitration and one of its primary benefits.²¹⁸ Mandating lawyer representation would likely increase procedural formality, as well as costs, and would, arguably, also slow down the process.²¹⁹ In light of the Court’s description of arbitration as a process with limited procedural rigor, which is also inexpensive, speedy, and lacks review, a state reform of the arbitration process that prohibited the possibility of non-lawyer representation in arbitration would likely be viewed as an impediment to the arbitration process and, as a result, be preempted.²²⁰

²¹⁵ *Id.* at 728.

²¹⁶ *Id.*

²¹⁷ Anti-lawyer sentiment and the desire to resolve disputes according to community norms prompted early American colonists to use arbitration to settle their disputes. See Carli N. Conklin, *Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America*, 28 OHIO ST. J. ON DISP. RESOL. 581, 584 (2013).

²¹⁸ *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985) (“Labor grievances and arbitrations frequently are handled by union employees or representatives who have not received any professional legal training at all.”); *Eisen v. State Dep’t of Pub. Welfare*, 352 N.W.2d 731, 737 (Minn. 1984) (asserting that representation by “a skilled union representative,” rather than by an attorney, is “the common form of representation in labor relations controversies”); Trade association rules often prohibited lawyer representation in arbitration because of the fear that lawyers might “complicate what might otherwise be simple proceedings.” JAY E. GRENIG & ROCCO M. SCANZA, *CASE PREPARATION AND PRESENTATION: A GUIDE FOR ARBITRATION ADVOCATES AND ARBITRATORS* 153 (2013).

²¹⁹ One of the early American proponents of the increased use of arbitration emphasized that the process would work more efficiently and cheaply than court processes because lawyers tended to increase fees and engage in a systematic plan to delay the process, when given the opportunity. See Conklin, *supra* note 217, at 623-24.

²²⁰ Not surprisingly, the dissent in *Concepcion* takes a different position. According to the dissent, class arbitration is not inconsistent with the FAA’s purpose unless it discouraged the enforcement of the arbitration agreement. See *AT&T Mobility LLC v.*

In considering what should be preempted, a court might use either an examination of arbitration's historical roots to interpret the language or adopt the approach the federal courts are currently utilizing.²²¹ Regardless of the chosen approach, the result would be the same: the possibility of non-lawyer representation in arbitration would be considered a fundamental attribute of arbitration and, therefore, the FAA would preempt any state attempts to regulate the issue or prosecute offending non-lawyers who represented parties in the arbitration of statutory claims.

C. Amend the FAA

Many academics and legislators have unsuccessfully urged amendments to the Federal Arbitration Act.²²² The CFPB's recent empirical study of arbitration, establishing that few consumers are using the arbitration process to resolve credit card and other financial services disputes, may result in limitation of or an outright ban on the use of arbitration in the financial services industry. If this were to happen, or if Congress were to acknowledge other problems with the FAA, Congress might reexamine the FAA and, hopefully, amend it. If Congress considered amendments to the FAA, it might contemplate addressing the problems the possibility of non-lawyers in arbitration may create. One possible amendment, modeled on FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12208, Representation of Parties,²²³ could be adopted to address this issue:

Concepcion, 131 S. Ct. 1740, 1757-58 (Breyer, J., dissenting). Treating the primary goal of the FAA as clause enforcement rather than as a means for ensuring that a certain kind of arbitration takes place enabled the dissent to enforce California's rule requiring class arbitration availability. *See id.* at 1758. The primary objective of the FAA, according to the dissent, was not to guarantee certain procedural rules — it was to “secure the ‘enforcement’ of agreements to arbitrate.” *Id.* The dissent emphasized the Court's early approach to arbitration as a dynamic process to show the inconsistency with its new, rigid conception of arbitration in the majority opinion. *See id.* at 1761.

²²¹ A court might also conclude that the possibility of non-lawyer representation in arbitration is *not* a fundamental attribute of arbitration. The Supreme Court's arbitration preemption rulings suggest that this result is unlikely.

²²² *See supra* note 31.

²²³ CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES R. 12208 (Fin. Indus. Regulatory Auth. 2008), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4114.

Representation of Parties

(a) Representation by a Party

Parties may represent themselves in an arbitration held in a United States hearing location.

(b) Representation by a Lawyer

At any stage of an arbitration proceeding held in a United States hearing location, all parties shall have the right to be represented by a lawyer at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

(c) Representation by Others

Parties may be represented in an arbitration by a person who is not an lawyer, unless:

- state law prohibits such representation; or
- a statutory claim is at issue in the arbitration; or
- the person is currently suspended from the practice of law or disbarred.

Under this rule, prior to arbitration, the arbitration administrator, AAA or JAMS, or the arbitration panel (in the case of non-administered arbitration) would be required to verify the non-lawyer's compliance with state law (if one applies). In addition, the panel or the administrator would be responsible for assessing whether the subject matter of the arbitration includes a statutory claim. If there is an administrator for the arbitration process, it would be useful for that entity to determine whether the party's proposed representation is acceptable. If the proposed representative is a non-lawyer, and the subject matter of the arbitration is a statutory claim, the administrator, or in a non-administered arbitration the chief arbitrator,²²⁴ could notify the party of

²²⁴ Arbitrator screening of a party's representative is not unheard of. In a FINRA arbitration, arbitrators discovered at the outset of an evidentiary hearing that the claimant's representative was not a lawyer. Although the arbitrators acknowledged that non-lawyer representation was not unusual in a FINRA arbitration, they expressed concern about suborning the unauthorized practice of law. Ultimately, they concluded that the claimant's non-lawyer could examine his client's own witnesses but could not cross-examine or question the respondent's witnesses. See *Ralston v. Syndicated Capital, Inc.*, FINRA Dispute Resol. Arb. Case No. 10-02276 (2011) (Saint-Aubin, Arb.).

the problem and provide the party a reasonable time during which the party could secure appropriate legal representation. If the determination was made after the demand for arbitration, or response to a demand, were filed, little would be lost in terms of preparation time for the arbitration process. Thus, a relatively simple and speedy administrative procedure would address this issue before problems arose.

D. *Non-lawyer Representative Practice Under Lawyer Supervision*

Without question, requiring lawyers to act as representatives in the arbitration of statutory disputes will increase the cost of the arbitration process for the one-shot player. Arbitration costs already exceed the prospective award in many cases, particularly since the Supreme Court decided to permit companies to implement arbitration clauses with class arbitration waivers. To avoid further one-shot player claim suppression while ensuring adequate representation of clients in the arbitration of statutory claims, non-lawyer representatives could represent parties in arbitration under the supervision of an experienced lawyer. This proposal, which ensures appropriate legal representation at a lower cost, has the added benefit of fitting nicely within the existing codes of ethics — the Model Code of Professional Responsibility and the Model Rules of Professional Conduct.²²⁵ Moreover, firms comprising lawyers and non-lawyers engaged in labor relations activities already exist and may provide a model of how to structure these arrangements.²²⁶

²²⁵ Most state ethics codes prohibit lawyers from assisting in the unauthorized practice of law and prohibit fee-splitting with non-lawyers or joining in a professional corporation with non-lawyer shareholders but permit lawyers to work with non-lawyers as long as those things do not occur. MODEL RULES OF PROF'L CONDUCT R. 5.4(a), (b) & (d) (2013); MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101 to 103, 5-107(c) (1980). The Restatement (Third) of the Law Governing Lawyers permits non-lawyers to practice under the supervision of lawyers:

For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain non-lawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a non-lawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice.

RESTATEMENT (THIRD) OF LAW GOVERNING LAW. § 4 cmt. g (2000). Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision. *See id.* § 11 cmt. f. In addition, the non-lawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm. *See id.* § 10 cmt. c.

²²⁶ For example, Clemans Nelson & Associates, an Ohio company, provides labor relations services to employers, including arbitration representation. Clemans Nelson staff

Under the rules of professional conduct, lawyers are permitted to delegate tasks to non-lawyers in order to properly represent clients as long as they make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the rules of professional conduct.²²⁷ While the language of the rules is relatively vague, lawyers may delegate work that, if performed by the non-lawyer without supervision, would be the unauthorized practice of law. As a practical matter, the ABA has only precluded lawyers from delegating certain tasks, such as representation in court or counseling clients about legal matters.²²⁸ Beyond these categorical exclusions, however, it would seem possible for a lawyer to form an arbitration practice with a non-lawyer, where the non-lawyer represents the client in the arbitral process, with active supervision when a statutory claim is at issue.²²⁹ Active supervision would likely include

includes both non-lawyers and lawyers. See CLEMANS NELSON & ASSOCS., INC., <http://www.clemansnelson.com/> (last visited Oct. 14, 2014). Other non-lawyer/lawyer labor relations consulting firms include: Renne Sloan Holtzman Sakai LLP, a California firm that advertises its eleven non-lawyer labor experts as providing consulting advice at a lower cost, see RENNE SLOAN HOLTZMAN SAKAI LLP, <http://www.publiclawgroup.com/practice-areas/labor-relations-labor-law/> (last visited Oct. 12, 2014); and Drummond Woodsum, a firm located in Maine and New Hampshire that employs a non-lawyer labor relations expert to assist in their practice, see DRUMMOND WOODSUM, <http://www.dwmlaw.com/attorneys-consultants/ann-s-chapman-consultant/> (last visited Oct. 12, 2014).

²²⁷ Rule 5.3 of the Model Rules of Professional Conduct states:

With respect to a non-lawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 5.3 (2013). Interpreting this rule, the Philadelphia Bar Association Professional Guidance Committee concluded that Rule 5.3 is satisfied when a lawyer reviews the written work of a non-lawyer community advocate in a timely fashion, discloses the relationship between the lawyer and non-lawyer to the client and takes responsibility for the actions of the non-lawyer advocate. Phila. Bar Ass'n for Prof'l Guidance Comm., Ethics Op. 2012-1, 2012 WL 7148212, at *2 (2012); see also N.Y.C. Ass'n Bar Comm. of Prof'l Judicial Ethics, Formal Op. 1995-11, 1995 WL 607778, at *2 (1995) (stating that lawyer employing non-lawyers must properly supervise non-lawyer, avoid aiding or encouraging the unauthorized practice of law, maintain client confidences, avoid misleading the public regarding non-lawyers' status and refuse to share fees with non-lawyers).

²²⁸ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 316 (1967); see Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653, 664 (2010).

²²⁹ According to Professor Tremblay, no court has disciplined a lawyer or sanctioned

reviewing documents the non-lawyer prepared, attending pre-hearing conferences, helping the non-lawyer prepare for arbitration hearings, attending and potentially participating in arbitration hearings if needed, and reviewing post-hearing arbitration briefs prior to their submission to the arbitrator. If the case involved a dispute regarding contract interpretation, rather than a dispute involving a statutory claim, direct supervision would be unnecessary because a court would be unlikely to view the non-lawyer's representation as the practice of law.

Efforts to accommodate the use of lay advocates in special education proceedings may provide a helpful analogy for structuring the participation of non-lawyers in the arbitration of statutory disputes because lay advocates have long been a fixture in special education mediation and due process hearings. Like non-lawyer advocates in some types of arbitration, various courts have ruled, and attorney general offices have opined, that lay advocates engage in the unauthorized practice of law when they represent families in due process hearings to resolve disputes over individualized employment plans under the Individuals with Disabilities Education Act ("IDEA").²³⁰ In addition, lay advocates have faced the same kind of criticism raised in this Article, particularly when statutory claims such as discrimination or sexual harassment are brought in conjunction with claims related to special education.²³¹ Professor Sonja Kerr, for example, expressed concern that unsupervised lay advocates may exceed their professional qualifications when they advocate for their client without an attorney present. Statutory claims, often levied in special education proceedings, "may

a non-lawyer when the non-lawyer was properly supervised and provided competent representation. Tremblay, *supra* note 228, at 669. Trouble only ensues when the lawyer failed to properly supervise the non-lawyer. *See id.*

²³⁰ *In re* Petition of Machette, 852 A.2d 908 (Del. 2004) (unpublished table decision) (holding that lay advocate may not represent parent in IDEA due process hearing); *In re* Arons, 756 A.2d 867, 868, 874 (Del. 2000) (finding that Arons, a lay advocate, had engaged in the unauthorized practice of law); Miss. Att'y Gen. Op. 2012-00370, 2012 WL 3611755, at *4 (2012) (holding that a non-attorney would be engaging in unauthorized practice of law if represented parent in IDEA due process hearing); Okla. Att'y Gen. Op. 27, at ¶ 29 (2006) (same). Under the IDEA, children with disabilities must be provided with "a free appropriate public education . . . designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A) (2012). One-fifth of the states prohibit the use of lay advocates in IDEA due process hearings. Forty percent of the states have no policy regarding the use of lay advocates and 15% of the states leave the question to the hearing officer's discretion. Perry A. Zirkel, *Law Advocates and Parent Experts Under the IDEA*, 217 EDUC. L. REP. 19, 22 (2007).

²³¹ *See* Sonja Kerr & Jenai St. Hill, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179, 193 (2012).

not be fully addressed without the assistance of an attorney who can help craft a mediation agreement that speaks to these concerns or can accurately assess if a due process hearing is necessary to resolve the claims.”²³²

In response to these concerns, state bar associations are increasingly insisting that lay advocates work under lawyer supervision rather than as independent advocates to avoid the problems associated with lack of regulation.²³³ New structures for representation involving both legal counsel and lay advocates in those states might provide a useful model for structuring the kind of arbitration practice recommended in this article.

Washington’s recent adoption of a “Limited Practice Rule for Limited License Legal Technicians” might also provide helpful guidance to lawyers and non-lawyers wishing to create a workable arbitration practice.²³⁴ The Washington rule licenses legal technicians to provide services in specific practice areas in order to satisfy the public’s unsatisfied legal needs.²³⁵ In order to receive the limited license, applicants must pass an examination, engage in 3,000 hours of “substantive law-related work experience supervised by a licensed

²³² *Id.*

²³³ See Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward A Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 328 (2005); Kay Hennessy Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA’s Lay Advocate Provision Too Narrow?*, 9 GEO. J. ON POVERTY L. & POL’Y 193, 214 (2002). In addition to the concerns about the use of lay advocates in IDEA due process hearings raised above, commentators also worry that the absence of training or certification requirements may result in uneven representation with the possible consequence that the party’s claim is compromised. Kerr & Hill, *supra* note 231, at 193-94. The lack of a mandatory code of ethics may also be problematic because there is no complaint procedure or malpractice action for a party who believes he has not been provided appropriate representation. See *id.* The New York Bar, advocating for greater use of non-lawyers to represent those without resources, noted the increased use of non-lawyers hired as employees of law firms, which charge fees and provide attorney supervision. N.Y.C. BAR ASS’N COMM. ON PROF’L RESPONSIBILITY, NARROWING THE “JUSTICE GAP”: ROLES FOR NONLAWYER PRACTITIONERS 12-17 (June 2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>.

²³⁴ WASH. SUP. CT. ADMISSION & PRACTICE R. 28, available at <http://www.wsba.org/~media/Files/WSBA-wide%20Documents/LLLT/Rules%20and%20Regulations/20130820%20APR%2028.ashx>.

²³⁵ The goal of the rule is to provide increased access to legal services in practice areas where the demand is greatest. In Washington, the first practice area identified as high demand is family law. The University of Washington School of Law, in conjunction with other Washington law schools, created a family law program of study for prospective non-lawyer Limited License Legal Technicians, which is scheduled to launch in winter quarter of 2014. See UNIV. OF WASH. SCH. OF LAW, <http://www.law.washington.edu/LLLT/Default.aspx> (last visited October 18, 2014).

lawyer” prior to licensure, and show proof of financial responsibility.²³⁶ Acknowledging that only lawyers may practice law, the rule prohibits legal technicians from representing clients in court proceedings, out-of-court negotiations, or formal dispute resolution proceedings.²³⁷ In authorized practice areas, however, the rule empowers legal technicians to, among other things, obtain relevant information and explain its relevance to the client; inform the client of applicable procedures; provide the client with certain approved materials that contain relevant information about legal requirements, case law relevant to the client’s claim, and venue and jurisdictional requirements; and review documents or exhibits that the client has received from the opposing side and explain them to the client.²³⁸ If a lawyer supervises the technician, the technician may also conduct legal research and draft letters and documents.²³⁹ The Rule addresses the lack of an ethics code for non-lawyers by holding the technicians to the standard of care of a Washington lawyer and extends to them the attorney-client privilege and the fiduciary duties of a lawyer.²⁴⁰ Finally, the Rule creates a “Limited License Legal Technicians Board” charged with drafting regulations for the legal technicians and administering the program.²⁴¹ In addition to identifying the areas in which the technicians may practice, the Board must also draft rules of professional conduct and disciplinary procedures.

While neither lay advocacy in special education proceedings nor the Washington legal technician position provide a perfect analogy for the proposed arbitration practice firm, creative efforts to provide access to representation are becoming more common.²⁴² Between these efforts,

²³⁶ WASH. SUP. CT. ADMISSION AND PRACTICE R. 28E(1)–(4).

²³⁷ *Id.* R. 28H(5)–(6). Obviously, in order for similar regulation to be workable in the arbitration context, this rule would need to be altered for non-lawyers wishing to represent parties in arbitration of non-statutory claims.

²³⁸ *Id.* R. 28F(1)–(5).

²³⁹ *Id.* R. 28F(7).

²⁴⁰ *Id.* R. 28K(1)–(3). The Rule imposes certain additional requirements, including: completion of a certain amount of credit hours in an ABA-approved paralegal training program; 3,000 hours of substantive law-related work experience supervised by a licensed lawyer; admission requirements, including an examination and proof of good moral character; and ongoing requirements for maintenance of legal technician status, including continuing education requirements, payment of an annual fee, and annual “proof of financial responsibility.” *Id.* R. 28(D), 1(1)–(3).

²⁴¹ *Id.* R. 28C(1)–(2).

²⁴² Creative ideas abound for use of non-lawyers to address access to justice issues. See, e.g., KRITZER, *supra* note 6, at 202-09 (arguing for applying institutional controls, liability controls, and disciplinary controls to non-lawyer advocates); Michele Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL

and the models provided by existing labor relations consulting firms that employ both lawyers and non-lawyers to provide representation to employers and employees, it seems likely that an appropriate model could be found to provide guidance regarding the appropriate amount of supervision non-lawyers might need in the evolving world of arbitration. A new approach would empower the lawyer to provide less expensive legal service to a client while enabling the non-lawyer to continue representing clients in arbitration, supervised when appropriate, without either representative concerned about engaging in the unauthorized practice of law.

CONCLUSION

Following *Concepcion*, businesses and employers are imposing arbitration agreements containing class arbitration waivers on consumers and employees in ever increasing numbers. As a result, more and more statutory claims will be adjudicated in the arbitral forum, rather than in a courtroom. One consequence of this move is that a fundamental attribute of arbitration, the possibility of non-lawyer representation, will now potentially trigger a UPL violation. While the securities industry recognized and addressed this problem long ago, few courts or bar committees have confronted this question. When they have, the outcome of the cases has depended upon whether the entity evaluating the issue used a modern conception of arbitration or the outdated, 1970s view, of traditional labor arbitration. Those courts and committees acknowledging that modern arbitration practice frequently involves statutory interpretation have properly held that non-lawyers simply cannot represent parties in arbitrations involving statutory claims without engaging in the unauthorized practice of law.

Continued ignorance of this problem places vulnerable populations, consumers, and employees at risk of receiving inadequate representation for their legal claims. A variety of policy changes could be implemented to address this growing problem. Congress could amend the FAA to preclude the possibility of non-lawyers representing one-shot players when the arbitration involves statutory claims. State legislatures could also attempt to address this problem by legislation. Unfortunately, the broad-sweeping preemptive impact of the FAA likely

J. FOR SOC. JUST. 179, 182 (2012) (arguing that in order to address significant access to justice problems, non-lawyer assistance must be considered despite the obstacles created by state UPL laws); Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 389 (2013) (recommending increased use of non-lawyers to provide access to justice).

precludes this path as an answer to the problem. State bar committees handling UPL issues might also provide a forum to address this issue, although preemption might preclude this approach as well. Perhaps more likely, and certainly more economical and practical, would be for non-lawyers experienced in arbitration to affiliate with lawyers to provide appropriate services to clients with pending arbitration claims. Because close supervision of the non-lawyer would only be necessary when the case involved a statutory claim, this arrangement would be the least costly to the client while still addressing the potential problems associated with non-lawyers attempting to provide adequate representation to a client with a statutory claim. Low cost and efficiency, hallmarks of the traditional arbitration process, would also be hallmarks of this new arrangement.