

# Corporate Self-Representation: Is It Truly the Unauthorized Practice of Law?\*

## I. INTRODUCTION

Arkansas maintains strict laws preventing corporate pro se representation. The Arkansas Supreme Court reinforced the state's prohibition on corporate self-representation in the 2012 decision *NISHA, LLC v. TriBuilt Construction Group, LLC*, holding that a nonlawyer, corporate officer's representation of a corporation in arbitration proceedings constitutes the unauthorized practice of law.<sup>1</sup> In analyzing the issue of corporate pro se representation, the court consulted lower Arkansas state-court decisions, other jurisdictions' decisions, statutes, and public policy.<sup>2</sup>

This comment addresses a single issue: whether corporations should be allowed to represent themselves. It does not address situations where corporations represent others or pay nonlawyer nonemployees to represent them. Under Arkansas and federal law, an individual who is not a licensed attorney may appear in court and practice law, provided he does so for himself and in connection with his own business.<sup>3</sup> But Arkansas law prohibits corporate employees, officers, or directors who are not licensed attorneys from representing their corporations in the state.<sup>4</sup> Arkansas's caselaw and statutes burden small corporations by requiring them to hire legal counsel, which prevents them from assuming the risk of representing themselves. This comment argues that Arkansas should amend section 16-22-

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1. 2012 Ark. 130, at 13, 388 S.W.3d 444, 451.

2. *Id.* at 12, 388 S.W.3d at 451.

3. 28 U.S.C. § 1654 (2006); Ark. Bar Ass'n v. Union Nat'l Bank of Little Rock, 224 Ark. 48, 51, 273 S.W.2d 408, 410 (1954).

4. ARK. CODE ANN. § 16-22-211 (Supp. 2013); *Union Nat'l Bank*, 224 Ark. at 51, 273 S.W.2d at 410.

211 of the Arkansas Code to allow corporate self-representation.

Part II of this comment discusses the practice of law generally. Part III analyzes the recent Arkansas Supreme Court decision, *NISHA, LLC v. TriBuilt Construction Group, LLC*, as well as section 16-22-211. Part IV examines corporate self-representation by the types of proceedings in Arkansas and nationwide. Part V recommends that Arkansas amend section 16-22-211 to allow nonlawyer corporate officers to represent the corporation in courts not of record and in other similar proceedings.

## II. THE PRACTICE OF LAW

The Arkansas Supreme Court has the power to regulate the practice of law and to determine what qualifies as the unauthorized practice of law.<sup>5</sup> Though states uniformly prohibit the unauthorized practice of law, they define the “practice of law” differently.<sup>6</sup> States generally provide guidance about what constitutes the practice of law through statutes and caselaw.<sup>7</sup> Rule 5.5 of the Arkansas Rules of Professional Conduct prohibits the “unauthorized practice of law.”<sup>8</sup> Nonetheless, the Arkansas Supreme Court has emphasized the difficulties of defining the practice of law.<sup>9</sup>

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5. ARK. CONST. amend. 28 (“The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law.”); *Preston v. Stoops*, 373 Ark. 591, 594, 285 S.W.3d 606, 609 (2008) (“Oversight and control of the practice of law is under the exclusive authority of the judiciary.”); *see also* ARK. CODE ANN. § 16-22-209 (Repl. 1999) (“Every person who shall attempt to practice law in any court of record without being licensed, sworn, and registered, as required in this subchapter, shall be deemed guilty of contempt of court and shall be punished as in other cases of contempt.”).

6. *Compare* ARK. CODE ANN. § 16-22-501(a) (Repl. 1999), *and* GA. CODE ANN. § 15-19-51(a) (West 2013), *with* 42 PA. CONS. STAT. ANN. § 2524(a) (West 2013). *See also* *Unauthorized Practice: New ABA Survey of UPL Enforcement Finds Varied Funding, Predicts Increased Activity*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA), Jan. 12, 2005, § 21:23 (providing a December 2004 American Bar Association survey of states’ laws on the unauthorized practice of law).

7. *See, e.g.*, ARK. CODE ANN. § 16-22-501; *see also* 2 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 36:4 (2003).

8. ARK. R. PROF’L CONDUCT 5.5.

9. *Ark. Bar Ass’n v. Union Nat’l Bank of Little Rock*, 224 Ark. 48, 53, 273 S.W.2d 408, 411 (1954) (“It has been said in many opinions that it is not possible to give a definition of what constitutes practicing law that is satisfactory and all inclusive, and we make no such attempt.”).

Under Rule 5.5, an attorney violates his professional duties by assisting another person in the unauthorized practice of law or by practicing law in a jurisdiction where the attorney is not authorized to do so.<sup>10</sup> Further, the Arkansas Supreme Court has held:

[W]hen one appears before a court of record for the purpose of transacting business with the court in connection with any pending litigation or when any person seeks to invoke the processes of the court in any matter pending before it, that person is engaging in the practice of law.<sup>11</sup>

Though the Arkansas Code neither defines “court of record” nor lists exactly which courts fall under that category, *Black’s Law Dictionary* defines “court of record” as “[a] court that is required to keep a record of its proceedings” and as “[a] court that may fine and imprison people for contempt.”<sup>12</sup> Arkansas circuit courts, courts of appeal, and federal courts keep records of their proceedings; however, small-claims courts and other state district courts do not.<sup>13</sup>

Additionally, the practice of law is not confined to services before a court; it also includes “writing and interpreting wills, contracts, trust agreements, and the giving of legal advice.”<sup>14</sup> The purpose of prohibiting the unauthorized practice of law is to protect the public from attorneys’ incompetence in the preparation of legal documents and to prevent harm resulting from inaccurate legal advice.<sup>15</sup> This prohibition ensures that the public does not rely upon legal counseling by nonlawyers or by lawyers who are neither answerable to the courts in this state nor held to the standards of professional conduct imposed upon those licensed to practice law in this state.<sup>16</sup> Although Arkansas courts hold that pleadings filed by individuals

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10. ARK. R. PROF’L CONDUCT 5.5.

11. *Union Nat’l Bank*, 224 Ark. at 53, 273 S.W.2d at 411.

12. BLACK’S LAW DICTIONARY 407 (9th ed. 2009).

13. Telephone Interview with Gay Reynolds, Deputy Court Clerk, Small Claims Court, in Fayetteville, Ark. (Feb. 15, 2013).

14. *Union Nat’l Bank*, 224 Ark. at 54, 273 S.W.2d at 412.

15. *See Undem v. State Bd. of Law Exam’rs*, 266 Ark. 683, 692, 587 S.W.2d 563, 568 (1979).

16. *Id.*

unauthorized to practice law are null and void,<sup>17</sup> other courts allow an opportunity to remedy the wrong by filing their own pleadings.<sup>18</sup>

Arkansas law clearly requires a corporation to represent itself in court through a licensed attorney.<sup>19</sup> Although individuals and sole proprietorships have a right to represent themselves in court,<sup>20</sup> other business entities—like corporations, partnerships, and limited-liability companies—are considered artificial entities that may not appear in court on their own behalf.<sup>21</sup> Moreover, issues arise about whether corporate self-representation in proceedings outside of court constitutes the practice of law.

### III. *NISHA, LLC V. TRIBUILT CONSTRUCTION GROUP, LLC, AND SECTION 16-22-211 OF THE ARKANSAS CODE*

In *NISHA, LLC v. TriBuilt Construction Group, LLC*, the Arkansas Supreme Court held that “a corporate officer, director, or employee, who is not a licensed attorney, engages in the unauthorized practice of law by representing

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17. See, e.g., *Diamond Enters., Inc. v. Arvest Bank*, 2012 Ark. App. 710, at 2, 2012 WL 6197203, at \*2; *Global Mills, Inc. v. Granger*, 2010 Ark. App. 463, at 1, 2010 WL 2195780, at \*1 (citing *Clarendon Am. Ins. Co. v. Hickok*, 370 Ark. 41, 47, 257 S.W.3d 43, 47 (2007)).

18. *Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829, 831 (7th Cir. 1986); see also *K. M. A., Inc. v. Gen. Motors Acceptance Corp.*, 652 F.2d 398, 399 (5th Cir. 1981) (expressing uncertainty over whether an attorney’s failure to file a corporation’s notice of appeal deprives an appellate court of jurisdiction); *Turner v. Franklin Cnty. Four Wheelers Inc.*, 889 N.E.2d 903, 908 (Ind. Ct. App. 2008) (holding that the trial court abused its discretion by denying plaintiff’s motion to amend her complaint).

19. ARK. CODE ANN. § 16-22-211(a) (Supp. 2013); *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130, at 6, 388 S.W.3d 444, 448.

20. See ARK. CODE ANN. § 16-22-206 (Repl. 1999); *RZS Holdings AVV v. PDVSA Petroleo S.A.*, 506 F.3d 350, 354 n.4 (4th Cir. 2007) (“[A] sole proprietorship has no legal existence apart from its owner, and . . . an individual owner may represent his sole proprietorship in a pro se capacity.”); *Stewart v. Hall*, 198 Ark. 493, 495, 129 S.W.2d 238, 239 (1939) (“Litigants have a right to represent themselves, and appellant presented his own case.”).

21. ARK. CODE ANN. § 16-22-211(a); see *McCarroll v. Ozarks Rural Elec. Coop. Corp.*, 201 Ark. 329, 332-33, 146 S.W.2d 693, 695 (1940); see also WILLIAM MEADE FLETCHER ET AL., *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 4463 (perm. ed., rev. vol. 2008) (“Generally, a corporation cannot appear in person, and hence it must appear through an attorney admitted to practice in the jurisdiction in which the action is pending.”).

the corporation in arbitration proceedings.”<sup>22</sup> The court determined that an arbitration proceeding is a legal proceeding; therefore, representation in an arbitration proceeding constitutes the practice of law.<sup>23</sup> Moreover, seemingly inconsistent with other Arkansas Supreme Court cases concerning the unauthorized practice of law, the court’s reasoning in *NISHA* relied on section 16-22-211 of the Arkansas Code.<sup>24</sup> The following sections discuss: (A) the facts of *NISHA*; and (B) the significance of section 16-22-211 and the court’s reliance on the statute for defining the practice of law.

#### A. Facts and Procedural History of *NISHA*

*NISHA*, LLC (*NISHA*) hired TriBuilt Construction Group, LLC (*TriBuilt*) as the general contractor to build a Country Inn & Suites in Conway, Arkansas.<sup>25</sup> *NISHA* entered into an agreement with Centennial Bank (*Centennial*), assigning *NISHA*’s interest in the construction contract to *Centennial* as security.<sup>26</sup> After *TriBuilt* completed the project, a dispute over construction costs ensued.<sup>27</sup> *TriBuilt* filed suit in the Sebastian County Circuit Court against *NISHA* and *Centennial* seeking the balance owed and alleging defamation and intentional interference with *TriBuilt*’s ability to acquire bonding for the project.<sup>28</sup>

*NISHA* moved to compel arbitration and to stay proceedings pending arbitration, invoking the contract clause that compelled the parties to arbitrate all disputes arising from the construction contract.<sup>29</sup> After the circuit court denied both of *NISHA*’s motions, *Centennial* filed a second motion to compel arbitration and asked *TriBuilt* to voluntarily enter into arbitration proceedings.<sup>30</sup> The circuit court partially granted *Centennial*’s motion to compel arbitration and to stay the proceedings, finding “that three

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22. 2012 Ark. 130, at 1, 388 S.W.3d at 445.

23. *Id.* at 13, 388 S.W.3d at 451.

24. *Id.* at 12, 388 S.W.3d at 451.

25. *Id.* at 1, 388 S.W.3d at 445.

26. *Id.* at 1-2, 388 S.W.3d at 445.

27. *NISHA*, 2012 Ark. 130, at 2, 388 S.W.3d at 445.

28. *Id.* at 2, 388 S.W.3d at 445.

29. *See id.*

30. *Id.*

of TriBuilt's claims against NISHA sounded in tort and were not subject to binding arbitration."<sup>31</sup>

TriBuilt's counsel thereafter withdrew from the arbitration and circuit-court proceedings.<sup>32</sup> TriBuilt consulted with another attorney, but that attorney subsequently advised the court he would not represent TriBuilt.<sup>33</sup> Having exhausted its funds, TriBuilt opted to represent itself through its nonlawyer president, Alan Harrison.<sup>34</sup> In an email to the arbitrator and opposing counsel, Mr. Harrison expressed his intention to represent TriBuilt in the arbitration proceedings.<sup>35</sup> In response, NISHA and Centennial jointly filed for a permanent injunction to prevent TriBuilt's nonlawyer corporate officer from representing it in the circuit-court case or in the arbitration proceedings.<sup>36</sup>

International Fidelity Insurance Company (FIC), a party to the arbitration proceedings, filed a response to the petition for permanent injunction, maintaining that the American Arbitration Association authorizes corporate self-representation in an arbitration proceeding.<sup>37</sup> The circuit court found that nonlawyer representation of a corporation in arbitration proceedings was not the unauthorized practice of law and that the arbitrator should decide who may represent a corporation in arbitration proceedings.<sup>38</sup> NISHA and Centennial then filed an interlocutory appeal to the Arkansas Supreme Court.<sup>39</sup> The circuit court found that

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31. *Id.* at 2 & n.1, 388 S.W.3d at 445-46 & n.1.

32. *NISHA*, 2012 Ark. 130, at 3, 388 S.W.3d at 446.

33. Joint Petition for Permanent Injunction at Exhibit A, TriBuilt Constr. Grp., LLC v. NISHA, LLC, Case No. CV-2009-2097 (I) (Ark. Cir. Ct. Mar. 31, 2011) [hereinafter Petition for Permanent Injunction].

34. *NISHA*, 2012 Ark. 130, at 3, 388 S.W.3d at 446; Telephone Interview with Jack East III, Senior Partner, Jack East III, PA (noting that TriBuilt's lawyers withdrew because TriBuilt could not use security to pay its attorneys' fees) (Jan. 31, 2013).

35. Petition for Permanent Injunction, *supra* note 33, at Exhibit B.

36. *NISHA*, 2012 Ark. 130, at 3, 388 S.W.3d at 446.

37. *Id.* at 3-4, 388 S.W.3d at 446; *see* AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R-26, at 20 (2013) (Arbitration Rule 26), available at <http://www.adr.org> ("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.").

38. *NISHA*, 2012 Ark. 130, at 4, 388 S.W.3d at 446.

39. *Id.*

pro se representation by a corporate officer in arbitration “was an issue of first impression and that there was no just reason to delay entry of final judgment.”<sup>40</sup>

On appeal, NISHA and Centennial argued that the Arkansas Supreme Court “should reverse the circuit court’s finding that nonlawyer representation in arbitration proceedings does not constitute the unauthorized practice of law.”<sup>41</sup> TriBuilt never responded to the appeal.<sup>42</sup> The Arkansas Supreme Court reversed on March 29, 2012, holding that corporate self-representation in arbitration proceedings constituted the unauthorized practice of law.<sup>43</sup>

Typically, TriBuilt employed six to eight employees and served as a general contractor for construction projects.<sup>44</sup> As a general contractor, TriBuilt usually contracted work to subcontractors.<sup>45</sup> Because NISHA did not pay TriBuilt for its work, TriBuilt was unable to pay the subcontractors and suppliers it hired to work on NISHA’s hotel project.<sup>46</sup>

At the time of the lawsuit, TriBuilt had two partners—Alan Harrison and Joey Marrone.<sup>47</sup> Initially, one attorney represented TriBuilt on a contingency-fee basis.<sup>48</sup> But after the first attorney passed away, another attorney took over the case and required TriBuilt to pay a substantial retainer.<sup>49</sup> The second attorney later withdrew from the case; and TriBuilt, lacking substantial capital, was unable to find another attorney willing to take the complex case for a contingency fee.<sup>50</sup>

TriBuilt’s president, Alan Harrison, initially represented the company in arbitration.<sup>51</sup> Mr. Harrison spent a significant amount of time preparing for the seventeen-day

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40. *Id.* at 4, 388 S.W.3d at 446-47.

41. *Id.* at 4, 388 S.W.3d at 447.

42. *Id.*

43. *NISHA*, 2012 Ark. 130, at 1, 388 S.W.3d at 445.

44. Telephone Interview with Alan Harrison, President, TriBuilt Constr. Grp., LLC (Mar. 4, 2013).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Telephone Interview with Alan Harrison, *supra* note 44.

50. *Id.*

51. *Id.*

arbitration that occurred over a six-month period.<sup>52</sup> But in 2012, the Arkansas Supreme Court ruled that Mr. Harrison engaged in the unauthorized practice of law by representing his company in the arbitration.<sup>53</sup> Before the Arkansas Supreme Court heard NISHA and Centennial's appeal, TriBuilt went out of business because of financial strain from the lawsuit and its inability to pay subcontractors and suppliers.<sup>54</sup>

Mr. Harrison believes TriBuilt did not achieve a monetary verdict against NISHA in the seventeen-day arbitration because the Arkansas Supreme Court decision came down days before the arbitrator issued his final decision.<sup>55</sup> As a direct result of the lawsuit's outcome, TriBuilt could not recover a monetary award in the arbitration because the company could no longer represent itself in the arbitration, its partners had filed for bankruptcy, and the company was no longer in business.<sup>56</sup>

#### B. *NISHA*'s Holding Based on Section 16-22-211 of the Arkansas Code

Although the Arkansas Supreme Court cited cases from multiple states when it analyzed corporate self-representation in arbitration proceedings,<sup>57</sup> this comment discusses the statute on which the court relied—section 16-22-211 of the Arkansas Code—which prevents corporate self-representation by a nonlawyer corporate officer.<sup>58</sup> The Arkansas Supreme Court's consistently strict enforcement of section 16-22-211 influenced the *NISHA* court's decision.<sup>59</sup>

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52. *Id.*

53. *Id.*

54. Telephone Interview with Alan Harrison, *supra* note 44.

55. *Id.*

56. *Id.*

57. *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130, at 10-11, 388 S.W.3d 444, 449-50.

58. ARK. CODE ANN. § 16-22-211(a) (Supp. 2013).

59. *NIISHA*, 2012 Ark. 130, at 12, 388 S.W.3d at 451.



### 1. Statutory History of Section 16-22-211

The statutory history of section 16-22-211 demonstrates that the statute has remained substantially unchanged and that only a few cases have interpreted the statute. The Arkansas General Assembly first enacted a law prohibiting corporations from engaging in the practice of law on March 23, 1929.<sup>60</sup> The Act was published in 1931,<sup>61</sup> republished in 1937,<sup>62</sup> then codified in 1947.<sup>63</sup> In response to the Little Rock Nine, Governor Orval Faubus called “an extraordinary session of the Arkansas General Assembly on August 26, 1958, which passed a series of laws to forestall desegregation.”<sup>64</sup> Among the sixteen bills enacted was Act 11, which removed an exception from the unauthorized-practice-of-law statute that allowed non-profit and charitable organizations to represent individuals, effectively banning the National Association for the Advancement of Colored People from providing legal assistance.<sup>65</sup> The 1962 supplement to the Arkansas Statutes Annotated reflects Act 11’s amendment to the statute.<sup>66</sup> The amended statute was re-codified in 1987 at section 16-22-211 of the Arkansas Code.<sup>67</sup> The General Assembly amended the statute again in 2005 to remove the statute’s misdemeanor punishment.<sup>68</sup>

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60. Act 182, 1929 Ark. Acts 904, 905-08.

61. STATUTES OF ARKANSAS §§ 596a–g (Crawford & Moses’ Digest Supp. 1931).

62. STATUTES OF ARKANSAS §§ 3630–3635 (Pope’s Digest 1937).

63. ARK. STAT. ANN. §§ 25-205 to -210 (1947).

64. *Lost Year*, ENCYCLOPEDIA ARK. HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=737> (last updated Aug. 9, 2013).

65. Section 2 of Act 11 read:

It has been found and declared by the General Assembly that the orderly administration of the educational facilities of Arkansas have been subjected to abuse by reason of the exemption granted them under the terms of Act 182, Ark. Acts of 1929, § 5 and it is to the public interest that our public school be administered without such interference, and the passage of this act will tend to alleviate such a situation. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

Act 11, 1958 Ark. Acts 2021, 2022.

66. ARK. STAT. ANN. § 25-209 (Repl. 1962).

67. ARK. CODE ANN. § 16-22-211 (Supp. 2013).

68. Act 1994, 2005 Ark. Acts 6932, 6999-7001.

The General Assembly amended section 16-22-211 for the last time on March 31, 2011, allowing non-profit and public-interest corporations and associations to represent individual persons.<sup>69</sup>

## 2. Cases Interpreting Section 16-22-211

Since the original enactment of Arkansas's statute against corporations practicing law in 1929, four cases dealing with nonlawyer officers representing corporations have interpreted the law in detail.<sup>70</sup> In the seminal Arkansas case, *Arkansas Bar Association v. Union National Bank of Little Rock*, the court issued its first recognized ruling under section 29-205 of the Arkansas Statutes, now codified at section 16-22-211 of the Arkansas Code (Statute).<sup>71</sup> In *NISHA*, *NISHA* and Centennial cited to *Union National Bank* to argue that a corporate entity representing itself in arbitration proceedings constituted the unauthorized practice of law.<sup>72</sup> However, *Union National Bank* involved a bank's licensed attorneys representing an estate, not the bank itself.<sup>73</sup> In *Union National Bank*, the Arkansas Bar Association sought to enjoin a bank from engaging in the unauthorized practice of law by representing individuals.<sup>74</sup> The court addressed the authority of the bank, acting as a fiduciary to various estates, to prepare and present petitions and other instruments in the probate and chancery courts on

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69. Act 858, 2011 Ark. Acts 3413, 3413-16 (codified as amended at ARK. CODE ANN. § 16-22-2011 (Supp. 2013)). Specifically, the General Assembly amended the statute to allow non-profit and public-interest corporations and associations to represent an "indigent, poor, or disadvantaged person as a client in a civil or criminal matter, provided that any legal services rendered by a nonprofit corporation or voluntary association are furnished through duly licensed attorneys in accordance with rules governing the practice of law in Arkansas." Act 858, 2011 Ark. Acts 3413, 3415 (emphasis omitted) (codified as amended at ARK. CODE ANN. § 16-22-211 (Supp. 2013)).

70. See *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130, at 11, 388 S.W.3d 444, 450; *All City Glass & Mirror, Inc. v. McGraw Hill Info. Sys. Co, Div. of McGraw Hill, Inc.*, 295 Ark. 520, 521, 750 S.W.2d 395, 395 (1988); *Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock*, 224 Ark. 48, 50-51, 273 S.W.2d 408, 410 (1954); *Roma Leathers, Inc. v. Ramey*, 68 Ark. App. 1, 5, 2 S.W.3d 82, 84-85 (1999).

71. *Union Nat'l Bank*, 224 Ark. at 53, 273 S.W.2d at 411.

72. *NISHA*, 2012 Ark. 130, at 6-7, 388 S.W.3d at 448 (citing *Union Nat'l Bank*, 224 Ark. at 53, 273 S.W.2d at 411).

73. *Union Nat'l Bank*, 224 Ark. at 49, 273 S.W.2d at 409.

74. *Id.*

behalf of the estates.<sup>75</sup> The bank had two full-time employees who were licensed attorneys and who prepared the estates' court documents and represented them in the probate and chancery courts.<sup>76</sup> The Arkansas Supreme Court held that a person or corporation acting as a trustee may not represent or practice law on behalf of the beneficiary or trusteeship on the theory that the person is practicing for himself—even if the person employs attorneys.<sup>77</sup> Further, the court stated:

[W]hen one appears before a court of record for the purpose of transacting business with the court in connection with any pending litigation or when any person seeks to invoke the process of the court in any matter pending before it, that person is engaging in the practice of law.<sup>78</sup>

Thus, “any one who assumes the role of assisting the court in its process or invokes the use of its mechanism is considered to be engaged in the practice of law.”<sup>79</sup> In essence, *Union National Bank* only prohibits banks from preparing wills and trusts for customers; it does not proscribe corporate self-representation.<sup>80</sup>

In addition, the *NISHA* court cited *Union National Bank* for the following general conclusions regarding the practice of law in Arkansas:

Corporations are prohibited from practicing law in this state and a corporate employee, officer, or director who is not a licensed attorney cannot hold himself or herself out as being entitled to practice law. An individual can practice law for himself or herself, but a corporation can only represent itself in connection with its own business or affairs in the courts of this state through a licensed attorney.<sup>81</sup>

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75. *Id.*

76. *Id.*

77. *Id.* at 51-52, 273 S.W.2d at 410.

78. *Union Nat'l Bank*, 224 Ark. at 53, 273 S.W.2d at 411.

79. *Id.*

80. Robert Laurence, *Swimming Upstream: A Final Attempt at Persuasion on the Issue of Corporate Pro Se Representation in Arkansas State Court*, 54 ARK. L. REV. 475, 487 (2001).

81. *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130, at 6-7, 388 S.W.3d 444, 448 (citation omitted).

Although *Union National Bank's* dicta is often cited to argue that a nonlawyer corporate officer representing a corporation is the unauthorized practice of law, the *NISHA* court correctly asserted that *Union National Bank* does not address the specific issue of arbitration.<sup>82</sup> *Union National Bank* deals solely with a corporation holding itself out to the public and representing its clients, not itself, in legal proceedings.<sup>83</sup> Therefore, *Union National Bank* does not prohibit corporate self-representation.<sup>84</sup>

Thirty years after *Union National Bank*, in *All City Glass & Mirror, Inc. v. McGraw Hill, Inc.*, the Arkansas Supreme Court held that the Statute was not controlling in a dispute that concerned whether a nonlawyer president could represent a corporation.<sup>85</sup> Counsel represented All City Glass before the Arkansas Supreme Court; but before the trial court, the corporation's president, Jimmy Overton, attempted to file an answer and appear at a hearing.<sup>86</sup> The trial judge struck the answer and would not allow Overton to act as counsel.<sup>87</sup> The trial judge ruled that the Statute requires an attorney to represent a corporation.<sup>88</sup> On appeal, the Arkansas Supreme Court held that the trial judge was correct, but for the wrong reason; the supreme held that *Union National Bank*, not the Statute, controlled.<sup>89</sup> By employing this reasoning, however, *All City Glass* misconceived *Union National Bank*. The Statute should have controlled because *Union National Bank's* holding only prohibits a corporation from representing its clients—not itself—in legal proceedings.

The Arkansas Court of Appeals, in *Roma Leathers, Inc. v. Ramey*, applied the supreme court's holding in *All City Glass*.<sup>90</sup> A corporation allegedly sent four shipments of leather goods to Mr. Ramey in Arkansas.<sup>91</sup> Mr. Ramey

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82. *Id.* at 7, 388 S.W.3d at 448.

83. *See Union Nat'l Bank*, 224 Ark. at 56, 273 S.W.2d at 413.

84. *See id.*

85. 295 Ark. 520, 521, 750 S.W.2d 395, 395 (1988).

86. *Id.* at 520, 750 S.W.2d at 395.

87. *Id.*

88. *Id.*

89. *Id.* at 521, 750 S.W.2d at 395.

90. *Roma Leathers, Inc. v. Ramey*, 68 Ark. App. 1, 5, 2 S.W.3d 82, 83 (1999).

91. *Id.* at 2, 2 S.W.3d at 83.

bounced two checks, declined to pay for the two shipments of goods he acknowledged receiving, and denied that he ever received the other two shipments.<sup>92</sup> The corporation sued and represented itself through Linda Lee, a nonlawyer corporate officer.<sup>93</sup> The corporation lost at trial and appealed, still represented by Lee.<sup>94</sup> Lee lost the appeal and failed to cite any legal authority for her arguments.<sup>95</sup> The court of appeals described her abstract on appeal as “flagrantly deficient.”<sup>96</sup> The court began its analysis of the plaintiff corporation’s pro se representation through the agency of Lee by examining the Statute, but it believed that the issue turned on caselaw, not the Statute.<sup>97</sup> The court noted: “Arkansas caselaw is clear that individuals may represent themselves, but corporations may do so only through a licensed attorney.”<sup>98</sup> The court, looking to *All City Glass*, held that Ms. Lee—not the corporation—engaged in the unauthorized practice of law.<sup>99</sup> However, public-policy concerns supported making the corporation bear the ultimate responsibility for the conduct of its unauthorized representative.<sup>100</sup>

Opponents of the decisions rejecting corporate self-represent could cite the concurrence in *Brown v. Kelton* to argue that the Statute should not even regulate the practice of law. In *Brown*, the majority analyzed the Statute and found that using in-house counsel to represent an insured equates to the insurance company unlawfully practicing law.<sup>101</sup> Appellants argued that the Statute was unconstitutional because it conflicted with the Arkansas Supreme Court’s exclusive power to regulate the practice of law as vested by amendment 28 to the Arkansas

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Ramey*, 68 Ark. App. at 3, 2, S.W.3d at 83.

96. *Id.*

97. *Id.* at 4, 2 S.W.3d at 84.

98. *Id.*

99. *Id.* at 5, 2 S.W.3d at 85.

100. *Ramey*, 68 Ark. App. at 5, 2 S.W.3d at 85.

101. *Brown v. Kelton*, 2011 Ark. 93, at 3-4, 380 S.W.3d 361, 363-64. *See generally* Dwayne D. Hedges, Note, *Brown v. Kelton: The Arkansas Prohibition on the Use of Employee Attorneys to Defend the Insured*, 65 ARK. L. REV. 953 (2012) (providing a detailed analysis of *Brown v. Kelton*).

Constitution.<sup>102</sup> Amendment 28 provides: “The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law.”<sup>103</sup> However, the majority found the Statute constitutional and held that it did not conflict with the Arkansas Supreme Court’s exclusive power to regulate the practice of law.<sup>104</sup>

In his concurrence, Chief Justice Hannah believed the appellants correctly argued that the Statute “cannot control the outcome of this case because the statute intrudes on the [Arkansas Supreme Court’s] exclusive power.”<sup>105</sup> Justice Hannah reasoned: “A statute, being an enactment of the legislative branch, may not control what is within the exclusive authority of the judicial branch.”<sup>106</sup> Justice Hannah explained that, as the highest court in the judicial branch of government, the Arkansas Supreme Court holds exclusive authority over regulating the practice of law.<sup>107</sup> He believes the authority to regulate the practice of law arises from the Arkansas Constitution and common law, not from the Statute.<sup>108</sup>

The four cases examining corporate self-representation demonstrate that Arkansas courts have evaluated the Statute inconsistently. Where a nonlawyer officer has represented a corporation, some courts have held that the officer—not the corporation—has engaged in the unauthorized practice of law.<sup>109</sup> But other courts have interpreted the Statute as holding the corporation itself liable for the unauthorized practice of law.<sup>110</sup> The courts that look to caselaw, rather than the Statute, unanimously cite to

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102. *Brown*, 2011 Ark. 93, at 5, 380 S.W.3d at 365.

103. ARK. CONST. amend. 28.

104. *Brown*, 2011 Ark. 85, at 5-7, 380 S.W.3d at 365-66.

105. *Id.* at 9, 380 S.W.3d at 366-67.

106. *Id.* at 9, 380 S.W.3d at 367.

107. *Id.*

108. *Id.*

109. *All City Glass & Mirror, Inc. v. McGraw Hill Info. Sys. Co, Div. of McGraw Hill, Inc.*, 295 Ark. 520, 521, 750 S.W.2d 395, 395-96 (1988); *Roma Leathers, Inc. v. Ramey*, 68 Ark. App. 1, 5, 2 S.W.3d 82, 85 (1999).

110. *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130, at 6, 12-13, 388 S.W.3d 444, 448, 451; *Arkansas Bar Ass’n v. Union Nat’l Bank of Little Rock*, 224 Ark. 48, 51-53, 273 S.W.2d 408, 410-11 (1954).

*Union National Bank*.<sup>111</sup> The courts' application of *Union National Bank* is problematic because the case only stands for the proposition that a bank may not prepare wills and trusts for its customers; it does not stand for the proposition that corporate self-representation is prohibited.<sup>112</sup>

#### IV. CORPORATE SELF-REPRESENTATION BY TYPE OF PROCEEDING

This Part analyzes various proceedings in which courts have traditionally prohibited or permitted corporate pro se representation. It compares and contrasts these proceedings to reveal the reasons why corporate pro se representation is allowed in some proceedings but not in others. Furthermore, understanding the differences between these proceedings reveals why the *NISHA* court incorrectly barred corporate pro se representation in arbitration proceedings and why Arkansas courts should permit corporate pro se representation in other proceedings. Therefore, the following sections detail proceedings that: (A) prohibit corporate self-representation; (B) allow corporate self-representation; and (C) should allow corporate self-representation.

##### A. Corporate Pro Se Prohibited: Court Proceedings

Following the overwhelming majority view, Arkansas courts have long adhered to the “well-known rule that the officers of a corporation are distinct and separate from the corporation itself, and that the appearance of an officer of a corporation is not an appearance by the corporation.”<sup>113</sup> The United States Supreme Court supports this view. Chief Justice Marshall, in addressing whether the record of a case should disclose that a defendant bank authorized the prosecution of a suit, stated: “A corporation, it is true, can appear only by attorney, while a natural person may appear

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111. See *NISHA*, 2012 Ark. 130, at 6-7, 388 S.W.3d at 447-48; *All City Glass*, 295 Ark. at 521, 750 S.W.2d at 395-96; *Union Nat'l Bank*, 224 Ark. at 50-51, 273 S.W.2d at 410; *Ramey*, 68 Ark. App. at 4-5, 2 S.W.3d at 84-85.

112. Laurence, *supra* note 80.

113. *J.C. Engleman, Inc., v. Briscoe*, 172 Ark. 1088, 1094, 291 S.W. 795, 798 (1927).

for himself.”<sup>114</sup> Thus, state courts traditionally hold that corporations may not represent themselves in civil or criminal court proceedings.

Whether the court proceeding is civil or criminal, states have unanimously held that licensed attorneys must represent corporations in court, pretrial motions, and discovery.<sup>115</sup> Courts have required an appearance by an attorney “even when the person seeking to represent the corporation is its president or sole shareholder,”<sup>116</sup> or when financial hardship threatens to prevent the corporation from being able to pay attorneys’ fees.<sup>117</sup> Arkansas law prohibits any person from practicing law in any court of record unless the Arkansas Supreme Court has admitted that person to practice.<sup>118</sup>

Policy reasons support the distinction between allowing individuals to represent themselves, but not corporations. The main goal of prohibiting the unauthorized practice of law is protecting the public from incompetent, unethical, or irresponsible representation.<sup>119</sup> Some courts have justified the distinction between natural persons and corporations on the basis that a person appearing on behalf of a corporation acts in a representative capacity, while a person appearing pro se does not.<sup>120</sup> Further, a distinction exists between court proceedings and other proceedings, such as arbitration, in that “thorough familiarity with procedural and substantive rules of law on the part of responsible advocates bound by rules of discipline is a prerequisite to the efficient functioning of courts and the proper administration of justice.”<sup>121</sup>

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114. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 830 (1824).

115. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. e (2000).

116. *FLETCHER ET AL.*, *supra* note 21; *see, e.g.*, *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985); *Capital Grp., Inc. v. Gaston & Snow*, 768 F. Supp. 264, 265 (E.D. Wis. 1991); *NISHA*, 2012 Ark. 130, at 3, 12, 388 S.W.3d at 446, 451; *All City Glass*, 295 Ark. at 520, 750 S.W.2d at 395.

117. *See FLETCHER ET AL.*, *supra* note 21.

118. ARK. CODE ANN. § 16-22-206 (Repl. 1999).

119. *Renaissance Enters., Inc. v. Summit Teleservices, Inc.*, 515 S.E.2d 257, 258 (S.C. 1999); *see Merco Constr. Eng'rs, Inc. v. Mun. Court*, 581 P.2d 636, 639, 641 (Cal. 1978); *Union Sav. Ass'n v. Home Owners Aid, Inc.*, 262 N.E.2d 558, 561 (Ohio 1970).

120. *See, e.g.*, *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc.*, 590 P.2d 570, 573-74 (Haw. 1979).

121. *Varney Enters., Inc. v. WMF, Inc.*, 520 N.E.2d 1312, 1314 (Mass. 1988).



In 2012, several courts upheld the common-law principle that an attorney must represent a corporation. A Minnesota court of appeals found the state's statute<sup>122</sup> unconstitutional—to the extent it required courts to allow nonlawyer corporate officers to appear in court on behalf of corporations—and held that a corporation's nonlawyer agent could not represent the corporation before the court of appeals.<sup>123</sup> Similarly, the West Virginia Supreme Court of Appeals held that the vice president of a corporation engaged in the unauthorized practice of law by filing an appeal to the circuit court.<sup>124</sup> The court further held as unconstitutional a provision of the statute allowing a corporation's nonlawyer representative to appeal a decision of the board of equalization to a circuit court.<sup>125</sup>

Likewise, the Illinois Supreme Court held that a corporate president's filing of a complaint seeking review of default judgments entered against the corporation in administrative hearings constituted the unauthorized practice of law.<sup>126</sup> In addition, the Montana Supreme Court upheld the State's proposition that a nonlawyer may not represent a corporation at trial or on appeal.<sup>127</sup> Finally, the Nebraska Court of Appeals held that the defendant corporation failed to adhere to the rule that an attorney must represent a corporation when a registered agent for the defendant wrote a letter in response to the plaintiff's petition.<sup>128</sup>

### B. Common Exceptions: Corporate Pro Se Permitted

As a very limited exception to the general rule against corporate self-representation, most states allow a layman to serve as a corporation's legal representative in proceedings

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122. MINN. STAT. ANN. § 481.02 (West 2013).

123. *Haugen v. Superior Dev., Inc.*, 819 N.W.2d 715, 718 (Minn. Ct. App. 2012).

124. *Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 724 S.E.2d 733, 740 (W. Va. 2012).

125. *Id.* at 741.

126. *Downtown Disposal Servs., Inc. v. City of Chi.*, 979 N.E.2d 50, 54 (Ill. 2012).

127. *H & H Dev., LLC v. Ramlow*, 272 P.3d 657, 662 (Mont. 2012).

128. *Turbines Ltd. v. Transupport, Inc.*, 808 N.W.2d 643, 650 (Neb. Ct. App. 2012).

before a small-claims court or in a court not of record.<sup>129</sup> As previously defined, a “court of record” is a court that is required to keep a record of its proceedings and may fine or imprison a party.<sup>130</sup> “Courts not of record” include inferior local courts, municipal courts, and courts that constitutional or statutory provisions may exclude from the definition of “courts of record.”<sup>131</sup> The rationale for this exception is that the problems commonly occurring when a layman serves as a corporation’s legal representative in a court of record are reduced in the informal setting of a proceeding in a court not of record.<sup>132</sup>

### 1. Administrative Proceedings

The Arkansas Court of Appeals recently addressed corporate representation in an administrative proceeding, holding that a president of a corporation may properly appear before the Workers’ Compensation Commission because the Commission is an administrative forum rather than a court.<sup>133</sup> Consulting an American Law Report, a 1981 Arkansas Attorney General opinion addressed the same issue, explaining:

[A] lay adjuster is not practicing law where he investigates and reports the facts, and negotiates on the basis thereof but does not give advice or an opinion representing his own judgment of the soundness of the claim in law, or any judgment necessarily resulting from an application of the rules of law to the facts.<sup>134</sup>

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129. See FLETCHER ET AL., *supra* note 21, § 4463.20, at 28-29; Jay M. Zitter, Annotation, *Propriety and Effect of Corporation’s Appearance Pro Se Through Agent Who Is Not Attorney*, 8 A.L.R.5th 653, § 5(a), at 689-90 (1992).

130. BLACK’S LAW DICTIONARY 407 (9th ed. 2009).

131. BLACK’S LAW DICTIONARY 406 (9th ed. 2009); 21 C.J.S. *Courts* § 6 (2006).

132. *Eckles v. Atlanta Tech. Grp., Inc.*, 485 S.E.2d 22, 25 (Ga. 1997) (citing *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc.*, 590 P.2d 570, 575 (Haw. 1979)).

133. *Global Mills, Inc. v. Granger*, 2010 Ark. App. 463, at 1, 2010 WL 2195780, at \*1.

134. 1981 Ark. Att’y Gen. Op. No. 81-124 (July 8, 1981) (citing Annotation, *Handling, Preparing, Presenting, or Trying Workmen’s Compensation Claims or Cases as Practice of Law*, 2 A.L.R.3d 724, § 2(b) (1965)); see also Michelle A. Pinkowski, Annotation, *Handling, Preparing, Presenting, or Trying Workers’ Compensation Claims or Cases as Practice of Law*, 58 A.L.R.5th 449, § 2(a) (1998) (replacing the 1965 version).

In jurisdictions outside Arkansas, the caselaw is split over whether corporations may represent themselves in administrative proceedings.<sup>135</sup> “Where a statute or court rule provides for the practice of law by nonlawyer corporate officers in an administrative tribunal setting, it is free to allow nonlawyer corporate officers to represent corporations.”<sup>136</sup> In California, the general common-law rule requiring counsel to represent corporations in proceedings before courts of record—other than small-claims courts—does not extend to proceedings before administrative agencies and tribunals, such as an administrative hearing for the Department of Alcoholic Beverage Control.<sup>137</sup> In addition, courts in Florida and Pennsylvania have held that self-representation by corporations is permissible in administrative proceedings like the Unemployment Appeals Commission.<sup>138</sup> Further, a Michigan court held that nonlawyer corporate officers could represent employers before the Employment Security Commission.<sup>139</sup> Finally, a nonlawyer officer, agent, or employee may represent a business in a civil magistrate’s court proceedings in South Carolina.<sup>140</sup> Though not recently, courts in other jurisdictions have also held that corporations may appear before administrative agencies through agents who are not attorneys.<sup>141</sup>

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135. See Zitter, *supra* note 129.

136. FLETCHER ET AL., *supra* note 21, § 4463.30.

137. *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 121 Cal. Rptr. 2d 758, 765 (Ct. App. 2002).

138. *N. Miami Gen. Hosp., Inc. v. Plaza*, 425 So. 2d 1140, 1141 (Fla. Dist. Ct. App. 1982); *Harkness v. Unemployment Comp. Bd. of Review*, 920 A.2d 162, 169 (Pa. 2007).

139. *State Bar of Mich. v. Galloway*, 335 N.W.2d 475, 480 (Mich. Ct. App. 1983).

140. *In re Unauthorized Practice of Law Rules Proposed by S.C. Bar*, 422 S.E.2d 123, 124 (S.C. 1992).

141. See, e.g., *Idaho State Bar Ass’n v. Idaho Pub. Utils. Comm’n*, 637 P.2d 1168, 1172 (Idaho 1981) (holding that a sole shareholder could represent the corporation before the public utilities commission); *Liberty Mut. Ins. Co. v. Jones*, 130 S.W.2d 945, 959 (Mo. 1939) (holding that lay employees of insurance companies could appear on behalf of the insurance company at an informal conference before the workers’ compensation commission regarding compensation claims); *Div. of Alcoholic Beverage Control in Dep’t of Law & Pub. Safety v. Bruce Zane, Inc.*, 239 A.2d 28, 31 (N.J. Super. Ct. App. Div. 1968) (holding that corporation’s president and principal shareholder could represent the corporation in an administrative hearing before the Alcoholic Beverage Control Division); *Blair v. Motor Carriers Serv. Bureau*, 40 Pa. D. & C. 413, 426, 1941 WL 2839 (Pa. Com. Pl. 1939) (allowing the secretary of a

An Arizona court, however, held that a nonlawyer could not represent a corporate employer in matters before an unemployment-insurance appeals board of the Department of Economic Security.<sup>142</sup> In Missouri, a managerial employee was not authorized to represent the Department of Employment Security in an employment security proceeding in front of the Labor and Industrial Relations Commission.<sup>143</sup> Further, the Idaho Supreme Court ruled that a nonlawyer corporate officer and sole shareholder could not represent a corporation in Industrial Commission proceedings, reasoning that when an entity chooses to incorporate and get the resulting benefits, it cannot then ask the court to ignore its corporate status and extend to it the advantages granted to individuals.<sup>144</sup> Similarly, other jurisdictions have held, though not as recently, that corporations are not allowed to appear before administrative agencies through agents who are not attorneys.<sup>145</sup>

Arkansas maintains that administrative tribunals are not courts of record.<sup>146</sup> Nonetheless, some states, like California, define administrative proceedings as courts of

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corporation that provided various services for motor carriers to appear before the Interstate Commerce Commission on grounds that the Commission regulated its own bar and ascertained the ability and character of those who sought to appear before it).

142. *Anamax Mining Co. v. Ariz. Dep't of Econ. Sec.*, 711 P.2d 621, 624 (Ariz. Ct. App. 1985).

143. *Haggard v. Div. of Emp't Sec.*, 238 S.W.3d 151, 154-55 (Mo. 2007). Missouri courts have consistently held that corporations cannot appear in legal proceedings except through an attorney. *See, e.g.*, *Clark v. Austin*, 101 S.W.2d 977, 982-83 (Mo. 1937) (holding that laymen, one of whom was a freight agent representing the Missouri Pacific Railroad Company, could not appear before the Missouri Public Service Commission); *see also Dobbs Houses, Inc. v. Brooks*, 641 S.W.2d 441, 442-44 (Mo. Ct. App. 1982) (holding that corporation's non-licensed Equal Employment Opportunity Affairs Manager could not represent corporation before the Missouri Commission on Human Rights).

144. *Kyle v. Beco Corp.*, 707 P.2d 378, 382-83 (Idaho 1985).

145. *See, e.g.*, *Ky. State Bar Ass'n v. Henry Vogt Mach. Co.*, 416 S.W.2d 727, 728 (Ky. 1967) (holding corporation's director of personnel, who was not a licensed attorney, guilty of the unauthorized practice of law for appearing on behalf of the corporation at a hearing before the Unemployment Insurance Commission); *Pub. Serv. Comm'n v. Hahn Transp., Inc.*, 253 A.2d 845, 851 (Md. 1969) (holding that a corporation could not appear before a public service commission hearing without an attorney).

146. *See Douglas v. City of Cabot*, 347 Ark. 1, 4, 59 S.W.3d 430, 432 (2001); *Bolen v. Wash. Cnty. Zoning Bd. of Adjustments*, 2011 Ark. App. 319, at 4, 384 S.W.3d 33, 36.

record “entitled to expect to be aided in resolution of contested issues by presentation of causes through qualified professionals rather than a lay person.”<sup>147</sup> But this definition of courts of record should not encompass administrative proceedings given the purposes of administrative agencies. Administrative proceedings “are designed and function as alternatives to judicial dispute resolution so that the services of a lawyer are not a requisite to receiving a fair hearing and just decision.”<sup>148</sup> The consideration of a given proceeding as an “alternative” to judicial resolution should be a principal indication that the proceeding is not a court of record and that it should allow corporate self-representation.

## 2. *Small-Claims Division of Municipal Court*

Although an attorney generally must represent a corporation in small-claims court, statutes or court rules may provide exceptions to this general rule.<sup>149</sup> Further, “[a] corporation that has invoked the small claims procedure should not be permitted to participate in subsequent proceedings outside the small claims procedure without counsel.”<sup>150</sup>

For example, Arkansas formerly had a statute—section 16-17-605 of the Arkansas Code—that allowed a corporate officer to represent his or her corporation in small-claims proceedings.<sup>151</sup> Arkansas Attorney General opinions

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147. *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 121 Cal. Rptr. 2d 758, 765 (Ct. App. 2002) (citing *Merco Constr. Eng’rs, Inc. v. Mun. Court*, 581 P.2d 636, 640 (Cal. 1978)).

148. *Henize v. Giles*, 490 N.E.2d 585, 588 (Ohio 1986).

149. See FLETCHER ET AL., *supra* note 21, § 4463.20.

150. *Id.*

151. ARK. CODE ANN. § 16-17-605(b) (Repl. 1999) (repealed 2003). Originally, subsections (a) and (b) stated:

(a) Corporations, other than those identified in § 16-17-604, which are organized under the laws of this state and which have no more than three (3) stockholders or in which eighty-five percent (85%) or more of the voting stock is held by persons related by blood or marriage within the third degree of consanguinity or any closely held corporation by unanimous vote of the shareholders may sue and be sued in small claims courts created pursuant to this subchapter.

(b) A corporation shall be represented in the proceedings by an officer of the corporation.

discussed the potential conflict between this statute and caselaw preventing corporate pro se representation, concluding that the statute allowed corporate pro se representation in small-claims proceedings.<sup>152</sup> In 1992—the same year as the most recent Attorney General opinion addressing this issue—the Arkansas Court of Appeals recognized a close corporation’s right, as granted by section 16-17-605, to be represented by an officer in small-claims proceedings.<sup>153</sup>

But the Arkansas General Assembly repealed the statute.<sup>154</sup> Arkansas courts now apply Administrative Order 18 for the restriction of attorneys in small-claims divisions.<sup>155</sup> Arkansas Supreme Court Administrative Order Number 18 specifically prohibits the use of attorneys in any stage of a small-claims proceeding and requires judges to immediately transfer the case to the civil docket if an attorney begins representing a party.<sup>156</sup> The Order further states that corporations meeting the requirements under subsection 4(c) “may sue and be sued in the small claims division” and “shall be represented in the proceedings by an officer of the corporation.”<sup>157</sup>

Other jurisdictions differ as to whether corporations can make an appearance in small-claims proceedings without an attorney.<sup>158</sup> The Hawaii Supreme Court recognizes that nonlawyer agents may represent corporations in small-claims court, as provided by statute,<sup>159</sup> and that such representation “is consistent with the established purpose of providing quick, impartial and inexpensive settlement of disputes in Small Claims courts.”<sup>160</sup> Likewise, the Kansas Supreme Court held that a corporation may appear in a

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ARK. CODE ANN. § 16-67-605(a)–(b).

152. See Ark. Att’y Gen. Op. No. 92-056 (Apr. 9, 1992); Ark. Att’y Gen. Op. No. 89-285 (Jan. 4, 1990); Ark. Att’y Gen. Op. No. 88-318 (Dec. 9, 1988).

153. *Moreland v. Vickers Chevrolet Co.*, 37 Ark. App. 1, 3, 826 S.W.2d 289, 290 (1992).

154. Act 1185, 2003 Ark. Acts 3937, 4019.

155. Arkansas Supreme Court Administrative Order No. 18 § 4(a).

156. Arkansas Supreme Court Administrative Order No. 18 § 4(a).

157. Arkansas Supreme Court Administrative Order No. 18 § 4(c).

158. FLETCHER ET AL., *supra* note 21, § 4463.20.

159. HAW. REV. STAT. § 633-28 (West 2013).

160. *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc.*, 590 P.2d 570, 575 (Haw. 1979).

small-claims proceeding through a full-time employee or officer who is not a licensed attorney.<sup>161</sup> The Kansas court cited to public-policy reasons suggesting “‘justice should not be a rich man’s luxury’ and that ‘these cases are relatively of as great importance to those litigants as those heard in our highest courts, but the expense of employing an attorney and paying normal court costs is more that the cause will bear.’”<sup>162</sup> Similarly, the Ohio Supreme Court does not require corporations to hire attorneys for small-claims courts, explaining that “[i]n small claims cases, where no special legal skill is needed, and where proceedings are factual, nonadversarial, and expected to move quickly, attorneys are not necessary.”<sup>163</sup>

The Utah Supreme Court, however, held that a corporation must act through a licensed attorney even though a corporation is a “‘person’” within the statute providing that any person who executes an affidavit setting forth an issue of the claim may maintain an action in small-claims court.<sup>164</sup> Likewise, the Indiana Supreme Court held that legal counsel must represent a corporation in a small-claims-court proceeding.<sup>165</sup> The Indiana Court of Appeals subsequently explained that the purpose of requiring legal counsel to represent a corporation in a small-claims proceeding “is to curtail unlicensed practice of law, the attendant ills of which can be exacerbated when one of the litigants is a corporation.”<sup>166</sup> Furthermore, the Illinois Appellate Court held that a corporation could not appear as a claimant in a small-claims proceeding unless represented by counsel, citing to the court rule prohibiting such unauthorized practice.<sup>167</sup>

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161. *Babe Houser Motor Co., Inc. v. Tetreault*, 14 P.3d 1149, 1153 (Kan. 2000) (quoting *Prudential Ins. Co. of Am. v. Small Claims Court of S.F.*, 173 P.2d 38, 40 (Cal. Ct. App. 1946)).

162. *Id.*

163. *Cleveland Bar Ass’n. v. Pearlman*, 832 N.E.2d 1193, 1198 (Ohio 2005).

164. *Tuttle v. Hi-Land Dairyman’s Ass’n*, 350 P.2d 616, 618 (Utah 1960).

165. *State ex rel. W. Parks, Inc. v. Bartholomew Cnty. Court*, 383 N.E.2d 290, 293 (Ind. 1978).

166. *Yogi Bear Membership Corp. v. Stalnaker*, 571 N.E.2d 331, 333 (Ind. Ct. App. 1991).

167. *Real Estate Buyer’s Agents, Inc. v. Foster*, 600 N.E.2d 83, 85 (Ill. App. Ct. 1992).

The primary purpose of small-claims courts is to resolve minor civil controversies in a timely, orderly fashion by not having to adhere to formal procedural and evidentiary court rules.<sup>168</sup> For example, the Small Claims Division of the Fayetteville District Court allows plaintiffs to file cases if the amount in controversy is \$5000 or less.<sup>169</sup> Hiring lawyers could easily cost more than the claim itself and prevent corporations from bringing a claim that they are entitled to bring. Requiring corporations to represent themselves with attorneys, and not allowing representation by a nonlawyer officer, defeats the purpose of providing an alternative court for parties not wanting to spend substantial money in pursuing a small claim. These qualities of small-claims courts—alternative resolution from traditional courts, fact-based proceedings, and cheaper, quicker resolutions—reflect the rationale for allowing corporate self-representation in administrative proceedings. Moreover, these qualities mirror much of the benefits and purposes of arbitration proceedings, underscoring why the Arkansas Supreme Court's holding in *NISHA* was misplaced.

### C. Proceedings in Which Arkansas Should Permit Corporate Pro Se Representation

The reasons why administrative proceedings and small-claim-court proceedings allow corporate pro se representation also support extending corporate self-representation to other proceedings in Arkansas. Moreover, these reasons supporting corporate pro se representation undermine Arkansas courts' current prohibition of corporate self-representation in bankruptcy proceedings; garnishment proceedings; and, after *NISHA*, arbitration. Accordingly, Arkansas should allow corporate pro se representation in: (1) bankruptcy proceedings; (2) mediation; (3) garnishment proceedings; and (4) arbitration.

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168. See, e.g., *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc.*, 590 P.2d 570, 575 (Haw. 1979).

169. CITY OF FAYETTEVILLE, *Small Claims Information*, ACCESS FAYETTEVILLE, [http://www.accessfayetteville.org/government/district\\_court/small\\_claims](http://www.accessfayetteville.org/government/district_court/small_claims) (last visited Mar. 21, 2014).



### 1. Bankruptcy Proceedings

“Bankruptcy” is a “statutory procedure by which a (usu[ally] insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor’s assets for the benefit of creditors.”<sup>170</sup> By its very definition, bankruptcy entails a debtor struggling financially and seeking relief from debts.<sup>171</sup> Studies of bankruptcy filings show that small businesses file the vast majority of bankruptcy petitions,<sup>172</sup> and in as many as eighty-five percent of small-business bankruptcies, the owner-operator has personally guaranteed the debts of the corporation.<sup>173</sup> Representation can be very costly, denying many corporations access to bankruptcy and consuming a large portion of companies’ assets that do enter bankruptcy.<sup>174</sup>

The United States Bankruptcy Court for the Eastern District of Arkansas explained that “[c]orporations may be debtors under Chapter 11 of the Bankruptcy Code. However, corporations are creatures of statute and cannot act for themselves. They act through their agents who are required to act within their authority and in good faith.”<sup>175</sup> This court further stated that “[i]t is well-settled that corporations must be represented by counsel in order to appear in federal court,”<sup>176</sup> which includes bankruptcy proceedings; and the Bankruptcy Court for the Western District of Arkansas subsequently recognized that

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170. BLACK’S LAW DICTIONARY 166 (9th ed. 2009).

171. *See id.*

172. Matthew Cormack, Note, *The Cost of Representation: An Argument for Permitting Pro Se Representation of Small Corporations in Bankruptcy*, 2011 COLUM. BUS. L. REV. 222, 223 & n.2; *see also* Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L. ECON. 381, 386 (2007) (reporting that eighty-one percent of a sample of debtors had fewer than twenty employees and seventy-five percent had less than \$1 million).

173. Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310, 2337 (2005).

174. Cormack, *supra* note 172, at 224.

175. *In re Arkco Props., Inc.*, 207 B.R. 624, 627 (Bankr. E.D. Ark. 1997).

176. *Brown v. Granite Fin. Servs. Corp. (In re Brown)*, No. 96–50392 S, 96–5047, 1997 WL 311508, at \*1 (Bankr. E.D. Ark. May 5, 1997).

representation of a corporation by a nonlawyer corporate officer constitutes the unauthorized practice of law.<sup>177</sup>

In contrast, the federal bankruptcy court in South Dakota recognized an exception to the general rule that a nonlawyer corporate officer could not represent a corporation in legal proceedings and allowed the president of a closely held corporation—rather than a licensed attorney—to represent the corporation in the bankruptcy.<sup>178</sup> The Hawaii Supreme Court also recognized an exception to the general rule and held: “In the limited situation where the statutory liquidator makes a showing that corporate funds are unavailable for the hiring of counsel, he may perform the necessary legal services.”<sup>179</sup> Further, a federal district court in New York gave a defendant corporation an opportunity “to show through documented evidence that financial conditions prevent them from obtaining a lawyer to represent the defendant corporations”; and if they succeeded, the corporations could appear in the court for the remainder of the proceedings without a licensed attorney.<sup>180</sup>

Many jurisdictions, however, consistently preclude corporate self-representation by a nonlawyer corporate officer in bankruptcy proceedings.<sup>181</sup> The United States Supreme Court, in addressing an analogous issue in corporate pro se representation, explained: “[S]ince it is common knowledge that corporations can often perfectly well pay court costs and retain paid legal counsel in spite of being temporarily ‘insolvent’ under any or all of these

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177. *KWHK Broad. Co., Inc. v. Sanders (In re Bozeman)*, 219 B.R. 253, 254 n.1 (Bankr. W.D. Ark. 1998) (advising a nonlawyer, in dicta, that he could not file pleadings on behalf of a corporation because such activity constitutes the unauthorized practice of law).

178. *In re MSD Woodworking Co., Inc.*, 132 B.R. 631, 632 (Bankr. D.S.D. 1991).

179. *In re Ellis*, 487 P.2d 286, 291 (Haw. 1971).

180. *Sanchez v. Marder*, No. 92CIV.6878 (PKL) (NRB), 1995 WL 702377, at \*2-3 (S.D.N.Y. Nov. 28, 1995).

181. See, e.g., *Pritchard v. Lubman (In re Tamojira, Inc.)*, 20 F. App'x 133, 133-34 (4th Cir. 2001); *Schreibman v. Walter E. Heller & Co. of P.R. (In re Las Colinas Dev. Corp.)*, 585 F.2d 7, 11 (1st Cir. 1978); *In re Victor Publishers, Inc.*, 545 F.2d 285, 286 (1st Cir. 1976); *Highlander, Inc. v. Rothman (In re Highley)*, 459 F.2d 554, 555 (9th Cir. 1972); *Sermor Inc. v. United States*, 13 Cl. Ct. 1, 5 (1987); *In re Canoe Mfg. Co.*, 466 B.R. 251, 252-53 (Bankr. E.D. Pa. 2012); *Neiman v. Irmen (In re Irmen)*, 379 B.R. 299, 306 (Bankr. N.D. Ill. 2007); *In re Elshiddi Enters., Inc.*, 126 B.R. 785, 788 (Bankr. E.D. Mo. 1991); *In re Global Constr. & Supply, Inc.*, 126 B.R. 573, 575 (Bankr. E.D. Mo. 1991).

definitions, it is far from clear that corporate insolvency is appropriately analogous to individual indigency.”<sup>182</sup>

Arkansas should follow the jurisdictions that recognize an exception to the general rule that a corporation must ordinarily appear through an attorney in bankruptcy proceedings. In such cases, the corporation—especially a closely held corporation—does not have funds to hire an attorney and would otherwise lose out on its claims.<sup>183</sup> Public policy strongly supports providing corporations the opportunity to show through documented evidence that financial conditions prevent them from obtaining a lawyer, thus preventing the inequity of a corporation not getting its day in bankruptcy court. Further, Arkansas should allow corporate self-representation in bankruptcy proceedings when the corporation is not a party, but merely a witness.

## 2. Mediation

“Mediation is a problem-solving negotiation process in which an outside, impartial, neutral party works with disputants to assist them to reach a satisfactory negotiated agreement.”<sup>184</sup> In contrast to litigation, “mediation is informal, voluntary, forward-looking, cooperative, and interest-based.”<sup>185</sup> Similar to judges and arbitrators, mediators must be impartial and neutral, but they do not make decisions or impose any particular substantive outcome; the parties themselves decide whether to agree with a mediator’s suggestions.<sup>186</sup> “The general consensus is that mediation services should not be characterized as legal services, partly because mediators traditionally have come from professional disciplines other than law.”<sup>187</sup>

In fact, mediators do not have to be attorneys and may have only a bachelor’s degree if they have a graduate-level

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182. *Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 206 (1993).

183. Zitter, *supra* note 129, at 653.

184. GARY GOODPASTER, *A GUIDE TO NEGOTIATION AND MEDIATION* 203 (1997) (footnote omitted).

185. *Id.* at 204.

186. *Id.* at 204-05.

187. Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenges*, 30 *FAM. L.Q.* 679, 682 (1996).

certificate in conflict resolution.<sup>188</sup> Further, Arkansas law only encourages an attorney to “advise his or her client about the dispute resolution process options available to him or her and to assist him or her in the selection of the technique or procedure, including litigation, deemed appropriate for dealing with the client’s dispute, case, or controversy.”<sup>189</sup> The American Arbitration Association states in its Commercial Mediation Procedures that “[s]ubject to any applicable law, any party may be represented by persons of the party’s choice.”<sup>190</sup> Therefore, corporations can choose to be represented by an officer rather than hiring an attorney.

For a corporation or other organization, mediation merely requires representation by an individual “who has the authority to settle the case.”<sup>191</sup> “Today U.S. corporations commonly include dispute resolution clauses in contracts with employees, customers, suppliers, and joint venturers that require . . . some form of nonbinding dispute resolution procedure such as mediation before the parties litigate or arbitrate.”<sup>192</sup> “Commercial disputes are excellent candidates for [mediation] where, as is frequently the case, the parties wish to maintain an ongoing business relationship.”<sup>193</sup> Because mediation is not binding and nonlawyer mediators can conduct it, public policy supports allowing corporate self-representation in such dispute resolution proceedings.

### 3. Garnishment Proceedings

Although Arkansas courts have not decided whether a nonlawyer corporate officer may file an answer to a garnishment, an attorney general opinion in 1982 expressly

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188. *Requirements and Procedures for Inclusion on the Roster of Certified Mediators for Circuit Courts*, ARK. JUDICIARY 3, [https://www.courts.arkansas.gov/sites/default/files/tree/CERTIFICATION%26DISCIPLINE2012\\_1.pdf](https://www.courts.arkansas.gov/sites/default/files/tree/CERTIFICATION%26DISCIPLINE2012_1.pdf) (last visited Oct. 29, 2013). Pursuant to section 16-7-104 of the Arkansas Code, the Arkansas Alternative Dispute Resolution Commission has the authority establish standards for the certification of mediators. ARK. CODE ANN. § 16-7-104 (Repl. 2010).

189. ARK. CODE ANN. § 16-7-204 (Repl. 2010).

190. AM. ARBITRATION ASS’N, *COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES M-3*, at 45 (2013), available at <http://www.adr.org>.

191. AM. BAR ASS’N., *ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK 6* (Nancy F. Atlas et al. eds., 2000).

192. *Id.* at 148.

193. *Id.* at 154.

found that such practice constitutes the unauthorized practice of law.<sup>194</sup> A federal district court in Kansas recently held that an answer to a garnishment could be signed by a corporate officer rather than an attorney, noting that “[r]equiring all corporate garnishees to obtain counsel before filing an answer of garnishment would force corporations to expend considerable expense and effort, where the ultimate goal is simply for garnishees to provide information about any debts owed the judgment debtor and to return the form to the court.”<sup>195</sup> Nevertheless, a federal district court in Arizona held that the “act of signing the application for the writ of garnishment fell within the realm of legal practice.”<sup>196</sup> A distinction exists between the two cases because Kansas allows a nonlawyer corporate officer to answer a writ of garnishment<sup>197</sup> while Arizona requires an attorney to file a writ of garnishment.<sup>198</sup> Although public policy favors requiring corporate garnishors to have a lawyer institute the garnishment, “a lawyer should not be required for a *pro forma* answer, either admitting or denying liability to the judgment debtor.”<sup>199</sup>

#### 4. Arbitration Proceedings

*Black’s Law Dictionary* defines “arbitration” as a “method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.”<sup>200</sup> “[M]any arbitrators are not lawyers,”<sup>201</sup> but the American Arbitration Association requires a minimum of ten years of professional or business experience, or legal practice, to become an

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194. Ark. Att’y Gen. Op. No. 82-145 (Sept. 14, 1982); *see generally* Robert Laurence, *Update: Recent Developments in the Arkansas Law of Garnishment 1992 Ark. L. Notes 39 – Does A Corporate Garnishee Need a Lawyer to Answer the Writ?*, 1997 ARK. L. NOTES 95, 98 (analyzing whether the advisory opinion is correct).

195. *Carpenters Dist. Council of Kan. City Pension Fund v. James Interiors, Inc.*, 338 F. Supp. 2d 1223, 1225 (D. Kan. 2004).

196. *Marchant v. U.S. Collections W., Inc.*, 12 F. Supp. 2d 1001, 1006 (D. Ariz. 1998).

197. *James Interiors*, 338 F. Supp. 2d at 1224-25.

198. *Marchant*, 12 F. Supp. 2d at 1005.

199. Laurence, *supra* note 194.

200. BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

201. JOHN W. COOLEY, THE ARBITRATOR’S HANDBOOK 24 (2d ed. 2005).

arbitrator.<sup>202</sup> As experts in alternative dispute resolution have pointed out, “[t]he ability of parties to select an arbitrator with the desired expertise—whether a lawyer or not—is one of the important advantages of arbitration over litigation.”<sup>203</sup>

Arkansas courts recognize arbitration as a cheap and quick alternative to litigation.<sup>204</sup> In addition, “[c]ommercial arbitration has long been used as a substitute for court action in the settlement of disputes between businessmen.”<sup>205</sup> Arkansas adopted the 1955 version of the Uniform Arbitration Act,<sup>206</sup> which the Arkansas General Assembly preempted in 2011 by adopting, in substantial part, the Revised Uniform Arbitration Act.<sup>207</sup> Specifically, the revised Act states that a party to arbitration may be—but is not required to be—represented by a lawyer.<sup>208</sup>

As discussed earlier, the Arkansas Supreme Court held in *NISHA* that arbitration proceedings constitute the practice of law.<sup>209</sup> The court cited to three other states that support its holding that a nonlawyer corporate officer may not represent a corporation in arbitration proceedings.<sup>210</sup>

202. *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS’N, [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003878](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878) (last visited Oct. 29, 2013).

203. Jay E. Grenig & Rocco M. Scanza, *Tear Down This Wall! The Case for the Non-Lawyer Employment Arbitrator*, 6 DISP. RESOL. J., May-July 2009, at 8-9.

204. *See* Dean Witter Reynolds, Inc. v. Deislinger, 289 Ark. 248, 251, 711 S.W.2d 771, 772 (1986) (“In Arkansas arbitration is strongly favored by public policy and is looked upon with approval by courts as a less expensive and expeditious means of settling litigation and relieving congestion of court dockets.”); *McEntire v. Monarch Feed Mills, Inc.*, 276 Ark. 1, 4, 631 S.W.2d 307, 308 (1982).

205. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 1-4 (Kenneth May et al. eds., 7th ed. 2012).

206. *See* Act 260, 1969 Ark. Acts 807 (codified as amended at ARK. CODE ANN. §§ 16-108-201 to -230 (Supp. 2011)).

207. *See* Act 695, 2011 Ark. Acts. 2563 (codified at ARK. CODE ANN. §§ 16-108-201 to -230 (Supp. 2011)); Katherine B. Church, Comment, *Arkansas and Mandatory Arbitration: Is the Feeling Really Mutual?*, 65 ARK. L. REV. 343, 343 (2012).

208. ARK. CODE ANN. § 16-108-216 (Supp. 2011). The Uniform Law Comment to section 16-108-216 states: “This section is not intended to preclude, where authorized by law, representation in an arbitration proceeding by individuals who are not licensed to practice law either generally or in the jurisdiction in which the arbitration is held.” ARK. CODE ANN. § 16-108-216 uniform law cmt. 2.

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

210. *Id.* at 9-10, 388 S.W.3d at 449.

The court first cited to the Florida Supreme Court,<sup>211</sup> which held that compensated, nonlawyer-corporate-officer representatives in securities arbitration engaged in the unauthorized practice of law and posed a sufficient threat of harm to the public.<sup>212</sup> However, when citing to Florida, the Arkansas Supreme Court failed to note that the court addressed compensated, nonlawyer-corporate-officer representatives, whereas TriBuilt was represented by its president and did not compensate an outside representative.<sup>213</sup>

The *NISHA* court then cited to the Ohio Supreme Court,<sup>214</sup> which held that a corporation and its nonlawyer shareholder engaged in the unauthorized practice of law by representing Ohioans in securities arbitration proceedings.<sup>215</sup> The case dealt with a nonlawyer corporate officer representing clients and not an officer representing a corporation; nonetheless, the court enjoined the defendant from representing his company “or any corporation before any legal or quasi-legal body, or in any legal action, settlement, or dispute in the state of Ohio.”<sup>216</sup>

Finally, the *NISHA* court cited the Arizona Supreme Court,<sup>217</sup> which stated “that a person need not appear in a judicial proceeding to engage in the [unauthorized] practice of law.”<sup>218</sup> The Arizona court—which pointed out that the “facts of this case do not require us to determine the extent of our power to regulate ‘practitioners’ who are not and have never been lawyers”<sup>219</sup>—held that a disbarred attorney’s examination of a treating physician, on behalf of an insured motorist in private arbitration, was the practice of law in violation of a disbarment order.<sup>220</sup>

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211. *Id.* at 9, 388 S.W.3d at 449.

212. Fla. Bar re Advisory Op. on Nonlawyer Representation in Sec. Arbitration, 696 So. 2d 1178, 1181 (Fla. 1997).

213. *NISHA*, 2012 Ark. 130, at 3, 9, 388 S.W.3d at 446, 449.

214. *Id.* at 9, 388 S.W.3d at 449.

215. *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348, 350 (Ohio 2004).

216. *Id.*

217. *NISHA*, 2012 Ark. 130, at 9, 388 S.W.3d at 449.

218. *In re Creasy*, 12 P.3d 214, 217 (Ariz. 2000).

219. *Id.* at 216.

220. *Id.* at 215, 219.

*NISHA* did not cite to cases from other jurisdictions with similar facts—a corporate officer representing the corporation in arbitration. Nonetheless, other courts recognize that jurisdictions have allowed corporate representation by nonlawyer corporate officers in arbitration.<sup>221</sup> Further, other jurisdictions have ruled that an out-of-state attorney’s representation of a corporate client during arbitration does not violate a state’s rules prohibiting the unauthorized practice of law.<sup>222</sup>

Jurisdictions clearly differ on whether arbitration proceedings constitute the practice of law. Jurisdictions holding that arbitration is not the practice of law cite to strong policy considerations.<sup>223</sup> Chief among these policy considerations are:

[1] [a]n arbitration tribunal is not a court of record; [2] its rules of evidence and procedures differ from those of courts of record; [3] its factfinding process is not equivalent to judicial fact finding; and [4] it has no

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221. See *More Light Invs. v. Morgan Stanley DW Inc.*, No. CV 08–580–PHX–MHM, 2008 WL 5044557, at \*2 (D. Ariz. Nov. 24, 2008) (“In his response, Dr. Licht admits that he is ‘an engineer[,] not a lawyer’ and argues that since he represented See More Light Investments during the arbitration proceeding, he, as an individual, should be considered to have been a party to that action.”); *Nordahl Dev. Corp., Inc. v. Salomon Smith Barney*, 309 F. Supp. 2d 1257, 1261 (D. Or. 2004) (providing that an arbitration panel in Oregon permitted an officer to represent corporation); see also *In re Town of Little Compton*, 37 A.3d 85, 95 (R.I. 2012) (noting the common practice of non-licensed-corporate-officer representation in labor arbitration).

222. See, e.g., *Prudential Equity Grp., LLC v. Ajamie*, 538 F. Supp. 2d 605, 608 (S.D. N.Y. 2008) (holding participation by a non-New York lawyer in New York arbitration was not the unauthorized practice of law); *Raymond James Fin. Servs., Inc. v. Bishop*, Civil Action No. 3:07cv28, 2007 WL 4531964, at \*4 (E.D. Va. 2007); *Berthold Types Ltd. v. Adobe Sys., Inc.*, 186 F. Supp. 2d 834, 838 (N.D. Ill. 2002); *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982); *Olson v. Cohen*, 131 Cal. Rptr. 2d 620, 625 (Ct. App. 2003); *Colmar, Ltd. v. Fremantlemedia N. Am., Inc.*, 801 N.E.2d 1017, 1026 (Ill. Ct. App. 2003); *Mscisz v. Kashner Davidson Sec. Corp.*, 844 N.E.2d 614, 616 (Mass. 2006); *Superadio Ltd. P’ship v. Winstar Radio Prods., LLC*, 844 N.E.2d 246, 252 (Mass. 2006).

223. See, e.g., *Williamson*, 537 F. Supp. at 616; see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974) (“Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.”).



provision for the admission *pro hac vice* of local or out-of-state attorneys.<sup>224</sup>

In addition, “[t]he arbitration of contractual disputes pursuant to an arbitration clause in the contract is not a stage in a judicial proceeding but an alternative to such a proceeding.”<sup>225</sup>

Further, arbitration does not rely upon legal precedent, and parties willingly accept the absence of procedural rules in return for a final and speedy resolution of their conflicts.<sup>226</sup> Finally, the American Arbitration Association permits nonlawyer corporate officers to represent parties in arbitration and does not require arbitrators to be licensed to practice law.<sup>227</sup> These strong policy reasons, combined with the fact that the cases relied on by the Arkansas Supreme Court in *NISHA* are distinguishable, support the proposition that Arkansas should allow a nonlawyer corporate officer to represent a corporation in arbitration proceedings.

## V. RECOMMENDATIONS

A major policy reason cited by courts for not allowing corporate pro se representation is that nonlawyer corporate officers, unlike attorneys, are not subject to any rules of professional conduct.<sup>228</sup> Unlike members of the Arkansas State Bar, a nonlawyer corporate officer is not subject to rules of professional conduct nor required to adhere to

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

225. *Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co.*, 210 F.3d 771, 774 (7th Cir. 2000).

226. *Drinane v. State Farm Mut. Auto. Ins. Co.*, 606 N.E.2d 1181, 1183 (Ill. 1992); *see also Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986) (“Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.”); *Perez v. Leibowitz*, 576 N.E.2d 156, 158 (Ill. 1991) (“Arbitration is a substitute for a court proceeding and a form of settlement for litigation, but not a trial. . . . The purpose of arbitration is the disposition of litigation in an easier, quicker, and more economical manner than by litigation. . . . To hold that arbitration . . . was equivalent to a ‘trial or hearing,’ would . . . extend the meaning of those terms beyond what was contemplated by the drafters of the statute.” (citations omitted)).

227. AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES M-3, at 45 (2013) (“Subject to any applicable law, any party may be represented by persons of the party’s choice.”), *available at* <http://www.adr.org>.

228. *Udem v. State Bd. of Law Exam’rs*, 266 Ark. 683, 695, 587 S.W.2d 563, 569 (1979).

ethical standards established by any governmental or professional agency.<sup>229</sup> For example, an attorney is subject to the following rule of professional conduct: “[A] lawyer who is not admitted to practice in this jurisdiction shall not: . . . hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”<sup>230</sup>

Another reason for not allowing corporate *pro se* representation is the speculation that judges tend to help *pro se* litigants.<sup>231</sup> In court, a judge expects an attorney to understand how the judicial process works and how to conduct himself or herself in the courtroom. A layperson, however, does not have the same training as attorneys; therefore, some judges may be more lenient and helpful. But Arkansas courts have made it clear that “[p]ro se [litigants] receive no special consideration of their argument and are held to the same standard as licensed attorneys; if they file frivolous lawsuits, they do so at their peril.”<sup>232</sup>

Although some policy reasons weigh against corporate self-representation, other policy reasons support allowing such representation. Chief among these policy reasons is that individuals may choose to risk representing themselves. By letting individuals choose—but not corporations—courts assume a parental role and protect the corporation from the consequences of its own decisions.<sup>233</sup>

More importantly, requiring corporations to hire an attorney imposes a harsh burden on small corporations, like TriBuilt, by requiring them to pay money for counsel even when the cost of counsel may prevent them from having their day in court. Even stronger policy reasons support corporate self-representation in a court not of record or in arbitration, which provide alternatives to the expensive legal

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229. PROCEDURES ARK. SUP. CT. REGULATING PROF'L CONDUCT ATTORNEYS AT LAW § 1(A).

230. ARK. R. PROF'L CONDUCT 5.5(b)(2).

231. See Laurence, *supra* note 80, at 497.

232. Elder v. Mark Ford & Assocs., 103 Ark. App. 302, 304, 288 S.W.3d 702, 704 (2008) (citation omitted); see also *Gidron v. State*, 312 Ark. 517, 520, 850 S.W.2d 331, 333 (1993) (“The *pro se* appellant should be aware before he elects to proceed *pro se*, that *pro se* appellants receive no special consideration of their argument and are held to the same standard for brief form as a licensed attorney. The *pro se* appellant cannot later claim that he was denied effective assistance of counsel.” (citation omitted)).

233. See Laurence, *supra* note 80, at 479.

proceedings in court. For example, policy supports corporate self-representation in small-claims proceedings because less money is at stake and hiring representation could cost more than the claim itself. Additionally, arbitration generally does not rely on legal precedent, and parties willingly accept the absence of procedural rules in return for final and speedy resolution of their conflict.<sup>234</sup> Courts are entitled to expect aid in resolving contested issues by having qualified professionals, rather than laypersons, present causes.<sup>235</sup> However, “those problems which are likely to arise when a layman serves as the legal representative for a corporation in a court of record are greatly minimized in the more informal setting of a court not of record.”<sup>236</sup>

Overall, public policy does not support the strict rule that a nonlawyer corporate officer cannot represent the corporation in courts not of record and similar proceedings. In *NISHA*, the Arkansas Supreme Court incorrectly decided that “a corporate officer, director, or employee who is not a licensed attorney engages in the unauthorized practice of law by representing the corporation in arbitration proceedings.”<sup>237</sup> In reaching a decision on this matter, the court consulted cases that did not deal explicitly with nonlawyer corporate officers representing a corporation in arbitration proceedings even though these cases were distinguishable and did not deal with the same policy considerations.<sup>238</sup>

Arkansas should follow other states and amend its statute preventing corporate pro se representation to allow nonlawyer corporate officers to represent the corporation in courts not of record and other similar proceedings. For example, an Indiana statute allows corporate entities to “appear by a designated full-time employee of the corporate entity in the presentation or defense of claims arising out of

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234. See cases cited *supra* note 226.

235. *Merco Constr. Eng'rs, Inc. v. Mun. Court*, 581 P.2d 636, 640 (Cal. 1978).

236. *Eckles v. Atlanta Tech. Grp., Inc.*, 485 S.E.2d 22, 25 (Ga. 1997) (citing *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc.*, 590 P.2d 570, 575 (Haw. 1979)).

237. *NISHA, LLC v. TriBuilt Constr. Grp., LLC*, 2012 Ark. 130, at 1, 388 S.W.3d 444, 445.

238. See discussion *supra* Part III.B.2 (citing cases that dealt with a compensated nonlawyer-corporate-officer representative and corporations representing others).

the business if the claim does not exceed one thousand five hundred dollars (\$1,500.00).<sup>239</sup> In addition, the Kansas small-claims statute specifically included corporations within the definition of “person,” thus allowing them to file and pursue small claims without an attorney.<sup>240</sup> Furthermore, a Pennsylvania magisterial district court statute states: “Corporations . . . may be represented . . . by an officer of the corporation, entity, or association, or by an employee or authorized agent of the corporation . . . .”<sup>241</sup> Arkansas should amend its statute and allow exceptions to the general rule that a corporation must be represented by attorneys in courts not of record and other similar proceedings, such as garnishment, administrative proceedings, small claims, arbitration, and bankruptcy. For a suggested revision to the current Arkansas statute, see the Appendix, which follows this comment.<sup>242</sup>

## VI. CONCLUSION

This comment specifically addressed whether a corporation can represent itself, not whether a corporation can represent others or pay a nonlawyer nonemployee to represent it. The strict laws preventing corporate pro se representation place a heavy burden on many small corporations like TriBuilt. Because “attorneys’ fees may be steep, and a close corporation, essentially the alter ego of an individual or a family group, or any small corporation in financial difficulties, may find it a real hardship or even impossible to hire an attorney,”<sup>243</sup> the Arkansas General Assembly should create exceptions to the bar on corporate self-representation.

SUZANNAH R. MCCORD

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239. IND. R. SMALL CLAIMS 8 (West 2013).

240. KAN. STAT. ANN. § 61-2703 (West 2013).

241. PA. R. C.P.M.D.J. No. 207 (West 2013).

242. See *infra* Appendix.

243. Zitter, *supra* note 129, at 653.

## APPENDIX

## § 16-22-211. Corporations or associations—Practice of law or solicitation prohibited—Exceptions—Penalty

(a)(1) It shall be unlawful for any corporation or voluntary association to practice or appear as an attorney at law for any person in any court in this state or before any judicial body, to make it a business to practice as an attorney at law for any person in any of the courts, to hold itself out to the public as being entitled to practice law, to tender or furnish legal services or advice, to furnish attorneys or counsel, to render legal services of any kind in actions or proceedings of any nature or in any other way or manner, or in any other manner to assume to be entitled to practice law or to assume or advertise the title of lawyer or attorney, attorney at law, or equivalent terms in any language in such a manner as to convey the impression that it is entitled to practice law or to furnish legal advice, service, or counsel or to advertise that either alone or together with or by or through any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts, or maintains a law office or any office for the practice of law or for furnishing legal advice, services, or counsel.

(2) A corporation is not permitted to represent itself through a corporate officer who is not a licensed attorney in courts of appeal, circuit courts, district courts, and other courts of record, but it is allowed to represent itself through a corporate officer who is not a licensed attorney in courts not of record, before administrative agencies, in small-claims proceedings, garnishment proceedings, arbitration, and mediation.

(b) It also shall be unlawful for any corporation or voluntary association to solicit itself by or through its officers, agents, or employees any claim or demand for the purpose of bringing an action thereon or of representing as attorney at law or for furnishing legal advice, services, or counsel to a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding that has been or may be instituted in any court or

before any judicial body, or for the purpose of so representing any person in the pursuit of any civil remedy.

(c) The fact that any officer, trustee, director, agent, or employee shall be a duly and regularly admitted attorney at law shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited in this section, nor shall that fact be a defense upon the trial of any of the persons mentioned for a violation of the provisions of this section.

(d) This section shall not apply to a:

(1) For-profit corporation or voluntary association lawfully engaged in:

(A) The examination and insuring of titles to real property; or

(B) Employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may become a party; or

(2) Nonprofit corporation or voluntary association lawfully engaged in representing or assisting an indigent, poor, or disadvantaged person as a client in a civil or criminal matter, provided that any legal services rendered by a nonprofit corporation or voluntary association are furnished through duly licensed attorneys in accordance with rules governing the practice of law in Arkansas.

(e)(1) Nothing contained in this section shall be construed to prevent a corporation from furnishing to any person lawfully engaged in the practice of law such information or such clerical services in and about his or her professional work as may be lawful, except for the provisions of this section, if at all times the lawyer receiving such information or such services shall maintain full professional and direct responsibility to his or her clients for the information and services so received.

(2) However, no corporation shall be permitted to render any services that cannot lawfully be rendered by a person not admitted to practice law in this state nor to solicit directly or indirectly professional employment for a lawyer.

(f)(1) Any corporation or voluntary association violating any of the provisions of this section shall be guilty of a violation and punished by a fine of not less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000).

(2) Every officer, trustee, director, agent, or employee of the corporation or voluntary association who directly or indirectly engages in any of the acts prohibited in this section or assists such a corporation or voluntary association to do such prohibited acts shall be guilty of a violation and shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000).