SCHEEHLE V. JUSTICES OF THE SUPREME COURT: THE ARIZONA SUPREME COURT'S RIGHT TO COMPEL ATTORNEYS TO SERVE AS ARBITRATORS

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BACKGROUND

Since its inception in 1971, the Arizona mandatory arbitration statute has changed multiple times.[1] Initially the legislature permitted—but did not require—the superior court in any county to implement mandatory arbitration for cases where the amount in controversy was less than five thousand dollars.[2] The statute placed responsibility on participating courts to appoint arbitrators as well as "maintain a list of qualified persons within its jurisdiction who have agreed to serve as arbitrators, subject to the right of each person to refuse to serve in a particular assigned case."[3]

In 1974, the Arizona Supreme Court promulgated the Uniform Rules of Procedure for Arbitration to govern courts that chose to implement mandatory arbitration programs under Arizona Revised Statutes section 12-133.[4] The Uniform Rules directed courts how to enact rules for their programs and appoint arbitrators to cases.[5] Specifically, Rule 2 provided that if the parties could not agree on an arbitrator, the court would appoint one at random from a list, which was comprised of Arizona State Bar members who resided in the same county in which the court was located.[6] Rule 2 further granted attorneys the ability to permanently remove their names from the arbitration list or refuse to serve as arbitrators if appointed.[7]

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1. Scheehle v. Justices of the Supreme Court, 120 P.3d 1092, 1095–96 (Ariz. 2005).
2. 1971 Ariz. Sess. Laws, ch. 142 § 1.
3. *Scheele*, 120 P.3d at 1095 (quoting 1971 Ariz. Sess. Laws, ch. 142 § 1 (current version codified at A.R.S. § 12-133(C) (2003))).
4. *Id.* at 1096.
5. *Id*.
6. *Id.*
7. *Id.*

In 1986, Arizona Revised Statutes section 12-133 was amended to require the superior court in each county implement mandatory arbitration programs.[8] Additionally, the legislature mandated arbitration for cases where the amount in controversy was fifty thousand dollars or less.[9] Shortly thereafter, the State Bar of Arizona, Maricopa County Superior Court, other attorneys, judges, and court administrators petitioned the Arizona Supreme Court to remove from Rule 2 the provision allowing attorneys to opt out of arbitration service absent good cause.[10]

The court responded to the legal community by adopting four changes to Rule 2.[11] Specifically, the court: (1) deleted the provision that allowed attorneys to remove their names from the list of potential arbitrators; (2) listed specific reasons that would permit an arbitrator to be excused from service; (3) added a provision to allow an attorney who "has served as an Arbitrator pursuant to these Rules for two or more days during the current year to be excused"; and (4) pronounced a clear policy in a comment to the rule that confirmed that "[i]t is the obligation of all qualified lawyers to serve as Arbitrators and only exceptional circumstances should justify removal from the list."[12] In 2000, the Uniform Rules of Arbitration were incorporated into the Arizona Rules of Civil Procedure,[13] and Rule 2 of the Uniform Rules was renumbered as Rule 73.[14]

In this case, Mark V. Scheehle, an attorney, challenged the provision of Rule 73 that authorized the Maricopa County Superior Court to include him on a list of eligible arbitrators without his consent.[15] Scheehle's federal claim alleged that Rule 73 violated his federal constitutional rights under both the Takings and Equal Protection Clauses.[16] Scheehle's pendent state law claim alleged that Rule 73 was invalid because it compelled him to serve as an arbitrator, whereas Arizona Revised Statutes section 12-133 only authorized the appointment of arbitrators who agreed to serve.[17]

PROCEDURAL HISTORY

A federal district court in Arizona granted summary judgment against Scheehle on his federal civil rights claims and refused to exercise supplemental jurisdiction over his state law claims.[18] The Ninth Circuit initially affirmed the decision,[19] but then withdrew the opinion[20] and certified a question to the Arizona Supreme Court, asking "whether A.R.S. § 12-133 mandated compulsory

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. The Uniform Rules of Arbitration are now Arizona Rules of Civil Procedure Rules 72–76. *See* ARIZ. R. CIV. P. 72–76.
14. *Scheehle*, 120 P.3d at 1096.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1096–97.
19. Scheehle v. Justices of the Supreme Court, 257 F.3d 1082 (9th Cir. 2001).
20. Scheehle v. Justices of the Supreme Court, 269 F.3d 1127 (9th Cir. 2001).

participation of attorneys as arbitrators?"[21] The Arizona Supreme Court held that it did not,[22] and the Ninth Circuit remanded the case to the district court for further consideration.[23] The district court again reaffirmed its rejection and dismissal of Scheehle's federal claims.[24] The district court then certified the following question to the Arizona Supreme Court: "Whether the Arizona Supreme Court under its exclusive constitutional authority to regulate the practice of law can promulgate rules mandating experienced attorneys to serve as arbitrators in light of the statutory language of A.R.S. § 12-133 authorizing only voluntary service?"[25]

THE COURT'S ANALYSIS OF THE CERTIFIED QUESTION

Scheehle made three alternative arguments: (1) Rule 73 violated the Takings Clause[26] and the Equal Protection Clause[27] of the U.S. Constitution, (2) Rule 73 impermissibly conflicted with the legislation authorizing the mandatory arbitration program, and (3) the Arizona Supreme Court's power to regulate the practice of law does not extend to compelling attorneys to serve as arbitrators.[28] The Arizona Supreme Court rejected all three arguments.

1. Federal constitutional claims are beyond the scope of the certified question

Even though the district court dismissed Scheehle's federal claims, he argued that it was improper for the Arizona Supreme Court to answer the certified question without reviewing the federal law rulings of the district court.[29] The Arizona Supreme Court rejected this argument and stated that it was "not the role of this Court to review the federal law rulings of the certifying federal court."[30] The court limited its opinion to the certified question, which included only questions of state law.[31]

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21. *Scheehle*, 120 P.3d at 1097.
22. *Id.*
23. Scheehle v. Justices of the Supreme Court, 315 F.3d 1191 (9th Cir. 2003).
24. *Scheehle*, 120 P.3d at 1097.
25. *Id.* "Upon certification, Scheehle objected to the participation of Justices McGregor, Berch, Ryan, and Hurwitz in answering the certified questions because they are defendants in the underlying federal court complaint." *Id.* at 1097 n.7. The district court rejected Scheehle's objections. *Id.*
26. U.S. CONST. amend. V.
27. U.S. CONST. amend. XIV.
28. *Scheehle*, 120 P.3d at 1097.
29. *Id.*
30. *Id.* The authority pursuant to which the court answered the district court's questions permitted the court to answer only questions of state law. *Id.*; *see* ARIZ. REV. STAT. § 12-1861 (2005) ("The supreme court may answer questions of law certified to it . . . if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause.").
31. *Scheehle*, 120 P.3d at 1097.

2. Rule 73 does not conflict with the statute authorizing the mandatory arbitration

The court rejected Scheehle's second argument that the list of voluntary arbitrators under Arizona Revised Statutes section 12-133(C) is the only source from which the superior court may appoint arbitrators. The court utilized traditional tools of statutory interpretation[32] and concluded that the plain text of the statute did not support Scheehle's argument.[33] Further, the court acknowledged that implying a limitation not explicitly stated in a statute may be appropriate in some circumstances, but concluded that it was inappropriate in this case for several reasons. First, the court noted that after it promulgated Rule 73, the legislature repeatedly amended Arizona Revised Statutes section 12-133 but "never indicated that the court could appoint only arbitrators who volunteered."[34] Second, nothing in the statute sought to regulate attorneys.[35] Implying such a limitation would not only have limited the superior court's power to appoint arbitrators, but would also have limited the scope of the Arizona Supreme Court's power to promulgate rules and regulate the practice of law.[36] The court refused to interpret the statute as limiting its power to act, stating that such a limitation should come explicitly from the legislature.[37]

3. The Arizona Supreme Court's power to regulate the practice of law extends to compelling attorneys to serve as arbitrators

The court rejected Scheehle's third argument that the power to regulate the practice of law does not extend to compelling attorneys to serve as arbitrators. Relying on article VI[38] of the Arizona Constitution, the court stated: "[T]he creation of an integrated judiciary gives to this Court the power not just to regulate all courts but also to regulate the practice of law."[39] The court's power to regulate the practice of law includes the authority to supervise judicial officers, including attorneys.[40]

The court also disagreed with the proposition that any qualification a state places on the entry to the practice of law "must have a rational connection with the

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32. For example, the court looked at the statute's plain language, legislative intent, subject matter, and historical background. *Id.* at 1098.

33. *Id.*

34. *Id.* After the court authorized superior courts to appoint active members of the bar as arbitrators, the legislature amended the statute to require each superior court to adopt a mandatory arbitration program and increased the jurisdictional limit on cases that must go to arbitration. This amendment increased the demand for arbitrators. *Id.* The court presumed that since the legislature did not provide for additional arbitrators, it must have relied on the court's rule to meet the demand. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1099.

38. Article VI, section 1 of the Arizona Constitution vests the judicial power "in an integrated judicial department." ARIZ. CONST. art. VI, § 1.

39. *Scheehle*, 120 P.3d at 1100.

40. *Id.*

applicant's fitness or capacity to practice law."[41] The court determined that this proposition did not apply because the obligation to serve as an arbitrator was not a restriction placed on the entry to the practice of law, but was rather a "uniform regulation requiring limited service to the judiciary for those already admitted to practice . . . ."[42] The court further noted that "[a]n attorney's right 'to pursue a profession is subject to the paramount right of the state to regulate . . . professions . . . to protect the public . . . welfare.'"[43] The court interpreted this to mean that the state may "exact a reasonable consideration from those who are engaged in a profession that it regulates."[44] This consideration may either be monetary or in the form of a service.[45]

Finally, the court disagreed with Scheehle that *Zarabia v. Bradshaw*[46] meant the court had no authority to enact rules that systematically deprive attorneys of their time.[47] *Zarabia* involved a challenge of Yuma County's procedure for providing criminal representation to indigent defendants.[48] At the time, representation for indigent defendants was provided by contract attorneys and attorneys appointed from the private bar.[49] The private attorneys were appointed on a rotational basis and were required to provide representation regardless of experience or expertise.[50] The court held that the system in *Zarabia* violated both Arizona statute and criminal procedure.[51] However, the court upheld "the ability of a court to require attorneys, by virtue of their office to provide pro bono public service in certain circumstances."[52] Relying on this confirmation, the court distinguished the system authorized by Rule 73 from *Zarabia*.[53] The court noted that Rule 73 does not compel a lawyer to be an arbitrator.[54] Rule 73 only authorizes superior courts to place attorneys on a list.[55] Therefore, if there are enough volunteers, the courts would not need to place eligible members of the state bar on the list.[56] Rule 73 also provides for random appointment.[57] Thus, placement on the list does not necessarily result in mandatory service.[58] Furthermore, Rule 73 limits the extent of service.[59] Under Rule 73, if an attorney

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41. *Id.* at 1101 (quoting Schware v. Bd. of Examiners, 353 U.S. 232, 239 (1957)).
42. *Id.*
43. *Id.* (quoting Cohen v. State, 588 P.2d 299, 303 (Ariz. 1978)).
44. *Id.* at 1101.
45. *Id.*
46. 912 P.2d 5 (Ariz. 1996).
47. *Scheehle*, 120 P.3d at 1101.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 1102.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

served as an arbitrator in two matters in any year, that attorney could not be compelled for further service.[60] Given these differences, the court concluded that the system under Rule 73 did not "constitute the systematic deprivation condemned in *Zarabia*."[61]

CONCLUSION

The Arizona Supreme Court concluded that it had the constitutional authority to require active members of the state bar to serve as arbitrators pursuant to Arizona Rules of Civil Procedure 73, and that Arizona Revised Statutes section 12-133 did not restrict the court's authority to promulgate Rule 73.[62] This result follows logically from statutory interpretation and makes practical sense—Arizona's attorneys will and should be required to perform this important service to the legal communities they are obligated to serve.

60. *Id.*
61. *Id.*
62. *Id.*