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## N.J. COURT COMMITTEE REQUIRES MOST OUT-OF-STATE LAWYERS TO REGISTER FOR ADR

BY RUSS BLEEMER & LAUREN A. GRAY

A New Jersey Supreme Court committee is requiring attorneys participating in alternative dispute resolution processes to register with the state.

The committee's opinion, focusing on New Jersey's 2004 adaptation of the Model Rules of Professional Conduct, applies to ADR in courts and private settings. It goes further than other multijurisdictional rules because it recommends that ADR providers inform out-of-state participants in New Jersey matters of the need to familiarize themselves with the opinion, the state's version of the conduct rules, and the need for pro hac vice-style admission.

The opinion also goes well beyond an informational approach. It recommends that providers enforce the registration rule. But it's unclear exactly what a mediator, arbitrator, or provider should do if a participant hasn't registered, or announces at an ADR session a refusal to register.

The Court committee opinion has significant implications for in-house counsel who come to New Jersey for negotiations, as well as ADR. If they are acting as lawyers, they will fall under the New Jersey rules, according to the opinion, and they will have to comply and register. By extension, the opinion potentially puts attorney-neutrals in line for some of the same extra filing paperwork as the advocates and the parties.

This apparent intrusion into what had been private processes is tempered not only because the requirements are explicit, but also because, behind closed doors, lawyers will be able to work around them by defining their roles as observers, or as business people, instead of legal representatives.

New Jersey has adopted the Uniform Mediation Act, which provides a safe harbor under Section 10. It allows attorneys or oth-

er party representatives to designate their status at a mediation as a party or representative.

And if that's too thin an ethical tightrope to avoid registering for, say, an emergency last-minute negotiation, then in-house attorneys and advocates can cross rivers and take their negotiations to neighboring states.

Despite the practice, ethics, and even constitutional and tax issues spurred by the legal opinion, the issue isn't new. Florida's tough appearance rule, applying to ADR, is linked to court work, but arguably extends to foreign in-house counsel representation. Like Florida, South Carolina limits unregistered out-of-state attorneys to three ADR appearances annually. California's seminal unauthorized practice of law case, *Birbrower, et al. v. Superior Court*, 949 P.2d 1 (1998), where a New York firm representing a California client in the client's home state arbitration was denied a fee, means plenty of assessment work for nonresident lawyers before taking on California ADR matters.

But those states largely rely on individuals to size up their relationship to the proceedings. In Opinion 43, issued on Jan. 4, the N.J. Supreme Court's Committee on the Unauthorized Practice of Law requires more. (The opinion is available at [www.judiciary.state.nj.us/notices/ethics/UPLC\\_Opinion43supplementing-op28.pdf](http://www.judiciary.state.nj.us/notices/ethics/UPLC_Opinion43supplementing-op28.pdf).)

The conclusion of "Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey," states,

[I]t is the recommendation of this Committee that the AAA and other alternate [sic] dispute resolution forums require, as part of the initial filing process, that out-of-state attorneys seeking to practice in New Jersey under the multi-jurisdictional practice rule be required to submit proof of compliance with RPC 5.5, particularly proof that they have registered with the Clerk of the Supreme Court and have paid the required fees.

"The problem is that we don't have any enforcement powers," says Eric P. Tuchmann, the American Arbitration Associa-

tion's general counsel in New York. "As an administering organization, we can disqualify an attorney," he says, "but there is no rule, and there is no statute, that gives the arbitrator the power to disqualify a lawyer for this reason—or any other reason."

For out-of-staters, "[i]t's going to be an extra step, no question," says Raymond S. Londa, an Elizabeth, N.J., attorney who chairs the Court's UPL committee, "but I don't think it's unreasonably burdensome." He notes that attorneys customarily get good standing letters from their jurisdictions for pro hac vice litigation admissions, so the extension to arbitration and mediation makes sense.

Londa's committee didn't go out on a protectionist limb, even though the state has historically been tough on visitors, especially involving bona fide office requirements. The 2004 New Jersey conduct rule's adoption foretold the January opinion. RPC 5.5, which provides the boundaries for out-of-state attorneys who are not admitted to New Jersey legal practice, seems to indicate on its face that out-of-state attorneys may not appear in New Jersey ADR settings.

Rule 5.5(b)(3) allows in-state practice for nonadmitted attorneys under the following ADR-related provisions:

- (i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
- (ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice . . .

New Jersey courts use the term "complete" (continued on next page)

Bleemer is editor of *Alternatives*, and Gray is a CPR Intern. This article is an expanded and updated version of an item prepared for the Recent News feature at [www.cpradr.org](http://www.cpradr.org) in January.

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mentary dispute resolution” instead of ADR.

A separate Rule 5.5 section also permits in-house counsel to practice, referring to a set of criteria in another rule, 1:27-2. Regardless, once these Rule 5.5 provisions are met, New Jersey’s additional, mandatory multijurisdictional practice requirements kick in, via the 2004 addition, Rule 5.5(c). That’s where the reach into private matters is strongly suggested.

The six RPC 5.5(c) criteria that out-of-state lawyers must follow are:

- (1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;
- (2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;
- (3) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer’s firm that may arise out of the lawyer’s participation in legal matters in this jurisdiction;
- (4) not hold himself or herself out as being admitted to practice in this jurisdiction;
- (5) maintain a bone fide office in conformance with R. 1:21-1(a), except that, when admitted pro hac vice, the lawyer may maintain the bona fide office within the bona fide law office of the associated New Jersey attorney pursuant to R. 1:21-2(a)(1)(B); and
- (6) annually complies with R. 1:20-1(b) and (c) [Annual Fee and Registration], R. 1:28-2 [payment to Lawyers’ Fund for Client Protection], and R. 1:28B-1(e) [payment to Lawyers Assistance Program] during the period of practice.

For example, an in-house attorney at a New York company who stops off at a New Jersey supplier and “engages in the negotiation of the terms of a transaction” potentially subjects himself or herself to registration.

## MEDIATION ISN’T EXCLUDED

The opinion expressly extends to mediation. The Court committee, according to the

opinion, “finds that [representing an existing out-of-state client in mediation] is akin to arbitration and that an out-of-state attorney may participate in mediation and may prepare an order for the court reflecting a memorandum of understanding/agreement reached in mediation, provided that the out-of-state attorney has satisfied the requirements of RPC 5.5.”

The attorney might be able to declare that he or she is not acting as an attorney under the state’s Uniform Mediation Act, explains Princeton, N.J., attorney Hanan Isaacs, and an out-of-state lawyer could even declare his or her status as a “non-party participant,” and not a lawyer or a representative.

But a narrow participation definition is at odds with public policy behind New Jersey’s UMA Sec. 10, which states, “An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of representation or participation given before the mediation may be rescinded.

Isaacs says a narrow Rule 5.5(b)(3)(ii) exception may exist, by parsing the relationships of the attorney’s admission, his or her existing representation of a party, and the location of the matter’s origins.

Regardless, the borderline exceptions don’t comport with ADR’s contract origins, says Isaacs, a former member of the Court’s UPL committee, who focuses on arbitration and mediation in his law practice.

He says that January’s opinion was inevitable in light of the conduct rules’ 2004 change on ADR participation. “It is clearly and simply an economic decision,” states Isaacs. “There is nothing about this [Rule of Professional Conduct] or this opinion that protects anybody but the lawyers who happen to practice in this state.”

But the opinion itself says it doesn’t change the practice dictated by a predecessor, 1994’s Opinion 28, also directed at the American Arbitration Association. The January opinion states that it merely supplements the earlier opinion to incorporate the 2004 rules changes.

Consumer protection is a key goal of the rule changes. The registration provisions are the new opinion’s “most important aspect,” says UPL committee chairman Raymond Londa, “so the [state Supreme] Court has jurisdiction over the individual in the event the Court has the need to review the conduct. . . .”

Eric Tuchmann of the American Arbitration Association says that consumer protection shouldn’t create obstructions to effective processes. “[E]very state has a right to and an interest in protecting users of attorneys’ services from unscrupulous conduct,” he says, but others have done it without the filing obligations. “The end result is that parties involved in dispute resolution services in New Jersey will simply select a different venue to avoid the registration requirement,” he says.

Conflict resolution experts and multijurisdictional practice authorities agree that there currently is only one New Jersey option available to ADR providers: Show participants the Court committee’s work. “You can’t ignore an opinion,” says John M. Barket, a partner in the Miami office of Shook, Hardy & Bacon LLP, who has written on multijurisdictional practice and ADR for the American Bar Association litigation section. “You have to think a little more about who is going to be involved.”

That preparation may mean constraining the role of the in-house counsel from another state, or hiring local counsel. Or it may mean limiting the topics under discussion—though putting boundaries on negotiations, or conversational restrictions for mediation topics, likely wouldn’t be practical for most corporate deals.

Even Court committee chairman Londa says “it will be difficult to monitor,” which, he adds, is why the committee recommended that the “ADR forum” require attorneys to submit proof of compliance.

Barket points out that the prevalence of step clauses, requiring negotiations before mediation, arbitration or litigation, involves the conduct covered by the opinion, but before it even gets to an ADR forum. “If there is no umbrella organization involved,” he says, “I don’t know how anybody would ever know about it.”

## CONSTITUTIONAL ISSUES, AND TAXES

Paul M. Lurie, a partner in Chicago’s Schiff Hardin LLP who also has written on UPL and arbitration, notes that model rules adoptions, like New Jersey’s, that restrict practices, raise constitutional issues under the Privileges and Immunities Clause of Article IV, and the Equal Protection Clause.

He states in an E-mail that, historically,

out-of-state attorneys representing clients in an arbitration haven't been considered to be engaging in the unauthorized practice of law. "Therefore," he notes, "sudden state restrictions on the participation in such arbitrations, through pro hac vice admission or numerical limits on appearances, are highly suspect."

[Next month, *Alternatives* will feature a commentary by Lurie on the constitutional issue.]

With respect to recovering attorney fees, the New Jersey Supreme Court Committee determined that, provided the out-of-state attorney has complied with the Rule 5.5 requirements, the attorney may collect fees for arbitration or mediation matters "pursuant to the rules of the dispute resolution forum," the opinion states, and any applicable New Jersey statutes and court rules governing the recovery of attorney fees.

John Barkett says that these rules arise primarily when there is a fee dispute, like *Birbrower*. But he says he believes that the multi-jurisdiction rule ultimately could prove to be a bonanza in states adopting them for tax-collecting authorities. Before statewide registration requirements, it was impractical, even with electronic filing, to check local pro hac vice motions to find out who had income in the state, and took it back home without paying taxes. Now, with representations registered centrally, "states may eventually see this as a source of income tax revenue," he says.

There likely will be opposition. Despite

the fact that New Jersey practitioners could benefit from these rules, the ADR Section of the New Jersey State Bar Association will examine the opinion closely. Section chairman Bennett Feigenbaum, president of Morristown, N.J.'s Legal Management & Audit Group, a consulting firm that helps government and business reduce its legal costs, declines to comment on what the group will do. Barbara S. Straczynski, the association's communications director, says that section's effort will need to be presented to association trustees for consideration before the bar adopts a resolution or makes a recommendation to the state Supreme Court to change the rules.

American Arbitration Association General Counsel Eric Tuchmann says that his organization will offer to assist the bar group. For now, says Tuchmann, the association "will notify non-New Jersey attorneys practicing in New Jersey dispute resolution proceedings that they have to take these steps." The notification process "isn't entirely new," he says, citing a questionnaire the association developed for California matters in *Birbrower's* wake.

And, in a common coda to discussions about Opinion 43 and the 2004 conduct rule, Tuchmann says, "It's a matter of time before there is a challenge."

[On Feb. 26, the CPR Institute, which publishes this newsletter with Jossey-Bass, conducted a brown bag luncheon at Newark, N.J.-based McCarter & English to discuss Opinion 43's aftereffects. "Should the New Jersey Court committee opinion processes become standard operating procedure in other jurisdictions," says Kathleen A. Bryan, CPR's president and *Alternatives'* publisher, "it would be a troubling trend because the opinion affects the sanctity of private consensual agreements, and runs counter to international business conflict resolution practice." CPR Senior Vice President Neal Blacker, who oversees the CPR Institute's Dispute Resolution Services and Cases, says that CPR will inform all participants in New Jersey matters of the new opinion.]

It was a busy start to the new year for New Jersey ADR. On Jan. 8, the state Administrative Office of the Courts published a proposal for a formal review process for complaints against civil and family court mediators by the Supreme Court's Advisory Committee on Mediator Standards.

The purpose of publishing the notice, available at [www.judiciary.state.nj.us/notices/2007/n070108a.pdf](http://www.judiciary.state.nj.us/notices/2007/n070108a.pdf), is to solicit comments. The comment period was open until late last month.

The AOC would collect the complaints under the proposal. It provides for an informal resolution procedure, literally: The AOC manager would forward the complaint to the mediator and the advisory committee's chairman and members. After committee review, the manager or a committee member "will seek to resolve the complaint informally unless the Committee determines otherwise."

If the dispute can't be resolved with informal talks, the committee under the proposal would determine the course of action, which may include asking the mediator to file a written response to be given to the complainant; requesting more information from the complainant, the mediator or other parties, or determining that the complaint requires no further action.

Or, "on review of the papers," the committee may decide that "no further action shall be taken or that action should be taken against the mediator."

The proposal would allow the committee to require the mediator to attend additional training; observe other mediators; or be mentored by other mediators currently on the roster. The committee also would be empowered to determine that the mediator should not conduct any mediation until the completion of the remedial actions it requires.

The committee also could remove the mediator from the court roster under the proposal, or ban the mediator from providing court mediation services.

The mediator would have an appeals process under the committee's proposal, under which a local appellate panel appointed by an assignment judge or designee where the grievance originated would make a final determination on a banned mediator's fate. ■

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Cartoon by John Chase

