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N.J. COURT COMMITTEE PROPOSES REMOVING REPRESENTATION REQUIREMENT

A vestige of New Jersey legal world protectionism that is opposed to the basic alternative dispute resolution principle of choosing your negotiating representatives—and which appears to have had a big effect on ADR practice—might be wiped off the state's rule books soon.

The New Jersey Supreme Court's Professional Responsibility Rules Committee recently recommended that the Court, in its biannual rules revision, change its version of Model Rule of Professional Conduct 5.5, the multistate practice rule that came down hard on ADR attorney-advocates.

If the change is adopted, out-of-state attorneys could represent clients in New Jersey ADR without hiring local counsel, registering or paying a court fee. The Court is expected to decide this summer on whether to adopt the recommendation.

The rule extended to commercial conflict resolution practice the pro hac vice rules on registering out-of-state lawyers in court cases. The rule was a step beyond: even private mediations were dragged under its orbit in Opinion 43, a 2007 ruling that says that non-New Jersey attorneys would have to register before ADR negotiations took place.

That opinion, by the Court's Committee on the Unauthorized Practice of Law, didn't merely provide a juicy hypothetical for Model Code of Professional Responsibility wonks and New Jersey law school ethicists. The state has many large companies conducting international business and interstate transactions. Some have large legal departments employing attorneys who had joined out of New York and Philadelphia practices, where they may not have been admitted across the river.

The specter of violating unauthorized practice of law rules loomed over in-house work in run-of-the-mill contract disputes as a result of the Court's UPL Committee opinion.

The ruling made providers the enforcers in policing the ADR matters. The American Arbitration Association—the target of the 2007 opinion—announced after the ruling it would issue warnings before ADR sessions started. The association objected to its new obligation to assess mediation and arbitration participants' bar memberships.

Some New Jersey ADR attorneys said that the tough registration requirement would mean that out-of-state attorneys would declare themselves business representatives of the companies they worked for in negotiations, rather than corporate legal representatives. That stance seeks shelter under the Uniform Mediation Act, which allows mediation participants to choose whoever they want as their representatives.

That New Jersey was an early adopter of the conciliation-supportive UMA added fuel to the griping by state ADR practitioners, who saw a newly invigorated market potentially cut off by protectionism. The 2004 UMA passage coincided with the state Supreme Court's adoption of its version of RPC 5.5, along with a Court rule designating mediation and arbitration to be "the practice of law."

When the 2007 Unauthorized Practice of Law opinion requiring the pro hac vice ADR admission for out-of-state attorneys was released, many state practitioners' feared was that any gains from the requirement of the presence of a New Jersey-licensed attorney would pale next to the losses that would be felt when mediation and arbitration matters fled to New York and Pennsylvania.

The new corrective Professional Responsibility Rules Committee proposal would make these issues a bad memory. "If the N.J. Supreme Court adopts the newly proposed RPC 5.5, then all of the many serious problems we critiqued for the last six years disappear instantly," according to Princeton, N.J., ADR attorney Hanan M. Isaacs. "We will be back to self-determination in selection of ADR neutrals and advocates: self representation or representation by non-lawyers, out of jurisdiction ("cross border") lawyers, or N.J. lawyers, in both arbitrations and mediations."

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"[W]e're very supportive of the changes being suggested here," says Eric Tuchmann, general counsel of the American Arbitration Association. "They would bring to an end what was a practice that was very out of line with most of the states' laws on out-of-state lawyers representing parties in the state."

The N.J. Professional Responsibility Rules Committee produced the report late last year, after a request to look at the Court rules and Opinion 43. The report was published by the state's Administrative Office of the Court on March 15. A notice to the bar opened a one-month comment period for the new proposed rule, extended to the end of last month, after which the Court will decide to adopt, change or reject.

The revision eliminates the problematic 2007 UPL committee's opinion gloss over an already highly restrictive regime. The new PRRC committee report notes that "[u]nder the state's current RPC 5.5(b)(3)(ii), a cross-border attorney may represent a party to a dispute by participating in ADR when 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."

The new report for the Court says that the fixes that have been proposed since the UPL Committee's ruling still leave holes requiring ADR attorney representatives to register. Those proposals, by another Court committee, have not been adopted by the Court.

In a paragraph in its report, the PRRC committee lays out the problems with the previous proposed solutions:

The Committee recognizes the policy of encouraging ADR, and that imposing additional requirements on cross-border attorneys seeking to engage in ADR processes on behalf of their clients will deter them from selecting New Jersey as their ADR forum. Although the previously proposed new safe harbor would allow cross-border representation in a matter involving a New Jersey client or a dispute that originated in New Jersey, the required prerequisites—association with local counsel, registration, and payment of the annual assessment—may prove to be too cost prohibitive for many clients. In addition, the justification for regulating the practice of law is more attenuated in the context of ADR than it is in a pure litigation setting. For example, in a private mediation conducted pursuant to

a private agreement between private individuals, there is no regulation or oversight by the courts. Even laypersons may assist parties under Section 10 of the Uniform Mediation Act, N.J.S.A. 2A:23C-10.

John M. Barkett, a partner at Shook, Hardy & Bacon in Miami says that the Court committee "cares more about keeping the business in New Jersey" than policing bad practices. He says that the statement that regulating legal practice "is more attenuated" in ADR than in litigation rings hollow. "You're still trying to protect somebody from having a bad lawyer," says Barkett, who has written extensively on MPC 5.5.

"The part where the committee says that [registration] 'will deter them from selecting New Jersey as their ADR forum' is the key," he explains. "That's what I think this is all about."

The PRRC committee's proposal, its report notes, correlates with the American Bar Association's versions of Model Rule of Professional Conduct, focusing on the relationship between the legal representation and the lawyer's practice—not the New Jersey location of the client or the dispute.

Practitioners have greeted the new proposed rule warmly. They seem to believe that the Court committee got it right after the earlier false starts, and the practices sought with the state's 2004 UMA adoption will finally be normalized. "If adopted in its entirety," says Jeffrey Posta, chair of the New Jersey State Bar Association's Dispute Resolution Section, "it will clear this up a bit and make it easier for ADR proceedings to be conducted across state lines."

The association had not yet taken a position at press time, but the DR section had backed the PRRC recommendation. The association's board of trustees was set to look at the entire 2008-2010 rules cycle package to prepare a comment letter regarding its positions on the various recommendations, of which the MPC 5.5 change is only a small part.

In a comment letter to the Supreme Court strongly backing the proposed fix, the Trenton, N.J.-based New Jersey Professional Association of Mediators, an accreditation group with more than 400 attorney and nonlawyer members, notes that the proposal corrects Opinion 43's explicit extension of pro hac vice filing

Cartoon by Leo Cullum



"I'M GOING TO REVERSE MYSELF RIGHT HERE. I'M GOING TO HAVE THE TUNA SANDWICH INSTEAD."

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requirements to private mediation process, even though the opinion specifically dealt with an inquiry about arbitration. The opinion was titled “Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey.”

In the NJAPM comment letter, organization president Robert J. McDonnell, who heads the Lincoln Park, N.J.-based provider Alliance Mediation Services, notes that “[h]aving the mediator ask parties and counsel if they are properly admitted in New Jersey can suggest a lack of neutrality—something which is critical to the mediation process. Mediators should not be enforcers of the RPC in their mediations.”

The proposed 5.5 revision, notes McDonnell in the letter, “would restore party self-determination in mediation and other ADR matters. It would permit lay people to serve as advocates in private mediations and allow parties to have the legal counsel of their choice, whether New Jersey based or from out of state.”

McDonnell said in an interview that the focus for his group, about 70%-75% of whose members are lawyers, is making New Jersey more mediation friendly, and operate more in accordance with the UMA. He says the organization doesn’t take a general position on pro hac vice admission or attorney conduct rules, but notes that the state version of 5.5 and Opinion 43 have provided an additional hurdle to get to mediation.

McDonnell says he recently mediated a court-annexed case where the party and the attorney were from Pennsylvania. For an unknown reason, local counsel dropped off, he says, and he had to help the Pennsylvanians—“who didn’t know anyone here”—find new local counsel, delaying the ADR proceedings.

So, says McDonnell, people were following the rule, but it wasn’t helping dispute resolution achieve its goals.

Hanan Isaacs, long active in New Jersey ADR and a former member of the Court’s Unauthorized Practice of Law Committee, also sent a comment letter strongly supporting the Professional Responsibility Rules Committee’s proposals.

An ADR purist, Isaacs urged the Court in March to adopt the proposed rule, not-

ing that ADR principles trump the business considerations:

I am a New Jersey licensed and practicing attorney, and proudly so. I welcome retention by out-of-state clients for advocacy assignments in New Jersey arbitrations and mediations as well as in the state and federal courts here. I would rather parties pick me for these assignments over lay advocates. But the lifeblood of [ADR] has always been party control. Its wide success in the marketplace has been built largely on avoidance of formality, regulation, and restriction, mediation being the least formal and regulated of the three. If parties want out of state legal counsel or a non-lawyer making their case to a mediator or an arbitrator, then too bad on me. That is their choice and the law should respect it. In my view, the Supreme Court should regulate lawyers in their court-based or directly court-related functions, and not impose itself into the purely private and contractual ADR marketplace. The legal system does not gain when the Court so acts, and the public loses. That is not good public policy.

National experts have followed the New Jersey drama closely, and they also mostly welcome the proposed change. The AAA’s Eric Tuchmann echoes the praise, though the New York-based nonprofit didn’t file a comment letter. The proposed changes “really bring New Jersey into the mainstream of the accepted practice,” he says.

They also would remove a burden imposed on the practice, but targeted at the AAA, by the 2007 UPL opinion. Since then, Tuchmann explains, parties and counsel to New Jersey AAA matters would get a letter providing the Opinion 43 cite and telling the participants that if they were out of state lawyers, registration would be necessary.

Tuchmann says the association can’t quantify how many matters moved out of New Jersey, or avoided the state altogether in light of the registration rule. “You don’t know why a particular lawyer, specifically, in retrospect might have moved out, or a counsel switched in a particular matter,” he says, adding, “All that would happen behind the scenes.”

“But,” continues Tuchmann, “as a general rule, where you have a rule that exists like in New Jersey and Florida, where they appear to be burdensome, the tendency is that the jurisdiction will become known as not friendly to the process. And over time, on the margins, lawyers will tend to avoid those jurisdictions.”

Shook Hardy’s John Barkett also cites Florida as another restrictive jurisdiction—but one that has an ADR accommodation. He says ADR practitioners attached to court matters, quickly wind up registering, pro hac vice style. Barkett points out, however, that Florida is a site for many international arbitrations involving Latin American parties. The state’s Rule 4-5.5 on multi-jurisdictional practice specifically exempts registration for lawyers in international arbitration proceedings attached to local courts.

Representation restrictions, he says, make ADR more expensive to conduct, rather than expeditious. The New Jersey proposal is a vast improvement, Barkett says. “They are being sensible and being practical to allow a New Jersey client involving a New Jersey dispute that happens to involve a cross-border attorney to get the benefit of mediating in New Jersey at a reasonable cost,” he says. “How could you argue with that?”

Still, notes Paul Lurie, a Chicago partner in Schiff Hardin, practice restrictions are a problematic part of the legal world that won’t disappear easily, in New Jersey or elsewhere. Lurie points out that if a motion to compel an arbitration is needed, or when an enforcement motion needs to be filed, the need to hire local counsel reemerges in an ADR context that otherwise wouldn’t invoke the multijurisdictional practice rules.

Referring to New Jersey’s lengthy court appearances rule, 1:21, Lurie says, “This looks like fairly flagrant constitutional violation.” (Lurie wrote an analysis of the constitutional issues related to the New Jersey Court rules in “Court Committee Opinion Limiting ADR Representation Raises Constitutional Issues, as Well As Problems Rooted in Protectionism,” 25 *Alternatives* 72 (April 2007).)

The proposed amendment to New Jersey RPC 5.5 incorporates a recommendation from previ-

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ous two-year rule cycles. In the earlier proposal, the section would permit the representation by the out-of-state attorney 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.”

The new proposal provides the safe harbor for out-of-state attorneys by adding that the

services also “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required.”

Hanan Isaacs, in his comment letter to the Supreme Court, concludes, “The revised Rule 5.5 would restore common sense. . . . It would restore party self-determination in contractual ADR dealings. It would permit lay people to serve as advocates in purely private ADR processes and allow parties to have the legal counsel of their choice, whether New Jersey based or from out of state.”

“It seems as though most states have settled in and there is a broader consensus,” concludes the AAA’s Eric Tuchmann, adding that, if the rule change is passed, New Jersey will be in “a much more consistent position” with other states.

“Building walls does not generally help the process or the practice,” says New Jersey state bar association dispute resolution section chair Jeff Posta, who is a partner at Stark & Stark in Lawrenceville, N.J. “It’s up to the Supreme Court to fine tune the registration and payment-of-fees rules. We’ll see what they do.”

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