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COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the New Jersey Supreme Court

OPINION 43 (SUPPLEMENTING OPINION 28)

Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey

In Opinion 28 of the Committee on the Unauthorized Practice of Law, 138 *N.J.L.J.* 1558 (December 12, 1994), 3 *N.J.L.* 2459 (December 19, 1994), the Committee considered an inquiry regarding whether an out-of-state attorney may appear before a panel of the American Arbitration Association (hereinafter "AAA") in New Jersey to present evidence and argue questions of substantive law on behalf of a client with a claim against a former employer for breach of an employment contract. After a review of the AAA Commercial Arbitration Rules and legal precedents, the Committee determined that an out-of-state attorney may represent a party in an arbitration proceeding conducted under the auspices of the AAA in New Jersey if there has not been a complaint filed in New Jersey on the issue and if the attorney is admitted and in good standing in another jurisdiction.

In 2004, the issue of multi-jurisdictional practice was addressed in newly-adopted *Rule of Professional Conduct* 5.5. After review, the Committee concludes that the new provisions of *RPC* 5.5 require a modification to Opinion 28.

RPC 5.5(b) provides that a lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice *pro hac vice* pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(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;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or

(iv) the lawyer practices under circumstances other than (i) through (iii) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

If a lawyer qualifies under one of the above categories to practice in the State of New Jersey, the lawyer must then satisfy the six criteria set forth in *RPC* 5.5(c):

> (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;
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> (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 bona 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.

While *RPC* 5.5 does not change the ultimate opinion of the Committee in Opinion 28, *i.e.*, that an out-of-state attorney may appear in an AAA arbitration, *RPC* 5.5 does change the prerequisites for this appearance. In Opinion 28 the Committee required that no related action was pending in the attorney's state of admission. This is not a requirement of *RPC* 5.5 and so is no longer required by this Committee. Further, *RPC* 5.5(c)(1) through (6) provides additional requirements, the most important of which is that the out-of-state attorney must register with the Clerk of the Supreme Court, authorize the Clerk to accept service of process on the attorney's behalf, and comply with New

Jersey Rules regarding registration and fees. These requirements are therefore added to Opinion 28 in this Supplemental Opinion.

Additionally, the question has been posed whether a multi-jurisdictional practitioner may represent an existing out-of-state client in mediation in New Jersey. The Committee finds that this 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.

Lastly, questions have arisen with regard to recovery of attorney fees by out-of-state attorneys. Provided that the out-of-state attorney has complied with the requirements of *RPC* 5.5, it is the opinion of the Committee that the attorney may collect fees for arbitration and/or mediation matters, pursuant to the rules of the dispute resolution forum in which the attorney participates and any applicable New Jersey Statutes and Rules of Court governing the recovery of attorney fees.

As such, the Committee hereby modifies Opinion 28 to require that out-of-state attorneys seeking to practice in alternate dispute resolution settings in New Jersey must comply with all requirements of *RPC* 5.5. Any out-of-state attorney who practices within New Jersey without complying with the provisions of *RPC* 5.5 will be engaged in the unauthorized practice of law.

It is understood that this Opinion and the requirement of *RPC* 5.5 will be difficult to monitor. As such, it is the recommendation of this Committee that the AAA and other alternate 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.