

NOTICE TO THE BAR

REPORT OF THE PROFESSIONAL RESPONSIBILITY RULES COMMITTEE – PUBLICATION FOR COMMENT

This notice publishes for written comment the February 2007 report of the Supreme Court's Professional Responsibility Rules Committee ("PRRC").

By notice of February 13, 2007 the Supreme Court published for comment the 2004-2007 reports of six rules and program committees: (1) Committee on Complementary Dispute Resolution, (2) Criminal Practice Committee, (3) Family Practice Committee, (4) Committee on Minority Concerns, (5) Municipal Court Practice Committee, and (6) Committee on the Rules of Evidence. The Court by this notice adds the Professional Responsibility Rules Committee's report to those reports open for comment. The Professional Responsibility Rules Committee's report also will be available for downloading on the Judiciary's Internet web site at <http://www.judiciary.state.nj.us/reports2007/index.htm>.

Please send any comments on the PRRC's report and recommendations in writing by Monday, April 16, 2007 to:

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Comments on the committee's report and recommendations may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). However, comments submitted in response to this notice will be maintained in confidence if the author specifically requests confidentiality. In the absence of such a request, the author's identity and his or her comments may be subject to public disclosure after the Court has acted on the Committee reports and supplemental reports.

The Supreme Court will be acting on the PRRC's report and recommendations in June 2007, with any rule amendments likely to become effective September 1, 2007.

/s/ Philip S. Carchman

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts

Dated: March 8, 2007

PROFESSIONAL RESPONSIBILITY RULES COMMITTEE

HON. STEWART G. POLLOCK, CHAIR
HON. ALAN B. HANDLER
KENNETH J. BOSSONG, ESQ.
JOSEPH A. BOTTITTA, ESQ.
CYNTHIA A. CAPPELL, ESQ.
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WILLIAM O'SHAUGHNESSY, ESQ.
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February 28, 2007

Chief Justice James R. Zazzali
Supreme Court of New Jersey
P.O. Box 023
Trenton, New Jersey 08625-0023

Dear Chief Justice Zazzali:

On behalf of the Professional Responsibility Rules Committee, I am pleased to submit the Committee's report to the Court:

I. Evaluation of Test Period for Bona Fide Office Rule Amendment and Multi-Jurisdictional Practice Requirements.

Background: Effective January 1, 2004, the Court removed Rule 1:21-1(a)'s in-state requirement for a bona fide office and amended RPC 5.5 to permit multi-jurisdictional practice under limited circumstances by attorneys licensed and in good standing in another jurisdiction. The Court's Official Statement directed the PRRC to undertake, in 2007, a "comprehensive evaluation of the experience gained in multijurisdictional practice to determine whether any modifications to the RPC 5.5 amendment as adopted are necessary or desirable." (The Administrative Office of the Courts is charged with conducting a similar review in respect of R. 1:21-1(a).) The PRRC suggests clarifications to RPC 5.5 as discussed herein and shown on Exhibit A.

In connection with its review of experience with the rule amendments, the PRRC received reports from the Office of Attorney Ethics (Exhibit B) and the New Jersey Lawyers' Fund for Client Protection (Exhibit C).

A. 2004 Amendment to the Bona Fide Office Rule.

The OAE and the Fund reported no known problems with respect to the deletion of the in-state requirement for a bona fide office. The PRRC is likewise unaware of any issues relating to the rule change. The PRRC understands that the Administrative Office of the Courts is in the process of polling the assignment judges and also will report to the Court on this rule change.

Debate about removing the in-state bona fide office requirement has all but disappeared since the amendment went into effect. *See* Robert G. Seidenstein, “Bona Fide Office Rule: The Piping Hot Issue that Turned Icy Cold,” N.J.L., Dec. 4, 2006. There is no indication that out-of-state attorneys with a New Jersey license have begun practicing law here to the detriment of the public as a result of the rule relaxation. Some out-of-state attorneys licensed in New Jersey – but previously on the ineligible list because they chose not to pay the annual assessment – have since been reinstated by becoming current on the annual assessment. The result is an increase in Fund collections.

Pending no report of any problems from the AOC, the PRRC recommends no modification to the 2004 amendment to Rule 1:21-1(a), and that another evaluation of the effect of the rule change be conducted after a further review period.

B. 2004 Multi-Jurisdictional Practice Rule.

The OAE reported to the PRRC (*see* Exhibit B) that it is unaware of any incidents relating to the amendment to RPC 5.5 to permit multi-jurisdictional practice in New Jersey, under limited circumstances, by attorneys licensed and in good standing in another jurisdiction. The Fund concurred and expressed the view that it is still too early to determine the effects of the MJP changes (*see* Exhibit C).

The Fund noted that as of 2/5/07, there are only *seventeen* multi-jurisdictional practitioners registered in New Jersey. The OAE, the Fund, and the PRRC agree that number seems low. In addition, as noted by both the OAE and the Committee on the Unauthorized Practice of Law, monitoring and enforcing RPC 5.5's requirements may be difficult. *See* UPLC Opinion No. 43, Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey (January 2007) (attached as Exhibit D).

The PRRC is of the view that an affirmative duty to “register” as a multi-jurisdictional practitioner is implied in RPC 5.5(c)(3)'s requirement to “consent to the appointment of the Clerk of the Supreme Court as agent” for service of process, as well as in RPC 5.5(c)(6)'s requirement to annually comply with the registration statement and assessment rules during the period of multi-jurisdictional practice. Nevertheless, the PRRC recommends that the Court insert clarifying language into current RPC 5.5(c)(3) and (c)(6) to leave no doubt that an out-of-state attorney seeking to engage in MJP (and not be charged with engaging in the unauthorized practice of law) must take certain affirmative steps. The following is suggested new language for RPC 5.5(c)(3):

(3) **register with and** consent **in writing on a form approved by the Supreme Court** 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;

Although a certification and designation form is available on the Court's website and upon request to the Clerk's Office (*see* Exhibit E), an explicit writing requirement will make clear that an out-of-state attorney seeking to lawfully engage in multi-jurisdictional practice must take affirmative steps. To that end, another suggested clarification is to RPC 5.5 (c)(6):

(6) annually **register with the New Jersey Lawyers' Fund for Client Protection and** ~~complies~~¹ **comply** with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

As further explained below (Section II), the PRRC also recommends that the Court propose additional language, within sub-paragraph (c)(6), to make clear that the trust account and recordkeeping requirements of R. 1:15(a) and R. 1:21-6 apply as equally to MJP attorneys as attorneys admitted to the New Jersey bar.

Whether or not the Court determines to amend the multi-jurisdictional practice rule, the PRRC endorses the OAE's detailed recommendation (*see* Exhibit B) to implement an outreach campaign. Renewed publicity should remind New Jersey attorneys, neighboring bar associations, and alternative dispute resolution groups of RPC 5.5's multi-jurisdictional practice requirements, as well as the ethical obligations imposed upon New Jersey attorneys to not assist others in the unauthorized practice of law, RPC 5.5(a)(2), and to report professional misconduct to appropriate authorities. RPC 8.3.

II. Referral from Civil Practice Committee: Proposal to Amend R. 1:21-6.

The Civil Practice Committee referred to the PRRC the following issue: whether to relax the requirements of Rule 1:21-6 in light of the removal of the in-state requirement from the bona fide office rule. Currently, Rule 1:21-6 and Rule 1.15(a) require every attorney who practices in New Jersey to maintain a trust account in a Court-approved *New Jersey* financial institution.

The PRRC received and reviewed responses to this proposal from the OAE (Exhibit F) and the Fund (Exhibit C). The PRRC endorses their view that the in-state requirement for attorney trust accounts should *not* be changed. The requirement is part of a comprehensive plan adopted "to ensure that the public is protected to the greatest extent possible." For

¹ The July 28, 2004 amendments to RPC 5.5 erroneously used "complies" rather than "comply"; this corrects that error.

example, allowing trust accounts to be maintained outside of New Jersey would impede disciplinary authorities' ability to oversee the proper maintenance of trust funds. Further, with no subpoena power in other jurisdictions, they would have no ability to secure essential records or freeze assets in emergent situations.

The same concerns prompt the PRRC to recommend that the attorney trust account and recordkeeping requirements be made explicitly applicable to multi-jurisdictional practitioners (*see* Section I.B above). For example, an out-of-state attorney representing a home-state client in a New Jersey real estate transaction should be required to hold any escrowed funds in an account in New Jersey. The concern is protecting the New Jersey public – regardless of the attorney's home state.

III. RPC 4.4(b) and the Use of Metadata

On November 29, 2006, a New Jersey Law Journal editorial (“Preventing Metadata Disclosure”) opined that the spirit (if not the text) of RPC 4.4(b) prohibits the recipient's use of confidential information embedded in the metadata² of an electronic document. As amended in 2004, RPC 4.4(b) provides:

A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

The ABA recently reached the opposition conclusion in respect of Model Rule 4.4(b), which is on its face not as strict as New Jersey's analog. (ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-442, “Review and Use of Metadata” (August 5, 2006)). Model Rule 4.4(b) provides:

² “Metadata” is, simply, data about data or information about information. In the context of electronic documents, metadata is often embedded in the file, hidden from view. It may identify the authors, dates and times the file was created and revised, and, in some cases, earlier versions of the document and prior “black lines” or “tracked changes.” For attorneys, this hidden metadata may reflect confidential information and privileged client communications.

A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

The PRRC recognizes that the *sender* bears some responsibility for ensuring that confidential information is not disclosed. See RPC 1.6(a) (duty of confidentiality). To that end, many firms use software to “scrub” the metadata from electronic files before providing them to third parties. The PRRC also agrees that RPC 4.4(b) generally imposes a duty on the *recipient* to not mine electronic documents for metadata containing privileged and confidential information. See also RPC 4.4(a) (“In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of . . . a [third] person.”).

Ultimately, the issue of whether it is ethical to mine and use metadata embedded in electronic documents is primarily one of interpretation of existing rules. Accordingly, the PRRC supports a decision either to refer the issue to the Advisory Committee on Professional Ethics, or to allow the issue to be resolved through the courts.

On behalf of all the members of the PRRC, we thank the Court for this opportunity to be of service.

Respectfully submitted,

/s/ Stewart G. Pollock

Hon. Stewart G. Pollock, Chair
Hon. Alan B. Handler
Kenneth J. Bossong, Esq.
Joseph A. Bottitta, Esq.
Cynthia A. Cappell, Esq.
Richard T. Fauntleroy, Esq.
Raymond S. Londa, Esq.
Melville D. Miller, Jr., Esq.
Sherilyn Pastor, Esq.
William O’Shaughnessy, Esq.
Michael S. Stein, Esq.

Holly M. Barbera, Esq., Staff

Exhibit A

PROPOSED RULE AMENDMENTS RECOMMENDED FOR ADOPTION

RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) ...no change

(b) ...no change

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b) above shall:

(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) register with and consent in writing on a form approved by the Supreme Court 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] register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:15(a), R. 1:20-1(b) and (c), R. 1:21-6, R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Exhibit B

OFFICE OF ATTORNEY ETHICS



SUPREME COURT OF NEW JERSEY

DAVID E. JOHNSON, JR.
Director

P.O. BOX 963
TRENTON, NEW JERSEY 08625
609-530-4008

OFFICE OF DIRECTOR

MEMORANDUM

TO: Keith Endo, Esq., Staff to the Professional Responsibility Rules Committee

FROM: David E. Johnson, Jr., Director

SUBJECT: Test Period for Bona Fide Office and Multi-Jurisdictional Practice Rule Changes

DATE: October 19, 2006

Effective January 1, 2004, the Supreme Court modified R.1:21-1(a) to delete the "in-state" requirement for a bona fide office. At the same time, the Court adopted changes to RPC 5.5 to permit multi-jurisdictional practice in New Jersey under limited circumstances. At the time these rules were changed, the Supreme Court indicated that they would ask the Professional Responsibility Rules Committee (PRRC) to review them at the end of the following three-year period and to recommend any changes that may be necessary.

Since the attorney disciplinary system would be likely to see some of these changes, I have annually requested the officers of our 17 district ethics committees and members of the OAE staff to advise me of any instances where these rules may have caused problems. I can advise you that during the almost three years since the Court changed these rules, no such problems have been reported to me.

With respect to the bona fide office rule, it goes without saying that investigating disciplinary charges claiming that an attorney practicing in New Jersey but maintaining a bona fide office outside of New Jersey does not have a bona fide office is problematic. While we will be able to investigate such claims thoroughly in our border states where cities are located adjacent to New Jersey, we will not be able to do so with respect to remote offices in places such as Iowa, California and Texas without going to those states. Travel to these states to investigate a bona fide office claim will hardly ever warrant the expenditure of funds necessary to do so. However, we will do what we can from Trenton by utilizing the Internet and other sources.

With respect to multi-jurisdictional practitioners, I also have nothing to report with regard to any problems. I have just been advised by the Lawyers Fund for Client Protection that, as of October 13, 2006, eight multi-jurisdictional practitioners are known to have practiced in New Jersey in 2006 and all eight have paid their annual registration fee. This number seems tremendously low to me. I would have expected that a much larger number of attorneys in our border states (at least in the hundreds) who are not admitted to practice in New Jersey would take advantage of our rule. It is certainly possible that a greater number of these practitioners have come into New Jersey, but that we are not aware of that fact. However, in my opinion it is too early to tell because procedures for publicizing the multi-jurisdictional practice rules and the criteria that must be complied with to ethically maintain such practice, have not, to my knowledge, occurred. I have examined the Judiciary's website and see no instructions under either the Supreme Court page or the Lawyers Fund home page or the Office of Attorney Ethics home page. Nor am I aware of any Notices to the Bar or notices sent to border state bar associations.

I would suggest that, if we expect multi-jurisdictional practitioners to follow our rules, and if we expect New Jersey practitioners with whom they come in contact to report such out-of-state practitioners who do not follow the rules, we must give the subject some publicity. I suggest the following:

- Website information on who may practice MJP and how they go about it, including the requirements of annual payments to the Lawyers Fund and designation of the Supreme Court Clerk as authorized to receive service of process.
- Notices to the Bar in the New Jersey Law Journal and New Jersey Lawyer once a week for a month and then once a month for the next year.
- Notices sent to the New York, Pennsylvania and Delaware state bar associations.
- Notices sent to the bar associations of the major metropolitan cities of New York, Philadelphia and Wilmington.
- Notices to the Bar to all 21 county bar associations, the New Jersey State Bar Association and all specialty bar associations.
- Notices to any groups conducting arbitration, mediation or other alternate or complementary dispute resolution programs (RPC 5.5(b)(3)(ii)).

DEJ/bc

cc: Stephen W. Townsend, Esq., Clerk
Supreme Court of New Jersey
Kenneth J. Bossong, Esq., Director
New Jersey Lawyers Fund for Client Protection
John J. Janasie, Esq., First Assistant Ethics Counsel

Exhibit C

**NEW JERSEY LAWYERS' FUND
FOR
CLIENT PROTECTION**

TRUSTEES

JEAN M. RAMATOWSKI, CHAIR
TINA E. BERNSTEIN, VICE CHAIR
EMMETT E. PRIMAS, JR., TREASURER
SUSAN E. LAWRENCE
JAMES H. LASKEY
LUIS R. SANCHEZ

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DANIEL R. HENDI

SENIOR COUNSEL
WILLIAM J. THOMAS

DEPUTY COUNSEL
RUBY D. COCHRAN

February 5, 2007

MEMORANDUM

TO: Holly M. Barbera, Esquire, Secretary
Professional Responsibility Rules Committee

FROM: Kenneth J. Bossong

RE: Agenda Items for February 6 Meeting

The PRRC Agenda for February 6 contains a few items upon which it might be useful for the New Jersey Lawyers' Fund to comment.

1) Test Period for Change to Bona Fide Office Rule.

The Fund has little to report on the amendment to the Bona Fide Office Rule that no longer requires such office to be located in New Jersey. While there may well be some clients who regret hiring lawyers who lack a physical presence within New Jersey, the Fund has no evidence of such.

On the positive side, there is reason to believe that some lawyers have reinstated themselves from the Ineligible List because of the Rule Change. There always were some lawyers on the Ineligible List who said that payment of the annual assessment seemed pointless since the Bona Fide Office Rule rendered them, in effect, ineligible anyway. Though I have no way of measuring the numbers involved, it would seem clear that at least some of these folks paid up when the Rule was changed.

There is no question that a large number of lawyers came off the Ineligible List in the last couple of years; the more powerful inducement, however, was clearly the Court's newly adopted Rule that seven consecutive years on the Ineligible List would result in revocation of license. Even so, I have little doubt that there were at least some lawyers who chose to pay for reinstatement, rather than resigning from the Bar without prejudice or simply permitting revocation to occur, because they could practice without the office in New Jersey.

Exhibit C

The third item to be addressed, below, actually presents the first concern I have had: that liberalizing the Bona Fide Office Rule may in some way have created the impression in some quarters that the Supreme Court might lessen its commitment to protecting clients in New Jersey.

2) Test Period for Multi-Jurisdictional Practice.

The rules permitting multi-jurisdictional practice were adopted around the same time that the Bona Fide Office Rule was liberalized. A three-year period for evaluation of each was suggested. Multi-jurisdictional practice is a very different matter, however. There is more at stake and the issues are more complicated. It is my distinct impression that it is far too soon to tell what the multi-jurisdictional practice changes will bring.

At this writing, there are exactly 17 multi-jurisdictional practitioners who have appointed the Clerk of the Supreme Court as agent for service of process and paid the annual assessment. I cannot say how many more lawyers are practicing in New Jersey without fulfilling these two most basic requirements, but the number of those in compliance is remarkably low. This is no small matter. RPC 5.5(c) conditions one's status as a legitimate multi-jurisdictional practitioner upon fulfilling these requirements, among others. It follows that lawyers handling matters here who are neither licensed in New Jersey nor fulfilling the requirements of MJP are engaged in the unauthorized practice of law. Clients of such lawyers are at risk. The Fund, for example, has never been seen as having jurisdiction over the unauthorized practice of law, and would not seek such jurisdiction.

David Johnson's suggestions with respect to publicizing the requirements of multi-jurisdictional practice are good ones. It would seem that the Court should defer evaluation of MJP for another three years of experience.

3) Proposal to Amend Rule 1:21-6 to Permit Out of State Attorney Trust and Business Accounts.

The Fund agrees with the Office of Attorney Ethics in opposing any notion of permitting attorney trust and business accounts to be maintained in banks outside of New Jersey, for all of the reasons expressed by David Johnson on behalf of the Office. The Fund would also emphasize a further point: Court orders imposing suspensions or disbarments on the basis of misappropriation, or other serious misconduct, freeze the assets of attorney trust and business accounts. This is not only an appropriate measure, but also an effective way of protecting clients and, ultimately, the Fund. A significant amount of harm is prevented, and restitution accomplished, through this mechanism. It seems clear that this effort would be seriously compromised by having trust and business accounts lawfully kept outside New Jersey. Money belonging to clients should be subject to the clear, undeniable jurisdiction of the courts of New Jersey. It is not too much to ask of one seeking the privilege of practicing in the State.

Thank you for the opportunity to comment on these items.

Exhibit D

__ N.J.L.J. __

__ N.J.L. __

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;
- (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.

Exhibit E

Supreme Court of New Jersey

NON-NEW JERSEY ATTORNEY DESIGNATION OF CLERK AS AGENT FOR SERVICE OF PROCESS

Re: Multi-Jurisdictional Practice (per RPC 5.5)

A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to subparagraph (b) of RPC 5.5 shall 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.

[Excerpt from RPC 5.5(c)(3)]

[N.J. MJP ATTORNEY ID: _____ (To be designated by Clerk's Office)]

ATTORNEY MUST PROVIDE ALL REQUESTED INFORMATION:

FIRST NAME: _____

MIDDLE NAME: _____

LAST NAME: _____

SUFFIX (if applicable): _____

BAR ADMISSIONS (List State(s) and Date(s) of Admission)

[Attorney must be in Good Standing in all jurisdictions in which he or she has been admitted]

BONA FIDE OFFICE FOR THE PRACTICE OF LAW:

Firm Name _____

Address _____

Municipality _____ State _____ Zip Code _____

Telephone _____

RESIDENCE:

Address _____

Municipality _____ State _____ Zip Code _____

Telephone _____

ATTORNEY'S CERTIFICATIONS & DESIGNATION:

I certify that I meet the criteria for practice in New Jersey in RPC 5.5(b).

I designate the Clerk of the Supreme Court as agent on whom service of process may be made for all actions against me or my firm that may arise out of my participation in legal matters in the State of New Jersey.

I certify that all of the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment, including possible attorney disciplinary action.

DATE: _____

(Signature)

(Print Name)

File the original of this form with:

Clerk of the Supreme Court of New Jersey
Hughes Justice Complex
PO Box 970
Trenton, NJ 08625-0970

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Exhibit F

OFFICE OF ATTORNEY ETHICS



SUPREME COURT OF NEW JERSEY

DAVID E. JOHNSON, JR.
Director

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OFFICE OF DIRECTOR

MEMORANDUM

TO: Hon. Stewart G. Pollock, Chair
Professional Responsibility Rules Committee

FROM: David E. Johnson, Jr.

SUBJECT: Maintaining Attorney Trust Accounts in New Jersey When Bona Fide Office
Can Be Out-of-State

DATE: December 27, 2006

Issue Presented

This memorandum responds to the question of whether *R. 1:21-6(a)* and *(b)* (Exhibit A) and RPC 1.15 (Exhibit B) should be changed to allow New Jersey attorneys to maintain attorney trust accounts outside of this state in light of the change to the bona fide office (hereafter BFO) rule, which now allows New Jersey admitted attorneys to practice in this state while maintaining a BFO in any other United States jurisdiction (*R. 1:21-1(a)*) (Exhibit C).

OAE's Position

The Office of Attorney Ethics (OAE) believes that the in-state requirement for attorney trust accounts is sound and is part of a comprehensive regulatory plan adopted by the Supreme Court of New Jersey to insure that the public is protected to the greatest extent possible. That rule should not be changed for the reasons discussed below.

Discussion

New Jersey has among the highest standards in the country in respect of maintaining the integrity of clients' trust funds in order to protect lawyers' clients. Public confidence is essential to the administration of justice and to the Court as an institution. See *In re Wilson*, 81 N.J. 451 (1979)

and *In re Greenberg*, 155 N.J. 151 (1998). Changing *R. 1:21-6* and RPC 1.15 as proposed would significantly compromise the protections that have carefully been constructed by the Court through case law and rules. On balance, we believe that the current requirement is a reasonable one for all New Jersey attorneys who wish to practice here to bear.

1. Rule 1:21-6 Contains No Exceptions For Maintaining Trust Accounts in This State.

R. 1:21-6(a) has, for decades, required all New Jersey attorneys to maintain attorney trust accounts "in a financial institution in New Jersey...." Moreover, *R. 1:21-6(b)* further states that such financial institutions must first be "approved by the Supreme Court...."

Furthermore, subparagraph (f), titled "Attorneys Practicing With Foreign Attorneys or Firms," states as follows:

All of the requirements of this rule shall be applicable to every attorney rendering legal services in this state regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

2. RPC 1.15(a) Also Requires Trust Accounts To Be Located In New Jersey.

Rule of Professional Conduct 1.15 (a), entitled "Safekeeping Property," also does not permit out-of-state trust accounts. In relevant part, that rule provides that:

"Funds shall be kept in a separate account maintained in a financial institution **in New Jersey**." (Emphasis added.)

3. Standards for Trust Accounting and Fiduciary Responsibility Differ In Various Jurisdictions.

Allowing an attorney to maintain trust accounts that relate to their New Jersey practice in any United States Jurisdiction would subject clients to the standards of different jurisdictions which are not as stringent as New Jersey. New Jersey has the following protections: a very detailed accounting rule (*R. 1:21-6*) for trust accounts that gives disciplinary authorities the ability to better oversee the proper maintenance of trust funds, case law that imposes disbarment for knowing misappropriation of trust funds, pre-authorization of financial institutions by the Supreme Court as "approved" trust account depositories (*R. 1:21-6(b)*) based on, among other things, the institution's agreement to timely report overdrafts of attorney trust accounts, the conduct of random audits (*R. 1:21-6(d)*) to insure proper accountability of clients' funds and compensation by the Lawyers' Fund for Client Protection to clients of New Jersey attorneys for the loss of monies due to dishonest conduct, regardless of where the attorney practices.

4. The Need for Immediate Subpoena Power.

Bank records are among the most important documents utilized by disciplinary authorities in cases of financial violations by attorneys. Permitting trust accounts to be maintained outside of New Jersey would make it impossible for disciplinary counsel to protect the public in emergent cases where there is suspicion of knowing misappropriation of trust funds. We have no subpoena power to secure essential records in other jurisdictions. Thus, we could not react to emergent situations and secure the attorney's temporary suspension from practice where the facts warrant it if the rule change requested was granted. Moreover, we would essentially be at the mercy of the attorney to produce voluntarily all trust records. If he/she did not, we would be almost powerless to secure financial records in another jurisdiction, thus depriving us of the ability in many cases to prove a "knowing" misappropriation. This places the disciplinary system at an untenable disadvantage and undermines client protections.

5. The Need for the Supreme Court's Approval of Financial Institutions.

Under *R. 1:21-6(b)*, in order to hold attorney trust funds in this state, every financial institution must first be approved by the Court. This occurs where the institution signs an agreement to a) report overdrafts of all attorney trust accounts to the OAE within the time and in the form set forth in the rule and b) to cooperate "fully with the OAE" in producing attorney trust account records. The rule also provides that the institution will "co-operate with the IOLTA Program and must offer an IOLTA account to any attorney who wishes to open one." To the detriment of the public and the disciplinary system, these protections would be lost if the use of out-of-state financial institutions is permitted. Such institutions would not agree to this reporting requirement at the request of a few attorneys. Moreover, even if an out-of-state institution agreed to do so, the threat for failure to comply with its undertaking – deauthorization of the institution's approved status in New Jersey – is hardly a deterrent against non-compliance.

For these reasons, the OAE believes that it is essential for all attorneys who practice New Jersey law to maintain attorney trust accounts within this state.

DEJ/bc

c: Holly M. Barbera, Esq., Professional Responsibility Rules Committee
John J. Janasie, Esq., First Assistant Ethics Counsel, OAE
Robert J. Prihoda, Esq., Chief, Random Audit Program
Kenneth J. Bossong, Esq., Director, Lawyers Fund for Client Protection