

## Alternative Dispute Resolution

### Rule Changes Ease ADR Process For Cross-Border Attorneys

By Kirsten Scheurer Branigan and Lori Ann Buza

**O**n Sept. 1, 2010, an often-criticized provision of the New Jersey Rules of Professional Conduct (RPC) was eliminated. The provision, within Section 5.5, pertained to the “lawful” practice of law in connection with alternative dispute resolution (ADR). Unlike the prior language, RPC 5.5 now permits out-of-state attorneys to represent clients in New Jersey during ADR without having to hire local counsel, register with the New Jersey Supreme Court or pay a court fee. This puts into effect an amendment adopted by the New Jersey Supreme Court on July 23, 2010.

The change in the requirements of RPC 5.5 has already begun to have a positive effect on ADR in New Jersey. Co-author to this article, Kirsten S.

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Branigan, serves as an arbitrator with the American Arbitration Association (AAA) and has seen firsthand the positive effects of the rule change. In a recent arbitration that occurred just after the rule change took effect, the out-of-state counsel was able to seamlessly appear on behalf of his client at the arbitration without having to adhere to the requirements embodied in the prior rule.

Practitioner Maureen S. Binetti, chairwoman of the employment law department at Wilentz, Goldman & Spitzer, P.A., and a certified civil trial attorney, has also seen the benefits as an experienced mediator. Binetti commented that “removing barriers and allowing out-of-state attorneys who regularly represent their clients to participate in mediations (particularly where they are prelitigation and there is not yet a need for local counsel) is more productive, efficient and cost-effective and has resulted in a positive attitude by such counsel and their clients to the mediation process in general.”

These are just a few examples of the many positive effects that will continue to result from the rule change. The rule change will undoubtedly continue to alleviate the concern that New Jersey's former RPC requirements deterred cross-border attorneys from selecting

New Jersey as their ADR forum.

By way of recent background, in its 2008-2010 Rules Cycle Report, the New Jersey Supreme Court's Professional Responsibility Rules Committee (PRRC) recommended the changes to the New Jersey Supreme Court (incorporating recommendations from its previous report proposed in 2006-2008). These modifications to the language were supported by the New Jersey State Bar Association, the New Jersey Association of Professional Mediators and the AAA, as well as numerous ADR attorneys in the state. *Alternatives*, “NJ Court Committee Proposes Removing Representation Requirement,” Vol. 28 No. 5, pgs. 113-116 (May 2010).

During the period of review and comment, numerous ADR professionals in New Jersey, as well as nationally, voiced their opinions on the subject. General counsel of the AAA, Eric Tuchmann, stated: “[W]e're very supportive of the changes being suggested here. 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 states.” *Alternatives* at pg. 114.

As noted in the PRRC's proposal, the new revisions to RPC 5.5 are consistent with the American Bar Association's Rules of Professional Conduct, Section 5.5(c)(3), by focusing on the relationship between the representation and the lawyer's practice, not the location of the client or the dispute. See 2008-2010 “Rules Cycle Report of the New Jersey Supreme Court Professional Responsibility Rules

Committee,” December 16, 2009, at pgs. 4-5.

The language in the old version of New Jersey’s RPC 5.5(b)(3)(ii) provided 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 . . . may engage in the lawful practice of law in New Jersey only if: “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.

As part of the new RPC 5.5(b)(3)(ii), the rule now reads that a lawyer may engage in the lawful practice of law in New Jersey only if:

the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolu-

tion program and the services 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.

The broader language in the new rule, which now encompasses services arising out of or those that are “reasonably related,” will provide a more flexible and appropriate framework to assess ADR representation.

Under amended RPC 5.5(c)(3), the requirement that a lawyer admitted to practice in another jurisdiction who appears in New Jersey obtain consent in writing by the Supreme Court, also no longer applies to a lawyer who is engaged in the ADR in the manner detailed in RPC 5.5(b)(3)(ii). And, finally, another significant change to RPC 5.5(c)(6) removes the cross-border attorney’s obligation to register with the New Jersey Lawyers’ Fund for Client Protection and pay the registration fee.

The 2010 amendments arose out of the difficulties associated with Opinion 43 of the Committee on the Unauthorized Practice of Law (UPL Committee). See Opinion 43 (Supplement to Opinion 28), 16 N.J.L. 191 (January 29, 2007). In Opinion 43, in modifying a prior UPL Opinion 28, the Committee determined

that, though out-of state attorneys were permitted to practice in ADR settings in New Jersey, they had to comply with all the requirements of RPC 5.5 (adopted in 2004); and should the attorney fail to comply, he or she would be engaged in the unauthorized practice of law. In Opinion 43, the UPL Committee recommended that the AAA and other alternative dispute resolution forums require that all out-of-state attorneys seeking to practice in New Jersey be required to submit proof of compliance with RPC 5.5, including proof of registration with the Clerk of the Supreme Court and payment of the registration fees. The scrutiny that followed Opinion 43 ultimately led to the corrective action of the PRRC in its recommendation to the Court and the subsequent revisions to RPC 5.5.

The current amendments will benefit New Jersey entities and individuals seeking to engage in the ADR process. A New Jersey client that has a New Jersey dispute can engage a cross-border attorney in the ADR process resulting in more cost effective solutions, especially where an out-of-state attorney has a history with the client’s affairs. The amended rule will also be a positive step in incentivizing parties to select New Jersey as an ADR forum. Finally, the revised RPC 5.5 appears to align New Jersey in closer uniformity with neighboring states and the Model Rules of the American Bar Association. ■