



Arbitration and The Unauthorized Practice of Law

Originally published in *ARIAS Quarterly U.S.* (First Quarter 2006), Volume 13, Number 1, pp 16-19. For the complete issue, visit the ARIAS Web site at <http://www.arias-us.org/>.

Written by:

David M. Spector
t 312.258.5552
dspector@schiffhardin.com

Jessica Romero
t 312.258.5537
jromero@schiffhardin.com

SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606-6473
t 312.258.5500
f 312.258.5600

www.schiffhardin.com

Introduction

All United States jurisdictions prohibit the unauthorized practice of law. The prohibition extends not only to non-lawyers, but also to lawyers licensed in foreign jurisdictions. Generally, only lawyers admitted to a state's bar may practice law in that state. The term "unauthorized practice of law" is, however, an inherently elastic concept that has been defined in various ways by state legislatures and the courts.¹ This definitional diversity presents challenges for the multijurisdictional arbitration practitioner, who is likely to encounter difficulties in ascertaining whether or not she is engaging in the "unauthorized practice of law" in any given jurisdiction and, if so, whether there are temporary admission procedures available by which an out-of-state lawyer can represent a party to an arbitration.

A lawyer must proceed with caution when representing a client in an arbitration outside of a state in which she is licensed. If it is determined that the lawyer has engaged in the unauthorized practice of law, she may be subject to sanctions, including the denial of fees,² disciplinary charges in her home state,³ contempt of court,⁴ and even criminal charges in some jurisdictions.⁵ Injunctive relief may also be available to prevent the unauthorized practice of law, as was the case in *Florida Bar v. Rapoport*, 845 So.2d 874 (Fla. 2003). In *Rapoport*, the Florida Supreme Court upheld an injunction prohibiting a lawyer licensed in the District of Columbia from representing parties in securities arbitrations in Florida.

ABA Model Rule and Variations

Many states have adopted rules, or are in the process of adopting rules, that permit out-of-state lawyers to conduct an arbitration when the proceedings arise out of the lawyer's home-state practice. But even when such a practice is permitted, many states impose additional requirements on out-of-state lawyers, such as filing for admission *pro hac vice*, or filing a statement or certificate with some state organization. A lawyer may also choose to associate with local counsel and, if so, it is required that the local lawyer actively participate in the representation. See Model Rule 5.5(c)(1).

ABA Model Rule 5.5 affirms that an out-of-state lawyer's representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of law when this representation arises out of, or is reasonably related to, the lawyer's home practice.⁶ The ABA Commission on Multijurisdictional Practice determined such a rule was necessary, as lawyers commonly engage in cross-border

practice and parties may specifically choose to conduct arbitrations in a specific state because it has no relation to the parties or the dispute.⁷

Under Model Rule 5.5(c), an out-of-state lawyer may practice in a foreign jurisdiction if the services rendered are related to an arbitration or other alternative dispute resolution mechanism, so long as those proceedings arise out of or are reasonably related to the lawyer's home state practice and the forum does not require *pro hac vice* admission. Comment 14 to Model Rule 5.5 elaborates on the nexus required to the lawyer's home state practice.⁸ Among the states that have adopted an identical version of Model Rule 5.5 are Arkansas, Delaware, Indiana, Iowa, Maryland, Nebraska, Oregon, and Utah.

A lawyer will still need to seek *pro hac vice* admission to participate in an arbitration proceeding, under Model Rule 5.5(c)(3), if the proceeding is court-annexed or sponsored or, otherwise, "if local court rules or state law so require." See Comment 12 Model Rule 5.5(c). Lawyers must, therefore, review local rules and state law to determine whether a particular jurisdiction requires *pro hac vice* admission specifically for arbitration proceedings. In Utah, for example, Supreme Court Rule 1.0 and the adopted Rule of Professional Conduct 5.5 require lawyers file a *pro hac vice* application in order to represent a client in an arbitration within the state. Anyone "serving in a neutral capacity as a[n] . . . arbitrator" is exempt from this requirement. Utah Sup. Ct. Rule 1.0(c)(9).⁹ The *pro hac vice* process has also been modified for those out of state lawyers appearing in arbitration proceedings so that neither a Utah licensed sponsoring counsel, a motion, nor order are required. Other requirements under the *pro hac vice* rule, including, but not limited to, the standard fee and a current certificate of good standing remain.

In contrast, some states will not require a lawyer to file a *pro hac vice* admission for purposes of an arbitration. For example, § 2-16 of Connecticut's Practice Book only gives judges the power to permit an out-of-state lawyer to pursue "a claim or appeal in any court of this state . . ." *In re the Application to Admit Attorney James W. Glatthaar Pro Hac Vice*, CV 05-4014630 (Superior Court October 18, 2005). A lower court in Connecticut denied *pro hac vice* admission to an out-of-state lawyer seeking to represent a client in an arbitration within the state on jurisdictional grounds. *Id.* Because an arbitration was not a court proceeding under § 2-16, the court found it had no power to rule on the motion. *Id.* Therefore, a lawyer proceeding under Model Rule 5.5(c), if adopted in Connecticut, may be able to avoid

applying for *pro hac vice* altogether and proceed with the arbitration.

Other jurisdictions have adopted modified versions of the Model Rules. In Florida, for example, new Rule 1-3.11 provides that an out-of-state lawyer may appear in an arbitration proceeding under the following circumstances: (1) (a) the appearance is for a client who resides in the lawyer's home state; or (b) the appearance arises out of or is reasonably related to the lawyer's home state practice, and (2) the appearance does not require *pro hac vice* admission.¹⁰ However, non-Florida lawyers who seek to represent clients in a Florida arbitration must first file a verified statement in the arbitration, accompanied by a \$250 filing fee made payable to the Florida Bar. R. Reg. Fl. Bar 1-3.11(e); (e)(6) (2006). Also, unlike the ABA Model Rules governing the temporary practice of law in a jurisdiction, Florida places a numerical limit on the number of appearances the lawyer can make in arbitrations conducted in that jurisdiction. Florida's new rules do not permit out-of-state lawyers to engage in a "general practice" of arbitration in Florida. *Id.* at 1-3.11(b)(6); (d). The term "general practice" is defined for this purpose as "fil[ing] more than three demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period." *Id.* Courts and arbitrators do not appear to have discretion to allow additional appearances in cases of hardship or for good cause.

New Jersey has also adopted a rule similar to Model Rule 5.5, allowing an out-of-state lawyer to practice in New Jersey if the services rendered are related to an arbitration or other alternative dispute resolution mechanism, so long as those proceedings arise out of the lawyer's home state practice. The lawyer must also maintain a *bona fide* office in New Jersey or any other state in accordance with state rule R:21-1(a).

In California, a lawyer admitted to the bar of any other state may represent a party to an arbitration within the state, provided that the lawyer files a timely certificate and the appearance is approved by the arbitrator. Cal. Code Civ. Pro. § 1282.4; Cal. Ct. Rule 983.4. The California provision, scheduled to sunset on January 1, 2007, is broader than Model Rule 5.5(c) because it does not require the arbitration arise out of the lawyer's home state practice. The legislature enacted this provision to overrule the controversial decision in *Birbrower*, 949 P.2d at 13. This case involved a fee dispute where an out-of-state law firm, in defending against a claim that it had committed legal malpractice in California, filed suit to recover lawyers fees. *Id.* at 3. The court found that the *Birbrower* lawyers

engaged in the unauthorized practice of law by filing a demand for arbitration in California, as they were not licensed in California, and were not entitled to recover fees. *Id.* at 14.

In light of Model Rule 5.5(c)(3) and its variations, most lawyers may never have to resort to hiring local counsel for purposes of conducting a foreign arbitration. Instead, they must simply comply with local *pro hac vice* requirements, if any, and have their services arise out of or be reasonably related to their home state practice. Local *pro hac vice* requirements must be reviewed carefully, however, for they may require that out-of-state lawyers initially rely on local counsel to obtain *pro hac vice* admission. For example, in Maryland Comment 12 to Maryland Rule of Professional Conduct 5.5 refers to Rule 14 of the Rules Governing Admission to the Bar of Maryland regarding admission to appear in arbitrations. Rule 14(a), in turn, requires a motion for special admission to be filed in court by Maryland counsel, on behalf of out-of-state counsel, in an arbitration proceeding. Rule 14(c) provides that out-of-state counsel can only act as co-counsel in the arbitration and participate only when accompanied by Maryland counsel, unless Maryland counsel's presence is waived by the arbitrator.

Non-Model Rule Jurisdictions

Although cited by some commentators as jurisdictions hostile to arbitrations by out-of-state lawyers, the law in Connecticut and Nevada does not live up to this characterization. All that sustains such a characterization of the law in Connecticut is *In re the Application to Admit Attorney James W. Glatthaar Pro Hac Vice*. This lower court opinion, however, is limited to denying *pro hac vice* admission for purposes of arbitration on jurisdictional grounds. In Nevada, new Supreme Court Rule 42 requires an out-of-state lawyer to associate as counsel with a Nevada lawyer for arbitration proceedings that "are court-annexed or court ordered, or that are mandated by statute or administrative rule." Nev. Sup. Ct. Rule 42.1(a)(3). Under Rule 42, an out-of-state lawyer must file a written application to appear as counsel in these types of proceedings and may do so only upon approval by the "court, arbitrator, mediator or . . . hearing officer." Nev. Sup. Ct. Rule 42.3. The Rule, however, explicitly excludes arbitrations "in which the parties engage voluntarily or by private agreement." Nev. Sup. Ct. Rule 42.1(b).

Lawyers may also attempt to invoke the Federal Arbitration Act ("FAA") when seeking to arbitrate outside their home state. The FAA establishes liberal policies favoring enforcement of arbitration agreements "notwithstanding

any state substantive or procedural policies to the contrary.” *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Citing this policy, commentators have suggested “that “[i]f a state treats arbitration differently, and imposes on . . . arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted” by the FAA.’ Samuel Estreicher and Steven C. Bennett, *Is Arbitration the Unauthorized Practice of Law?* 1/6/2005 N.Y.L.J. 3 (January 6, 2005) (citing *Obliv, Inc. v. Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004)). The commentators argue that the practice of out-of-state lawyers representing clients in arbitrations is “so common that it might be deemed an implied term of every arbitration contract, to be enforced broadly by virtue of the FAA.” *Id.* Prevailing domestic and international arbitration practices, that allow parties to select their own attorneys and do not impose residency requirements, may strengthen this position. Therefore, the application of state statutes or court rules that preclude the complete enforcement of the arbitration agreement may be preempted by the FAA.¹¹

The Effect of a Finding of an Unauthorized Practice of Law on an Arbitral Award

Although the case law is limited, so far courts have held that the validity of arbitral awards is not undermined when a lawyer participating in an arbitration is found to have engaged in the “unauthorized practice of law.” The lawyer’s licensure status, therefore, does not bear on whether an award should be vacated.

An Illinois intermediate appellate court has held that representation of an out-of-state client by an out-of-state lawyer during arbitration has no effect on the validity of the arbitration award. *Colmar, LTD., v. Fremantlemedia North America Inc.*, 801 N.E.2d 1017 (Ill. App. Ct. 2003). The Colmar court cited “modern trend in the jurisprudence of multijurisdictional practice, and the public policy reasons promoting both the rule prohibiting unauthorized practice and the general voidance rule, we find that the harsh general rule should not be applied in the instant case.” *Id.* at 1022-23. The court also cited Model Rule 5.5 and the American Arbitration Association rules, which do not require that the party’s representative be a lawyer. *Id.*

At least one other court has rejected the invalidity argument. In an unpublished opinion, the California Court of Appeals upheld the validity of an arbitration award even when finding *Birbrower* applicable. *Gerowitz v. Noll*, No. G030308, 2003 WL 1711279 (Cal. App. March 8, 2003). The court held that an arbitrator’s decision is not generally

reviewable for the validity of an arbitrator’s reasoning, the sufficiency of evidence supporting the award, or any errors of fact or law. In declining to overturn the award, the court relied on the California Code of Civil Procedure §1286.2, which enumerates statutory grounds for vacating an arbitration award.

Conclusion

The central question for practitioners is what should a prudent lawyer do when called upon to participate in an arbitration in a jurisdiction where he or she is not licensed and that does not have clear local rules on the subject. It is respectfully submitted that a model not to follow is the one in *In re the Application to Admit Attorney James W. Glatthaar, Pro Hac Vice*, where a lawyer faced with that dilemma proceeded, in essence, to seek an advisory opinion. While the Connecticut court properly refused to issue such an opinion, its procedurally based ruling has unfortunately (and unnecessarily) resulted in a chilling effect on multijurisdictional arbitration practices. In those instances in which a lawyer believes that judicial clarification is required, the lawyer should at least seek to bring the proceeding in a procedural context where a court has jurisdiction, such as a motion to compel arbitration under the FAA or a constitutional challenge of the regulatory scheme at issue.

It is suggested, however, that a prudent lawyer will rarely, if ever, find judicial clarification to be either necessary or desirable. After all, notwithstanding aberrant decisions such as *Rapoport* and *Birbrower*, state disciplinary activity with respect to multijurisdictional arbitral practice has been virtually nonexistent even though such practice has been common for decades. A prudent lawyer should derive considerable comfort from this long standing and nearly universal custom and practice, a custom and practice now implicitly acknowledged and explicitly legitimized by Model Rule 5.5 and by local state variations of Model Rule 5.5. Moreover, even if jurisdictions that have not adopted Model Rule 5.5 or variations of it unexpectedly undertook actions to curtail or prohibit *ad hoc* rather than regular multijurisdictional arbitral practice within such jurisdictions, such actions may well face effective constitutional challenges. See Perlman, 18 GEO J. LEGAL ETHICS at 178.

Other practical considerations also weigh heavily towards a default conclusion that *ad hoc* multijurisdictional arbitral practice is permitted. Notwithstanding the decision in *Birbrower*, court proceedings with respect to fee disputes are uncommon (and in the reinsurance arena almost

unknown), but if one were brought, the lawyer's home state would probably have jurisdiction and be unlikely to refuse enforcement of a fee obligation simply because of a regulatory issue in another state. Moreover, the case law so far does not implicate the enforceability of an arbitral award. In general, the remedies provided for a finding of unauthorized practice of law are personal to the offending lawyer and do not directly affect clients, including those clients who may have been fully aware of the lawyer's failure to gain admission in the state in which services were provided. See *Charles W. Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 665, 692-93 (1995).

About the Authors

David M. Spector is a co-leader of Schiff Hardin's Insurance Group. For more than twenty-five years, he has ranked among the preeminent American practitioners in the insurance field. His expertise encompasses a variety of complex matters, including reinsurance litigation and arbitration, insurance company insolvencies, business counseling, and coverage litigation.

Jessica Romero has assisted with a range of commercial litigation, corporate, and regulatory projects as well as licensing and counseling engagements. Ms. Romero has obtained experience through the multiple stages of the negotiation and litigation processes, including research, pleadings, discovery and appellate work, in the franchise, reinsurance, insurance, environmental, and securities areas.

About Schiff Hardin LLP

Schiff Hardin LLP was founded in 1864, and we are Chicago's oldest large law firm. In the past 141 years we have grown to more than 350 attorneys, with additional offices in New York, New York; Washington, D.C.; Lake Forest, Illinois; Atlanta, Georgia; and Dublin, Ireland. As a general practice firm with local, regional, national, and international clients, Schiff Hardin has significant experience in most areas of the law. For more information visit our Web site at www.schiffhardin.com.

This article has been prepared for general information. It is not meant to provide legal advice with respect to any specific matter. The reader should consult a lawyer regarding specific legal advice.

Available on the Schiff Hardin Web site at <http://www.schiffhardin.com/media/news/media.539.pdf>

References

¹ See, e.g., *El Gemayel v. Seaman*, 533 N.E.2d 245 (N.Y. 1988) (when a foreign lawyer's work within a state is merely "incidental and innocuous," there is no unauthorized practice of law); *Cowen v. Calabrese*, 41 Cal. Rptr. 441 (Cal. App. 1964) (out-of-state lawyer did not engage in the unauthorized practice of law when giving legal advice with respect to a single case).

² See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (denying fees when attorney engaged in unauthorized practice of law).

³ Lawyers practicing outside their licensing jurisdiction remain subject to the licensing jurisdiction's governing authority. Therefore, lawyers may face charges in their home states, as well as the jurisdiction in which they conducted the arbitration. See, e.g., *In re Carter*, 426 S.E.2d 897, 898-99 (Ga. 1993) (attorney disciplined for representing divorce client in Alabama proceeding without being admitted to practice there).

⁴ See, e.g., *United States v. Kozel*, 908 F.2d 205, 208 (7th Cir. 1990) (affirming sanctions and finding of contempt for violation of local rule prohibiting unauthorized practice); *State ex rel. Fla. Bar. v. Sperry*, 140 So.2d 587, 589 (Fla. 1962) (unauthorized practice of law constitutes contempt of court), *rev'd on other grounds*, 373 U.S. 379 (1963).

⁵ See, e.g., Ga. Code Ann. § 15-19-56(a) (2005); Va. Code Ann. § 54.1-3904 (2005).

⁶ Model Rule 5.5(c) states: A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that . . . (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if 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 the forum requires *pro hac vice* admission

⁷ See Report 201B, ABA Comm. On Multijurisdictional Practice (2002), available online at <<http://www.abanet.org/cpr/mjphome.html>>

⁸ Comment 14 to Model Rule 5.5 provides: [Model Rule 5.5(c)(3)] require[s] that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

⁹ The language of Utah Supreme Court Rule 1.0(c)(9) does not seem to address party-appointed arbitrators.

¹⁰ These enactments were in response to *Rapoport*, 845 So.2d at 874. The *Rapoport* court found that giving legal advice and performing the traditional tasks of lawyers in arbitration proceedings consisted of the unauthorized practice of law.

¹¹ Other constitutional provisions which may lend themselves to challenging these restrictions include the Privileges and Immunities Clause in Article IV and the Fourteenth Amendment, and the dormant Commerce Clause. See Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-state Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 178 (2004) ("State rules that make it unnecessarily difficult for lawyers to practice in other jurisdictions are exactly the kind of seemingly minor protectionism that, in the interests of economic and national unity, the Constitution has deemed impermissible.").