State Regulation of Unauthorized Practice of Law in Arbitration

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Available at: https://works.bepress.com/barry_temkin/23/
May a lawyer appear before an arbitration panel which is empanelled in a jurisdiction in which the lawyer is not licensed? Lawyers who engage in national practices, including arbitration and mediation, must be aware of the laws of the individual states in which they appear. These state laws proscribe the unauthorized practice of law (UPL) by lawyers who lack licenses in the forum state. While the rules of some arbitration forums, such as the Financial Industry Regulatory Authority (FINRA), permit nationwide representation in arbitrations by lawyers licensed in any jurisdiction, or even non-lawyers, counsel are still subject to local prohibitions on unauthorized practice of law.1 This article considers the tension between the growing trend towards interstate practice of law, particularly in arbitrations before national forums such as FINRA or the American Arbitration Association, and traditional state regulation of the practice of law.

Introduction

As will be seen, there is no nationwide consensus on a definition of unauthorized practice of law, or whether appearance in an alternative dispute resolution (ADR) forum is the practice of law in the forum’s home juris-

1 FINRA is the organization formed as a result of the merger of the National Association of Securities Dealers Inc. (NASDAQ) and NYSE Regulation Inc.
diction. In recent years, the trend has been for law firms and corporate legal departments to grow their multi-jurisdictional practices, particularly in the ADR field. Some jurisdictions, notably California and Florida, had historically issued decisions challenging appearances in ADR proceedings by out of state practitioners, some of whom had simply assumed that it was unnecessary to request permission to appear in a mediation or arbitration or to employ local counsel. The practicing bar questioned these state court decisions, arguing that the realities of modern legal practice require more flexibility in multi-jurisdictional appearances. Subsequent amendments to the American Bar Association Model Rules of Professional Conduct (and some state ethics codes) have paved the way for interstate practice on a temporary basis in a variety of situations. A revised version of American Bar Association Model Rule of Professional Conduct 5.5, adopted in 2002, recognizes several instances in which lawyers may ethically appear in jurisdictions in which they are not licensed in accordance with ADR matters. Furthermore, the ABA’s Section of Dispute Resolution resolved in 2002 that mediation is not the practice of law and should be exempt from state regulation of unauthorized practice of law.\(^2\)

Recently, the Association of Corporate Counsel has argued, in a related context, that “the idea that your client’s representation needs must be limited, to retention or employment of lawyers who hold a plenary license in each of the relevant jurisdictions in which the client has a business, is an anachronism that demands reform.”\(^3\) The pressure for reform has been building, and is likely to continue.

While the rules of some arbitration forums permit nationwide representation in arbitrations by lawyers licensed in any jurisdiction, counsel are still subject to local prohibitions on unauthorized practice of law.

The stage was set for New York, which implemented new ethics rules in 2009, to adopt a modified version of the amended ABA rule. Empire State ethicists and bar representatives complained for years that New York had clung for decades to the format of the ABA Code of Professional Responsibility, long after other jurisdictions had followed some form or other of the ABA Model Rules of Professional Conduct. New York, while finally adopting the format of the ABA Model Rules, has declined to adopt their substance in regard to ADR appearances by out of state lawyers. Although New York had traditionally permitted out of state lawyers to appear in New York ADR proceedings without admission pro hac vice, it declined to adopt the ABA revisions to Model Rule 5.5. Thus the status of the issue, particularly in New York, is unresolved at this time. However, the overall trend favors expansion of multi-jurisdictional practice. Accordingly, the New York rule is due for a re-examination.

Unauthorized Practice of Law

There is little national consensus on a definition of what constitutes the practice of law. Unauthorized practice of law is defined by substantive state law, not by ethics rules.\(^4\) In fact, only a small minority of states have ventured a statutory definition of the practice of law.\(^5\) According to the official commentary to the ABA Model Rules of Professional Conduct, “The definition of the practice of law is established by law and varies from one jurisdiction to another.”\(^6\)

The outer limits of what constitutes the practice of law are plumbed by cyber-practitioners who operate “virtual law offices” without brick and mortar offices.\(^7\) Professor Catherine Lanctot describes the history of UPL regulation in her article, Scriveners in Cyberspace, OnLine Document Preparation and the Unauthorized Practice of Law.\(^8\) As Professor Lanctot explains, courts have tended to define practice of law on a case by case basis.\(^9\) For example, a Mexican lawyer who advised New York residents about Mexican law was found to have engaged in unauthorized practice of law in New York County Lawyers’ Association v. Ruel.\(^10\) In Spivak v. Sachs, a California lawyer unlawfully participated in a New York divorce proceeding by traveling to New York and giving a New York client advice about New York law.\(^11\) A New York court has recently held that an Israeli lawyer rendering legal services regarding “an international law transaction” was not engaged in the unauthorized practice of law in New York.\(^12\) In that case, most of the work performed by the lawyer took place in his Israeli offices; the contact with New York consisted of phone calls to New York to discuss the progress of a legal proceeding in Lebanon and one visit to New York after the successful completion of his legal services.

\(^2\) The American Bar Association Section of Dispute Resolution on Mediation and the Unauthorized Practice of Law ( adopted by the section on February 2, 2002)

\(^3\) http://www.acc.com/advocacy/keyissues/mp.cfm

\(^4\) The American Bar Association Task Force on the Model Definition of the Practice of Law declined, in 2002, to adopt a uniform definition of the practice of law, resolving instead that each individual state should formulate its own definition. Stephen Gillers, Roy Simon and Andrew Perlman, Regulation of Lawyers (Aspen 2010) at 374.

\(^5\) See http://www.abanet.org/cpr/model-def/home.html for the various states’ definitions of unauthorized practice of law.

\(^6\) ABA Model Rules of Professional Conduct, Rule 5.5 cmt.

\(^7\) See the webpage of “Virtual Law Partners” at http://www.virtuallawpartners.com/index.asp and discussion in Lanctot, supra, Scriveners in Cyberspace, 30 Hofstra L. Rev. 811.

\(^8\) 30 Hofstra L. Rev. 811 (2002).


\(^10\) 3 N.Y.2d 224 (1957).

\(^11\) 16 N.Y.2d 163 (1965).

\(^12\) Gover v Savyon, 2009 NY Slip Op 52746U; 26 Misc. 3d 1224A; 2009 N.Y. Misc. LEXIS 3625 (November 17, 2009).
The court found that this did not constitute the unauthorized practice of law in New York. 13

In one extraordinary case, a Georgia lawyer was criminally indicted for unauthorized practice of law by a North Carolina grand jury after the lawyer undertook an investigation into grade-fixing on behalf of a North Carolina University. 14

There are limits to state regulation of the practice of law. The United States Supreme Court has held on preemption grounds that states may not regulate the practice of law before federal agencies or courts. 15

FINRA rules permit a party to be represented by a non-lawyer, or by a lawyer admitted in any state. 16 FINRA is not a federal agency. Rather, it is a self-regulatory organization (SRO). Consequently, courts have refused to apply the preemption concept in FINRA or NASD arbitrations. 17 Indeed, compliance with FINRA rules is not a free pass with state regulators. Several states have held that an out of state lawyer who appears at an arbitration in the forum state is engaged in the unauthorized practice of law. 18

As mentioned, the ABA Section of Dispute Resolution has opined that mediation is not the practice of law. As we will see, some state bars have taken the view that their UPL rules are not intended to cover the provision of mediation or alternative dispute resolution services, while others have taken the opposite view. 19

16 See FINRA Rules 12208, 13208.
17 See, e.g., Florida Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003).
18 See, for example, the Unauthorized Practice of Law Rule 49(g)(12) of the District of Columbia Court of Appeals, which contains an express exception in respect of ADR services covering ‘the provision of legal services in or reasonably related to a pending or potential arbitration, mediation, or other dispute resolution proceeding’ provided that certain conditions are met, is not intended to cover the provision of mediation or alternative dispute resolution services. In contrast, the New Jersey Supreme Court Advisory Commission on Professional Ethics issued an Ethics Opinion No. 676 (April 4, 1994), which concluded that where a lawyer acts as a Third Party Neutral

Restrictions on Interstate Practice of Law

Some states have extensively regulated appearances by out of state practitioners in ADR forums. An instructive lesson in the general trend, in fits and starts, towards multijurisdictional practice is provided by the California experience. California stunned the ADR legal community by its 1998 decision in Birbrower, Montalbano, Condon & Frank v. Superior Court. 22 Birbrower was a New York law firm which advised a California client about a dispute with another California company under a contract which designated California law. The New York lawyers traveled to California, where they met with their clients, vetted mediators and negotiated an out of court settlement. The lawyers changed their fee arrangement during the representation from a contingency fee to a fixed fee of $1 million. After the case was settled, the client sued Birbrower for legal malpractice, whereupon the firm counterclaimed for its legal fees. 23

A California Statute, Business and Professions Code § 6125, proscribed the unauthorized practice of law: “No person shall practice law in California unless the person is an active member of the State Bar.” 24 The California court interpreted this provision as preventing a non-licensed attorney from giving legal advice about California law to a California client, regardless of physical presence in California. A lawyer’s visit to the state is one factor in considering whether a lawyer is practicing law in California. However, according to the California court, there are many factors in determining whether an out of state lawyer is practicing there:

One may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law in California whenever that person practices California law anywhere, or ‘virtually’ enters the state by telephone, fax, e-mail, or satellite. 25

Thus, each case is fact-based. On the facts before it, the California court decided that Birbrower’s contacts constituted the unauthorized practice of law, because the lawyers made numerous physical visits to California, in which they actually advised California clients about a California dispute governed by California law. The lawyers further negotiated a settlement with adverse counsel while present in California. Since the Birbrower lawyers were “acting as a lawyer”. That said, in New Jersey, an out-of state attorney representing a party in an arbitration proceeding does not constitute the unauthorized practice of law (N.J. Comm. Unauth. Prac. Op. 28, 1994 WL 719208 (1994): “representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law”). 26

22 949 P.2d 1 (Cal. 1998).
23 In most jurisdictions, a civil settlement is no bar to the client’s subsequent action for legal malpractice.
24 949 P.2d at 2.
25 Id. at 5-6.
brower lawyers were not admitted in California, their entire fee was forfeited.  

The legal profession clamored for clarification in the wake of *Birbrower’s* totality-of-the-circumstances approach to unauthorized practice of law in California. California subsequently amended its law to permit an out of state attorney to appear in an arbitration proceeding, provided that the attorney obtained the permission of the arbitral forum and file a certificate with the California State Bar. The California statute now provides that: “(b) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California,” files a certificate containing prescribed information and pays a fee. This provision is designed to sunset in 2011.

Other jurisdictions have held that appearance in an arbitration is the practice of law. In *Disciplinary Counsel v. Alexicole, Inc.* an Ohio Court enjoined a corporation owned by a layman from representing clients in arbitrations venued in Ohio. In that case, a non-lawyer was found to be engaging in the unauthorized practice of law when he “regularly prepares statements of claim, conducts discovery, participates in prehearing conferences, negotiates . . . settlements, and participates in mediation and arbitration hearings, all on behalf of Alexicole clients.”

In *Gould v. Harkness*, a lawyer admitted in New York but based in Florida advertised in Florida for Florida clients. Gould’s office was in Florida. His advertisements were not constitutionally protected by law firm’s conduct in changing its legal fee in the middle of the case is unlikely to have escaped notice. The California ethics code, however, merely proscribes the unauthorized practice of law. See http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?slmgBarPath=CurrentRules+disc+categoryPath=Home+Attorney%20%20Resources+Rule+4-5.5+Professional+Practice+of+Law+With+Out+Of+State+Lawyers+No+Purple+Letter+Bar+Or+In+ matters reasonably related to the lawyer’s licensed practice, upon registration with the Florida bar and payment of a fee.

**Jurisdictions Permitting ADR Appearance by Out Of State Lawyers**

On the other hand, other jurisdictions have held that appearances by out of state practitioners in arbitrations do not constitute the practice of law. Illinois has held that the act of representing another person in an arbitration is not the practice of law such that admission in the forum state is required. An ethics committee in New Jersey has opined that an out of state attorney may participate in an arbitration in that state without engaging in unauthorized practice of law. And New York authorities have permitted out of state attorneys to participate in arbitrations in New York without admission pro hac vice. See, e.g., Committee Report, Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York. A leading pronouncement in New York is *Williamson v. John D. Quinn Constr. Corp.*, which presents the obverse of the California holding in *Birbrower*: it permitted an out of state lawyer to recover attorneys’ fees incurred in representing a New York client in an ADR proceeding venued in New York. In that case, a New Jersey attorney participated in a construction arbitration venued in New York. When the client balked at the New Jersey attorney’s fees, the lawyer sued. A federal district judge ordered the client to pay up, notwithstanding the plaintiff’s out of state license. The judge reasoned that “Plaintiff’s services were rendered solely in the arbitration proceeding. An arbitration tribunal is not a court of record: its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys.” Thus, the informality of an arbitration proceeding exempted it from UPL rules.

In *Prudential Equity Group, LLC v. Ajamie*, the U.S. District Court for the Southern District of New York, applying New York law, held that a Texas lawyer may lawfully collect an agreed-upon fee from an arbitration conducted in New York. Although the court recognized that arbitration practice had developed and become more complex since the decision in *Williamson*, it nevertheless followed *Williamson* and rejected the *Birbrower* approach. In his decision in *Ajamie*, Judge Jed Rakoff stated:

Although, in the quarter century since [Williamson], arbitration proceedings have become more protracted and com-

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26 While not an express basis for the court’s decision, the law firm’s conduct in changing its legal fee in the middle of the case is unlikely to have escaped notice.
27 Id.
29 California’s ethics code, however, merely proscribes the unauthorized practice of law. See http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?slmgBarPath=CurrentRules+disc+categoryPath=Home+Attorney%20%20Resources+Rule+4-5.5+Professional+Practice+of+Law+With+Out+Of+State+Lawyers+No+Purple+Letter+Bar+Or+In+mat- ences.32 Gould’s office was in Florida. His advertise-

34 Id. at 616.
plex, not to mention costly, they still retain in most settings their essential character of private contractual arrangements for the relatively informal resolution of disputes. It would be incongruous to apply a state’s unauthorized practice rules in such an informal setting. Whatever beneficial purposes New York’s prohibition against the unauthorized practice of law may serve in protecting clients and regulating lawyer’s conduct, it is not designed as a trap for the unwary or as a basis on which New York lawyers can extend a monopoly over every private contractual dispute-resolving mechanism.\(^{40}\)

Moreover, since the defendant client had personally chosen to retain the Texas lawyer, the former’s argument “wins the Oscar for chutzpah.”\(^ {41}\) Thus, New York courts have a well-established record of eschewing UPL claims in arbitration and mediation.\(^ {42}\)

In sum, some states permit out of state lawyers to participate in arbitrations, while others require affiliation with local counsel or registration with local authorities, or both. As discussed below, the American Bar Association, in its 2002 amendment to the Model Rules of Professional Conduct, attempted to promote some level of uniformity in multijurisdictional practice.

The ABA Model Rules

The ABA Model Rules of Professional Conduct are adopted at least in part in every state except California. ABA Model Rule 5.5(a) forbids lawyers from practicing in jurisdictions in which they are not licensed: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”\(^ {43}\) A lawyer licensed in another jurisdiction runs afoul of Model Rule 5.5 “if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law.”\(^ {44}\) This “presence” may be found with or without physical appearance in the state.\(^ {45}\)

In 2002, four years after the Birbrower decision in California, the ABA revised Model Rule 5.5, in order to facilitate interstate practice in certain categories.\(^ {46}\) In essence, ABA Model Rule 5.5 permits lawyers to make limited temporary appearances in forum states in which they are unlicensed under the following circumstances: 1. In association with local counsel who actively participates in the matter; 2. Where the out of state lawyer plans to be or is admitted pro hac vice in the forum; 3. Where the services are related to an arbitration or other alternative dispute resolution proceeding, “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”\(^ {47}\) and do not require pro hac vice admission; or 4. Where the services “arise out of or are reasonably related to the lawyer’s practice” in a jurisdiction in which the lawyer is admitted. The text of ABA Model Rule 5.5(c) provides as follows:

A lawyer admitted in another United States jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction that:

1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
2. are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
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; or
4. are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.\(^ {48}\)

By definition, the ABA Model Rules are merely templates for the guidance of individual states, which may or may not choose to adopt any individual Model Rule in whole or in part. Forty three U.S. states (including Florida) have adopted rules similar or identical to ABA Model Rule 5.5(c).\(^ {49}\)

Some of the exceptions in Model Rule 5.5(c) are clearer than others. The first two categories of exceptions seem to contemplate practicing with the active assistance of local counsel, or seeking admission in the forum pro hac vice. The third exception refers to ADR proceedings, but does not give lawyers carte blanche to appear in arbitrations and mediations in any jurisdiction. Rather, this exception requires a nexus between the ADR proceeding and “the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”\(^ {50}\) It is not entirely clear what is meant by this requirement. The comments to the ABA Model Rules suggest that this is a totality of the circumstances analysis, which could consider the residence or business activities of the client, or the relationship to the forum when “[t]he matter, although involving other jurisdictions, may have a significant connection with that jurisdiction.”\(^ {51}\) If a New York lawyer is hired by a New York client to prosecute or defend arbitrations throughout

\(^{41}\) 538 F. Supp. 2d at 607.
\(^{43}\) MRPC 5.5(a).
\(^{44}\) MRPC 5.5, cmt [4].
\(^{45}\) Stephen Gillers; Roy Simon and Andrew Perlman, Regulation of Lawyers (Aspen 2010) at 358.

Note to Readers

The editors of BNA’s Securities Regulation & Law Report invite the submission for publication of articles of interest to practitioners.

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the country, do those services “arise out of or are [they] reasonably related to the lawyer’s practice” in New York within the meaning of 5.5(c)(3)? The Rule’s commentary does suggest that a particular lawyer’s expertise in a federal or nationally uniform type of legal work might bring that lawyer’s practice within the ambit of Model Rule 5.5(c). According to the commentary to Rule 5.5:

The necessary relationship [with the forum jurisdiction] 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 ... 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.\footnote{MRPC 5.5 cmt. [14].}

The fourth exception also imports an element of judgment, since it references an out of state practice which is “reasonably related” to the lawyer’s practice in his licensed state. What is “reasonable” may depend on a variety of factors, as referenced in the comments.\footnote{See MRPC 5.5 cmt. [14].} To complicate matters further, a comment to Rule 5.5 indicates that the four exceptions in Rule 5.5(c) are not exclusive: “Paragraph (c) identifies four such exceptions. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.”\footnote{MRPC 5.5 cmt. [5].} Thus, the rules include a catch-all, totality of the circumstances exception. Some states, such as Florida, as we have seen, have adopted the substance of ABA Model Rule 5.5.\footnote{Fl. Rule 4-5.5, quoted in, In re Amendments to the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration, 907 So. 2d 1138 (2005).}

**New York Rules of Professional Conduct**

On April 1, 2009 New York’s Rules of Professional Conduct (RPC) were adopted by that state’s Appellate Divisions.\footnote{N.Y. Code, R. & Regs. tit. 22, § 1200 (2009).} The New York RPC, like the ABA Model Rules, forbid lawyers from practicing in jurisdictions in which they are not admitted to practice: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.”\footnote{NYRPC 5.5(a), N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (2009).} But the similarity ends there.\footnote{ABA Model Rule 5.5(a) contains the additional language “or assist another in doing so.”} New York, despite the urging of its organized bar, has declined to adopt a provision similar to ABA Model Rule 5.5(c), which, as mentioned, explicitly permits appearances by out of state practitioners in furtherance of ADR proceedings in specified circumstances.

New York, unlike California or Florida, had a long history of judicial opinions permitting out of state practitioners to appear in arbitrations without gaining admission pro hac vice.\footnote{In light of existing New York precedent taking a permissive approach towards appearance by out of state practitioners in arbitrations, one would have expected that New York would take advantage of the recent amendments to the ABA Model Rules to expressly adopt clear exceptions delineating under what circumstances out of state practitioners would be permitted to appear in New York ADR forums. Since New York went over to an ABA Model Rules format in 2009, it would have been a simple matter for its Appellate Divisions simply to adopt ABA Model Rule 5.5 in its entirety, including the four exceptions contained in RPC 5.5(c). After all, the ABA version seems to reflect actual practice in New York. Yet, the New York courts have only adopted sections (a) and (b) of ABA Model Rule 5.5, and declined to adopt the language permitting limited appearances by out of state practitioners in furtherance of ADR proceedings.\footnote{New York’s RPC 5.5 continues the language from the corresponding portion of the former Code of Professional Responsibility.} The New York RPC—like the Code they replaced—fail to meaningfully address multijurisdictional practice. Consequently, New York’s long-awaited adoption of new ethics rules has done little to shed light on the issue of out of state attorneys’ ability to practice in New York. New York simply missed an opportunity to clarify the issue. This development does little to bring predictability to appearance in a New York-based ADR proceeding by an out of state practitioner.\footnote{New York State Bar Association Ethics Opinion 835 considered whether an out-of-state lawyer may serve as in-house counsel with an office in New York without gaining admission to the New York Bar. \textit{www.NYSBA.org/Opinion 835 (12/24/09)} The New York State Bar thought that this was entirely a matter of state law governed principally by the Judiciary Law. Since the question was not governed by any provision in the New York Rules of Professional Conduct the Committee lacked jurisdiction to answer the question, but urged the Appellate Divisions and/or the New York State Legislature to provide further guidance regarding whether and to what extent out-of-state lawyers - especially in-house lawyers who provide services solely to a corporate employer - are authorized to practice law in New York.}

The necessary relationship [with the forum jurisdiction] 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 ... 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.\footnote{ABA Model Rule 5.5 b(5). See: Committee Report, Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York, 49 REC. ASS’N B. CITY N.Y., 1 (1991); Williamson v. John D. Quinn Constr. Corp., 537 F. Supp. 613, 616 (S.D.N.Y. 1982); Prudential Equity Group, LLC v. Ajamie, 538 F. Supp. 2d 605 (S.D.N.Y. 2008) (Texas lawyer may lawfully collect agreed-upon fee from arbitration conducted in New York).}

As can be seen from the foregoing authorities, most states have tended not to define practice of law (or unauthorized practice of law) in broad, sweeping generalities. Rather, the courts have been analyzing ADR appearance issues on an incremental, case-by-case basis. State regulators seek to preserve decades of tradition recognizing local regulation of the legal profession. On the other hand, new generations of lawyers are following the realities of the market, expanding across state lines and across the internet. For instance, recent ethics...
opinions have approvingly considered the practice of outsourcing legal work to overseas venues.61

Many of the state courts to consider UPL in ADR proceedings have considered, among other factors, whether the out of state lawyer is physically present in the forum state. For example, in Birbrower, the court specifically mentioned the extended multiple visits by the New York lawyers to the California forum. And in Spivak, a New York court found that a California lawyer engaged in unauthorized practice of law due to the California lawyer’s multiple visits to the New York forum.62 Thus, while not determinative, it seems that the existence of proverbial boots on the ground in the forum jurisdiction is an important factor in determining whether an out of state lawyer’s conduct constitutes unauthorized practice of law.

This factor, of physical presence in a jurisdiction, is absent in ADR proceedings in which the parties participate remotely, e.g. by telephone, teleconference, video or Skype. The same could be said for arbitrations decided on the papers, without an evidentiary hearing. For example, FINRA currently administers simplified arbitrations for disputes below a certain monetary threshold.63 These disputes are administered by regional offices, in New York, Chicago and California, for locations in all 50 states. There is no hearing in these simplified arbitrations, which are decided by a single arbitrator on the papers. The claimant files a statement of claim, the respondent files an answer, FINRA appoints an arbitrator who remotely issues a written award without meeting or seeing the parties.

Theoretically, the following could occur. A hypothetical Arizona claimant, represented by Arizona counsel, commences an arbitration against a Maine respondent represented by New Jersey counsel. FINRA Rules would place venue in the claimant’s home state, and defer to Arizona’s UPL rules.64 While theoretically venue in Arizona, the proceeding requires no appearance or hearing, and the claim would be administered out of the FINRA New York office. The New Jersey defense attorney does not set foot in or appear in Arizona. Nor does she retain Arizona counsel or seek admission pro hac vice. She simply drafts an answer, which is approved by her Maine client and transmitted to FINRA in New York. By mailing a pleading from New Jersey to New York, has that hypothetical attorney engaged in the unauthorized practice of law in Arizona?

Logically, it seems that the hypothetical New Jersey lawyer’s presence in Arizona is close to nil. The lawyer does not set foot on the ground in Arizona, therefore distinguishing Birbrower and Spivack. The New Jersey lawyer is not soliciting Arizona clients, thereby distinguishing Rapoport and Gould. Yet the four exceptions in ABA Model Rule 5.5(c) do not appear directly to address the facts of this hypothetical. There is no association with local counsel, as contemplated by Model Rule 5.5(c)(1), the lawyer does not anticipate admission pro hac vice (Rule 5.5(c)(2)) (nor it is justified by the modest amount in dispute), and the services are not related to a pending arbitration in Arizona (Rule 5.5(c)(3)). The New Jersey lawyer could argue that her appearance is “reasonably related to the lawyer’s practice” in her home jurisdiction, but that argument is not self-evident either. The lawyer is admitted in New Jersey and represents a Maine client in a dispute with an Arizona customer. That dispute seems to have little connection with the New Jersey lawyer’s New Jersey license. Rule 5.5(c)(3) does provide an exception for an “alternative dispute resolution proceeding in this or another jurisdiction,” thereby suggesting that the appearance is permissible, wherever that hypothetical, metaphorical arbitration can be said to be pending.

The commentary to ABA Model Rule 5.5 suggests a flexible, totality of the circumstances approach to interpreting the exceptions in Rule 5.5(c). For example, a lawyer seeking to show a relationship to the lawyer’s existing, licensed practice may do so by simply pointing to the lawyer’s expertise in an area of federal or uniform law:

The necessary relationship [with the forum jurisdiction] 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 . . . 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.65

By this token, then, the hypothetical New Jersey lawyer may point to a past relationship with the Maine client, or a particular expertise in securities arbitrations. This argument would be consistent with New Jersey precedents permitting limited appearances by out of state lawyers at New Jersey arbitrations. In addition, it would be permissible under Arizona law as well.66

This hypothetical illustration is but a snapshot of a larger, gradual trend in the profession. The realities of the profession are that ADR practice is becoming more national and international in scope. Clients with specialty niche issues in multiple jurisdictions want to entrust their legal problems to experienced in-house or outside counsel with particular expertise in those areas.

As dispute resolution is becoming more national in scope, it, like everything else, is going on-line. Over time, it is inevitable that the individual states will gradually come to accommodate the trend more liberally to permit interstate practice by ADR practitioners.

**Conclusion**

There is no clear national answer to the question of whether lawyers may handle arbitrations in jurisdictions in which they are not licensed. Some jurisdictions consider appearance at arbitrations to be the practice of law, such that advocates in ADR proceedings must be licensed in the forum state or affiliated with local counsel. For example, California permits out of state lawyers to appear in arbitrations, provided they seek written approval from the arbitral forum and file a certificate with the state bar. On the other hand, authorities in several

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63 See www.FINRA.org/dispute resolution.
64 Arizona follows ABA Model Rule 5.5(c) In addition, Arizona’s ethics rules require an out of state practitioner to obtain the client’s informed consent before appearing in Arizona, and to comply with local disciplinary rules. See Gillers, Simon and Perlman, supra, at 359.
65 MRPC 5.5 cmt. [14].
66 See: Simon, Gillers and Perlman, supra, at 359.
states do not even consider arbitration the practice of law. The 2002 amendments to ABA Model Rule 5.5(c) opened the door to a broader scope of multijurisdictional practice in furtherance of alternative dispute resolution proceedings. However New York, in its 2009 overhaul of its own Rules of Professional Conduct, missed a golden opportunity to clarify the scope of permissible multijurisdictional practice in ADR proceedings. As a result, whether lawyers’ appearances in ADR proceedings run afoul of the unauthorized practice of law regulations of individual states will continue to be resolved on a case by case basis. Ultimately, the trend is likely to continue in favor of expanded multijurisdictional practice.