


Med-Arb

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success being the neutral's experience level. In fact, med-arb is in its infancy. As counsel become more sophisticated and understand this process, its use will expand.

Former Los Angeles Superior Court Judge Lawrence C. Waddington, a neutral in the Santa Monica, Calif., JAMS

office, and an eminent ADR leader, praised this process and extolled its qualities. In the survey, he said of med-arb, "It is a valuable addition to the constantly maturing world of alternatives to litigation. The increasing use of mediation by the bar has developed experienced lawyers who recognize a variety of techniques to settle cases, and med-arb is one. No mediator should ignore its potential for resolution of a dispute."

This does not mean that this process should be used in all conflicts but it should be considered, and discussed by counsel with their clients. Garden City, N.Y., neutral Eugene Ginsberg in the survey said, "Med-arb is not an ethics issue if the parties and counsel give their informed consent. If it is their process, it is to be used." 

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Court Committee Opinion Limiting ADR Representation Raises Constitutional Issues, as Well as Problems Rooted in Protectionism

BY PAUL M. LURIE

In an Alternatives article last month, Paul Lurie discussed *Opinion 43*, by the New Jersey State Supreme Court Court's Committee on the Unauthorized Practice of Law, dealing with representation in alternative dispute resolution matters in the state. See "N.J. Court Committee Requires Most Out-of-State Lawyers to Register for ADR," 25 Alternatives 61 (March 2006). This month, he expands on the issues he raised concerning the constitutionality of the N.J. Court committee opinion.

The New Jersey Court UPL committee's Jan. 4 opinion, "Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey," raises serious federal Constitutional issues. The opinion is available at www.judiciary.state.nj.us/notices/ethics/UPLC_Opinion43supplementingop28.pdf.

As originally promulgated under American Bar Association Model Rule of Professional Conduct 5.5(c)(3), an out-of-state lawyer may represent his or her client in an arbitration provided that the services related to arbitration or mediation "arise out of or are reasonably related to the lawyer's practice," and aren't subject to any other rule limits in that particular state—for ex-

ample, pro hac vice procedures.

New Jersey has further modified that rule by requiring that, in nearly all instances, attorneys acting as party representatives in alternative dispute resolution matters in the state register with the state as pro hac vice representatives, or under similar



registration rules for in-house counsel. The New Jersey opinion suggests that the registration requirements extend well beyond court-annexed ADR to private matters. It also recommends that providers like the American Arbitration Association get attorneys' proof of compliance before proceeding with arbitration and mediation matters.

The U.S. Supreme Court has held that the practice of law is a constitutionally protected privilege. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280-81 (1985). States have authority to regulate entry into the local legal profession in the interest of public welfare. "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v.*

Bd. of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957). See also *In re Griffiths*, 413 U.S. 717, 722-23 (1973) (states can adopt standards to help determine whether an applicant possesses the charter and general fitness requisite for an attorney).

PASSING MUSTER

But these regulations must have a substantial relationship with that state's legitimate interest to pass constitutional muster. It has been suggested that restrictions that states place on out-of-state lawyers historically have been motivated to restrain competition, rather than for the public welfare.

For example, author Andrew M. Perlman believes that historical restrictions were motivated more by the urge to restrain competition than out of concern for the public welfare:

Strict regulations are relatively recent in origin. Throughout much of the history of the American legal profession, few restrictions on interstate law practice existed. Professor Richard Abel found that "[u]ntil the 1930s, lawyers admitted in one state encountered few impediments in practice in another, and many migrated in response to economic opportunities or personal preferences." Indeed, "[i]n 1930-31, only five out of forty-nine jurisdictions required out-of-state attorneys to pass their bar examinations. The other forty-four admitted lawyers on motion

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as long as they had practiced for a specified period in a state that granted reciprocity, virtually every applicant was admitted."

Andrew M. Perlman, "A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers," 18 *Geo. J. Legal Ethics* 135, 145 (2004).

Recently, several states have required out-of-state lawyers be admitted pro hac vice for arbitration, and a few of these states have added limitations on the number of appearances a foreign attorney may make in an arbitration or litigation. See Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions, available at www.abanet.org/cpr/jclr/pro-hac_admin_comp.pdf. See also, John Barkett, "The MJP Maze: Avoiding the Unauthorized Practice of Law," ABA Section of Litigation Annual Conference (New York, 2005).

In particular, both Florida and South Carolina had limited out-of-state lawyers to three arbitrations per year. See Rules Reg. the Fl. Bar R. 1-3.11; SC App. Ct. R. 404. Although North Dakota allows a foreign attorney to represent an arbitration client, after five years of practice that counsel must be admitted to the North Dakota bar. See North Dakota Admission to Practice Rule 3.

In addition, some states limit how often out-of-state lawyers can be admitted pro hac vice for litigation. For example, Florida limits admission pro hac vice for litigation to three per year. Rules Reg. the Fl. Bar R. 1 3.11. Nevada does not allow more than five appearances within a three-year period—a rule applying to the petitioner and/or the members of the petitioner's firm. The Nevada result is that pro hac vice admission is limited to no more than five appearances within a three-year period for an entire law firm. See Nevada S. Ct. R. 42 procedure, available at www.nvbar.org/PDF/SCR42%20Ap-CURRENTweb%20version.pdf.

Montana only allows an out-of-state lawyer to be admitted pro hac vice two times ever. See Pro hac Vice Rules, at www.montanabar.org/admission/pro-hacvicrules.html. The D.C. Court of Appeals Rule 49 limits out-of-state lawyers to five pro hac vice proceedings annually.

Imposing pro hac vice requirements, along with numerical restrictions on arbi-

trations within a state, raises constitutional issues under both the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the U.S. Constitution.

DISCRIMINATION UNDER THE CONSTITUTION

The Privileges and Immunities Clause intends to prevent states from discrimination against out-of-state citizens. See, e.g., Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 449 (2d ed. 2002) ("It is well-settled that the privileges and immunities clause is meant to limit the ability of states to discriminate against citizens from other states. . . ."). As a result, the U.S. Supreme Court has ruled that it will strike down rules that discriminate against nonresidents unless the state can show that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, supra, 470 U.S. at 284.

The Fourteenth Amendment's Equal Protection Clause provides that no state can make any law "nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Section 1. The Fourteenth Amendment differs from the Privileges and Immunities Clause of Article IV, Section 2, because the Fourteenth Amendment places emphasis on "any person," rather than "citizens."

In addition, the U.S. Supreme Court has held "[e]ven in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." *Schwartz*, supra, 353 U.S. at 239.

Generally speaking, discrimination, in varying forms, is prohibited under these constitutional provisions. Requiring registration, pro hac vice admission for arbitration, or limiting the number of appearances may violate these constitutional provisions.

ARGUMENT UNDERMINED

Most jurisdictions do not limit the appearances an out-of-state lawyer can make in an arbitration or litigation. And most do not

require pro hac vice admission for private arbitrations. As a result, the argument that these restrictions are necessary to serve the public welfare is undermined.

Similarly, many states have enacted numerous exceptions that allow foreign attorneys to practice within their borders without passing the state's bar exam or demonstrating fluency in local laws and procedure. For example, a lawyer may be admitted to a bar by reciprocity based on the assumption that competency in one state suffices to be admitted in another. Another 26 states allow foreign lawyers to serve as foreign legal consultants. See Current Status of FLC Rules, available at http://www.abanet.org/cpr/jclr/8_and_9_status_chart.pdf.

The foreign legal consultant rules place limits on the scope of legal services that the foreign lawyer can provide. For example, foreign legal consultants generally are allowed to set up an office in the state, but are limited to providing legal services to issues dealing with the law of their foreign country. See N.Y. Ct. Rules § 521.1, available at www.law.northwestern.edu/career/llm/documents/NY_FLC_rules.pdf.

Other states allow foreign lawyers to sit for the bar examination. For example, California and New York state bars allow foreign lawyers who meet certain educational requirements admission to the bar. In such states, foreign lawyers generally must seek an L.L.M. from a U.S. law school before seeking bar admission. See New York State Bar Requirements for Foreign Lawyers, available at <http://www.nybarexam.org/foreign.htm>. See also George D. Pappas, "Bar Admission Rules and Foreign Lawyers: U.S. State Barriers Challenged in a Global Economy," *Malet Street Gazette* (Aug. 2000)(available at www.malet.com/bar_admission_rules_and_foreign_1.htm).

In another recent example of this trend, several states have waived their pro hac vice requirements to allow lawyers who were affected by Hurricane Katrina to temporarily practice within their borders.

ARBITRATION RESTRICTIONS ARE HIGHLY SUSPECT

Another significant consideration is that out-of-state attorneys representing clients in an arbitration historically have not been considered to be engaging in the

ADR Representation

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unauthorized practice of law; nor is arbitration generally considered part of a tribunal. Therefore, sudden state restrictions on the participation in such arbitrations, through pro hac vice admission or numerical limits on appearances, are highly suspect.

Such states would need to demonstrate a substantial reason for the recent adoption

of such rules, particularly in light of the established nature of arbitration as an extrajudicial proceeding. Significantly, the effect of imposing pro hac vice requirements and the like is to make arbitration more akin to traditional tribunals.

Finally, it cannot be overlooked that these pro hac vice procedures impose a substantial financial burden on out-of-state lawyers, as well as their clients. Once again, the public welfare justification is unpersuasive because the practical effect of such regulation is to require duplicate lawyering in

a forum where the parties select the applicable rules of procedure and substantive law and where local counsel will not be more knowledgeable about the underlying facts. In fact, the out-of-state lawyer does not need guidance on procedural questions.

Given these considerations, economic protectionism and restraint on competition emerge as the underlying explanation for such regulation. 

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ADR v. the Bench

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not have to make disclosures from the bench. And the judge's rulings can be appealed. It is perhaps another thing to contribute \$10,000 to the campaign coffers of a supreme court justice. Only impeachment or, in some states, a public referendum can remove a biased justice.

GOOD REASONS

There are good reasons to argue that arbitrators are more likely to be neutral than judges: An arbitrator is in a private business enterprise. His or her reputation for neutrality is a badge of honor, and an essential credential in getting business. Elected judges are no less honorable, but beholden to their constituency and have to run for office and retention.

Once on the bench, it is hard to challenge a judge's neutrality based on campaign contributions. In fact, judges' biases

are perfectly well known to the litigants before them and to the extent they can, litigants judge-shop to get a more sympathetic ear.


PROMOTING FULL TIMERS

Judges and arbitrators are equally susceptible to predisposition. But differentiate predisposition from bias: Everyone has preferences, likes and dislikes, moral values and political beliefs. That, in part, is why mediation got started in the first place—to avoid the wild card result of a disinterested but all-too-human judge or jury.

Arbitration began in the world of unique trades, to keep internecine disputes within the trade, to be resolved by a person of that trade knowledgeable in the rules and about the players. Arbitration has morphed out of that world, into the world of labor-management, and finally into the world of commerce at large. Why not create a sworn cadre of full-time, certified neutrals, who take an oath of office and whose sole job it is to arbitrate or mediate

commercial claims?

They would be paid by the parties; the billing of each would be transparent to the others. It would be understood that the neutral, since it is her sole employment, would be busy full-time with disputes generated by the parties as represented by their lawyers. There would be repeat business that would not have to be disclosed because it would be expected. Labor-management arbitrators are always seeing repeat parties and counsel. Their duty of disclosure runs only to disclosing personal relationships, whether they currently serve as an advocate for any party, and whether they have maintained or maintain any managerial, representational or consultative relationship with a party.

It is assumed they have repeat business because that is what they do for a living. But the day that full-time neutrals in the commercial law field are given the same distance and treated with the same respect as judges hasn't yet arrived. 

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CPR NEWS • CPR NEWS • CPR NEWS

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NEXT MONTH: CPR'S THIRD ANNUAL EUROPEAN CONGRESS

The CPR Institute will hold its Third Annual European Congress on Business Dispute Management at the Westin Hotel in Paris in May.

The two-day meeting—which will provide attendees with New York state

continuing legal education credit hours—will open with a breakfast at 9:00 a.m. on Thursday, May 10, and will conclude at 1:00 p.m. on Friday, May 11. The meeting is open to individuals at CPR member companies and law firms, and members of CPR's Panels of Distinguished Neutrals.

Registration information is available at www.cpradr.org.

In addition, CPR is conducting a full-day workshop on cross-cultural ne-

gotiation on May 8, the day before the meeting.

The agenda includes the following sessions:

- Using facilitators to create value at any stage of a deal.
- The corporate ADR pledge: A vital new tool for European business?
- Best practices in insurance: Managing disputes with policyholders and with