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## STATE COURT COMMITTEE REQUIRES PARTIES TO GET MEDIATION REPRESENTATION

A New Jersey Supreme Court Committee has decided that business executives may not represent their companies at court-related mediations.

According to Michelle V. Perone, who oversees civil court programs in the New Jersey Administrative Office of the Court's civil practice division, the state Conference of Civil Presiding Judges referred a representation question, raised by several mediators, late last year to its Unauthorized Practice of Law Committee.

Perone reports that the committee considered whether nonattorneys may appear on behalf of business entities in court-ordered mediation proceedings at its December 2004 meeting.

The committee, noted Perone in an E-mail to *Alternatives*, "determined that such appearances are not permissible under the Rules of Court and of Professional Conduct."

The ruling also emphasizes the language of a New Jersey Rule of Professional Conduct that limits arbitration and mediation representation by an out-of-state attorney to "specific, limited circumstances," notes Perone.

Committee chairman Raymond Londa, of Elizabeth, N.J.'s Londa & Londa, explains the committee ruling appeared in a letter he sent about the inquiries, and doesn't take the form of a formal New Jersey court rule, which would have to be proposed to and signed off on by the state Supreme Court.

States generally don't focus on mediation or arbitration representation separately in their court rules, but instead often adapt Rule 5.5 on unauthorized law practice and multijurisdictional practice in the American Bar Association's Model Rules of Professional Conduct.

New Jersey is not an exception, though the state's standard under its Rule of Professional Conduct is slightly tougher than the ABA rule, using a more direct relationship requirement. Under New Jersey Rule of Professional Conduct 5.5(b)(3)(II)—which

the committee cited as support in barring nonattorney court ADR representation—out-of-state attorneys may represent "a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, [if] 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." New Jersey courts use the term "complementary dispute resolution" instead of ADR.

The ABA rule allows an out-of-state lawyer to provide temporary representation services that "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."

Lewis Pepperman, assistant managing director at Princeton, N.J.'s Stark & Stark, says that the court committee's statement on mediation representation won't change

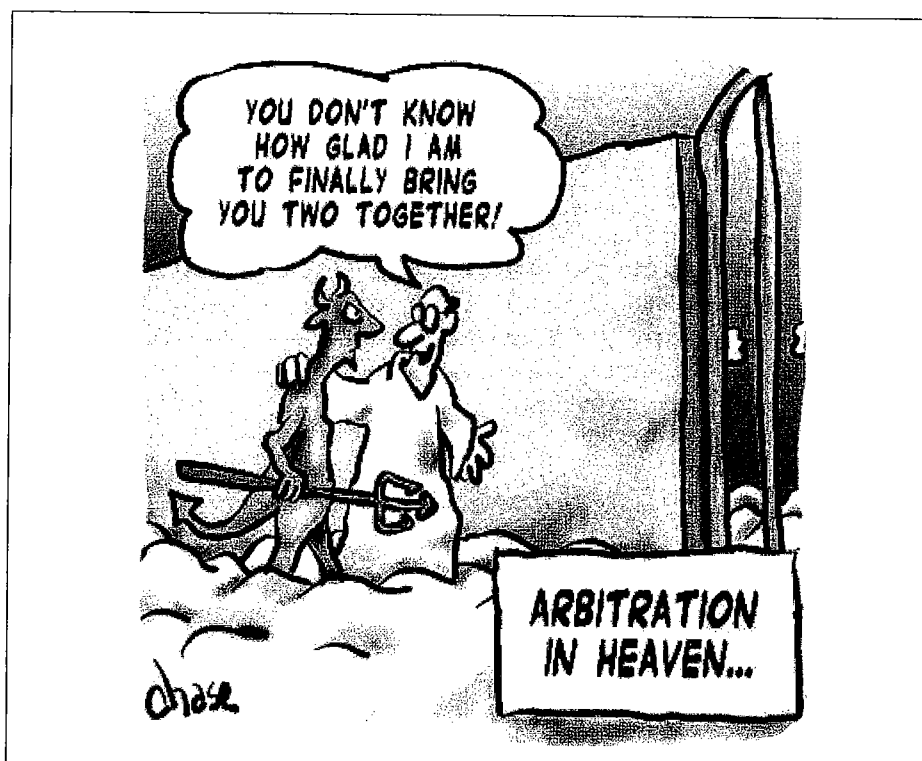
practice significantly. First, he says, court rules encouraging mediations have provided the bulk of mediation work via referrals in recent years. And since the matter already is in court, he says, representation likely will continue, since the mediation is an extension of the court process.

It follows, says Pepperman—who learned of the committee action and wrote about it on his law firm Weblog—that the out-of-state exception also often may be moot. The reason, he explains, is that the out-of-state attorney likely already would have had to have been admitted pro hac vice to be close enough to the matter to be part of the court mediation.

Pepperman says that the attorneys' limited mediation representation appearance is viable, and likely will continue to occur, with local counsel enlisted for the courtroom action. It's "a good idea," he says, noting that the "courts are trying to maintain the formality of pro hac vice, but recognize that mediation is a little more informal even though it mandated by the court."

He says that the unauthorized law prac-

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tice committee's pronouncement on mediation representation emanates from 2000 court rule changes which pushed more cases for mediation referrals. "All the rules are slowly developing," he says, adding that he expects more clarifications and additional court rules on mediation procedures.


In fact, the more recent New Jersey professional conduct rule came with a caveat that more changes may be on the way. Rule 5.5 on multijurisdictional practice took effect Jan. 1, 2004; the state Supreme Court noted in an official comment that after three years, the Court's Professional Responsibility Rules Committee would "undertake a comprehensive evaluation of the

containing expensive litigation. At a minimum, they may be hesitant about taking over the reins in a court mediation session.

Isaacs says it may come down to semantics for out-of-state lawyers. "Don't tell me you're their representative," he says. "Tell me you're 'participating.' Tell me you're a 'nonrepresentative party participant.'"

The play on words becomes necessary not only because of New Jersey RPC 5.5's distinction between representation and participation. Since the rule became effective at the beginning of last year, the state also signed onto the Uniform Mediation Act. The uniform act's November passage put a law on the books which clashes with the professional conduct rule. Under the state's version of the uniform act, an "at-

lawyered—so that people have a comfort level." But he adds that, instead of the uniform act's self determination, the committee ruling is a "move in the wrong direction" of "economic self-protection . . . and an overarching protective self interest. . . ."

When the new law and committee ruling were released late last year, New Jersey had just completed research for its latest two-year rules cycle. In each cycle, the Court committees make proposals, commented upon by the public, and which are presented to the state Supreme Court for modification and approval. Therefore, any changes related to the ruling and the uniform act in state court operations, which include the professional conduct rules, probably are about two years away from consideration. 

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## A ruling that lawyers must represent court-connected mediation parties collides with the Uniform Mediation Act.

experience gained in multijurisdictional practice" to consider rule changes.

Princeton, N.J., lawyer-neutral Hanan Isaacs, who heads his own firm, says he has spoken to the state's Administrative Office of the Courts about submitting comments on the rule's operation. He already concludes that it needs work. "That RPC snuck through," says Isaacs. He explains that it changed a customary—if not uniform—judicial deference to out-of-state ADR representatives as creatures of contract, not individuals practicing law in need of pro hac vice admittance.

Moreover, warns Isaacs, unlike the Unauthorized Practice of Law Committee's late 2004 ruling, RPC 5.5 can be read beyond the courtroom, applying ADR representation restrictions to private mediation contracts and matters.

The RPC interpretations won't have much effect on big companies, but small business owners could have a harder time

torney or other individual designated by a party may accompany the party to and participate in a mediation." N.J. Rev. Stat. 2A:23C-10.

"So one possibility," says Isaacs, "is that 'participate' doesn't 'represent.'" Referring to the members of the Court's Uniform Practice of Law Committee, he adds, "If they want to be nitpicky about the UPL issue, then tell me what the Legislature meant when [it] said who can participate in mediation."

The result of the Court committee's informal bar on nonattorney business representation in mediation, just weeks after the uniform act was signed into law by New Jersey Acting Gov. Richard J. Codey in November, is a collision not only of court rule and statute, but also philosophy. The purpose of the uniform act's Section 10, says Isaacs, is "to give people a connection with the roots of mediation, and the idea of it wasn't to make it legalistic and over-