

## Outside Counsel

## Expert Analysis

# Appearances in FINRA Arbitrations By Out-of-State Lawyers

Many practitioners who appear before the Financial Industry Regulatory Authority (FINRA) handle arbitrations and mediations which are venued in states in which they are not admitted to practice law. FINRA rules permit a party to an arbitration to be represented by a non-lawyer, or by a lawyer admitted in any state.<sup>1</sup> Organizations staffed by non-lawyers, such as Stock Market Recovery Consultants Inc., advertise for and represent claimants in FINRA arbitrations in some jurisdictions.<sup>2</sup> Some law firms and corporate law departments maintain national practices, representing parties in FINRA arbitrations, sometimes in jurisdictions in which the individual attorney of record is not admitted to practice law. Still other firms eschew brick and mortar offices altogether, and purport to practice law in cyberspace.<sup>3</sup>

But compliance with FINRA rules is not a free pass with state regulators. The practice of law is defined by the individual states, which grant plenary law licenses to and police the conduct of attorneys who appear and practice in their jurisdictions. Several

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unauthorized practice of law.<sup>4</sup> And while attorney discipline by state bar counsel or grievance committees for unauthorized practice of law (UPL) is rare, unhappy clients have successfully avoided fees in cases in which their counsel made unauthorized appearances in arbitrations in jurisdictions in which they were not admitted. Moreover, some jurisdictions

have successfully sued out-of-state practitioners to enjoin advertising for and representing clients in the forum state, even in alternative dispute resolution (ADR) proceedings.

### 'Birbrower'

National attention on multi-jurisdictional practice of law in ADR proceedings followed California's game-changing 1998 decision in *Birbrower, Montalbano, Condon & Frank v. Superior Court*.<sup>5</sup> *Birbrower* was a New York law firm that advised a California client about a commercial (non-securities) dispute with another California company under a contract that 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. After the case was settled, the client sued *Birbrower* for legal malpractice, whereupon the firm counterclaimed for its legal fees.

California Statute, Business and Professions Code §6125, proscribes the unauthorized practice of law: "No person shall practice law in California unless the person is an active member of the State Bar."<sup>6</sup> The California court interpreted this provision as preventing an out-of-state attorney from giving legal advice about California law to a California client. According to the California court:

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.<sup>7</sup>

Since the *Birbrower* lawyers practiced law when they were not admitted in California, their fee was forfeited. Following *Birbrower*, California amended its law to permit an out-of-state attorney to appear in an arbitration proceeding, provided that the attorney obtain the permission of the arbitral forum and file a certificate with the California State Bar.<sup>8</sup>

In *Gould v. Harkness*, a federal district court held that a New York lawyer engaged in the unauthorized practice of law by proposing to represent Florida clients out of an office in Miami without being licensed in Florida.<sup>9</sup> Florida subsequently amended its ethics code and court rules to permit a limited annual number of appearances by out-of-state attorneys in alternative dispute resolution proceedings on behalf of clients in the lawyer's home state or in matters reasonably related to the lawyer's licensed practice, upon registration with the Florida bar and payment of a fee.<sup>10</sup>

### Other Jurisdictions

Other jurisdictions have held that appearance in an arbitration is the practice of law. In *Disciplinary Counsel v. Alexicole Inc.*,<sup>11</sup> an Ohio court enjoined a corporation owned by a layperson 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."<sup>12</sup>

On the other hand, authorities in several states do not consider arbitration 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 not required.<sup>13</sup> 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.<sup>14</sup>

### The ABA Model Rules

The American Bar Association, in response to *Birbrower*, amended its Model Rules of Professional Conduct to facilitate multi-jurisdictional practice by attorneys. The 2002 amendments to ABA Model Rule 5.5(c) opened the door to a broader scope of multi-jurisdictional practice in furtherance of alternative dispute resolution proceedings in some settings. The ABA model rules are suggestions for state bars, not enforceable disciplinary rules. The individual states are free to modify or ignore the ABA Model Rules, and many states do. For example, New York, whose courts had a long history of permitting ADR appearances by lawyers from other jurisdictions without obtaining admission pro hac vice, recently declined to adopt ABA Model Rule 5.5.<sup>15</sup>

ADR practice is becoming more national in scope. 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. But until that day, ADR practitioners are well-advised to research and investigate the UPL regulations of a forum state before entering an appearance in a FINRA arbitration.

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1. See: FINRA Rules 12208, 13208.

2. See <http://stockloss.com>. Stock Market Recovery Consultants Inc. is an organization staffed by laymen which claims to have a 95 percent success rate in recovering losses for investors.

3. See, e.g., [www.vlplawgroup.com](http://www.vlplawgroup.com), advertising for Virtual Law Group LLP, which does not mention ADR, litigation or FINRA practice.

4. See: e.g., *Florida Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003); *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P. 2d 1 (Cal. 1998).

5. 949 P. 2d 1 (Cal. 1998).

6. 949 P.2d at 2.

7. 949 P. 2d at 5-6.

8. Cal. Civ. Proc. Code §1282.4. This provision was scheduled to sunset in 2011.

9. 470 F.Supp.2d 1357 (S.D. Fla. 2006), aff'd, 2007 U.S. App. LEXIS 28968 (11th Cir. 2007).

10. 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)

11. 822 N.E.2d 348 (Ohio 2004).

12. 822 N.E.2d at 349.

13. 801 N.E.2d 1017 (Ill. App. 2003).

14. N.J. Comm. on Unauthorized Practice of Law, Op. 28, 138 NYLJ, 1558, 1994 WL 719208 (1994).

15. See Barry Temkin, "State Regulation of Unauthorized Practice of Law in Arbitration," 42 BNA Securities Regulation & Law Reports 1561 (8/16/10), [http://works.bepress.com/barry\\_temkin/23](http://works.bepress.com/barry_temkin/23).