



*UPL ADVISORY OPINION
UPL 06-04
(April 2006)*

Representation by Non-Arizona Attorney in Private Arbitration

This is an Advisory Opinion regarding Arizona Supreme Court Rules 31, 33, and 42 (ER 5.5) pertaining to whether a non-Arizona attorney is engaging in the unauthorized practice of law by representing a client in a securities arbitration conducted by a private dispute resolution service as required by the National Association of Securities Dealers or the New York Stock Exchange.¹

Issues:

1. Is an attorney licensed to practice in another jurisdiction but not in Arizona engaging in the Unauthorized Practice of Law by representing a client in a securities arbitration conducted by a private dispute resolution service as required by the National Association of Securities Dealers or the New York Stock Exchange? No.
2. If the answer to the above question is “Yes” may the attorney remedy the violation by becoming admitted pro hac vice in a state or federal court even though the dispute resolution service is not affiliated with the State of Arizona or the U.S. District Court for the District of Arizona? The answer to the above question is “No”, therefore this question is moot.

Facts:

Securities arbitrations are conducted on a regular basis in Arizona. The arbitrations are conducted, not through a state or federal court, but under the auspices of a private dispute resolution service. The National Association of Securities Dealers (NASD), the New York Stock Exchange (NYSE) and the American Bar Association (ABA), to name a few organizations, require this service, but for extremely limited circumstances. For example, in 2004 there were 2,070 dispute resolution cases filed with the NASD.²

Relevant Authority:

Arizona Supreme Court Rule 31
Arizona Supreme Court Rule 33
Arizona Supreme Court Rule 42, E.R. 5.5

Rule 31, Arizona Rules of the Supreme Court reads in pertinent part,

¹ Opinions of the Committee are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2006

² NASD website

Rule 31. Regulation of the Practice of Law

(a) Supreme Court Jurisdiction Over the Practice of Law

1. *Jurisdiction.* Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court’s jurisdiction.

2. *Definitions.*

A. “Practice of law” means providing legal advice or services to or for another by:

(1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;

(2) preparing or expressing legal opinions;

(3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;

(4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or

(5) negotiating legal rights or responsibilities for a specific person or entity.

B. “Unauthorized practice of law” includes but is not limited to:

(1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d); or

(2) using the designations “lawyer,” “attorney at law,” “counselor at law,” “law,” “law office,” “J.D.,” “Esq.,” or other equivalent words by any person or entity who is not authorized to practice law in this state pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state.

* * *

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar, and no member shall practice law in this state or represent in any way that he or she may practice law in this state, while suspended, disbarred, or on disability inactive status.

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(d) Exemptions

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26. Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.

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Rule 42. Arizona Rules of Professional Conduct

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ER 5.5 Unauthorized Practice of Law

(c) 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; or

Discussion:

1. Is an attorney licensed to practice in another jurisdiction, but not in Arizona engaging in the Unauthorized Practice of Law by representing a client in a securities arbitration conducted or required by a securities regulatory body such as the National Association of Securities Dealers or the New York Stock Exchange?

While the dispute resolution process discussed herein is not one that falls within the purview of the state or federal court, representation of a client at arbitration still falls under the definition of “practice of law”.

Rule 31 (a) (2) (A) defines “Practice of Law” as “providing legal advice or services to or for another by:

- (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
- (2) preparing or expressing legal opinions;
- (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
- (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
- (5) negotiating legal rights or responsibilities for a specific person or entity.

Arbitration is specifically mentioned in paragraph (A) (3) above and is further embedded in Arizona’s dispute resolution process as evidenced by AZ. R. Civ. Pr. Rules 72-76. Rule 31(a) (2) (A) (3), which states that representation in a dispute resolution process such as arbitration is

the practice of law. There is no exception for arbitration that does not fall within the auspices of a court.

Rule 31, however, provides a list of exceptions to the requirement that a person be an active member of the state bar in order to practice law. Nothing in the exceptions deals with securities arbitration cases.

The final listed exception, exemption 26, states,

26. Nothing in these rules shall affect the ability of lawyers licensed in another jurisdiction to engage in conduct that is permitted under ER 5.5 of the rules of professional conduct.

Rule 42 (ER 5.5), in pertinent part, states,

(c) 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;

ER 5.5 (c) (3) establishes what is, in essence, a five-prong test:

- (i) The lawyer is admitted in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction;
- (ii) The legal services are being performed in Arizona by the lawyer on a temporary basis;
- (iii) The legal services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Arizona or another jurisdiction;
- (iv) The legal 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
- (v) The applicable forum does not require *pro hac vice* admission to perform the services.

The query assumes that the lawyer is admitted to practice in another jurisdiction, and this discussion will assume that the lawyer is not disbarred or suspended from practice in any jurisdiction. This discussion further assumes that the legal services will be performed in Arizona on a temporary basis. Consequently, the first two prongs of the test are assumed to be met. Securities arbitration no doubt fits within the confines of ER 5.5 (c) (3), the services being related to an arbitration or alternative dispute resolution here in Arizona, so the third prong of the test is satisfied.

Determination of whether the legal services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which he or she is admitted requires a case-by-case specific analysis. For instance, an attorney seeking to represent a client before an arbitration panel in Arizona would meet the fourth prong of the test if that attorney is licensed to practice in another state, practices securities law in the home state, and represents parties before a securities arbitration panel.

Finally, it must be determined whether an appearance in arbitration is a service for which the forum requires *pro hac vice* admission.

Rule 33, Supreme Court Rules, reads in pertinent part,

Rule 33. Committees; Practice

(C) Practice in Courts. No person shall practice law in the State of Arizona without being admitted to the bar by compliance with the following rules, provided that an attorney practicing in another state or territory or insular possession of the United States or the District of Columbia may be permitted by any court to appear in a matter *pro hac vice*, in accordance with the procedures set forth in subpart (d) of this Rule.

(d) Admission Pro Hac Vice.

1. Eligibility. An attorney who is not a member of the State Bar of Arizona, but is currently a member in good standing of the bar of another state or eligible to practice before the highest court in any state, territory or insular possession of the United States (hereinafter called a nonresident attorney) and who is of good moral character and is familiar with the ethics, professionalism and practices of the legal profession in the State of Arizona, may appear as counsel *pro hac vice* in a particular case before any state or local court, board or administrative agency in the State of Arizona upon compliance with this rule. However, no person is eligible to appear as counsel pursuant to this rule if that person (a) is a resident of the State of Arizona, or (b) is regularly employed in the State of Arizona, or (c) is regularly engaged in substantial business, professional, or other activities in the State of Arizona.

Even if one did seek the ability to practice before the arbitration panel, *pro hac vice*, there is no Arizona court or agency to which the attorney could turn to be admitted. The last prong of the test is met as well.

In reading Rule 31 and E.R. 5.5 in *pari materia*, assisted by Rule 33, it is evident that the Rule 31 (d) (26) exemption governs. An attorney licensed to practice in another jurisdiction but not in Arizona may represent a client in a securities arbitration conducted or required by a securities regulatory body such as the NASD or the New York Stock Exchange NYSE if the representation is on a temporary basis and is a service arising from, or that is reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

The attorney requesting this Advisory Opinion has cited Florida and Ohio as examples where such conduct is considered the unauthorized practice of law.

In Florida, a local attorney petitioned the Florida Bar Standing Committee on the Unlicensed Practice of Law for an advisory opinion on whether a non-attorney, company or individual who offers advice on securities related matters and represents the public before, during, or after any NASD, NYSE, or other arbitration proceedings for compensation is engaged in the unauthorized practice of law. The Florida Bar committee issued an opinion stating the above conduct does constitute the unauthorized practice of law.

The Florida Supreme Court reviewed and upheld the Bar committee opinion, *The Florida Bar Re: Advisory Opinion on Non-Lawyer Representation in Securities Arbitration*, 696 So.2d 1178 (1997). It is illustrative that the Florida Supreme Court noted,

Although we recognize that arbitration was set up to be a non-judicial alternative for dispute resolution, it is clear, in light of our case law thoroughly discussing the activities that constitute the practice of law, the services provided by non-lawyer representative in the alternative but still *adversarial* (emphasis added) context of securities arbitration, constitutes the practice of law". 696 So 2d at 1183.

The Florida Supreme Court subsequently dealt with a similar question, except the respondent was an attorney, not licensed to practice in Florida, but in another state. In *The Florida Bar v Rapoport*, 845 So.2d 874 (2003). Rapoport, a licensed Washington D.C. attorney, was representing clients in Florida in securities arbitration matters conducted by entities such as the ABA, NASD and NYSE. The court held that the respondent was enjoined from engaging in the unlicensed practice of law.

The Ohio Supreme Court in *Disciplinary Counsel v. Alexicole, Inc. et al.*, 105 Ohio St.3rd 52, 822 N.E.2d348 (2004) issued a similar ruling in the case of a non-attorney. The court prohibited one not licensed to practice law from representing the interests of any corporation before any legal or quasi-legal body or in any legal action, settlement or dispute in the state of Ohio.

However, it is this committee's responsibility to interpret Arizona court rule and other relevant authority. In Arizona, as discussed above, under the conditions set forth in ER 5.5, as applied with other relevant court rules, representation before a securities arbitration panel is permitted on a temporary, case by case basis.

It is noted that at the time the Florida and Ohio opinions were rendered neither state's rules included the equivalent of ER 5.5 or the exemption to the prohibition on the practice of law found in Rule 31 (d)(26). The Florida Supreme Court amended its Rules of Professional Conduct, effective January 1, 2006 to include the substantial equivalent of E.R. 5.5 (c).³

2. If the answer to the above question is "Yes", may the attorney remedy the violation by becoming admitted pro hac vice in a state or federal court even though the dispute resolution service is not affiliated with the State of Arizona or the U.S. District Court for the District of Arizona? The answer to the above question is "No". Therefore, this question is moot.

³ Florida Bar Rule 4-5.5 Unlicensed Practice of Law; Multijurisdictional Practice of Law