



Report of the

**Out of State Lawyers in Arbitration
Task Force**

August 13, 2010

Introduction

The Out of State Lawyers in Arbitration (OOSLA) Task Force was created on January 6, 2010 by OSB President Kathleen Evans in response to a 2009 House of Delegates Resolution which directed the Board to Governors (BOG) to:

“...study and implement a program whereby out-of-state attorneys appearing in Oregon in an arbitration...register with the Oregon State Bar prior to any hearing..., provide a certificate of good standing from the [jurisdiction] in which the attorney is admitted to practice and certificate of insurance [and] that the registration program collect a reasonable fee from out-of-state attorneys applying to appear in arbitration in Oregon.”

The Task Force was chaired by Richard G. Spier (Portland). The other members of the Task Force were Robert S. Banks, Jr. (Portland); Jeffrey M. Batchelor (Portland); Hon. Frank L. Bearden (Portland); James M. Brown (Portland); Hon. Mary J. Deits (Portland); M. Christie Helmer (Portland); David A. Hilgemann (Salem); Michelle Vlach-Ing (Salem); Leslie S. Johnson (Portland); James L. Knoll (Portland); Michael Moffitt (Eugene); Katherine H. O’Neil (Portland); James R. Uerlings (Klamath Falls); O. Meredith Wilson, Jr. (Portland); and Barbara Woodford (Portland). Christopher Kent (Portland) was the Board of Governors liaison. OSB General Counsel Sylvia E. Stevens served as reporter. The OOSLA Task Force met on February 17, March 13, May 26, and June 24, 2010.

After thoroughly and carefully analyzing the myriad issues raised by the HOD resolution, a majority of the Task Force (9 members) recommends against establishing a registration program for OOSLs participating in arbitrations in Oregon. A minority of the Task Force (6 members) recommends that new language be added to Oregon Rule of Professional Conduct 5.5 requiring (1) certification by OOSLs participating in pending or potential arbitrations to be held in Oregon that they are in good standing in their home jurisdictions and (2) evidence that they possess malpractice insurance equivalent to that required of Oregon attorneys or that they have informed their client that they do not possess such insurance.

Task Force Analysis and Findings

The Task Force began its work by reviewing the HOD resolution which, according to the proponent, was aimed at addressing the following concerns:

- clarifying whether representation of a client in arbitration constitutes the practice of law in Oregon;
- ensuring that OOSLs are subject to discipline in Oregon;
- filling any gaps in existing regulation, including what is meant by “temporary practice” in RPC 5.5; and
- gathering information about the frequency of OOSL participation in Oregon arbitrations

There was agreement among Task Force members, as an initial proposition, that a lawyer representing a client in an arbitration proceeding is engaged in the practice of law, no different than representing a client in court-based litigation.¹ The Task Force then turned to a review of Oregon RPCs 5.5 and 8.5. The Task Force acknowledged that RPC 5.5(c)² clearly contemplates the provision of legal services by OOSLs in connection with “pending or potential arbitration” proceedings without any kind of registration. The Task Force read RPC 8.5³ to unequivocally subject OOSLs who provide or offer to provide legal services in Oregon to

¹ The Task Force recognized that certain arbitration forums allow representation by nonlawyers, and that such practice is outside the Task Force’s purview.

² Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice) provides in pertinent part:

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(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 alternate 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;

(5) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

³ Rule 8.5 (Disciplinary Authority; Choice of Law) provides in pertinent part:

the disciplinary authority of the Oregon State Bar, although there was some question about the efficacy of such authority. Finally, the Task Force reviewed ORS 36.670, which expressly allows OOSLs to appear in arbitration proceedings in Oregon. There was some discussion about whether the statute prohibited the imposition of any regulations or requirements, but it was ultimately concluded that modest requirements wouldn't impinge with the statutory mandate.

To ensure it considered as wide a range of views as possible, the Task Force directed the following inquiry to arbitration organizations:

1. Have your administrators, arbitrators or participants identified any problems or concerns with the performance or conduct of out-of-state lawyers as advocates in Oregon arbitration proceedings?
2. Have there been any concerns or allegations of misconduct or incompetence?
3. Has your organization identified any significant difference in the outcome of proceedings when out-of-state lawyers are involved?
4. If out-of-state lawyers were required to register with the Oregon State Bar in order to appear in an Oregon arbitration, would that have any impact on the manner in which your organization handles the proceedings?

Responses were received from the American Arbitration Association, US Arbitration & Mediation, and the Arbitration Service of Oregon. None had experienced any problems with OOSLs and they were unanimous in opining that a registration requirement would create unnecessary barriers to client's ability to be represented by the lawyer of their choosing. The American Arbitration Association reported that there are only a handful of states that require OOSLs to register in order to appear in an arbitration and that lawyers and parties tend to avoid those jurisdictions, especially when insurance is a requirement.

A similar inquiry was sent to members of the ADR, Litigation, Business, Insurance and Consumer Law Sections of the OSB:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

1. Have you identified any problems or concerns with the performance or conduct of out-of-state lawyers as advocates in Oregon arbitration proceedings?
2. Have you identified any significant difference in the outcome of proceedings when out-of-state lawyers are involved?
3. Do you think it would be a good idea for the bar to require out-of-state lawyers appearing in Oregon arbitrations to register with the bar?

Nineteen lawyers responded. Of those, 10 were strongly opposed to any requirement for registration or certification of OOSLs; 4 were in favor and 5 were ambiguous. The principal arguments in opposition were that registration would create barriers to clients' free choice of counsel and risk the imposition of reciprocal limits imposed against Oregon lawyers. Some respondents also questioned the authority or propriety of the OSB regulating private dispute resolution proceedings. Those in favor cited the similarity of arbitrations to court proceedings and analogized a registration or certification obligation to the existing requirement for *pro hac vice* admission to appear in an Oregon court proceeding.

Synthesizing the many views expressed as well as their own experience and opinions, the Task Force identified the following factors as important to a final decision:

- There is no evidence, anecdotal or otherwise, to suggest that OOSL practice in Oregon arbitrations is currently a problem;
- Arbitrations are often complex and significant, comparable to court cases, and there is a similar need for protection of affected clients;
- Clients are typically unaware of the jurisdictional limits of a lawyer's practice and the corresponding differences in what recourse is available in the event of a fee dispute, malpractice claim or complaint of disciplinary misconduct;
- The guiding principle for practicing law in Oregon, including through *pro hac vice* or reciprocity admission, is "thou shalt be insured;"
- Registration would be a minor inconvenience and not anti-competitive;
- No registration program will assure that clients have full recourse against incompetent lawyers even if they have malpractice coverage;

- Compliance with any registration rule must be the obligation of lawyers, with no duty to monitor or enforce imposed on or expected of arbitrators; and
- Registration should not erect unnecessary or overly burdensome barriers to an out-of-state client's choice of counsel.

Conclusions and Recommendation

After considering all the information received from within and outside the group, a majority of the Task Force concluded that the bar should not impose a certification or registration program on OOSLs in Oregon arbitrations. They found no evidence or other basis to indicate that a problem existed that would be corrected by a certification or registration; moreover, they had some concern that erecting such a barrier might have unfortunate consequences for Oregon lawyers who handle arbitrations in other jurisdictions.

A minority of Task Force members disagreed, concluding that protection of clients justifies the imposition of a modest certification requirement focusing on malpractice coverage. They are concerned that widespread and ever-increasing Internet advertising by OOSLs coupled with the growing use of arbitration to resolve disputes in a wider variety of practice areas will mean more OOSL practice in Oregon. A certification or registration program will assist the bar in monitoring the magnitude of temporary practice and ensuring appropriate action to protect clients.

While the majority of the Task Force recommends against any kind of certification for OOSLs in Oregon arbitrations, they recognize that the HOD resolution appears to require the BOG to "implement" such a program. Accordingly, the Task Force offers a proposed amendment to RPC 5.5 for the BOG's consideration if it determines implementation of a certification program is required. The proposal is a compromise between the desire of the minority to require malpractice insurance of all OOSLs in Oregon arbitrations. Task Force members recognize that lawyers in other jurisdiction are not required to have such insurance, and that mandating coverage would inappropriately intrude on an out-of-state client's ability to be represented by a lawyer of their choosing. Accordingly, the Task Force agreed that the rule should require *either* proof of malpractice coverage equivalent to that required of Oregon lawyers *or* that the client has been notified that the lawyer does not have the coverage required of Oregon lawyers. It was also agreed that in-house counsel (including government lawyers) should be exempt from the certification requirement. A question was raised whether to exempt collective bargaining arbitrations, but after discussion, the group concluded that no special treatment in that area is needed.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice

(a) 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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(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:

(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 alternate 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;

(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; or

(5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide

legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in his jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

(1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and

(2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer

(i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or

(ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.

The Task Force recognizes that certification, if required, will impose administrative burdens on the Oregon State Bar and on OOSLs and their clients. The costs to the bar can be alleviated by the fee, and any burden on the lawyers and clients is outweighed by the protection it will afford to clients of OOSLs, commensurate with those available to clients of Oregon lawyers.

Respectfully submitted,

OUT-OF-STATE LAWYERS IN ARBITRATION TASK FORCE