

Out-of-State Attorneys Participating in Arbitrations in California: Duties of the Attorneys, Co-Counsel, Opposing Counsel, and Arbitrators

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In short, out-of-state attorneys may represent parties in California arbitration proceedings provided 1) a certificate showing where the attorney is admitted to practice (as well as other specified facts) is filed and served on the arbitrator(s), other parties and counsel, and the State Bar of California; and 2) the appearance is approved by the arbitrator(s). [Code Civ. Proc. § 1282.4(b)-(e); Cal. Rules of Court, rule 9.43.] In addition to complying with Code of Civil Procedure section 1282.4 and California Rules of Court, rule 9.43, out-of-state attorneys also must follow the rules and procedures of the California State Bar's Out-of-State Attorney Arbitration Counsel (OSAAC) program. [See Knight, *et al.*, *Cal. Prac. Guide Alternative Dispute Resolution* (The Rutter Group 2020) ¶ 5:384.7c.]

An attorney who fails to comply with the requirements of Code of Civil Procedure section 1282.4, California Rules of Court, rule 9.43, or the OSAAC program, who submits false information in connection therewith, or who otherwise does not comply with the standards of professional conduct required by the State Bar during the course of the arbitration will be subject to disciplinary action by the State Bar.

Attorneys representing parties in California arbitrations when they are not licensed to practice in California or have not obtained the out-of-state attorney arbitration counsel certificate are also guilty of a misdemeanor punishable by up to one year in jail or by a fine of up to one thousand dollars (\$1,000), or both. [Bus. & Prof. Code § 6126(a).]

However, it is not only the out-of-state attorney who needs to be aware of the requirements of (and compliance with) Code of Civil Procedure section 1282.4, California Rules of Court, rule 9.43, and the OSAAC program. What about the out-of-state attorney's California-licensed co-counsel, opposing counsel, and even the arbitrator?

Pursuant to California Rules of Professional Conduct, rule 5.5(a)(2), a lawyer admitted to practice law in California shall not knowingly assist a person in the unauthorized practice of law. ("Knowingly" requires actual knowledge of the fact in question, which may be inferred from the circumstances. [Cal. Rules Prof. Conduct, rule 1.0.1(f).]) (This rule is similar to the previous rule 1-300(A), under which a member could not aid any person or entity in the unauthorized practice of law.) Further, pursuant to California Rules of Professional Conduct, rule 8.4(a), it is professional misconduct for a lawyer to violate these rules or the State Bar Act, knowingly assist, solicit, or induce another to do so, or do so through the acts of another.

If other counsel and the arbitrator are aware that an out-of-state attorney has not complied with the requirements of Code of Civil Procedure section 1282.4, California Rules of Court, rule 9.43, and the OSAAC program, and nevertheless continue to participate in the arbitration proceeding

and treat that attorney as legitimate counsel, are they liable for “assisting” that attorney in the unauthorized practice of law?

Opposing Counsel

A recent case from the Central District of California has held that a party does not assist in the unauthorized practice of law, in violation of the California Rules of Professional Conduct, simply by participating in an arbitration with one who is arguably violating the rules of professional conduct of the state in which the arbitration is occurring. [*Mitchell v. Corelogic, Inc.* (C.D. Cal. 2019) 424 F.Supp.3d 815, 820.]

In *Mitchell*, the defendants refused to participate in pending arbitrations based on the fact that the plaintiffs’ counsel – who were licensed in California and Minnesota – were practicing law without authorization in other states where arbitrations were filed. Defendants argued they could not participate in the arbitrations or they would be facilitating and enabling the unauthorized practice of law, specifically violating California Rules of Professional Conduct, rules 5.5(a)(2) and 8.4(a). The court rejected the defendants’ argument, holding: “Simply participating in an arbitration with opposing counsel who may arguably be engaged in the unauthorized practice of law does not violate Rule 5.5(a)(2) or 8.4(a).” The Court stated that it was reasonable for defendants to “raise the issue” of a potential violation of California rules but that, once the issue was raised, it was unreasonable to discontinue participation in the arbitration. [*Mitchell v. Corelogic, Inc.* (C.D. Cal. 2019) 424 F.Supp.3d 815, 820-821.]

However, unlike opposing counsel, who has no real power to aid or assist an out-of-state attorney in practicing law in California, co-counsel and arbitrators arguably do have such power.

Co-Counsel

Code of Civil Procedure section 1282.4(c)(11) requires the out-of-state attorney to retain California-licensed co-counsel in the arbitration. (Pursuant to section 1282.4(c)(11), the out-of-state attorney arbitration counsel certificate must list the contact information of the active member of the California State Bar who is the attorney of record.) The California-licensed co-counsel would obviously be aware that the out-of-state attorney was not licensed to practice in California, so to the extent they were also aware the out-of-state attorney had not complied with the out-of-state attorney arbitration counsel certificate requirements, yet continued to allow that attorney to continue representing the client, they could possibly be vulnerable to discipline under California Rules of Professional Conduct, rules 5.5(a)(2) and 8.4(a). [See *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 637-638 (evidence in city’s action for preliminary injunction was sufficient to support finding that law firm and attorney aided and abetted lawyer’s unauthorized practice of law); *Bluestein v. State Bar of California* (1974) 13 Cal.3d 162, 175.]

Arbitrators

Arbitrators might also violate California Rules of Professional Conduct, rules 5.5(a)(2) and 8.4(a) if they knowingly permit an unlicensed attorney to represent a party in a California arbitration without completing the out-of-state attorney arbitration counsel certificate requirements. (This is assuming they are licensed California attorneys themselves, of course. Of note, however, the State

Bar takes the position that serving as a private arbitrator or other dispute resolution neutral constitutes the practice of law and thus requires an active law license, as opposed to having an inactive license. “This is based on the presumption that these activities call upon a member to give legal advice or counsel or examine the law or pass upon the legal effect on any act, document or law.” [See Tuft, *et al.*, *Cal. Prac. Guide Professional Responsibility* (The Rutter Group 2020) ¶ 1:213; Application for Transfer to Inactive Status, available on the State Bar website (www.calbar.ca.gov); State Bar Rule 2.30(B).]

Pursuant to Code of Civil Procedure section 1282.4(d), failure to timely file and serve the out-of-state attorney arbitration counsel certificate **shall** be grounds for the arbitrator to disapprove of the appearance and disqualify the attorney from serving as an attorney in the arbitration, so if an arbitrator is aware that an out-of-state attorney has not complied with the certificate requirements, and does not act under section 1282.4(d) to disqualify the unlicensed attorney from participating in the arbitration, thus allowing the attorney to practice law in the California arbitration proceedings, it is possible the arbitrator could be found to have violated California Rules of Professional Conduct, rules 5.5(a)(2) and 8.4(a).

It is not clear if arbitrators have an affirmative duty to ascertain whether all the attorneys appearing before them are licensed to practice law in California or have completed the out-of-state attorney arbitration counsel certificate requirements, but it would be wise for them to do so. Certainly if they become aware of such a violation by out-of-state counsel, they should take steps to immediately rectify that and disapprove and disqualify the attorney from serving as counsel in the arbitration.

For the most part, it seems to be up to the attorneys themselves (and perhaps the arbitrators) to be aware of the requirements for out-of-state attorneys to appear in California arbitrations, with the arbitration tribunals not seeming to take an active role in ensuring compliance. While the Financial Industry Regulatory Authority (FINRA) does provide notice that out-of-state attorneys need to comply with certain requirements to appear in California arbitrations,¹ the American Arbitration Association’s Commercial Arbitration Rules and Mediation Procedures merely provide that “Any party may participate without representation (pro se), or by counsel or any other representative of the party’s choosing, unless such choice is prohibited by applicable law,”² and the JAMS Comprehensive Arbitration Rules and Procedures provide no caveat at all, stating that “The Parties . . . may be represented by counsel or any other person of the Party’s choice.”³

But what if the arbitration is conducted and concluded without the out-of-state attorney completing the out-of-state attorney arbitration counsel certificate (and without the other attorneys or arbitrator seemingly realizing that fact)? Is there a risk the arbitration award could

¹See “Notice to Attorneys and Parties Represented by Out-of-State Attorneys,” <https://www.finra.org/arbitration-mediation/notice-attorneys-and-parties-represented-out-state-attorneys> (October 14, 2021) and FINRA Dispute Resolution Services Party’s Reference Guide (June 2021 Edition), <https://www.finra.org/sites/default/files/Partys-Reference-Guide.pdf>.

²American Arbitration Association’s Commercial Arbitration Rules and Mediation Procedures, rule R-26.

³JAMS Comprehensive Arbitration Rules and Procedures, rule 12.

be set aside? Would it matter if the award was in favor of or adverse to the party who was represented by the out-of-state attorney? These appear to be unsettled questions.

While not directly on point, in one California case, the court set aside a judgment adverse to a party when an unlicensed attorney represented that party in a court proceeding, noting that “Two public policies underlie the strictures against the unlicensed practice of law. First, attorneys must be licensed so that the public is protected from being advised and represented by persons who are not qualified to practice law. Second, the litigation of cases by unlicensed attorneys threatens the integrity of the judicial process itself.” [*Russell v. Dopp* (1995) 36 Cal.App.4th 765, 773 (internal citations omitted).] However, the court noted that these policy considerations do not apply when the unlicensed attorney actually prevails, and so similar relief would not be granted in such an instance. [*Russell v. Dopp* (1995) 36 Cal.App.4th 765, 778, citing *Gomes v. Roney* (1979) 88 Cal.App.3d 274, 275.]