

# CALIFORNIA SUPREME COURT INTERNATIONAL COMMERCIAL ARBITRATION WORKING GROUP

## REPORT AND RECOMMENDATIONS

Presented by:

Daniel M. Kolkey, chair

Fred Bennett

Cedric Chao

Maria Chedid

Professor Jeffrey Dasteel

Sally Harpole

Professor Robert Lutz

Steven L. Smith

Professor Abraham D. Sofaer

State Bar Liaison: Saul Bercovitch

Supreme Court Liaison: Carin Fujisaki

## INTRODUCTION

On February 10, 2017, California Chief Justice Tani G. Cantil-Sakauye formed the “Supreme Court International Commercial Arbitration Working Group” (the “Working Group”) and charged it with submitting a report addressing whether foreign and out-of-state attorneys should be authorized to represent parties in international commercial arbitrations held in California.

In conducting its work, the Working Group studied California law and regulations, considered the practices of other U.S. states and non-U.S. jurisdictions with respect to the right of foreign and out-of-state attorneys to represent parties in international commercial arbitrations, and kept in mind the interests of the Supreme Court and the State Bar in ensuring the competent practice of law within the State’s borders and in protecting the public.

The Working Group was comprised of a diverse group of lawyers and academics experienced in international commercial arbitration, and it received invaluable assistance and counsel from liaisons to the State Bar and the California Supreme Court.<sup>1</sup>

This Report analyzes:

- the current legal framework in California, which presently prohibits foreign and out-of-state attorneys from representing parties in international commercial arbitrations held in California (Section I.A.);
- the nature of international commercial arbitration in California, its differences from domestic arbitration, and the procedural and ethical law governing international commercial arbitration (Section I.B.);
- California’s competitive disadvantage in attracting international commercial arbitrations to be held in this state (Section I.C.);
- a comparison between California’s rules governing legal representation in international commercial arbitrations and the legal-representation rules of other U.S. and international jurisdictions (Section I.D.);
- three different proposals for authorizing foreign and out-of-state attorneys to represent parties in international commercial arbitrations in California (Section II); and
- a proposed course of action for implementing the Working Group’s recommendations through legislation or rulemaking (Section III).

The three principal options we considered for authorizing foreign and out-of-state attorneys to represent parties in international commercial arbitrations in California are as follows:

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<sup>1</sup> The Working Group was comprised of Daniel M. Kolkey (chair), Fred Bennett, Cedric Chao, Maria Chedid, Professor Jeffrey Dasteel, Sally Harpole, Professor Robert Lutz, Steven L. Smith, and Professor and former Legal Advisor to the U.S. State Department, Abraham D. Sofaer. Carin Fujisaki and Saul Bercovitch served as liaisons from the Supreme Court and State Bar, respectively.

The first option, and the Working Group’s unanimous recommendation, is based on the American Bar Association (“ABA”) Recommendation for a Model Rule of Temporary Practice by Foreign Lawyers. (See Appendix 1.) This proposal authorizes foreign and out-of-state attorneys to represent parties in international commercial arbitrations in California, without making a *pro hac vice* application, based on the parameters set forth in the ABA model rule; requires the foreign or out-of-state attorney to adhere to the California Rules of Professional Conduct and laws of this state governing attorney conduct; subjects the foreign and out-of-state attorneys to the disciplinary authority of this state; authorizes the State Bar to report complaints and evidence of disciplinary violations to the appropriate disciplinary body of the jurisdiction that licensed the attorney subject to disciplinary action; clarifies, by definition, that such “commercial” arbitrations do not extend to routine consumer, healthcare, or employment disputes; requires annual reports by the State Bar to the Supreme Court; and recognizes the Supreme Court’s authority over the regulation of the practice of law in California. Such a rule would put California on par with authorizations for foreign and out-of-state attorneys in New York, Florida, and the leading international venues for international commercial arbitration. It would also optimize California’s ability to capitalize on its west coast location to develop into an international commercial arbitration center and to expand legal and business opportunities within this state. The proposal implicitly recognizes that a more stringent regime for authorizing representation in international commercial arbitrations would continue the strong preference of parties and international arbitral tribunals to *not* select California as a venue for arbitrations, thereby subjecting California parties to the cost and inconvenience of litigating disputes in other states or foreign jurisdictions and to the procedural law of such non-California jurisdictions.

The second option is based on New York’s court rule authorizing foreign and out-of-state attorneys to represent parties in New York-based international commercial arbitrations. (See Appendix 2.) This proposal is not significantly different in concept from the ABA rule, except that in the Working Group’s view, the language in the New York rule is not as clear as the ABA model rule and might be viewed as somewhat more restrictive in light of the fact that not all of its provisions are applicable to California. (See Section II.C, pp. 32-33, *post*.)

The third option is a streamlined version of Code of Civil Procedure section 1282.4, which presently provides a procedure for attorneys licensed in other U.S. states to participate in domestic arbitrations in California. (See Appendix 3.) The Working Group recognizes that this option largely adheres to the procedures already specified for domestic arbitrations. Nonetheless, the Working Group considers it less attractive because the requirements to file an application and pay a fee (as exists for domestic arbitrations under this procedure) would continue to deter parties from selecting California as a venue for international commercial arbitration, ultimately resulting in less protection – and more cost and inconvenience – for California parties, which would be compelled to arbitrate their disputes outside of California. Further, unlike domestic arbitration where (1) the U.S. out-of-state attorneys are accustomed to applying for *pro hac vice* status, and (2) the arbitration agreements are often in the form of adhesion contracts that provide little choice for the arbitral site, international commercial arbitration agreements are usually freely negotiated by sophisticated parties who have a range of venues to choose from. The Working Group’s experience is that foreign attorneys in particular (and the foreign parties they advise) are reluctant to agree to arbitrate in a venue that requires applications and fees in order to be authorized to arbitrate a dispute that may have little to do with the arbitral site and that is governed primarily by internationally recognized procedural rules.

The Working Group's conclusions can be found on pages 39-41.

April 10, 2017

CALIFORNIA SUPREME COURT  
INTERNATIONAL COMMERCIAL  
ARBITRATION WORKING GROUP

  
Daniel M. Kolkey  
Chair

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## I. THE LEGAL AND FACTUAL BACKGROUND

### A. Foreign and Out-of-State Attorneys Are Presently Barred from Participating in International Commercial Arbitrations in California.

Despite California's economic prominence, sophisticated business climate, and highly developed legal infrastructure, foreign parties have historically been reluctant to agree to arbitrate in California. This section discusses the statutes, rules, and developments underpinning, in part, that reluctance.

#### 1. The *Birbrower* Decision and the Resulting Legislation.

In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119 (*Birbrower*), this Court held that a New York law firm had engaged in the unauthorized practice of law when it performed legal services in California on behalf of a California corporation regarding a dispute subject to a California-sited arbitration governed by California substantive law. As a result, the firm could not recover fees generated for legal services performed in California. In so holding, this Court ruled that the practice of law in California, as provided under Business and Professions Code section 6125, included the representation of parties in arbitrations in California: "We decline *Birbrower's* invitation to craft an arbitration exception to [Business and Professions Code section] 6125's prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications of admission to the State Bar and to decide what constitutes the practice of law. . . . In the face of the Legislature's silence, we will not create an arbitration exception under the facts presented." (*Id.* at pp. 133-34; accord, *id.* at p. 134, fn. 4.)

In response to the *Birbrower* decision, the California Legislature amended Code of Civil Procedure section 1282.4 in 1998 to provide a means for out-of-state attorneys licensed in other U.S. states to represent parties in arbitrations in California. Specifically, Code of Civil Procedure section 1282.4 (which has been amended multiple times since its 1998 passage) provides that out-of-state attorneys may represent clients in California arbitrations provided that they satisfy several requirements, including listing an active member of the California State Bar as the attorney of record, filing a certificate enumerating specified information with the arbitrator, the State Bar, all parties, and all parties' counsel, and obtaining the approval of the arbitrator(s) or arbitral forum to appear. The Supreme Court thereafter adopted rules to implement the procedures set forth in that statute. (See Cal. Rules of Court, rule 9.43.)

But neither Code of Civil Procedure section 1282.4 nor Rule 9.43 addresses the right of *foreign* attorneys to represent parties in arbitrations in California.

Moreover, Code of Civil Procedure section 1282.4 does not authorize U.S. out-of-state attorneys to represent parties if the arbitration is an international commercial arbitration. Specifically, California's International Commercial Arbitration and Conciliation Act expressly supersedes sections 1280 to 1284.2 of the Code of Civil Procedure (which includes section 1282.4) from its scope, and thus section 1282.4 does not apply to international arbitrations. (Code Civ. Proc., § 1297.17.) Accordingly, even U.S. licensed attorneys have no means of representing a party in an

international commercial arbitration in California unless they are themselves licensed to practice in California.

## **2. The Scope of Other California Rules Authorizing Non-California Attorneys to Practice Law in California.**

Existing legislation and rules permit foreign and out-of-state attorneys to practice law in this state only under a limited set of circumstances:

First, an individual does not need to be licensed to practice law in California (1) in an arbitration proceeding under a collective bargaining agreement,<sup>2</sup> (2) in a workers' compensation proceeding,<sup>3</sup> or (3) in international conciliation (a form of mediation).<sup>4</sup>

Second, a foreign attorney, who is licensed to practice law outside the U.S., may become a registered foreign legal consultant.<sup>5</sup> Under this program, the foreign lawyer is limited to providing legal advice on the law of the jurisdiction in which the foreign lawyer is licensed to practice.<sup>6</sup>

Third, attorneys licensed in other U.S. states may serve as (1) counsel *pro hac vice* in a pending case,<sup>7</sup> (2) military counsel, under certain circumstances, to represent persons in military service in pending cases brought under the Servicemembers Civil Relief Act, 50 U.S.C. Appendix § 501 et seq.,<sup>8</sup> (3) a registered legal services attorney while working with a qualifying nonprofit legal services provider,<sup>9</sup> (4) in-house counsel residing in California and working for a qualifying institution,<sup>10</sup> and (5) a litigating or non-litigating attorney temporarily practicing law in California for purposes of, for instance, a proceeding pending in another jurisdiction or a transaction, a material aspect of which is taking place in a non-California jurisdiction in which the attorney is licensed to provide legal service.<sup>11</sup>

California also permits certified law students to represent clients under the supervision of a member of the State Bar.<sup>12</sup>

Although none of these rules or laws directly addresses whether foreign and out-of-state attorneys may participate in international commercial arbitration in California, they illustrate the

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<sup>2</sup> Code Civ. Proc., § 1282.4, subd. (h).

<sup>3</sup> *Id.*, §§ 1282.4, subd. (i), 1282.4, subd. (j)(4).

<sup>4</sup> *Id.*, § 1297.351.

<sup>5</sup> Cal. Rules of Court, rule 9.44.

<sup>6</sup> *Id.*, rule 9.44(d).

<sup>7</sup> *Id.*, rule 9.40.

<sup>8</sup> *Id.*, rule 9.41.

<sup>9</sup> *Id.*, rule 9.45.

<sup>10</sup> *Id.*, rule 9.46.

<sup>11</sup> *Id.*, rules 9.47, 9.48.

<sup>12</sup> *Id.*, rule 9.42.



Legislature's and the Court's willingness to expand the scope of competent, multijurisdictional practice in certain circumstances when certain conditions are met, either by the attorney or by limiting the scope of the attorney's practice within California.

Attached as Appendix 4 is a compilation of California statutes and court rules that permit (i) non-attorneys to represent clients in specified proceedings in California, (ii) U.S. out-of-state attorneys to represent clients in certain proceedings in California, and (iii) the limited practice available to foreign lawyers in the state.

## **B. The Nature of International Commercial Arbitration.**

To better understand the relevance of authorizing and regulating the representation by foreign and out-of-state attorneys of parties in international commercial arbitrations, the Working Group next addressed the nature of international commercial arbitration and its differences from domestic arbitration.

### **1. The Differences Between Domestic Arbitration and International Commercial Arbitration.**

International commercial arbitration is a voluntary system for the private resolution of disputes. It is primarily used to resolve disputes arising from cross-border transactions in a manner that will permit enforcement of the resulting arbitral award in other jurisdictions. It is the latter consideration that is the foundation of international commercial arbitration because, as a result of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and a second treaty to which the United States is a party – the Inter-American Convention on International Arbitration of 1975 – it is easier to enforce an international arbitration award overseas than a U.S. judgment. (This is further discussed below.)

An essential feature of international commercial arbitration is the presence of the following elements: (1) an arbitration award made in one jurisdiction and enforceable in another jurisdiction; and (2) a dispute that has an international character, such as a dispute between citizens of different nations or a dispute that has an international subject matter – *e.g.*, it relates to property or a project located abroad.

In domestic disputes, parties can resolve the dispute in a single domestic court or in arbitration in the jurisdiction in which the dispute arises or is associated. Often, especially in consumer transactions and employment contracts, agreements to arbitrate these disputes are found in contracts of adhesion (although not necessarily unconscionable ones) whereby one party has little choice over the venue selected for the arbitration.

This is in stark contrast to disputes that are resolved in international commercial arbitration. A key reason parties to international commercial contracts elect arbitration is to provide a single *neutral* forum to resolve their commercial disputes. In the absence of international commercial arbitration, parties to cross-border transactions must rely on domestic courts with appropriate, albeit often limited, jurisdiction to resolve disputes. This often leads to multiple actions in competing jurisdictions, with parties racing to secure jurisdiction in the most friendly forum. International arbitration agreements allow parties to avoid these maneuverings by pre-selecting a neutral venue where neither party will have a home court advantage.

Thus, the fundamental idea behind international commercial arbitration is to provide a voluntary dispute resolution mechanism that the parties consider to be fair (even where the dispute is between citizens of a civil law jurisdiction and a common law jurisdiction) and that has sufficient hallmarks of neutrality so that the parties have confidence in both the process and the outcome. It is typical in party-agreed regimes for there to be an agreement to hold the proceedings in a location perceived to be neutral and supportive of international commercial arbitration. It is frequently the case that the venue selected as the place of arbitration has nothing to do with any of the parties to the arbitration, but rather has been chosen so that neither party can claim a home court advantage.

Furthermore, to achieve fairness, the parties who choose international commercial arbitration for their dispute resolution often negotiate over the governing substantive law and the governing procedure for the arbitration, as well as the location, so that each party gets some combination of benefits in the event of a dispute. Even where one of the parties' jurisdictions is chosen as the arbitral site, the parties' selection of internationally recognized procedural rules, the governing law, and the means for appointing the arbitrator(s) help avoid a home court advantage.

These agreements are usually negotiated by sophisticated parties as part of the contract memorializing the transaction out of which the dispute arises.

Another reason that parties forgo judicial resolution of their international commercial disputes and instead select international arbitration is that there is no generally applicable international treaty that requires enforcement of a domestic judgment in another jurisdiction. In the absence of an arbitration agreement, parties to cross-border commercial disputes are left to principles of comity to resolve competing domestic court jurisdictional rulings and judgments.<sup>13</sup> And where a domestic court issues a judgment, that judgment's enforceability depends upon the law of the jurisdiction in which enforcement of the judgment is sought. In contrast, for parties that agree to international commercial arbitration, a series of international treaties provide for the enforcement of covered international commercial arbitration awards. Under the New York Convention – the most broadly used treaty on international commercial arbitration – all of the more than 150 contracting states must enforce a covered arbitration award made in another contracting state unless the covered award fails to meet certain procedural safeguards.<sup>14</sup>

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<sup>13</sup> The Convention on Choice of Court Agreements (2005) is a treaty that requires contracting states to enforce agreements that vest exclusive jurisdiction in the courts of a contracting state. Other contracting states are bound to enforce the judgment of the contracting state with exclusive jurisdiction. This treaty goes a long way towards making domestic litigation a satisfactory means to finally resolve a dispute in a single forum. However, as of this date, the convention has entered into force in only 30 countries, and the vast majority of those did so only very recently as a result of the European Union having ratified the treaty. Notably, the U.S. has signed, but not ratified this treaty. (See Hague Convention, Choice of Court Section <<https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>> (as of Apr. 2, 2017).)

<sup>14</sup> Chapter 2 of the (U.S.) Federal Arbitration Act implements the New York Convention.

A further key feature of international commercial arbitration in the U.S. is that it must involve “commercial” disputes or relationships. Both the Federal Arbitration Act provisions regarding international commercial arbitrations<sup>15</sup> and the California International Commercial Arbitration and Conciliation Act<sup>16</sup> limit their coverage to *commercial* disputes. When the “commercial” dispute restriction is coupled with the “international” requirement, the result is that disputes subject to international arbitration are generally business disputes between sophisticated parties. (Further, in all the proposals set forth in section II, the Working Group has sought to clarify that routine consumer, healthcare, and employment disputes would be excluded from the scope of the “international commercial” arbitrations in which foreign and out-of-state attorneys would be authorized to represent parties.)

In investigating the types of disputes subject to international commercial arbitration, the Working Group surveyed three major arbitral provider institutions regarding the types of matters subject to international commercial arbitration seated in the United States: the International Centre for Dispute Resolution (ICDR) (which is the international arm of the American Arbitration Association), JAMS, and the International Chamber of Commerce (ICC). As noted in the responses received from these three institutions (attached hereto as Appendices 5-7), the vast majority of the international commercial arbitrations they administer involve business disputes. A limited number involve employment disputes, but in the experience of the members of the Working Group, these employment disputes largely involve trade secrets or the purported infringement of intellectual property rights. However, none of these institutions keeps track of international “consumer” disputes as distinguished from “business-to-business” disputes because, under the Federal Arbitration Act and California’s International Commercial Arbitration and Conciliation Act, the definition of “commercial” is very broad.<sup>17</sup> (As a result, as noted in the introduction and discussed later, the Working Group’s proposals expressly exclude routine consumer, healthcare, and employment disputes from the definition of “commercial” for purposes of the authorizations of foreign and out-of-state attorneys to appear in the arbitrations.)

The Working Group notes that it does not have information about the numbers and kinds of ad hoc international commercial arbitrations held in California, that is, arbitrations that are not administered by an organization like the ICC, ICDR or JAMS.

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<sup>15</sup> 9 U.S.C. § 202.

<sup>16</sup> Code Civ. Proc., §§ 1297.11, 1297.16.

<sup>17</sup> 9 U.S.C. § 202 (“An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention”); Code Civ. Proc., § 1297.16 (“An arbitration or conciliation agreement is commercial if it arises out of a relationship of a commercial nature including, but not limited to, any of the following: (a) A transaction for the supply or exchange of goods or services. (b) A distribution agreement. (c) A commercial representation or agency. (d) An exploitation agreement or concession. (e) A joint venture or other, related form of industrial or business cooperation. (f) The carriage of goods or passengers by air, sea, rail, or road. (g) Construction. (h) Insurance. (i) Licensing. (j) Factoring. (k) Leasing. (l) Consulting. (m) Engineering. (n) Financing. (o) Banking. (p) The transfer of data or technology. (q) Intellectual or industrial property, including trademarks, patents, copyrights and software programs. (r) Professional services.”)

## **2. The Procedural Law Applicable to International Commercial Arbitration.**

International commercial arbitration proceedings are governed by (1) the procedural law at the seat (the location) of the arbitration, (2) the arbitration rules promulgated by an international arbitral institution or organization administering the arbitration, which are incorporated into the parties' arbitration agreement, and (3) when adopted by the parties or the arbitral tribunal, so-called "soft law," which is comprised of protocols and guidelines developed by international arbitral institutions and organizations, such as the International Bar Association.

These procedural laws, rules, and guidelines are separate from the substantive law applicable to the parties' dispute. For example, the parties' commercial agreement may designate the law of France to govern the substance of their dispute, but may fix the seat of their arbitration in California. In that event, the procedural law of the U.S. and of California (to the extent not preempted by the parties or the Federal Arbitration Act) would apply to the conduct of the proceedings although French law would govern the substance of the dispute.

The state procedural law that governs international commercial arbitrations in California is set forth in the International Commercial Arbitration and Conciliation Act, commencing at Code of Civil Procedure section 1297.11, and is based on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (a model law that sets forth widely accepted principles for arbitrating international commercial disputes). Although its enactment, which pre-dated *Birbrower*, was meant to provide a friendly, internationally accepted regime for arbitrating disputes in California, other barriers – like the lack of authorization of foreign attorneys to represent their clients in such arbitrations in California – have limited California's attractiveness as an international arbitral venue.

Under the Federal Arbitration Act and California's International Commercial Arbitration and Conciliation Act, the parties are free to incorporate their own rules of procedure into their arbitration agreements so long as they do not conflict with mandatory aspects of federal or state law.

Finally, it is important to understand that the procedural law of the place of arbitration also includes substantive elements, which are designed to support international arbitration as a means of dispute resolution. The Federal Arbitration Act provides procedures for enforcing international commercial arbitration agreements, and both the Federal Arbitration Act and California laws arbitration law provides for grounds for confirming and challenging arbitration awards rendered in California.

## **3. Ethical Obligations of Attorneys in International Commercial Arbitrations.**

Traditionally, counsel in international arbitrations, wherever they are sited, remain subject to the ethical obligations imposed by their home jurisdictions. Counsel's adherence to these applicable ethical obligations is normally subject to the enforcement powers of the relevant authority in the foreign (or out-of-state) counsel's home jurisdiction, as well as to the oversight of the arbitral tribunal. The arbitral tribunal's role in this regard has often been based on the inherent power of arbitrators to control the proceedings before them and ensure that they are conducted in a fair and even-handed manner.

For the arbitrator to have the power to discipline counsel for ethical violations, that power must appear in the scope of the arbitrator’s authority in the arbitration agreement.<sup>18</sup> Recently, there has been a move towards establishing fundamental ethical obligations of counsel, regardless of the jurisdiction where that counsel is licensed, and to expressly provide arbitrators with the power to enforce those obligations. For example, the London Court of International Arbitration (LCIA), a leading international arbitral provider, has required representatives to adhere to specific ethical guidelines when participating in an arbitration administered by the LCIA.<sup>19</sup> Indeed, LCIA Rule 18.6 expressly grants arbitrators the power to remedy ethical violations:

In the event of a complaint by one party against another party’s legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).<sup>20</sup>

In 2013, the International Bar Association issued “Guidelines on Party Representation in International Arbitration.” Under the IBA Guidelines, if adopted by the parties, the arbitrators have the authority to discipline counsel for ethical violations up to and including disqualification.<sup>21</sup> In its communication to our Working Group, the ICDR (the international arm of the American Arbitration Association) indicated that the ICDR currently is working on a set of standards of conduct for representatives in arbitrations conducted under its rules.<sup>22</sup>

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<sup>18</sup> *InterChem Asia 2000 PTE. Ltd. v. Oceana Petrochem. AG* (S.D.N.Y. 2005) 373 F. Supp. 2d 340 (“[F]inding that the Arbitrator had inherent authority to sanction [an attorney] would directly contradict the principle that an arbitrator’s authority is circumscribed by the agreement of the parties”). Cf. *Certain Underwriters at Lloyd’s London v. Argonaut Ins.* (N.D. Cal. 2003) 264 F. Supp. 2d 926, 943 (arbitrator does not have inherent authority under Federal Arbitration Act to impose a sanction analogous to civil contempt). But see *Seagate Technology, LLC v. Western Digital Corporation* (Minn. Sup. Ct. 2014) 854 N.W.2d 750 (finding arbitrators had authority to award punitive sanctions for misconduct because arbitration agreement was broad and incorporated arbitration rules granting arbitrators the authority to award any relief that might be available in court).

<sup>19</sup> LCIA Rule 18.5 <[http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Article 18](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2018)> (as of Apr. 2, 2017); LCIA Annex: LCIA General Guidelines for the Parties’ Legal Representatives <[http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Annex](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Annex)> (as of Apr. 2, 2017).

<sup>20</sup> See *ibid.*

<sup>21</sup> See IBA Guidelines on Party Representation in International Arbitration 26 and 27 and Commentary thereto <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#Practice Rules and Guidelines](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice_Rules_and_Guidelines)> (as of Apr. 2, 2017).

<sup>22</sup> See Appendix 5.

Arbitral tribunals can also sanction unethical conduct in more indirect ways. For example, documents obtained in an ethically questionable manner can be excluded by the tribunal or otherwise disregarded in its determination of the case. In addition, unethical behavior that delays the proceedings and increases its cost can be remedied through an award to the aggrieved party of the costs incurred from the behavior.

In addition to the potential power of arbitrators to police counsel misconduct, there are independent judicial controls. In *Bidermann Industries Licensing, Inc. v. Avmar, N.V.* (1991) 570 N.Y.S.2d 33, the appellate division of the New York Supreme Court affirmed the trial court's stay of arbitration on the issue of whether Bidermann's attorneys should be disqualified from representing it in the arbitration. The disqualification motion was based on the premise that Bidermann's attorneys would be required to appear as substantive witnesses in the matter, a violation of New York State ethical rules. The court held that "matters of attorney discipline are beyond the jurisdiction of arbitrators [citation omitted]. Issues of attorney disqualification similarly involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client's choosing [citation omitted], and cannot be left to the determination of arbitrators selected by the parties . . . ." <sup>23</sup> This decision suggests that in circumstances raising clear ethical issues, parties could seek redress from the courts as long as they did not waive the issue by failing to timely raise it.

Moreover, under the Federal Arbitration Act, the federal courts have the power to refuse to confirm or to set aside arbitral awards. Under section 207 of the Federal Arbitration Act (applicable to international commercial arbitrations), a court may refuse to confirm an arbitral award on any grounds available under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (9 U.S.C. § 207.) Under that Convention, a court may refuse to enforce an award if a party "was unable to present his case."<sup>24</sup> Moreover, if the arbitration was seated in the United States, the Federal Arbitration Act permits a court to set aside or refuse confirmation of the award under sections 10 and 11, including "where the award was procured by corruption, fraud, or undue means."<sup>25</sup> An attorney also may be subject to malpractice claims for misconduct in arbitration.<sup>26</sup>

Accordingly, there are a number of means for parties in international arbitrations to police unethical prejudicial conduct, whether through rulings by the arbitrators, the courts, or the home jurisdiction of the attorney engaged in the unethical conduct. As will be seen, in recognition of this Court's charge that the Working Group bear in mind the Court's interest in ensuring the competent practice of law within California's borders, the Working Group's proposals also include an

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<sup>23</sup> See also *Munich Reinsurance America, Inc. v. ACE Property Casualty Insurance Co.* (S.D.N.Y. 2007) 500 F.Supp.2d 272, 275 ("New York and Pennsylvania courts have determined with some degree of certainty that 'possible attorney disqualification—is not capable of settlement by arbitration'").

<sup>24</sup> NY Convention, Article V, Section 1(b).

<sup>25</sup> 9 U.S.C. § 10(a)(1); see also Code Civ. Proc. § 1286.2 (court may vacate an award "where the award was procured by corruption, fraud, or undue means").

<sup>26</sup> See, e.g., *Rubens v. Mason* (2d Cir. 2008) 527 F.3d 252.

additional safeguard that subjects participating foreign or out-of-state attorneys to California's laws governing attorney conduct.

### **C. California's Competitive Position in the United States with respect to International Commercial Arbitrations.**

As of June 2016, California was the sixth largest economy in the world, with a nominal GDP totaling over \$2.4 trillion.<sup>27</sup> International commerce (including exports, imports, and investments) constitutes roughly one quarter of our state's economy, according to some estimates.<sup>28</sup>

However, California lags behind other jurisdictions – both domestic and international – as a venue for international commercial arbitration.

The selection of a venue in international commercial arbitrations is highly competitive; London, Paris, Geneva, Singapore, and Hong Kong, among other leading jurisdictions for international arbitration, permit a party to an international arbitral proceeding to be represented by any lawyer of its choice.

In 2015, there were 777 arbitrations administered in the United States by the International Centre for Dispute Resolution (ICDR), JAMS, and the International Chamber of Commerce (ICC), and 124 of them were administered in California. But in 2015, New York had more than 200% of that number – 338 – while Florida had 50% more than California at 182. Texas had 60.

Significantly, New York, Florida, and other U.S. jurisdictions have taken steps to welcome foreign attorney representation of parties in international commercial arbitrations. For example, New York (the most popular jurisdiction for international arbitrations in the U.S.) and Florida (which is working to establish itself as the leading venue for Latin American-related arbitrations) both have so-called Fly-In Fly-Out (FIFO) rules that expressly allow foreign attorneys to appear in arbitrations taking place in those states without any filing or fee requirements<sup>29</sup>:

- New York: Section 523 of the Rules of the New York Court of Appeals provides for the “temporary practice” of a foreign or out-of-state attorney if the attorney is “admitted or authorized to practice law” in a different state or foreign jurisdiction and “in good standing in every jurisdiction where admitted or authorized to practice.” (22-CRR-NY § 523.2.) The scope of this “temporary practice” specifically includes “a pending or potential arbitration” if the services “are not services for which the forum requires *pro hac vice* admission,” or “are reasonably related to the lawyer’s practice in a jurisdiction where the lawyer is admitted.” (*Ibid.*) Moreover, the foreign attorney does not need to complete any forms

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<sup>27</sup> Wikipedia, Comparison between U.S. states and countries by GDP (nominal) <[http://en.wikipedia.org/wiki/comparison\\_between\\_U.S.\\_states\\_and\\_countries\\_by\\_GDP\\_\(nominal\)](http://en.wikipedia.org/wiki/comparison_between_U.S._states_and_countries_by_GDP_(nominal))> (as of Apr. 2, 2017).

<sup>28</sup> See Cal. Chamber, International Advocacy <<http://advocacy.calchamber.com/international>> (as of Apr. 2, 2017).

<sup>29</sup> Attached as Appendices 8 and 9 are the FIFO rules in New York and Florida that permit foreign attorneys to represent clients in arbitration in those states. (See New York Rules of the Court of Appeals 523.2 and Florida Bar Rule 4-5.5(c).) Attached as Appendix 10 is Texas Bar Rule XIX, which permits foreign attorneys to represent clients in court on a *pro hac vice* basis. Although we have been told anecdotally that foreign and out-of-state attorneys routinely represent clients in international commercial arbitrations seated in Texas, there is a lack of clarity as to the means by which they may do so.

or register in any way, although the attorney may not “establish an office or other systematic and continuous presence” in New York unless authorized by law and may not “hold out to the public or otherwise represent that the lawyer is admitted to practice law” in New York. (*Id.*, § 523.1.) Furthermore, the attorney practicing temporarily in New York is subject to New York’s Rules of Professional Conduct and its disciplinary authority. (*Id.*, § 523.3.)

- **Florida:** Rule 1-3.11 of the Rules Regulating the Florida Bar provides that, with some limited exceptions, an attorney who is authorized to practice law in a different United States jurisdiction or a foreign jurisdiction “may appear in an arbitration proceeding” in Florida on behalf of a client “who resides in or has an office in the lawyer’s home state” or where the appearance “arises out of or is reasonably related to the lawyer’s practice in a jurisdiction” where the lawyer is admitted or authorized to practice.<sup>30</sup> In such cases, Florida’s Rules of Professional Conduct, Rule 4-5.5, provides that the foreign attorney “does not engage in the unlicensed practice of law in Florida when on a temporary basis the lawyer performs services in Florida” that are “reasonably related to a pending or potential arbitration” that is “held or to be held in Florida,” so long as one or both of the conditions of Rule 1-3.11 are met. (Florida Rules of Professional Conduct, rule 4-5.5(d)(3).) Lawyers who appear in such arbitral proceedings are subject to the Rules Regulating the Florida Bar “while engaged in the permitted representation.” (Rules Regulating the Florida Bar, rule 1-3.11(c).) The comment to the rule defines what constitutes “an international arbitration.”

Statistics from the International Chamber of Commerce showing the number of international arbitrations commenced in leading venues from 2013-2015 illustrate California’s weak position, particularly given its size, in this competitive landscape.<sup>31</sup>

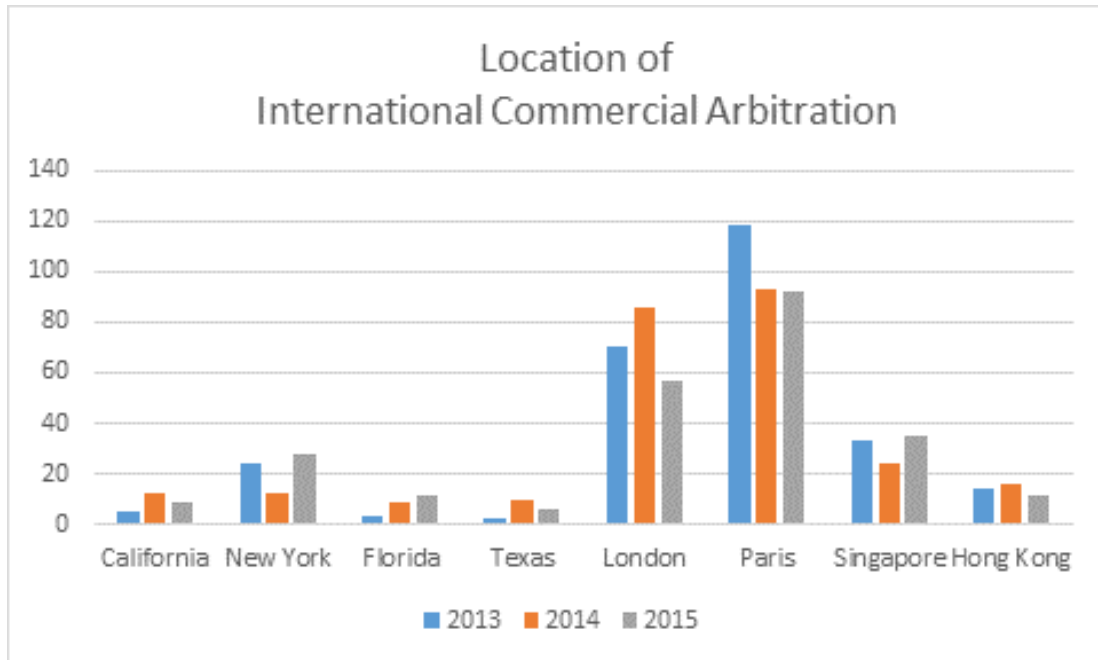
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<sup>30</sup> The rule also contains a requirement that in any arbitration “except international arbitrations,” the non-Florida attorney file a “verified statement for leave to appear” and pay a \$250 filing fee to the Florida Bar. (Rules Regulating the Florida Bar, rule 1-3.11(e).)

<sup>31</sup> Statistical information for 2016 is not yet available.



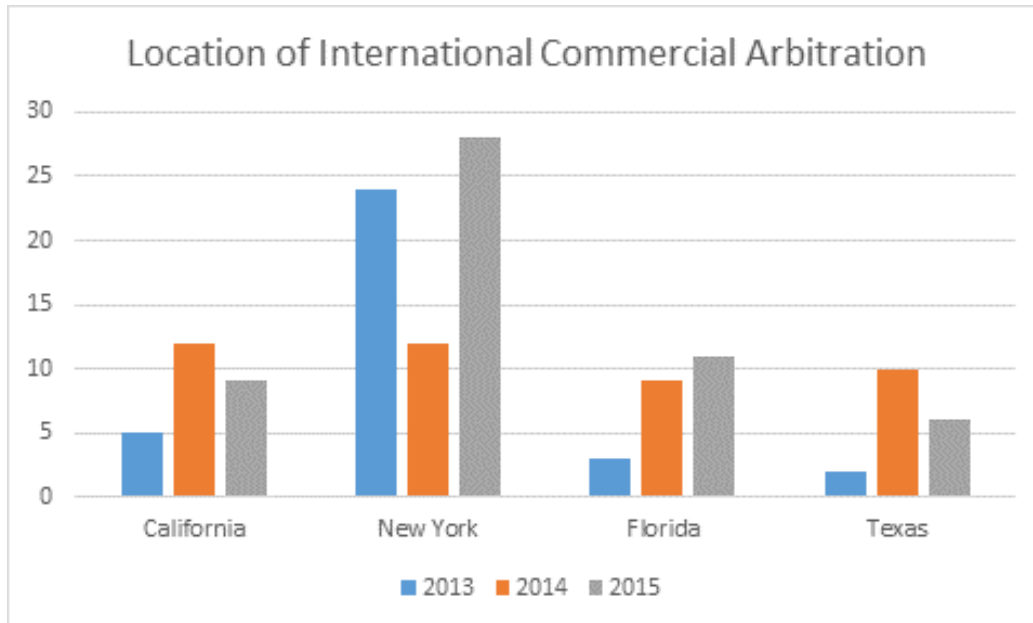
Figure 1: California vs. Non-California Jurisdictions for ICC Arbitrations



As illustrated by Figure 1 above, foreign jurisdictions thoroughly outperform U.S. jurisdictions on the whole, with London and Paris each regularly hosting more ICC international commercial arbitrations annually than California, New York, Florida, and Texas combined. These foreign cities have developed a reputation as friendly to international commercial arbitration as well as an extensive infrastructure to host international commercial arbitrations involving parties from all over the world, not just their home countries. Indeed, the London Court of International Arbitration notes that 80% of the parties in its pending cases are *not* English.<sup>32</sup>

<sup>32</sup> See LCIA, Introduction <<http://www.lcia.org/LCIA/introduction.aspx>> (as of Apr. 2, 2017).

Figure 2: California vs. Other U.S. Jurisdictions for ICC Arbitrations



As shown in Figure 2, for ICC arbitrations, even within the U.S., California fares poorly compared to New York, and even compares unfavorably with Florida, which does not host the same sort of international business centers as California does in Los Angeles, San Francisco, and the Silicon Valley. New York and Florida in particular hold themselves out as friendly to international commercial arbitration and have taken steps to declare themselves “open for business” to the international commercial arbitration community.<sup>33</sup>

Accordingly, notwithstanding California’s robust economy, legal infrastructure, and size, the inability of foreign and even out-of-state U.S. companies to be represented by their existing counsel has given California a reputation as hostile to international commercial arbitration. Since attorneys normally negotiate these commercial agreements, this results in those attorneys, in consultation with their clients, declining to choose California as a venue for international dispute resolution. Moreover, even in those cases where California-based companies might otherwise have some leverage to negotiate California as the venue for their international commercial arbitration, the inability of foreign and out-of-state companies to be represented by their existing counsel gives them an easy ground for refusing to designate California as the place of arbitration, to the disadvantage of the California company and its California counsel, who would prefer the convenience and benefits of a California venue. Indeed, members of the Working Group reported that the ICC secretariat will not seat an international arbitration in California, if given the choice, because of California’s prohibition against foreign attorneys representing parties in international commercial arbitrations there.

<sup>33</sup> See, e.g., New York State Bar Association <[https://www.nysba.org/Sections/Dispute\\_Resolution/Dispute\\_Resolution\\_PDFs/Choose\\_New\\_York\\_Law\\_For\\_International\\_Commercial\\_Transactions.html](https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Choose_New_York_Law_For_International_Commercial_Transactions.html)> (as of Apr. 2, 2017); Jose M. Ferrer, *A New Center for International Arbitration* <<https://www.law360.com/articles/524515/a-new-destination-for-international-arbitration>> (as of Apr. 2, 2017).

#### **D. A Comparison of the Right of Foreign Attorneys to Represent Parties in International Commercial Arbitrations in Various Jurisdictions.**

Foreign jurisdictions and other U.S. states take a number of approaches regarding the authorization of foreign counsel to represent parties in international commercial arbitrations held in their jurisdictions.

The International Bar Association has published a Country Guide surveying fifty-five different nations regarding arbitration.<sup>34</sup> Fifty-three of the surveyed countries authorize attorneys from foreign jurisdictions to represent clients in international arbitrations seated in their jurisdictions. These jurisdictions include England and Wales, Scotland, France, Germany, Hong Kong, India, Italy, and Mexico. Eight surveyed countries place some type of limited restrictions or conditions on foreign counsel's representation or limit the scope of the representation. For instance, Canada generally permits foreign attorneys to represent parties in international arbitration, but Quebec and Ontario set some light conditions on representation similar to those in New York State. Two jurisdictions (Chile and Egypt) prohibit or place severe restrictions on foreign counsel's participation in international arbitrations. Appendix 11 provides a summary of the results of this survey (excepting the U.S.).

The Working Group also surveyed U.S. jurisdictions to determine which states permit foreign counsel to represent parties in international arbitrations in their jurisdictions and under what conditions. Permission typically comes through either the adoption of the so-called FIFO rule or a *pro hac vice* mechanism. The FIFO rule is generally based on the 2002 ABA recommendation of a Model Rule for Temporary Practice by Foreign Lawyers.<sup>35</sup> FIFO activities are distinguished from *pro hac vice* appearances primarily in that FIFO activities do not involve appearances before courts in the host jurisdiction, and often do not require the attorney to make an application. Alternatively, a limited number of jurisdictions have determined by statute or court opinion that state licensing requirements do not extend to representation in certain arbitration activities.

Attached as Appendix 12 is a map prepared by Professor Laurel Terry of the Dickinson Law School at Penn State University, which sets out the jurisdictions in the United States that have rules governing the practice by foreign attorneys.

Attached as Appendix 13 is a summary chart of our review of the U.S. jurisdictions with FIFO, *pro hac vice* rules, or other means by which foreign attorneys may represent parties in arbitration. Among the U.S. jurisdictions that authorize foreign attorneys to represent parties in international arbitrations under a FIFO rule, *without the need to file anything with the state*, are Colorado, Delaware, the District of Columbia, Florida, Georgia, New Hampshire, New York, Pennsylvania, and Virginia. Three additional states permit foreign attorneys to represent parties in international commercial arbitrations *without any filings* pursuant to a means other than a rule: Connecticut (by statute) and Illinois and New Jersey (by court decision that such representation is not

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<sup>34</sup> International Bar Association, Country Guides <<http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64>> (as of Apr. 2, 2017).

<sup>35</sup> See Appendix 16. See also Appendix 15, the ABA's Model Rule of Professional Conduct, rule 5.5, on multi-jurisdictional practice.

the practice of law). As discussed below, Texas appears to permit foreign attorneys to represent parties in international arbitrations without any necessary filings as a matter of practice.

Oregon authorizes representation under a FIFO rule, but requires a filing to effectuate the right to represent a party in an international arbitration.

In total, 18 U.S. jurisdictions (19 if Texas is included) authorize foreign lawyers to represent parties in international arbitration in their jurisdictions. Of those 19 jurisdictions, 12 permit foreign lawyers to represent parties in international arbitrations under a FIFO rule, based on either a statute, court rule, or opinion. In practice, Texas also acts like a FIFO state (and is included as a FIFO state in the chart below). The remaining 5 states permit foreign lawyers to represent clients in international arbitration under a *pro hac vice* rule.

### Summary Chart

	Permit Representation by Foreign Attorneys in International Arbitrations (FIFO, <i>pro hac vice</i> or other)		Prohibit Representation by Foreign Attorneys in International Arbitrations
	No Filing Required	Filing Required	
Foreign Jurisdictions	53	0	2
U.S. States, plus the District of Columbia	13 <sup>36</sup>	5	1 (Current California law) 32 (States have not taken a definitive position)

We have included selected copies of the rules implemented in the FIFO and *pro hac vice* states as exemplars of how those jurisdictions provide for practice by foreign lawyers.<sup>37</sup>

<sup>36</sup> We have included Texas in the list of states that do not require a filing, although this is far from certain. (See discussion of Texas Rules in footnote 37 below.)

<sup>37</sup> See Appendix 8 (New York), Appendix 9 (Florida) and Appendix 10 (Texas). It is our understanding that out-of-state counsel and foreign attorneys represent parties in international arbitrations seated in Texas. However, the basis for such activity is not clear. Court Rule XIX – the out-of-state and foreign attorney *pro hac vice* rule – by its terms appears to apply only to court proceedings. But it is our understanding that practitioners may be relying on the view that representation of parties in arbitration is not covered by Texas Government Code Section 81.101’s definition of the unauthorized practice of law. That section provides: “the ‘practice of law’ means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.” It is not obvious to us how representation in arbitration is excluded from that

In the U.S., most of the FIFO jurisdictions do not require filings or fees. *Pro hac vice* jurisdictions typically require some form of application, and in many cases, a fee. Historically, and as noted in the Appendices, international arbitral jurisdictions have allowed freedom of representation without counsel having to submit applications or pay fees to the host jurisdiction to participate in an international commercial arbitration. This, in part, was the result of the international nature of the proceedings and their coverage under international treaties, such as the New York Convention and the Convention on the Settlement of Investment Disputes, which traditionally have been treated separately from domestic arbitral regimes.

This absence of filing requirements also resulted from the more traditional notion that representation in arbitration did not constitute the practice of law. For example, until recently, certain federal district courts in New York held that representation of a party in arbitration was not considered to be the practice of law.<sup>38</sup> But California's prominent *Birbrower* decision and recent changes to the ABA Model Rules of Professional Conduct, which now include arbitration tribunals within the definition of "tribunal,"<sup>39</sup> appear to have changed the traditional view so that states have begun to address representation in arbitration as the practice of law. Indeed, although not expressly addressing past federal decisions, the New York Court of Appeals has expressly adopted a rule permitting the temporary practice of law in New York for out-of-state and foreign lawyers in "a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires *pro hac vice* admission."<sup>40</sup>

As a result of this changed perspective regarding the practice of law, many of the jurisdictions that have adopted a version of the FIFO rule, and virtually all the jurisdictions that permit foreign attorneys to represent parties in arbitrations pursuant to a *pro hac vice* application, have made such representation subject to the rules of professional conduct in the host jurisdiction.

Finally, the Working Group surveyed 7 sets of major international arbitration rules and international arbitration soft law to identify whether the rules and soft law include (1) restrictions on the representation of parties and (2) ethical obligations governing party representatives. The table annexed as Appendix 14 provides the results of this survey. Significantly, none of the rules includes restrictions on representation in international commercial arbitration.

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definition. Nonetheless, we are unaware of any *Birbrower*-type pronouncement of the Texas courts on the issue. Finally, we note that the Texas Arbitration Act, Section 171.048, which gives parties the unwaivable right to "representation by an attorney," does not necessarily resolve the issue.

<sup>38</sup> *Williamson v. John D. Quinn Constr. Corp.* (S.D.N.Y. 1982) 537 F.Supp. 613 (domestic arbitration); *Siegel v. Bidas Sociedad Anomina Petrolera Industrial y Comercial* (S.D.N.Y. Aug. 19, 1991) 1991 U.S. Dist. LEXIS 11455 (international arbitration); see also New Jersey Supreme Court Committee on Unauthorized Practice, "Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey," Opinion No. 28 (1994) ("[T]his Committee finds that an out-of-state attorney's representation of a party in an arbitration proceeding conducted under the auspices of the AAA in New Jersey does not constitute the unauthorized practice of law").

<sup>39</sup> ABA Model Rules of Professional Conduct, Rule 1.0(m).

<sup>40</sup> N.Y. Rules of the Ct. of Appeals, rule 523.2(a)(3)(iii). See Appendix 8.

## II. PROPOSALS AND WORKING GROUP'S RECOMMENDATIONS

In order to address the current prohibition against foreign and out-of-state attorneys participating in international commercial arbitrations in California, the Working Group developed three proposals for authorizing these attorneys to participate in such matters. The text of, and rationale for, each proposal are presented below. Please note that although this Report presents the proposals in legislative form, each one could be implemented as a Rule of Court.<sup>41</sup>

In developing these proposals, the Working Group kept in mind the Court's interest in ensuring the competent practice of law in California. Thus, we drafted each of the following options so as to subject attorneys to the State's professional and ethical standards and its disciplinary authority. This approach is consistent with the approach taken by New York and Florida and is exemplified by subdivision (d) in Proposal 1, which states that attorneys authorized to represent parties in international commercial arbitrations are subject to the California Rules of Professional Conduct and other laws governing attorney conduct. Furthermore, Proposals 1 and 2 impose an annual reporting requirement on the State Bar so that the Court can monitor how the proposal is working.

On the other hand, the members of the Working Group – all of whom are experienced in international commercial arbitration – recognize that California ideally should adopt a rule seen as friendly to foreign and out-of-state parties and attorneys, for they have many other jurisdictions from which to choose when drafting an international arbitration clause.

Furthermore, unduly restricting foreign attorney representation in California-based international commercial arbitrations appears unnecessary because, as shown in the preceding sections, the selection of California as the arbitral venue may have little connection with the jurisdiction in which the dispute arises or there may be little relationship between the dispute and the practice of law in California. Typically, an arbitral venue is selected because the forum is seen as a neutral forum governed by a set of internationally recognized procedural rules, like the UNICTRAL Model Law<sup>42</sup> and the New York Convention.

And even where California is negotiated as the substantive governing law, the Working Group recognizes that a stringent regime for authorizing foreign attorneys to represent their clients in California-based international arbitrations may not protect the practice of law in California, but may merely prompt the parties to choose a non-California venue for the arbitration governed by California substantive law. In that circumstance, there is a greater likelihood that the arbitrator adjudicating California law in the foreign jurisdiction will not be a California attorney. Moreover, it will be the courts of the foreign jurisdiction that will have primary jurisdiction over the arbitration, including the enforceability of the arbitral award.

In this light, a stringent regime for authorizing foreign attorneys to represent parties in international commercial arbitrations will simply result in the selection of a non-California forum, which neither protects the integrity of California law nor the procedural rights of any California parties to the arbitration.

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<sup>41</sup> Appendices 1-3 provide the complete text of each Proposal without commentary.

<sup>42</sup> See U.N. Commission on International Trade Law <<http://www.uncitral.org/>> (as of Apr. 2, 2017).

The Working Group recommends Proposal 1 as the best solution to the problem at issue while promoting the interests of the California Supreme Court and the State Bar in the protection of California-based parties. Proposal 2, which is based on the New York rule and is similar in most respects to Proposal 1, also has the Working Group's support. Proposal 3, which is a variation of California's authorization for out-of-state attorneys to appear in domestic arbitrations, is also a viable option, but will be a less attractive means for encouraging foreign and out-of-state parties and their attorneys to agree to arbitrate their international commercial disputes in California.

**A. Proposal 1: Authorization Based on the American Bar Association Recommendation for a Model Rule for Temporary Practice by Foreign Lawyers.**

The Working Group proposes that this option be amended into Title 9.3 of Part 3 of the Code of Civil Procedure – the statutory scheme governing Arbitration and Conciliation of International Commercial Disputes.

*Proposed Code of Civil Procedure Section 1297.18. Representation by Foreign and Out-of-State Attorneys.*

- (a) An attorney who is not admitted to practice in this state does not engage in the unauthorized practice of law in this state when the attorney provides legal services in connection with an international commercial arbitration held in this state where such services:
  - (1) are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter; or
  - (2) arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice; or
  - (3) are not within paragraphs (1) or (2) and
    - (i) are performed for a client who resides or has an office in a jurisdiction in which the attorney is admitted or otherwise authorized to practice to the extent of that authorization; or
    - (ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice to the extent of that authorization; or
  - (4) arise out of a dispute governed primarily by international law or the law of a jurisdiction other than California.
- (b) The attorney specified under subdivision (a) must also meet the following requirements:

- (1) the attorney must be admitted to practice law in a state or territory of the United States or in the District of Columbia, or be a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority of that jurisdiction; and
  - (2) the attorney must be in good standing in every jurisdiction where admitted or otherwise authorized to practice; and
  - (3) the attorney must not make an appearance in any of the courts of this state except to the extent that he or she is permitted to appear as counsel *pro hac vice* pursuant to the procedures of said court.
- (c) For purposes of this section,
- (1) “international” shall be defined as provided in section 1297.13.
  - (2) “commercial” shall be defined as provided in section 1297.16 or as otherwise provided under California law, but shall not extend to (i) any dispute or controversy that concerns an individual’s acquisition or lease of goods or services primarily for personal, family, or household use, (ii) any dispute or controversy between an individual and a healthcare insurance plan over insurance coverage or between an individual and a healthcare provider, (iii) any dispute or controversy that concerns an application for employment in California, or (iv) any dispute or controversy that concerns the terms or conditions of employment or the right to employment in California that does not primarily concern the right to or misappropriation of intellectual property, including, but not limited to, trade secrets, trademarks, patents, copyrights, and software programs.
  - (3) the phrase, “legal services in connection with an international commercial arbitration,” includes not only the international commercial arbitration but a conciliation, mediation, or other alternative dispute resolution procedure held in connection with said international commercial arbitration.
- (d) (1) An attorney who provides legal services in connection with an international commercial arbitration in this state shall be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of this state otherwise governing the conduct of attorneys and to the disciplinary authority of this state to the same extent as an attorney admitted to practice in this state. The State Bar of California may report complaints and evidence of a disciplinary violation against an attorney practicing pursuant to this



statute to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or otherwise authorized to practice law.

- (2) On or before the first of May of each year following the year of enactment, the State Bar shall submit an annual report to the California Supreme Court that specifies the number and nature of any complaints that it has received against any attorneys practicing pursuant to this statute, and any actions taken in connection therewith.
- (e) Nothing herein affects the right of representation in an international commercial conciliation pursuant to section 1297.351.
- (f) In recognition of the California Supreme Court's authority over the regulation of the practice of law in this state, the California Supreme Court may issue any rules appropriate for implementing this section.

Comments from the Working Group:

Proposal 1 is largely based on the American Bar Association's recommended Model Rule for Temporary Practice by Foreign Lawyers, with limited changes meant to adapt the rule to better suit California.

To be eligible under the proposed Model Rule and thus this option, the foreign attorney must be a member in good standing of a recognized legal profession in the attorney's home country and must be subject to effective regulation and discipline by a duly constituted body or public authority of that jurisdiction. (Subd. (b)(1).) The attorney must also be in good standing in every jurisdiction where admitted to practice. (Subd. (b)(2).)

Based on this eligibility, the Model Rule and this proposal permit the foreign or out-of-state attorney to provide legal services in connection with an international commercial arbitration under four circumstances: (1) the services are undertaken in association with an attorney who is admitted to practice in California *and who actively participates* in the matter; (2) the services are reasonably related to the attorney's practice in the jurisdiction where the attorney is admitted to practice; (3) the services (i) are performed for a client who resides or has an office in a jurisdiction in which the attorney is admitted to practice, or (ii) are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted; or (4) the services arise out of a dispute governed primarily by *international law or the law of a jurisdiction other than California*.

The foregoing conditions, which are drawn from the ABA Model Rule, require the existence of a nexus between the foreign or out-of-state attorney and either the client or the subject matter of the arbitration, or the existence of a dispute governed by non-California law in those cases where the foreign or out-of-state attorney is not required to associate with a California licensed attorney.

Notably, the Working Group adds a prohibition against the attorney appearing in any courts of the state – unless permitted to do so *pro hac vice* pursuant to the court’s existing procedures. (Subd. (b)(3).) This is designed to make clear the limits of the authorization under this option.

The Working Group then adds two additional requirements not found in the ABA Model Rule: Similar to New York’s rule, the Working Group adds that any attorney providing the services authorized under Proposal 1 would be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of this state governing the conduct of attorneys and to the disciplinary authority of this state “to the same extent as an attorney admitted to practice in this state.” (Subd. (d)(1).) Secondly, the Working Group requires that the State Bar of California provide annual reports to the California Supreme Court that specify the nature and number of any complaints that it received against any attorneys practicing pursuant to the authorization under this option. (Subd. (d)(2).)

Finally, the Working Group adds a subdivision that recognizes this Court’s authority over the regulation of the practice of law and that authorizes it to issue any rules appropriate for implementing this proposal. (Subd. (f).)

One important benefit to adopting the ABA Model Rule is the absence of any filing or registration requirement. After extended discussion over many meetings, the Working Group determined that such requirements would likely discourage the selection of California as a venue for international commercial arbitrations, thereby likely subjecting any arbitration involving California residents or California law to a foreign venue, which would promote neither the protection of Californians nor the integrity of California law. In short, the additional requirement of registration or a fee would be counter-productive.

In allowing foreign and out-of-state attorneys to participate in international commercial arbitrations without requesting *pro hac vice* status, the Working Group also considered the following:

First, the absence of registration requirements in the leading foreign jurisdictions and all U.S. jurisdictions adopting a FIFO rule – and the popularity of such jurisdictions as arbitral venues for international commercial disputes – suggests that registration requirements are not viewed as necessary to protect the parties in an international commercial arbitration.

Second, the very nature of an international commercial arbitration indicates that the parties are sophisticated and capable of selecting qualified counsel. It is unclear how requiring registration, or the submission of a *pro hac vice* application to an arbitrator, would provide any additional safeguards to these parties. In the Working Group’s view, no occupational licensing system, no matter how justified in general, should be employed to the point that its sole function is to act as a barrier to entry.

Third, to further reinforce that international commercial arbitration involves sophisticated parties engaged in a commercial dispute that do not need the protection of a *pro hac vice* application or registration, the Working Group’s proposal makes clear that for the purposes of party representation, “commercial” does not extend to routine employment, healthcare, and consumer disputes, such as those involving the acquisition or lease of goods or services primarily for personal,

family, or household use, any dispute concerning an application for employment, or a dispute that concerns the terms or conditions of employment or the right to employment that does not primarily concern the right to or misappropriation of intellectual property. (Subd. (c)(2).) Because some international commercial arbitrations can involve a dispute over the misappropriation of trade secrets, which might be characterized as an employment dispute, the Working Group carved out an exception from its exemption for employment disputes if the *primary* dispute concerns the misappropriation of intellectual property.

**B. Proposals 1(a) and 1(b): Modified Versions of Proposal 1, Based on the American Bar Association Recommendation for a Model Rule for Temporary Practice by Foreign Lawyers.**

**Option 1(a):** *This is the same as Proposal 1, but it adds a new subdivision (b)(4), which more broadly prohibits an attorney who is not a member of the California bar from giving advice on California law:*

(b) The attorney specified under subdivision (a) must also meet the following requirements:

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(4) where the parties to a contract, agreement, or undertaking have agreed that the dispute or controversy subject to the international commercial arbitration shall be governed by the substantive law of California, the attorney must associate with an attorney admitted to practice in this state to advise on California law in connection with said arbitration.

Comments from the Working Group:

If the protections and explanations regarding Proposal 1 do not persuade the Court that its interest in the competent practice of law in California would be adequately safeguarded, the Working Group has proposed a supplemental protection that can be added to Proposal 1 as subdivision (b)(4).

This option is the same as Proposal 1, but would also require the foreign or out-of-state attorney to associate with a California attorney to advise on California law where the contract provides that the dispute is governed by the substantive law of California.

However, the Working Group believes the requirement to retain a California lawyer will be deemed by the international arbitration community as a parochial effort to protect the employment of California lawyers and an additional obligatory expense for agreeing to arbitrate in California, thereby discouraging its selection as a venue. Moreover, if the dispute truly turns on the proper interpretation of California law, sophisticated parties will no doubt retain California counsel. In short, requiring that California counsel be employed will discourage the selection of California as a venue, defeating the provision's purpose. Put differently, by requiring a California counsel be associated whenever the parties choose California law as the governing law, the parties will likely choose to have the dispute arbitrated outside California, virtually assuring that non-California arbitrators will decide the application of California law. On the other hand, by not requiring the retention of California counsel, the state will more likely end up with the arbitration seated in California and California counsel will likely be hired as a result.

**Option 1(b):** *This is an alternative to Option 1(a). Again, it is largely the same as Proposal 1, but instead of requiring that a California-licensed attorney be associated whenever the parties have agreed to California law as the governing law (as proposed in Option 1(a)), it provides more narrow provisions in a new subdivision (b)(4), specifying the circumstances when an attorney who is not a member of the California bar must associate with a California licensed attorney. If one of these options is adopted, the “consumer disputes” exception to the definition of “commercial” proposed in subdivision (c)(2) is unnecessary and can be deleted:*

(b) (4) where the dispute that is subject to an international commercial arbitration is governed by California substantive law and is primarily related to (i) an employee’s employment, (ii) an individual’s healthcare, (iii) an individual’s application for employment or (iv) an individual’s acquisition or lease of goods or services primarily for personal, family, or household use, the attorney must associate an attorney admitted to practice in this state to advise on California law.

[or]

(b) (4) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent a California citizen or resident unless the attorney associates an attorney admitted to practice in this state to advise on California law.

[or]

(b) (4) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent an individual unless the attorney associates an attorney admitted to practice in this state to advise on California law.

*Comments from the Working Group:*

If the protections and explanations regarding Proposal 1 do not persuade the Court that its interest in the competent practice of law in California would be adequately safeguarded, but it agrees that Option 1(a) is too broad, the Working Group proposes Option 1(b). This alternative offers a choice of three different options for specifying the circumstances that require the foreign attorney to retain a California lawyer.

The first option provides for the retention of California counsel where the dispute is a consumer dispute. This is an alternative to merely *excluding* such disputes from coverage under subdivision (c)(2) in Proposal 1. Instead of excluding such disputes, it requires the retention of California counsel. However, the mere fact that this option would require a foreign attorney to retain California counsel in certain disputes may itself undermine the attractiveness of California’s authorization of foreign counsel.

Another option provides that if the dispute is governed by California law, an attorney cannot represent a *California citizen or resident* unless the attorney retains a California lawyer to advise on California law. This is meant to protect the California resident, and research suggests that this option is likely legal. (See, e.g., *Hoffman v. State Bar of California* (2003) 113

Cal.App.4th 630; *Saenz v. Roe* (1999) 526 U.S. 489.) However, in those particular circumstances, it is likely that the California resident or citizen would voluntarily retain California counsel. Thus, while this option is intended to protect California residents, it would appear to be unnecessary.

The final option is that a California attorney must be retained whenever the dispute is governed by California substantive law *and* the attorney represents *any individual* (and not simply a California citizen or resident). This particular option is thus broader than the previous option that only required California counsel where a California citizen or resident was represented and California law governed. However, the requirement that the foreign attorney retain California counsel whenever an individual is represented and California law governs would undermine the attractiveness of California as a venue.

Furthermore, the last two options do not require the parties to *agree* that California law applies; they are triggered if the dispute is governed by California law. Accordingly, these options would clearly act as a deterrent to the selection of California as a venue because the parties may not know whether California law will govern at the commencement of the arbitration (which is why option 1(a) requires the retention of California counsel only if the parties *agreed* that the dispute would be governed by California law, providing certainty as to the condition that triggers the retention of California counsel).

In short, these options either are unnecessary or will discourage the selection of California as a venue for international arbitration, thereby maintaining the unsatisfactory status quo. This would not further California's interests in protecting Californians subject to international commercial arbitration. And since international commercial arbitration agreements typically provide for arbitration before the dispute arises, a statute that seeks to protect the interpretation of California law by requiring the retention of California counsel may simply cause those arbitration clauses to bypass California entirely.

Furthermore, the California Rules of Professional Conduct (to which Proposal 1 subjects any attorney providing legal services) require competent representation, which would mitigate the effect of not mandating the retention of California counsel where California law governs. After all, in order to satisfy the requirement to provide competent representation where California law is at issue, the attorney would either have to become competent in California law or associate in an attorney who is competent in California law.

Finally, because we would expect California residents in an international commercial arbitration in California to choose California counsel, the only parties "protected" by a rule requiring the retention of California counsel are foreign companies who may prefer to use their own foreign counsel. Thus, the Working Group recommends not requiring a foreign attorney to associate in California counsel, even where California law governs.

**C. Proposal 2: Authorization Based on the New York Rule.**

*Proposed Code of Civil Procedure Section 1297.18. Representation by Foreign and Out-of-State Attorneys.*

- (a) An attorney who is not admitted to practice in this state may provide legal services in connection with an international commercial arbitration held in this state provided all of the following requirements are met:
  - (1) the attorney is admitted to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority of that jurisdiction; and
  - (2) the attorney is in good standing in every jurisdiction where admitted or otherwise authorized to practice; and
  - (3) the legal services provided by the attorney could be provided in a jurisdiction where the attorney is admitted or otherwise authorized to practice and may generally be provided by an attorney admitted to practice in this state, and such legal services:
    - (i) are undertaken in association with an attorney admitted to practice in this state who actively participates in, and assumes joint responsibility for, the international commercial arbitration; or
    - (ii) are in or reasonably related to the international commercial arbitration held in this state and arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted or authorized to practice; and
  - (4) the attorney does not make an appearance in any of the courts of this state except to the extent that he or she is permitted to appear as counsel *pro hac vice* pursuant to the procedures of said court.
- (b) For purposes of this section,
  - (1) "international" shall be defined as provided in section 1297.13.
  - (2) "commercial" shall be defined as provided in section 1297.16 or as otherwise provided under California law, but shall not extend to
    - (i) any dispute or controversy that concerns an individual's acquisition or lease of goods or services primarily for personal, family,

or household use, (ii) any dispute or controversy between an individual and a healthcare insurance plan over insurance coverage or between an individual and a healthcare provider, (iii) any dispute or controversy that concerns an application for employment in California, or (iv) any dispute or controversy that concerns the terms or conditions of employment or the right to employment in California that does not primarily concern the right to or misappropriation of intellectual property, including, but not limited to, trade secrets, trademarks, patents, copyrights, and software programs.

- (3) the phrase, “legal services in connection with an international commercial arbitration,” includes not only the international commercial arbitration but a conciliation, mediation, or other alternative dispute resolution procedure held in connection with said international commercial arbitration.
- (c)
    - (1) An attorney who provides legal services in connection with an international commercial arbitration in this state shall be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of this state otherwise governing the conduct of attorneys and to the disciplinary authority of this state to the same extent as an attorney admitted to practice in this state. The State Bar of California may report complaints and evidence of a disciplinary violation against an attorney practicing pursuant to this statute to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or otherwise authorized to practice law.
    - (2) On or before the first of May of each year following the year of enactment, the State Bar shall submit an annual report to the California Supreme Court that specifies the number and nature of any complaints that it has received against any attorneys practicing pursuant to this statute, and any actions taken in connection therewith.
  - (d) Nothing herein affects the right of representation in an international commercial conciliation pursuant to section 1297.351.
  - (e) In recognition of the California Supreme Court’s authority over the regulation of the practice of law in this state, the California Supreme Court may issue any rules appropriate for implementing this section.

*Comments from the Working Group:*

Proposal 2 is based on Rule 523.1 of the Rules of the New York Court of Appeals, which addresses the temporary practice of law in New York by any attorney not admitted to practice in that state.

The New York rule, which the international commercial arbitration community has embraced as fair and friendly, is one reason that foreign parties view New York as an attractive and popular venue for international commercial arbitration.

Based on this acceptance, the Working Group's proposal adopts a variation of the New York rule but eliminates provisions that are not applicable to California. For example, the New York rule expressly prohibits foreign and out-of-state attorneys from establishing an office or other systematic and continuous presence in the State for the practice of law. The Working Group considered including a temporal limit on the participation of foreign and out-of-state attorneys in California, either by prohibiting continuous representation in the State or imposing a strict cut-off in representation after a certain number of years. However, the Working Group decided not to include such a provision for the following reasons:

(1) The New York rule is a broader authorization that covers any proceeding undertaken in association with a New York lawyer or relates to a proceeding before a tribunal in New York or elsewhere if the attorney reasonably expects to be authorized to appear. Therefore, there is a greater risk under the New York rule of continuous representation in New York. That should not be a material risk with respect to a rule only addressing international commercial arbitration.

(2) A limit on the number of international commercial arbitrations in which any particular foreign attorney could appear simply would dissuade the selection of California as a venue.

(3) In any event, these attorneys pose no risk to the State by making repeat appearances in international commercial arbitrations. Attorneys practicing under the proposed rule would likely have a transnational practice, where the governing law varies from dispute to dispute and arbitral awards are generally enforced outside the state. Thus, they are unlikely to improperly extend the time period of their practice in California. Eliminating this provision makes the proposed statute friendlier to foreign and out-of-state attorneys and clearer to those interpreting the law.

The New York rule also expressly provides that an attorney not admitted to practice in that state could provide legal services in connection with a pending or potential arbitration "if the services are not services for which the forum requires pro hac vice admission." (§ 523.2(a)(3)(iii).) The Working Group did not include that provision as part of Proposal 2 because California requires pro hac vice admission for domestic arbitration. (Code Civ. Proc., § 1282.4.) That would appear to negate the utility of this particular New York provision in California, or would at least create confusion as to the provision's application. This was another reason that the Working Group favored the ABA's recommended Model Rule for Temporary Practice by Foreign Lawyers as the basis for its preferred option.

Like Proposal 1, Proposal 2 excludes routine consumer, healthcare, and employment disputes from the definition of international "commercial" arbitrations in which foreign and out-of-state attorneys are permitted to participate; it provides that attorneys practicing under this proposal are subject to the California Rules of Professional Conduct and other laws governing the conduct of attorneys in this state; and it maintains the same annual reporting requirement by the State Bar to the California Supreme Court.



However, as noted above, the reason that the Working Group ranks this option as less optimal than Proposal 1 is that by eliminating the inapplicable provisions of the New York rule, the only authorization for the foreign and out-of-state attorneys to represent parties in an international commercial arbitration in California under this proposal is where (1) the services are undertaken in association with a California attorney who actively participates in the arbitration, or (2) the services are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice. Given the ambiguity of the second ground, the Working Group considers the language in the ABA Model Rule to be clearer and more inviting, while adding obvious additional grounds to premise the foreign or out-of-state attorney's participation in the international commercial arbitration, such as the client having an office in the same jurisdiction in which the attorney is admitted, or the dispute being governed primarily by international law or a law other than the law of California.

If this Court were to prefer this option but were to seek more protection over the competent practice of law in California, Options 2(a) and 2(b) (like Option 1(a) and 1(b)) provide additional provisions requiring a foreign attorney to associate a California lawyer to advise on California law under certain circumstances. (See Part D below.) As explained above, the Working Group prefers that any authorization not include these options because the obligation to associate a California attorney will act as a deterrent to selecting California as the venue and is unnecessary.

**D. Proposals 2(a) and 2(b): Modified Versions of Proposal 2, Based on the New York Rule.**

**Option 2(a):** *This is the same as Proposal 2, but like option 1(a), it also requires the attorney who is not a member of the California bar to associate California counsel where the parties have agreed that the dispute is governed by California substantive law. It adds subdivision (a)(5) as follows:*

(a)(5) Where the parties to a contract, agreement, or undertaking have agreed that the dispute or controversy subject to the international commercial arbitration is governed by the substantive law of California, the attorney must associate an attorney admitted to practice in this state to advise on California law in connection with said arbitration.

**Option 2(b):** *This is the same as Proposal 2, but like option 1(b), it offers several options for a new subdivision (a)(5), which specify the circumstances when an attorney who is not a member of the California bar must associate with a California licensed attorney. If one of these options is adopted, the "consumer disputes" exception to the definition of "commercial" proposed in subdivision (b)(2) is unnecessary and can be deleted:*

(a) (5) where the dispute that is subject to an international commercial arbitration is governed by California substantive law and is primarily related to (i) an employee's employment, (ii) an individual's healthcare, (iii) an individual's application for employment or (iv) an individual's acquisition or lease of goods or services primarily for personal, family, or household use, the attorney must associate an attorney admitted to practice in this state to advise on California law.

[or]

(a) (5) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent a California citizen or resident unless the attorney associates an attorney admitted to practice in this state to advise on California law.

[or]

(a) (5) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent an individual unless the attorney associates an attorney admitted to practice in this state to advise on California law.

*Comments from the Working Group:*

Since both options 2(a) and 2(b) are the same as options 1(a) and 1(b), the Working Group's explanations and concerns over the effect of these options on making California an attractive venue for international commercial arbitration apply equally here.

**E. Proposal 3: Authorization Based on Streamlined Version of Code of Civil Procedure Section 1282.4.**

*Proposed California Code of Civil Procedure Section 1297.18. Representation by Foreign and Out-of-State Attorneys in International Commercial Arbitrations.*

- (a) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, an attorney not admitted to practice in this state may represent parties in an international commercial arbitration proceeding in this state, provided that the attorney timely serves the certificate described in subdivision (b) in the manner provided in subdivision (b).
- (b) Within a reasonable period of time after the attorney described in subdivision (a) indicates an intention to appear in the international commercial arbitration, the attorney shall serve a certificate in a form prescribed by the State Bar of California on (i) the arbitrator, arbitrators, and any arbitral organization administering the arbitration, (ii) the State Bar of California, and (iii) all other counsel in the arbitration whose addresses are known to the attorney. The certificate shall state all of the following:
  - (1) The case name and number, and name of the arbitrator, arbitrators, and any arbitral organization administering the arbitration.
  - (2) The jurisdiction in which the attorney resides.
  - (3) The attorney's office address.
  - (4) The jurisdiction(s) in which the attorney has been admitted to practice and the date(s) of admission.

- (5) That the attorney is currently a member in good standing of, and eligible to practice law in, the jurisdictions identified in paragraph (4).
  - (6) That the attorney is not currently suspended or disbarred from the practice of law in any jurisdiction.
  - (7) That the attorney is not a resident of the State of California.
  - (8) That the attorney is not regularly employed in the State of California.
  - (9) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the laws of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.
- (c) The knowing failure to timely serve the certificate required by this section, the service of a certificate containing false information, or the failure to comply with the standards of professional conduct required of members of the State Bar of California may be grounds for the arbitrator, arbitrators, or any arbitral organization administering the arbitration to disapprove the attorney's appearance and to disqualify him or her from serving as an attorney in the international commercial arbitration.
- (d) An attorney who knowingly fails to timely serve the certificate required by this section and continues to appear in the arbitration, serves a certificate containing false information, or otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California may be subject to the disciplinary jurisdiction of the State Bar with respect to that certificate or any of his or her acts occurring in the course of the arbitration.
- (e) For purposes of this section,
- (1) "international" shall be defined as provided in section 1297.13.
  - (2) "commercial" shall be defined as provided in section 1297.16 or as otherwise provided under California law, but shall not extend to (i) any dispute or controversy that concerns an individual's acquisition or lease of goods or services primarily for personal, family, or household use, (ii) any dispute or controversy between an individual and a healthcare insurance plan over insurance coverage or between an individual and a healthcare provider, (iii) any dispute or controversy that concerns an application for employment in California, or (iv) any dispute or controversy that concerns the terms or conditions of employment or the right to employment in California that does not primarily concern the right to or misappropriation of

intellectual property, including, but not limited to, trade secrets, trademarks, patents, copyrights, and software programs.

\* \* \*

Comments from the Working Group:

Proposal 3 is drawn from Code of Civil Procedure section 1282.4, which authorizes U.S. out-of-state attorneys (but not foreign attorneys) to participate in domestic arbitrations in California pursuant to a *pro hac vice* process.

This proposal goes a step further than Proposals 1 and 2 by requiring that the foreign or out-of-state attorney serve a certificate on the arbitrator, the State Bar, and counsel for the parties prior to participation in the international commercial arbitration in California.

Attorneys practicing under Proposal 3 must meet the same basic requirements as given in section 1282.4 for domestic arbitrations, such as certifying that they are members in good standing in their home jurisdictions, and must agree to be subject to the jurisdiction of the courts of this state with respect to the laws governing the conduct of attorneys.

However, there is one important difference between this proposal and Code of Civil Procedure section 1282.4: Unlike section 1282.4, Proposal 3 does not require the foreign or out-of-state attorney to obtain approval from the arbitrators or arbitral authority in order to represent a party to the arbitration. The reason for this change is that arbitrators involved in international commercial arbitration are often from foreign jurisdictions and, therefore, are likely to be unfamiliar with any need to provide consent to an attorney seeking to participate in an international commercial arbitration. Moreover, in the context of international commercial arbitration, it is unclear how the arbitrators' or arbitral forum's approval would afford a safeguard to the parties. Because the arbitrators are selected by the parties or by an international arbitral institution selected by the parties through their attorneys, the arbitrators or arbitral forum will be reluctant to veto a party's choice of counsel. Nor are arbitrators or international arbitral forums in the business of qualifying attorneys for legal services. Thus, the additional step of obtaining arbitral approval would only unnecessarily delay service of the certificate while accomplishing little.

However, because Proposal 3 does not provide for arbitrator consent, the sanctions for a failure to timely file the certificate under section 1282.4 have been adjusted. Instead of providing that the failure to timely file is a ground for disapproval of the attorney's appearance, Proposal 3 provides that a *knowing* failure to timely serve the certificate may be grounds for the arbitrators or arbitral organization to disapprove the attorney's appearance and to disqualify him or her from serving as an attorney in the international commercial arbitration. The addition of a "knowing" standard is a result of the recognition that the foreign attorney may have no idea that he or she is required to file any such certificate.

Another difference between this option and section 1282.4 is that Proposal 3 does not require the foreign or out-of-state attorney to certify that he or she "is not regularly engaged in substantial business, professional, or other activities in the State of California." (However, Proposal 3 requires the attorney to assert that he or she is not a California resident and is not regularly employed in California.) The Working Group determined that the restriction regarding substantial

business, professional, or other activities in California was unnecessary in the context of international commercial arbitration: Because the authorization under this option is restricted to international commercial arbitration, the possibility that the foreign attorney would participate in multiple international arbitrations in California holds no risk that the representation would become the practice of law in California. Nor should it matter if the foreign attorney has substantial business or professional activities in the State. As long as such activities do not involve the unauthorized practice of law, the state should embrace business and professional activities in the state, which have the benefit of generating business and revenue in the State. On the other hand, the mere existence of a restriction on business activities in which a foreign or out-of-state attorney may engage would deter the selection of California as a venue, thus defeating the purpose of the proposal.

Another more minor difference between Proposal 3 and Code of Civil Procedure section 1282.4 is that the attorney need not list every court in which the attorney has been admitted and the date of admission. This seems unnecessary and simply makes the certification process more onerous. However, each jurisdiction in which the attorney is admitted to practice must be listed.

The Working Group also considered whether to recommend a fee as part of the certification requirement. We noted that the fee authorizations for domestic arbitration and other multijurisdictional appearances are located only in the Rules of Court. Thus, if such a fee requirement were deemed necessary, the State Bar and the Court could insert the requirement when drafting implementing rules. However, the consensus among the members of the Working Group is that the requirement that the foreign or out-of-state attorney serve a certificate would, by itself, deter parties from choosing California as a venue, and that an additional fee obligation would exacerbate that deterrent.

Finally, Proposal 3 adds the same definitions of “international” and “commercial” (including the exclusion for routine consumer and employment disputes) as found in Proposals 1 and 2.

### **III. LEGISLATION AND RULEMAKING**

The Court has two available options should it agree with one or more of the proposals above to authorize foreign and out-of-state attorneys to represent parties in international commercial arbitrations held in California.

#### *The Legislative Avenue*

The Court could rely on the Legislature to enact one of the proposals. The Working Group considers legislation to be an effective and appropriate way to implement any one of its proposals for the following reasons:

First, the legislative option is consistent with language in the *Birbrower* opinion, stating that any exception from the prohibition against the unlicensed practice of law in California is best left to the Legislature.

Second, the Legislature has already acted in response to *Birbrower* by enacting Code of Civil Procedure section 1282.4 and providing a means for out-of-state attorneys to represent parties

in domestic arbitrations in California. An additional authorization, limited to international commercial arbitrations, could logically also be implemented by statute.

Third, in 2014, Senator Monning introduced a bill that allowed a party in an international commercial arbitration to be represented by *any person* of its choice; thus, the Legislature has previously considered a statute as an appropriate vehicle for such an authorization. But after passing the Senate, the author withdrew the bill at the request of the Judicial Council's Office of Governmental Affairs, which had conveyed the Court's desire for additional study of party representation in international commercial arbitrations. This Report now provides that study.

Fourth, while this Court has ultimate authority over the practice of law in the state, the Legislature and the Court have often shared responsibility regarding the right to practice law in California. Thus, it would be an act of comity for the Court to acknowledge that the Legislature may enact a statute authorizing foreign and out-of-state attorneys to represent parties in international commercial arbitrations. However, in recognition of this Court's authority over the regulation of the practice of law in California, both Proposals 1 and 2 acknowledge this authority in the final subdivision of Proposals 1 and 2 and authorize this Court to issue any rules appropriate for implementing the statute.

#### *The Rulemaking Avenue*

Alternatively, given its inherent authority over the regulation of law in this state, this Court certainly has the power to issue a rule governing the provision of legal services in international commercial arbitrations in California. While *Birbrower* stated "a decision to except out-of-state attorneys licensed in their own jurisdictions from [Business and Professions Code] section 6125 is more appropriately left to the California Legislature" (*Birbrower, supra*, 17 Cal.4th at p. 132) and that "[a]ny exception for arbitration is best left to the legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law" (*id.* at p. 134), these assertions were necessarily expressions of comity with the Legislature.

Furthermore, for the reasons set forth herein, international commercial arbitration appears sufficiently distinct from domestic arbitration to suggest that the analysis in *Birbrower* as to domestic arbitration may not necessarily apply to international commercial arbitration, depending upon the circumstances. Thus, this Court could promulgate a rule that addresses international commercial arbitration differently than the statutory rules governing domestic arbitration. Specifically, while performing legal services in a domestic arbitration in California is the practice of law in California, an international commercial dispute arbitrated in California may not necessarily have any nexus with California. Instead, California may be selected as an acceptable neutral venue for the arbitration of a dispute that necessarily arises outside of California between non-California parties. Alternatively, if the dispute is with a California party that had the leverage to negotiate California as the venue for the international commercial arbitration, the parties may not have chosen California substantive law as the governing law. In any event, regardless of the particular circumstances, the key point is that an international arbitration clause, which includes the selection of the organization administering the arbitration, an internationally recognized set of procedural rules, the number of arbitrators, and the governing law, would have been negotiated in advance by the parties in order to provide a neutral adjudication governed by a neutral set of rules unrelated to any state's court system. Thus, the foreign attorney's contacts with California and the nature of

his or her activities in the state would materially differ from that in *Birbrower*. In deciding what constituted the practice of law under Business and Professions Code section 6125, the *Birbrower* court stated, “[i]n our view, the practice of law ‘in California’ entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer’s activities in the state. . . .” (*Birbrower, supra*, 17 Cal.4th at p. 128.) A foreign attorney representing a foreign party pursuant to an internationally recognized set of arbitral rules may not necessarily be practicing law in California.

In any event, this Court’s issuance of a rule in the form of one of the proposals suggested in this report would ensure the competent practice of law in this state since each proposal required at a minimum that the foreign or out-of-state attorney be a member of a recognized legal profession and be subject to the California Rules of Professional Conduct and laws of this state otherwise governing the conduct of attorneys and to the disciplinary authority of this state.

However, while the proposals herein could be enacted by either statute or rule, if forced to make a recommendation, the Working Group recommends a collaborative approach with the Legislature.

#### IV. CONCLUSION

Unlike many domestic arbitral regimes, international commercial arbitration is the product of freely negotiated agreements between sophisticated parties engaged in international commerce, who seek to craft a neutral dispute resolution process divorced from the courts of the state in which the arbitration is sited. The arbitral agreements are not standard-form contracts. Instead, the parties negotiate over the venue for the arbitration, the procedural rules governing the arbitration, the arbitral body administering the arbitration, the substantive law governing the dispute, the number of arbitrators, and occasionally the process for selecting the arbitrators (otherwise the rules selected or the procedures of the forum state will govern the selection of the arbitrators). The result is a mutually agreed neutral process for the adjudication, which could take place in any of a number of jurisdictions.

The fact that California law bars a foreign party or an out-of-state U.S. party from being represented by its regular law firm is a significant deterrent to their selection of California as a neutral venue for arbitrating international commercial disputes. It also gives the foreign or out-of-state party an easy excuse for not agreeing to California as the venue. This adversely affects California business and parties in multiple ways:

First, the fact that California deters foreign parties from selecting our state as a venue for international commercial arbitrations disadvantages California parties that would prefer the convenience and benefits of having the arbitration in California. Given the barrier to choosing California as the venue for the arbitration, California parties are forced to go to the considerable expense of arbitrating their disputes in a foreign jurisdiction and having any resulting arbitral award challenged in that foreign jurisdiction. Moreover, if the parties have selected California law as the governing law, where California’s barriers result in the selection of a venue outside California, California law will likely be determined by non-California arbitrators. Accordingly and ironically,

by barring both foreign and out-of-state attorneys from representing parties in international commercial arbitrations in California, California residents are less protected because the dispute and the application of California law will likely be decided by non-California arbitrators in a foreign jurisdiction.

Second, the fact that California deters foreign parties from selecting our state as a venue for international commercial arbitrations also disadvantages the local economy, including the travel industry, restaurants, and retail businesses, while other U.S. states, like New York and Florida, actively work to attract this type of business.

Third, this ban on foreign and out-of-state attorneys adversely affects the California legal industry because often local counsel in the jurisdiction in which an international arbitration is held will be retained either to assist the foreign or out-of-state parties or to be lead counsel.

On the other hand, permitting foreign and out-of-state attorneys to easily represent parties in international commercial arbitrations will not undermine the protections that California law affords to the practice of law in this state. First, only a member of a recognized legal profession is permitted to represent parties in such arbitrations pursuant to the proposals presented by the Working Group. Second, the proposal requires the attorney to adhere to the California Rules of Professional Conduct and other laws of this state governing the conduct of attorneys and to this state's disciplinary authority. Third, the proposals allow the State Bar to report disciplinary violations to the appropriate disciplinary authority of the jurisdiction in which the attorney is admitted to practice. Fourth, arbitral tribunals often address any disciplinary issues that would affect the fairness of the proceeding. Fifth, both federal and California law permits awards to be vacated if the award is procured by corruption, fraud, or undue means, among other grounds.

The alternative to locating the arbitration in California means less protection to any California party to that arbitration, which is now compelled to go to the cost of arbitrating in a foreign jurisdiction, likely before a non-California arbitrator. Instead, if the arbitration were held in California, the California party would have a greater likelihood of a California arbitrator being appointed, would have access to the California courts with respect to judicial review of the award, and would have the convenience of a local forum for its witnesses and attorneys.

California should join the 13 U.S. jurisdictions (including New York, Florida, Illinois, Texas, and the District of Columbia) and numerous foreign jurisdictions (including Great Britain, France, Italy, Switzerland, Singapore, and Hong Kong) that authorize foreign and out-of-state attorneys to represent parties in international commercial arbitrations without any filing or fee requirement.

While the Working Group would expect that eliminating the existing barriers to foreign and out-of-state attorneys would result in more international commercial arbitrations in California where one of the parties was a California business, ultimately California could attract many international arbitrations where none of the parties were Californian. After all, after Singapore dropped its barrier to foreign attorneys participating in international arbitrations there, it evolved from a very limited to a leading venue for international commercial arbitrations.



This Report provides three proposals for authorizing foreign and out-of-state attorneys to represent parties in international commercial arbitrations in California, while ensuring the integrity of such proceedings. The adoption of Proposal 1 is optimal and would encourage foreign parties to select California as a venue for international commercial arbitrations, thereby bolstering this State's legal industry and local economy and protecting Californians who otherwise would be compelled to arbitrate in a foreign jurisdiction.

**APPENDIX 1: Proposal 1: Authorization Based on the American Bar Association Recommendation for a Model Rule for Temporary Practice by Foreign Lawyers**

*Proposed Section 1297.18. Representation by Foreign and Out-of-State Attorneys*

- (a) An attorney who is not admitted to practice in this state does not engage in the unauthorized practice of law in this state when the attorney provides legal services in connection with an international commercial arbitration held in this state where such services:
- (1) are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter; or
  - (2) arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice; or
  - (3) are not within paragraphs (1) or (2) and
    - (i) are performed for a client who resides or has an office in a jurisdiction in which the attorney is admitted or otherwise authorized to practice to the extent of that authorization; or
    - (ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice to the extent of that authorization; or
  - (4) arise out of a dispute governed primarily by international law or the law of a jurisdiction other than California.
- (b) The attorney specified under subdivision (a) must also meet the following requirements:
- (1) the attorney must be admitted to practice law in a state or territory of the United States or in the District of Columbia, or be a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority of that jurisdiction; and
  - (2) the attorney must be in good standing in every jurisdiction where admitted or otherwise authorized to practice; and
  - (3) the attorney must not make an appearance in any of the courts of this state except to the extent that he or she is permitted to appear as counsel *pro hac vice* pursuant to the procedures of said court.
- (c) For purposes of this section,
- (1) "international" shall be defined as provided in section 1297.13.

- (2) “commercial” shall be defined as provided in section 1297.16 or as otherwise provided under California law, but shall not extend to (i) any dispute or controversy that concerns an individual’s acquisition or lease of goods or services primarily for personal, family, or household use, (ii) any dispute or controversy between an individual and a healthcare insurance plan over insurance coverage or between an individual and a healthcare provider, (iii) any dispute or controversy that concerns an application for employment in California, or (iv) any dispute or controversy that concerns the terms or conditions of employment or the right to employment in California that does not primarily concern the right to or misappropriation of intellectual property, including, but not limited to, trade secrets, trademarks, patents, copyrights, and software programs.
- (3) the phrase, “legal services in connection with an international commercial arbitration,” includes not only the international commercial arbitration but a conciliation, mediation, or other alternative dispute resolution procedure held in connection with said international commercial arbitration.
- (d) (1) An attorney who provides legal services in connection with an international commercial arbitration in this state shall be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of this state otherwise governing the conduct of attorneys and to the disciplinary authority of this state to the same extent as an attorney admitted to practice in this state. The State Bar of California may report complaints and evidence of a disciplinary violation against an attorney practicing pursuant to this statute to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or otherwise authorized to practice law.
- (2) On or before the first of May of each year following the year of enactment, the State Bar shall submit an annual report to the California Supreme Court that specifies the number and nature of any complaints that it has received against any attorneys practicing pursuant to this statute, and any actions taken in connection therewith.
- (e) Nothing herein affects the right of representation in an international commercial conciliation pursuant to section 1297.351.
- (f) In recognition of the California Supreme Court’s authority over the regulation of the practice of law in this state, the California Supreme Court may issue any rules appropriate for implementing this section.

**Option 1a: Same as option 1, but it adds subdivision (b)(4), which more broadly prohibits the attorney who is not a member of the California bar, from giving advice on California law:**

- (b) The attorney specified under subdivision (a) must also meet the following requirements:

\*\*\*\*\*

(4) where the parties to a contract, agreement, or undertaking have agreed that the dispute or controversy subject to the international commercial arbitration shall be governed by the substantive law of California, the attorney must associate with an attorney admitted to practice in this state to advise on California law in connection with said arbitration.

**Option 1b:** *Same as option 1, but it adds several options for a new subdivision (b)(4), which provides more limited circumstances where the attorney who is not a member of the California bar must associate with a California licensed attorney. In such a case, the “consumer disputes” exception to the definition of “commercial” in subdivision (c)(2) is probably unnecessary:*

(b) (4) where the dispute that is subject to an international commercial arbitration is governed by California substantive law and is primarily related to (i) an employee’s employment, (ii) an individual’s healthcare, (iii) an individual’s application for employment or (iv) an individual’s acquisition or lease of goods or services primarily for personal, family, or household use, the attorney must associate an attorney admitted to practice in this state to advise on California law.

[or]

(b) (4) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent a California citizen or resident unless the attorney associates an attorney admitted to practice in this state to advise on California law.

[or]

(b) (4) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent an individual unless the attorney associates an attorney admitted to practice in this state to advise on California law.

**APPENDIX 2: Proposal 2: Authorization Based on the New York Rule**

*Proposed Section 1297.18. Representation by Foreign and Out-of-State Attorneys*

- (a) An attorney who is not admitted to practice in this state may provide legal services in connection with an international commercial arbitration held in this state provided all of the following requirements are met:
- (1) the attorney is admitted to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority of that jurisdiction; and
  - (2) the attorney is in good standing in every jurisdiction where admitted or otherwise authorized to practice; and
  - (3) the legal services provided by the attorney could be provided in a jurisdiction where the attorney is admitted or otherwise authorized to practice and may generally be provided by an attorney admitted to practice in this state, and such legal services:
    - (i) are undertaken in association with an attorney admitted to practice in this state who actively participates in, and assumes joint responsibility for, the international commercial arbitration; or
    - (ii) are in or reasonably related to the international commercial arbitration held in this state and arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted or authorized to practice; and
  - (4) the attorney does not make an appearance in any of the courts of this state except to the extent that he or she is permitted to appear as counsel *pro hac vice* pursuant to the procedures of said court.
- (b) For purposes of this section,
- (1) "international" shall be defined as provided in section 1297.13.
  - (2) "commercial" shall be defined as provided in section 1297.16 or as otherwise provided under California law, but shall not extend to (i) any dispute or controversy that concerns an individual's acquisition or lease of goods or services primarily for personal, family, or household use, (ii) any dispute or controversy between an individual and a healthcare insurance plan over insurance coverage or between an individual and a healthcare provider, (iii) any dispute or controversy that concerns an application for employment in California, or (iv) any dispute or controversy

that concerns the terms or conditions of employment or the right to employment in California that does not primarily concern the right to or misappropriation of intellectual property, including, but not limited to, trade secrets, trademarks, patents, copyrights, and software programs.

- (3) the phrase, “legal services in connection with an international commercial arbitration,” includes not only the international commercial arbitration but a conciliation, mediation, or other alternative dispute resolution procedure held in connection with said international commercial arbitration.
- (c) (1) An attorney who provides legal services in connection with an international commercial arbitration in this state shall be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of this state otherwise governing the conduct of attorneys and to the disciplinary authority of this state to the same extent as an attorney admitted to practice in this state. The State Bar of California may report complaints and evidence of a disciplinary violation against an attorney practicing pursuant to this statute to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or otherwise authorized to practice law.
- (2) On or before the first of May of each year following the year of enactment, the State Bar shall file an annual report to the California Supreme Court that specifies the number and nature of any complaints that it has received against any attorneys practicing pursuant to this statute, and any actions taken in connection therewith.
- (d) Nothing herein affects the right of representation in an international commercial conciliation pursuant to section 1297.351.
- (e) In recognition of the California Supreme Court’s authority over the regulation of the practice of law in this state, the California Supreme Court may issue any rules appropriate for implementing this section.

**Option 2a:** *Same as option 2, but it also prohibits the attorney not a member of the California bar from giving advice on California law by adding subdivision (a)(5) as follows:*

(a)(5) Where the parties to a contract, agreement, or undertaking have agreed that the dispute or controversy subject to the international commercial arbitration is governed by the substantive law of California, the attorney must associate an attorney admitted to practice in this state to advise on California law in connection with said arbitration.

**Option 2b:** *Same as Proposal 2, but offers several options for a new subdivision (a)(5), which specifies when an attorney who is not a member of the California bar must associate with a California licensed attorney. (If one of these alternatives is adopted, the “consumer disputes” exception to the definition of “commercial” proposed in subdivision (b)(2) is unnecessary and can be deleted.)*

(a) (5) where the dispute that is subject to an international commercial arbitration is governed by California substantive law and is primarily related to (i) an employee's employment, (ii) an individual's healthcare, (iii) an individual's application for employment or (iv) an individual's acquisition or lease of goods or services primarily for personal, family, or household use, the attorney must associate an attorney admitted to practice in this state to advise on California law.

[or]

(a) (5) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent a California citizen or resident unless the attorney associates an attorney admitted to practice in this state to advise on California law.

[or]

(a) (5) where the dispute that is subject to an international commercial arbitration is governed by California substantive law, the attorney cannot represent an individual unless the attorney associates an attorney admitted to practice in this state to advise on California law.

### **APPENDIX 3: Proposal 3: Streamlined Version of Code of Civil Procedure Section 1282.4**

*Proposed Section 1297.18. Representation by Foreign and Out-of-State Attorneys in International Commercial Arbitrations*

- (a) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, an attorney not admitted to practice in this state may represent parties in an international commercial arbitration proceeding in this state, provided that the attorney timely serves the certificate described in subdivision (b) in the manner provided in subdivision (b).
- (b) Within a reasonable period of time after the attorney described in subdivision (a) indicates an intention to appear in the international commercial arbitration, the attorney shall serve a certificate in a form prescribed by the State Bar of California on (i) the arbitrator, arbitrators, and any arbitral organization administering the arbitration, (ii) the State Bar of California, and (iii) all other counsel in the arbitration whose addresses are known to the attorney. The certificate shall state all of the following:
  - (1) The case name and number, and name of the arbitrator, arbitrators, and any arbitral organization administering the arbitration.
  - (2) The jurisdiction in which the attorney resides.
  - (3) The attorney's office address.
  - (4) The jurisdiction(s) in which the attorney has been admitted to practice and the date(s) of admission.
  - (5) That the attorney is currently a member in good standing of, and eligible to practice law in, the jurisdictions identified in paragraph (4).
  - (6) That the attorney is not currently suspended or disbarred from the practice of law in any jurisdiction.
  - (7) That the attorney is not a resident of the State of California.
  - (8) That the attorney is not regularly employed in the State of California.
  - (9) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the laws of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.
- (c) The knowing failure to timely serve the certificate required by this section, the service of a certificate containing false information, or the failure to comply with the standards of professional conduct required of members of the State Bar of California may be grounds for the arbitrator, arbitrators, or any arbitral organization administering the arbitration to



disapprove the attorney's appearance and to disqualify him or her from serving as an attorney in the international commercial arbitration.

- (d) An attorney who knowingly fails to timely serve the certificate required by this section and continues to appear in the arbitration, serves a certificate containing false information, or otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California may be subject to the disciplinary jurisdiction of the State Bar with respect to that certificate or any of his or her acts occurring in the course of the arbitration.
- (e) For purposes of this section,
  - (1) "international" shall be defined as provided in section 1297.13.
  - (2) "commercial" shall be defined as provided in section 1297.16 or as otherwise provided under California law, but shall not extend to (i) any dispute or controversy that concerns an individual's acquisition or lease of goods or services primarily for personal, family, or household use, (ii) any dispute or controversy between an individual and a healthcare insurance plan over insurance coverage or between an individual and a healthcare provider, (iii) any dispute or controversy that concerns an application for employment in California, or (iv) any dispute or controversy that concerns the terms or conditions of employment or the right to employment in California that does not primarily concern the right to or misappropriation of intellectual property, including, but not limited to, trade secrets, trademarks, patents, copyrights, and software programs.

## APPENDIX 4: Current Rules Permitting Non-California Attorney Practice

### 2017 California Rules of Court

#### **Rule 9.40. Counsel pro hac vice**

(a) **Eligibility**

A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel *pro hac vice*, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel *pro hac vice* under this rule if the person is:

- (1) A resident of the State of California;
- (2) Regularly employed in the State of California; or
- (3) Regularly engaged in substantial business, professional, or other activities in the State of California.

(b) **Repeated appearances as a cause for denial**

Absent special circumstances, repeated appearances by any person under this rule is a cause for denial of an application.

(c) **Application**

(1) *Application in superior court*

A person desiring to appear as counsel *pro hac vice* in a superior court must file with the court a verified application together with proof of service by mail in accordance with Code of Civil Procedure section 1013a of a copy of the application and of the notice of hearing of the application on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office. The notice of hearing must be given at the time prescribed in Code of Civil Procedure section 1005 unless the court has prescribed a shorter period.

(2) *Application in Supreme Court or Court of Appeal*

An application to appear as counsel *pro hac vice* in the Supreme Court or a Court of Appeal must be made as provided in rule 8.54, with proof of service on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office.

(d) **Contents of application**

The application must state:

- (1) The applicant's residence and office address;
- (2) The courts to which the applicant has been admitted to practice and the dates of admission;

- (3) That the applicant is a member in good standing in those courts;
- (4) That the applicant is not currently suspended or disbarred in any court;
- (5) The title of court and cause in which the applicant has filed an application to appear as counsel *pro hac vice* in this state in the preceding two years, the date of each application, and whether or not it was granted; and
- (6) The name, address, and telephone number of the active member of the State Bar of California who is attorney of record.

(e) **Fee for application**

An applicant for permission to appear as counsel *pro hac vice* under this rule must pay a reasonable fee not exceeding \$50 to the State Bar of California with the copy of the application and the notice of hearing that is served on the State Bar. The Board of Governors of the State Bar of California will fix the amount of the fee:

- (1) To defray the expenses of administering the provisions of this rule that are applicable to the State Bar and the incidental consequences resulting from such provisions; and
- (2) Partially to defray the expenses of administering the Board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services and the incidental consequences resulting therefrom.

(f) **Counsel *pro hac vice* subject to jurisdiction of courts and State Bar**

A person permitted to appear as counsel *pro hac vice* under this rule is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California. The counsel *pro hac vice* must familiarize himself or herself and comply with the standards of professional conduct required of members of the State Bar of California and will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance. Article 5, chapter 4, division III of the Business and Professions Code and the Rules of Procedure of the State Bar govern in any investigation or proceeding conducted by the State Bar under this rule.

(g) **Supreme Court and Court of Appeal not precluded from permitting argument in a particular case**

This rule does not preclude the Supreme Court or a Court of Appeal from permitting argument in a particular case from a person who is not a member of the State Bar, but who is licensed to practice in another jurisdiction and who possesses special expertise in the particular field affected by the proceeding.

Rule 9.41. Appearances by military counsel

(a) **Permission to appear**

A judge advocate (as that term is defined at 10 United States Code section 801(13)) who is not a member of the State Bar of California but who is a member in good standing of and eligible to

practice before the bar of any United States court or of the highest court in any state, territory, or insular possession of the United States may, in the discretion of a court of this state, be permitted to appear in that court to represent a person in the military service in a particular cause pending before that court, under the Servicemembers Civil Relief Act, 50 United States Code Appendix section 501 et seq., if:

- (1) The judge advocate has been made available by the cognizant Judge Advocate General (as that term is defined at 10 United States Code section 801(1)) or a duly designated representative; and
- (2) The court finds that retaining civilian counsel likely would cause substantial hardship for the person in military service or that person's family; and
- (3) The court appoints a judge advocate as attorney to represent the person in military service under the Servicemembers Civil Relief Act.

Under no circumstances is the determination of availability of a judge advocate to be made by any court within this state, or reviewed by any court of this state. In determining the likelihood of substantial hardship as a result of the retention of civilian counsel, the court may take judicial notice of the prevailing pay scales for persons in the military service.

**(b) Notice to parties**

The clerk of the court considering appointment of a judge advocate under this rule must provide written notice of that fact to all parties who have appeared in the cause. A copy of the notice, together with proof of service by mail in accordance with Code of Civil Procedure section 1013a, must be filed by the clerk of the court. Any party who has appeared in the matter may file a written objection to the appointment within 10 days of the date on which notice was given unless the court has prescribed a shorter period. If the court determines to hold a hearing in relation to the appointment, notice of the hearing must be given at least 10 days before the date designated for the hearing unless the court has prescribed a shorter period.

**(c) Appearing judge advocate subject to court and State Bar jurisdiction**

A judge advocate permitted to appear under this rule is subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California. The judge advocate must become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and is subject to the disciplinary jurisdiction of the State Bar of California. Division 3, chapter 4, article 5 of the Business and Professions Code and the Rules of Procedure of the State Bar of California govern any investigation or proceeding conducted by the State Bar under this rule.

**(d) Appearing judge advocate subject to rights and obligations of State Bar members concerning professional privileges**

A judge advocate permitted to appear under this rule is subject to the rights and obligations with respect to attorney-client privilege, work-product privilege, and other professional privileges to the same extent as a member of the State Bar of California.

Rule 9.42. Certified law students**(a) Definitions**

(1) A "certified law student" is a law student who has a currently effective certificate of registration as a certified law student from the State Bar.

(2) A "supervising attorney" is a member of the State Bar who agrees to supervise a certified law student under rules established by the State Bar and whose name appears on the application for certification.

**(b) State Bar Certified Law Student Program**

The State Bar must establish and administer a program for registering law students under rules adopted by the Board of Governors of the State Bar.

**(c) Eligibility for certification**

To be eligible to become a certified law student, an applicant must:

(1) Have successfully completed one full year of studies (minimum of 270 hours) at a law school accredited by the American Bar Association or the State Bar of California, or both, or have passed the first year law students' examination;

(2) Have been accepted into, and be enrolled in, the second, third, or fourth year of law school in good academic standing or have graduated from law school, subject to the time period limitations specified in the rules adopted by the Board of Governors of the State Bar; and

(3) Have either successfully completed or be currently enrolled in and attending academic courses in evidence and civil procedure.

**(d) Permitted activities**

Subject to all applicable rules, regulations, and statutes, a certified law student may:

(1) Negotiate for and on behalf of the client subject to final approval thereof by the supervising attorney or give legal advice to the client, provided that the certified law student:

(A) Obtains the approval of the supervising attorney to engage in the activities;

(B) Obtains the approval of the supervising attorney regarding the legal advice to be given or plan of negotiation to be undertaken by the certified law student; and

(C) Performs the activities under the general supervision of the supervising attorney;

(2) Appear on behalf of the client in depositions, provided that the certified law student:

(A) Obtains the approval of the supervising attorney to engage in the activity;

(B) Performs the activity under the direct and immediate supervision and in the personal presence of the supervising attorney (or, exclusively in the case of government agencies, any deputy, assistant, or other staff attorney authorized and designated by the supervising attorney); and

(C) Obtains a signed consent form from the client on whose behalf the certified law student acts (or, exclusively in the case of government agencies, from the chief counsel or prosecuting attorney) approving the performance of such acts by such certified law student or generally by any certified law student;

(3) Appear on behalf of the client in any public trial, hearing, arbitration, or proceeding, or before any arbitrator, court, public agency, referee, magistrate, commissioner, or hearing officer, to the extent approved by such arbitrator, court, public agency, referee, magistrate, commissioner, or hearing officer, provided that the certified law student:

(A) Obtains the approval of the supervising attorney to engage in the activity;

(B) Performs the activity under the direct and immediate supervision and in the personal presence of the supervising attorney (or, exclusively in the case of government agencies, any deputy, assistant, or other staff attorney authorized and designated by the supervising attorney);

(C) Obtains a signed consent form from the client on whose behalf the certified law student acts (or, exclusively in the case of government agencies, from the chief counsel or prosecuting attorney) approving the performance of such acts by such certified law student or generally by any certified law student; and

(D) As a condition to such appearance, either presents a copy of the consent form to the arbitrator, court, public agency, referee, magistrate, commissioner, or hearing officer, or files a copy of the consent form in the court case file; and

(4) Appear on behalf of a government agency in the prosecution of criminal actions classified as infractions or other such minor criminal offenses with a maximum penalty or a fine equal to the maximum fine for infractions in California, including any public trial:

(A) Subject to approval by the court, commissioner, referee, hearing officer, or magistrate presiding at such public trial; and

(B) Without the personal appearance of the supervising attorney or any deputy, assistant, or other staff attorney authorized and designated by the supervising attorney, but only if the supervising attorney or the designated attorney has approved in writing the performance of such acts by the certified law student and is immediately available to attend the proceeding.

*(Subd (d) amended effective January 1, 2007.)*

**(e) Failure to comply with program**

A certified law student who fails to comply with the requirements of the State Bar Certified Law Student Program must have his or her certification withdrawn under rules adopted by the Board of Governors of the State Bar.

**(f) Fee and penalty**

The State Bar has the authority to set and collect appropriate fees and penalties for this program.

**(g) Inherent power of Supreme Court**

Nothing in these rules may be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law in California.

**TITLE 3. PROGRAMS AND SERVICES**  
**Adopted July 2007**  
**DIVISION 1. PROSPECTIVE MEMBERS**

**Chapter 1. Practical Training of Law Students**

Rule 3.1 Practical Training of Law Students Program

Practical Training of Law Students is a program that allows a supervised law student certified by the State Bar to negotiate and appear on behalf of a client in the limited circumstances permitted by Rule of Court 9.42 and these rules.<sup>1 1</sup> Rule of Court 9.42(a).

Rule 3.2 Eligibility

(A) To be considered for the State Bar program for Practical Training of Law Students a law student must meet the eligibility requirements of Rule of Court 9.42(c).

(B) Other qualifications notwithstanding, a person is ineligible to apply for certification who

(1) is licensed to practice law in any jurisdiction; or

(2) has not taken the first California Bar Examination for which he or she is eligible.

Rule 3.3 Application

(A) To apply to be a certified law student, an eligible applicant must

(1) register as a general applicant for admission to the practice of law in California;<sup>2 2</sup> Rule 4.3(G) defines “general applicant.” Rule 4.16(B) explains the Application for Admission. and

(2) submit an Application for Practical Training of Law Students Program<sup>3 3</sup> See Rule 4.16(B). with

(a) the fee<sup>4 4</sup> Rule of Court 9.42(f). set forth in the Schedule of Charges and Deadlines;

(b) a current e-mail address not to be disclosed on the State Bar’s Web site or otherwise to the public without the applicant’s consent;

(c) a Declaration of Law School Official attesting that the law student meets the eligibility requirements of these rules and is qualified to be a certified law student, absent any subsequent notification to the contrary that the official agrees to provide; and



(d) a Declaration of Supervising Attorney attesting that for a specified period the attorney will supervise the applicant as required by these rules.

(B) Upon approval of the application, the State Bar issues a “Notice of Law Student Certification” (“notice”) stating that the applicant is a certified participant in the program for Practical Training of Law Students for the period stated in the notice.<sup>5 5</sup> See Rule 3.8.

#### Rule 3.4 Permitted activities

(A) A certified law student may engage only in the activities permitted by Rule of Court 9.42(d) under the conditions prescribed by that rule.

(B) Nothing in this rule prohibits a certified law student from providing advice or representation that might be provided by anyone who is not a member of the State Bar of California.

#### Rule 3.5 Duties of certified law student

A certified law student must

(A) act as a certified law student only during the period stated in the Notice of Law Student Certification;<sup>6 6</sup> See Rule 3.8.

(B) at all times comply with Rule of Court 9.42 and these rules;

(C) maintain a current e-mail address with the State Bar;

(D) upon ceasing to be eligible for the program, promptly inform the State Bar and cease any activity that a certified law student is permitted to perform;

(E) not claim in any way to be a member of the State Bar of California.

#### Rule 3.6 Supervising Attorney

(A) “Supervising Attorney” is an active member of the State Bar of California in good standing who agrees to supervise a certified law student as required by these rules. A member who is inactive, suspended, or subject to discipline, or who has resigned or been disbarred may not be a Supervising Attorney. In these rules, “Supervising Attorney” may also refer to a government agency attorney whom the Supervising Attorney delegates to supervise the permitted activities of a certified law student.

(B) A Supervising Attorney must

(1) be an active member of the State Bar of California who has practiced law in California or taught law in a law school as a full-time occupation for at least the two years before supervising a certified law student;

- (2) supervise the permitted activities of a certified law student as specified by Rule 9.42(d);
- (3) personally assume professional responsibility for any activity a certified law student performs pursuant to these rules;
- (4) provide training and counsel that prepares a certified law student to satisfactorily perform an activity permitted by these rules in a manner that best serves the interest of a client;
- (5) read, approve, and sign any document prepared by the certified law student for a client;
- (6) supervise at one time no more than five certified law students or twentyfive if employed full-time to supervise law students in a law school or government training program; and
- (7) promptly notify the State Bar that he or she no longer meets the requirements of these rules or that his or her supervision is ending before the period stated in the Notice of Certification.

#### Rule 3.7 Designation as certified law student

- (A) A certified law student may use the title “Certified Law Student” and no other in connection with activities performed as a certified law student.
- (B) On written materials prepared pursuant to these rules, a certified law student must use the title Certified Law Student with his or her name and provide the name of his or her Supervising Attorney.

#### Rule 3.8 Duration of certification

- (A) Subject to the exceptions set forth in this rule, a certified law student may perform an activity that complies with these rules for the period stated in the Notice of Law Student Certification and only while the supervising attorney identified in the application supervises the student. A request to change the supervising attorney requires a new application.
- (B) A student who graduates from law school during the period stated in the Notice of Law Student Certification and then takes the first California Bar Examination for which he or she is eligible may participate in the program until the State Bar releases results for that examination.
- (C) Certification terminates before the end of the period stated in the Notice of Law Student Certification if

- (1) the certified law student no longer meets the eligibility requirements of these rules;
- (2) the certified law student requests that certification terminate on an earlier date;
- (3) the certified law student fails to take the first California Bar Examination for which he or she is eligible; or
- (4) the State Bar revokes certification. See Rule 3.9.

#### Rule 3.9 Revocation of certification

The State Bar may revoke certification for noncompliance with any applicable rule or law. Rule of Court 9.42(e). The State Bar must provide the certified law student a written notice of revocation. The revocation is effective ten days from the date of its transmission.

#### Rule 3.10 Request for review of revocation

A certified law student whose certification has been revoked may request review of the revocation. The request must be in writing and received by the State Bar no more than fifteen days from the date of transmission of the notice. Within sixty days of receiving the request, the State Bar must provide the certified law student with a written determination affirming or denying the revocation. The determination constitutes the final action of the State Bar.

**CODE OF CIVIL PROCEDURE - CCP**  
**PART 3. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE [1063 - 1822.60]**  
**TITLE 9. ARBITRATION [1280 - 1294.2]**

**CHAPTER 3. Conduct of Arbitration Proceedings [1282 - 1284.3]**

*( Chapter 3 added by Stats. 1961, Ch. 461. )*

1282.4.

(a) A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes that waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

(b) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, satisfies all of the following:

(1) He or she timely serves the certificate described in subdivision (c).

(2) The attorney's appearance is approved in writing on that certificate by the arbitrator, the arbitrators, or the arbitral forum.

(3) The certificate bearing approval of the attorney's appearance is filed with the State Bar of California and served on the parties as described in this section.

(c) Within a reasonable period of time after the attorney described in subdivision (b) indicates an intention to appear in the arbitration, the attorney shall serve a certificate in a form prescribed by the State Bar of California on the arbitrator, arbitrators, or arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney. The certificate shall state all of the following:

(1) The case name and number, and the name of the arbitrator, arbitrators, or arbitral forum assigned to the proceeding in which the attorney seeks to appear.

(2) The attorney's residence and office address.

(3) The courts before which the attorney has been admitted to practice and the dates of admission.

(4) That the attorney is currently a member in good standing of, and eligible to practice law before, the bar of those courts.

(5) That the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court.

(6) That the attorney is not a resident of the State of California.

(7) That the attorney is not regularly employed in the State of California.

(8) That the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California.

- (9) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.
- (10) The title of the court and the cause in which the attorney has filed an application to appear as counsel pro hac vice in this state or filed a certificate pursuant to this section in the preceding two years, the date of each application or certificate, and whether or not it was granted. If the attorney has made repeated appearances, the certificate shall reflect the special circumstances that warrant the approval of the attorney's appearance in the arbitration.
- (11) The name, address, and telephone number of the active member of the State Bar of California who is the attorney of record.
- (d) The arbitrator, arbitrators, or arbitral forum may approve the attorney's appearance if the attorney has complied with subdivision (c). Failure to timely file and serve the certificate described in subdivision (c) shall be grounds for disapproval of the appearance and disqualification from serving as an attorney in the arbitration in which the certificate was filed. In the absence of special circumstances, repeated appearances shall be grounds for disapproval of the appearance and disqualification from serving as an attorney in the arbitration in which the certificate was filed.
- (e) Within a reasonable period of time after the arbitrator, arbitrators, or arbitral forum approves the certificate, the attorney shall file the certificate with the State Bar of California and serve the certificate as described in Section 1013a on all parties and counsel in the arbitration whose addresses are known to the attorney.
- (f) An attorney who fails to file or serve the certificate required by this section or files or serves a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California shall be subject to the disciplinary jurisdiction of the State Bar with respect to that certificate or any of his or her acts occurring in the course of the arbitration.
- (g) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, an attorney who is a member in good standing of the bar of any state may represent the parties in connection with rendering legal services in this state in the course of and in connection with an arbitration pending in another state.
- (h) Notwithstanding any other law, including Section 6125 of the Business and Professions Code, any party to an arbitration arising under collective bargaining agreements in industries and provisions subject to either state or federal law may be represented in the course of, and in connection with, those proceedings by any person, regardless of whether that person is licensed to practice law in this state.
- (i) Nothing in this section shall apply to Division 4 (commencing with Section 3200) of the Labor Code.
- (j) (1) In enacting the amendments to this section made by Assembly Bill 2086 of the 1997–98 Regular Session, it is the intent of the Legislature to respond to the holding in *Birbrower v. Superior Court* (1998) 17 Cal.4th 119, to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings.

(2) In enacting subdivision (h), it is the intent of the Legislature to make clear that any party to an arbitration arising under a collective bargaining agreement governed by the laws of this state may be represented in the course of and in connection with those proceedings by any person regardless of whether that person is licensed to practice law in this state.

(3) Except as otherwise specifically provided in this section, in enacting the amendments to this section made by Assembly Bill 2086 of the 1997–98 Regular Session, it is the Legislature’s intent that nothing in this section is intended to expand or restrict the ability of a party prior to the decision in *Birbrower* to elect to be represented by any person in a nonjudicial arbitration proceeding, to the extent those rights or abilities existed prior to that decision. To the extent that *Birbrower* is interpreted to expand or restrict that right or ability pursuant to the laws of this state, it is hereby abrogated except as specifically provided in this section.

(4) In enacting subdivision (i), it is the intent of the Legislature to make clear that nothing in this section shall affect those provisions of law governing the right of injured workers to elect to be represented by any person, regardless of whether that person is licensed to practice law in this state, as set forth in Division 4 (commencing with Section 3200) of the Labor Code.

## 2017 California Rules of Court

### Rule 9.43. Out-of-state attorney arbitration counsel

#### (a) Definition

An "out-of-state attorney arbitration counsel" is an attorney who is:

- (1) Not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in the course of, or in connection with, an arbitration proceeding in this state;
- (2) Has served a certificate in accordance with the requirements of Code of Civil Procedure section 1282.4 on the arbitrator, the arbitrators, or the arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney; and
- (3) Whose appearance has been approved by the arbitrator, the arbitrators, or the arbitral forum.

#### (b) State Bar Out-of-State Attorney Arbitration Counsel Program

The State Bar of California must establish and administer a program to implement the State Bar of California's responsibilities under Code of Civil Procedure section 1282.4. The State Bar of California's program may be operative only as long as the applicable provisions of Code of Civil Procedure section 1282.4 remain in effect.

#### (c) Eligibility to appear as an out-of-state attorney arbitration counsel

To be eligible to appear as an out-of-state attorney arbitration counsel, an attorney must comply with all of the applicable provisions of Code of Civil Procedure section 1282.4 and the requirements of this rule and the related rules and regulations adopted by the State Bar of California.

#### (d) Discipline

An out-of-state attorney arbitration counsel who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California is subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of the arbitration.

#### (e) Disqualification

Failure to timely file and serve a certificate or, absent special circumstances, appearances in multiple separate arbitration matters are grounds for disqualification from serving in the arbitration in which the certificate was filed.

#### (f) Fee

Out-of-state attorney arbitration counsel must pay a reasonable fee not exceeding \$50 to the State Bar of California with the copy of the certificate that is served on the State Bar.

**(g) Inherent power of Supreme Court**

Nothing in these rules may be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law in California.



**TITLE 3. PROGRAMS AND SERVICES**  
**Adopted July 2007**  
**DIVISION 3. NON-MEMBER ATTORNEYS**  
**Chapter 2. Out-of-State Attorney Arbitration Counsel**

Rule 3.380 Compliance procedure

To appear as Out-of-State Attorney Arbitration counsel, an attorney who meets the eligibility requirements of Code of Civil Procedure § 1282.4 and Rule 9.43 of the California Rules of Court (“Rule 9.43”) must:

- (A) be retained to appear in an arbitration in California in association with an active member of the State Bar of California;
- (B) complete the Certificate of Out-of-State-Attorney Counsel for Arbitration, which includes an agreement to comply with the standards of professional conduct required of members of the State Bar of California;
- (C) serve a copy of the completed certificate with an original signature and provide proof of service in accordance with California law 1 Code of Civil Procedure § 1013a. on (1) the State Bar with the nonrefundable fee prescribed in the Schedule of Charges and Deadlines; and (2) all other parties and counsel; and
- (D) obtain the approval of the arbitrator or the arbitral forum as indicated on the Certificate of Out-of-State-Attorney Counsel for Arbitration.

Rule 3.381 Duration of certificate

An Out-of-State-Attorney Arbitration Counsel Certificate remains in effect:

- (A) until resolution of the arbitration matter;
- (B) as long as an active member of the State Bar of California is associated as attorney of record in the arbitration matter;
- (C) as long as the attorney complies with the requirements of Code of Civil Procedure 1284.4, Rule 9.43, and these rules;
- (D) unless the attorney is subject to disciplinary action by the California Supreme Court or the State Bar Court for failure to comply with the standards of professional conduct required of members of the State Bar of California;
- (E) unless discipline is imposed by a professional or occupational licensing authority;
- (F) unless the State Bar determines that the attorney has filed a certificate containing false information;

(G) until the Out-of-State Attorney Arbitration Counsel is terminated; or

(H) unless the attorney requests termination.

Rule 3.382 Public information

State Bar records for attorneys permitted to practice law as Out-of-State Attorney Arbitration Counsel are public to the same extent as member records.

## 2017 California Rules of Court

### Rule 9.44. Registered foreign legal consultant

#### (a) Definition

A "registered foreign legal consultant" is a person who:

- (1) Is admitted to practice and is in good standing as an attorney or counselor-at-law or the equivalent in a foreign country; and
- (2) Has a currently effective certificate of registration as a registered foreign legal consultant from the State Bar.

#### (b) State Bar Registered Foreign Legal Consultant Program

The State Bar must establish and administer a program for registering foreign attorneys or counselors-at-law or the equivalent under rules adopted by the Board of Governors of the State Bar.

#### (c) Eligibility for certification

To be eligible to become a registered foreign legal consultant, an applicant must:

- (1) Present satisfactory proof that the applicant has been admitted to practice and has been in good standing as an attorney or counselor-at-law or the equivalent in a foreign country for at least four of the six years immediately preceding the application and, while so admitted, has actually practiced the law of that country;
- (2) Present satisfactory proof that the applicant possesses the good moral character requisite for a person to be licensed as a member of the State Bar of California;
- (3) Agree to comply with the provisions of the rules adopted by the Board of Governors of the State Bar relating to security for claims against a foreign legal consultant by his or her clients;
- (4) Agree to comply with the provisions of the rules adopted by the Board of Governors of the State Bar relating to maintaining an address of record for State Bar purposes;
- (5) Agree to notify the State Bar of any change in his or her status in any jurisdiction where he or she is admitted to practice or of any discipline with respect to such admission;
- (6) Agree to be subject to the jurisdiction of the courts of this state with respect to the laws of the State of California governing the conduct of attorneys, to the same extent as a member of the State Bar of California;
- (7) Agree to become familiar with and comply with the standards of professional conduct required of members of the State Bar of California;
- (8) Agree to be subject to the disciplinary jurisdiction of the State Bar of California;

(9) Agree to be subject to the rights and obligations with respect to attorney client privilege, work-product privilege, and other professional privileges, to the same extent as attorneys admitted to practice law in California; and

(10) Agree to comply with the laws of the State of California, the rules and regulations of the State Bar of California, and these rules.

**(d) Authority to practice law**

Subject to all applicable rules, regulations, and statutes, a registered foreign legal consultant may render legal services in California, except that he or she may not:

(1) Appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer;

(2) Prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States;

(3) Prepare any will or trust instrument affecting the disposition on death of any property located in the United States and owned by a resident or any instrument relating to the administration of a decedent's estate in the United States;

(4) Prepare any instrument in respect of the marital relations, rights, or duties of a resident of the United States, or the custody or care of the children of a resident; or

(5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction named in satisfying the requirements of (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise.

**(e) Failure to comply with program**

A registered foreign legal consultant who fails to comply with the requirements of the State Bar Registered Foreign Legal Consultant Program will have her or his certification suspended or revoked under rules adopted by the Board of Governors of the State Bar.

**(f) Fee and penalty**

The State Bar has the authority to set and collect appropriate fees and penalties for this program.

**(g) Inherent power of Supreme Court**

Nothing in these rules may be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the practice of law in California.

**TITLE 3. PROGRAMS AND SERVICES**  
**Adopted July 2007**  
**DIVISION 3. NON-MEMBER ATTORNEYS**  
**Chapter 4. Foreign Legal Consultants**

Rule 3.400 Definitions

(A) A “Registered Foreign Legal Consultant” is a person who meets the eligibility requirements of Rule of Court 9.44 of the California Rules of Court (“Rule 9.44”) and is registered by the State Bar as a Foreign Legal Consultant.

(B) “Registered” means that the State Bar has issued a certificate of registration to a person it deems eligible to practice law as a Foreign Legal Consultant.

Rule 3.401 Application

(A) To practice law as a Registered Foreign Legal Consultant, a person who meets the eligibility requirements of the Rule 9.44 must:

(1) submit an Application for Registration<sup>1</sup> 1 See Rule 4.16(B). as an attorney applicant for admission to the State Bar of California with the required certificate and the fee set forth in the Schedule of Charges and Deadlines;<sup>2</sup> 2 See Rule 4.3(B).

(2) submit an Application for Registered Foreign Legal Consultant<sup>3</sup> 3 See Rule of Court 9.44. with the fee set forth in the Schedule of Charges and Deadlines (the Schedule);

(3) meet State Bar requirements for acceptable moral character, which are set forth in the instructions for Application for Registered Foreign Legal Consultant;

(4) submit a letter of recommendation from an authorized representative of the professional body having final disciplinary jurisdiction or a judge of the highest law court or court of original jurisdiction attesting to his or her professional qualifications in the foreign jurisdiction.

(B) An application to practice law as a Registered Foreign Legal Consultant may be denied for failure to comply with eligibility or application requirements or a material misrepresentation of fact.

(C) Upon a showing of undue hardship by the applicant, the State Bar may waive or vary this rule’s requirement of the letter of recommendation attesting to the applicant’s professional qualifications.

Rule 3.402 Duties of Registered Foreign Legal Consultants

A Foreign Legal Consultant must:

- (A) annually renew registration as a Registered Foreign Legal Consultant and submit the fee set forth in the Schedule of Charges and Deadlines;
- (B) report to the State Bar within thirty days any change in eligibility or the security for claims required by these rules;
- (C) at all times maintain the security for claims required by these rules and upon demand promptly provide the State Bar with current evidence of security for claims;
- (D) provide legal advice in California exclusively regarding the law of a foreign jurisdiction where he or she is licensed to practice law and which is identified in the Application To Register as a Foreign Legal Consultant;
- (E) use the title “Registered Foreign Legal Consultant” and no other in connection with activities performed as a Registered Foreign Legal Consultant;
- (F) not claim in any way to be a member of the State Bar of California;
- (G) maintain an address of record and a current e-mail address with the State Bar; and
- (H) otherwise comply with Rule 9.44 and these rules.

#### Rule 3.403 Security for claims

A Registered Foreign Legal Consultant must provide evidence of security for claims for pecuniary losses resulting from acts, errors, or omissions in the rendering of legal services. The security assets must be maintained at all times, and the State Bar may require current evidence of security for claims at any time. The evidence:

- (A) may be a certificate of insurance, a letter of credit, a written guarantee, or a written agreement executed by the applicant;
- (B) must be provided in a form acceptable to the State Bar; and
- (C) must be computed in United States dollars.

#### Rule 3.404 Insurance as security for claims

If insurance serves as security for claims, it must be acceptable to the State Bar and provide the Registered Foreign Legal Consultant a minimum amount of annual insurance and a maximum deductible. These amounts are specified in the Schedule of Charges and Deadlines for a single claim and for all claims.

- (A) If the insurance excludes the cost of defense, the Registered Foreign Legal Consultant may reduce the minimum amount of annual insurance as specified in the Schedule.

(B) If the insurance provides for a deductible greater than that specified in the Schedule, the Registered Foreign Legal Consultant must provide a letter of credit or a written agreement as evidence of security for the deductible.

(C) If the insurance is provided by an insurer outside California, the Registered Foreign Legal Consultant must promptly provide, upon request of the State Bar, a copy of the insurance policy and a translation if the policy is not in English.

#### Rule 3.405 Letter of credit as security for claims

If a letter of credit serves as security for claims, the Registered Foreign Legal Consultant must maintain the letter of credit at all times in the minimum amount specified in the Schedule of Charges and Deadlines for a single claim and for all claims.

#### Rule 3.406 Written guarantee as security for claims

If a written guarantee serves as security for claims, the Registered Foreign Legal Consultant must maintain the written guarantee at all times for a minimum amount in favor of the State Bar. The amount is specified in the Schedule for a single claim and for all claims.

(A) The guarantor must be a California law firm or law corporation, an active member of the State Bar, or a financial institution.

(B) The written guarantee must be supported by an independent accountant's certified financial statements and subsidiary records evidencing that tangible net worth for the most recent fiscal year is equivalent to the minimum amount required for security for claims, exclusive of intangible assets such as good will, licenses, patents, trademarks, trade names, copyrights, and franchises. Net worth may include fifty percent of earned fees that have not been billed and billed fees that have not been collected.

#### Rule 3.407 Written agreement as evidence of security for claims

If a Foreign Legal Consultant's written agreement serves as security for claims, the agreement must be for the minimum amount specified in the Schedule of Charges and Deadlines for a single claim and for all claims.

#### Rule 3.408 Suspension of registration as a Foreign Legal Consultant

(A) Registration as a Foreign Legal Consultant is suspended

(1) for failure to annually register as a Foreign Legal Consultant and submit any related fee and penalty by the date set forth in the Schedule of Charges and Deadlines;

(2) for failure to otherwise comply with these rules or with the laws or standards of professional conduct applicable to a member of the State Bar; or

(3) upon imposition of discipline by a professional or occupational licensing authority.

(B) A Foreign Legal Consultant suspended under these rules is not permitted to practice law during the suspension. A Foreign Legal Consultant suspended for failure to comply with annual registration requirements may be reinstated upon compliance.

(C) A notice of suspension is effective ten days from the date of receipt. Receipt is deemed to be five days from the date of mailing to a California address; ten days from the date of mailing to an address elsewhere in the United States; and twenty days from the date of mailing to an address outside the United States. Alternatively, receipt is when the State Bar delivers a document physically by personal service or otherwise.

(D) Appeal of a suspension is subject to the disciplinary procedures of the State Bar.

#### Rule 3.409 Termination of Registration

Permission to practice law as a Registered Foreign Legal Consultant terminates

(A) upon failure to meet the eligibility requirements of Rule 9.44 or these rules;

(B) as required by Rule 9.44 or these rules;

(C) upon admission to the State Bar;

(D) upon repeal of Rule 9.44 or termination of the Foreign Legal Consultants program; or

(E) upon request.

#### Rule 3.410 Reinstatement after termination

An attorney terminated as a Registered Foreign Legal Consultant who seeks reinstatement must meet all eligibility and application requirements of these rules. Reinstatement is effective from the date of compliance.

#### Rule 3.411 Public information

State Bar records for attorneys permitted to practice law as Foreign Legal Consultants are public to the same extent as member records.



## 2017 California Rules of Court

### Rule 9.45. Registered legal services attorneys

#### (a) Definitions

The following definitions apply in this rule:

(1) "Qualifying legal services provider" means either of the following, provided that the qualifying legal services provider follows quality-control procedures approved by the State Bar of California:

(A) A nonprofit entity incorporated and operated exclusively in California that as its primary purpose and function provides legal services without charge in civil matters to indigent persons, especially underserved client groups, such as the elderly, persons with disabilities, juveniles, and non-English-speaking persons; or

(B) A program operated exclusively in California by a nonprofit law school approved by the American Bar Association or accredited by the State Bar of California that has operated for at least two years at a cost of at least \$20,000 per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.

(2) "Active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who:

(A) Is a member in good standing of the entity governing the practice of law in each jurisdiction in which the member is licensed to practice law;

(B) Remains an active member in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency other than California while practicing law as a registered legal services attorney in California; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

#### (b) Scope of practice

Subject to all applicable rules, regulations, and statutes, an attorney practicing law under this rule may practice law in California only while working, with or without pay, at a qualifying legal services provider, as defined in this rule, and, at that institution and only on behalf of its clients, may engage, under supervision, in all forms of legal practice that are permissible for a member of the State Bar of California.

#### (c) Requirements

For an attorney to practice law under this rule, the attorney must:

(1) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency;

(2) Register with the State Bar of California and file an Application for Determination of Moral Character;

(3) Meet all of the requirements for admission to the State Bar of California, except that the attorney:

(A) Need not take the California bar examination or the Multistate Professional Responsibility Examination; and

(B) May practice law while awaiting the result of his or her Application for Determination of Moral Character;

(4) Comply with the rules adopted by the Board of Governors relating to the State Bar Registered Legal Services Attorney Program;

(5) Practice law exclusively for a single qualifying legal services provider, except that, if so qualified, an attorney may, while practicing under this rule, simultaneously practice law as registered in-house counsel;

(6) Practice law under the supervision of an attorney who is employed by the qualifying legal services provider and who is a member in good standing of the State Bar of California;

(7) Abide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education (MCLE) requirements;

(8) Satisfy in his or her first year of practice under this rule all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years; and

(9) Not have taken and failed the California bar examination within five years immediately preceding application to register under this rule.

**(d) Application**

To qualify to practice law as a registered legal services attorney, the attorney must:

(1) Register as an attorney applicant and file an Application for Determination of Moral Character with the Committee of Bar Examiners;

(2) Submit to the State Bar of California a declaration signed by the attorney agreeing that he or she will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will not practice law in California other than under supervision at a qualifying legal services provider during the time he or she practices law as a registered legal services attorney in California, except that, if so qualified, the attorney may, while practicing under this rule, simultaneously practice law as registered in-house counsel; and

(3) Submit to the State Bar of California a declaration signed by a qualifying supervisor on behalf of the qualifying legal services provider in California attesting that the applicant will work, with or without pay, as an attorney for the organization; that the applicant will be supervised as specified in this rule; and that the qualifying legal services provider and the supervising attorney assume professional responsibility for any work performed by the applicant under this rule.

**(e) Duration of practice**

An attorney may practice for no more than a total of three years under this rule.

**(f) Application and registration fees**

The State Bar of California may set appropriate application fees and initial and annual registration fees to be paid by registered legal services attorneys.

**(g) State Bar Registered Legal Services Attorney Program**

The State Bar may establish and administer a program for registering California legal services attorneys under rules adopted by the Board of Governors of the State Bar.

**(h) Supervision**

To meet the requirements of this rule, an attorney supervising a registered legal services attorney:

- (1) Must be an active member in good standing of the State Bar of California;
- (2) Must have actively practiced law in California and been a member in good standing of the State Bar of California for at least the two years immediately preceding the time of supervision;
- (3) Must have practiced law as a full-time occupation for at least four years;
- (4) Must not supervise more than two registered legal services attorneys concurrently;
- (5) Must assume professional responsibility for any work that the registered legal services attorney performs under the supervising attorney's supervision;
- (6) Must assist, counsel, and provide direct supervision of the registered legal services attorney in the activities authorized by this rule and review such activities with the supervised attorney, to the extent required for the protection of the client;
- (7) Must read, approve, and personally sign any pleadings, briefs, or other similar documents prepared by the registered legal services attorney before their filing, and must read and approve any documents prepared by the registered legal services attorney for execution by any person who is not a member of the State Bar of California before their submission for execution; and
- (8) May, in his or her absence, designate another attorney meeting the requirements of (1) through (7) to provide the supervision required under this rule.

**(i) Inherent power of Supreme Court**

Nothing in this rule may be construed as affecting the power of the Supreme Court of California to exercise its inherent jurisdiction over the practice of law in California.

**(j) Effect of rule on multijurisdictional practice**

Nothing in this rule limits the scope of activities permissible under existing law by attorneys who are not members of the State Bar of California.

**TITLE 3. PROGRAMS AND SERVICES**  
**Adopted July 2007**  
**DIVISION 3. NON-MEMBER ATTORNEYS**  
**Chapter 1. Multijurisdictional Practice**

**Article 1. Registered Legal Services Attorneys**

Rule 3.360 Definitions

(A) A “Registered Legal Services Attorney” is an attorney who meets the eligibility requirements of Rule 9.45 of the California Rules of Court (“Rule 9.45”) and is registered by the State Bar as a Registered Legal Services Attorney.

(B) “Registered” means that the State Bar has issued a certificate of registration to an attorney it deems eligible to practice law as a Registered Legal Services Attorney.

(C) A “qualifying legal services provider” is an entity or program that meets the requirements of Rule of Court 9.45(a)(1) or that receives a grant from the Legal Services Trust Fund.<sup>1</sup> See Rules 3.670(A), 3.671(A), and 3.680.

Rule 3.361 Application

(A) To apply to register as a Registered Legal Services Attorney, an attorney who meets the eligibility and employment requirements of Rule 9.45 must

(1) submit an Application for Registration<sup>2</sup> See Rule 4.16(B). as an attorney applicant for admission to the State Bar of California with the fee set forth in the Schedule of Charges and Deadlines;<sup>3</sup> See Rule 4.3(B).

(2) submit an Application for Registered Legal Services Attorney<sup>4</sup> See Rule of Court 9.44. with the fee set forth in the Schedule of Charges and Deadlines;

(3) meet State Bar requirements for acceptable moral character; and

(4) submit a Declaration of Qualifying Legal Services Provider.

(B) An application to practice law as a Registered Legal Services Attorney may be denied for failure to comply with eligibility or application requirements or a material misrepresentation of fact.

Rule 3.362 Duties of Registered Legal Services Attorney

An attorney employed as Registered Legal Services Attorney must

(A) annually renew registration as a Registered Legal Services Attorney and submit the fee set forth in the Schedule of Charges and Deadlines;

- (B) practice for no more than a total of three years as a Registered Legal Services Attorney;
- (C) meet the Minimum Continuing Legal Education (MCLE) requirements set forth in Rule 9.45;
- (D) report a change of attorney supervisor in accordance with State Bar requirements;
- (E) use the title “Registered Legal Services Attorney” and no other in connection with activities performed as a Registered Legal Services Attorney;
- (F) not claim in any way to be a member of the State Bar of California;
- (G) maintain with the State Bar an address of record that is the current California office address of the attorney’s employer and a current e-mail address;
- (H) report to the State Bar within thirty days:
  - (1) a change in status in any jurisdiction where admitted to practice law and engaged in the practice of law, such as transfer to inactive status, disciplinary action, suspension, resignation, disbarment, or a functional equivalent;
  - (2) termination of employment with the qualifying legal services provider; or
  - (3) any information required by the State Bar Act, such as that required by sections 6068(o) and 6086.8(c) of the California Business and Professions Code, or by other legal authority;
- (I) submit a new application to register as a Registered Legal Services Attorney before beginning employment with a new qualifying legal services provider;
- (J) otherwise comply with the requirements of Rule 9.45 and these rules.

#### Rule 3.363 Duties of employer

An employer who meets the requirements of Rule 9.45 for a qualifying legal services provider must

- (A) at all times meet the statutory requirements for a legal services project or be the recipient of a grant from the Legal Services Trust Fund; 5 Business & Professions Code §§ 6213 and 6214(b)(3)(B).
- (B) complete the Application for Approval as Qualifying Legal Services Provider and be approved by the State Bar as a qualifying employer;
- (C) before employing a Registered Legal Services Attorney, complete a Declaration of Qualifying Legal Services Provider attesting that it

(1) is a qualifying legal services provider;

(2) agrees to supervise the Registered Legal Services Attorney (“attorney”) and otherwise comply with the requirements of Rule 9.45 and these rules;

(3) deems the attorney, on the basis of reasonable inquiry, to be of good moral character;

(4) agrees to notify the State Bar of California, in writing, within thirty days if

(a) the attorney has terminated employment;

(b) the attorney is no longer eligible for employment as required by Rule 9.45 and these rules;

(c) the supervising attorney no longer meets the requirements of these rules;

(d) its status as a qualifying legal services provider has changed; or

(e) it has changed its office address; and

(D) comply with State Bar quality control procedures for qualifying legal services providers.

#### Rule 3.364 Suspension of Legal Services Attorney registration

(A) Registration as a Legal Services Attorney is suspended

(1) for failure to annually register as a Registered Legal Services Attorney and submit any related fee and penalty set forth in the Schedule of Charges and Deadlines;

(2) for failure to comply with the Minimum Continuing Legal Education requirement of Rule of Court 9.45 and to pay any related fee and penalty set forth in the Schedule of Charges and Deadlines;

(3) upon transfer to inactive status, disciplinary action, suspension, resignation, disbarment, or a functional equivalent in status in any jurisdiction where admitted to practice law;

(4) upon imposition of discipline by a professional or occupational licensing authority; or

(5) for failure to otherwise comply with these rules or with the laws or standards of professional conduct applicable to a member of the State Bar.

(B) An attorney suspended under these rules is not permitted to practice law during the suspension. An attorney suspended for failure to comply with annual registration requirements may be reinstated upon compliance.

(C) A notice of suspension is effective ten days from the date of receipt. Receipt is deemed to be five days from the date of mailing to a California address; ten days from the date of mailing to an address elsewhere in the United States; and twenty days from the date of mailing to an address outside the United States. Alternatively, receipt is when the State Bar delivers a document physically by personal service or otherwise.

(D) Appeal of a suspension is subject to the disciplinary procedures of the State Bar.

#### Rule 3.365 Termination of Registration

Permission to practice law as a Registered Legal Services Attorney terminates

(A) upon failure to meet the eligibility requirements of Rule 9.45 or these rules;

(B) as required by Rule 9.45 or these rules;

(C) upon admission to the State Bar;

(D) upon repeal of Rule 9.45 or termination of the Registered Legal Services Attorney program;  
or

(E) upon request.

#### Rule 3.366 Reinstatement after termination

An attorney terminated as a Registered Legal Services Attorney who seeks reinstatement must meet all eligibility and application requirements of these rules.

#### Rule 3.367 Public information

State Bar records for attorneys permitted to practice law as Registered Legal Services Attorneys are public to the same extent as member records.



## 2017 California Rules of Court

### Rule 9.46. Registered in-house counsel

#### (a) Definitions

The following definitions apply to terms used in this rule:

(1) "Qualifying institution" means a corporation, a partnership, an association, or other legal entity, including its subsidiaries and organizational affiliates. Neither a governmental entity nor an entity that provides legal services to others can be a qualifying institution for purposes of this rule. A qualifying institution must:

(A) Employ at least 10 employees full time in California; or

(B) Employ in California an attorney who is an active member in good standing of the State Bar of California.

(2) "Active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who meets all of the following criteria:

(A) Is a member in good standing of the entity governing the practice of law in each jurisdiction in which the member is licensed to practice law;

(B) Remains an active member in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency, other than California, while practicing law as registered in-house counsel in California; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

#### (b) Scope of practice

Subject to all applicable rules, regulations, and statutes, an attorney practicing law under this rule is:

(1) Permitted to provide legal services in California only to the qualifying institution that employs him or her;

(2) Not permitted to make court appearances in California state courts or to engage in any other activities for which *pro hac vice* admission is required if they are performed in California by an attorney who is not a member of the State Bar of California; and

(3) Not permitted to provide personal or individual representation to any customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution.

#### (c) Requirements

For an attorney to practice law under this rule, the attorney must:

- (1) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency;
- (2) Register with the State Bar of California and file an Application for Determination of Moral Character;
- (3) Meet all of the requirements for admission to the State Bar of California, except that the attorney:
  - (A) Need not take the California bar examination or the Multistate Professional Responsibility Examination; and
  - (B) May practice law while awaiting the result of his or her Application for Determination of Moral Character;
- (4) Comply with the rules adopted by the Board of Governors relating to the State Bar Registered In-House Counsel Program;
- (5) Practice law exclusively for a single qualifying institution, except that, while practicing under this rule, the attorney may, if so qualified, simultaneously practice law as a registered legal services attorney;
- (6) Abide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education (MCLE) requirements;
- (7) Satisfy in his or her first year of practice under this rule all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years and, thereafter, satisfy the MCLE requirements applicable to all members of the State Bar; and
- (8) Reside in California.

**(d) Application**

To qualify to practice law as registered in-house counsel, an attorney must:

- (1) Register as an attorney applicant and file an Application for Determination of Moral Character with the Committee of Bar Examiners;
- (2) Submit to the State Bar of California a declaration signed by the attorney agreeing that he or she will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will not practice law in California other than on behalf of the qualifying institution during the time he or she is registered in-house counsel in California, except that if so qualified, the attorney may, while practicing under this rule, simultaneously practice law as a registered legal services attorney; and

(3) Submit to the State Bar of California a declaration signed by an officer, a director, or a general counsel of the applicant's employer, on behalf of the applicant's employer, attesting that the applicant is employed as an attorney for the employer, that the nature of the employment conforms to the requirements of this rule, that the employer will notify the State Bar of California within 30 days of the cessation of the applicant's employment in California, and that the person signing the declaration believes, to the best of his or her knowledge after reasonable inquiry, that the applicant qualifies for registration under this rule and is an individual of good moral character.

**(e) Duration of practice**

A registered in-house counsel must renew his or her registration annually. There is no limitation on the number of years in-house counsel may register under this rule. Registered in-house counsel may practice law under this rule only for as long as he or she remains employed by the same qualifying institution that provided the declaration in support of his or her application. If an attorney practicing law as registered in-house counsel leaves the employment of his or her employer or changes employers, he or she must notify the State Bar of California within 30 days. If an attorney wishes to practice law under this rule for a new employer, he or she must first register as in-house counsel for that employer.

**(f) Eligibility**

An application to register under this rule may not be denied because:

- (1) The attorney applicant has practiced law in California as in-house counsel before the effective date of this rule.
- (2) The attorney applicant is practicing law as in-house counsel at or after the effective date of this rule, provided that the attorney applies under this rule within six months of its effective date.

**(g) Application and registration fees**

The State Bar of California may set appropriate application fees and initial and annual registration fees to be paid by registered in-house counsel.

**(h) State Bar Registered In-House Counsel Program**

The State Bar must establish and administer a program for registering California in-house counsel under rules adopted by the Board of Governors.

**(i) Inherent power of Supreme Court**

Nothing in this rule may be construed as affecting the power of the Supreme Court of California to exercise its inherent jurisdiction over the practice of law in California.

**(j) Effect of rule on multijurisdictional practice**

Nothing in this rule limits the scope of activities permissible under existing law by attorneys who are not members of the State Bar of California.

**TITLE 3. PROGRAMS AND SERVICES**  
**Adopted July 2007**  
**DIVISION 3. NON-MEMBER ATTORNEYS**  
**Chapter 1. Multijurisdictional Practice**  
**Article 2. Registered In-House Counsel**

Rule 3.370 Definitions

(A) An attorney registered as Registered In-House Counsel is an attorney who meets the eligibility requirements of Rule 9.46 of the California Rules of Court (“Rule 9.46”) and is registered by the State Bar as Registered In-House Counsel.

(B) “Registered” means that the State Bar has issued a certificate of registration to an attorney it deems eligible to practice law as Registered In-House Counsel.

(C) A “qualifying institution” is a corporation, a partnership, an association, or other legal entity that meets the requirements of Rule of Court 9.46(a)(1).

Rule 3.371 Application

(A) To apply to register as Registered In-House Counsel, an attorney who meets the eligibility and employment requirements of Rule 9.46 must

(1) submit an Application for Registration<sup>1</sup> See Rule 4.16(B). as an attorney applicant for admission to the State Bar of California with the fee set forth in the Schedule of Charges and Deadlines;<sup>2</sup> See Rule 4.3(B).

(2) submit an Application for Registered In-House Counsel<sup>3</sup> See Rule of Court 9.46(d). with the fee set forth in the Schedule of Charges and Deadlines;

(3) meet State Bar requirements for acceptable moral character; and

(4) submit a Declaration of Qualifying Institution.

(B) An application to practice law as Registered In-House Counsel may be denied for failure to comply with eligibility or application requirements or a material misrepresentation of fact in the application.

Rule 3.372 Duties of Registered In-House Counsel

An attorney employed as Registered In-House Counsel must

(A) annually renew registration as Registered In-House Counsel and submit the fee set forth in the Schedule of Charges and Deadlines;

(B) meet the Minimum Continuing Legal Education (MCLE) requirements set forth in Rule 9.46;

(C) use the title “Registered In-House Counsel” and no other in connection with activities performed as Registered In-House Counsel;

(D) not claim in any way to be a member of the State Bar of California;

(E) maintain an address of record with the State Bar, which must be the current California office address of the attorney’s employer and a current e-mail address;

(F) report to the State Bar within thirty days

(1) a change in status in any jurisdiction where admitted to practice law and engaged in the practice of law, such as transfer to inactive status, disciplinary action, suspension, resignation, disbarment, or a functional equivalent;

(2) termination of employment with the qualifying institution; or

(3) any information required by the State Bar Act, such as that required by sections 6068(o) and 6086.8(c) of the California Business and Professions Code, or by other legal authority;

(G) submit a new application to register as Registered In-House Counsel before beginning employment with a new qualifying institution;5 5 Rule of Court 9.46(a)(1). and

(H) otherwise comply with the requirements of Rule 9.46 and these rules.

(A) A qualifying institution prospectively employing of an attorney applying for registration as Registered In-House Counsel must complete a Declaration of Qualifying Institution.

(B) Within thirty days of ceasing to meet the requirements of Rule of Court 9.46(a), an employer of Registered In-House Counsel must report that to the State Bar that it is no longer a qualifying institution.

#### Rule 3.374 Suspension of Registered In-House Counsel registration

(A) Registration as In-House Counsel is suspended

(1) for failure to annually register as Registered In-House Counsel and submit any related fee and penalty set forth in the Schedule of Charges and Deadlines;

(2) for failure to comply with the Minimum Continuing Legal Education requirement of Rule of Court 9.46 and pay any related fee and penalty set forth in the Schedule of Charges and Deadlines;

(3) upon transfer to inactive status, disciplinary action, suspension, resignation, disbarment, or a functional equivalent in status in any jurisdiction where admitted to practice law;

(4) upon imposition of discipline by a professional or occupational licensing authority; or

(5) for failure to otherwise comply with these rules or with the laws or standards of professional conduct applicable to a member of the State Bar.

(B) An attorney suspended under these rules is not permitted to practice law. An attorney suspended for failure to comply with annual renewal or MCLE requirements may be reinstated upon compliance.

(C) A notice of suspension is effective ten days from the date of receipt. Receipt is deemed to be five days from the date of mailing to a California address; ten days from the date of mailing to an address elsewhere in the United States; and twenty days from the date of mailing to an address outside the United States. Alternatively, receipt is when the State Bar delivers a document physically by personal service or otherwise.

(D) Appeal of a suspension is subject to the disciplinary procedures of the State Bar.

#### Rule 3.375 Termination of Registration

Permission to practice law as Registered In-House Counsel terminates

(A) upon failure to meet the eligibility requirements of Rule 9.46 or these rules;

(B) as required by Rule 9.46 or these rules;

(C) upon admission to the State Bar; (D) upon repeal of Rule 9.46 or termination of the Registered In-House Counsel program; or

(E) upon request.

#### Rule 3.376 Reinstatement after termination

An attorney terminated as Registered In-House Counsel who seeks reinstatement must meet all eligibility and application requirements of these rules.

#### Rule 3.377 Public information

State Bar records for attorneys permitted to practice law as Registered In-House Counsel are public to the same extent as member records.

## 2017 California Rules of Court

### Rule 9.47. Attorneys practicing law temporarily in California as part of litigation

#### (a) Definitions

The following definitions apply to the terms used in this rule:

(1) "A formal legal proceeding" means litigation, arbitration, mediation, or a legal action before an administrative decision-maker.

(2) "Authorized to appear" means the attorney is permitted to appear in the proceeding by the rules of the jurisdiction in which the formal legal proceeding is taking place or will be taking place.

(3) "Active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who meets all of the following criteria:

(A) Is a member in good standing of the entity governing the practice of law in each jurisdiction in which the member is licensed to practice law;

(B) Remains an active member in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency while practicing law under this rule; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

#### (b) Requirements

For an attorney to practice law under this rule, the attorney must:

(1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;

(2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;

(3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

**(c) Permissible activities**

An attorney meeting the requirements of this rule, who complies with all applicable rules, regulations, and statutes, is not engaging in the unauthorized practice of law in California if the attorney's services are part of:

- (1) A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;
- (2) A formal legal proceeding that is anticipated but is not yet pending in California and in which the attorney reasonably expects to be authorized to appear;
- (3) A formal legal proceeding that is anticipated but is not yet pending in another jurisdiction and in which the attorney reasonably expects to be authorized to appear; or
- (4) A formal legal proceeding that is anticipated or pending and in which the attorney's supervisor is authorized to appear or reasonably expects to be authorized to appear.

The attorney whose anticipated authorization to appear in a formal legal proceeding serves as the basis for practice under this rule must seek that authorization promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule.

**(d) Restrictions**

To qualify to practice law in California under this rule, an attorney must not:

- (1) Hold out to the public or otherwise represent that he or she is admitted to practice law in California;
- (2) Establish or maintain a resident office or other systematic or continuous presence in California for the practice of law;
- (3) Be a resident of California;
- (4) Be regularly employed in California;
- (5) Regularly engage in substantial business or professional activities in California; or
- (6) Have been disbarred, have resigned with charges pending, or be suspended from practicing law in any other jurisdiction.

**(e) Conditions**

By practicing law in California under this rule, an attorney agrees that he or she is providing legal services in California subject to:

- (1) The jurisdiction of the State Bar of California;



(2) The jurisdiction of the courts of this state to the same extent as is a member of the State Bar of California; and

(3) The laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

**(f) Inherent power of Supreme Court**

Nothing in this rule may be construed as affecting the power of the Supreme Court of California to exercise its inherent jurisdiction over the practice of law in California.

**(g) Effect of rule on multijurisdictional practice**

Nothing in this rule limits the scope of activities permissible under existing law by attorneys who are not members of the State Bar of California.

**Rule 9.48. Nonlitigating attorneys temporarily in California to provide legal services**

**(a) Definitions**

The following definitions apply to terms used in this rule:

(1) "A transaction or other nonlitigation matter" includes any legal matter other than litigation, arbitration, mediation, or a legal action before an administrative decision-maker.

(2) "Active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who meets all of the following criteria:

(A) Is a member in good standing of the entity governing the practice of law in each jurisdiction in which the member is licensed to practice law;

(B) Remains an active member in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency other than California while practicing law under this rule; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

**(b) Requirements**

For an attorney to practice law under this rule, the attorney must:

(1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;

(2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;

(3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

**(c) Permissible activities**

An attorney who meets the requirements of this rule and who complies with all applicable rules, regulations, and statutes is not engaging in the unauthorized practice of law in California if the attorney:

(1) Provides legal assistance or legal advice in California to a client concerning a transaction or other nonlitigation matter, a material aspect of which is taking place in a jurisdiction other than California and in which the attorney is licensed to provide legal services;

(2) Provides legal assistance or legal advice in California on an issue of federal law or of the law of a jurisdiction other than California to attorneys licensed to practice law in California; or

(3) Is an employee of a client and provides legal assistance or legal advice in California to the client or to the client's subsidiaries or organizational affiliates.

**(d) Restrictions**

To qualify to practice law in California under this rule, an attorney must not:

(1) Hold out to the public or otherwise represent that he or she is admitted to practice law in California;

(2) Establish or maintain a resident office or other systematic or continuous presence in California for the practice of law;

(3) Be a resident of California;

(4) Be regularly employed in California;

(5) Regularly engage in substantial business or professional activities in California; or

(6) Have been disbarred, have resigned with charges pending, or be suspended from practicing law in any other jurisdiction.

**(e) Conditions**

By practicing law in California under this rule, an attorney agrees that he or she is providing legal services in California subject to:

(1) The jurisdiction of the State Bar of California;

- (2) The jurisdiction of the courts of this state to the same extent as is a member of the State Bar of California; and
- (3) The laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar of California, and these rules.

**(f) Scope of practice**

An attorney is permitted by this rule to provide legal assistance or legal services concerning only a transaction or other nonlitigation matter.

**(g) Inherent power of Supreme Court**

Nothing in this rule may be construed as affecting the power of the Supreme Court of California to exercise its inherent jurisdiction over the practice of law in California.

**(h) Effect of rule on multijurisdictional practice**

Nothing in this rule limits the scope of activities permissible under existing law by attorneys who are not members of the State Bar of California.

## APPENDIX 5: Response from the International Centre for Dispute Resolution (ICDR) to Working Group Inquiry

**From:** Steve Andersen, Esq AndersenS@adr.org  
**Subject:** RE: California Supreme Court Work Group on Representation in International Arbitration  
**Date:** February 24, 2017 at 1:55 PM  
**To:** Jeffrey Hart Dasteel jeffrey.dasteel@gmail.com  
**Cc:** Steve Andersen, Esq AndersenS@adr.org

Jeff,

1. How many international arbitrations has AAA/ICDR administered in the United States in each of the last three years in the aggregate and by state.
  - a. ICDR Total International Case Filings: 2016 Cases 1050; 2015 Cases: 1064; 2014 Cases 1015; 2013 Cases 1165
  - b. State Breakdown:
    - i. 2015: New York 296; Florida 162; California 63; Texas 48; DC 23; Illinois 22
    - ii. 2014: We don't have this break down for 2014
    - iii. 2013: New York 333; Florida 128; California 78; Texas 41; DC 24; Illinois 18
    - iv. 2012: New York 236; Florida 115; California 87; Texas 54; DC 27; Illinois 29

2. To the extent your organization has maintained the information, please provide the following (does not need to be broken down by state):

A majority of our international cases are considered business to business commercial disputes. For example, in 2015 our top 10 case categories were as follows: Franchise, Hospitality, Construction, Insurance, Technology, Financial Services, Pharmaceuticals, Energy, Dealer/Distributor and Freight/Transportation. These categories vary some year to year, but are by and large the top filing categories over a 3 year history.

My understanding is that there would be very few or no consumer cases administered by the ICDR. The ICDR does not administer any significant personal injury cases. Occasionally these issues may arise in other types of disputes handled by the ICDR. The ICDR administers about 3 or 4 dozen international employment cases each year. Most of these arise out of individually negotiated employment contracts that contain arbitration agreements.

b.) What statistics are available on the dollar sizes of the claims for the international arbitrations compared to the dollar sizes of claims for domestic arbitrations. We are not able to gather this information in time.

3. Does the AAA/ICDR have protocols, rules or guidelines on the ethical obligations of

counsel representing parties in AAA/ICDR international arbitrations? If so, please provide them. [We apply the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Model Standards of Conduct for Mediators and AAA/ICDR Standards of Conduct for Parties and Representatives for both international and domestic cases. We are working on a Code of Conduct for a Party and its Representative that will be applicable for ICDR cases.](#)

Best,

Steve

**Steve Andersen, Esq**  
**Vice President**

American Arbitration Association  
International Centre for Dispute Resolution  
725 South Figueroa, Suite 400  
Los Angeles, CA 90017  
[www.icdr.org](http://www.icdr.org)  
T: +1 213 271 9915

F:

The information in this transmittal (including attachments, if any) is privileged and/or confidential and is intended only for the recipient(s) listed above. Any review, use, disclosure, distribution or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately by reply email and destroy all copies of the transmittal. Thank you.

-----Original Message-----

From: Jeffrey Hart Dasteel [mailto:[jeffrey.dasteel@gmail.com](mailto:jeffrey.dasteel@gmail.com)]

Sent: Monday, February 20, 2017 5:56 PM

To: Steve Andersen, Esq

Subject: California Supreme Court Work Group on Representation in International Arbitration

Steve,

The California Supreme Court has appointed me to a work group to study the possibility of allowing foreign and out-of-state attorneys to participate in international arbitrations seated in California. As part of that work group, I have been tasked to contact major provider organizations for certain data on international arbitrations in the United States. The information the work group would like is as follows:

1. How many international arbitrations has AAA/ICDR administered in the United States in each of the last three years in the aggregate and by state.
2. To the extent your organization has maintained the information, please provide the following (does not need to be broken down by state):
  - a. ) How many of the international arbitrations involved (a) consumers, (b) employment disputes, (c) personal injury claims (products liability or otherwise); (d) business-to-business

commercial disputes; (e) franchisor-franchisee disputes

b.) What statistics are available on the dollar sizes of the claims for the international arbitrations compared to the dollar sizes of claims for domestic arbitrations.

3. Does the AAA/ICDR have protocols, rules or guidelines on the ethical obligations of counsel representing parties in AAA/ICDR international arbitrations? If so, please provide them.

We are trying to work quickly on this, so that if you can respond this week that would be great.

Thanks,  
Jeff Dasteel

## APPENDIX 6: Response from JAMS to Working Group Inquiry

**From:** Richard Chernick [Richard@RichardChernick.com](mailto:Richard@RichardChernick.com)  
**Subject:** FW: California Supreme Court Work Group on International Arbitration  
**Date:** February 23, 2017 at 6:40 AM  
**To:** Jeffrey Hart Dasteel [jeffrey.dasteel@gmail.com](mailto:jeffrey.dasteel@gmail.com)  
**Cc:** Taylor Kimberly ([KTaylor@JAMSADR.com](mailto:KTaylor@JAMSADR.com)) [KTaylor@JAMSADR.com](mailto:KTaylor@JAMSADR.com)

---

Jeff:

Here is the info you requested. It was assembled by Kim Taylor our COO in NYC  
 She is available to answer any questions  
 Thanks for your work on this important issue.  
 Rich

---

**From:** Kimberly Taylor [<mailto:KTaylor@JAMSADR.com>]  
**Sent:** Thursday, February 23, 2017 5:33 AM  
**To:** Richard Chernick <[Richard@RichardChernick.com](mailto:Richard@RichardChernick.com)>  
**Subject:** RE: California Supreme Court Work Group on International Arbitration

Richard,

Here is the information you requested:

### 1. How many international arbitrations has JAMS administered in the United States in each of the last three years in the aggregate and by state?

State	2014	2015	2016
CA	51	52	51
DC	4	4	9
FL	12	9	15
GA	3	7	1
IL	3	4	3
MA	2	3	2
MN	0	2	2
NV	0	2	3
NY	29	14	33
PA	1	0	0
TX	5	6	6
WA	3	0	2
	<b>113</b>	<b>103</b>	<b>127</b>

**2. How many international arbitrations involved (a) consumers, (b) employment disputes, (c) personal injury claims (products liability or otherwise), (d) business-to-business commercial disputes; (e) franchisor-franchisee disputes?**

<b>CASETYPE</b>	<b>Y2014</b>	<b>Y2015</b>	<b>Y2016</b>
Business/Commercial	72	71	83
Construction	3	4	5
Employment	9	8	11
Energy	3	3	4
Estate/Probate Issues	0	0	1
Health Care (Non-malpractice)	0	0	1
Insurance Issues	5	2	2
Intellectual Property	7	7	6
Maritime	10	7	11
Professional Liability/Malpractice	1	1	2
Real Estate/Real Property (Non-Construction Defect)	2	0	0
	<b>112</b>	<b>103</b>	<b>127</b>

**3. What statistics are available on the dollar sizes of the claims for the international arbitrations seated in the United States?**

a. We do not track this information.

**4. Does JAMS have protocols, rules or guidelines on the ethical obligations of counsel representing parties in JAMS arbitrations? If so, please provide them.**

a. We do not have guidelines or protocols on this issue. We do, however, include the following language in our letters to the parties:

**Out of State Attorneys in California Arbitrations, please note:**

The California legislature, effective January 1, 2007, has changed the process by which out-of-state attorneys may participate in non-judicial arbitrations occurring in California. See [www.calbar.ca.gov](http://www.calbar.ca.gov) for requirements.

Also, JAMS International Arbitration Rule 20.1 provides:

**Article 20. Representation**

**20.1** The parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by the persons of their choice, irrespective of, in particular, nationality or professional qualification. The names, addresses and telephone, facsimile, email or other communication references of representatives will be communicated to the Administrator, the other parties and, after its establishment, the Tribunal.

Kim



-----Original Message-----

From: Richard Chernick [<mailto:Richard@RichardChernick.com>]  
Sent: Monday, February 20, 2017 8:49 PM  
To: Kimberly Taylor  
Cc: Robert Davidson; Christopher Poole  
Subject: FW: California Supreme Court Work Group on International Arbitration

Kim:

This is an important committee assessing the Birbrower issue and looking for a solution. The committee is very pro arbitration and will not misuse the data Can we help on this??

--

Richard Chernick

-----Original Message-----

From: Jeffrey Hart Dasteel [<mailto:jeffrey.dasteel@gmail.com>]  
Sent: Monday, February 20, 2017 5:00 PM  
To: Richard Chernick  
Subject: California Supreme Court Work Group on International Arbitration

Rich,

The California Supreme Court has appointed me to a work group to study the possibility of allowing foreign and out-of-state attorneys to participate in international arbitrations seated in California. As part of that work group, I have been tasked to contact major provider organizations for certain data on international arbitrations in the United States. The information the work group would like is as follows:

1. How many international arbitrations has JAMS administered in the United States in each of the last three years in the aggregate and by state.
2. To the extent your organization has maintained the information, please provide the following (does not need to be broken down by state):
  - a. ) How many of the international arbitrations involved (a) consumers, (b) employment disputes, (c) personal injury claims (products liability or otherwise); (d) business-to-business commercial disputes; (e) franchisor-franchisee disputes
  - b.) What statistics are available on the dollar sizes of the claims for the international arbitrations seated in the United States?
3. Does JAMS have protocols, rules or guidelines on the ethical obligations of counsel representing parties in JAMS arbitrations? If so, please provide them.

We are trying to work quickly on this, so that if you can respond this week that would be great.

Best,

Jeff

**APPENDIX 7: Response from the International Chamber of Commerce (ICC) to Working Group Inquiry**

From: **AKERLY Alexandra** alexandra.al<erly@iccwbo.org  
Subject: RE: California Supreme Court Work Group on Representation in International Arbitration in California  
Date: February 24, 2017 at 4:18 PM  
To: Jeffrey Hart Dasteel jeffrey.dasteel@gmail.com  
Cc: DIGON Rocio Rocio.DIGON@iccwbo.org, MEHR KAUR Mehr.Kaur@iccwbo.org

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Dear Jeff,

Please find below the information requested for point 1 and 3 below. As discussed, I will follow up, with info for point 2 on Monday.

1. Commenced in 2015: 60 cases with seats in the USA: 28 were in the state of New York, 11 in Florida, 9 in California, 6 in Texas, 2 each in Missouri and Washington OC, and 1 each in North Carolina and Ohio.

Commenced in 2014: 58 cases with seats in the USA: 12 in New York, 12 in California, 10 in Texas, 9 in Florida, 3 in Pennsylvania, 2 in Arizona, 2 in Delaware, 2 in Georgia, one each in Colorado, Illinois, Massachusetts, Minnesota, New Jersey and Wyoming.

Commenced in 2013: 38 cases with seats in the USA: 24 in the State of New York, 5 in California, 3 in Florida, 2 in Texas, one in each of the states of Massachusetts, Pennsylvania and Virginia, and one in Washington D.C.

3. No

Have a great weekend.

Best regards,

Alex

**APPENDIX 8: New York Rules Authorizing Foreign Attorney Practice in International  
Commercial Arbitration  
New York Rules of the Court of Appeals**

§ 523.2 Scope of temporary practice

- (a) A lawyer who is not admitted to practice in this State may provide legal services on a temporary basis in this State provided the following requirements are met.
- (1) The lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority; and
  - (2) the lawyer is in good standing in every jurisdiction where admitted or authorized to practice; and
  - (3) the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in this State, and such temporary legal services:
    - (i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or
    - (ii) 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; or
    - (iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires *pro hac vice* admission; or
    - (iv) are not within paragraph (3)(ii) or 3(iii) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice.
- (b) A person licensed as a legal consultant pursuant to 22 NYCRR Part 521, or registered as in-house counsel pursuant to 22 NYCRR Part 522, may not practice pursuant to this Part.

§ 523.3 Discipline authority

A lawyer who practices law temporarily in this State pursuant to this Part shall be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State in connection with such temporary practice to the same extent as if the lawyer were admitted or authorized to practice in the State. A grievance committee may report complaints and evidence of a disciplinary violation against a lawyer practicing temporarily pursuant to this Part to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law.

§ 523.4 Annual report

On or before the first of September of each year, the Office of Court Administration shall file an annual report with the Chief Judge reviewing the implementation of this rule and making such recommendations as it deems appropriate.

## APPENDIX 9: Florida's Rule of Professional Conduct 4-5.5

### Rule 4-5.5, Unlicensed Practice of Law; Multijurisdictional Practice of Law

- (a) **Authorized Temporary Practice by Lawyer Admitted in Another United States Jurisdiction.** A lawyer admitted and authorized to practice law in another United States jurisdiction who has been neither disbarred or suspended from practice in any jurisdiction, nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule, may provide legal services on a temporary basis in Florida that are:
- (1) undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter; or
  - (2) in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized; or
  - (3) in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and the services are not services for which the forum requires *pro hac vice* admission:
    - (A) if the services are performed for a client who resides in or has an office in the lawyer's home state, or
    - (B) where 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; or
  - (4) not within subdivisions (c)(2) or (c)(3), and
    - (A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice, or
    - (B) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (b) **Authorized Temporary Practice by Lawyer Admitted in a Non-United States Jurisdiction.** A lawyer who is admitted only in a non-United States jurisdiction who is a member in good standing of a recognized legal profession in a foreign jurisdiction whose members are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who has been neither disbarred or suspended from practice in any jurisdiction nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule does not engage in the unlicensed practice of law in Florida when on a temporary basis the lawyer performs services in Florida that are:

- (1) undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter; or
- (2) in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal to appear in the proceeding or reasonably expects to be so authorized; or
- (3) in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in Florida or another jurisdiction and the services are not services for which the forum requires *pro hac vice* admission:
  - (A) if the services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is admitted to practice, or
  - (B) where 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; or
- (4) not within subdivisions (d)(2) or (d)(3), and
  - (A) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization, or
  - (B) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
- (5) governed primarily by international law or the law of a non-United States jurisdiction in which the lawyer is a member.

**APPENDIX 10: Texas Bar Rule XIX****Requirements for Participation in Texas Proceedings by a Non-Resident Attorney**

- (a) A reputable attorney, licensed in another state or in a foreign jurisdiction but not in Texas, who resides outside of Texas may seek permission to participate in the proceedings of any particular cause in a Texas court by complying with the requirements of Texas Government Code Section 82.0361 concerning payment of a non-resident attorney fee to the Board of Law Examiners as a mandatory initial requirement. Upon completion of this requirement and receipt of an acknowledgment issued by the Board of Law Examiners, the non-resident attorney shall file with the applicable Texas court a written, sworn motion requesting permission to participate in a particular cause. The motion shall contain:
- (1) the office address, telephone number, fax number, and email address of the non-resident attorney movant;
  - (2) the name and State Bar card number of an attorney licensed in Texas, with whom the non-resident attorney will be associated in the Texas proceedings, and that attorney's office address, telephone number, fax number, and email address;
  - (3) a list of all cases and causes, including cause number and caption, in Texas courts in which the non-resident attorney has appeared or sought leave to appear or participate within the past two years;
  - (4) a list of jurisdictions in which the non-resident attorney is licensed, including federal courts, and a statement that the non-resident attorney is or is not an active member in good standing in each of those jurisdictions;
  - (5) a statement that the non-resident attorney has or has not been the subject of disciplinary action by the Bar or courts of any jurisdiction in which the attorney is licensed within the preceding five years, and a description of any such disciplinary actions;
  - (6) a statement that the non-resident attorney has or has not been denied admission to the courts of any State or to any federal court during the preceding five years;
  - (7) a statement that the non-resident attorney is familiar with the State Bar Act, the State Bar Rules, and the Texas Disciplinary Rules of 34 Professional Conduct governing the conduct of members of the State Bar of Texas, and will at all times abide by and comply with the same so long as such Texas proceeding is pending and said Applicant has not withdrawn as counsel therein.
- (b) The motion of the non-resident attorney seeking permission to participate in Texas proceedings must be accompanied by motion of the resident practicing Texas attorney with whom the non-resident attorney will be associated in the proceeding of a particular cause. The motion must contain a statement that the resident attorney finds the Applicant to be a



reputable attorney and recommends that the Applicant be granted permission to participate in the particular proceeding before the court.

- (c) The motion of the non-resident attorney must also be accompanied by the proof of payment or proof of indigency acknowledgment issued by the Board of Law Examiners.
- (d) The court may examine the non-resident attorney to determine that the non-resident attorney is aware of and will observe the ethical standards required of attorneys licensed in Texas and to determine whether the non-resident attorney is appearing in courts in Texas on a frequent basis. If the court determines that the non-resident attorney is not a reputable attorney who will observe the ethical standards required of Texas attorneys, that the non-resident attorney has been appearing in courts in Texas on a frequent basis, that the non-resident attorney has been engaging in the unauthorized practice of law in the state of Texas, or that other good cause exists, the court or hearing officer may deny the motion.
- (e) If, after being granted permission to participate in the proceedings of any particular cause in Texas, the non-resident attorney engages in professional misconduct as that term is defined by the State Bar Act, the State Bar Rules, or the Texas Disciplinary Rules of Professional Conduct, the court may revoke the non-resident attorney's permission to participate in the Texas proceedings and may cite the non-resident attorney for contempt. In addition, the court may refer the matter to the Grievance Committee of the Bar District in which the court is located.
- (f) The filing of a motion under this Rule constitutes submission to the jurisdiction of the Grievance Committee for the District in which the court is located. The county in which the court is located is considered the county of residence of the non-resident attorney for purposes of determining venue in any disciplinary action involving the attorney.

**APPENDIX 11: International Bar Association (IBA) Report on International Arbitration  
in 55 Non-U.S. Jurisdictions**

The following question was posed in respect of each country which is covered in the IBA report:

**“Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?”**

The responses to this question are grouped under the following four categories (note: items (1) and (2) may overlap in some cases):

**(1) Jurisdictions which allow (do not prohibit) Foreign Lawyers in International Arbitration:**

Argentina	Finland
Australia	France
Austria	Germany
Belgium	Greece <sup>43</sup>
Brazil	Hong Kong
Brunei <sup>44</sup>	Hungary
Canada <sup>45</sup> (see conditions at item (2) below)	India
China (see conditions at item (2) below)	Indonesia (see comments regarding potential requirements under item (3) below)
Colombia	Ireland
Costa Rica (see conditions at item (2) below)	Italy
Czech Republic (see recommendation under “conditions” at item (2) below)	Japan (see conditions at item (2) below)
Denmark	Lebanon
Ecuador	Lithuania

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<sup>43</sup> This issue has not been tested in the Greek courts. Accordingly, the report by respected local counsel cautiously states that they “doubt” that there are any restrictions applicable to foreign lawyers.

<sup>44</sup> Brunei is not included in the IBA Arbitration Committee Country Guides, but this information has been confirmed with local counsel and arbitration experts.

<sup>45</sup> While Canada has no general prohibition against foreign lawyers representing parties in Canada-seated international arbitrations, each province in Canada governs professional activity within its own territory. The report on Canada reflects certain conditions that apply in the provinces of Quebec and Ontario, as outlined at item (2) hereof.

Malaysia (except for the member state of Sabah, although there has been an appeal to the Federal Court from the Court of Appeal about the restriction in Sabah/Malaysia; also, see comments under item (3) below)	Singapore
Mexico	South Africa
The Netherlands	South Korea (see conditions at item (2) below)
New Zealand	Spain
Nigeria	Sweden
Peru	Switzerland
Poland	Thailand (see conditions at item (2) below)
Portugal	Turkey
Romania	Ukraine (see comments under item (3) below)
Russian Federation	United Arab Emirates (see comments under item (3) below)
Saudi Arabia <sup>46</sup>	Venezuela
Scotland	Vietnam
Senegal <sup>47</sup>	

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<sup>46</sup> The Guide is not unequivocal on this point, but appears to permit freedom of representation in international arbitration.

<sup>47</sup> The Guide indicates restrictions on foreign counsel acting in domestic arbitrations, but mentions no restrictions for international arbitrations.

**(2) Jurisdictions which Permit Foreign Lawyers in International Arbitration, but with conditions:**

Canada – While foreign lawyers are generally permitted to represent parties in international arbitration, the following conditions would apply where the arbitration is seated in the province of Quebec or the province of Ontario, respectively: in Quebec, a foreign practitioner may give advice and consultations on legal matters if the person (1) is legally authorized to exercise outside of Quebec the same profession as members of the Barreau du Quebec, (2) acts as counsel or advocate before an international arbitration tribunal and (3) gives advice and consultations on legal matters regarding the case for which said person is acting as counsel or advocate before an international arbitration tribunal. Similarly, in Ontario, foreign practitioners do not need a license if (1) they are authorized to practice law in a jurisdiction outside Ontario, and (2) their practice of law in Ontario is limited to acting as counsel to a party to a commercial arbitration that is conducted in Ontario and that is “international” within the meaning prescribed by the International Commercial Arbitration Act.

China (People’s Republic of China) – While both foreign lawyers and non-lawyers are allowed to represent parties in international arbitration in China, they are not permitted to engage in the practice of Chinese law while representing a party in arbitration. In the context of international arbitration, this would include disputes relating to Chinese law matters and/or contracts that are governed by Chinese law.

Costa Rica – While foreign lawyers are generally allowed to represent parties in international arbitration in Costa Rica, they are restricted from doing so where Costa Rican law is the applicable law of the dispute.

Czech Republic – Where the same foreign lawyer repeatedly represents clients in international arbitration that is seated in the Czech Republic, it has been recommended that they consider undergoing procedures for local bar admission. This is not a clear legal requirement, but is a recommendation by an experienced local practitioner.

El Salvador – The allowance for foreign lawyers applies only where the arbitration involves foreign rather than local law.

Japan – The Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986) sets forth significant exceptions to a general rule which limits the practice of law in Japan to those who are admitted to the local bar. First, a foreign lawyer who is registered in Japan as a special foreign member of the Japan Federation of Bar Associations (“Registered Foreign Lawyer”) may handle certain legal business, such as legal business concerning the law of the country of their primary qualification. Article 5-3 of the Foreign Lawyers Law further provides that a Registered Foreign Lawyer may represent a client in international arbitration proceedings regardless of whether the subject matter concerns Japanese law. Secondly, Article 58(2) of the Foreign Lawyers Law provides that a foreign lawyer (who is not a Registered Foreign Lawyer) qualified to practice law in a foreign country (excluding a person who is employed and is providing services in Japan, based on their knowledge of foreign law) may, notwithstanding the

provision of Article 72 of the Practicing Attorneys Law, represent clients in international arbitration cases which they were requested to undertake or undertook in such foreign country.

South Korea – In an international arbitration having at least one issue of foreign law or customary law, foreign licensed attorneys may independently advise parties or act as counsel in arbitrations in Korea. Where Korea law issues are implicated, it is advisable to retain Korean counsel.

Thailand – Local counsel must be engaged for Thai law matters.

### **(3) Jurisdictions which Require a Filing by Foreign Counsel and/or which Bind Foreign Counsel under the Ethical Obligations at the Seat**

Indonesia – Although the reporter finds no indication that a work permit would be required of foreign counsel in international arbitrations that are seated in Indonesia, this issue as well as a somewhat burdensome tax law may be imposed where the counsel work involves a long stay in Indonesia, such as more than 60 days within a 12-month period.

Malaysia – There are onerous tax implications for lawyers appearing in Malaysia and there are also tax implications for arbitrators in Malaysia. The leading local international arbitration institution, KLRCA (Kuala Lumpur Regional Center for Arbitration, which was originally formed by UNCITRAL) claims that by virtue of a special letter given to them by a Malaysian Government cabinet meeting, arbitrators at the KLRCA are not subjected to any income tax. However, to date no one has been able to get a copy of this letter from the KLRCA. As such, unless there is a change to the Income Tax Act, foreign arbitrators can still be affected by this legislation, as well as foreign counsel.

Ukraine – Foreign counsel wishing to represent parties in a proceeding before the the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Industry must obtain a duly certified power of attorney.

United Arab Emirates – Foreign counsel wishing to represent parties in a proceeding in the UAR must obtain a proper power of attorney.

### **(4) Jurisdictions which do not allow (which prohibit) Foreign Lawyers (from) Participating as Sole Counsel in International Arbitration**

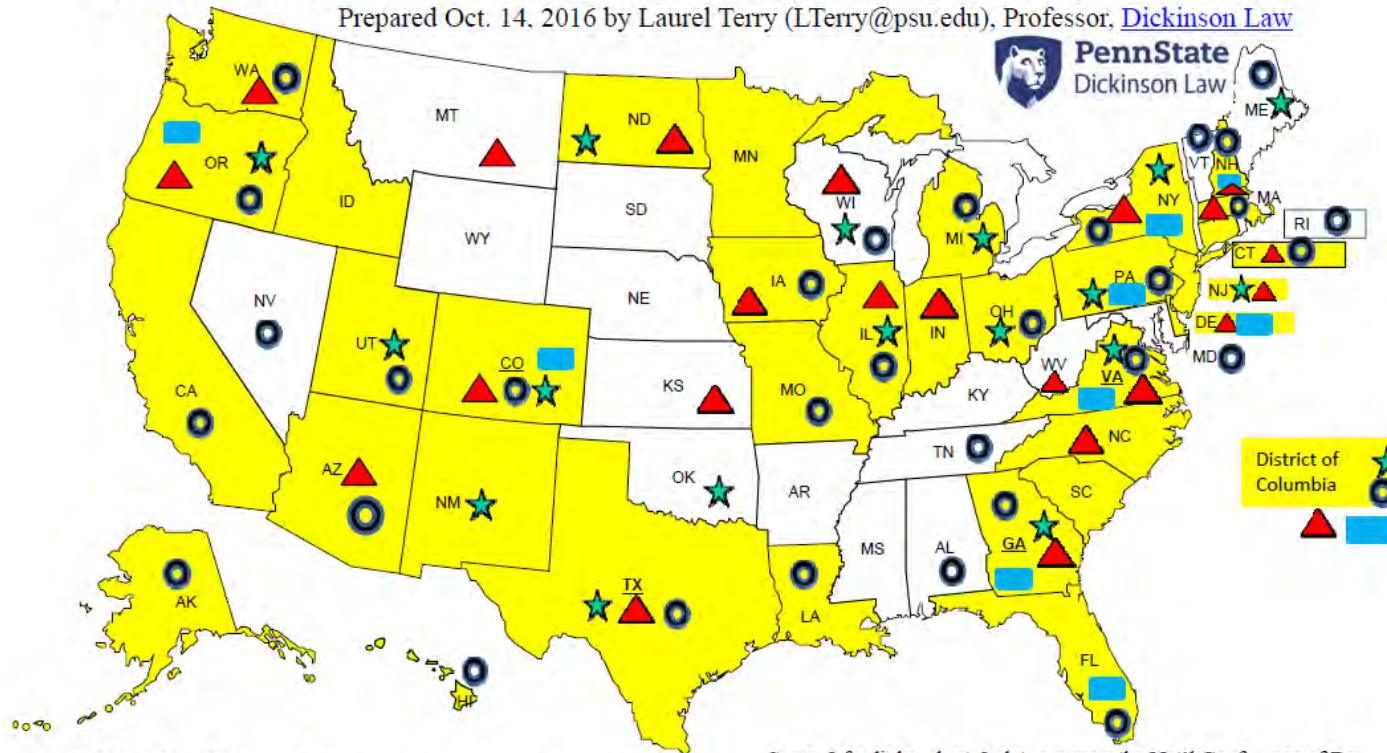
Chile – This issue has undergone change in Chile over the past 10 years and requires further examination. In a cautious gesture, we are listing Chile as a jurisdiction which imposes restrictions on foreign lawyers, but we are continuing to investigate this question given that the situation is not perfectly clear.

Egypt – Foreign counsel is permitted to represent a party in international arbitrations seated in Egypt only as co-counsel with a member of the Egyptian Syndicate of Lawyers.

**APPENDIX 12: Jurisdictions with Rules Regarding Foreign Lawyer Practice**

**Jurisdictions with Rules Regarding Foreign Lawyer Practice**

Prepared Oct. 14, 2016 by Laurel Terry (LTerry@psu.edu), Professor, [Dickinson Law](#)



**LEGEND** (see back page for additional information)

See p. 2 for links, chart & data sources: the Nat'l Conference of Bar Examiners and the ABA Center for Professional Responsibility

- Yellow shading** = has a foreign legal consultant rule
- Blue rectangle** = rule permits temporary practice by foreign lawyers (also known as FIFO or fly-in, fly-out)
- Star** = rule permits foreign pro hac vice admission
- Red triangle** = rule permits foreign in-house counsel
- Circle** = has had at least one foreign-educated applicant sit for a bar exam between 2010 and 2014.



## Summary of State Foreign Lawyer Practice Rules (10/14/16\*)

Prepared by [Laurel Terry \(LTerry@psu.edu\)](mailto:LTerry@psu.edu), Professor, [Dickinson Law](#)



### Based on implementation information contained in charts prepared by the ABA Center for Professional Responsibility

dated [4/20/2016](#) and [9/29/16](#) available at <http://tinyurl.com/ABA-MJP-Chart> and <http://tinyurl.com/ABA-20-20-Chart>

\*This document is regularly updated. You can find the most recent version online on this [ABA webpage](#) and my webpage: see <http://tinyurl.com/laurelterrymap>

There are five methods by which foreign lawyers might *actively* practice in the United States: 1) through a license that permits only limited practice, known as a foreign legal consultant rule [addressed in ABA MJP Report 201H]; 2) through a rule that permits temporary transactional work by foreign lawyers or arbitration or mediation [addressed in ABA MJP Report 201J]; 3) through a rule that permits foreign lawyers to apply for *pro hac vice* admission in which a court grants a lawyer to appear temporarily in ongoing litigation [ABA Resolution #107C (Feb. 2013)]; 4) through a rule that permits foreign lawyers to serve as in-house counsel [ABA Resolutions #107A&B (Feb. 2013)]; and 5) through full admission as a regularly-licensed lawyer in a U.S. jurisdiction. (The ABA does not have a policy on Method #5 although there are a number of [foreign lawyers](#) admitted annually; information about state admission rules is available in NCBE's annual [COMPREHENSIVE GUIDE TO BAR ADMISSIONS](#). See also [NCBE Statistics](#).) Links to the ABA policies appear in the chart below.

In 2015, the Conference of Chief Justices [CCJ] adopted a [Resolution](#) that urged states to adopt explicit policies on issues 1-4 and on the issue of "association." (For a related map, see [here](#)). States that are considering whether to adopt rules regarding these five methods of foreign lawyer admission might want to consider the model provided in [International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience](#), available at <http://tinyurl.com/GAtoolkit>. The CCJ endorsed this "Toolkit" in 2014.

Jurisdictions with FLC Rules	Explicitly Permit Foreign Lawyer Temporary Practice	Jurisdictions that Permit Foreign Lawyer Pro Hac Vice	Jurisdictions that Permit Foreign In-House Counsel	Since 2010 has had a foreign-educated full-admission applicant
33	11	18	23	32
<a href="#">AK</a> , <a href="#">AZ</a> , <a href="#">CA</a> , <a href="#">CO</a> , <a href="#">CT</a> , <a href="#">DE</a> (Rule 55.2), <a href="#">DC</a> , <a href="#">FL</a> , <a href="#">GA</a> , <a href="#">HI</a> , <a href="#">ID</a> , <a href="#">IL</a> , <a href="#">IN</a> , <a href="#">IA</a> , <a href="#">LA</a> , <a href="#">MA</a> , <a href="#">MI</a> , <a href="#">MN</a> , <a href="#">MO</a> , <a href="#">NH</a> , <a href="#">NJ</a> , <a href="#">NM</a> , <a href="#">NY</a> , <a href="#">NC</a> , <a href="#">ND</a> , <a href="#">OH</a> , <a href="#">OR</a> , <a href="#">PA</a> , <a href="#">SC</a> , <a href="#">TX</a> , <a href="#">UT</a> , <a href="#">VA</a> , <a href="#">WA</a>	<a href="#">CO</a> , <a href="#">DE</a> , <a href="#">DC</a> (Rule 49(c)(13) (RPC 5.5(d))), <a href="#">FL</a> , <a href="#">GA</a> , <a href="#">NH</a> , <a href="#">NM</a> (includes transactional matters), <a href="#">NY</a> , <a href="#">OR</a> , <a href="#">PA</a> , <a href="#">VA</a>	<a href="#">CO</a> , <a href="#">DC</a> (Rule 49), <a href="#">GA</a> (Rule 4.4), <a href="#">IL</a> , <a href="#">ME</a> , <a href="#">MI</a> , (Rule 8.126), <a href="#">NJ</a> , <a href="#">NM</a> , <a href="#">NY</a> , <a href="#">ND</a> , <a href="#">OH</a> (Rule XII), <a href="#">OK</a> (Art. II(5)), <a href="#">OR</a> , <a href="#">PA</a> , <a href="#">TX</a> (Rule XIX), <a href="#">UT</a> (appellate courts only). (Note: not on the CPR's list. Cf. Utah Rule of Appellate Procedure 40 with <a href="#">Rule 14-806</a> ), <a href="#">VA</a> , <a href="#">WI</a>	<a href="#">AZ</a> (R. 38(a)), <a href="#">CO</a> (205.5), <a href="#">CT</a> , <a href="#">DC</a> , <a href="#">DE</a> (Rule 55.1), <a href="#">GA</a> , <a href="#">IL</a> , <a href="#">IA</a> , <a href="#">IN</a> , <a href="#">KS</a> , <a href="#">MA</a> , <a href="#">MT</a> , <a href="#">NH</a> , <a href="#">NJ</a> , <a href="#">NC</a> , <a href="#">NY</a> , <a href="#">ND</a> , <a href="#">OR</a> (allowed on a temporary basis under Rule 5.5(c); further study underway); <a href="#">TX</a> , <a href="#">VA</a> (Part 1A), <a href="#">WA</a> , <a href="#">WI</a> , <a href="#">WV</a>	AL, AK, AZ, CA, CO, CT, DC, FL, GA, HI, IL, IA, LA, ME, MD, MA, MI, MO, NV, NH, NY, OH, OR, PA, RI, TN, TX, UT, VT, VA, WA, WI
<a href="#">ABA Model FLC Rule (2006)</a>	<a href="#">ABA Model Rule for Temporary Practice by Foreign Lawyers</a>	<a href="#">ABA Model Pro Hac Vice Rule</a>	<a href="#">ABA Model Rule 5.5 (d) re Foreign In-House Counsel and Registration Rule</a>	No ABA policy; Council did not act on <a href="#">Committee Proposal</a> ; see state rules
<a href="#">ABA Commission on Multijurisdictional Practice web page</a>	State Rules—Temporary Practice by Foreign Lawyers ( <a href="#">ABA chart</a> )	Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions and Amendments since August 2002 ( <a href="#">ABA chart</a> )	In-House Corporate Counsel Registration Rules ( <a href="#">ABA chart</a> ); Comparison of ABA Model Rule for Registration of In-House Counsel with State Versions ( <a href="#">ABA chart</a> ); State-by-State Adoption of Selected Ethics 20/20 Commission Policies ( <a href="#">ABA chart</a> )	NCBE <a href="#">COMPREHENSIVE GUIDE TO BAR ADMISSIONS</a>

\*Note: As the map on the back of this page shows, six jurisdictions (CO, DC, GA, NY, OR, VA) have rules for all 5 methods; four jurisdictions have rules on 4 methods (IL, NH, PA and TX); and thirteen jurisdictions have rules on 3 methods (AZ, CT, DE, FL, IA, MA, MI, NJ, ND, OH, UT, WA, and WI). [Prior editions of the map erroneously included PA among the "five method" states. This chart covers 50 U.S. states & the District of Columbia.]

**APPENDIX 13: Survey of U.S. Jurisdictions**

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
Colorado	Court Rule	Yes (Court Rule 205.2)	Yes for court proceedings; not required for arbitrations	[FIFO] Good standing in Non-US jurisdiction and  Matter or client has substantial connection to jurisdiction where counsel is licensed or matter is governed primarily by international law or law of non-US jurisdiction	None	None	None	Yes.	Acting in Colorado subjects the foreign lawyer to Colorado's ethical rules (Rule 205.2(5))
Connecticut	Statute	Yes (Section 51-88(d)(3))	No	None	None	N/A	N/A	Yes	Connecticut Rules of Professional Conduct applies to



State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
									lawyers not admitted in Connecticut, but practicing there (Rule 8.5)
Delaware	Court Rule	Yes (Rule 5.5(c)(3))	No	Foreign lawyer must be a member in good standing in home jurisdiction, and  Services must reasonably relate to arbitration arising out of or reasonably related to the lawyer's practice in jurisdiction where lawyer is admitted to practice; or	None	None	None	Yes	Jurisdiction in which lawyer is licensed to practice law and Delaware (Rule 5.7)

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
				Reasonably related to arbitration or other alternative dispute resolution proceeding.					
D.C.	Court Rule	Yes (Rule 49(c)(12))	Yes for court proceedings; not required for arbitrations	[FIFO] Good standing in non-US jurisdiction	None	None	No more than 5 appearances per year	No	N/A
Florida	Court Rule	Yes (Court Rule 4-5.5(d))	No	Good standing in Non-US jurisdiction and  In association with licensed Florida attorney or  client is located in jurisdiction where counsel is licensed or	None for International Arbitrations	None	None	Yes	Acting in Florida subjects the lawyer to Florida's ethical rules. (Rule 4-5.5, comments)

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
				<p>Matter is reasonably related to lawyer's practice in jurisdiction where lawyer is licensed or</p> <p>The matter is governed by international law or law of attorney's home jurisdiction</p>					
Georgia	Court Rule	Yes (Rule 5.5(e))	Yes for court proceedings; not required for arbitration	<p>[FIFO] Lawyer in good standing in home jurisdiction and</p> <p>In association with a lawyer who is admitted to practice in Georgia or</p>	None	None	None	Yes	Georgia Rules of Professional Conduct (Rule 5.5, comment 19, and Rule 8.5(a))

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
				<p>Services are in or reasonably related to arbitration or other ADR proceeding if the services arise out of or are reasonably related to the foreign lawyer's practice in a jurisdiction in which the foreign lawyer is admitted to practice or</p> <p>Services are performed for a client from the foreign lawyer's jurisdiction or</p> <p>Arise out of or reasonably related to</p>					

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
				<p>a matter that has substantial connection to jurisdiction in which foreign lawyer authorized to practice or</p> <p>Matter is governed primarily by international law or the law of a non-US jurisdiction</p>					
Illinois	Court Decision	Yes (Representation in private arbitration and not the unauthorized practice of law - <i>Colmar, Ltd. v. Fremantle-media</i> )	Yes as to court proceedings and court-annexed arbitration; but not applica-	None	None	None	None	No	N/A

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
		<i>North America, Inc.</i> , 344 Ill.App.3d 977(2003)	ble to private arbitration						
Michigan	Court Rule	No	Yes (Rule 8.126)	Must be licensed to practice law in home jurisdiction and must be associated with a Michigan attorney	Yes	Yes	Fee required; No more than 5 cases in a 365-day period	Yes	Attorney practicing under pro hac vice subject to Michigan's ethical rules of conduct
New Hampshire	Court Rule	Yes (Rules 35-39)	No	Foreign lawyer must be a member in good standing in home jurisdiction, and  Services must reasonably relate to arbitration arising	None	None	None	Yes	Jurisdiction in which lawyer is licensed to practice law and New Hampshire

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
				out of or reasonably related to the lawyer's practice in jurisdiction where lawyer is admitted to practice					(Rule 37.1(b))
New Jersey	Court Rule	Yes (Representation in private arbitration is not the unauthorized practice of law, NJ Supreme Court Committee on Unauthorized Practice of Law, Opinion	Yes (Order of Supreme Court April 14, 2016 modifying Rule 1:21-2)	[PHV] Foreign lawyer must be in good standing in home jurisdiction; Foreign lawyer cannot advise on US law and local counsel must accompany foreign lawyer for all court or related proceedings	Yes for court related proceedings; not required for arbitration	Good cause required	None	Yes	New Jersey rules of professional conduct (Rule 8.5(a))

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
		No. 28 (1994)),							
New Mexico	Court Rule	No	Yes (Rule 24-106)	Lawyer in good standing in home jurisdiction and  Must be associated with a New Mexico lawyer	Yes for each proceeding	None	\$450 for first proceeding, \$275 for each subsequent proceeding; limited to 5 appearances per calendar year	Yes	Governed by New Mexico Rules of Professional Conduct (Rule 16-505, comment 19)
New York	Court Rule	Yes (Rule 523.1)	Yes for court proceedings; not required for arbitration	[FIFO] Lawyer in good standing in home jurisdiction and  Services could be provided in lawyer's home jurisdiction; and  Undertaken in association with a	None	None	None	Yes	Acting in NY subjects lawyer to New York Rules of Professional Conduct (Rule 523.3)



State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
				<p>lawyer admitted to practice in NY, or</p> <p>Services reasonably related to proceeding before a tribunal in NY or another jurisdiction if lawyer authorized to appear in such proceeding; or</p> <p>Services are reasonably related arbitration or mediation; or</p> <p>Services are reasonably related to lawyer's practice in jurisdiction in which lawyer is admitted</p>					

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
Ohio	Court Rule	No	Yes (Rule XII)	Attorney is in good standing in home jurisdiction, and neither resides in or is permanently employed in this state and has not taken and failed to pass the bar in this state within the last 5 years	Yes	Yes	\$300 fee; limited to 3 proceedings in a calendar year	Yes	Attorney practicing under pro hac vice subject to Ohio's ethical rules of conduct
Oklahoma	Court Rule	No	Yes (Art. II, Section 3)	Foreign attorney must be a member of the bar in home jurisdiction and must associate with an Oklahoma attorney	Yes	Yes	\$350	Yes	Attorney practicing under pro hac vice subject to Oklahoma's ethical rules of conduct

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
Oregon	Court Rule	Yes (Rule 5.5(c)(3))	Yes for court proceedings; not required for arbitration	[FIFO] Foreign attorney must be in good standing in home jurisdiction and  Services are in or reasonably related to a pending or potential arbitration 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	Yes	No	Filing Fee and must have professional liability insurance or notify client in writing that lawyer does not have insurance	Yes	Oregon Rules of Professional Conduct (Rule 8.5(a))

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
Pennsylvania	Court Rule	Yes (Rule 5.5(c)(3))	Yes for court proceedings; not required for arbitration	[FIFO] Foreign attorney must be in good standing in home jurisdiction and  Services are in or reasonably related to a pending or potential arbitration 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	No	None	None	Yes	Pennsylvania Rules of Professional conduct (Rule 8.5(a))

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
Texas	Possibly Court Rule or Statute	Possibly (Gov't Code Section 81.101)	Yes as to court proceedings Possibly as to Arbitration(Rule XIX)	[PHV] Foreign attorney must be licensed in home jurisdiction and must associate with a Texas attorney. This rule expressly applies to court proceedings. There is some confusion about how this rule applies, if at all, to arbitration.	Yes	Yes	\$250 per case	Yes	Attorney practicing under pro hac vice subject to Texas' ethical rules of conduct
Virginia	Court Rule	Yes (Rule 5.5)	Yes for court-annexed arbitration or mediation	[FIFO] Foreign lawyer must be a member in good standing in home jurisdiction and  Must be reasonably related to an arbitration if the services arise out	None	None	None	Yes	Jurisdiction where lawyer is licensed to practice law and Virginia rules (Rule 5.5, comment 19,

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
				<p>of or reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice, and</p> <p>must not be for an arbitration where pro hac vice is required (if so, must get PHV admission);</p>					and Rule 8.5(a))
Wisconsin	Court Rule	No	Yes (Rule 10.03(4))	Must be associated with an active member of Wisconsin state bar	Yes, for each case.	Yes	\$350	Yes	Attorney practicing under pro hac vice subject to Wisconsin-

State	Foreign Attorneys Permitted in International Arbitrations Seated in State			Form of Permission to Practice In International Arbitrations Seated in State				Ethical Obligations	
	Law or Court Rule	Via Temporary Practice (FIFO)	Via Pro Hac Vice	Qualification Requirements	Necessary Filings	Consent by Court or Arbitrator Required	Cost or Restrictions on No. of Appearances	Practice Subject to Ethical Obligations	Choice of Law for Ethical Obligations
									sin's ethical rules of conduct

### APPENDIX 14: Survey of International Rule Sets

<b>Rule Set</b>	<b>Restrictions on Representation</b>	<b>Ethical Obligations of Party Representatives</b>	<b>Number of Arbitrations Administered in California in 2015</b>
London Court of International Arbitration (LCIA)	None (Article 18)	LCIA General Guidelines for the Parties' Legal Representatives	Unknown
International Chamber of Commerce Court of Arbitration (ICC)	None (Rule 26(4))	None	9
International Center for Dispute Resolution (ICDR/AAA)	None (Article 16)	AAA/ICDR Standards of Conduct for Parties and Representatives. In process of developing Code of Conduct for Parties and Representatives applicable to ICDR cases	63
JAMS International Arbitration Rules	None (Rule 20.1)	None	52
Stockholm Chamber of Commerce (SCC)	None	None	Unknown



<b>Rule Set</b>	<b>Restrictions on Representation</b>	<b>Ethical Obligations of Party Representatives</b>	<b>Number of Arbitrations Administered in California in 2015</b>
International Center for Settlement of Investment Disputes (ICSID)	None (Rules, Article 26)	None	Unknown
United Nations Commission on International Trade Law (UNCITRAL)	When determining place of arbitration, UNCITRAL Notes on Organization of Arbitral Proceedings recommend the parties and arbitrators take into account “any qualification restrictions with respect to counsel representation” under the law of the seat. <sup>48</sup>	None	Unknown
International Bar Association Protocols and Guidelines	None	IBA Guidelines on Party Representation in International Arbitration <sup>49</sup>	N / A

<sup>48</sup> UNCITRAL Notes on Organization of Arbitral Proceedings, Annotation 30(d).

<sup>49</sup> The IBA also has promulgated Guidelines on Conflicts of Interest in International Arbitration and Rules on the Taking of Evidence in International Arbitration.

## APPENDIX 15: ABA Model Rules of Professional Conduct Rule 5.5

The current text of the American Bar Association's Model Rule 5.5 is as follows:

**Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law** 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.

- (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 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
  - (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.

- (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:
  - (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or
  - (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

**APPENDIX 16: ABA Commission on Multijurisdictional Practice Report to the House of Delegates re Model Rule for Temporary Practice by Foreign Lawyers  
Report 201J**

**RECOMMENDATION**

RESOLVED, that the American Bar Association adopts the proposed Model Rule for Temporary Practice by Foreign Lawyers, dated August 2002:

**Model Rule for Temporary Practice by Foreign Lawyers**

- (a) A lawyer who is admitted only in a non-United States jurisdiction shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the lawyer performs services 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 held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal 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 alternative dispute resolution proceeding held or to be held 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;
  - (4) are not within paragraphs (2) or (3) and
    - i) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or
    - ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(5) are governed primarily by international law or the law of a non-United States jurisdiction.

(b) For purposes of this grant of authority, the lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.