

Is Arbitrating and/or Mediating Practicing Law?

As I have mentioned previously, I am trying to move my construction practice to all arbitration and mediation. I am pretty much an expert (not using the term in violation of ethical rules) in residential construction and do commercial as well. I would like to develop a national or even international practice.

It is a violation of state ethical rules for me to mediate and/or arbitrate in other states?

P.S. Big firm lawyers never seem to worry about these things.

Are you talking about as the Mediator or as representing someone in mediation/arbitration?

Erin M. Schmidt, Ohio

In Oregon, the practice of mediation is not considered practicing law.

When I served as a volunteer mediator in one of the local courts years ago, most of the volunteer mediators were not attorneys.

I have not seen any official guidance regarding whether arbitration is considered practicing law, but I have seen agreements where disputes are to be decided by an arbitrator with technical expertise (i.e., an

engineer) rather than an attorney. I recall that the issue of arbitration being considered the practice of law arose a few years ago in California. This prompted FINRA to temporarily shift its arbitrations from California to Oregon and Washington because many of its arbitrators were not attorneys. That issue seems to have been resolved, but I am unaware of how.

Bert Krages, Oregon

As the mediator or arbitrator.

Original Poster

You will have to look at the requirements state by state. But most of the rules I have read do not require you to be an attorney to be a mediator, some states you may have to register with and prove that you took mediation courses etc.

I would suspect that the states will accept mediation classes from other places that fulfill the same requirements of that state (though some may not).

Ohio, for example, only regulates mediators who want to do family law mediation and or be on approved/appointed mediation court lists

Erin M. Schmidt

I would think it's a state specific question.

In FL for example non-lawyers can serve as mediators, but must pass a state certification process.

Getting on, say, the American Arbitration Association panel for a region is a much tougher nut to crack, but one need not necessarily be a lawyer licensed in that state (though it probably helps depending on the specific panel).

Bryce Davis

My understanding is that neither Arbitration nor Mediation requires a license to practice law. Both areas have a lot of non-attorney players.

Darrell G. Stewart, Texas

The question is: if you are a lawyer, would arbitrating or mediating in another state be considered the unauthorized practice of law?

Andrea Goldman, Massachusetts

Only if that state required mediators to be licensed attorneys in that state.

One cannot engage in the unauthorized practice of law when the state has indicated the activity is either not under the umbrella of practicing law or that the state has authorized non-lawyers to engage in it.

Erin M. Schmidt

Okay folks. You misunderstand my question. Clearly non-lawyers can serve as arbitrators and mediators.

The question is, can I, as a lawyer, mediate and arbitrate in other states? Or, would it be violating ethical rules for me to do so?

Andrea Goldman

What ethical rule do you think you would be violating?

If the state says to be a mediator or arbitrator you do not need to be a licensed attorney in this state, you have your answer. Just because you are a licensed attorney in State A doesn't change the fact that State B authorized people who have not licensed attorneys in State B to do it and that you fall into that authorization.

Erin M. Schmidt

Andrea -- it depends on the state and their rules on UPL -- generally speaking, most states allow out-of-state lawyers to do certain things sitting in their own states (including mediating & arbitrating), and in the last year, there have been articles and anecdotes of arbitrators and mediators sitting at beaches / remote working in this area without major issues. I served on the UPL committee for Texas -- and I recall a discussion we had that out-of-state lawyers were granted an exception to arbitrate here, but it was very grey for non-lawyers. In California, I understand the restriction is more restrictive on California-seated arbitrations.

That all being said, I think this is more of a competency issue on the law of other states. I have two arbitrator/mediator friends who have been waiving into bars of a lot of other states (where possible) and they even took the qualifying exam for England & Wales for their int'l arbitrations practice (as UK law predominates internationally, and New York or French law as runners-up IME) because of the "appearance" of not being licensed in the seat of arbitration.

Murtaza Sutarwalla, Texas

So, to be clear, you mean can you *rep a client* in a mediation or arbitration in a state in which you are not otherwise licensed to practice law?

Again, this is likely a state specific question. cursory Googling pulled an article on California law <<https://www.arc4adr.com/articles-turk-practice-of-law.php>> that says mediation isn't UPL, but arbitration is. This seems to be the way the winds are blowing.

In Florida the general rule for stuff like this is that the out-of-state attorney can assist if there's a Florida attorney of record who is "actively involved" in the case. In practice, I would imagine a lot of lawyers just rubber stamp things and take their cut. You are probably looking at having to find some co-counsel in the relevant states you are seeking to build an ADR practice in.

This seems like a really situational/grey area of law depending on the facts. I personally do not see how you get around the fact that you're repping a client in a state you are not licensed in during a quasi-legal proceeding. I guess in a mediation you can just function as an "advisor" or something to that effect, but it becomes much more difficult to draw that distinction in arbitration when the parties are trying

to convince the arbitrator of legal principles using litigation/lawyer tools like discovery and case law to argue specific legal points.

Bryce Davis

I don't know, but around here there are a # of mediators and arbitrators that are not lawyers.

Randy Birch, Utah

I don't see how breeding a mediator or an arbitrator can be practicing law. You do not represent anyone. You are not advocating. You are not sharing for someone in court or before any tribunal.

You are hired to be a neutral third party and hired to help resolve the parties' dispute.

Each state may have license requirement to comply with. May also have requirements to comply with to maintain confidentiality of proceedings. Phil A. Taylor, Massachusetts

If I recall, by definition practicing law is applying your knowledge of the law to a specific set of facts. Helping folks settle dispute and doing some arm twisting doesn't seem to qualify.

Randy Birch

I am still trying to figure out why Phil is trying to breed arbitrators and mediators!

Jonathan Stein, California

Speaking as a California lawyer (but not an expert in this field), let me just say that this is **weird.**

The State Bar of California does **not** appear to be opining (directly) on whether it is the practice of law to act as an arbitrator; rather, they are addressing whether a member of the State Bar can go on “inactive” status, and saying one cannot do so if “he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law.” That is, one cannot be on inactive status if it might be necessary to render any legal opinion.

I suppose one could conclude that this means that it is UPL to be an arbitrator if one is not admitted to the State Bar.

But a cynic might conclude that the State Bar is trying to protect its revenue (and, make no mistake, the dues are higher for “active” members than for “inactive” members). If lawyers can still serve as arbitrators if they are in inactive status, then the State Bar loses revenue.

But here’s the thing. It is not necessary to continue active status with the State Bar if the “licensee [is] serving for a court or any other governmental agency as a referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator or in another similar capacity.”

So, a member of the State Bar who serves as a mediator or arbitrator **for a governmental agency** is not required to be an **active** member of the State Bar, but a member of the State Bar that is performing those same duties independently must be an **active** member of the State Bar (and pay the higher dues required for that status).

The activities are the same, but the employer differs.

That strikes me as fundamentally unfair—but what do I know?

Brian H. Cole, California
