Chapter 10

REPRESENTATION OF PARTIES BY ATTORNEYS AND NON-ATTORNEYS

SYNOPSIS

§ 10.1 • INTRODUCTION

Historically, lawyers were somewhat of a rarity in arbitration. Arbitrators typically were not lawyers; rather, arbitrators were non-lawyers who were highly regarded for their experience, fairness, prestige, and ability to resolve disputes, without much regard for written law. Often, then as now, the arbitrator had specialized knowledge in the subject area of the dispute. Parties often simply represented themselves, and only occasionally did the question arise as to whether a party could be represented by a lawyer. Today, however, the issue of whether a party can be represented by a lawyer is well established. The open question today in many jurisdictions is whether a party can be represented by a non-lawyer in an arbitration.

This chapter discusses the right of a party in a Colorado arbitration procedure to represent itself, to be represented by a non-lawyer, or to be represented by a lawyer not admitted in Colorado to represent a party in a Colorado arbitration procedure.

§ 10.2 • THE RIGHT OF A PARTY TO BE REPRESENTED IN ARBITRATION

§ 10.2.1—The Right Of A Party To Be Represented By An Attorney

The Colorado Revised Uniform Arbitration Act (CRUAA), C.R.S. § 13-22-216 (2016), expressly provides that a party to an arbitration may be represented by an attorney. The Federal Arbitration Act (FAA) is silent on the subject, but the right to counsel in arbitration no doubt also exists in arbitrations governed by the FAA under federal common law.

Can this right to be represented by counsel be waived at the time of or prior to the arbitration? The CRUAA, C.R.S. § 13-22-204(2)(d) (2016), provides that the right to be represented cannot be waived prior to the controversy arising, implying that it can be waived after a controversy arises. Thus, at least under the CRUAA, the parties cannot agree prior to a controversy arising not to be represented by attorneys. This statute seems to provide logical answers and probably would be adopted as a matter of common law.

The American Arbitration Association (AAA) rules also provide that a party may be represented by counsel.[1] If adopted by the parties, that rule governs, although it is doubtful such rules can supersede state statutes or rules on the subject.

§ 10.2.2—The Right Of A Party To Be Represented By An Attorney Not Admitted To Practice In Colorado

Must the lawyer retained to represent a party in arbitration be admitted to practice law in the jurisdiction in which the arbitration is to be held? Can an arbitrator "admit" a foreign lawyer *pro hac vice*? Is the representation of a party in arbitration the practice of law?

Most lawyers blithely ignored these issues until the California Supreme Court decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*.[2] *Birbrower* held that a New York

lawyer not licensed in California appearing for a party in an arbitration held in California could not sue to collect his fees in California, even fees for services performed in New York where he was licensed to practice law.

Prior to *Birbrower*, several courts had held that representing a party in arbitration was not the practice of law.[3] Indeed, other courts have refused to follow the principles of *Birbrower*.[4] For example, the Illinois Appellate Court held that the fact that a party's attorney was not admitted to practice in Illinois was irrelevant to the validity of the arbitration award. Moreover, it was within the arbitrator's authority to permit an out-of-state attorney to participate in the arbitration.[5]

After the *Birbrower* decision was rendered, the California Supreme Court issued a rule allowing out-of-state lawyers to obtain *pro hac vice* admission for purposes of appearing in an arbitration conducted in California.

C.R.S. §§ 12-5-101 and -112 define the requirement to be licensed to practice law.

> **12-5-101. License to practice necessary.** No person shall be permitted to practice as an attorney . . . or to commence, conduct, or defend any action, suit, or plaint in which he is not a party concerned *in any court of record* within this state . . . without having previously obtained a license or other authorization to practice law pursuant to the supreme court's rules governing admission to the practice of law in Colorado. (Emphasis added.)

> **12-5-112. Practicing law without license deemed contempt.** Any person who, without having a license from the supreme court of this state so to do, advertises, represents, or holds himself out in any manner as an attorney . . . or *who appears in any court of record* in this state to conduct a suit, action, proceeding, or cause for another person is guilty of contempt of the supreme court of this state and of the court in which said person appears. . . .[6] (Emphasis added.)

C.R.S. § 12-5-113 provides for admission of out-of-state licensed lawyers to make special appearances in court. However, there is no equivalent provision for arbitrations. Presently, it appears that the office of Attorney Regulation Counsel, which handles unauthorized practice of law issues, generally will defer to the arbitrator as to who may appear in the arbitration to "represent" the parties. The Office of Attorney Regulation takes the reasonable position that an out-of-state lawyer who is licensed and on active status in his or her home state, is a member in good standing of the bar of all courts and jurisdictions in which the attorney is admitted to practice, has not established a domicile in Colorado, and has not established a place for the regular practice of law in Colorado from which the attorney holds himself or herself out as practicing Colorado law or solicits or accepts Colorado clients, is authorized to practice law in Colorado and to represent his or her domicile client in arbitration in Colorado.[7] Given the long history of non-lawyers serving as arbitrators — including applying "a bit of law" — most people would hope that the courts would defer to the arbitration process. However, this is another issue that the parties to an agreement should consider resolving in advance by appropriate provisions in the agreement to arbitrate.

The Ohio Supreme Court has held that a lawyer not licensed in Ohio was engaged in the unauthorized practice of law when he represented clients in securities arbitration.[8]

The Philadelphia Professional Guidance Committee ruled that a suspended (former) lawyer could serve as a mediator, arbitrator, or master, so long as he did not hold himself out as a lawyer or violate other provisions of the rule defining restrictions on former attorneys.[9]

On the other hand, the U.S. District Court for the Eastern District of Pennsylvania held that a lawyer authorized to appear in federal court may practice federal law in the district, notwithstanding the fact that the lawyer's license had been suspended by the state supreme court.[10] The court relied on the supremacy clause of the U.S. Constitution. In the District of Colorado, an out-of-state attorney may be admitted to practice in the U.S. District Court for the District of Colorado without fulfilling the Colorado statutes and rules for admission to practice.[11] Hence, when the FAA is applicable, if it were held that one must be a licensed lawyer to represent a party in arbitration, admission to the federal court might suffice. However, the District of Colorado rules provide a presumption that discipline by another court was proper.[12]

See also § 10.6.1.

§ 10.2.3—The Right Of A Party To Be Represented By A Non-Lawyer

The AAA arbitration rules expressly provide that a party may be represented by a non-lawyer. For example, Commercial Arbitration Rule R-26 provides that "[a]ny party may participate without representation (pro se), or by counsel or any other representative of the party's choosing. . . ." Of course, that rule cannot supersede state law regarding unauthorized practice of law. Query, however, if the FAA is applicable to the arbitration, are state unauthorized-practice-of-law rules applicable? *See* § 10.6. Generally, a federal court controls who is admitted to practice before it, without necessarily adopting state statutes or regulations.

Absent AAA rules, a question arises as to whether a party may be "represented" by a non-lawyer in arbitration. For example, may a corporate party be represented by one of its officers or employees who is a non-lawyer? May a party be represented by a non-lawyer friend or acquaintance? Particularly in the early days of arbitration, and particularly in construction disputes, often attorneys were not involved in arbitrations. The informal nature of arbitration procedures and the nature of the disputes often made it appropriate for parties not to retain counsel — and for the arbitrator not to be a lawyer. At the present, there does not appear to be any answer under the Colorado unauthorized-practice-of-law statute or cases thereunder. There is an issue as to whether service as an arbitrator and service as a representative of a party to an arbitration is the practice of law. Similarly, the issue may be the extent to which "the law" governs arbitration proceedings and the award.

Rule 20 of the Colorado Small Claims Court generally prohibits lawyers. Arbitrations within the same dollar limits should not prohibit non-lawyers representing a party.

The federal and Colorado statutes do not define when a non-lawyer may "represent" a party in arbitration. Historically, non-lawyers have commonly appeared on behalf of parties to arbitration, just as non-lawyers commonly have, and do, serve as mediators.[13]

The Ohio Supreme Court enjoined a non-lawyer and his company from representing claimants in securities arbitrations.[14] The court found that preparing statements of claims, conducting discovery, participating in pre-trial conferences, and engaging in settlement negotiations constituted the unlicensed

practice of law. The non-lawyer was enjoined from representing Ohio residents in matters or activities relating to securities arbitration, including legal advice, preparation of claims, conducting discovery, participating in pre-hearing conferences or settlement negotiations, and attending arbitration or mediation.

There may be a difference between a non-lawyer representing others and a non-lawyer employee representing his or her employer.

The Financial Industry Regulatory Authority (FINRA) has amended its arbitration and mediation code to allow representation by attorneys licensed anywhere in the United States, and by non-attorneys, subject to state regulation of the unauthorized practice of law.[15]

- Annot., *Power of President of Corporation to Commence or to Carry on Arbitration Proceeding*, 65 A.L.R.2d 1321.

§ 10.3 • FEDERAL REGULATION OF ADVOCATES IN ARBITRATIONS GOVERNED BY THE FAA

Historically, the regulation and qualifications of attorneys and the practice of law were largely left to the states, even as to "federal proceedings." However, in recent years, federal (and not state) regulation of attorneys and other representatives increasingly has been held to apply as to federal law, federal courts, and federal agencies. Perhaps the same is true as to arbitrations governed by the FAA. *See* §§ 10.2.2 and 10.2.3.

For example, the Internal Revenue Service defines who may practice before it. So, too, does the U.S. Patent and Trademark Office, which also has its own rules of professional conduct. Likewise, the U.S. District Court for the District of Colorado defines who may be admitted to practice before it, expressly rejecting Colorado licensing as a condition.

In *Augustine v. Department of Veterans Affairs*,[16] the Federal Circuit held that federal law and not state law controls whether a lawyer not licensed in a state may represent a claimant and recover statutory fees in a federal administrative proceeding. The court held that it would adversely affect federal administrative proceedings if state licensing rules were to govern which attorneys could practice before federal agencies. Following this logic, it might be said that application of state licensing rules governing who can represent parties in arbitrations governed by the FAA might impede the federal statute and policy concerning arbitration.

§ 10.4 • THE RIGHT OF A PARTY TO REPRESENT ITSELF

It is reasonable to assume that an individual party may represent himself or herself *pro se*, without being a lawyer, as in any civil action. On the other hand, a non-lawyer, even if an employee of a corporate party, generally cannot appear for a corporate party in judicial proceedings. Perhaps it is or should be allowable.

• Annot., *Power of President of Corporation to Commence or to Carry on Arbitration Proceedings*, 65 A.L.R.2d 1321.

§ 10.5 • THE RIGHT OF WITNESSES TO BE REPRESENTED

While there is very little case law on this point, generally a witness has a right to counsel while testifying in a judicial proceeding, at least other than before a grand jury. The rule ought to apply in arbitrations.

If so, the role of the attorney would basically be limited: objecting to questions the answers to which are privileged information.

AAA Commercial Arbitration Rule R-26 provides that a "party may participate without representation (pro se), or by counsel or any other representative of the party's choosing," but the rule does not mention witnesses.

§ 10.6 • UNAUTHORIZED PRACTICE OF LAW IN ARBITRATION

A recurring question is whether a lawyer representing a party in arbitration or sitting as an arbitrator must be admitted to practice in the jurisdiction of the arbitration. *See* Colorado Rules of Civil Procedure, Chapter 19, "Unauthorized Practice of Law Rules."

§ 10.6.1—Out-Of-State Lawyers Representing Parties

Many states take the position that out-of-state lawyers may appear in the forum state to represent parties without being admitted in the forum state. It does not constitute the unauthorized practice of law.[17] *See* § 10.2.2. Perhaps the safe, although perhaps unnecessary, procedure is to seek *pro hac vice* admission to the Colorado Bar. *See* Colorado Rules of Civil Procedure, Chapter 18, "Rules Governing Admission to the Bar," 220–222.

See "Colorado Adopts Rules Governing Out-of-State Attorneys," 32 *Colo. Law.* 27 (Feb. 2003).

§ 10.6.2—Non-Lawyer Employee Representing Corporate Party

Arkansas holds that a corporate officer, director, or employee who is not a licensed attorney engages in the unauthorized practice of law by representing the corporation in arbitration proceedings. The court, and not the arbitrator, should determine issues regarding legal representation during the arbitration proceedings.[18]

See generally Cole, "Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitration Involving Statutory Claims Practicing Law?," 48 *U.C. Davis L. Rev.* 921 (2015)

§ 10.7 • REGULATION OF PERSONS REPRESENTING PARTIES IN ARBITRATION

As discussed in § 10.2, it is generally recognized that a party in arbitration may be represented by either a lawyer or non-lawyer. The issue then becomes, aside from unauthorized practice of law issues discussed in § 10.6, who has the power to regulate those representatives? See also §§ 14.6, 14.7, and 16.6.9 as to the imposition of sanctions.

§ 10.7.1—Regulation Of Lawyers Appearing In Arbitration

Generally, disqualification of an attorney for an alleged conflict of interest is held to be a matter for the courts and not the arbitrator.[19]

Generally, a lawyer who represents a party in arbitration or mediation is subject to the rules of the jurisdiction in which he or she is admitted, and perhaps of the jurisdiction in which he or she is appearing. However, the court may not have inherent power to sanction a lawyer for alleged misconduct during arbitration.[20]

§ 10.7.2—Disqualification Of Lawyer Representing A Party

The issue of who has supervisory power over lawyers representing parties in arbitration is substantially unresolved. *See generally* § 10.2.

Judicial Power to Disqualify Attorney

It appears that upon motion of a party in arbitration, and perhaps of the arbitrator, a court has jurisdiction to disqualify (for a conflict) a lawyer from representing a party in arbitration.[21]

Arbitrator Power to Disqualify Attorney

Under a broad form arbitration clause (including all "other matters in question arising out of, or relating to, this agreement . . .") a Florida court held that the issue of disqualification of an attorney was an "other matter in question arising out of or relating to" the agreement, and therefore was to be determined by the arbitrator.[22] Similarly, The Delaware Chancery Court held that whether a law firm representing one party should be disqualified for ethical breaches related to electronically stored information (ESI) were issues for the arbitrator "in the first instance."[23]

See Djinis & Bazil, "Attorney Disqualification: Legal Procedural and Tactical Considerations," Practicing Law Institute, PLI Order No. BO-0ING (2003); Jacobas, Rohner & Hefty, "Conflict of Interest Affecting Counsel in International Arbitrations," *Mealey's Int'l Arb. Rep.* (Aug. 2005).

Some courts have considered issues of lawyers' professional responsibility and disqualification to be for the court.[24] However, the arbitrator may have inherent powers arising from his or her authority to control the hearing.[25] Other courts have held that "in the first instance" an arbitrator has jurisdiction to disqualify a law firm because of ethical breaches.[26]

§ 10.7.3—Arbitrator Versus Court Determination Of Issues Regarding Legal Representation During Arbitration Proceedings

The Arkansas Supreme Court has held that determining what parties and representatives may participate in arbitration proceedings, as well as what rules apply in the process, is its exclusive authority.[27]

§ 10.8 • ETHICAL RULES

Section 10.7.2 discusses a Delaware decision, *SOC-SMG, Inc. v. Day and Zimmerman, Inc.*,[28] holding that the arbitration panel, and not the court, should determine whether a law firm should be disqualified for ethical breaches related to discovery.

The ethics rules that apply to attorneys in arbitration start with the Colorado Rules of Professional Conduct. For the most part, these rules have also been adopted by the Colorado federal courts.

At least when the parties have agreed to AAA administration, the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes applies. These rules also provide a "common law" of arbitration ethics.

NOTES

1. AAA Commercial Arbitration Rule R-26.
2. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998).
3. *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982).
4. *Colmar, Ltd. v. Fremantlemedia North Am.*, 801 N.E.2d 1017 (Ill. App. 2003).
5. *Id. See also Superadio Ltd. P'ship v. Winstar Radio Prods., LLC*, 844 N.E.2d 246 (Mass. 2006); *Mscisz v. Kashner Davidson Sec. Corp.*, 844 N.E.2d 614 (Mass. 2006).
6. *See also* C.R.C.P. Ch. 18 (Rules Governing Admission to the Bar) and Ch. 19 (Unauthorized Practice of Law Rules).
7. The authority is C.R.C.P. 220. Rules 221 and 221.1 are not applicable.
8. *Disciplinary Counsel v. Alexicole Inc.*, 822 N.E.2d 348 (Ohio 2004). *See also Florida Bar v. Rapoport*, 845 So.2d 874 (Fla. 2003). (Thereafter, the Florida Supreme Court adopted a new rule entitled "Appearance of Non-Florida Lawyer in Arbitration," which gives substantial leeway to the non-Florida lawyer. Rule 1-3.11.) In *Colmar Ltd. v. FremantleMedia N. Am.*, 801 N.E.2d 1017 (Ill. App. 2003), the Illinois Appellate Court refused to vacate an award because the attorney was not licensed in Illinois.
9. Philadelphia Bar Ass'n Professional Guidance Comm. Op. 2005-10 (July 2005).
10. *Surrick v. Killion*, 2005 U.S. Dist. LEXIS 6755 (E.D. Pa. April 18, 2005).
11. D.C. Colo. L. Civ. R. 83.3 F.
12. *Id.*
13. *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348 (Ohio 2004).
14. *Id.*
15. FINRA Regulatory Notice 07-57: Representation of Parties in Arbitration and Mediation (Nov. 2007).
16. *Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005); *see also Benninghoff v. Superior Court*, 38 Cal. Rptr. 3d 759 (Cal. App. 2006).

17. *E.g.*, *Prudential Equity Grp., LLC v. Ajamie*, 538 F. Supp. 2d 605 (S.D.N.Y. 2008); *contra Birbrower, Montalbano, Condon & Frank PC v. Superior Court*, 949 P.2d 1 (Cal. 1998) (overruled by statute).

18. *Nisha, LLC v. Tribuilt Constr. Grp., LLC*, 388 S.W.3d 444 (Ark. 2012).

19. *Munich Reinsurance Am., Inc. v. ACE Prop. & Cas. Ins. Co.*, 500 F. Supp. 2d 272 (S.D.N.Y. 2007), and cases cited therein. *Simply Fit of N. Am., Inc. v. Poyner*, 579 F. Supp. 2d 371 (E.D.N.Y. 2008). *Compare* discussion in § 10.2.2.

20. *See Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458 (5th Cir. 2010).

21. *See generally Shomron v. Fuks*, 730 N.Y.S.2d 90 (N.Y. App. Div. 2001); *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663 (N.Y. 1996).

22. *Reuter Recycling of Fla., Inc. v. City of Hallandale*, 993 So.2d 1178 (Fla. Dist. Ct. App. 2008). *See also Benasra v. Mitchell Silberberg & Knupp*, 116 Cal. Rptr. 2d 644 (Cal. App. 2002).

23. *SOC-SMG, Inc. v. Day & Zimmerman, Inc.*, 2010 Del. Ch. LEXIS 195, 2010 WL 3634204 (Del.Ch. Sept. 15, 2010).

24. *See Nw. Nat'l Ins. Co. v. Insco, Ltd.*, 2011 U.S. Dist. LEXIS 113626, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011); *Dean Witter Reynolds, Inc. v. Clements, O'Neill, Pierce & Nickens, L.L.P.*, 2000 U.S. Dist. LEXIS 22852, 2000 WL 36098499 (S.D. Tex. Sept. 8, 2000).

25. *See generally Emp'rs Ins. Co. of Wausau v. Munich Reinsurance Am., Inc.*, 2011 U.S. Dist. LEXIS 52048, 2011 WL 1873123 (S.D.N.Y. May 13, 2011) (leaving door open for arbitrator determination if the parties so delegate the issue).

26. *SOC-SMG, Inc. v. Day & Zimmermann, Inc.*, 2010 Del. Ch. LEXIS 195, 2010 WL 3634204 (Del. Ch. Sept. 15, 2010); *Benasra v. Mitchell Silberberg & Knupp*, 116 Cal. Rptr. 2d 644 (Cal. App. 2002). *See Sacks v. Dietrich*, 663 F.3d 1065 (9th Cir. 2011) (arbitrator had authority to determine qualification under FINRA rules).

27. *Nisha, LLC v. TriBuilt Constr. Grp., LLC*, 388 S.W.3d 444 (Ark. 2012).

28. *SOC-SMG, Inc. v. Day & Zimmerman, Inc.*, 2010 Del. Ch. LEXIS 195, 2010 WL 3634204 (Del. Ch. Sept. 15, 2010).