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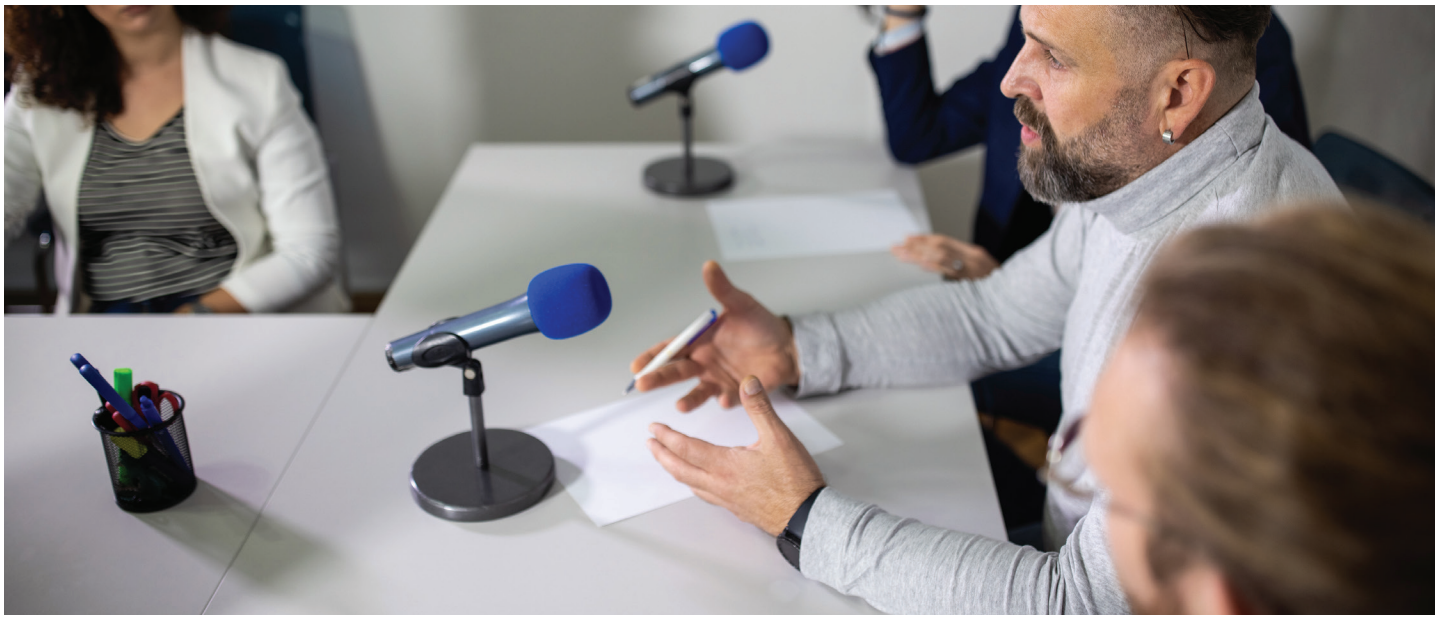

Arbitration discovery rights in California: What you need to know

WITH CAREFUL ATTENTION TO THE ARBITRATION CLAUSE AND APPLICABLE RULES AND STATUTES, YOU CAN GET THE NEEDED DISCOVERY

Discovery in arbitration is governed by (1) the arbitration agreement, (2) arbitration provider rules, (3) statutes, (4) case law, and (5) the arbitrator. This article provides a step-by-step approach to getting needed discovery for California arbitrations.

1. The arbitration agreement discovery rules and how to modify them

Arbitration is a creature of contract, and the arbitration clause is the first place to look to see what, if anything, the parties have agreed to about discovery. Often the arbitration clause does not mention discovery but simply states that the parties agree the arbitration shall be administered by a named provider (e.g., JAMS or American Arbitration Association (AAA)) pursuant to its rules. It may specify which administrative provider rules to follow (e.g., comprehensive or employment). The provider's rules will govern subject to applicable state law.

Arbitration agreements sometimes specify that discovery will be governed by applicable discovery procedures, such as the California Code of Civil Procedure (CCP), and other times provide for specific limitations (e.g., each party may take only two depositions). The parties can also stipulate different discovery rules or procedures.

If the arbitration agreement specifies the provider or the rules, check out the discovery allowed under the applicable rules. Once the scope of available discovery is understood, compare it to the needs of your case. For example, does the other party have the documents and witnesses whose discovery is needed, thus requiring broader discovery? Or should the burden of comprehensive discovery be avoided?

If opposing counsel will not agree to modify the scope of discovery provided for in the arbitration agreement and a legitimate need for more discovery is needed, do not despair. Discovery rights may be claimed under Code of Civil Procedure section 1283.05 or the *Armendariz* case. (See sections 4 and 5 below.)

The arbitrator may also be asked to modify the scope of discovery, but be careful what is requested. In one recent case, the arbitration clause was silent on discovery issues, and discovery requirements defaulted to the provider's limited discovery rules. After the arbitration process commenced, counsel stipulated to expand discovery and to follow the CCP's discovery rules that allowed both sides to propound 35 of each written discovery requests and take multiple depositions. Within weeks, the sole practitioner who agreed to this stipulation was inundated with requests for production, special interrogatories, requests for admission, and deposition notices. Given counsel's stipulation, there was little the arbitrator could do to modify discovery rights.

2. Know provider arbitration discovery rules required by the contract

Introduction: Does the arbitration agreement specify a provider service, e.g., JAMS or AAA? If so, familiarize yourself with their rules regarding discovery. If no provider is specified in the arbitration agreement, you may want to select one (unless you want an arbitrator doing all the administrative work at an hourly rate).

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JAMS rules and AAA rules recognize an arbitrator's authority to control discovery based on the reasonable needs of each case. Additionally, the JAMS Recommended Arbitration Discovery Protocols also guide how arbitrators can authorize or limit discovery to achieve an efficient, cost-effective process that affords the parties a fair opportunity.

JAMS rules: The JAMS rules provide specific discovery obligations, and it requires the exchange of all relevant, non-privileged documents and electronically stored information, including the names of witnesses and experts who may be called to testify at the arbitration hearing. (Employment Rules and Comprehensive Rules, Rule 17.) In theory, this is all the discovery information the parties need, but JAMS's requirement to provide discovery information is ongoing.

JAMS rules allow one deposition per party to be a matter of right, and the arbitrator can order additional depositions. The rules do not expressly provide for interrogatories, requests for production, or admissions, but California's arbitrators are open to allowing such discovery for good cause. The parties may also stipulate to additional discovery.

AAA rules: Rule 9 of the AAA's Employment Arbitration Rules and Mediation Procedures takes a different approach. It leaves discovery to the discretion of the arbitrator, simply stating that the arbitrator "[has] the *authority* to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."

Additional discovery: To seek additional discovery rights under provider rules, present the arbitrator with specific factual reasons why more or less discovery is needed and why that information is necessary for a full and fair hearing.

3. The applicable arbitration discovery codes

Applicable codes allowing discovery for arbitrations: The California Arbitration Act (CAA), Code of Civil Procedure section 1280, et seq., and specifically sections 1283, 1283.05, 1283.1, and 1282.6, specify what prehearing discovery is allowed in arbitrations, with special provisions for personal injury and wrongful death matters. (See section 4, below.) Additionally, arbitrators may make discovery orders whenever necessary or appropriate. The arbitrator's orders are as conclusive, final, and enforceable as an award on its merits. (§ 1283.05, subds. (c)-(d).)

Code of Civil Procedure section 1283 provides for depositions but *only* for a witness who may not be available to testify at the arbitration hearing or for exceptional circumstances. The code states in part:

> On application of a party to the arbitration, the neutral arbitrator may order the deposition of a witness to be taken for use as evidence and not for discovery if the witness cannot be compelled to attend the hearing or if exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be taken.

Nonparty discovery: The code does not authorize *nonparty* discovery depositions, *except* for personal-injury or wrongful-death matters (§ 1283.05; See section 4, below) or *otherwise provided* for in the parties' arbitration agreement. (See *Aixtron, Inc. v. Veeco Instruments, Inc.* (2020) 52 Cal.App.5th 360 for a discussion.) But note that a nonparty has the right to full judicial review of a deposition subpoena. (See *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528.)

The *Aixtron* court holds that while an arbitration agreement may empower an arbitrator to issue subpoenas for *nonparty* depositions when section 1283.05 is incorporated into the arbitration agreement, an arbitration agreement that *neither* references section 1283.05, *nor* provides for full discovery rights under California's Civil Discovery Act, does *not* authorize the issuance of nonparty subpoenas for discovery purposes. (*Aixtron* at 396-397.)

Federal rules: Unlike the CAA, the Federal Arbitration Act (FAA), 9 USC § 1, et seq., has no provision for pre-arbitration discovery. Discovery under the FAA, however, can be agreed upon by the parties in their arbitration agreement or after the arbitration process commences. But the agreement cannot give the arbitrator power to order a *nonparty* to be deposed and produce documents, and the FAA grants no such power to the arbitrator. (See *CVS Health Corp. v. Vividus, LLC* (9th Cir., 2017) 878 F.3d 703.)

In *Vividus*, the Ninth Circuit held that although the FAA authorizes arbitrators to issue subpoenas to nonparties "to attend before them … and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case," the subpoena power is restricted to hearings in the presence of the arbitrator. (See 9 USC § 7.)

The *Vividus* decision preceded the COVID-19 pandemic and the resultant use of remote depositions and hearings. A developing issue is whether the FAA requires the arbitrator to be physically present during the deposition or remote hearing.

Suggestions: So, how do you get nonparty discovery? First, see if the nonparty will voluntarily provide the needed documents or sit for a deposition. For example, does the nonparty have a business relationship or other affiliation with a party such that they might be willing to cooperate? Second, be prepared to make a factual showing to the arbitrator of the need for the discovery

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and request that the arbitrator issue subpoenas for deposition testimony and/or document production.

If a nonparty challenges the arbitrator's authority to issue a discovery subpoena under the FAA or CAA, and it would prejudice the parties to delay production of the evidence until the evidentiary hearing, ask the arbitrator to schedule a hearing for compelling nonparties to testify and produce documents. As a practical matter, the prospect of having to sit for a deposition and produce documents in front of the arbitrator often convinces the nonparty (and the nonparty's counsel) to agree to the discovery without convening a hearing. (But see, *McConnell v. Advantest America*, 2023 WL 4014295 (Cal. Ct.App. May 24, 2023), holding that subpoenas issued by arbitrator on nonparty requiring production of documents at a hearing set for that purpose was an impermissible use of the arbitrator's subpoena power for discovery purposes under the CAA.)

4. Special discovery code provisions for personal-injury arbitrations

The codes: The CAA has two discovery code sections for personal-injury and wrongful-death cases. They are Code of Civil Procedure sections 1283.1 and 1283.05.

Section 1283.1, subsection (a), explicitly allows for full discovery rights provided for in section 1283.05 for personal-injury and wrongful-death cases. Section 1283.1, subsection (a), states:

> All of the provisions of Section 1283.05 [arbitration discovery provisions] shall be conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another. (Bracket added.)

Note that Code of Civil Procedure 1283.1, subsection (b), extends the same discovery rights to parties *who provide in their agreement* that section 1283.05 has application. Subsection (b) states: "Only if the parties by their agreement so provide, may the provisions of Section 1283.05 be incorporated into, made a part of, or made applicable to, any other arbitration agreement."

After the appointment of an arbitrator, the parties can "exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration … as if the subject matter of the arbitration were pending before a superior court of this state in a civil action…." (§ 1283.05, subd. (a).)

Nonparties: Because Code of Civil Procedure section 1283.05, subdivision (a) incorporates the Civil Discovery Act, discovery from *nonparties* is permitted. (§ 2016.010, et seq.) Further, in cases subject to section 1283.05 (i.e., personal injury or as agreed to by the parties), the "arbitrator's powers to enforce discovery resembles that of a judge in a civil action in superior court…including the authority to enforce discovery against nonparties through the imposition of sanctions." (See *Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.* (2008) 44 Cal.4th 528, 535.)

Note that *Berglund* supports the position that (1) nonparties must first submit any discovery objections to the arbitrator before attempting a judicial review, and (2) the arbitrator can enforce discovery obligations by imposing the same sanctions and penalties as a court could impose, short of the arrest or imprisonment. (See Code of Civ. Proc., §§ 1283.05 and 1283.1.)

While discovery disputes must first be submitted to the arbitrator for resolution, a *nonparty* is entitled to a full judicial review of the arbitrator's order. (See *Berglund* at 534-36.) Such review, however, may have an unfortunate consequence of delay and expense.

As set forth above, this statutory authority to order nonparty discovery does not automatically apply in cases that *do not* involve personal injury or wrongful death. (See *Roman v. Superior Court*, 172 Cal.App.4th 1462 (2009) (Applying *Armendariz* principle re "injury" to employment cases).) Therefore, the arbitrator can only utilize the power to order discovery of a nonparty if (1) the arbitration agreement *explicitly* provides for nonparty discovery *or* (2) the parties *stipulate* to modify the arbitration agreement. The code provides: "Only if the parties by their agreement so provide, may the provisions of section 1283.05 be incorporated into, made a part of, or made applicable to, any other arbitration agreement." (§ 1283.1, subd. (b).)

While broad nonparty discovery is often viewed as a benefit, it may be a pitfall if your client needs a more expedited proceeding with discovery limited to that provided under the applicable arbitration rules or if your client does not want to deal with broad discovery obligations.

Subpoena power: Where nonparty *discovery* is unavailable, it is important to remember that Code of Civil Procedure section 1282.6 gives the arbitrator *subpoena* power to compel nonparty witness appearances and production of documents and other evidence at the arbitration *hearing*. The code for subpoenas provides: "Subpoenas shall be served and enforced" in compliance with Code of Civil Procedure sections 1985 through 1997 and section 1282.6.

Section 1283.05 of the CAA incorporates the Civil Discovery Act, but only if the dispute arises out of a claim for (i) wrongful death, (ii) personal injury, or (iii) the arbitration provision so provides. (See Code Civ. Proc., § 1283.1, subds. (a)-(b).)

5. Recognize special considerations for discovery in employment arbitrations

FEHA: Using a broad definition of "personal injury," claimants in employment arbitrations often assert they are entitled to all discovery rights allowed under section 1283.05. They argue that the Fair Employment and Housing Act (FEHA) alleging emotional distress claims constitute a personal-injury claim. While

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some supporting authority exists, this recognition is not referenced in Code of Civil Procedure section 1283.05. (See *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1001-02.)

Armendariz: In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, the California Supreme Court held employment claims brought under FEHA are arbitrable if "the arbitration permits an employee to vindicate his or her statutory rights." The Court additionally declared that arbitrations concerning statutory rights must meet specific minimum requirements, including the provision of "adequate discovery."

The "adequate discovery" phrase controls discovery rights in employment arbitrations, and it requires arbitrators to strike an appropriate balance between the desired efficiency of limited discovery in arbitration and an employee's statutory rights. The *Armendariz* holding requires the arbitrator and counsel to assess the amount of default discovery permitted under the arbitration agreement, the standard for obtaining additional discovery, and whether any requested discovery limitations will prevent the claimants from adequately arbitrating their statutory claims.

A useful analysis of the balancing required by the "adequate discovery" standard, including citations to authority, is provided in *Davis v. Kozak* (2020) 53 Cal.App.5th 897. The arbitration agreement (drafted by the employer) limited each party to a maximum of two depositions, and it contained no provisions entitling the parties to propound interrogatories, requests for admission, or demand production of relevant documents. Plaintiff Davis had a 15-year work history with the defendant's employer. He offered facts demonstrating a complex age discrimination case involving numerous percipient witnesses, executives, and investigators. He further alleged the arbitration agreement's discovery limitations would frustrate his statutory rights.

The *Davis* court found the arbitration agreement unconscionable. The decision was based partly on the discovery limitations, although the court recognized a "limitation on discovery is an important way in which arbitration can provide a simplified and streamlined procedure for the resolution of disputes," citing *Dotson* v. *Amgen* (2010) 181 Cal.App.4th 975, 983 and *Armendariz*.

Davis emphasized that adequate discovery is indispensable for vindicating statutory claims, citing *Fitz* v. *NCR Corp.* (2004) 118 Cal.App.4th 702, 715. The court went further: "[t]he denial of adequate discovery in arbitration proceedings leads to the de facto frustration of " statutory rights (*Armendariz*) while recognizing that "adequate" does not mean "unfettered." (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 184.)

The takeaway – be prepared to demonstrate factually what discovery is needed and why it is needed.

Remember these practical tips for convincing the arbitrator

a. Before filing a motion to compel: Ask the arbitrator if a formal motion to compel is required. Some arbitrators allow informal discovery conferences and require a formal motion only if the matter is unresolved during the informal discovery conference.

b. Factual support: Present the factual support for your position regarding discovery. For example, if depositions are wanted, name the deponents and explain the relevance of the expected testimony. If additional documents are needed, give examples of the relevant documents believed to exist.

c. Avoid being overly aggressive. Drop "any and all" from document request forms. Overly aggressive requests may lead to fee-shifting if a massive production contains only a small percentage of relevant documents.

d. Discovery limitation requests. If limitation on discovery is wanted, specify why discovery should be limited. For example, is it too burdensome or too expensive? Define the burden in terms of discovery quantity, the expense of production, and why additional discovery is unlikely to justify the cost.

Conclusion

The arbitrator's goal is to manage an efficient, cost-effective arbitration that affords the parties a fair opportunity to be heard. Be factually specific in explaining your discovery needs and objections to the arbitrator, and help the arbitrator understand why the requested discovery is needed or is too burdensome. With careful attention to the arbitration clause and applicable rules and statutes, you should be able to get the needed discovery. The tools are there.

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