



Witnesses in Arbitration – California Arbitration Act (Part I)

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Testimony and documents may be obtained in arbitration in accordance with the parties' agreement, the applicable institutional arbitration rules and provisions of law (federal and state arbitration acts, as applicable). This article addresses the California Arbitration Act (CAA); significant differences under the Federal Arbitration Act (FAA) will be discussed in Part II.

Documents: Some clauses and most rules contemplate an exchange of documents prior to the hearing (e.g., JAMS Comprehensive Arbitration Rule 17(a); AAA Commercial Arbitration Rule R-22). The CAA also authorizes pre-hearing exchange of documents in certain cases (Cal. Code Civ. Proc. § 1282.2). Where the parties have so provided in their agreement, broader discovery may be conducted pre-hearing (Code Civ. Proc. § 1283.05, 1283.1). These provisions are read into any arbitration agreement involving personal injury or wrongful death claims. Discovery in arbitration may also include issuance of subpoenas by the arbitrator for the production of documents from a third party. The arbitrator ordinarily must sign the subpoena; if it is issued pursuant to § 1283.05, the attorney may do so.

As a practical matter, parties may be able to use the arbitrator's subpoena power as leverage to obtain documents voluntarily from third-parties where no right to discovery exists.

Depositions: The parties may agree in their clause or thereafter to allow discovery depositions; the JAMS rules authorize one deposition per side (Rule 17(b)) and additional depositions at the arbitrator's discretion. AAA rules allow depositions in large complex cases (Rule L-3) and possibly in regular cases (see Preliminary Hearing Rule P-2 (viii) ("whether to establish any additional procedures to obtain information that is relevant and material to the outcome of the case")). Commercial parties in large and complex cases almost invariably agree to a reasonable number of depositions.

The CAA allows depositions to preserve testimony (where a witness may not be compelled to attend the hearing) per Code Civ. Proc. § 1283. This is not a discovery deposition, but rather to preserve testimony and notice of that fact should be given so the participants know that they need to conduct whatever examination they think appropriate.

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See also JAMS Rule 19(c) (arbitrator may conduct a hearing in any location in order to hear a third party witness).

Hearing witnesses: Arbitrators have power to issue subpoenas for witnesses and for production of documents, records and evidence at the hearing. Such subpoenas are enforceable by the court. (Code Civ. Proc. § 1282.6 – “Subpoenas shall be served and enforced” in compliance with Code Civ. Proc. §§ 1985-1997). Parties typically ask their opponent to produce witnesses in their control without the need of a subpoena. See, e.g., JAMS Rule 21 (no equivalent AAA provision). Of course, hearing subpoenas may also be directed to parties for documents “missed” during prehearing document exchange. See also JAMS Rule 19(c) (above).

Although arbitrators cannot directly enforce compliance with a subpoena, they are not totally without power. For example, if a subpoena for document production is addressed to a party or to a third-party over whom a party has control, the arbitrator may draw an appropriate evidentiary inference in the event of noncompliance.

Motions to quash: Although the statute does not expressly so provide, arbitrators apparently may quash a subpoena on whatever grounds a civil subpoena may be quashed—e.g., improper notice or service, burdensome or oppressive demands, records privileged or protected by a right of privacy. (Code Civ. Proc. § 1987.1.)

Court enforcement under CAA: The procedure for court enforcement of subpoenas under GCP § 1282.6 is not specified. When a court action is pending (e.g., the action in which the court compelled arbitration), it would appear that a motion to compel attendance of the witness and production of documents may be filed in that proceeding. But if no action is pending, a new court proceeding needs to be instituted (e.g., petition for OSC, asking the court to issue an OSC re Contempt against the recalcitrant witness).

Third-party challenge to subpoenas: Third-parties should make objections to discovery directed to them first to the arbitrator, but then may challenge any final ruling with the court. *Berglund v. Arthroscopic & Laser Surgery Center of San Diego L.P.*, 44 Cal. 4th 528 (2008). (This was a case that arose under § 1283.05; it is unclear whether third-party discovery initiated under different authority would require same procedure.) ●

This is Part I of II. Part II will address these issues under the Federal Arbitration Act.

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