# DISCOVERY IN CONTRACTUAL ARBITRATIONS: "WHAT DO YOU MEAN I CAN'T SERVE INTERROGATORIES?"

This article first appeared in *Orange County Lawyer* magazine in June 2006, Vol. 48 No. 6 (page 18). © Copyright 2006 Orange County Bar Association. The views expressed herein are those of the author(s). They do not necessarily represent the views of the *Orange County Lawyer* magazine, the Orange County Bar Association or its staff. All legal and other issues should be independently researched.

***by Robert A. Merring***

**"What do you mean I can't take a deposition or serve interrogatories?"** On more than one occasion, attorneys have expressed incredulity at the suggestion that there generally is no "right" to conduct discovery in most arbitration proceedings. This article explores (1) the bases for the traditional rule; (2) how the courts and alternative dispute resolution providers have modified that position in recent years; (3) the increasingly important role that preliminary hearings and mandatory prehearing "Exchange of Information" provisions have come to play in arbitration proceedings; and (4) what the parties to an arbitration agreement can do to ensure that they have provided for a level of discovery adequate to meet their needs.

## The Historical Aversion to Discovery in Arbitration Proceedings

Two of the traditional hallmarks of arbitration have been its relative speed and economy compared to most judicial proceedings. Historically, most cases were resolved within six months of the time that an arbitrator was appointed, and the costs of resolving a dispute were often considerably less than in court proceedings. Generally, there was – and still is – no unilateral right to conduct prehearing discovery unless permitted by the parties' agreement to arbitrate or by the applicable rules of the chosen arbitration provider.

To the contrary, by agreeing to arbitrate, the parties to an arbitration agreement are deemed to have waived their right to the full arsenal of judicial procedures (including pretrial discovery and motions, public trials, formal rules of evidence, and the right to appeal) in favor of the relative informality and expediency of arbitration. That most arbitrations do not apply the formal rules of evidence, and allow the use of affidavits, declarations, and telephonic testimony, also obviate the need for much traditional discovery.

For the California practitioner, the traditional aversion to discovery in contractual, or non-judicial, arbitrations is most notably reflected in California Code of Civil Procedure §§ 1283.05 and 1283.1. Collectively, they provide that there is a statutory right to discovery in contractual arbitration proceedings only in personal injury and wrongful death cases or when "the parties by their agreement so provide." Cal. Civ. Proc. Code § 1283.1(b). Moreover, even when prehearing discovery is permitted, "[d]epositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators." (*Id.* at § 1283.05(e).)

In this regard, the courts will almost never interfere with an arbitrator's discovery decisions. As Justice Rylaarsdam has poignantly observed, under Cal. Civ. Proc. Code § 1283.05, "arbitrators have great latitude and discretion when ruling on discovery matters," and an "arbitrator does not exceed power even if discovery rulings incorrect." (*Evans v. Cornerstone Development Co.*, 134 Cal. App. 4th 151, 164 (2005) (citing *Alexander v. Blue Cross of California*, 88 Cal. App. 4th 1082, 1089 (2001)).) Indeed, in certain respects, an arbitrator's powers over discovery matters may even exceed those of a judge. Section 1283.05(b) vests in arbitrators the same power over discovery matters, including the imposition of sanctions, as those of superior court judges "except the power to order the arrest or imprisonment of a person." Yet, unlike a judge, an arbitrator's rulings are not subject to further review; they are essentially "bulletproof."

The Federal Arbitration Act ("FAA") does not even mention the word "discovery" within its provisions. 9 U.S.C. §§ 1- 16 (2000). While section 7 of the FAA clearly grants arbitrators the authority to subpoena both parties and non-parties to appear and produce documents at an arbitration hearing, there is a substantial question as to whether this section also grants arbitrators the power to order pre-trial discovery against non-parties, and, if so, to what extent. The reported decisions are widely split on these issues with probably a slim majority concluding that an arbitrator simply lacks the authority to order a non-party to participate in any prehearing discovery. (*Compare Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409-10 (8th Cir. 2004) and *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269, 275 (4th Cir. 1999) ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or that non-parties provide the litigating parties with documents during prehearing discovery") with *Security Life Insurance Co. of America v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870-71 (8th Cir. 2000) ("implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing").)

**The Expanding Scope of Discovery in Arbitration Proceedings**

During the past few decades, the traditional assumption that there is generally no right to discovery in arbitration proceedings has been challenged by two significant developments. First, there has been an explosive growth in the number and complexity of "big stakes" matters which are being referred to arbitration. For example, arbitration has become increasingly prevalent as an alternative to litigation in such highly sophisticated fields as patent and reinsurance matters. In many cases, the parties to such disputes are now simply demanding that there should be a "right" to prehearing discovery, even when there is no express statutory or contractual provision. Indeed, as one leading treatise observes: "In complex disputes or those involving substantial sums, it borders on the absurd to arbitrate unless some modicum of prehearing discovery is available." 2 THOMAS H. OEMKE, COMMERCIAL ARBITRATION § 89:2 (3d ed. 1995).

Second, and more importantly, during this period, the scope and nature of alternative dispute resolution have expanded almost exponentially from their roots – resolving relatively simple contractual disputes between businesses with roughly equal bargaining power – to the point that arbitration provisions now directly affect virtually all adult Americans. Credit card and bank customers, medical patients, residential home buyers, franchisees, millions of employees, and anyone who operates an Internet site have all been added to the rolls of those who are subject to mandatory ADR provisions.

These two parallel developments have caused some courts and the major ADR providers to expand considerably the role of discovery in arbitration. One of the very few times that the courts will intervene and refuse to enforce a mandatory arbitration agreement is when the arbitration provisions are so one-sided or devoid of procedural fairness as to offend contemporary notions of due process. These concerns are particularly heightened when the claimant has an inferior bargaining position and seeks to enforce statutorily-created rights, such as the Title VII employment charges involved in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) or the California Fair Employment and Housing Act claims considered in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

In *Armendariz*, the California Supreme Court held that antidiscrimination claims "are in fact arbitrable *if* the arbitration permits an employee to vindicate his or her statutory rights" and effectively adopted the five-factor test set forth in the *Cole* decision as to what minimum requirements must be met for such vindication to occur. (*Id.* at 90 (emphasis in original), 103.) The second of the *Cole* requirements mandates that the arbitration agreement "provide[] for more than minimal discovery." (*Id.* at 102.) The *Armendariz* Court agreed that "adequate discovery is indispensable for the vindication of FEHA claims" and that employees "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review pursuant to Code of Civil Procedure 1286.2." (*Id.* at 104, 106 (footnote omitted).) In so doing, however, Justice Mosk also instructed "that parties incorporating the [California Arbitration Act] into their agreement are also permitted to agree to something *less than* the full panoply of discovery provided in Code of Civil Procedure section 1283.05" and that it was up to the arbitrator and any reviewing court to balance the "'simplicity, informality, and expedition of arbitration'" with the requirements of the FEHA and other remedial legislation to determine "the appropriate discovery, absent more specific statutory or contractual provisions." ( *Id.* at 105-106 & n.11 (citation omitted).)

However, even before the *Cole* and *Armendariz* decisions were rendered, in 1995, representatives from the American Arbitration Association ("AAA"), the American Bar Association, the National Employment Lawyers Association, and other interested parties had formed a Task Force on Alternative Dispute Resolution in Employment and developed a "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" ("Employment Protocol") available at http://www.adr.org/sp.asp?id=22078. Among other things, section B(1) of that Protocol directs: "Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims."

In conformity with the Employment Protocol, Rule 7 of the AAA's National Rules for the Resolution of Employment Disputes now provides: "The arbitrator shall have 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." Similarly, JAMS has adopted its own "Minimum Standards of Procedural Fairness" in employment-related disputes and implementing rules. Rule 15(c) of JAMS's current "Employment Arbitration Rules & Procedures" guarantees that each party has the right to take "at least one deposition of an opposing party or an individual under the control of the opposing Party" and that further depositions may be taken either upon mutual agreement of the parties or by order of the arbitrator "based upon the reasonable need for the requested information, the availability of other discovery, and burdensomeness of the request."

In response to the demands of parties for discovery in "big stakes" arbitration matters, the AAA and JAMS also now recognize the right to

conduct discovery in matters arising under their respective provisions for "large, complex" disputes and "Comprehensive Arbitration Rules and Procedures."

In sum, it can no longer be flatly stated that there is no right to discovery in arbitration proceedings. Moreover, there has been a strong trend among alternative dispute resolution providers to address discovery issues at any early stage in the arbitration proceedings and to encourage the exchange of documents and the identification of witnesses prior to the arbitration hearing. The remainder of this article will explore some of the mechanisms that various ADR providers have implemented to encourage such voluntary exchanges and what the parties can do to ensure that they have provided for an adequate level of prehearing information exchange.

**Preliminary Hearings and the Prehearing Exchange of Information**

In my experience, there is nothing quite so destructive to the smooth operation of an arbitration hearing as for the parties to wait until the first day of hearing before exchanging the documents they intend to use as exhibits or producing documents that the other side had subpoenaed to be produced at the hearing. Invariably, one or more sides to the dispute will insist on inspecting the documents before they agree to continue with the hearing or else take a seemingly interminable amount of time to inspect each document when it is first sought to be introduced as evidence. Yet, when I first began serving as an arbitrator thirteen years ago, preliminary hearings or conferences were the exception rather than the rule. Many arbitrators would send letters encouraging the parties to premark and exchange exhibits at least a week before the hearing and to explain their other "ground rules." However, the first time that an arbitrator normally had any direct communications with all of the parties or their counsel was at the arbitration hearing itself, and there was very little the arbitrator could do to force the parties to comply with his or her procedural "suggestions." Thankfully, those days are now a memory.

While preliminary hearings are still at least nominally optional at the request of any party or at the direction of the arbitrator (*see e.g.*, AAA Commercial Arbitration Rule R-20; JAMS Comprehensive Arbitration Rules & Procedures Rule 16), their use has proliferated in recent years. As a practical matter, there is now almost always a telephonic prehearing conference held at least in AAA arbitrations even in the smallest of cases. Many other ADR providers, whether expressly or not, have taken a similar viewpoint. As Martha Stewart would say, "It's a good thing," for they provide an ideal opportunity for the arbitrator and counsel for the parties to address any discovery issues and the prehearing exchange of documents and other information at an early stage in the proceedings.

Preliminary hearings can be especially valuable when the parties have not made any express provision in their arbitration agreement for discovery. In many ways, discovery in arbitration proceedings remains a much more collaborative process than in judicial ones. This fact is reflected, for example, in Rule 15(c) of the JAMS Employment Arbitration Rules & Procedures which requires the parties "to attempt to agree on the number, location and duration of the deposition(s)." Moreover, even when there is no express right to discovery under an ADR provider's rules or even an outright proscription against discovery, any discovery the parties voluntarily agree upon during a preliminary hearing will almost invariably be signed off by an arbitrator. In other words, an arbitrator will intervene only when there is a disagreement among the parties as to whether discovery should be allowed or as to the appropriate scope or manner of discovery. Even then, most arbitrators will effectively try to mediate a just resolution among the parties without being forced to make a binding determination.

Another procedural mechanism that most of the major ADR providers have now adopted to encourage the prehearing exchange of documents and the identification of the witnesses to be called at the hearing is the largely self-executing provisions which are typically referred to as the "Exchange of Information." For example, AAA Commercial Arbitration Rule R-21 provides that "[a]t the request of any party or at the direction of the arbitrator. . . the arbitrator may direct (i) the production of documents and other information; and (ii) the identification of any witnesses to be called" and further requires that "[a]t least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing."

JAMS mandates an even earlier exchange. Somewhat reminiscent of Federal Rules of Civil Procedure Rule 26(a), the "Exchange of Information" provisions under both JAMS's "Streamlined" and "Comprehensive" Arbitration Rules direct that the parties "complete an initial exchange of all relevant, nonprivileged documents" and "the names of all witnesses whom they may call as witnesses" within 14 and 21 days, respectively, after all the pleadings have been received.

The NASD (formerly the National Association of Securities Dealers) takes the process further. Its Discovery Guide, "which includes Document Production Lists, provides to parties in NASD arbitrations guidance on which documents they should exchange without arbitrator or staff intervention, and guidance to arbitrators in determining which documents customers and member firms or associated persons are presumptively required to produce in customer arbitrations." (SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, THE ARBITRATOR'S MANUAL 15 (MAY 2005), *available at* http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_009640.) Thus, for example, List 1 of the NASD Discovery Guide requires a member firm to produce within 30 days of the answer not only all records relating to the customer's account but also all "[r]ecords of disciplinary action taken against the Associated person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue." (NASD, THE DISCOVERY GUIDE, Document Production Lists, List 1 (March 2003), *available at* http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009420.pdf.)

Although the term "discovery" is seldom used, through these and similar procedural devices, ADR providers have taken great strides in recent years to ensure that all parties to an arbitration are provided with the information which, at least in most instances, is sufficient to allow all sides to adequately prepare for the hearing and sufficient to ensure that the hearing itself goes as smoothly and expeditiously as possible. Nevertheless, the extent and scope of "traditional" discovery in arbitration proceedings remain severely limited. Ultimately, it is largely up to the parties themselves to craft what they deem to be the proper scope and extent of discovery. It is to

this subject that I now turn.

**Working with Each Other and the Arbitrator to Ensure an Appropriate Level of Discovery**

So far, the thrust of this article has largely focused on what "right" to conduct discovery, if any, a party has in arbitration proceedings. However, it cannot be emphasized strongly enough that the discovery provisions contained in the California and Federal Arbitration Acts, or arising under the relevant decisional law, are essentially "default" rules and merely establish the minimum levels of discovery to which a party may be entitled to as a matter of due process. As *Abramson v. Juniper Networks, Inc.* instructs:

> Where the plaintiff's claims arise from unwaivable public rights, whether statutory or nonstatutory, the arbitration agreement must satisfy the minimum requirements set forth in *Armendariz.* Assuming it satisfies the *Armendariz* requirements, an agreement to arbitrate public claims also must be conscionable.
>
> Where the plaintiff asserts private rights, rather than (or in addition to) unwaivable public rights, the agreement to arbitrate is tested only against conscionability standards.

(*Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 652 (2004) (citations omitted).)

Conversely, provided that the minimum due process and "conscionability" standards are met, any discovery procedures which are agreed upon among the parties either before or after a dispute has arisen will generally override these default rules and be enforced. These include not only adopting by reference the rules of a given ADR provider, but also modifying those rules to suit the parties' specific discovery preferences. In other words, the only way parties can confidently guarantee a "right" to prehearing discovery is to include a provision in their arbitration agreement providing for it. By doing so, the parties may also largely dictate the manner and scope of discovery themselves.

For example, if the parties want to be able to propound interrogatories to one another, then they are free to agree upon a provision in their arbitration agreement incorporating by reference the provisions of Cal. Civ. Proc. Code § 1283.05, expressly indicating that interrogatories will be permitted or even specifying how many and what types of interrogatories will be acceptable. Most ADR providers acknowledge this flexibility in their respective rules. Thus, for example, Rule R-1 of the AAA's Commercial Arbitration Rules states, "The parties, by written agreement, may vary the procedures set forth in these rules." Rule 2 of both JAMS's "Streamlined" and "Comprehensive" Rules similarly provides that the parties "may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies. . . "

Moreover, when an ADR provider has tiered sets of arbitration procedures which variously apply, depending upon the amount in controversy, the parties can, almost invariably, elect to have the alternative set of those rules apply which provide for a greater level of discovery regardless of the amount in controversy. To illustrate: the AAA's "Regular Track" Construction Industry Rules apply by default to all construction controversies when the stated amount of the claim is between $75,000 and $500,000. Rule R-22 of the "Regular Track" procedures provides that there is no right to discovery unless otherwise indicated in the rules "or as ordered by the arbitrator in extraordinary cases when the demands of justice require it." Conversely, Rule L-4 of AAA's Procedures for Large, Complex Construction Disputes acknowledges that the "parties may conduct such discovery as may be agreed to by all the parties" and further vests in the arbitrator the express authority to order whatever discovery he deems appropriate "consistent with the expedited nature of arbitration." By agreeing to apply the Large, Complex Construction Dispute Procedures in their arbitration agreement or at the time the initial claims are filed, the parties can thereby effectively agree in advance to allow at least limited discovery regardless of the amount in controversy. Similarly, while there is no "right" to take the opposing party's deposition under JAMS's "Streamlined" procedures, such a right is recognized under Rule 17(c) of JAMS' Comprehensive Rules, which apply whenever any disputed claim exceeds $250,000 or when the parties agree to use those rules.

Finally, after you have determined what your mandatory discovery obligations are under the existing law, which particular set of discovery rules of your chosen ADR provider apply to your specific controversy, and what modifications to these rules the parties have (or can) mutually agree upon, perhaps the most important consideration of all is the selection of the arbitrator. For, in the final analysis, it is in his or her experience, integrity, and discretion that your ability to conduct the level of discovery that you believe your case deserves will ultimately depend.

---

*Robert A. Merring is a solo practitioner, arbitrator and mediator in Costa Mesa. He has been a member of the San Diego-Orange County Panel of Commercial Arbitrators of the American Arbitration Association since 1993. He is also an arbitrator for the NASD and the Orange County Superior Court. He may be reached at rmerring@merringlaw.com*