



WINNING WHILE SAVING ON COSTS WITH ARBITRATIONS AND SPECIAL REFERENCES

Hon. Kevin Murphy (Ret.)

Mediator | Arbitrator | Referee

ADR Services, Inc. MCLE Day 2022 – January 19, 2022

1. UNDERSTANDING THE IMPORTANCE OF ALTERNATIVES TO TRADITIONAL LITIGATION AND THE THREE MYTHS

2. TEMPORARY JUDGES
 - A. SOURCE:

California Constitution Article VI section 21 (see California Rules of Court 2.830-2.834):
Allows for full trial

California Probate Code sections 2405(a) and 9620- disputes relating to estate between guardian or conservator/personal representative and third person: Allows for summary procedure without pleading and discovery
 - B. CONSENT OF PARTIES - YES
 - C. SIGNIFICANCE OF DECISION: Operates as Decision of the Court

3. REFERENCES
 - A. SOURCE:

California Code of Civil Procedure (“CCP”) sections 638-639 (see in general CCP 638-645.1)
 - B. TYPES

GENERAL: CCP 638(a):
“To hear and determine any or all of the issues in an action or proceedings, whether of fact or of law, and to report a statement of decision”

SPECIAL: CCP 638 (b) and 639
 - C. CONSENT OF PARTIES

CCP 638 - YES

CCP 639 - NO
 - D. SIGNIFICANCE OF DECISION

638- “must stand as the decision of the court” (CCP 644(a))

639- advisory (CCP 644(b))



4. THE DIFFERENCE BETWEEN REFERENCES AND ARBITRATIONS

A. Appellate Rights

- References- Full Appellate Rights
- Arbitrations- Limited Appellate Rights: erroneous factual or legal conclusions, even if award causes substantial injustice, not reversible
- CCP 1286.2 procured by corruption fraud, or undue influence;

Bad behavior by arbitrator: corruption, misconduct, failed to disclose ground for disqualification

Exceeded powers and award cannot be corrected without effecting merits of decision

Substantial prejudice by refusal to postpone upon sufficient cause or refusal to hear material evidence or other conduct contrary to title

- ***W*** BUT SEE Cable Connection Inc. V DIRECTTV Inc. where arbitration agreement read “The arbitrators shall not commit errors of law or legal reasoning and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”

California Supreme Court upheld BUT MUST BE EXPLICIT AND UNAMBIGUOUS
HOWEVER, CAN'T CREATE EXPANDED APPELLATE RIGHTS UNDER FEDERAL ARBITRATION ACT

B. The Applicable Law

Reference referees and temporary judges, absent agreement to the contrary, follow law that applies in courts

Arbitrations-relaxed procedural law, especially when it relates to Discovery

DISCOVERY: As a general rule limited discovery including, THE ABSENCE OF NONPARTY DISCOVERY

W The importance of reading CCP 1283.05 with CCP 1283.1

1283.05 does not automatically apply in cases that don't involve personal injury or wrongful death

W SOLUTIONS : write in application of 1283.05 or subpoena nonparty and records to arbitration hearing

OTHER PROCEDURAL LAW

DISPOSITIVE MOTIONS NOT ALWAYS ALLOWED

American Arbitration Association (“AAA”) Commercial Rule 33: Arbitrator “may allow the filing of and make rulings upon

a dispositive motion only if the arbitrator determines that the moving party has shown...likely to succeed...”



EVIDENCE ADMISSIBILITY RULES RELAXED

Private companies like ADR Services, Inc. AAA have relaxed evidence admissibility rules

CCP 1282.2 Rules of evidence and judicial procedure need not be observed; oath on request

ADR Services, Inc. Arbitration Rule 33: "strict conformity with the rules of evidence is not required"

5. SAVING ON COSTS

THE COST MYTH

WAYS TO SAVE

1. Before your hire a temporary judge, referee, or arbitrator have a joint conference with the candidate
2. Make good use of the Arbitration Management Conference
 - Ask about how to save and find out about billing
 - Discuss a discovery protocol that involves less formal ways of resolving discovery disputes
 - See if letter briefs are acceptable
3. Avoid formal discovery motions
4. Identify dispositive issues that can be litigated as soon as possible (ie evaluation; contract interpretation; damage calculation)
5. Mediate as early as possible and with an evaluative mediator and, if appropriate, consider mediating with the arbitrator
6. Remote Hearings including the trial or arbitration hearing

6. WINNING *W*

1. Know the Law that applies to your case
2. Don't forget oral advocacy
3. Understand the Impact of the Federal Arbitration Act 9 U.S.C. section 1 et seq.
 - If no mention in Arbitration Agreement of law that applies, the FAA applies if "involving commerce"
 - If FAA referenced it preempts State arbitration law
 - No Federal Preemption if the parties clearly provide in agreement or stipulation that State law applies
 - The parties to an arbitration agreement can specify under which arbitration rules the arbitration will be conducted
 - VOLT INFORMATION SCIENCES, INC. V BOARD OF TRUSTEES OF LEYLAND STANFORD JUNIOR UNIV. (1989)
4. Understand the interrelationship between Code of Civil Procedure 1283.05 and 1283.1
 - 1283.05 grants full discovery rights to arbitration parties BUT
 - 1283.1 indicates 1283.05 applies only to cases involving wrongful death or personal injury or death (b) notes that parties by agreement may include 1283.05
 - In California to obtain Non-Party discovery you need to specifically incorporate CCP 1283.05 into arbitration agreement even then Non-Party discovery open to full judicial review



5. Read these FIVE STAR CASES
 - CABLE CONNECTION, INC. V DIRECTTV, INC. (2008) 44 CAL. 4TH 1334
 - TARRANT BELL PROPERTY, LLC. V SUPERIOR COURT (2011) 51 CAL. 4TH 538
 - AITRON, INC. V VEECO INSTRUMENTS, INC. (2020) 52 Cal. App. 5th 360
 - VOLT INFORMATION SCIENCES, INC. V BOARD OF TRUSTEES OF LEYLAND STANFORD JUNIOR UNIV. (1989) 489 U.S. 468
6. Choose Wisely and the Fear of Bias
 - Investigate
 - Avoid Out to Pasture Judges and Decision Makers
 - Interview
7. Cure Poorly Written Arbitration Agreement with Stipulations

Thank you



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