Flexibility in Arbitration
By Hon. Steven Kleifield (Ret.)

Hon. Steven J. Kleifield (Ret.) is a respected neutral and former Los Angeles Superior Court Judge with more than 40 years of civil litigation experience. After 22 years in private practice and 20 years on the bench—including service in an Independent Calendar court and two years handling coordinated asbestos matters across Southern California—he is known for his fairness, patience, and deep understanding of the challenges facing litigants and counsel. As a mediator and arbitrator with ADR Services, Inc., Judge Kleifield brings insight, balance, and practical problem-solving to even the most complex disputes.

Why arbitrate? When I had a general civil assignment, I had 700 cases in my caseload. According to the latest statistics from the Los Angeles Superior Court, general civil departments average approximately 1,100 cases. Trials often are set out two years from the case management conference, and perhaps 6 or 7 trials are set per week. There is no guarantee that your case will get out for trial on the date that it is set. Some cases run up to the 5-year trial deadline. Hearings on motions may be set months down the road. For your client's benefit and for your own, it may be tempting to consider arbitration as an alternative.

To be clear, the right to a trial in court, and especially a trial by jury, should never be surrendered lightly. In deciding whether to arbitrate, it is important to consider its advantages and disadvantages, and discuss them with your client. While there are many advantages to arbitration, the one that is addressed here is **flexibility**. This includes, among other things, selecting the person who will manage and hear your case; choosing and modifying rules and procedures; and setting and modifying dates and deadlines. You can

use that flexibility to work for you and your client.

If you are going to maximize the flexibility advantage, it is important to establish a good working relationship with opposing counsel. What is advantageous to you and your client may be advantageous to your opposing counsel and their client. You can only find out if you take the initiative to discuss it. Talking about the selection of the arbitrator, rules and procedures to follow, and setting and modifying dates and deadlines is not a sign of weakness; rather, it is a sign of strength. Additionally, it is much more effective to propose something that is agreed to by the parties. An arbitrator can work with counsel to make arbitration user-friendly to everyone.

At the outset you should discuss the **selection of the arbitrator**. Some arbitration agreements merely state that the arbitrator will be someone agreed to by the parties. For others that identify a particular ADR provider, you can still agree to someone else. **An arbitration agreement is a contract, and contracts can be modified by agreement of the parties.** If a different arbitrator suits your

purpose, see if opposing counsel will agree. Use this to your advantage to find an arbitrator with relevant experience, subject matter expertise, the availability you need, or a procedure that fits your case. You may want to choose a retired judge you appeared before in court.

Most ADR Provider firms have a set of arbitration rules that are different than what you typically encounter in court, where you are bound by statutes, Judicial Council Rules of Court, local rules, and "local local" rules in the department where your case is set. The provider arbitration rules, which are typically much simpler, can even be modified on request. For example, you may be more comfortable following the Code of Civil Procedure, because that's what you are used to. You can follow the CCP and modify the rules, such as shortening or lengthening time for certain events, such as for discovery requests or motions. You can agree that the arbitrator will conduct informal discovery conferences, saving the time and expense of bringing a motion. Such IDCs can typically be set quickly. You may want to modify the time frame for identifying and deposing experts. You may want to modify the deadline for bringing a summary judgment motion and filing an opposition and reply, or the time for bringing a motion to compel. I have agreed to dispense with the necessity for a separate statement in summary judgment or discovery motions. In my practice, I am willing to consider any such requests, especially when counsel are in agreement.

You may request to modify other aspects of the rules of the ADR provider. For example, it is fairly common for rules to provide for a mutual exchange of exhibits at the outset. Maybe you would rather dispense with that requirement and conduct discovery the traditional way. While many provider rules prohibit demurrers, both sides might want to have one heard to get an early ruling on an issue of law. While the rules of evidence are commonly more relaxed in arbitrations, sometimes the parties request that the rules of evidence be strictly followed. The possibilities are endless. It all depends on the case, and no two cases are alike.

With respect to setting and modifying dates and deadlines, it is a much simpler matter in arbitration. You can usually get an arbitration date on or near the date that you and your client would prefer. Most arbitrators, including myself, will set a conference call on short notice. There is no need to file a formal motion to continue the trial, with an ex parte application for an order to shorten time. Either the matter can be resolved at the conference call, or a hearing may be set and letter briefs can be filed.

The best time to discuss these matters is at the initial arbitration management conference. Identify what will work best for you and your client, and talk to opposing counsel beforehand. Even if you haven't reached agreement, the arbitrator will appreciate the fact that you discussed it and have given it some thought. I will meet with counsel upon request as matters arise; no ex parte applications required. Use the flexibility inherent in arbitrations to your advantage. Make it work for you.