

RESOLUTION 06-10-2015

DIGEST

Arbitration: Grounds for Vacating Awards – Refusal to Allow Court Reporting of Proceedings
Amends Code of Civil Procedure section 1286.2 to provide that the refusal of the arbitrator to allow reporting of proceedings constitutes a ground for vacating an arbitration award.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1286.2, to read as follows:

§1286.2

- 1 (a) Subject to Section 1286.4, the court shall vacate the award if the court determines any
2 of the following:
- 3 (1) The award was procured by corruption, fraud or other undue means.
4 (2) There was corruption in any of the arbitrators.
5 (3) The rights of the party were substantially prejudiced by misconduct of a neutral
6 arbitrator.
7 (4) The arbitrators exceeded their powers and the award cannot be corrected without
8 affecting the merits of the decision upon the controversy submitted.
9 (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to
10 postpone the hearing upon sufficient cause being shown therefor or by the refusal of the
11 arbitrators to hear evidence material to the controversy or by refusal of the arbitrators to allow
12 any party, at the party's expense, to have a certified shorthand reporter transcribe as the official
13 record any deposition, proceeding, and/or hearing or by other conduct of the arbitrators contrary
14 to the provisions of this title.
15 (6) An arbitrator making the award either: (A) failed to disclose within the time required
16 for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was
17 subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of
18 timely demand to disqualify himself or herself as required by that provision. However, this
19 subdivision does not apply to arbitration proceedings conducted under a collective bargaining
20 agreement between employers and employees or between their respective representatives.
21 (b) Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the
22 provisions of Section 128.7.

(Proposed new language underlined; deleted language stricken.)

PROPONENTS: Joseph A. Goldstein, Lisa Berger, Barbara E. Figari, Daryl Miller, Morgan E. Pietz, Vickly L. Barker, Charles Wake, Robin Berstein-Lev, Margaret J. Grover, Cathleen Yonahara

STATEMENT OF REASONS

The Problem: The rights of a party in arbitration can be substantially prejudiced because in the

absence of a reporter's transcript or a suitable substitute, a reviewing court will conclude that an arbitration award, like all judgments or orders of lower courts, are presumed to be correct. Numerous appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. Another piece of direct evidence is the American Arbitration Association ("AAA") Employment Arbitration Rule and Mediation ("EARM") Procedure No. 20 which states in pertinent part: "If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator." The underlined portion of this rule, which is applicable to all AAA Employment cases, is a denial of a fundamental right to fairness of an arbitration proceeding because it gives either the party opposing official transcription and/or the Arbitrator complete veto power over having an official record of any deposition, hearing, and/or proceedings, which in turn causes substantially prejudice because no reporter's transcript or suitable substitute is then available for a reviewing court. In addition, JAMS Arbitration, Mediation, and ADR Services ("JAMS") Rule 22 (j) states: "Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing". Here, the only mention of a court reporter's record in the JAMS Rule is as that term relates to a "Hearing". Depending on the meaning of the term "Hearing", as defined either by the parties' arbitration agreement or by the Arbitrator, a party will be denied the right to have a court reporter present at a deposition, status conference, and/or other proceeding, and to have the court reporter's record deemed the official record of the arbitration proceedings to enable court review. This is a denial of a fundamental due process right to fairness of an arbitration proceeding.

The Solution: Would add specific language to subdivision (a) (5) of Section 1286.2 which would prohibit an arbitrator from refusing to allow any party to an arbitration from having an official reporter produce a transcript as the official record of any deposition, proceeding, and/or hearing.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1286.2 to provide that the refusal of the arbitrator to allow reporting of proceedings constitutes a ground for vacating an arbitration award. This resolution should be disapproved because it would provide a basis to avoid agreements where the parties elected to not have a reporter and would allow for a battle of competing reporters.

Arbitration is a creature of contract and the parties have the ability to fashion its procedures by agreement, including streamlined processes that do not allow a court reporter. There are many instances where the parties do not want the arbitration proceedings transcribed when they agreed to arbitration, e.g. trade secret disputes and contracts involving sensitive personal or business information. This resolution would effectively allow one party to avoid that agreement by requesting the proceedings be transcribed knowing the arbitrator would be required to deny the request as contrary to the party's agreement and then attack ensuing arbitration award on grounds a reporter was not allowed.

Likewise, as drafted, this resolution creates a problem because it would require an arbitrator allow multiple reporters if each request the use of their hired reporter and cannot agree on a joint reporter. This result is created by the "any party" language without regard to whether the proceedings are ultimately reported. This, in turn, creates the potential additional problem of competing official transcripts.

SECTION COMMENTS TO RESOLUTION 06-10-2015

**STATE BAR OF CALIFORNIA'S COMMITTEE ON ALTERNATIVE DISPUTE
RESOLUTION**

DISAPPROVE

According to the proponents, this Resolution "would prohibit an arbitrator from refusing to allow any party to an arbitration from having an official reporter produce a transcript as the official record of any deposition, proceeding, and/or hearing." The State Bar's Committee on Alternative Dispute Resolution (ADR Committee) is composed of arbitrators, mediators, and consumers of ADR services with many years of experience. In the ADR Committee's collective experience, this has not been a problem, and committee members were not aware of a situation where an arbitrator has refused to allow a party to an arbitration to have an official reporter produce a transcript as an official record. Those on the ADR Committee who act as arbitrators report that it is not uncommon for a party to provide an official reporter at the party's expense, and could see no reason to refuse to allow a party to have to have an official reporter produce a transcript as an official record.

The Resolution also proposes a problematic solution to any issues that may exist. Under this Resolution, the court would have the power to vacate an arbitration award if it determined

that the rights of the party were substantially prejudiced by the refusal of the arbitrator to allow a party to have a certified reporter transcribe as the official record any deposition, proceeding or hearing. Under most or all scenarios, a party would know at the time of the deposition, proceeding or hearing whether the arbitrator will allow the party to have a reporter produce a transcript as an official record. The party could then choose to proceed without a reporter's transcript, assuming a refusal by the arbitrator. Under this proposal, the party could then wait until after the arbitration award is issued, to see if the arbitrator ruled in favor of the party. If not, the party could then seek to vacate the adverse arbitration award, claiming that rights of the party were substantially prejudiced by the arbitrator's refusal to allow a reporter to produce a transcript as an official record. Assuming a party knows at the time of the deposition, proceeding or hearing that the arbitrator refuses to allow the party to have a reporter produce a transcript as an official record, allowing a party to wait until after the arbitration award is issued and potentially have the award vacated as a result of that refusal does not, under those circumstances, seem to be an appropriate remedy. All parties would have incurred the time and expense of the initial arbitration, and vacatur could require the parties to arbitrate a second time, incurring the time and expense again.

Disclaimer

This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

STATE BAR OF CALIFORNIA'S COMMITTEE ON ADMINISTRATION OF JUSTICE

DISAPPROVE

According to the proponents, this Resolution "would prohibit an arbitrator from refusing to allow any party to an arbitration from having an official reporter produce a transcript as the official record of any deposition, proceeding, and/or hearing." In the experience of the members of the State Bar's Committee on Administration of Justice (CAJ), this has not been a problem. CAJ is not aware of a situation where an arbitrator has refused to allow a party to an arbitration to have an official reporter produce a transcript as an official record.

Although the Resolution says that appellate courts have refused to reach the merits of an appellant's claim because no reporter's transcript was provided, it does not say whether these appellate proceedings arose out of arbitrations or – more importantly – whether they involve situations where an arbitrator refused to allow a party to have an official reporter produce a transcript. The Resolution also quotes two rules that could be interpreted in certain ways, but does not say whether either rule has actually resulted in such a refusal.

The Resolution also proposes a problematic solution to any issues that may exist. Under this Resolution, the court would have the power to vacate an arbitration award if it determined that the rights of the party were substantially prejudiced by the refusal of the arbitrator to allow a party to have a certified reporter transcribe as the official record any deposition, proceeding or

hearing. A party would presumably know at the time of the deposition, proceeding or hearing whether the arbitrator will allow the party to have a reporter produce a reporter's transcript. Under this proposal, the party could wait until after the arbitration award is issued, to see if the arbitrator ruled in favor of the party. If not, the party could then seek to vacate the adverse arbitration award, based on a refusal to allow a reporter to produce a transcript as an official record.

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COUNTERARGUMENTS TO RESOLUTION 06-10-2015

ORANGE COUNTY BAR ASSOCIATION

Although Proponents cite "fundamental due process and right to fairness" in support of their resolution, their real concern is that a party may be denied an "official record" of the proceeding for a merits appeal. This reasoning suffers two major flaws. First, the forum rules cited by Proponents do not prohibit reporters. AAA Rule 20 cited by Proponents includes the following not quoted by Proponents: "Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing." Similarly, the JAMS rule quoted by Proponents permits a party to have a reporter at that party's cost. No one is being denied a reporter by such rules. Second, there is no merits appeal to a reviewing court from an arbitration award in the absence of a specific contractual right. *Cable Connections, Inc. v. DirecTV, Inc.* (2008) 44 Cal.4th 1334, 1361 ("to take themselves out of the general rule that the merits of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts"). Parties desiring such judicial appellate review would be wise to include in their arbitration agreement a requirement for an "official transcript." It would turn arbitrations on their head to allow a party, who in the first instance must agree to arbitration and in the second may specify terms of that arbitration, to vacate an award because of the lack of a useless transcript.