



Arbitration myth busting: What every attorney and client needs to know

All arbitrators “split the baby,” misapply the law, prevent discovery and rule with ultimate authority – or do they?

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A common misperception among the public and attorneys alike is that arbitration of a case is a good thing. Many people believe arbitration will save them money and time, and they will achieve a fair result. Too often, these beliefs are corrected by the realities of private judging.

Arbitration and mediation services have blossomed over the last few years. On average over the last five years, California has initiated approximately 1.4 million civil actions each year.¹ Of these matters, about 70 percent of all civil matters are dismissed or disposed of each year via a mechanism other than trial. While people value our courts as a place to assert their rights, they also believe the court system is not necessarily the place to resolve disputes effectively. As a result, attorneys and their clients seek the help of “private judges” to resolve disputes.

Arbitration offers certain advantages over trial before a judge or jury. Scheduling tends to be more flexible. Arbitration can offer security and privacy for the litigants, who might otherwise find certain facts subject to public disclosure or

to a business competitor with either a bench or jury trial. Even with judicial safeguards such as gag orders and filing documents under seal, we all too often are privy to the most private details of an individual’s life. If it is binding, arbitration can offer finality to litigants in a dispute, while an appeal after trial can drag on for years. This article will examine some of the common myths associated with arbitration versus the courts, both in the public’s eye and among attorneys.

Myth one: Arbitrators do not make fair decisions

The first myth is that arbitrators tend not to make fair decisions for a variety of reasons. One of the phrases attorneys like to use is that arbitrators tend to “split the baby” or rule down the middle rather than engage in a decision based on the facts that favor one party over another. This belief may stem from the fact that individual plaintiffs may come before an arbitrator once while defendants may constitute repeat business. Thus, in an effort to avoid making the defendants unhappy, the arbitrators will “split the baby” to preserve these long-term rela-

tionships with the hope of obtaining future business.

It is unethical for an arbitrator to consider profit making or future business in his or her decision-making. The Arbitrator Guidelines (adopted by JAMS) and the AAA guidelines provide that an award must not be influenced “by any interest in potential future case referrals by any of the Parties or by counsel, nor should an arbitrator issue an Award that reflects a compromise position in order to achieve such acceptability.”²

The California Arbitration Act provides that all persons who serve as neutral arbitrators in private arbitration must comply with ethical rules.³ These rules, adopted in 2002, expanded the level of investigation and conflict of interest disclosures by arbitrators. They also provide the parties with the ability to disqualify an arbitrator on demand.⁴ Further, under these rules, if an arbitrator fails to disqualify himself once a demand is made, or fails to make the necessary disclosures to the parties and then makes an award, the award must be vacated.⁵

Attorneys and clients who have experience with arbitrators who “split the baby” generally tend to be dissatisfied and tend not to use that arbitrator again. They also tell their friends and colleagues about how they feel. Eventually that reputation will catch up with an arbitrator, who may soon find business has dried up. So for practical purposes, the idea that arbitrators routinely “split the baby” is just that, a myth.



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Myth two: Arbitrators misapply the law

Another myth is that arbitrators either do not know the law in a specific area, or if they are familiar with it, they misapply it. It is true that arbitrators are not restricted by legal precedent and have more flexibility in their decision-making than do trial courts. Arbitrators are not bound by *stare decisis*. They may substitute their concepts of fairness for the law, but they generally follow common law and statutory law in making their decisions.

Perhaps the frustration that an attorney feels is more a reflection of the fact that the attorney has not done his or her homework in selecting the right arbitrator for their case. It is the attorney's job to research the arbitrator's background, legal training and judicial temperament. It is the attorney's job to determine how an arbitrator has ruled in similar cases in the past. The attorney must also ascertain the arbitrator's style and procedures, and then to follow them. This information is readily available.

Private judging organizations often post an arbitrator's biography on their Web sites. Many private arbitrators are former superior court or appellate court judges, so their judicial temperament and level of experience in, let's say, a complex construction defect case, is easy to determine by calling attorneys who practice in that area of the law. Of course, much can be learned from reading some of the former judge's published decisions and articles. For complex disputes, many organizations such as AAA even allow attorneys to interview potential arbitrators before they select an arbitrator.⁶ The selection process is made as easy as possible. An attorney cannot blame the arbitrator for a bad selection or for a personality conflict between the arbitrator and their client. An attorney who fails to do his homework does so at his own peril and the peril of his client.

Myth three: Arbitrators do not follow rules of evidence or allow for discovery

Both of these myths go to the issue of evidence. Attorneys are often frustrated by the idea that arbitrators do not have to comply with the California Rules of Evidence. While this is true, Code of Civil Procedure section 1282.2(d) provides that parties to an arbitrations "are entitled to be heard, present evidence and to cross-examine witnesses appearing at the hearing."⁷ An award can be vacated if the arbitrator refuses to hear evidence material to the controversy. Under JAMS Rules, an arbitrator can exclude evidence that is cumulative, repetitive, irrelevant or immaterial, providing that the parties are afforded a fair opportunity to present their case.⁸ So it becomes an attorney's job not to argue that evidence should have been excluded, but to focus the arbitrator's attention on the evidence that supports the client's case. An arbitrator will then likely disregard an opponent's irrelevant evidence in making a decision.

Many attorneys also believe that no discovery allowed in arbitration. This is not necessarily true. Limited discovery is allowed in the arbitration of employer-employee disputes involving an arbitration clause in a pre-employment agreement,⁹ as well as some wrongful death, personal injury claims and insurance coverage matters.¹⁰ Also to the extent the parties are engaged in a contractual arbitration, they can provide for the right to conduct discovery in the terms of the agreement. An arbitrator is bound by these provisions to some extent, but the right to discovery may also be affected by the arbitrator's temperament.

Under California law, arbitrators also have the power to compel attendance of witnesses and production of documents at the arbitration hearing.¹¹ However, arbitrators have no power to compel third parties to attend pre-arbitration depositions or to produce

documents prior to arbitration. So the concern that arbitrations do not allow for discovery in most cases is legitimate. The flip side is that if we allow full-scale discovery and law and motion in arbitrated cases, then the cost and time-savings associated with arbitration evaporate.

Myth Four: There is no ability to review an arbitration decision

Another myth is that arbitration provides litigants no right for review by an appeal courts on the merits. This is somewhat true, given the limited basis for vacating an award set forth by statute. However, as a practical matter, less than 11 percent of appeals result in reversal at the Court of Appeal. With such a small possibility of reversal on appeal in a litigated civil matter, the loss of the right to appeal may not be a legitimate basis for attorney bias against arbitration. From a practical perspective, the right to appeal is sometimes used as an out of court tool to facilitate settlement by attorneys. Furthermore, some private judging organizations even allow the parties to agree to an appeal within the judicial process.¹² So the concept that there is no right to an appeal in arbitration is flawed.

For many attorneys, the real problem with arbitration is not the loss of the right to appeal, but the failure to have an adequate record of the arbitration proceedings and the arbitrator's reasoning in coming to a decision. In court, a court reporter is generally available to make a record and a record exists for trial. In arbitration, however, a party seeking such a record must take the time to arrange for and pay for a stenographer. Moreover, for an arbitration record to be considered "the official record," it must be provided to the arbitrator and offered to the opposing counsel for inspection.¹³ There is also no requirement that an arbitrator provide a written statement of decision unless both parties agree and the arbitrator agrees to do so. In court, the bench



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officer's statement of decision or a jury's special verdict forms as a record of their reasoning and conclusion. These differences can create problems where arbitrations involve complex areas of the law or demand mastery of complex facts.

Conclusion

This article is not intended to pass judgment on either the trial court system or private judging. Its purpose is simply to address common perceptions that cloud attorney and public perceptions of arbitration. Many of these misconceptions can be addressed by properly educating clients about what to expect in arbitration, by doing the appropriate research on an arbitrator's background during the selection process and by creating a pre-litigation arbitration agreement that provides for specific discovery rights and duties of the parties.

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Endnotes

- ¹ See 2001-2005 Court Statistics Caseload Trends provided by the Judicial Counsel of California, Administrative Office of the Courts (2005), www.courtinfo.ca.gov/reference
- ² Arbitrators Ethics Guidelines, JAMS, available at www.jamsadr.com/arbitration/ethics
- ³ See Code of Civil Procedure sections 1285, 1281.9
- ⁴ Code of Civil Procedure section 1281.9
- ⁵ Code of Civil Procedure sections (a) (6)
- ⁶ See AAA Commercial Rules, Rule R-12, Jams Rules, Rule 15, www.adr.org. (Enhanced Neutral Selection process)
- ⁷ Code of Civil Procedure section 1286.2(a)(5)
- ⁸ JAMS, Rule 22
- ⁹ *Mercuro v. Sup. Court*, 96 Cal.App.4th 83, 105. This type of discovery is also allowed in federal employment discrimination cases under FEHA
- ¹⁰ Code of Civil Procedure sections 1283.05, 1283.1(a)
- ¹¹ Code of Civil Procedure sections 1282.6
- ¹² See JAMS Appeal Rules at www.jamsadr.com/rules and CPR Appeal Rules at www.cpradr.org/arb_appeal_intro.asp?M=9.2.3.1
- ¹³ See AAA Commercial Rules, R 26

