

By Rebecca Delfino

# Make the Most of Court-Ordered Arbitration

## A court's order to arbitrate is not a setback but another step toward resolution of the case

At some time nearly every litigator will stand before the court at a status conference and hear the court characterize the case as appropriate for court-ordered arbitration. Often before counsel can respond, the court orders the matter to arbitration and calls the next case. The speed with which a case may be sent to arbitration makes it important to understand the process beforehand.

Pursuant to Code of Civil Procedure Sections 1141.11 and 1141.12, any case with claims of less than \$50,000 per plaintiff is eligible for court-ordered arbitration. Parties may also request court-ordered arbitration. For example, a plaintiff may request arbitration in writing and agree that the award will not exceed \$50,000. Another route is for all parties to stipulate to arbitration, in which case there is no upper limit on the potential award.<sup>1</sup> The crucial difference, however, between court-ordered arbitration and private arbitration is that with court-ordered, the defendant or the plaintiff can reject the arbitrator's decision and request a trial de novo.

Once the determination is made that the case is suitable for arbitration, the court directs counsel to proceed immediately to the ADR office to initiate the arbitration process. At the ADR office, counsel complete intake forms that request, among other information, a brief description of the case, the amount in controversy, potential arbitration hearing dates, and the court-ordered completion date.

The ADR office maintains a list of neutrals who are active members of the State Bar, retired judges, or court commissioners.<sup>2</sup> This list can be accessed online from the ADR office or via the Los Angeles Superior Court Web site at [www.lasuperiorcourt.org](http://www.lasuperiorcourt.org). The educational and professional background of each panelist can be obtained through a name search on the ADR page. Arbitrators on the ADR list have agreed to donate three hours of hearing time per case.

Arbitrators are chosen in several ways. In all but limited civil cases, the parties may select a neutral directly from the ADR panel list or they can use a private neutral at their own cost.<sup>3</sup> The parties can also perform a random search on the ADR Web site. The search will produce a list of three neutrals. In the event the parties cannot agree on a neutral, the ADR staff is available to assist in the selection. In limited civil cases, the ADR office randomly assigns neutrals.<sup>4</sup>

The best way to choose an arbitrator is to know which neutral to choose prior to being directed to the ADR office. Be thoroughly familiar with the list of panelists beforehand. Because the list is available online, the profiles of the panelists may be reviewed anywhere and anytime. Show the list to colleagues. Often other lawyers who practice in the same area, office, or side of the bar are the best source of information about neutrals. Colleagues can provide invaluable insight into how an individual neutral conducts arbitrations and can tell which neutrals might be most sympathetic to a particular case.

Knowing which neutrals are acceptable (or unacceptable) for a case makes the process of choosing a neutral simpler. If you have access to the Association's new searchable Civil Register database, you can enter a potential arbitrator's name in the appropriate field in the customized search feature and obtain a list of cases to which the neutral has been assigned. You can then contact the attorneys of record in the case to gain insights into the arbitrator. (For more information about the Civil Register, go to [www.lacba.org](http://www.lacba.org) and click on Searchable Civil Register on the right-hand navigator.)

The first task in preparing for arbitration is to obtain a hearing date. Under Rule 1611 of the California Rules of Court, the arbitrator sets the time and place for the arbitration after consultation with the parties, and arbitration hearings should be scheduled so that they may be completed no sooner than 35 days or later than 90 days from the date of the assignment of the arbitrator. If the parties do not hear from the arbitrator within 10 days of the assignment, the plaintiff's counsel should contact the defense counsel to obtain three possible hearing dates and then inform the arbitrator of the dates in writing.

After the arbitration is scheduled, counsel should complete all necessary discovery. Pursuant to Rule 1612 of the California Rules of Court, all discovery must be completed no later than 15 days prior to the date set for the arbitration. In addition, counsel must be familiar with Rule 1613, which describes rules and important deadlines for the hearing. Under Rule 1613, the rules of evidence governing civil actions apply to arbitration hearings, with certain limited exceptions. These include that a party may offer certain written reports of expert witnesses, medical records and bills, and other documentary evidence prepared in the ordinary course of business. A party may also present deposition testimony as well as the written statements made under the penalty of perjury of any other witness. The arbitrator may receive this evidence if copies of it have been delivered to the opposing parties at least 20 days prior to the hearing. The opposing party may subpoena the author, document custodian, declarant, or deponent to appear.<sup>5</sup>

Preparation for arbitration also requires that counsel submit an arbitration brief that is no longer than 10 pages and that contains 1) a summary of the procedural background of the case, describing the claims and defenses, 2) a statement of the disputed and undisputed facts, 3) a statement of the issues with



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citations to relevant legal authority, 4) a time estimate for the hearing, and 5) a description of the evidence to be offered.<sup>6</sup> Counsel should submit briefs to the arbitrator and opposing counsel at least two days prior to the arbitration. Briefing the case will assist counsel in preparing not only for the arbitration but also for any subsequent trial. Preparing a brief is also the best way to clarify the legal theories and factual issues; it discloses weakness and strengths in the evidence and helps counsel formulate a theme for the case.

As with any court appearance, making a good impression on the arbitrator is key. Counsel should be prepared to present all evidence and arguments. Bring clients (and an interpreter, if one is needed), necessary witnesses, and all documentary evidence. At the outset of the arbitration, the arbitrator will explain the process. In general, each side will be given an opportunity to present an opening statement. Parties will present their evidence and witnesses; the arbitrator administers the oath to the witnesses and makes rulings on the admissibility of the evidence.<sup>7</sup> Bring original documents to the arbitration, but do not leave originals with the arbitrator. If counsel intends to seek an award of costs, present proof of costs. After all the evidence is presented, counsel make final arguments.

No formal record will be made of the proceedings, but counsel should take full advantage of the opportunity to question witnesses and challenge evidence. For witnesses who have not been deposed, the arbitration is an excellent opportunity to see how they will perform at trial. It is also a chance to put your themes and arguments to a pretrial test.

At the conclusion of the hearing the arbitrator takes the case under submission, and within 10 days files the award with the ADR office and sends copies to all parties.<sup>8</sup> The form for the award may be viewed online at the Los Angeles Superior Court Web site ADR page. The form provides no information except to identify the prevailing party and the amount of the award, if any. If counsel desires a more detailed award allocating damages into economic and noneconomic classes or an explanation as to the various causes of action, counsel should make a request to the arbitrator.

It is extremely important to be aware that the award is final and entered as a judgment unless a request for a trial de novo is filed within 30 days of the date on which the arbitrator files the award with the ADR office.<sup>9</sup> The fact that a trial de novo can be requested leads some counsel to think that they need not take court-ordered arbitration seriously. This

rationale can keep counsel from fully or carefully preparing for arbitration and is a disservice to the court system, the profession, and the client. The arbitration hearing gives the client a rare pretrial opportunity to be heard by a neutral judicial figure. The hearing also allows the client to observe and interact with opposing counsel, witnesses, and the evidence. A client's full understanding of the case is extremely important, especially if settlement is the ultimate goal.

Arbitration is an invaluable way for counsel to learn about the opponent's case. Moreover, the arbitrator's reactions to the evidence, and the final disposition can provide a preview of how a trial court or jury will view the case; putting forth a complete case for arbitration is the best way to get a clear picture of how the case may resolve at trial. The ADR process may not be exciting, but attorneys who take court-ordered arbitration seriously serve their clients well. ■

<sup>1</sup> CODE CIV. PROC. §1141.12; CAL. R. OF CT. 1600.  
<sup>2</sup> CODE CIV. PROC. §1141.18; L.A. SUP. CT. R. 12.3.  
<sup>3</sup> CAL. R. OF CT. 1602, 1604; CODE CIV. PROC. §1141.18.  
<sup>4</sup> L.A. SUP. CT. R. 12.3.  
<sup>5</sup> CAL. R. OF CT. 1613.  
<sup>6</sup> CAL. R. OF CT. 1614; L.A. SUP. CT. R. 12.9.  
<sup>7</sup> CAL. R. OF CT. 1614.  
<sup>8</sup> CAL. R. OF CT. 1615(b).  
<sup>9</sup> CAL. R. OF CT. 1616.

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