Hon. Rita "Sunny" Miller (Ret.)
ADR SERVICES, INC.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2025

New laws on discovery in arbitration

PLUS OTHER NEW CONSUMER-FRIENDLY CHANGES TO CALIFORNIA ARBITRATION LAW EFFECTIVE JANUARY 1, 2025

Senate Bill 940 has made discovery in all arbitrations governed by the California Arbitration Act almost as extensive as discovery in superior court. The Legislature also has added other consumer-friendly provisions to California's arbitration laws. All of this became effective January 1, 2025. The changes:

(1) Effectuate a sea change in discovery in arbitration because the alterations to the statutory scheme all but obliterate the differences between discovery in arbitration and discovery in superior court unless the parties agree otherwise;
(2) Allow pre-hearing discovery from nonparties in all arbitrations;
(3) Invalidate arbitration provisions requiring consumers to arbitrate outside California if the matter arose in California;
(4) Invalidate arbitration provisions requiring the application of other states' laws in consumer arbitrations if the matter arose in California;
(5) Permit consumers to elect to have the action proceed in small-claims court rather than arbitration if the claim otherwise qualifies for small claims court, notwithstanding any agreement that requires arbitration;
(6) Impose new obligations on neutrals and ADR providers; and
(7) Repeal Code of Civil Procedure section 1283.1 that (a) permitted discovery in *wrongful death and personal injury* matters and (b) permitted discovery in *other matters only* where the arbitration agreement provided for discovery. As is discussed below, discovery now is permitted in all arbitrations unless the parties agree otherwise.

Code of Civil Procedure section 1283.05 – arbitration discovery rights

When the Legislature repealed Code of Civil Procedure section 1283.1, effective January 1, 2025, it repealed statutory language that limited discovery rights in arbitration to wrongful death, personal injury, and matters where the parties explicitly authorized discovery in their arbitration agreements. With the repeal of section 1283.1, section 1283.05 now applies to all arbitrations governed by the California Arbitration Act. Although there have been no substantive changes to section 1283.05, its application to all arbitrations effectuates a sea change, as it all but obliterates the differences between discovery in arbitration and discovery in superior court.

Previous law

Former Code of Civil Procedure section 1283.1 provided that, if the arbitration agreement did not incorporate the provisions of section 1283.05 explicitly, and the arbitration concerned something other than wrongful death or

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personal injury, there was no right to any pre-hearing discovery. (*Aixtron, Inc. v. Veeco Instruments Inc.* (2020) 52 Cal.App.5th 360, 395-397.) Under the provisions of Code of Civil Procedure section 1283.1, requiring the parties to incorporate the provisions of Code of Civil Procedure section 1283.05 in their arbitration agreements, many consumers and employees were deprived of the ability to take discovery. The failure to include the magic words allowing discovery was not the consumer's or employee's fault, as the provider of goods, services, or employment inevitably was the one who drafted the arbitration agreement.

In *Aixtron*, a party claimed that its former employee had taken its trade secrets to a competitor and sued the employee, but not the competitor. The arbitrator issued a subpoena duces tecum to the nonparty competitor seeking pre-discovery production of documents and computers.

The Court of Appeal in *Aixtron* held that there was no right to pre-hearing discovery under the circumstances. First, the arbitration was not for wrongful death or personal injury, so discovery was not statutorily guaranteed by Code of Civil Procedure section 1283.1. Second, the parties had not incorporated into their arbitration agreement any provision allowing discovery, as required by section 1283.1. Third, the applicable JAMS rules provided only for very limited discovery and did not provide for nonparty pre-hearing document discovery. Thus, the court held that the arbitrator was not authorized by statute, the arbitration agreement or the JAMS Rules to allow discovery from nonparties.

Current law as to discovery from parties

The repeal of section 1283.1 effectively overrules *Aixtron* because it is no longer necessary to provide for discovery in an arbitration agreement. The repeal eliminates the requirement to include magic words in the arbitration agreement, which requirement made discovery unavailable in so many arbitrations.

Subdivision (a) of section 1283.05 is the key provision. It provides in pertinent part, "[T]he parties to the arbitration shall have the right to take depositions and to obtain discovery on the subject matter of the arbitration, and to that end, to use and exercise all of the same rights, remedies and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration . . . as if the . . .arbitration were pending before a superior court . . . ."

Subdivisions (b) and (c) give the arbitrator essentially the same powers as a superior court judge to oversee and adjudicate discovery disputes, including the right to impose sanctions. (*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 535-536.)

Subdivision (e) preserves the requirement of prior law that depositions for discovery must be pre-approved by the arbitrator. This requirement is the only obvious way discovery in arbitration now differs from discovery in superior court.

The provisions of section 1283.05 are not limited to consumers. They apply to all types of arbitrations.

Since these statutory provisions of section 1283.05 now apply to all arbitrations governed by the California Arbitration Act, it is no longer necessary to distinguish between actions for wrongful death or personal injury and other types of claims, as repealed Code of Civil Procedure section 1283.1 once did.

It is clear under the new statutory scheme that the parties can take discovery from each other despite any failure to use any magic words in their arbitration agreement. But some have raised questions as to whether the statutory scheme allows pre-hearing discovery from nonparties.

Current law concerning pre-hearing discovery from nonparties

Some have viewed *Aixtron* as suggesting that an arbitrator may not authorize pre-hearing discovery from nonparties.

The *Aixtron* court's decision, however, was not based on the fact that the discovery was propounded to nonparties. The *Aixtron* court found that the arbitrator *in that case* did not have authority to allow discovery from the nonparty because of limitations imposed by the parties' arbitration agreement and the provisions of the JAMS Rules in light of Code of Civil Procedure sections 1283.1 and 1283.5. The court did not expressly question the authority of arbitrators under California law to allow discovery from nonparties.

Indeed, well-established authority provides that arbitrators *do* have authority to allow discovery from nonparties. In *Berglund v. Arthroscopic Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, the California Supreme Court held that Code of Civil Procedure 1283.05, subdivision (a) permits discovery from nonparties in arbitration. *Berglund* reasoned that, under section 1283.5 "the parties to the arbitration have the same rights to take depositions and obtain discovery and to 'exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration . . . as provided in' the statutory provisions governing subpoenas (§§ 1985-1997) and in the Civil Discovery Act (§ 2016.010 et seq.) 'as if the subject matter of the arbitration were pending before a superior court of this state in a civil action. . . .' Thus, parties to arbitration have a right to discovery. And because section 1283.05's subdivision (a) incorporates the Civil Discovery Act and that law permits discovery from nonparties (§ 2020.010 et seq.), the right to discovery includes discovery from nonparties." (*Id.* at 535.)

The *Berglund* court went on to hold that arbitrators have the authority to enforce discovery orders against nonparties. It stated:

> "Section 1283.05's subdivision (b) grants arbitrators the power to enforce discovery through sanctions 'as can be or may be imposed in like circumstances in a civil action by a superior court of this state under the provisions of [the Code of Civil Procedure], except the power to order

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> the arrest or imprisonment of a person.' (*Ibid.*)
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> Thus, in an arbitration proceeding the arbitrator's power to enforce discovery resembles that of a judge in a civil action in superior court . . . including the authority to enforce discovery against nonparties through imposition of sanctions (§ 2023.030). Section 1283.05's subdivision (c) grants arbitrators the power to issue discovery orders imposing 'terms, conditions, consequences, liabilities, sanctions, and penalties,' and it states that '*such orders shall be as conclusive, final, and enforceable as an arbitration award on the merits,* if the making of any such order that is equivalent to an award or correction of an award is subject to the same conditions, if any, as are applicable to the making of an award or correction of an award.'" (*Ibid.*)

The Court held that any dispute concerning nonparty discovery was required to be adjudicated initially before the arbitrator, stating that this "conclusion follows logically from section 1283.05, which grants parties to an arbitration proceeding the right to discovery, including discovery from nonparties; authorizes arbitrators to order discovery; and expressly gives arbitrators the power to enforce discovery rights and obligations. Because the Legislature granted arbitrators the authority to order a nonparty to an arbitration proceeding to provide discovery to a party, and granted arbitrators the power to enforce discovery, it is reasonable to infer that the Legislature intended discovery disputes arising out of arbitration to be initially litigated before the arbitrator." (*Id.* at 535-536.)

The Court then construed section 1283.05 as requiring a full judicial review of the arbitrator's decisions as to nonparty discovery to protect the rights of nonparties who had not agreed to arbitrate. (*Id.* at 536-539.)

Current law where the arbitration agreement limits discovery

Section 1283.05 does not prevent parties from limiting discovery in their arbitration agreements. Thus, suppliers of goods and services, employers and others may well promulgate arbitration agreements that do not allow the broad discovery authorized by section 1283.05. Alternatively, if they place in their agreements provisions that adopt the rules of an alternate dispute resolution provider, and those rules limit discovery, that agreement still supersedes the grant of broad discovery contained in section 1283.05. However, if the rules do not allow the claimant sufficient discovery to adequately arbitrate his or her claims, including access to essential documents and witnesses, the arbitration agreement may be held to be unconscionable. (*Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, discussed below.)

Retroactivity

There are arguments to support that the change in the law applies to arbitrations initiated before January 1, 2025, and arguments to the contrary. For an excellent discussion of these see "*Do the discovery provisions in SB 940 apply to arbitrations commenced before January 2025?*" by Glenda Sanders and Janet Lee ("Jayli") Miller. Los Angeles Daily Journal, May 9, 2025 p. 4.

Two recent cases on discovery in arbitration

Two recent cases indicate that the parties to an arbitration must be allowed to take necessary discovery and, if an arbitration agreement does not allow necessary discovery, the arbitration agreement is fatally unconscionable. Both were decided in the FEHA context and could be held limited to that context.

The first of these cases is *Ramirez v. Charter Communications, Inc*. (2024) 16 Cal.5th 478. There, a claimant in a FEHA/wrongful termination arbitration argued that the arbitration agreement was unconscionable because it only allowed her to take four depositions when she needed seven. Relying on *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, the California Supreme Court reiterated the rule that, at least in FEHA cases, an arbitration agreement "must generally permit employees sufficient discovery to adequately arbitrate any statutory claims." As in *Armendariz,* this required "access to essential documents and witnesses, as determined by the arbitrators(s)." (See 24 Cal.4th, *supra*, at 106.)

The Court of Appeal had held in *Ramirez* that somewhat vague language in the arbitration agreement did not allow the arbitrator to expand the number of depositions from four to seven. The Supreme Court disagreed. It held that, "[w]here a contract is susceptible to two interpretations, one which renders it valid and the other which renders it void, a court should select the interpretation that makes the contract valid." (16 Cal.5th, *supra,* at 507.) It also held that "giving the arbitrator the authority to expand discovery [was] one way the [*Armendariz*] adequacy concern [could] be addressed." (*Id.* at 506.) In *Ramirez,* the arbitrator had authority to allow additional discovery to "allow a full and equal opportunity for all parties to present evidence." (*Id.* at 503-504.) This was sufficient to allow necessary discovery and thus defeat the claim of unconscionability.

Ramirez prescribed a five-part test for determining if a discovery limitation in an arbitration agreement renders it fatally unconscionable. The five factors to be considered are "the types of claims covered by the agreement, the amount of discovery allowed, the degree to which that amount may differ from the amount available in conventional litigation, any asymmetries between the parties with regard to discovery, and the arbitrator's authority to order additional discovery." (*Id*. at 506.) It should be noted that an arbitrator's ability to order additional discovery is only one of the five factors. Thus, if the other factors strongly suggest unconscionability, the arbitrator's ability to order additional discovery may not overcome the unconscionability argument.

The importance of *Ramirez*, at least in FEHA cases, is threefold. *First*, arbitration agreements and arbitration rules adopted therein will have to allow for sufficient discovery to be enforceable. This can be described as discovery

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"sufficient to arbitrate" the claims and "access to essential documents and witnesses." *Second*, arbitration agreements that are ambiguous as to whether the arbitrator can allow essential discovery generally should be interpreted to allow the arbitrator to do so, in order not to void the arbitration agreement. *Finally*, *Ramirez* provides a five-part test for determining if a discovery limitation is fatally unconscionable.

The second recent case that bears on the issues here is *Vo v. Technology Credit Union* (2025) 108 Cal.App.5th 632, reh'g denied (March 4, 2025), review filed (March 14, 2025). *Vo* also was a FEHA case where the employee had signed an arbitration agreement. The employee argued that the arbitration agreement should not be enforced because it was unconscionable, as it did not provide for pre-hearing discovery from nonparties. The *Vo* court, relying on *Ramirez*, held that the JAMS Rules in effect when the arbitration agreement was made gave "the arbitrator the authority to expand discovery, permitting Vo the opportunity to obtain third party discovery required to arbitrate his claims."

In accordance with *Ramirez*, the Court of Appeal interpreted the arbitration agreement so as to render it enforceable rather than void. (108 Cal.App.5th, *supra*, at 647.) This panel of the Court of Appeal disagreed with the panel that decided *Aixtron* because the court in *Aixtron* had not recognized that the arbitrator's ability to expand discovery allowed the parties to propound more discovery than the agreement allowed on its face, defeating the unconscionability argument. (*Ibid.*)

Arbitration discovery rights under the Federal Arbitration Act

It is important to note that the rules under the Federal Arbitration Act ("FAA") are different than the California Arbitration Act. The Ninth Circuit has held that, under the FAA, the arbitrator has no power to allow discovery from nonparties. The arbitrator's power is limited to requiring nonparties to attend the arbitration hearing and bring documents to the hearing. (*CVS Health Corp. v. Vividus, LLC* (2017) 878 F.3d 703, 706.) One federal district court has even expressed disdain for the argument that an arbitration agreement could be held to be fatally unconscionable because it was governed by the FAA and therefore did not allow necessary discovery or nonparty depositions or document production. (*League v. Guidehouse, Inc.* (C.D. Cal. 2024) 2024 WL 5311157.)

Code of Civil Procedure section 1282.6 – arbitration subpoena power

This code section, which has been edited in inconsequential ways as of January 1, 2025, now applies to all arbitrations by virtue of the repeal of section 1283.1. Subdivison (a) provides that a "subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents and other evidence, at an arbitration proceeding or a deposition . . . [or] for the purposes of discovery" can be issued in various ways.

Consistent with *Berglund*, the statute expressly states that subpoenas issued in arbitrations can be used "for the purposes of discovery." Since subpoenas are not necessary for party discovery, the statute thus appears explicitly to authorize discovery from nonparties. Under the new statutory scheme, this means that parties now may take pre-hearing discovery from third parties in all arbitrations unless the arbitration agreement provides otherwise.

The statute allows subpoenas to be issued in various ways. A party or arbitrator may fill in subpoena forms and issue a subpoena. The party may issue the subpoena without involving the arbitrator. Blank forms may be provided by the neutral or arbitration provider to be filled out and issued to the party wishing to obtain the discovery.

The statute does not state whether superior court subpoena forms may be used. Thus, the safest course may be to use forms provided by the neutral or arbitration provider. Of course, the party issuing the subpoena must serve it on all parties to be effective under existing law.

As discussed above, Code of Civil Procedure section 1285.05, subdivision (e), preserves the requirement embodied in prior law that the arbitrator must give permission to take depositions.

The provisions of section 1282.6 are not limited to consumers. They apply to all types of arbitrations.

Civil Code section 1799.208 – venue and choice-of-law protections

New Civil Code section 1799.208 invalidates arbitration provisions requiring consumers to arbitrate outside California and invalidates provisions requiring the application of other states' laws where the matter arose in California. It applies to a seller's contract with a consumer entered into, modified, or extended on or after January 1, 2025.

Section 1799.208 provides that an arbitration agreement shall not require a consumer to agree to a provision requiring the consumer to arbitrate in a venue outside California as to a matter that has arisen in California. Similarly, an arbitration agreement may not require that the law of another state govern the arbitration if the matter arose in California.

These provisions apply only to consumer matters litigated in court or arbitration. It should be noted that the consumer need not be a resident of California. The requirement is simply that the matter arose in California.

Offending provisions are voidable at the consumer's request. If there is litigation about venue or choice of law, that litigation must be conducted in California and governed by California law. The consumer may obtain injunctive or other equitable relief and recover reasonable attorney fees incurred in enforcing the foregoing rights.

Civil Code section 1799.209 – small-claims option

Section 1799.209 provides that if a consumer contract requires a dispute to be arbitrated, and if the dispute would

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otherwise qualify to be tried in small-claims court (See Small Claims Act, Code of Civil Procedure section 116.110 et seq.), the consumer "shall be given the option to have the dispute adjudicated pursuant to" the Small Claims Act. It applies to a contract entered into, modified, or extended on or after January 1, 2025.

The statute does not specify who is responsible to "give the option." This requirement may fall on the entity imposing the arbitration provision or even on the arbitration provider or neutral.

Again, these provisions apply only to consumers.

New obligations imposed on neutrals and ADR providers

New and amended code provisions impose new obligations on neutrals and ADR providers, as follows:

- New Business & Professions Code section 6173 directs the California State Bar to create an Affirmative Dispute Resolution Certification Program. The program "shall not require a firm, provider or practitioner to be a licensee of the State Bar in order to be certified under the program." The statute's provisions encourage neutrals to receive training in ethics and require ADR providers to maintain procedures facilitating complaints about ethical violations by their neutrals and to promulgate remedies for failures by their neutrals to comply with ethical standards.
- Amended Code of Civil Procedure section 1281.9 adds subdivisions (a)(7) and (c)(4), which place restrictions on "solicitations" by neutrals and ADR providers.
- New Code of Civil Procedure section 1281.93 prohibits any "solicitation" of a party to a consumer arbitration "during the pendency of the consumer arbitration[.]"

Other provisions concerning depositions in arbitration

It is worth mentioning two well-established provisions of law concerning depositions in arbitration. Code of Civil Procedure section 1283 provides that, where a witness cannot be compelled to appear at the arbitration hearing, or where other exceptional circumstances exist, the arbitrator may order that the deposition of a witness be taken for use as evidence at the hearing, rather than as discovery.

Code of Civil Procedure section 1282.5 provides that "[a] party to an arbitration has the right to have a certified shorthand reporter transcribe any deposition, proceeding or hearing." The transcript will be the official record of the matter. "[I]n a consumer arbitration, a certified shorthand reporter shall be provided upon request of an indigent consumer, as defined in Section 1284.3, at the expense of the nonconsumer party."

Conclusion

In non-business litigation, the defendant usually imposes an arbitration agreement on the plaintiff. In assessing the benefits of arbitration, the parties need to consider who benefits from expanded discovery in arbitration. In cases where the plaintiff needs more discovery than the defendant, arbitration may be more attractive to the plaintiff than it was previously. By a parity of reasoning, the defendant, which usually has to pay for the arbitration it has demanded, may find arbitration less beneficial in light of the newly expanded discovery rights, and the costs thereof. On the other hand, the creator of the arbitration agreement may simply avoid the provisions of section 1283.05 by limiting dfiscovery in the arbitration agreement.

Judge Rita ("Sunny") Miller (Ret.) is a mediator and arbitrator at ADR Services, *handling all types of civil litigation, including personal injury, employment, products and premises liability, malpractice, business disputes, and civil rights. She graduated first in her class from Loyola Law School, summa cum laude. Judge Miller sat in Mosk Courthouse for 14 years and by assignment on the Court of Appeal for more than a year. She was CAALA's 2011 Trial Judge of the Year, is a frequent CAALA speaker, and was a founding member of the Loyola Law School Civil Justice Program. judgemiller@adrservices.com.*