

RESOLUTION 03-16-08

DIGEST

Arbitration: Enforcement of Subpoenas

Amends Code of Civil Procedure section 1283.05 to add contempt of court as a means of enforcing a subpoena issued in an arbitration proceeding.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 1283.05 to add contempt of court as a means of enforcing a subpoena issued in an arbitration proceeding. This resolution should be disapproved because it would adversely impact the speed, informality and cost-savings purposes of arbitration; and the purported problem is not sufficiently likely to occur to warrant a change in universally applicable law.

This resolution’s remedy of contempt is not limited to instances of disobedience by non-parties, but includes disobedience by the parties and their affiliates as well. Requesting an order of contempt from a court involves opening a civil court action and first appearance fees by all parties wishing to appear and be heard, and would therefore add unacceptable delay and cost for the parties and any third parties involved. Would this trigger appeal rights by the parties and/or the third parties – of the contempt order, of the court’s refusal to grant the contempt order, and/or of the arbitration award itself? These issues are not addressed.

There is not sufficient detriment under existing law to warrant the negative consequences that would follow this resolution’s enactment. The instances in which evidence so critical as to determine the outcome of an arbitration proceeding exists only in the hands of some third party must be assumed to be extremely rare. In those rare instances, there is already a remedy, a civil action for a penalty and damages against the third party under Civil Code section 1992.

This resolution seeks a similar result as Resolution 03-17-08 by the same author.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 1283.05 to read as follows:

- 1 §1283.05
- 2 To the extent provided in Section 1283.1 depositions may be taken and discovery
- 3 obtained in arbitration proceedings as follows:
- 4 (a) After the appointment of the arbitrator or arbitrators, the parties to the
- 5 arbitration shall have the right to take depositions and to obtain discovery regarding the

6 subject matter of the arbitration, and, to that end, to use and exercise all of the same rights,
7 remedies, and procedures, and be subject to all of the same duties, liabilities, and
8 obligations in the arbitration with respect to the subject matter thereof, as provided in
9 Chapter 2 (commencing with Section 1985) of Title 3 of Part 4, and in Title 4
10 (commencing with Section 2016.010) of Part 4, as if the subject matter of the arbitration
11 were pending before a superior court of this state in a civil action other than a limited civil
12 case, subject to the limitations as to depositions set forth in subdivision (e) of this section.

13 (b) The arbitrator or arbitrators themselves shall have power, in addition to the
14 power of determining the merits of the arbitration, to enforce the rights, remedies,
15 procedures, duties, liabilities, and obligations of discovery by the imposition of the same
16 terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be
17 imposed in like circumstances in a civil action by a superior court of this state under the
18 provisions of this code, except the power to order the arrest or imprisonment of a person.

19 (c) The arbitrator or arbitrators may consider, determine, and make such orders
20 imposing such terms, conditions, consequences, liabilities, sanctions, and penalties,
21 whenever necessary or appropriate at any time or stage in the course of the arbitration, and
22 such orders shall be as conclusive, final, and enforceable as an arbitration award on the
23 merits, if the making of any such order that is equivalent to an award or correction of an
24 award is subject to the same conditions, if any, as are applicable to the making of an award
25 or correction of an award.

26 (d) For the purpose of enforcing the duty to make discovery, to produce evidence or
27 information, including books and records, and to produce persons to testify at a deposition
28 or at a hearing, and to impose terms, conditions, consequences, liabilities, sanctions, and
29 penalties upon a party for violation of any such duty, such party shall be deemed to include
30 every affiliate of such party as defined in this section. For such purpose:

31 (1) The personnel of every such affiliate shall be deemed to be the officers,
32 directors, managing agents, agents, and employees of such party to the same degree as
33 each of them, respectively, bears such status to such affiliate; and

34 (2) The files, books, and records of every such affiliate shall be deemed to be in the
35 possession and control of, and capable of production by, such party. As used in this
36 section, "affiliate" of the party to the arbitration means and includes any party or person for
37 whose immediate benefit the action or proceeding is prosecuted or defended, or an officer,
38 director, superintendent, member, agent, employee, or managing agent of such party or
39 person.

40 (e) Depositions for discovery shall not be taken unless leave to do so is first granted
41 by the arbitrator or arbitrators.

42 (f) Disobedience of a subpoena issued pursuant to Title 4 (commencing with
43 Section 2016.010) of Part 4 may be punished as contempt by a court having jurisdiction in
44 the county where the arbitration is pending, as provided in subdivision (e) of Section
45 2023.030, without the necessity of a prior order of court directing compliance by the
46 witness.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Section 1283.05, subdivision (b) provides that arbitrators have the power to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by imposing the same sanctions and penalties as could be imposed in similar circumstances in a civil action by a superior court under the provisions of the Code of Civil Procedure. This Section makes clear, however, that arbitrators do not have the power of contempt. No procedure exists in the Code to enforce deposition subpoenas issued in arbitration pursuant to title 4 (commencing with section 2016.010) of part 4.

This Resolution: Would add language to section 1283.05 to permit a court in the county where the arbitration is pending to punish disobedience to a subpoena issued in arbitration pursuant to title 4 (commencing with section 2016.010) of part 4.

The Problem: A third party subpoenaed to testify or produce documents in a deposition in an arbitration proceeding can disobey the subpoena without risk of significant consequences because arbitrators do not have the power of contempt, and the Code does not provide the remedy of contempt for disobedience to a deposition subpoena issued in arbitration. Thus, third parties subpoenaed in arbitration to testify or produce documents in a deposition are assured that they will not be punished by contempt for disobeying the subpoena. Without a meaningful enforcement procedure, a party in arbitration thus may be deprived of important evidence. Because the grounds on which a party may seek to vacate an arbitration award are narrow, a party deprived of evidence in the possession of a third party who disobeys the subpoena is irreversibly prejudiced.

IMPACT STATEMENT:

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

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RESPONSIBLE FLOOR DELEGATE: John Ott

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution would adversely impact the speed, informality and cost-savings purposes of arbitration. Requesting an order of contempt from a court involves opening a civil court action, and first appearance fees by all parties wishing to appear and be heard. This would add unacceptable delay and cost for the parties and any third parties involved. This resolution would allow for contempt proceedings to be brought against a party as well as against a nonparty, and may involve the right to appeal the court's order or the final arbitration award.