

9/9/83

First Supplement to Memorandum 83-48

Subject: Priority for Study of Topics

Attached is a letter from Peter D. Collison suggesting that the Judicial Council provide forms to be used for subpoenas and subpoenas duces tecum in connection with arbitration proceedings. He believes that statutory amendments would be necessary to accomplish his suggestions.

The Commission is authorized to study arbitration. Does the Commission wish the staff to work up a tentative recommendation on this suggestion when staff time permits and to work it into the Commission's meeting schedule when time is available for consideration of the tentative recommendation?

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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California Law Revision Commission
4000 Middlefield Road
Room D-2
Palto Alto, California 94306

Attention: John De Mouilly
Executive Secretary

Re: Issuance of Subpenas in Arbitration Proceedings

Dear Mr. De Mouilly:

In recent years the California Code of Civil Procedure has been amended on several occasions to simplify the procedural burdens involved in the issuance of subpenas and subpenas duces tecum in civil proceedings. Generally speaking, subpenas are now provided by the court on preprinted forms, but are signed by the attorney for a party to the civil action. It is no longer necessary to obtain the signature of the court clerk or an order by a judge authorizing the issuance of a subpena duces tecum. As a civil litigation attorney I can state that this change has been beneficial to both attorneys, who no longer have to go through the rigmarole of obtaining court-issued subpenas, and litigants, who do not have to pay for all of this needless effort on the part of their attorneys.

In arbitration proceedings, however, CCP §1282.6 provides that subpenas must be issued by a neutral arbitrator. I do a substantial amount of arbitration work, both as an attorney representing parties to arbitration and as an arbitrator. I recognize that there have been occasions in which subpenas have been misused in arbitration, but I think the statute can be amended to comport with the issuance of subpenas in civil litigation and still prevent my perception of the misuse of such subpenas.

The misuse that I have observed normally involves attorneys who are not knowledgeable about arbitration proceedings. Those attorneys are not aware that, in general, subpenas may not be used to obtain pre-hearing discovery in arbitration proceedings. When I am acting as an arbitrator many attorneys will submit

subpenas to me and ask me to issue the subpenas so that the attorneys can take depositions or conduct document examinations prior to the date of the arbitration hearing. In most cases I am forced to deny these requests. If the attorneys were allowed to sign and issue the subpenas themselves, this misuse would go unchecked.

On the other hand, if the intended use of the subpoena is legitimate, there is no reason why in an arbitration proceeding the attorney requesting the subpoena should have to apply to the neutral arbitrator, when in a comparable civil litigation proceeding, the attorney would be permitted to sign the subpoena himself.

Once an arbitration subpoena has been issued I have found in a number of instances that the party upon whom the subpoena is served looks upon it somewhat skeptically, since it does not bear any "official looking" seal or the name of any court. In some instances the understandable reaction has been "who do these guys think they are?" On a number of occasions this reaction has led to noncompliance with the subpoena, which has delayed or interrupted the arbitration proceeding. As you know, the major benefits of arbitration are its speed and simplicity.

My suggestion for dealing with all of these problems is that Judicial Council forms be provided for both subpoenas and subpoenas duces tecum in connection with arbitration proceedings. These forms should be drafted so that they may be issued by the attorney for a party. The form should also state clearly that unless the form is signed by a neutral arbitrator, the subpoena cannot be used to obtain documents or the attendance of a witness prior to the date of the arbitration hearing. Of course, a number of statutory amendments will be required. If the Commission sees any merit in these proposals, either with or without modification, I would be happy to discuss the proposals further with any representative of the commission and would be glad to assist in any necessary drafting of forms and statutory amendments.

Very truly yours,

P. D. Collisson bh

Peter D. Collisson

PDC/bh

cc: Mr. Jerry Murase
Regional Director
American Arbitration Association