

ARBITRATION ADVISORY

2008-02

AUTHORITY TO COMPEL COMPLIANCE WITH THIRD-PARTY SUBPOENAS

May 25, 2008

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INTRODUCTION

The purpose of this Advisory is to address issues relating to arbitrators' authority to compel compliance with third-party subpoenas. In Arbitration Advisory 2002-01 (May 17, 2002), this Committee concluded that arbitrators lack authority to impose monetary sanctions against parties conducting fee arbitrations pursuant to Business & Professions Code §6200 et. seq. ("the MFA statutes"). However, Advisory 2002-01 further concluded that arbitrators do have authority to impose procedural sanctions (*e.g.*, issue or evidence sanctions) against parties as a last resort to achieve fairness in the face of willful and/or repeated disregard of procedural requirements, including compliance with demands to produce documents. Advisory 2002-01 did not address issues arising out of the disregard of procedural requirements by third-parties, including the refusal to comply with subpoenas. The present advisory is intended to address some of those issues.

DISCUSSION

Business & Professions Code §6200(g) sets forth certain powers granted to arbitrators, including compelling (by subpoena) the attendance of witnesses or the production of documents. However, while arbitrators have the power to compel the attendance of witnesses or the production of documents via subpoena, there is no express authority in §6200(g) or elsewhere in the MFA statutes providing arbitrators with authority to compel compliance with subpoenas. In particular, there are no provisions in the MFA statutes authorizing the issuance of sanctions (monetary or otherwise) in the event a party or non-party fails to comply with a subpoena. Accordingly, Advisory 2002-01 concluded that arbitrators acting in proceedings conducted pursuant to the MFA statutes lack authority to impose monetary sanctions against parties. Given that arbitrators lack authority to impose monetary sanctions against parties, the Committee concludes that they also lack authority to impose monetary sanctions against third-parties for

failing to comply with subpoenas. The rationale for concluding that arbitrators lack such authority applies with even greater force in the context of third-parties, who have not agreed to participate in MFA proceedings and have not subjected themselves to the procedural requirements of the MFA system.

While there is no California authority directly on point in the context of the MFA statutes, there is some authority that arbitrators conducting proceedings pursuant to Code of Civil Procedure §1280, et. seq. possess the power to compel compliance with subpoenas and, in particular, to impose sanctions against third-parties for failing to comply with subpoenas [*see* C.C.P. §1283.05]. However, the Committee believes that those authorities are inapplicable in the context of arbitrations conducted pursuant to the MFA statutes because Code of Civil Procedure §1283.1 provides that the provisions of Code of Civil Procedure §1283.05 apply only to arbitrations of disputes arising out of wrongful death or injury unless the parties expressly agree otherwise.

The issue then becomes whether arbitrators in MFA proceedings have authority to compel third-parties to comply with subpoenas, with or without sanctions. As noted above, this Committee concluded in Advisory 2002-01 that arbitrators may, “as a last resort to achieve fairness in the proceedings,” compel parties to comply with procedural requirements (such as demands to produce documents made pursuant to program rules) by imposing procedural sanctions. However, unlike parties, third-parties do not subject themselves to the procedural requirements of the MFA system. Moreover, even assuming that the authority to impose procedural sanctions extends to non-parties, these types of sanctions would have no practical effect on non-parties and therefore would be useless for purposes of compelling compliance with properly-issued third-party subpoenas. Accordingly, the Committee concludes arbitrators lack authority to compel third-parties to comply with subpoenas and, in particular, that arbitrators lack authority to impose either monetary or procedural sanctions to compel such compliance.

The issue therefore becomes whether an aggrieved party has any recourse in the event a third-party willfully and/or repeatedly disregards a subpoena that has been properly issued pursuant to the MFA statutes or the procedural rules of a local bar association program. At least one California case suggests that arbitrators may stay the proceedings to permit an aggrieved party to seek court assistance in compelling compliance with a third-party subpoena.

In *Person v. Superior Court*, 52 Cal. App.4th 813 (1997), the plaintiff filed for arbitration seeking reimbursement of certain medical expenses from his insurer. The plaintiff issued a subpoena to a third-party, his chiropractor, seeking production of the chiropractor’s bills. The chiropractor refused to produce all responsive records in her possession unless the plaintiff signed a lien for her fees. The plaintiff then “obtained a civil court civil action number for the purposes of filing [a] motion to compel [the third-party chiropractor] to produce the subpoenaed documents”¹ [*Id.* at 816 n. 3].

¹ The trial court in *Person* granted the motion to compel. The appellate court affirmed the ruling on the basis that the chiropractor has no right to refuse to relinquish patient records pursuant to various Health & Safety Code provisions.

Although *Person* apparently involved private contractual arbitration, nothing in that decision suggests that the procedural mechanism of staying proceedings to permit a party to file a miscellaneous action with the superior court would not apply in the context of arbitrations conducted under the MFA statutes. Indeed, the fact that the plaintiff in *Person* turned to the superior court for assistance suggests that the arbitrator in *Person*, like arbitrators under the MFA statutes, lacked the authority to compel the third-party to comply with the subpoena. Moreover, nothing in the MFA statutes expressly prohibits arbitrators from staying proceedings to permit parties to seek limited forms of relief in superior court in extraordinary situations.

The Committee therefore concludes that where a party establishes that: (1) it properly issued a subpoena to a third-party²; (2) the third-party has willfully refused to comply with the subpoena despite efforts by the party to informally resolve the dispute; and (3) the information or documents to be obtained pursuant to the subpoena are essential to a fair resolution of the matter and not obtainable through any other means, the arbitrator has discretion to stay the proceedings to provide the aggrieved party an opportunity to seek relief in the appropriate superior court. The Committee cautions arbitrators and program administrators that stays of proceedings to permit parties to seek limited relief in superior court should be issued only as a last resort and only if the aggrieved party satisfies the elements noted above, especially the requirement of a showing that the documents or information are essential to a fair resolution and not available from any other source. In other words, the party seeking the stay is essentially required to show good cause for the stay. The Committee acknowledges that there may be concerns that parties will request stays as part of a tactical ploy to achieve delay. Arbitrators should be mindful of possible ulterior motives behind requests for the issuance of subpoenas or stays. However, the Committee believes that these concerns should not, in and of themselves, foreclose parties from seeking relief in appropriate circumstances.

The Committee also cautions arbitrators that they should refrain from providing legal advice to the parties and, in particular, counseling a party on the correct procedure to follow in order to obtain court assistance in compelling compliance with a subpoena. If an arbitrator is advised that a party has been unable to obtain critical evidence due to a third party's failure to comply with a subpoena, the arbitrator should stay the proceedings in order to allow the aggrieved party to seek legal advice and/or to make the showing set forth above. Arbitrators should also refrain from issuing stays of open-ended duration, but instead should monitor the proceedings and periodically conduct informal status conferences to ensure that the proceedings are not unduly delayed while parties seek court assistance.

The Committee also recognizes that most program rules have time limits for the commencement of the hearing and for the preparation of the award, such as Rule 3.539 of the State Bar Rules of Procedure. Arbitrators should be mindful of these time limits in weighing the duration of a stay. On the other hand, Code of Civil Procedure §1286.2(5) provides that one of

² The Committee notes that certain MFA programs (including the State Bar program) do not require a showing of good cause before issuance of a subpoena at the request of a party. Some local programs do, however, require a showing of good cause before issuance of a subpoena. Arbitrators may and should take these requirements (or the lack thereof) into consideration when determining whether an aggrieved party has made a sufficient showing that a subpoena was properly issued to a third-party in support of a request for a stay of proceedings.

the grounds for vacating an arbitration award is where “[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor” Accordingly, where the arbitrator has concluded that a fair hearing cannot be had without the information or documents encompassed by the subpoena, the arbitrator may and should grant a continuance of a reasonable time notwithstanding the time limits otherwise applicable under program rules.

CONCLUSION

Arbitrators in matters governed by the MFA statutes lack authority to compel third-parties to comply with subpoenas. In particular, arbitrators lack authority to impose monetary or procedural sanctions against third-parties who willfully and/or repeatedly refuse to comply with properly-issued subpoenas. However, arbitrators do have authority to stay proceedings for a reasonable period of time to allow aggrieved parties to seek relief in the appropriate superior court. However, the discretion to issue a stay for this purpose should be exercised sparingly and only when the aggrieved party establishes that the information or documents encompassed by the subpoena are essential to a fair resolution of the matter and unavailable from any other source.