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# COVID-19 has delayed your settlement; what are you going to do about it?

Arbitration is a great resolution for small personal-injury cases

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The COVID-19 pandemic not only brought fear to our society but delayed thousands of civil litigation trials for several months, and some for years. As plaintiffs' attorneys, we are in a position where the simple act of filing a personal-injury complaint and having a hearing date has become arduous and distant. More than ever, we are unable to pursue a

rapid and efficient case resolution for our clients. This is where arbitration might be an efficient and effective method to resolve certain personal injury matters during these times where jury trials are rare or non-existent.

In certain cases, arbitration can be advantageous for *both* plaintiff and the defendant's insurance carrier. For the plaintiff, it can bring the case value up by saving costs if there is a rapid resolution. When it takes years to finalize a case, the costs for discovery, experts and attorneys'

fees are likely to go up and the plaintiff is likely to walk away with less money. Insurance companies will also benefit from choosing arbitration, because in cases where liability has already been determined, the adjuster needs to process the claim anyway; the only question remaining is the value of the damages. There is an incentive to also have a case resolved in a quicker manner instead of keeping a large volume of cases without a final determination. Thus, both the plaintiff and defense are



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incentivized to save valuable time and costs on these smaller, admitted-liability auto claims.

### How to move forward

This article provides an outline of how to move forward with a small personal injury case through an alternative dispute resolution. When it comes to arbitration, parties can stipulate which set of rules will govern their case. From the very moment that parties decide that arbitration is the path to follow on their personal injury case, the first decision should be which set of rules will guide the arbitration process. The rules followed here are the California Civil Procedure, American Arbitration Association (AAA), and JAMS.

The main goal of arbitration is to have an expedited case resolution. It is up to the parties to determine how long or short the process will take since once the arbitration process starts, they can determine the set of laws applicable to their cases. The parties should agree on which documents will be allowed as evidence, how many witnesses will testify, which experts will be utilized and who will testify in person or via video. Our recommendation is an attempt to reach a stipulation with opposing counsel that can be presented to a judge whereby the parties agree to binding arbitration in hopes of a fast resolution.

The essential benefits of arbitration are realized when certain personal-injury cases are quickly resolved whereby (1) the scope of the arbitration proceedings is limited by the parties, and (2) virtual tools are used to accelerate the arbitration process especially during a pandemic where social distance is key for the health and safety of the public.

### Is arbitration the best avenue?

Many plaintiffs' attorneys question the use of binding arbitration for personal-injury matters. However, in an admitted-liability case where you are not dealing with significant future injuries or disabilities, the costs of litigation and

delays of the process can have a significant impact on your client's recovery. In these situations, plaintiff's attorney may find that it is advantageous to their client to proceed with a binding arbitration where it will result in similar compensation but with fewer costs and occur in a shorter amount of time.

In such a scenario, arbitration might be the best course for your small personal-injury case. Code of Civil Procedure (hereinafter "CCP") section 1141.10, subdivision (a) explains that arbitration has proven to be an efficient and equitable method for resolving small civil cases. CCP section 1141.11 (a) further states that all nonexempt, unlimited civil cases shall be submitted to arbitration if the amount in controversy will not exceed \$50,000 for each plaintiff. Additionally, section 1141.11 (d) (1) also requires that "all limited civil cases that involve a claim for money damages against a single defendant as a result of a motor vehicle collision, except those heard in the small claims division, shall be submitted to arbitration within 120 days..."

California rules not only encourage parties to go to arbitration, but state that parties are required to move forward with arbitration in certain cases. It promotes a simplified and economic procedure for a case dispute. Although arbitration can sometimes be advantageous, it is not appropriate for every personal-injury case. Arbitration is more appropriate for small auto-accident claims, where liability has been accepted and the arbitrator will only decide the damages portion.

AAA Rule 1 states, "The parties make these rules a part of their arbitration agreement whenever a policy of insurance or applicable insurance-department regulation provides; for arbitration by the (AAA) in connection with a dispute involving a motor-vehicle liability claim." Moreover, AAA Rule 4 continues, "... arbitration shall be initiated by filing a written Demand for Arbitration." Thus, under the AAA rules, if the insured has agreed to arbitration under his policy and the arbitration clause requires that

the AAA shall be followed, the only obligation is to file a written demand for arbitration. This means that the arbitration proceeding can be easily started and does not need extensive investigation or preparation.

We propose that plaintiffs' attorneys take the first step and suggest arbitration for the small claim, as it might conclude cases that have been stuck due to the amount of the damages. It is crucial though that, first, both parties voluntarily agree in writing to arbitrate a matter.

JAMS Comprehensive Arbitration Rule 5. (a) (i) states that "arbitration commences with a post-dispute arbitration agreement fully executed by all parties; a written confirmation of an oral agreement of all parties or a copy of a court order compelling arbitration at JAMS."

Therefore, under the CCP certain civil cases will automatically be submitted to arbitration. In cases where parties are not obligated to arbitrate, they can choose to do so by agreeing to an arbitration clause and follow the AAA rules. The parties can, in the alternative, follow the JAMS rules, and the only requirement to start the arbitration proceeding is to submit the agreement to arbitrate in writing.

### How can you limit the scope of arbitration and have an expedited arbitration?

Arbitrator selection can make you win or lose your case since the arbitrator's decision is *final* in binding arbitration. Parties must then carefully agree on who is going to arbitrate their case. The CCP states in section 1141.18, subdivision (a) that arbitrators shall be retired judges, retired court commissioners who were licensed to practice law, or members of the State Bar. The CCP also adds in section 1282 (a), "the arbitration shall be a single neutral arbitrator."

AAA Rule 9 requires that arbitrators do not have a financial or personal interest in the arbitration and disclose any circumstances likely to create a presumption of bias.



JAMS Rule 7 (a) also states, “The Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise.” JAMS rules also require that the arbitrator be neutral and independent, unless the parties agree otherwise.

We suggest that the parties send each other a list with three arbitrators that are neutral, have vast experience in negligence, and do not have an interest in the arbitration. From the six names, they can strike four names. Subsequently, the parties can interview two arbitrators and come to an agreement on who the arbitrator will be. Thus, the selection of an arbitrator should be a simple process between the parties and should not take too long.

Once it is time to determine the arbitration proceeding, keep in mind that you want to resolve a case as fast as possible and maximize the value of the case; hence, be critical on which documents and information you want the arbitrator to focus on.

A preliminary conference will be held for the parties to exchange information, to schedule discovery, hearings, witness attendance, and what the award will encompass. According to JAMS, the preliminary conference can be held via telephone. Therefore, there will be no COVID-19 risks. Our guideline is that the parties limit the scope of discovery to mutual document exchanges and limit their opening and closing statements to ten minutes.

Under CCP 1282.2 (d) “The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed...”

In compliance with AAA Rule 19 the parties may offer evidence as is relevant and “the arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.”

According to JAMS Rule 16.2. (b) the parties must limit document requests to documents that are directly relevant to the dispute or to its outcome. Furthermore, the parties shall restrict time frame, subject matter and persons or entities to which the requests pertain. JAMS rules also limit depositions of witnesses to one discovery deposition per side, unless the arbitrator decides that, based on the circumstances, more depositions are warranted.

By following one of the following sets of rules, CCP, AAA or JAMS the ultimate goal of a fast case conclusion will be achieved. Both parties can easily request and review only documents that are imperative for the dispute. The parties do not need to observe the traditional rules of evidence and rules of judicial procedure.

Moreover, the plaintiff’s attorney and the defense can decide who will testify in person and who will testify virtually. The parties have absolute control over which witnesses they find to be necessary to testify in person. If the parties wish to have the witnesses to testify or be deposed in person, our recommendation is that one expert doctor testifies in person and the other witnesses via video. The hearing in which the parties will testify can be held in a large conference room, respecting social distance, and the only persons present and wearing face masks will be the parties, the arbitrator, and a court reporter. This way, CDC guidelines for COVID-19 not to have more than 10 people in one space are being followed.

### **Holding hearings from your home office via video conference**

Going to an arbitration conference, hearing, and deposition has become much easier and accessible as they can be done via video, through Zoom, for example.

Code of Civil Procedure section 1141.10, subdivision (2) states that

arbitration hearings shall be as informal as possible and shall be held during nonjudicial hours whenever possible. Having all or certain witnesses testify via video and at nonjudicial hours gives more flexibility in scheduling these hearings. California rules already allow the parties the opportunity to have flexible and easygoing hearings. It could not be a better time to fully utilize virtual tools for arbitration hearings.

AAA updated their guidance for remote hearings, expressing that online video and other forms of teleconferencing “can facilitate a full and equal opportunity for all parties to present evidence in a hearing.” Therefore, final hearings can also be done via video conference.

JAMS Rule 22 (e) states, “The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine.” This means that even if witnesses are not able to provide live video testimony, it can be recorded at a convenient time.

The arbitration proceeding will not be jeopardized if the damage experts such as economists, and the witnesses give their testimony via video or declaration. This guideline is effective and helps everyone involved in the arbitration process to avoid any gatherings that may put the involved parties at risk.

### **Conclusion**

The extensive delays to personal-injury matters currently occurring within our court system because of COVID-19 may cost the parties valuable time and further hinder the ability to settle cases. Plaintiff’s attorneys can follow the guidelines above to have a case resolved in a rapid and efficient manner through arbitration. In COVID-19 times, arbitration brings a fast-paced case resolution for the benefit of the parties and allows them to move on with their lives.



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