LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

FRIDAY, APRIL 25, 2025

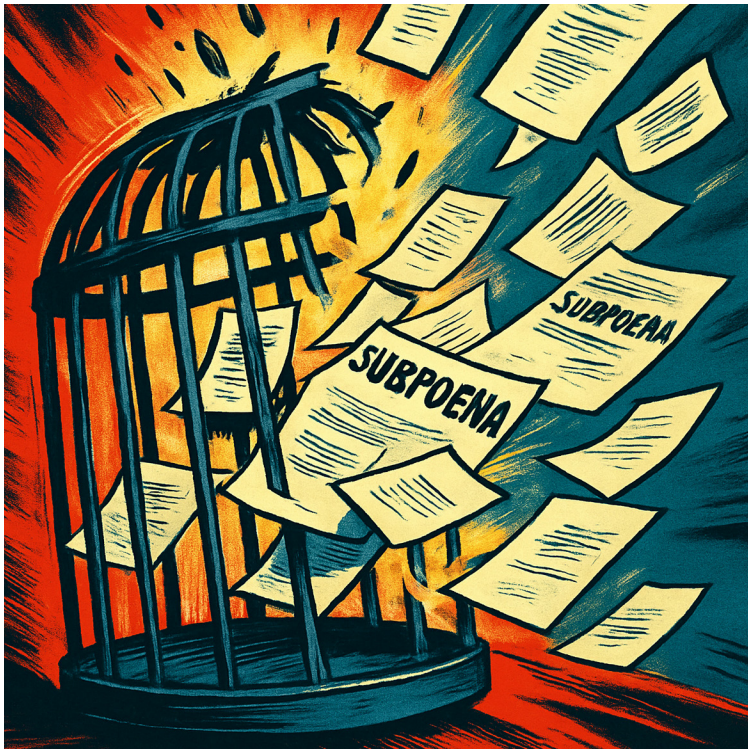
PERSPECTIVE

Early lessons on third-party subpoenas for California practitioners under SB 940

SB 940 expands discovery in California arbitrations, making civil-style subpoenas the new norm - unless parties clearly opt out.

By David B. Coher

Now that SB 940 has been in effect for over four months, California's arbitration community is beginning to see how the new rules play out. Though no appellate decisions have interpreted the law yet, a few early experiences of arbitrators offer a glimpse into the emerging legal and procedural challenges, particularly around the scope and enforceability of third-party subpoenas in arbitration proceedings.



This art was created with the assistance of Shutterstock AI tools

A new era for arbitration discovery

Before this year, California law only permitted third-party deposition subpoenas to be issued by arbitrators in narrow circumstances, where the arbitration clause expressly authorized such discovery (a rare occurrence) or in all personal injury or wrongful death cases. This framework was reinforced when *Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal.App.5th 360 (2020) confirmed that unless parties had specifically opted into robust discovery procedures, they had no general right to prehearing discovery of third parties in arbitration.

SB 940 has changed the rules significantly. By repealing Code of Civil Procedure § 1283.1 and allowing § 1283.05 to apply without preconditions, the legislature expanded the availability of deposition subpoenas to all arbitrations in California. As of Jan. 1, arbitrators can issue deposition subpoenas under § 1283.05, and § 1282.6(a) confirms that subpoenas - including subpoenas duces tecum - may be issued by an arbitrator either on their initiative or at the request of a party. The discovery tools available in civil litigation are now, at least in principle, available in arbitration proceedings - a development that holds both promise and complexity, especially as three key issues emerge for those to avoid such third-party discovery.

Retroactivity?

There is good news for parties and counsel in an arbitration that began before Jan. 1, 2025 - the rules are not changing for you mid-case. California law generally holds that procedural rules in a case remain fixed once the case has commenced, unless the legislature explicitly provides otherwise. *Miller v. Superior Court*, 221 Cal.App.3d 1200 (1990); *Medical Board of California v. Superior Court*, 88 Cal.App.4th 1001 (2001). This principle is rooted in the presumption against retroactively applying new procedural statutes to ongoing cases.

Here, SB 940 specifically called out that it applies retroactively in two other respects. Cal Civ. Code §§ 1799.208(e) and 1799.209(b) (2025). However, SB 940 does not call out the same for third-party subpoenas; therefore, it does not apply retroactively under Miller and Medical Board. *Id*, Cal. Civ. Proc. Code § 1283.05 (2025). Therefore, the new rules will only apply to those arbitrations where the arbitrator was appointed after the first of the year. *Id.*

FAA or CAA?

Recently, one arbitrator faced a situation where a Texas-based healthcare startup had engaged a California software company to design and implement a bespoke telemedicine platform. The parties were ambitious: the platform would integrate video consultations, digital prescriptions, and real-time analytics for patient care. However, as the project progressed, so did the disagreements. The startup alleged the software company missed deadlines and delivered buggy features. The software provider claimed the issue was shifting project requirements. Either way, months of unpaid invoices resulted.

After the relationship broke down, the software company initiated an arbitration under the agreement's broad dispute resolution clause in

San Francisco. The software firm then requested internal emails from the startup's executive team to shed light on the shifting project expectations. The startup objected, asserting that the Federal Arbitration Act (FAA) governed the arbitration and precluded such broad discovery. They pointed out that the contract involved parties in different states and affected interstate commerce - a classic FAA scenario. The software company countered that because the arbitration was seated in California and the agreement was silent on procedural law, the California Arbitration Act (CAA) should govern. That, they argued, entitled them to the discovery they sought under SB 940's amendment to § 1283.05.

Thus, the arbitrator faced a foundational procedural question: Does the FAA or the CAA govern discovery in a California-seated arbitration when the contract does not specify a procedural framework?

In such scenarios, California law provides a clear default. In the absence of an agreement by the parties (either a contractual provision to the contrary or another agreement), the CAA governs procedural matters in arbitrations held in California. This includes discovery rights, appointment of arbitrators, and rules for vacatur and confirmation of awards. The FAA still applies - particularly to the arbitration agreement's enforceability and in Federal proceedings - but it does not automatically displace the CAA. Unless the FAA directly conflicts with California law or a party seeks to enforce the arbitration agreement in Federal court, the procedural law of the forum typically governs. This structure is supported by cases like *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) ("Volt"), which upheld the application of California arbitration rules in a contract involving interstate commerce, and *Cronus Investments v. Concierge Services*, 35 Cal. 4th 376 (2005), which reaffirmed that the CAA governs unless expressly displaced.

In this particular arbitration, because the agreement did not specify the FAA and the proceedings were in California, the arbitrator determined that the CAA governed the procedure.

The choice of law trap: Massachusetts rules in an LA arbitration?

Another arbitrator faced a matter that brought a different twist. A Los Angeles investment firm had partnered with a Boston-based crypto currency startup to raise capital and navigate the shifting terrain of digital asset regulation. Their agreement called for "binding arbitration of all disputes" in Los Angeles. However, it also included a choice-of-law clause stating that the agreement "shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts."

When the relationship soured, the investment firm initiated an arbitration, claiming that the startup had misrepresented its regulatory compliance, leading to a failed fundraising round and reputational fallout. The startup responded by arguing that the firm had been unable to promote the offering as promised. Procedural friction soon followed. The Los Angeles firm sought to depose several former startup employees and requested broad document production. The startup pushed back, arguing that Massachusetts arbitration law, which sharply limits prehearing discovery, should control based on the choice-of-law clause in the agreement.

The arbitrator was now faced with a nuanced but crucial question: Does a general choice-of-law clause importing another state's substantive law also displace California's procedural arbitration rules?

Under California precedent, the answer is generally no. Courts interpret choice-of-law clauses as selecting *substantive* law unless the contract explicitly states that the arbitration will be conducted under another state's procedural law. Volt; see *Mastick v. TD Ameritrade, Inc.*, 209 Cal.App.4th 1258 (2012). As a result, the CAA continues to govern procedural issues - including discovery - unless the parties have clearly and unambiguously agreed otherwise. The FAA, again, remains in the background, relevant primarily for questions of enforceability or preemption but not determinative of procedural matters in state-seated arbitrations.

In this case, because the agreement did not expressly provide that Massachusetts arbitration procedures would apply, the arbitrator ruled that California's procedural rules did. Discovery moved forward under the CAA with broader rights than would have been available under Massachusetts law.

Final thoughts

SB 940 is transforming the procedural playing field for arbitration in California. Agreements that once relied on silence to limit discovery may now expose clients to a litigation-like process if the arbitration is seated in California. Unless parties expressly opt out of the CAA's procedural rules and clearly identify alternative frameworks, SB 940 opens the door to discovery tools that were once off-limits.

David B. Coher *is a private neutral who serves on the American Arbitration Association's Commercial Panel and can be reached at Coher ADR (http://www.coheradr.com).*