

**Arbitration vs. Litigation: The Right to Appeal and Other Misperceptions**

**Fueling the Preference for a Judicial Forum**

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**1. Introduction**

On average over the last five years, Californians have initiated approximately 1.4 million civil actions each year.<sup>1</sup> According to the data collected by the California Judicial Council, approximately 70 percent of all civil matters were dismissed or disposed of each year by means other than trial.<sup>2</sup> For matters that proceed to trial, approximately 28 percent are bench trials and only about two percent were jury trials.<sup>3</sup> California's disposition experience is consistent with statewide trends which show that jury trials have always represented only a tiny fraction of all

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<sup>1</sup> See, Appendix 1 for summary of statistics compiled by the California Judicial Council. In addition to general business disputes, the "civil action" statistics include probate, family law, small claims and personal injury matters.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

civil dispositions<sup>4</sup> and that disposition by trial has been declining over the past two decades.<sup>5</sup> This empirical data suggests that while the courts may be the place where people assert their civil grievances, it is not the place where most such disputes are decided.

For many reasons which are beyond the scope of this paper, alternatives to litigation have blossomed over the past quarter century and include a wide variety of practices. Among those alternatives is private arbitration where the parties submit their disputes to a neutral for binding resolution in a nonjudicial setting. One of the hallmarks of the arbitration process is that it is flexible, allowing parties to craft the process by which their dispute is resolved, to select their decision maker, to schedule their matter for hearing according to their personal calendars and to keep the particulars about their dispute private. Another cornerstone of arbitration is that it offers finality, which generally translates into less time and money spent on the dispute resolution process. Even though there are clear benefits associated with arbitration, it is not the preferred method for resolving civil disputes. To the contrary, there is a perception that attorneys prefer and will recommend litigation as the dispute resolution mechanism to be employed by their clients, and that one of the leading reasons for this preference is the availability of the right to take an appeal should they be unsatisfied with the outcome after trial. Since the right to appeal is only triggered after a trial is concluded and judgment is entered, the disposition statistics discussed above, coupled with the low reversal rate statistics discussed in Section 3 of this paper,<sup>6</sup> suggest that the availability of appellate review may not always be a good reason for preferring litigation over arbitration.

In connection with the research for this paper, approximately 400 business litigators in Southern California were surveyed in November 2005 to test the perception that attorneys generally prefer litigation over arbitration for the resolution of general civil disputes. As

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<sup>4</sup> For the past two decades, jury trials have represented one percent or less of all civil dispositions. Paula Hannaford-Agor, Robert C. LaFountain and Shauna Strickland, *Trial Trends and Implications for the Civil Justice System*, Caseload Highlights / Examining the Work of State Courts, Vol. 11, No. 1 (June 2005), <http://www.ncsconline.org/D-Research/csp/Highlights/Vol11No3.pdf>.

<sup>5</sup> “Bench and jury trials have been declining steadily for the past twenty years, both in absolute numbers and as a proportion of all civil dispositions.” *Id.* Data for civil dispositions and trial rates collected from 22 states during the period of 1984 through 2002 shows that while there was a 46 percent increase in civil dispositions during that time period, that increase closely tracks the population growth in those states during the same period. That same data shows that trial dispositions fell from 36 percent in 1984 to 16 percent in 2002, representing a 49 percent overall decline. *Id.*

<sup>6</sup> *See*, Tables 7 and 8, *infra*.

discussed below, the survey showed that approximately 87 percent of the responding attorneys do prefer litigation over arbitration and that one of the reasons for this preference is the availability of appellate review.<sup>7</sup> The purpose of this paper is to examine the survey results and to discuss some of the misperceptions that exist concerning the value of appellate review in the courts, as well as the misperception that further review is not available in arbitration proceedings.

The survey also asked attorneys to state any other reasons they might have for preferring litigation over arbitration. This question elicited a broad assortment of responses.<sup>8</sup> Those responses revealed bad experiences in arbitration; lack of confidence in arbitrators as decision makers; a higher level of comfort and confidence in the court system based on training and experience; and frustration with arbitrators deciding matters by “splitting the baby” and not following legal precedent.<sup>9</sup> Another purpose of this paper is to examine these responses and discuss some of the perceptions behind them.

The survey which is the basis for this paper establishes the contours of a relatively consistent image of arbitration as contrasted with litigation. To be sure, it is a broad brush portrait, but one that nevertheless shows a preference for litigation based on perceived shortcomings associated with the arbitration process and misperceived attributes associated with the litigation process. In this paper, the survey findings are used to demystify the arbitration process in an effort to present arbitration as a more attractive alternative to litigation.

## **2. A Comparison of the Litigation and Arbitration Processes**

### **A. Civil Litigation**

Civil litigation is a process through which a remedy is sought through the courts.<sup>10</sup> Within the framework of shared governmental responsibilities that defines our democratic system of government, the primary role of the judiciary is to provide an accessible forum for the

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<sup>7</sup> Of the 113 attorneys who responded to the survey, 103 responded to the “preference” question. Of those, 90 confirmed that they generally prefer litigation over arbitration because of the right to take an appeal.

<sup>8</sup> See, Table 12, *infra*, and Appendix 2 for summary of responses given with respect to other reasons for preferring litigation over arbitration.

<sup>9</sup> *Id.*

<sup>10</sup> Cal. Civ. Proc. Code § 20.

just resolution of disputes.<sup>11</sup> Court proceedings are a public process<sup>12</sup> and, with limited exceptions, are open to the public.<sup>13</sup>

Courts exist for the purpose of determining controversies between litigants according to their respective rights under the law.<sup>14</sup> In the words of Justice Tobriner, courts exist “primarily to afford a forum for the settlement of litigable matters between disputing parties.”<sup>15</sup> Judicial power is limited, however, to deciding legal disputes.<sup>16</sup> Courts have no power to prevent breaches of moral duties which violate no law,<sup>17</sup> and they are not constituted or operated for moral vindication.

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<sup>11</sup> The powers of the government of the state are divided into three separate departments – the legislative, executive and judicial branches. CAL. CONST. art. III, § 1. Judicial power represents one of the three powers of government. CAL. CONST. art. IV, § 1. Statewide judicial power may be exercised by only three courts enumerated in the Constitution: namely, the Supreme Court, the courts of appeal and the superior courts. *Id.*, §§ 2, 3 and 4.

<sup>12</sup> “A trial is a public event. What transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374, 91 L.Ed. 1546, 67 S.Ct. 1249 (1947).

<sup>13</sup> Cal. Civ. Proc. Code §§ 124, 125. The concept of a public trial was explained by the Supreme Court in *People v. Hartman*, 103 Cal. 242, 37 P. 153 (1894) (“*Hartman*”):

“The trial should be public in the ordinary common-sense acceptation of the term. The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial.”

*Id.* at 245; *see also* *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1192, 980 P.2d 337, 86 Cal.Rptr. 778 (1999) (citing the *Hartman* decision favorably in a civil context and rejecting the suggestion that California Code of Civil Procedure section 124 was intended to apply to criminal cases only and not to civil cases). Other reasons for promoting public access to the courts are the “traditional Anglo-American distrust for secret trials,” and the desire to safeguard against any attempt to employ the courts “as instruments of persecution.” *In re Oliver*, 333 U.S. 257, 269-270, 92 L.Ed. 682, 68 S.Ct. 499 (1947).

<sup>14</sup> *Warner v. The F. Thomas Parisian Dyeing and Cleaning Works*, 105 Cal. 409, 412, 38 P. 960 (1895); *Vecki v. Sorensen*, 171 Cal. App. 2d 390, 393, 340 P.2d 1020 (1959). A civil action is defined as the prosecution of an action by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong. Cal. Civ. Proc. Code § 30.

<sup>15</sup> *Vecki v. Sorensen*, *supra*, 171 Cal. App. 2d at 393.

<sup>16</sup> *Dabney v. Dabney*, 104 Cal. App. 4th 379, 383, 127 Cal.Rptr.2d 917 (2002) (No court has inherent authority to decide a matter for which there is no legally recognized cause of action.) *See also* U.S. CONST. art. III, §§ 1-2 (limiting the “judicial Power of the United States” to “cases” and “controversies”); *Aetna Life Ins. Co. v. Hayworth*, 300 U.S. 227, 241, 81 L.Ed. 617, 57 S.Ct. 461 (1937) (stating that federal adjudication requires “a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged”).

<sup>17</sup> 16 Cal. Jur. 3d, *Courts* § 30.

Relief through civil litigation is accomplished through the prosecution of an action by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong.<sup>18</sup> It is an involuntary process in the sense that it can be commenced by one party without the advance knowledge or consent of the other party.

Court proceedings are governed by a variety of statutes and court rules.<sup>19</sup> So stringent are the rules governing civil litigation proceedings that the failure to adhere to those rules may serve as grounds for disposing of the matter without reaching the merits.<sup>20</sup> For disputes that do proceed to trial, the object of the proceedings is to discover where the truth lies and to bring about substantial justice in accordance with fixed rules of law and procedure.<sup>21</sup> While final responsibility for administering justice in the courts rests with the judge,<sup>22</sup> the judge is not empowered and has no duty to investigate or initiate proceedings on behalf of the litigants.<sup>23</sup>

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<sup>18</sup> Cal. Civ. Proc. § 30.

<sup>19</sup> See, e.g., Cal. Civ. Proc. Code §§ 1, *et seq.*; Cal. R. Ct. 1-78 (Supreme Court and Courts of Appeal); Cal. R. Ct. 200-892 (Trial Courts); Cal. Evid. Code §§ 1, *et seq.*

<sup>20</sup> For example, if the plaintiff fails to serve and return summons on the complaint within three years after the action is commenced, the action may not be further prosecuted and shall be dismissed. Cal. Civ. Proc. Code § 583.250. For another example, if a party engages in conduct which is found to constitute a misuse of the discovery processes, the court may issue and order dismissing the action of that party. Cal. Civ. Proc. Code § 2023.030(d)(3).

<sup>21</sup> Buchman v. Buchman, 123 Cal. App. 2d 546, 267 P.2d 73 (1954).

“To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly.”

*Id.* at 560.

<sup>22</sup> People v. Hambrick, 162 Cal. App. 2d 239, 143, 327 P.2d 570 (1958).

<sup>23</sup> State of Missouri v. Goodman, 406 S.W.2d 121 (Mo. 1966).

“With few exceptions, the forte of any court is to relegate itself to limbo until presented proper pleadings to be employed as vehicles for judicial locomotion. Even in matters over which a court has general jurisdiction, it cannot, ex mero motu, set itself in motion nor have power to determine questions unless they are presented to it in the manner and form prescribed by law. Jurisdiction to decide concrete issues in a particular case is limited to those presented by the parties in their pleadings, and anything beyond is coram non iudice and void.”

*Id.* at 126.

Courts essentially are “passive forums”<sup>24</sup> where the litigants determine the scope of the inquiry and the information on which the judgment will be based via their statement of the issues to be decided, their statement of the relief to be awarded or denied, and the evidence offered and admitted at the time of trial.<sup>25</sup>

Whether a matter is tried by a jury or before a judge, the proceeding is concluded by the entry of judgment.<sup>26</sup> All aspects of verdicts and judgments are governed by statute. In the case of a jury verdict, judgment is entered by the court clerk in conformity with the verdict and must be so entered within 24 hours after the rendition of the verdict.<sup>27</sup> The jury is not required to explain the basis for its decision<sup>28</sup> unless it has been instructed, prior to deliberations, to provide a special verdict<sup>29</sup> or to answer specific questions in combination with returning a general verdict.<sup>30</sup> The verdict must be in writing and signed by the foreman.<sup>31</sup> In the case of a bench trial, the judge must issue a statement of decision explaining the factual and legal basis for his decision.<sup>32</sup> The statement of decision can be made orally unless any party appearing at the trial

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<sup>24</sup> *Sale v. Railroad Comm'n of the State of California*, 15 Cal. 2d 612, 617, 104 P.2d 38 (1940).

<sup>25</sup> *Id.*; *see also* 16 Cal. Jur. 3d, *Courts* § 30.

<sup>26</sup> Cal. Civ. Proc. Code § 664.

<sup>27</sup> Cal. Civ. Proc. Code §§ 624-628. In civil cases, three-fourths of the jurors (*i.e.*, 9 out of 12) must agree upon the verdict. CAL. CONST. art. L, § 16; Cal. Civ. Proc. Code § 618.

<sup>28</sup> A general verdict is the most common type of jury verdict and simply renders a decision in favor of one party or the other on all issues submitted to them. Cal. Civ. Proc. Code § 624. A general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense. *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 673, 117 Cal. Rptr. 1 (1974).

<sup>29</sup> A special verdict is one by which the jury finds the facts only, leaving the judgment to the Court. Cal. Civ. Proc. Code § 624. A special verdict must present conclusions of fact (*i.e.*, ultimate facts) established by the evidence rather than the evidence itself and those ultimate facts must be presented so that nothing remains for the Court to do other than drawing conclusions of law. *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal. App.4th 847, 871, 93 Cal. Rptr. 2d 364 (2000).

<sup>30</sup> The trial judge may instruct the jury to answer specific questions of fact, to be stated in writing, to test the validity of the general verdict. Cal. Civ. Proc. Code § 625; *Hurlbut v. Sonora Comm. Hosp.*, 207 Cal. App. 3d 388, 403, 254 Cal. Rptr. 840 (1989).

<sup>31</sup> *Id.*

<sup>32</sup> Cal. Civ. Proc. Code § 632.

requests a written decision.<sup>33</sup> Under either scenario, the verdict and statement of decision are not enforceable until judgment is entered.<sup>34</sup> Once judgment is entered, the trial court loses jurisdiction to amend or set aside the judgment, except in the context of post-trial motions seeking a new trial or judgment notwithstanding the verdict.<sup>35</sup>

The entry of judgment on the court's docket is that which makes it eligible for enforcement against the judgment debtor.<sup>36</sup> The entry of judgment allows the judgment creditor to levy against all property of the judgment debtor,<sup>37</sup> except as may be provided by law.<sup>38</sup> The entry of judgment also opens the door to a possible second set of court proceedings: namely, appellate review which available for any judgment entered by the Superior Court.<sup>39</sup>

Like the trial proceedings leading up to the entry of judgment, appeals are governed by a strict set of rules that must be followed in order to obtain review. The first of those rules requires the timely filing of a notice of appeal with the Superior Court.<sup>40</sup> Thereafter, the party seeking

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<sup>33</sup> *Id.* Any request for a written statement of decision must be made within 10 days after the court announces its tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day, in which event the request must be made prior to the submission of the matter for decision. *Id.*

<sup>34</sup> Cal. Civ. Proc. Code § 664.

<sup>35</sup> APRI Ins. Co. v. Superior Court, 76 Cal. App. 4th 176, 182, 90 Cal. Rptr. 2d 171 (1999); Rochin v. Pat Johnson Mfg. Co., 67 Cal. App. 4th 1228, 1238, 79 Cal. Rptr. 2d 719 (1998).

<sup>36</sup> Cal. Civ. Proc. Code § 683.010.

<sup>37</sup> Cal. Civ. Proc. Code §§ 695.010-695.070.

<sup>38</sup> Cal. Civ. Proc. Code §§ 703.010-704.995.

<sup>39</sup> There is a distinction between appellate jurisdiction and the right to appeal that is sometimes overlooked or misunderstood. 9 Witkin, California Procedure, Appeal, § 2, p. 60 (4th ed. 1997). Appellate jurisdiction is derived from the California Constitution and cannot be destroyed or abridged by Legislative action or inaction. *In re Establishment of Perris City News*, 96 Cal. App. 4th 1194, 1197, 118 Cal. Rptr. 2d 38 (2002) (statute specifying that appeal of judgment deciding general circulation petition could be heard by California Supreme Court improperly abridged appellate jurisdiction constitutionally reserved to Courts of Appeal); *In re Sutter-Butte By-Pass Assessment*, 190 Cal. App. 532, 537, 213 P. 974 (1923) (Legislature cannot indirectly destroy or limit the constitutional right by means of a change in procedure); *Byers v. Smith*, 4 Cal. 2d 209, 214, 47 P.2d 705 (1935) (same); *In re Shafter-Wasco Irr. Dist.*, 55 Cal. App. 2d 484, 487, 130 P.2d 755 (1942) (same). There is no constitutional right to an appeal. *In re Taya C.*, 2 Cal. App. 4th 1, 6, 2 Cal. Rptr. 2d 810 (1991). The right of a party to appeal is wholly statutory and no judgment or order is appealable unless expressly made so by statute. *Id.*; see also *Landau v. Superior Court*, 81 Cal. App. 4th 191, 198, 206, 71 Cal. Rptr. 2d 54 (1998) (holding that Cal. Bus. & Prof. C. § 2337 limiting review in medical disciplinary proceedings to extraordinary writ is constitutional); *Powers v. Richmond*, 10 Cal. 4th 85, 89-90, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (1995) (holding that Cal. Govt. C. § 6259(c) limiting superior court decisions in Public Records Act cases to extraordinary writ is constitutional).

<sup>40</sup> Cal. R. Ct. 1(a)(1). Notices of appeal and cross-appeal must be filed within the time periods established by Rules 2 and 3 of the California Rules of Court. These deadlines are jurisdictional, meaning that the timely filing is

appellate review (the appellant) must designate an adequate record so as to enable the reviewing court to be able to evaluate the claimed error in the trial proceedings.<sup>41</sup> The appellant must also provide the appellate court with a brief that identifies the perceived problems in the trial proceedings and cites the court to the legal authorities that make the resulting judgment in error.<sup>42</sup> In this regard, the fundamental difference between the trial and appellate proceedings is that the purpose of an appeal is not to determine the case on its merits, but to review for trial court error.<sup>43</sup> The purpose of the appellate process is not to retry the case, but to review action taken in the trial court, all the while giving substantial deference to the trial court's resolution of disputed facts and the exercise of its discretion regarding the administration of the proceedings.<sup>44</sup>

## **B. Contractual Arbitration**

Long before law was established, or courts were organized, or judges had formulated principles of law, civilized society resorted to other mechanisms for the resolution of disputes. Arbitration was one such mechanism.<sup>45</sup> It is an adjudicatory, as opposed to an advisory, process

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an absolute prerequisite to the appellate court's power to entertain the appeal. *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, 15 Cal. 4th 51, 56, 61 Cal. Rptr. 2d 166 (1997). In civil cases, courts have no inherent authority to excuse a tardy notice of appeal or otherwise extend or shorten the time for appeal. *Laraway v. Pasadena Unified School Dist.*, 98 Cal. App. 4th 579, 582, 120 Cal. Rptr. 2d 213 (2002). Likewise, appellate jurisdiction may not be conferred by party consent or stipulation. *Hollister Convalescent Hosp., Inc. v. Rico*, 15 Cal. 3d 660, 666, 125 Cal. Rptr. 757 (1975). It is the timely filing of a notice of appeal that vests jurisdiction in the appellate court and, subject to certain exceptions, terminates the lower court's jurisdiction. Cal. Civ. Proc. Code § 916.

<sup>41</sup> Cal. R. Ct. 4-7. The penalty for failing to timely procure the record is default. Cal. R. Ct. 8; *see also* *Marriage of Wilcox*, 124 Cal. App. 4th 492, 498-499, 21 Cal. Rptr. 3d 315 (2004) (it is not the appellate court's responsibility to independently acquire documents from the trial court).

<sup>42</sup> Cal. R. Ct. 13-18.

<sup>43</sup> *See In re Zeth S.*, 31 Cal. 4th 396, 404, 2 Cal. Rptr. 3d 683 (2003). The courts of appeal do not supplant the trial courts as the original forum for consideration of the facts and evidence, nor do they reweigh the evidence or reassess witness credibility. *Uriate v. United States Pipe & Foundry Co.*, 51 Cal. App. 4th 222, 235, 107 Cal. Rptr. 2d 412 (2001).

<sup>44</sup> *Pazderka v. Caballeros Dimas Alang, Inc.*, 62 Cal. App. 4th 658, 667, 73 Cal. Rptr. 2d 242 (1998). An appeal does not give losing litigants a second bite at the apple. *James B. v. Superior Court*, 35 Cal. App. 4th 1014, 1021, 41 Cal. Rptr. 2d 762 (1995). The court of appeal is not a second trier of fact. *Marriage of Calcaterra & Badakhsh*, 132 Cal. App. 4th 28, 31, 33 Cal. Rptr. 3d 246 (2005).

<sup>45</sup> For example, between 500 BC and 300 BC, the Greek city-states used arbitration extensively for settling disputes concerning boundary delimitation. Edwin R. Teple and Robert B. Moberly, *Arbitration and Conflict Resolution* (BNA 1979), pp. 1-7, citing 1 Cor. VI 5. Arbitration was an accepted practice under Roman law. *Id.*, citing H.B. Cohen, *Jewish and Roman Law* (1966), p. 659. It was similarly practiced in ancient Babylon and was an established institution of early Islamic society. *Id.* Other accounts of early and diverse experiences with arbitration are recited in F. Kellor, *American Arbitration* (1948); E. Walover, *The Historical Background of Commercial Arbitration*, 18

because the arbitrator renders a decision at the end of an arbitration hearing that is final and binding upon the parties. The arbitration award is binding because the parties agreed to accept the arbitrator's determination of the issues as an alternative to litigation in the courts and a decision by a judge.<sup>46</sup> Modern arbitration differs significantly from earlier common law arbitration in this regard, because it encourages the use of arbitration for future, as well as existing, disputes and provides for enforcement of such pre-dispute agreements.<sup>47</sup>

Private arbitration is a voluntary process which arises when parties agree to submit their disputes to a neutral (or panel of neutrals) for resolution in a nonjudicial setting.<sup>48</sup> It is a process which arises from and is dictated by contract. "[I]t only comes into play when the parties to the dispute have agreed to submit to it,"<sup>49</sup> and can validly take place only if the parties have specifically agreed to use this method for the settlement of their dispute.<sup>50</sup> When parties contract to have their disputes resolved through arbitration, both state and federal law provide for enforcement of those agreements<sup>51</sup> in accordance with strong public policy.<sup>52</sup>

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U. Pa. L. Rev. 132 (1934); W. Jones, *3 Centuries of Commercial Arbitration in New York*, 1956 Wash. U. L. Q. 193. Arbitration has also been used extensively throughout America's history to resolve issues such as ownership of colonies, ownership of particular pieces of territory, recovery of money owed by one state to another, and in all sorts of religious matters. *Arbitration in Action*, Vol. 1, Nos. 4-5 (April-May 1943), p. 5. In the early Anglo-Norman period, it was difficult to distinguish between jury determinations and arbitration proceedings. The courts during that period had a well-developed conception of the essential attributes of a valid arbitration proceeding, and the jury system developed as an outgrowth of the arbitral concept. *The Arbitration Journal*, Vol. 16, No. 4 (1961), p. 193.

<sup>46</sup> *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 401-402 & fn. 5, 696 P.2d 645, 212 Cal. Rptr. 151 (1985).

<sup>47</sup> *Manual for Commercial Arbitrators*, American Arbitration Association at 12 (2004) ("AAA Manual").

<sup>48</sup> *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944, 955, 116 P.3d 479, 32 Cal. Rptr. 3d 5 (2005); *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 713, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976). Contractual arbitration is quite different from judicial arbitration where, by statute, California law requires that certain actions be diverted before trial to "judicial arbitration." Cal. Civ. Proc. Code §§ 1141.10, *et seq.* For one thing, there is no pre-existing agreement to arbitrate. For another, a judicial arbitration award is not binding on the parties. Cal. Civ. Proc. Code § 1141.20.

<sup>49</sup> *Herman Feil, Inc. v. Design Center of Los Angeles*, 204 Cal. App. 3d 1406, 1414, 251 Cal. Rptr. 895 (1988); *see also* 6 Witkin, California Procedure, *Proceedings Without Trial*, § 484, p. 912 (4th ed. 1997).

<sup>50</sup> AAA Manual, *supra*.

<sup>51</sup> The Federal Arbitration Act ("FAA") (9 U.S.C. §§ 1, *et seq.*) was enacted in 1925 and declares a national policy favoring arbitration of disputes. In this regard, Section 2 of the FAA provides that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Similarly, the present Arbitration Act in California (Cal. Civ. Proc. Code §§ 1280, *et seq.*) was enacted in 1961 and provides "a comprehensive, all-inclusive statutory scheme applicable to all written agreements to arbitrate disputes." *American Home Assur. Co. v. Benowitz*, 234 Cal. App. 3d 192, 198, 285 Cal. Rptr. 626 (1991); *see* *Crown Homes v. Landes*,

Though the law favors agreements for arbitration of disputes, there is no policy compelling persons to accept binding arbitration.<sup>53</sup> Absent a clear statement of consent to arbitrate, an agreement to submit a dispute to arbitration will not be inferred.<sup>54</sup> Similarly, even with an agreement to arbitrate, the scope of what is subject to arbitration is limited by the parties' agreement and can be further limited by parties through a post-dispute agreement as to what issues will or will not be submitted to the arbitrator for decision.<sup>55</sup>

California statutory and case law does not define arbitration procedure.<sup>56</sup> As such, an arbitration proceeding may take many procedural forms,<sup>57</sup> and an agreement's failure to identify a set of grievance procedures will not be fatal to the use of arbitration as a binding mechanism for resolving disputes.<sup>58</sup> Statutorily, all that is required for a dispute resolution proceeding to qualify as an arbitration proceeding is that it must have a third-party decision maker selected by the parties; a mechanism for ensuring neutrality in the rendering of the decision; an opportunity for both sides to be heard; and a final and binding decision.<sup>59</sup> It is not necessary that the term

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22 Cal. App. 4th 1272, 1276, 27 Cal. Rptr. 2d 827 (1994). The California Arbitration Act mirrors the FAA and provides that a written agreement to arbitrate "is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Cal. Civ. Proc. Code § 1281.

<sup>52</sup> Arbitration agreements are liberally interpreted in favor of enforcing such agreements. *Izze v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1315, 231 Cal. Rptr. 315 (1986). The public policy in favor of arbitration that is evidenced by the enactment of the California Arbitration Act (Cal. Civ. Proc. Code §§ 1280, *et seq.*) is incorporated by implication into all arbitration agreements unless inconsistent with their terms. *See Freeman v. State Farm Mut. Auto. Ins. Co.*, 14 Cal. 3d 473, 479, 535 P.2d 341, 121 Cal. Rptr. 477 (1975); *Conejo Valley Unified School Dist. v. William Blurock & Partners*, 111 Cal. App. 3d 983, 993, 169 Cal. Rptr. 102 (1980); *American Home Assur. Co. v. Benowitz*, *supra*, 234 Cal. App. 3d at 198.

<sup>53</sup> *Victoria v. Superior Court*, 40 Cal. 3d 734, 744, 222 Cal. Rptr. 1 (1985).

<sup>54</sup> *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, 164 Cal. App. 3d 1122, 1129, 211 Cal. Rptr. 62 (1985).

<sup>55</sup> *See* discussion in Section 4(C), *infra*.

<sup>56</sup> 6 Witkin, California Procedure, *Proceedings Without Trial*, *supra*, § 484 (2005 supp), p. 216.

<sup>57</sup> *See Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 478-479, 103 L. Ed. 2d 488, 109 S.Ct. 1248 (1989) ("Volt") (whether to arbitrate, how to arbitrate and when to arbitrate are matters that the parties may specify by contract).

<sup>58</sup> *Id.*

<sup>59</sup> *Cheng-Canindin v. Renaissance Hotel Assocs.*, 50 Cal. App. 4th 676, 684, 57 Cal. Rptr. 2d 867 (1996) ("Cheng-Canindin"); *Elliot & Ten Eyck P'ship v. City of Long Beach*, 57 Cal. App. 4th 495, 503, 67 Cal. Rptr. 2d 140 (1997); *Saeta v. Superior Court*, 117 Cal. App. 4th 261, 268, 11 Cal. Rptr. 3d 610 (2004). Under California law, the general rule is that parties to a private arbitration agreement impliedly agree that the arbitrator's decision will be

“arbitration” be used. The key factor is whether the dispute resolution proceeding agreed to by the parties is intended as a substitute for judicial litigation.<sup>60</sup>

Even though the components of an arbitration proceeding are not statutorily defined, many provider organizations have adopted rules that govern the proceedings they administer.<sup>61</sup> Such rules include the manner in which an arbitrator will be appointed to hear a given matter,<sup>62</sup> the scheduling and conduct of a preliminary hearing or conference,<sup>63</sup> the taking or exchange of any formal or informal discovery,<sup>64</sup> the summary disposition of a claim or issue,<sup>65</sup> securing documents or witnesses through subpoena,<sup>66</sup> and the conduct of the arbitration hearing.<sup>67</sup>

An arbitration proceeding is concluded by the issuance of an award. The only statutory requirements concerning the form of the award is that it must be in writing, signed by the arbitrator, and include a determination of all questions submitted to the arbitrator that must be

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both binding and final. “Indeed, the very essence of the term ‘arbitration’ . . . connotes a binding award.” *Moncharsh v. Heily & Blase*, 3 Cal. 4<sup>th</sup> 1, 9, 10 Cal. Rptr. 2d 183 (1992) (“Moncharsh”). Federal courts, however, are split on whether (a) the arbitration must be binding in order to fall within the FAA, and (b) the agreement must expressly state that the arbitrator’s decision is judicially enforceable. *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998) (“arbitration need not be binding in order to fall within the scope of the FAA); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 193 (4th Cir. 1991) (agreement must provide for binding arbitration, but such agreement need not be express and may be inferred); *PVI, Inc. v. Ratiopharm GmbH*, 135 F.3d 1252, 1253 (8th Cir. 1998) (agreement must expressly state that award is judicially enforceable to comply with 9 U.S.C. § 9); *Oklahoma City Assocs. v. Wall-Mart Stores, Inc.*, 923 F.2d 791, 793 (10th Cir. 1991) (same); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 389-390 (7th Cir. 1981) (judicial enforceability may be inferred); *In re I/S Stayborg v. National Metal Converters, Inc.*, 500 F.2d 424, 426-427 (2d Cir. 1974) (same).

<sup>60</sup> *Cheng-Canindin*, *supra*, 50 Cal.App.4th at 691-692; *see also* *State Farm Fire & Cas. v. Hardin*, 211 Cal. App. 3d 501, 506, 259 Cal. Rptr. 2d 433 (1989) (agreement that dispute regarding the amount of loss be resolved by an “appraisal process” constitutes an agreement to arbitrate); *Louise Gardens of Encino Homeowners’ Ass’n, Inc. v. Truck Ins. Exch.*, 82 Cal. App. 4th 648, 658, 98 Cal. Rptr. 3d 378 (2000).

<sup>61</sup> *See, e.g.*, Commercial Arbitration Rules and Mediation Procedures, American Arbitration Association (“AAA Commercial Rules”), <http://www.adr.org/sp.asp?id=22440>; Comprehensive Arbitration Rules & Procedures, JAMS (“JAMS Rules”), <http://www.jamsadr.com/rules/comprehensive.asp>.

<sup>62</sup> AAA Commercial Rules, *supra*, §§ R-11-R-16; JAMS Rules, *supra*, Rule 15.

<sup>63</sup> AAA Commercial Rules, *supra*, § R-20; JAMS Rules, *supra*, Rule 16.

<sup>64</sup> AAA Commercial Rules, *supra*, § R-21; JAMS Rules, *supra*, Rule 17.

<sup>65</sup> JAMS Rules, *supra*, Rule 18.

<sup>66</sup> AAA Commercial Rules, *supra*, § R-31; JAMS Rules, *supra*, Rule 21.

<sup>67</sup> AAA Commercial Rules, *supra*, §§ R-26-36; JAMS Rules, *supra*, Rule 22.

decided in order to determine the controversy.<sup>68</sup> There are, however, rules governing the award process that have been adopted by various provider organizations.<sup>69</sup> These rules include bracketing the amounts that may be awarded by the arbitrator (“High-Low Arbitration”),<sup>70</sup> instructing the arbitrator to choose between the parties’ last proposals (“Baseball Arbitration”),<sup>71</sup> or setting a high and low value and agreeing to accept whichever figure is closest to the arbitrator’s award (“Night Baseball”).<sup>72</sup>

As a matter of statutory law, the arbitrator is not required to issue formal findings of fact or conclusions of law.<sup>73</sup> Likewise, the arbitrator is not required to disclose his or her rationale or reasons for the award.<sup>74</sup> However, some provider organizations require that the arbitrator issue an award that includes a statement of the reasons for the award, unless the parties agree otherwise.<sup>75</sup> Other provider organizations give the parties the option of requesting a “reasoned award” as part of the process.<sup>76</sup>

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<sup>68</sup> Cal. Civ. Proc. Code § 1283.4.

<sup>69</sup> The American Arbitration Association (“AAA”) was founded in 1926 and is one of the oldest provider organizations in the world. AAA Manual, pp. 9-10; *see also* <http://www.adr.org/Welcome>. According to the AAA Commercial Rules, the award “shall be made promptly . . . no later than 30 days from the date of closing the hearing” unless otherwise agreed by the parties or specified by law. AAA Commercial Rules, *supra*, § R-41. JAMS is another large provider organization. According to the JAMS Rules, “the Arbitrator shall render the Award within thirty (30) calendar days after the date of the closing of the Hearing . . . .” JAMS Rules, *supra*, Rule 24.

<sup>70</sup> This is a proceeding wherein the parties agree in advance to the parameters within which the arbitrator may render his or her award. If the award is lower than the pre-set “low,” the defendant will pay the agreed-upon low figure. If the award is higher than the pre-set “high,” the plaintiff will accept the agreed-upon high. If the award is in between, the parties agree to be bound by the arbitrator’s figure. The high and low figures may or may not be revealed to the arbitrator in advance if the ruling. <http://www.jamsadr.com/arbitration/defined.asp>.

<sup>71</sup> This is a form of binding arbitration wherein each of the parties chooses one and only one number, and the arbitrator may select only one of the figures as the award. In this type of proceeding, there are only two possible outcomes. <http://www.jamsadr.com/arbitration/defined.asp>.

<sup>72</sup> Like baseball arbitration, this is a form of arbitration wherein the parties exchange their own determination of that value of the case, but the figures are not revealed to the arbitrator. The arbitrator assigns a value to the case and the parties agree to accept the high or low figure closest to the arbitrator’s value. <http://www.jamsadr.com/arbitration/defined.asp>.

<sup>73</sup> *Cothron v. Interinsurance Exchange*, 103 Cal. App. 3d 853, 861, 163 Cal. Rptr. 2d 240 (1980).

<sup>74</sup> *Arco Alaska v. Superior Court*, 168 Cal. App. 3d 139, 148, 214 Cal. Rptr. 51 (1985); *Baldwin Co. v. Rainey Const. Co.*, 229 Cal. App. 3d 1053, 1058 n. 3, 280 Cal. Rptr. 499 (1990) (“Baldwin”).

<sup>75</sup> *See, e.g.*, JAMS Rules, *supra*, Rule 24.

<sup>76</sup> Rule R-42 of the AAA Commercial Rules provides that parties may request a reasoned award but, in order for that request to be binding on the arbitrator, all parties must request such an award in writing and the request must be

An arbitrator's award is not directly enforceable. Until it is confirmed, an award has no more force or effect than a written contract between the parties to the arbitration.<sup>77</sup> In order to enforce an arbitration award, the prevailing party must ask a judge to confirm the award.<sup>78</sup> That request is made by filing a petition with the court.<sup>79</sup> For purposes of creating a record in these court proceedings, the petition must name as respondents all parties to the arbitration.<sup>80</sup> The petition must also set forth the substance of the arbitration agreement or have a copy attached, it must identify the arbitrator; and it must set forth or have attached a copy of the award and the arbitrator's written opinion, if any.<sup>81</sup> The petition must be served on all respondents and a noticed hearing must be held similar to the type of proceeding had with respect to a petition to compel arbitration.<sup>82</sup> Once confirmed, the arbitration award becomes a judgment of the court, has the same force and effect as a judgment in a civil action, and may be enforced like any other judgment of the court in which it is entered.<sup>83</sup>

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made prior to the arbitrator's appointment. Thereafter, a request for a reasoned award is subject to the discretion of the arbitrator. A "reasoned award" means an award that includes "either brief or detailed reasons or a written explanation of the arbitrator's decision." *Arbitration Awards / Safeguarding, Deciding & Writing Awards*, American Arbitration Association at 42 (2004) ("AAA Awards Manual"). The term "reasoned award" is not synonymous with formal findings of fact and conclusions of law. *Id.* Beyond what is stated in the arbitrator's award, parties may not depose the arbitrator to establish and then challenge his or her reasoning. *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 66-68 (2d Cir. 2003) ("Hoelt").

<sup>77</sup> Cal. Civ. Proc. Code § 1287.6; *Jones v. Kvistad*, 19 Cal. App. 3d 836, 840, 97 Cal. Rptr. 100 (1971). However, unless vacated or corrected by the court, an arbitration award is entitled to res judicata and collateral estoppel effect in any subsequent proceedings. *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 211 Cal. App. 3d 5, 14, 259 Cal. Rptr. 50 (1989) (collateral estoppel effect as to issues "actually, necessarily, and finally" resolved in the arbitration proceeding); *Thibodeau v. Crum*, 4 Cal. App. 4th 749, 755, 759, 6 Cal. Rptr. 2d 27 (1992) (res judicata doctrine applies to an arbitration award, even though unconfirmed, and bars subsequent assertion of claims falling within the scope of the arbitration).

<sup>78</sup> Cal. Civ. Proc. Code §§ 1285, 1287.4.

<sup>79</sup> Cal. Civ. Proc. Code §§ 1288, 1288.4

<sup>80</sup> Cal. Civ. Proc. Code § 1285; *see Walter v. National Indem. Co.*, 3 Cal. App. 3d 630, 634, 83 Cal. Rptr. 803 (1970).

<sup>81</sup> Cal. Civ. Proc. Code § 1285.4.

<sup>82</sup> Cal. Civ. Proc. Code §§ 1290, *et seq.*

<sup>83</sup> Cal. Civ. Proc. Code § 1287.4; *see Britz, Inc. v. Alfa-Laval Food & Dairy Co.*, 34 Cal. App. 4th 1085, 1106, 40 Cal. Rptr. 2d 700 (1995).

An award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review, except on statutory grounds.<sup>84</sup> Such relief is sought by petitioning to vacate the award and may be filed by any party.<sup>85</sup> Judicial review for vacatur is limited to the specific grounds defined by statute, which are directed at the process, not the substance of the award or the merits of the dispute. Grounds for vacating an award include: the arbitrator exceeded his powers and the award cannot be corrected without affecting the merits of the decision;<sup>86</sup> the award was procured by corruption, fraud or other undue means or corruption in any of the arbitrators;<sup>87</sup> the award was issued by an arbitrator required to disqualify himself or herself;<sup>88</sup> the rights of the party challenging the award were substantially prejudiced by the arbitrator's refusal to postpone the hearing despite sufficient cause shown for a postponement,

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<sup>84</sup> See, 9 U.S.C. § 10(a)(1)-(4); Cal. Civ. Proc. Code § 1286.2(a)(1)-(6); Moncharsh, *supra*, 3 Cal. 4th at 33. Courts may not act sua sponte. Cal. Civ. Proc. Code §§ 1286.4, 1286.8; Valsan Partners Ltd. P'ship v. Calco Space Facility, Inc., 25 Cal. App. 4th 809, 818, 30 Cal. Rptr. 2d 785 (1994).

<sup>85</sup> Baldwin, *supra*, 229 Cal. App. 3d at 1058.

<sup>86</sup> 9 U.S.C. § 10(a)(4); Cal. Civ. Proc. Code § 1286.2(a)(4). An arbitrator derives his power solely from parties' arbitration agreement or the stipulation of submission and he has no legal right to decide issues not submitted by the parties. Moncharsh, *supra*, 3 Cal. 4th at 8; O'Malley v. Petroleum Maintenance Co., 48 Cal. 2d 107, 110, 308 P.2d 9 (1957); Luster v. Collins, 15 Cal. App. 4th 1338, 1346, 19 Cal. Rptr. 2d 215 (1993). A party's failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award. Corona v. Amherst Partners, 107 Cal. App. 4th 701, 706, 132 Cal. Rptr. 2d 250 (2003). Arbitrators do not exceed their powers because they assign erroneous reasons for their decision. Moncharsh, *supra*, 3 Cal. 4th at 28. The focus of this inquiry is on whether arbitrators had the power, based on the parties' submissions, to reach a certain issue, not whether the arbitrator correctly decided the issue. DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 824 (2d Cir. 1997).

<sup>87</sup> 9 U.S.C. § 10(a)(1); Cal. Civ. Proc. Code §§ 1286.2(a)(1), 1286.2(a)(2). This ground for vacatur applies to extrinsic fraud perpetrated by the arbitrator or a party (*i.e.*, fraud which deprives the party of a fair hearing). Pacific Crown Dist v. Brotherhood of Teamsters, Etc., 183 Cal. App. 3d 1138, 1147, 228 Cal. Rptr.2d 645 (1986). It also applies to "undue" behavior which deprives a party of a "heartly 'first bite'." Pour Le Bebe, Inc. v. Guess? Inc., 112 Cal. App. 4th 810, 831, 5 Cal. Rptr. 3d 442 (2003).

<sup>88</sup> 9 U.S.C. § 10(a)(2); Cal. Civ. Proc. Code § 1286.2(a)(6). Arbitrators conducting arbitrations in California must comply with the Judicial Council ethics standards which require that an arbitrator make extensive conflict disclosures to the parties before accepting the appointment and hearing the dispute. Cal. Civ. Proc. Code §§ 1281.85, 1281.9 and 1281.91; Cal. R. Ct Appendix, Div. VI. An arbitrator's failure to comply with the disclosure requirements may be ground for disqualification of the arbitrator and for vacatur of any award issued. Ovitz v. Schulman, 133 Cal. 4th 830, 35 Cal. Rptr. 3d 117 (2005). Likewise, an arbitrator's failure to honor a demand for disqualification after making the required conflict disclosures mandates vacatur of any award issued. Azteca Const., Inc. v. ADR Consulting, Inc., 121 Cal. App. 4th 1156, 1168-1169, 18 Cal. Rptr. 3d 142 (2004). An arbitrator's mere failure to disclose a conflict is not a basis for vacatur under the FAA. Proof of evident partiality is required under the FAA. 9 U.S.C. § 10(a)(2); ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493, 499-500 (4th Cir. 1999).

his or her refusal to hear evidence material to the controversy or other misconduct.<sup>89</sup>

Additionally, both state and federal common law recognize a “public policy” exception to confirmation of an award, which allows courts to refuse to enforce an arbitration award that violates well-defined public policy.<sup>90</sup>

For arbitrations governed by the FAA, there are two additional, common law grounds for seeking vacatur of an award.<sup>91</sup> The first is the “manifest disregard” of the law exception and allows the award to be vacated where the arbitrator knew applicable law but ignored or refused to apply it,<sup>92</sup> or where an obvious error of law exists.<sup>93</sup> The second is the “arbitrary and

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<sup>89</sup> 9 U.S.C. § 10(a)(3); Cal. Civ. Proc. Code § 1286.2(a)(5). Arbitrators are required to decide all questions submitted that are necessary to determine the controversy. Cal. Civ. Proc. Code § 1283.4. Failure to do so may constitute “other conduct” for vacatur. *Muldrow v. Norris*, 12 Cal. 331 (1859) (“Muldrow”). A party challenging an award on this ground bears the a “heavy burden” because it is presumed that all issues submitted have been decided. *Rodrigues v. Keller*, 113 Cal. App. 3d 838, 841, 170 Cal. Rptr. 349 (1980). To overcome that presumption, the party challenging the award must show that its claims were expressly raised and not decided by the arbitrator. *Id.* This is difficult to do because findings are usually not required or part of the award. *Id.* In the case of a monetary award without findings, the decision that one of the parties should pay the other a sum of money “is sufficiently determinative of all items embraced in the submission.” *Sapp v. Barenfeld*, 34 Cal. 2d 515, 522-523, 212 P.2d 233 (1949).

<sup>90</sup> In 1987, the United States Supreme Court held that courts can decline to enforce an arbitrator’s award where enforcement “would violate ‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” *United Paperworkers’ Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43, 98 L.Ed. 2d 286, 108 S.Ct. 364 (1987) (“United Paperworkers”); *see also Exxon Shipping Co. v. Exxon Seamen’s Union*, 11 F.3d 1189, 1191-1192 (3d Cir. 1994) (“Exxon”) (vacating labor arbitration award that required the reinstatement of a seaman who was found to be highly intoxicated while on duty), or a party’s statutory rights. *Board of Education, Etc. v. Round Valley Teachers Ass’n*, 13 Cal. 4th 269, 277, 52 Cal. Rptr. 2d 115 (1996) (vacating arbitration award that required school district to comply with collective bargaining agreement procedure for termination a probationary teacher which was preempted by conflicting Education Code provisions). This exception arises out of the contract defense to enforcement where a contract is found to violate public policy. *Vimar Sequros y Reasegueros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540, 132 L.Ed. 2d 462, 115 S.Ct. 2322 (1995). This exception derives legitimacy from the public’s interest in having its views represented in matters to which it is not a party but which could harm the public interest. *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993); *see also Di Russa, supra*, 121 F.3d at 824-825.

<sup>91</sup> AAA Awards Manual, *supra*, p. 10.

<sup>92</sup> *See, e.g., Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991) (vacatur allowed for arbitrator’s manifest disregard of the law).

<sup>93</sup> *See, e.g., International Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82 (2d Cir. 1996) (vacatur allowed for error of law which is obvious and capable of being instantly perceived by the average arbitrator); *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2000), cert denied, 534 U.S. 1020 (2001) (“Roadway”) (same); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 104 L.Ed. 2d 526, 109 S.Ct. 1917 (1989); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L.Ed. 2d 985, 115 S.Ct. 1920 (1995); *Halligan v. Pipe Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998); *Tanoma Mining Co. v. Local Union No. 1269*, 896 F.2d 745 (3d Cir. 1990); *Bowen v. Amoco Pipeline Co.*, 254 F.2d 925 (10th Cir. 2001) (“Bowen”).

capricious” exception and allows the award to be vacated where no ground for the decision can be inferred from the facts, which is not yet uniformly accepted.<sup>94</sup>

Judicial review of arbitration awards is limited in California and the Ninth Circuit to the statutory and common law FAA grounds discussed above.<sup>95</sup> This is so even if the parties agreed between themselves for an expanded scope of review<sup>96</sup> and even if the arbitrator committed an error of law.<sup>97</sup>

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<sup>94</sup> See, e.g., *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997). If no ground for the decision can be inferred from the facts, the award may be vacated as arbitrary and capricious. *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000). Likewise, if an award is “so palpably faulty that no judge . . . could ever conceivably have made such a ruling,” the award may be vacated as arbitrary and capricious. *Safeway Stores v. Am. Bakery & Confectionary Workers, Local 111*, 390 F.2d 79, 82 (5th Cir. 1968) (“Safeway Stores”). The award may also be vacated if it is found to be “completely irrational.” *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986) (“French”); *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096 (9th 2003) (same).

<sup>95</sup> *Moncharsh, supra*, 3 Cal.4<sup>th</sup> at 9-12; *Zueta v. County of San Benito*, 38 Cal.App.4th 106, 110, 44 Cal. Rptr. 2d 678 (1995); see also *French*, 784 F.2d at 906 (under the FAA, “confirmation is required even in the face of erroneous findings of fact or misinterpretations of law”). The statutory grounds for vacatur specifically do not allow the court to review the merits of the controversy. Sufficiency of evidence to support the award is immaterial. *Morris v. Zuckerman*, 69 Cal. 2d 686, 691, 72 Cal. Rptr. 880 (1968). Validity of the arbitrator’s reasoning is also immaterial. The case law is clear that the court may not substitute its judgment for that of the arbitrator. *Id.*; *Department of Public Health, Etc. v. Service Employees Int’l Union, Local 790*, 215 Cal. App. 3d 429, 433 n. 5, 263 Cal. Rptr. 711 (1989). Similarly, the interpretation of the underlying contract is ordinarily a question of law for the arbitrator to decide because it is the arbitrator’s construction that was bargained for. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 4 L.Ed. 2d 1424, 80 S.Ct. 1358 (1960); *Safeway Stores, supra*, 83 Cal. App. 3d at 438.

<sup>96</sup> The law in California is clear that parties cannot contractually expand the scope of judicial review to include review on the merits. *Crowell v. Downey Community Hosp. Found.*, 95 Cal. App. 4th 730, 739, 114 Cal. Rptr. 2d 810 (2002) (“Crowell”); *Oakland-Alameda County Coliseum Authority v. CC Partners*, 101 Cal. App. 4th 635, 645, 124 Cal. Rptr. 2d 363 (2002) (“CC Partners”); see also *Little v. Auto Stiegler, Inc.* 29 Cal.4th 1064, 63 P.3d 979, 130 Cal. Rptr. 2d 892 (2003) (“Little”). Likewise, parties cannot stipulate to vacate a decision of the court. *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 29, 130 L.Ed. 2d 233, 115 S.Ct. 386 (1994) (judicial precedents are not the property of the litigants). The federal circuit courts of appeals are split, however, on the issue of whether parties can contract for expanded judicial review. The Third, Fourth and Fifth Circuits have indicated that they are willing to honor contract provisions which expand judicial review beyond that provided by Section 10(a) of the FAA. See, *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790, 793 (5th Cir. 2002); *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001); *Roadway, supra*, 257 F.3d at 292-293, cert denied, 534 U.S. 1020 (2001); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995). These circuits generally emphasize that the purpose of the FAA is to enforce the terms of private arbitration agreements, including terms specifying the scope of review of arbitration decisions. More specifically, these circuits find support for upholding the parties’ contractual choice of additional grounds for review in the *Volt, supra*, 489 U.S. 468, in which the Supreme Court determined that just as private parties may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which the arbitration will be conducted. *Id.* at 478-479. Opinions from the Seventh, Eighth, Ninth and Tenth Circuits have held to the contrary or hinted that contractual expansion of judicial review of arbitration awards will not be enforced. See *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003), cert denied, 540 U.S. 1098, 157 L.Ed. 2d 810, 124 S.Ct. 980 (2004) (“Kyocera”); *Bowen, supra*, 254 F.3d at 932; *UHC Mgmt. Co. v. Computer Sciences corp.*, 148 F.3d 992, 997 (8th Cir. 1998); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (“Chicago Typographical”). These circuits generally emphasize that the FAA provides for extremely limited review authority

In addition to judicial review at the trial court level through the petition to confirm or vacate process, any judgment entered on the award is appealable<sup>98</sup> and is subject to the rules and procedures described in Section 2(A) of this paper. Likewise, an order denying a petition to confirm the award is appealable.<sup>99</sup> The scope of this appellate review is limited, however, to whether the trial court erred in granting or denying a petition to confirm or vacate the arbitration award. It does not extend to a review of the merits of the arbitration award or to de novo review of the arbitration proceedings. The appellate court must accept the trial court's findings of fact if substantial evidence supports them and must draw every reasonable inference to support the award.<sup>100</sup> On issues concerning whether the arbitrator exceeded his or her powers, the appellate court reviews the trial court's decision de novo, but must give substantial deference to the arbitrator's assessment of his or her contractual authority.<sup>101</sup>

### C. Conclusion

On their face, litigation and arbitration appear to be from the same dispute resolution family in terms of process. They both involve formal complaints and answers; they both involve adversaries squaring off in front of a decision maker; they both involve a formal presentation of the parties' respective evidence and arguments; they both involve a third party neutral who makes a binding decision to resolve the parties' dispute; and they both involve a decision making

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so as to preserve due process but not permit unnecessary public intrusion into private arbitration matters. As to the Supreme Court's decision in *Volt*, *supra*, these circuits limit that ruling to the procedures and systems utilized in the arbitration up to the point of completion, after which time, the parties' freedom to fashion their own arbitration process has no bearing whatsoever on their ability to amend the statutorily prescribed standards governing federal court review and jurisdiction. *Kyocera*, *supra*; *cf.*, *Hoelt*, *supra*, 343 F.3d at 65 (parties can agree to preclude or waive arbitral review); *Katz v. Fenberg*, 290 F.3d 95 (2d Cir. 2002) (same).

<sup>97</sup> *Moncharsh*, *supra*, 3 Cal.4th at 11; *Marsh v. Williams*, 23 Cal. App. 4th 238, 244, 28 Cal. Rptr. 2d 402 (1994).

<sup>98</sup> Cal. Civ. Proc. Code § 1294(d). An appeal from a judgment confirming an arbitration award is subject to a finality requirement. If other issues remain unresolved in the trial court, the judgment confirming the arbitration award is not final and cannot be appealed. *Rubin v. Western Mut. Ins. Co.*, 71 Cal. App. 4th 1539, 1547-1548, 84 Cal. Rptr. 2d 648 (1999) (award only appraised the amount of earthquake damage, liability phase still awaited trial on the merits).

<sup>99</sup> Cal. Civ. Proc. Code § 1294(c); *Ray Wilson Co. v. Anaheim Mem. Hosp. Ass'n*, 166 Cal. App. 3d 1081, 1085 n. 1, 213 Cal. Rptr. 62 (1985).

<sup>100</sup> *Alexander v. Blue Cross of Calif.*, 88 Cal. App. 4th 1082, 1087, 106 Cal. Rptr. 2d 431 (2001) ("Alexander"); *Pierotti v. Torian*, 81 Cal. App. 4th 17, 24, 96 Cal. Rptr. 2d 553 (2000)

<sup>101</sup> *Alexander*, *supra*; *California Faculty Assn. v. Superior Court*, 63 Cal. App. 4th 935, 944-945, 75 Cal. Rptr. 2d 1 (1998) ("California Faculty"); *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 373, 376 fn. 9, 885 P.2d 994, 36 Cal. Rptr. 2d 531 (1994).

process which requires that the decision be put in writing. Beyond these basic process components, the similarity between arbitration and litigation ends. This is so for several reasons, not the least of which is the orientation of these two very different processes. The courts serve the public and, as such, exercise their power in a way that seeks to balance the interests of society with the individual interests of the parties. In contrast, the orientation of an arbitration is on the parties and finding or tailoring a remedy to address the particularities of their dispute and meet their needs.

### **3. Survey and Results**

As part of the research for this paper, approximately 400 business litigators in Southern California were surveyed in November 2005 for the purpose of testing their preference for litigation over arbitration as a dispute resolution procedure for general civil disputes. The survey<sup>102</sup> was mailed to attorneys practicing in Los Angeles and Orange Counties. In addition to asking about their preference for litigation over arbitration, the survey questions also sought background information about the responding attorneys' years in practice and their level of experience with litigation, arbitration and appeals. It also solicited information as to any reasons they might have for preferring litigation over arbitration besides the availability of appellate review.

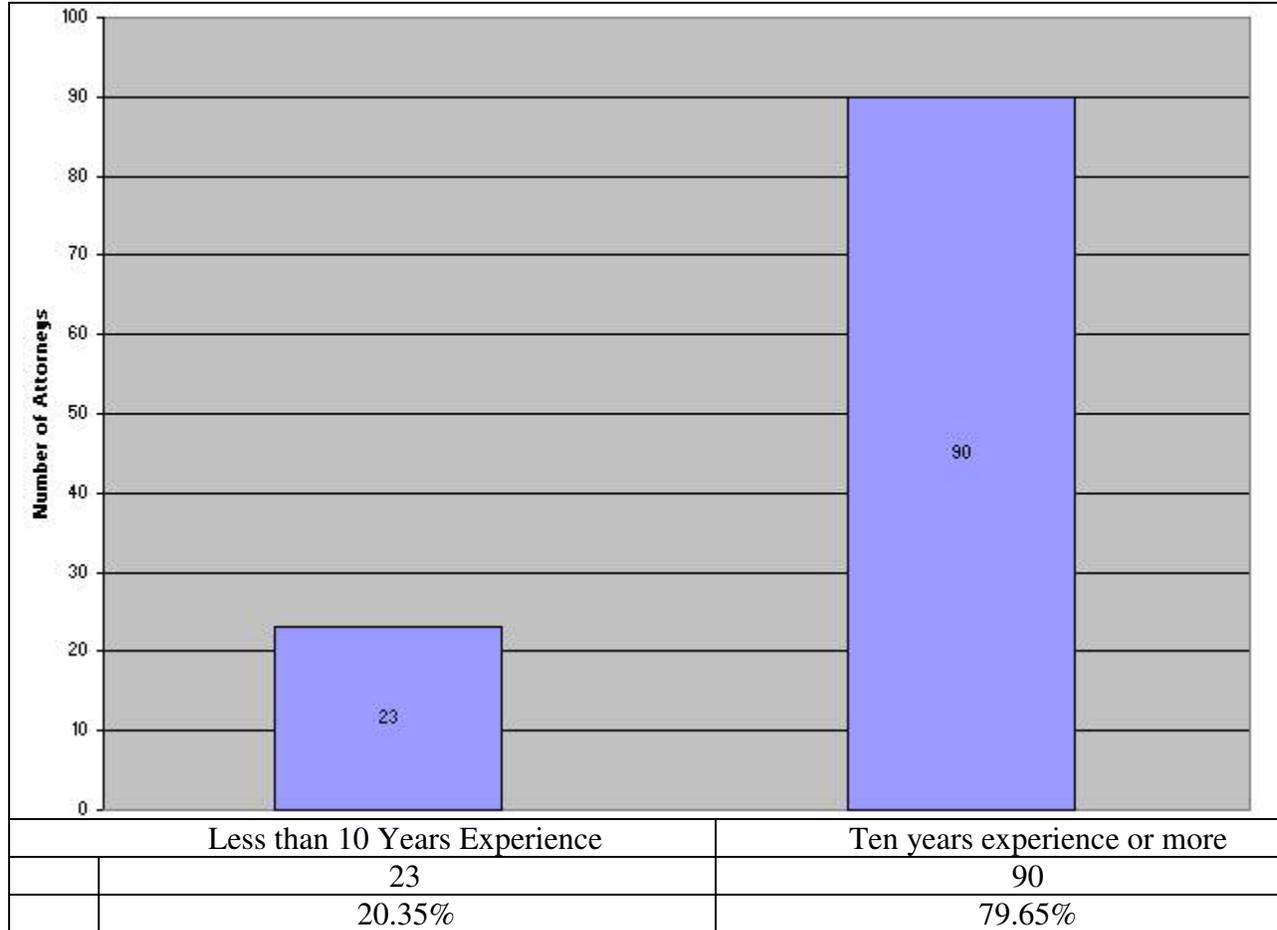
#### **A. Participants' Backgrounds**

As shown in Table 1, the pool of responding attorneys was weighted more heavily with attorneys who had practiced ten or more years. This is surprising because the group to whom questionnaires were sent was split fairly evenly between associate level and partner level attorneys.

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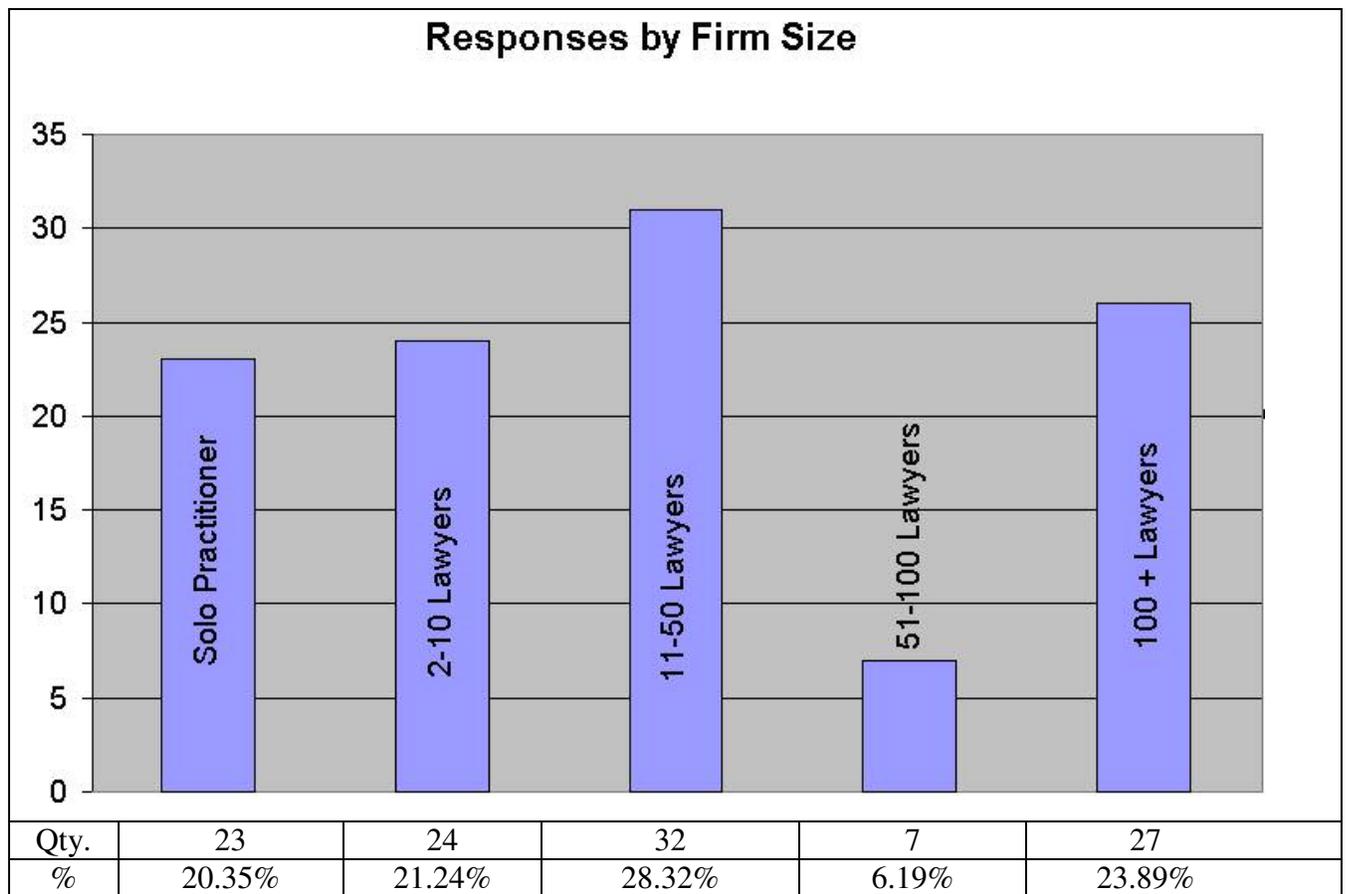
<sup>102</sup> See Appendix A.

**Table 1**  
**Survey Participants' Years of Practicing Law**



As shown in Table 2, all sizes of firms were represented by the responding attorneys, with fairly even distribution among the different size firms: approximately 28 percent were in small-medium (11-50 attorney) firms; approximately 24 percent were in large (100+ attorney) firms; approximately 20 percent were solo practitioners or in small (2-10 attorney) firms; and about 6 percent were in large-medium (51-100 attorney) firms.

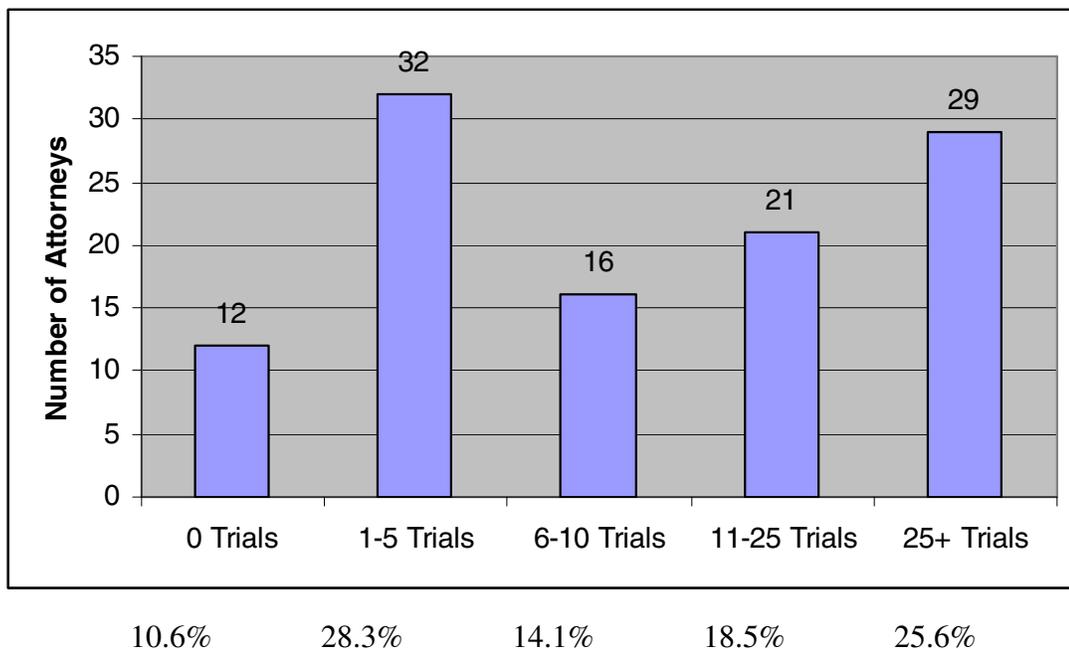
**Table 2**  
**Survey Participants' Firm Situation**



**B. Participants' Experience**

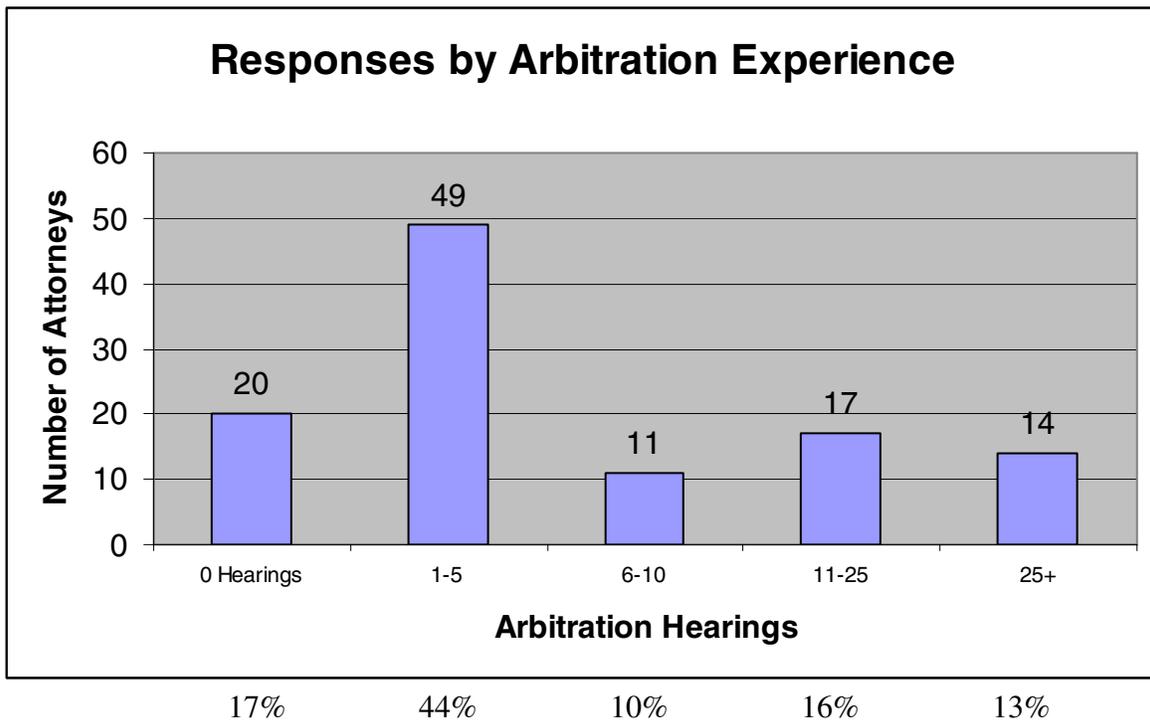
As detailed in Table 3, despite the fact that the majority of the responding attorneys had been practicing ten or more years, they were fairly evenly represented in terms of their trial experience: 40 percent reported having had five or fewer trials, with about 10 percent reporting no trial experience, and 60 percent reported having had six or more trials, with about 26 percent reporting 25 or more trials.

**Table 3**  
**Survey Participants' Trial Experience**



As detailed in Table 4, the responding attorneys were less evenly represented in terms of arbitration experience: 61 percent reported five or fewer arbitrations, with about 17 percent reporting no arbitration experience at all, and 39 percent reported six or more arbitrations, with about 13 percent reporting 25 or more arbitrations.

**Insert Table 4**  
**Survey Participants' Arbitration Experience**



With regard to appellate experience, 92 of the 113 responding attorneys reported that they had experience representing appellants, but only 86 of those attorneys responded to the question concerning the outcomes of that experience in terms of reversal rates.<sup>103</sup> With regard to experience representing appellees, 88 of the 113 responding attorneys reported that they had experience defending appeals, but only 83 of those attorneys responded to the question concerning the outcomes of that experience in terms of being reversed.

As with the trial and arbitration experience charts discussed above, despite the fact that the majority of the responding attorneys had been practicing ten or more years, the majority had prosecuted or defended five or less appeals.<sup>104</sup> Their reported success rate in prosecuting appeals and obtaining reversal or defending appeals and being reversed is shown in Tables 5 and 6 below.

In prosecuting appeals, 30 percent of the responding attorneys reported that they succeeded in obtaining a reversal about 10 percent of the time.<sup>105</sup> Approximately 21 percent of the responding attorneys reported a reversal rate of about 25 percent;<sup>106</sup> 28 percent reported a reversal rate of about 50 percent;<sup>107</sup> eight percent reported a reversal rate of 75 percent<sup>108</sup>; and 12 percent reported a 100 percent reversal rate.<sup>109</sup> On this last response, those reporting a 100 percent reversal rate had prosecuted one to five appeals, suggesting that the responses could be based upon a single appeal experience.

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<sup>103</sup> Interestingly, an attorney who responded that he or she had no appellate experience responded to the question concerning reversal rates, reporting a 10 percent reversal rate. This is why in Table 5 there is a bar for a respondent having had “0 Appeals” experience.

<sup>104</sup> 55 of the 92 attorneys with appellant experience (approximately 59.7%) had prosecuted five or less appeals. 59 of the 88 attorneys with appellee experience (approximately 67%) had defended five or less appeals.

<sup>105</sup> 26 of the 86 responding attorneys (approximately 30%) were in this category. Of those 61.5 percent had prosecuted five or less appeals and 38.5 percent had prosecuted six or more appeals.

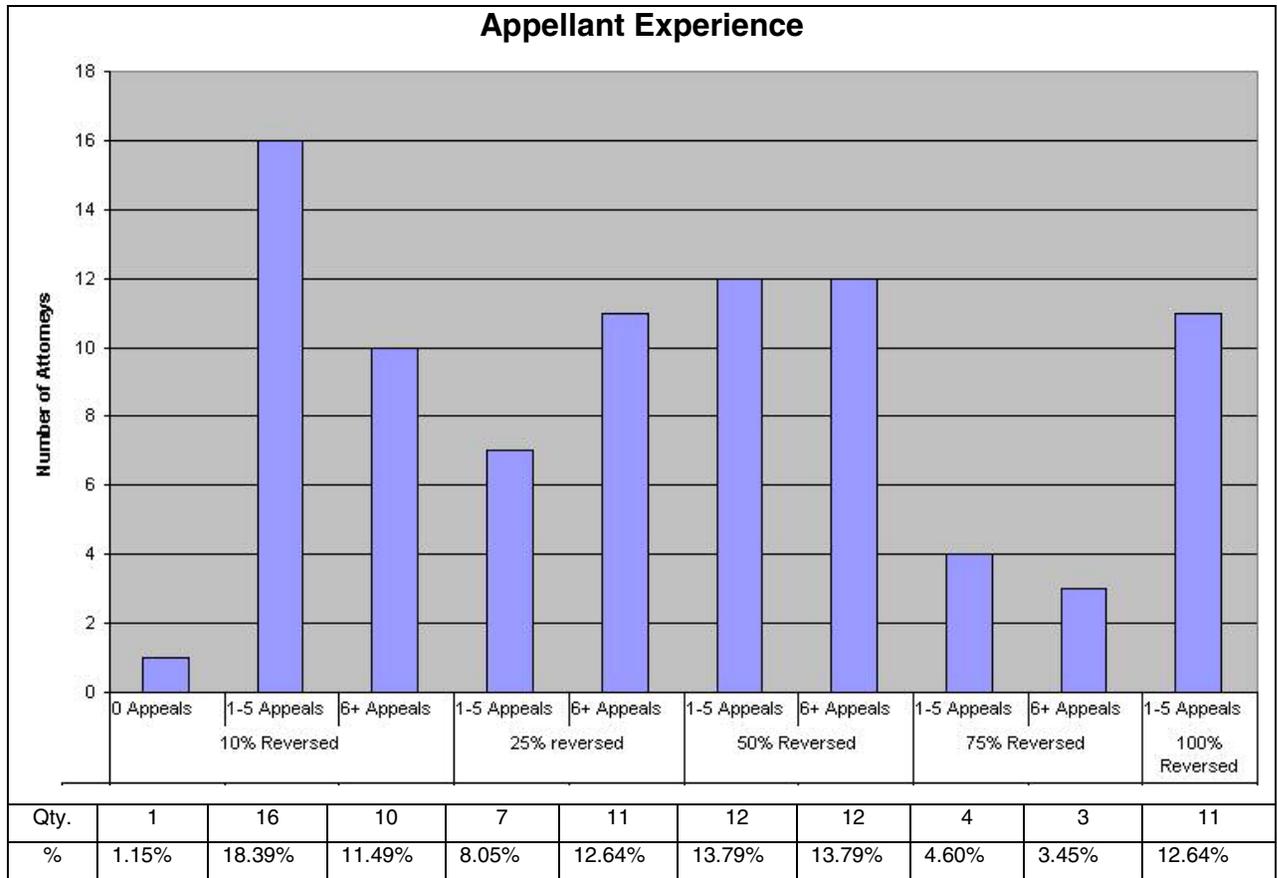
<sup>106</sup> 18 of the 86 responding attorneys (approximately 21%) were in this category. Of those 38.8 percent had prosecuted five or less appeals and 61.2 percent had prosecuted six or more appeals.

<sup>107</sup> 24 of the 86 responding attorneys (approximately 28%) were in this category. Of those 50 percent had prosecuted five or less appeals and 50 percent had prosecuted six or more appeals.

<sup>108</sup> 7 of the 86 responding attorneys (approximately 8%) were in this category. Of those 57 percent had prosecuted five or less appeals and 43 percent had prosecuted six or more appeals.

<sup>109</sup> Significantly, attorneys in this category had prosecuted only one to five appeals. There were no attorneys with six or more appeals reporting a 100 percent reversal rate.

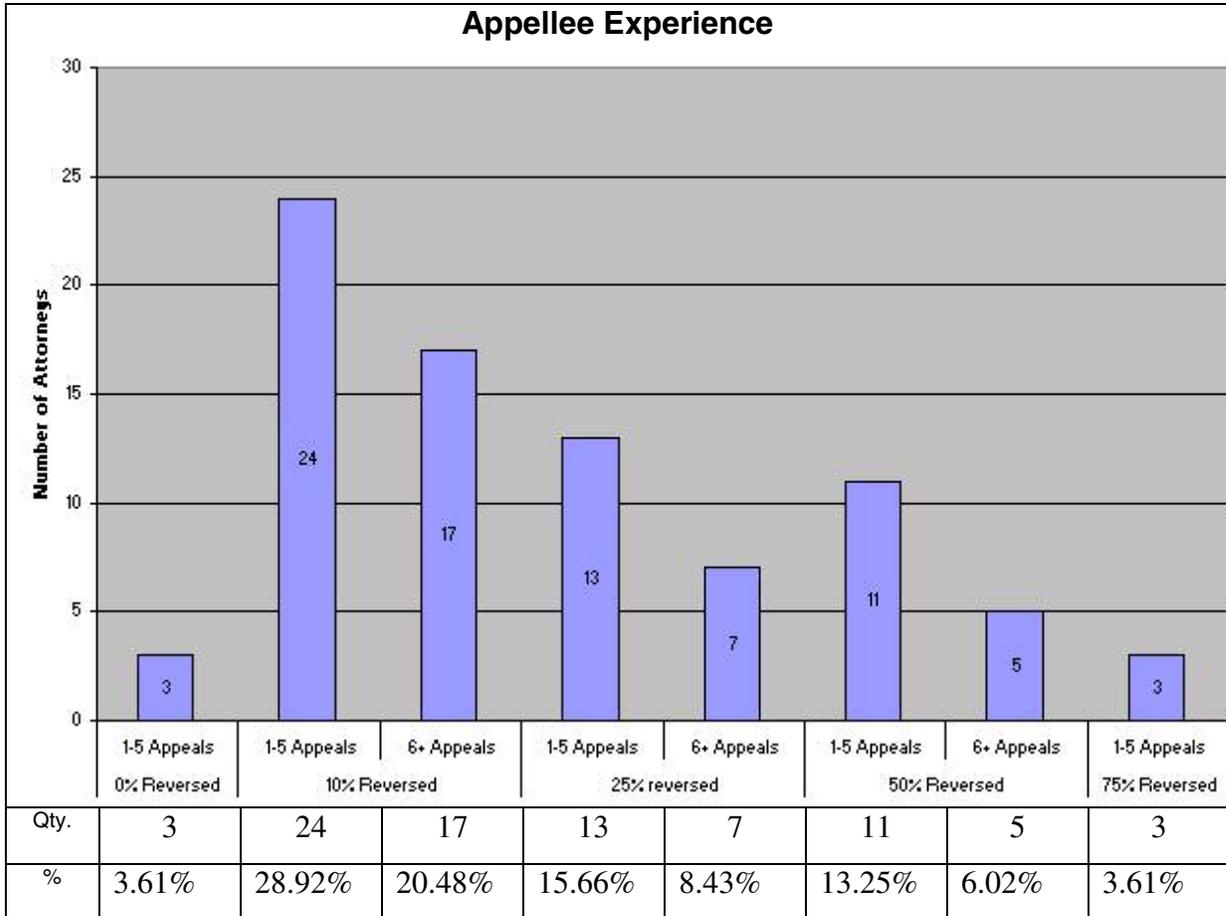
**Table 5**  
**Survey Participants' Experience Representing Appellants**



In defending appeals, approximately four percent of the responding attorneys reported that they had never been reversed. Interestingly, those attorneys had defended one to five appeals, suggesting that the responses could be based upon a single appeal experience. About half of the responding attorneys reported a 10 percent reversal experience and another 24 percent reported a 25 percent reversal experience. These reported experiences are closely in line with the statistics maintained by the California Judicial Council for all appeals filed with the state's court of appeals.<sup>110</sup>

<sup>110</sup> Each year, the California Judicial Council compiles and publishes statistics and trend data for the state's courts. These reports are prepared under the provisions of section 6 of article VI of the California Constitution, which requires the Judicial Council to survey the condition of business in state courts and to report and make recommendations to the Governor and Legislature. *See*, [courtinfo.ca.gov/reference/2\\_annual.htm](http://courtinfo.ca.gov/reference/2_annual.htm).

**Table 6**  
**Survey Participants' Experience Representing Appellees**



As summarized in Tables 7 and 8, the statistics compiled by the California Judicial Council over the last 10 years related to the disposition of civil appeals to the California Courts of Appeal show a consistent 10-year trend in which, on average, 76 percent of all appeals decided by written opinion were affirmed, three percent were dismissed and only 21 percent resulted in a reversal of the underlying decision.<sup>111</sup> If the statistics for appeals decided by written opinion are combined with total appeals, the success rate drops from a 21 percent reversal rate to a reversal rate of between 10 to 12 percent.<sup>112</sup> This latter statistic is more in line with the responding attorneys' success rate in defending appeals<sup>113</sup> than with their reported success rate in prosecuting appeals.

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<sup>111</sup> See Table 7, *infra*.

<sup>112</sup> See Table 8, *infra*.

<sup>113</sup> In defending appeals and securing an affirmance of the judgment, 50 percent of responding attorneys reported a 10 percent reversal rate and an additional 25 percent of responding attorneys reported a 25 percent reversal rate. See Table 6, *supra*.

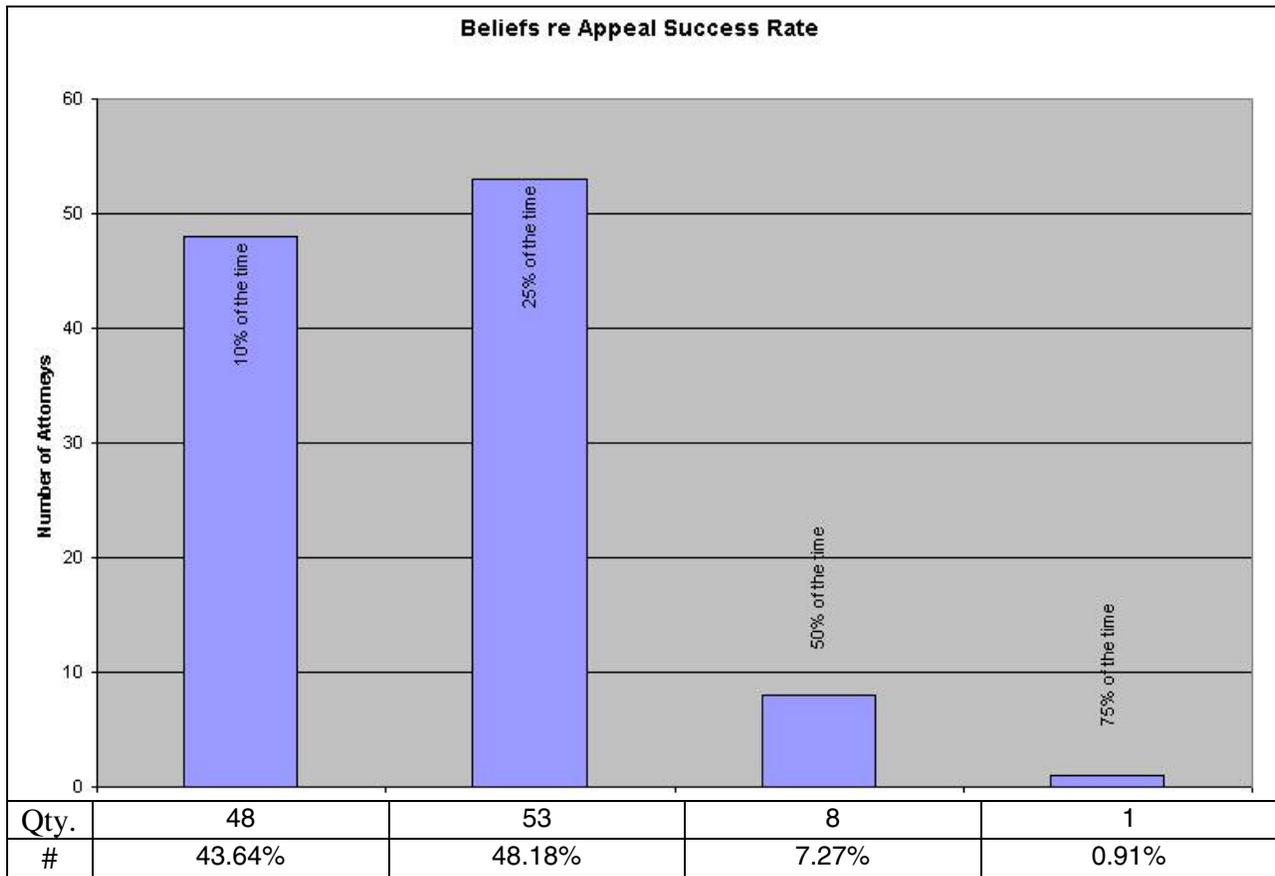
**Table 7**

**Table 8**

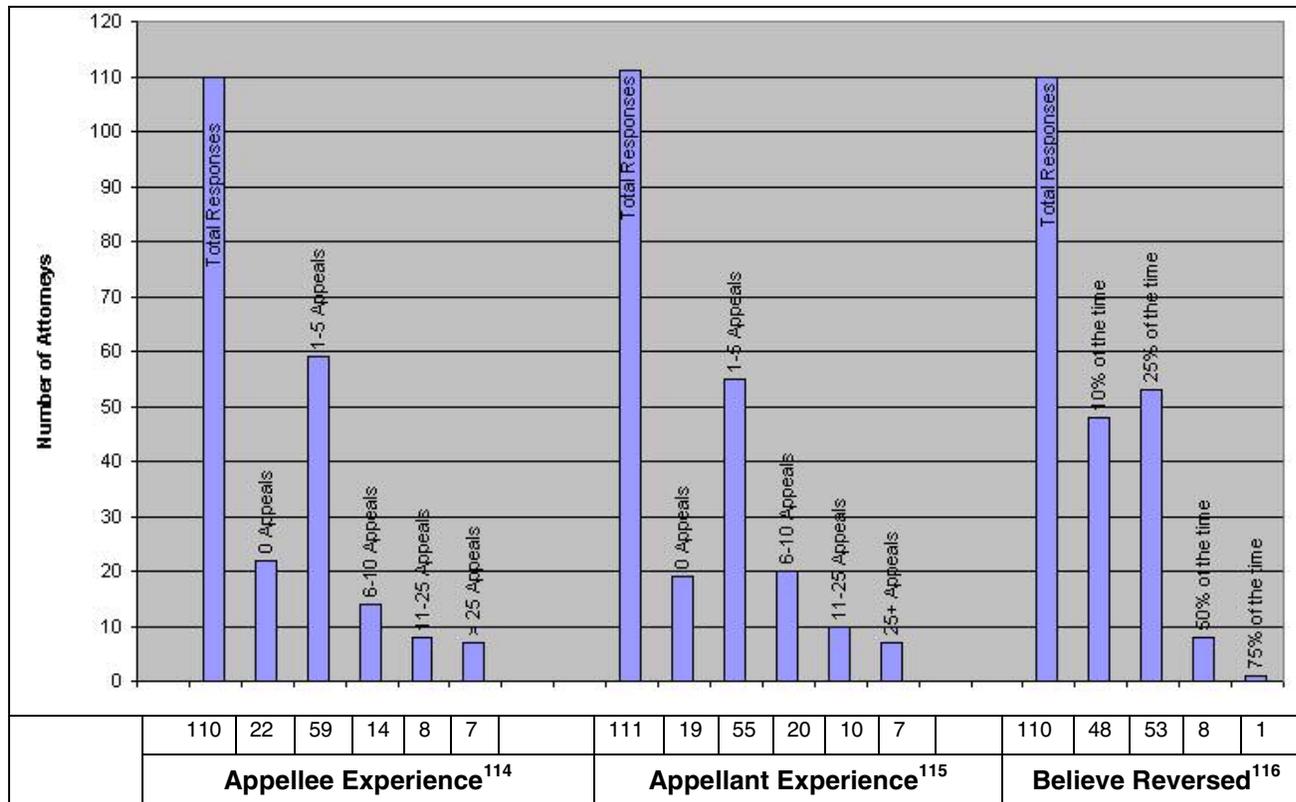
**C. Participants' Beliefs**

Irrespective of their actual experience, Table 9 shows that approximately 92 percent of the responding attorneys believe that the likelihood of obtaining a reversal is 25 percent or less, with almost half of those attorneys believing that the success rate on appeal is only ten percent. Table 10 charts those beliefs next to the responding attorneys' appellate experience.

**Table 9  
Survey Participants' Beliefs re Appellate Success Rate**



**Table 10**  
**Survey Participants' Beliefs and Appellate Experience**



<sup>114</sup> 88 out of 110, or 80 percent of the responding attorneys who answered the “appellee experience” question said they had had experience representing appellees.

<sup>115</sup> 98 out of 111, or 82.8 percent of the responding attorneys who answered the “appellant experience” question said they had had experience representing appellants.

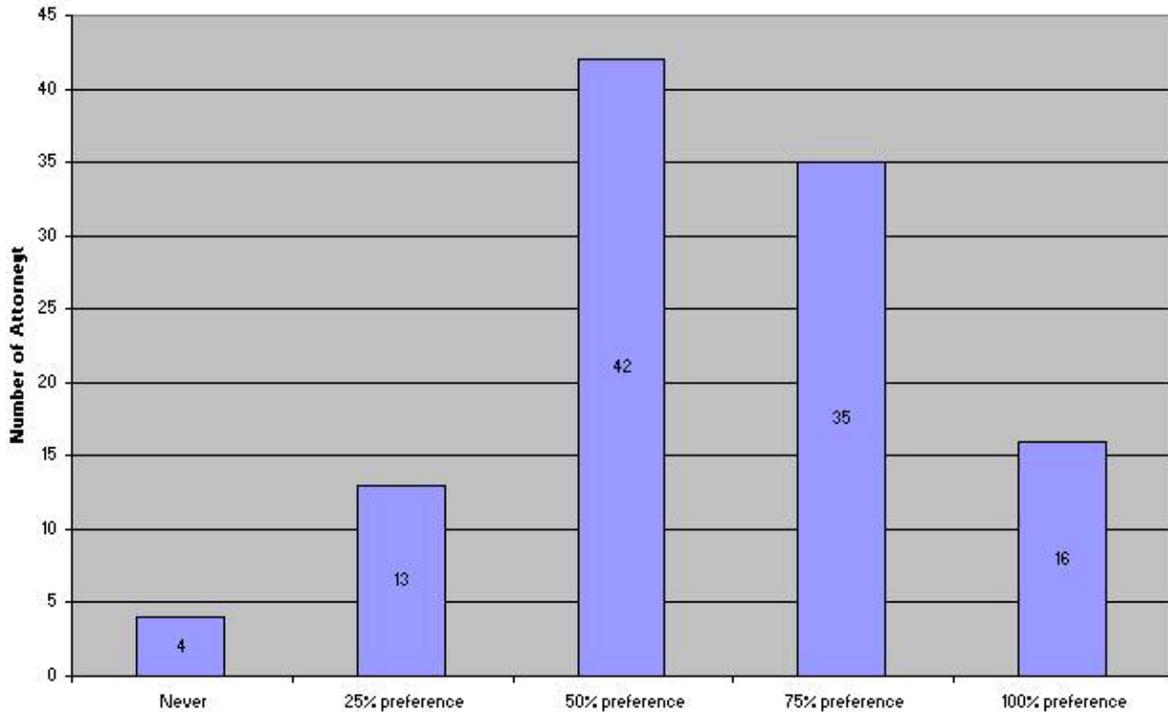
<sup>116</sup> 100 percent of the responding attorneys who answered the “reversal belief” question had an opinion about the reversal rate in California irrespective of their personal experience.

**D. Participants' Preferences**

Notwithstanding their beliefs, appellate experience, trial experience or arbitration experience, Table 9 shows that the overwhelming majority of attorney surveyed – 84 percent -- prefer litigation over arbitration 50 percent of the time or more.<sup>117</sup>

**Table 11**

**Preference for Judicial Forum vs. Private Arbitration**

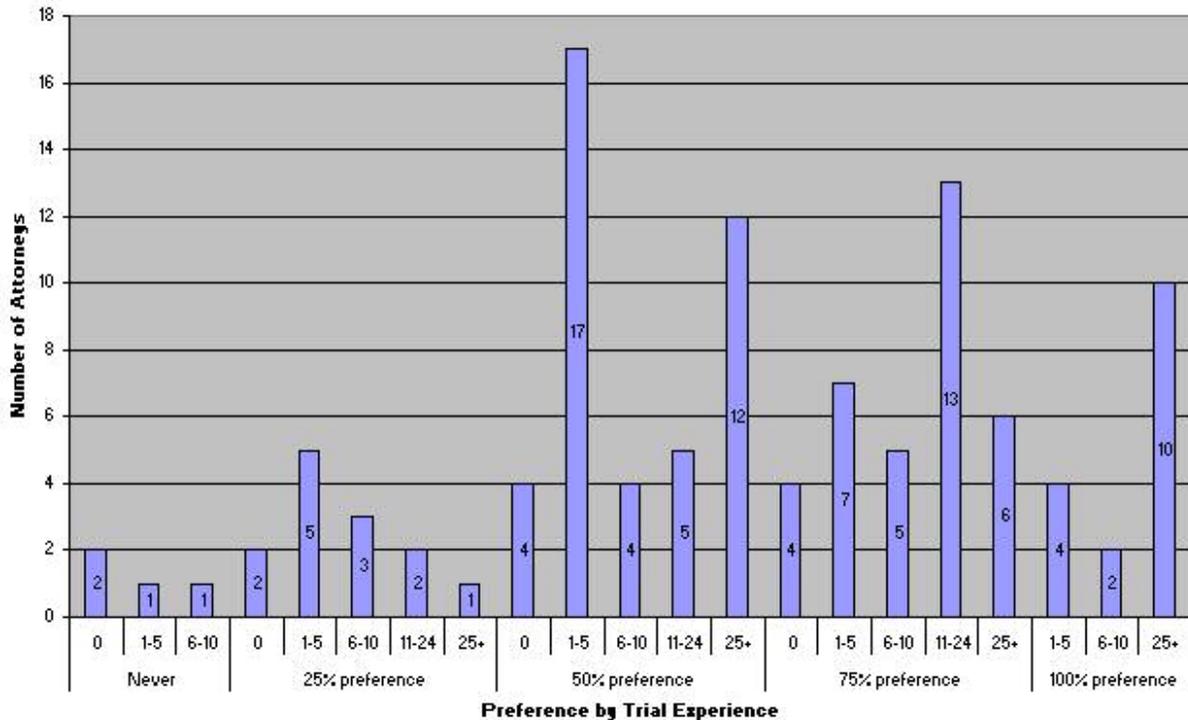


<sup>117</sup> Of the 113 attorneys who returned questionnaires, 110 responded to Question 7, which whether the responding attorney, if “given a choice between a judicial forum and an arbitration forum,” would recommend or select a judicial forum over arbitration 100 percent of the time (Choice A), 75 percent of the time (Choice B), 50 percent of the time (Choice C), 25 percent of the time (Choice D) or never (Choice E). Of the 110 responding attorneys, 93 said that they would choice a judicial forum (*i.e.*, litigation) 50 percent of the time or more.

If the responding attorneys' preference for litigation over arbitration is charted based on their trial experience, Table 10 suggests that the more trial experience an attorney had, the stronger his or her preference for that forum. For example, Table 3 shows that 29 of the responding attorneys reported having had more than 25 trials. According to Table 10, approximately 55 percent of those attorneys prefer litigation over arbitration 75 percent of the time or more and 96 percent of those attorneys prefer litigation over arbitration 50 percent of the time or more. Likewise, Table 10 the lack of trial experience had very little bearing on the preference for litigation over arbitration. In this study, 35 percent of attorneys with five or less trials reported that they still preferred litigation over arbitration 75 percent of the time or more and 81 percent of those attorneys would recommend litigation over arbitration 50 percent of the time or more.

**Table 12**

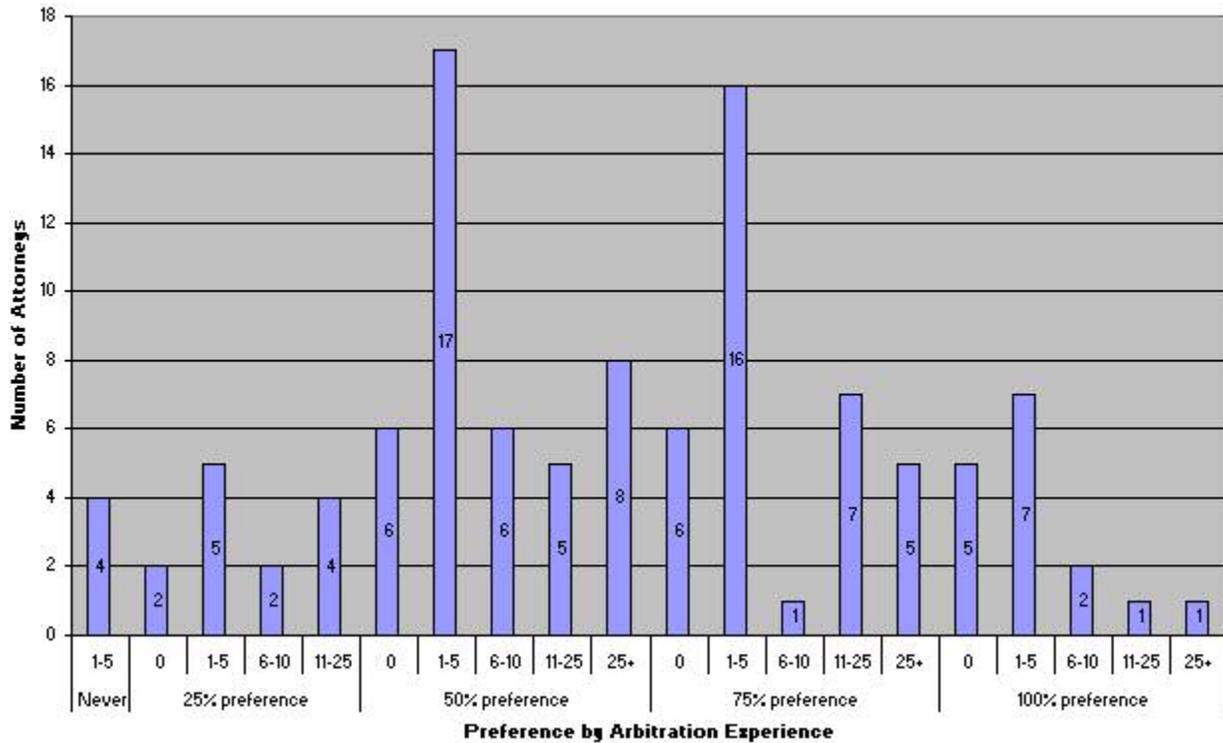
**Preference for Judicial Forum vs. Private Arbitration**



If the responding attorneys' preference for litigation over arbitration is charted based on their arbitration experience, Table 11 shows that irrespective of their level of arbitration experience the responding attorneys preferred litigation. In this regard, 46 percent responded that they would recommend litigation over arbitration 75 percent of the time or more and 84 percent responded that they would recommend litigation over arbitration 50 percent of the time or more.

**Table 13**

**Preference for Judicial Forum vs. Private Arbitration**



**E. Other Responses**

In addition to surveying attorney perceptions about the value of appellate review as a reason for preferring litigation over arbitration, the survey also asked attorneys to state any other reasons they might have for preferring litigation over arbitration. This question elicited a broad assortment of responses.<sup>118</sup> A few of those responses are summarized in Table 14, and reveal bad experiences in arbitration; lack of confidence in arbitrators as decision makers; a higher level

<sup>118</sup> See, Appendix 2 for broader summary of responses given with respect to other reasons for preferring litigation over arbitration.

of comfort and confidence in the court system; and frustration with arbitrators deciding matters by “splitting the baby” and not following legal precedent.

**Table 14**

- I don't like Arbitrators. They seem interested in prolonging hearings and the process. They get paid by the hour. Also, they apply the law wrong and under current CA law, that is not a ground to challenge an award.
- I've been taken advantage of by Arbitrators.
- More procedural certainty/clarity (rules and procedure in court is generally more clear)
- I prefer the formality, the rules and guidelines and what I believe is greater attention by Judges versus Arbitrators in hearing the matter.
- Cheaper; allows for discovery; I know the rules
- Rules of evidence and code of civil procedure protections are more uniformly enforced.
- Arbitration results most often “split the baby.”
- A Judge is expected to follow the law; an Arbitrator is not.
- Judicial decisions are more consistent and better.
- I prefer litigation because Judges are neutral.
- Discovery rules apply in litigation.
- Often arbitrators do not understand the law or the evidence, or the ruling is simply wrong.
- Many arbitrators are biased in favor of “repeat clients” such as large corporations or law firms.
- It's difficult to constrain the Arbitrator to the arbitration agreement and limit his power.
- I prefer litigation because 1) there is a record; 2) rules of evidence matter; 3) the Judge has clerks and research staff; 4) I don't have to pay for the Judge's time; 5) the Judge has no profit incentive.

## **E. Conclusion**

If the direct question about whether the responding attorneys preferred litigation over arbitration was not enough to confirm that bias, the responses to the question asking for any additional reasons, discussed in Section D, above, certainly confirms that preference. What is particularly telling about the additional reasons given by the responding attorneys is that irrespective of whether they would recommend litigation over arbitration 50 percent of the time or 100 percent of the time, the additional responses show that 75 percent of the responding attorneys have a high level of suspicion or distrust about the arbitration process or have had very negative arbitration experiences.<sup>119</sup> It can be no coincidence that the 75 percent of respondents who provided additional responses corresponds almost directly with the 84 percent of attorneys who responded that they prefer litigation over arbitration.<sup>120</sup>

### **4. Misperceptions About Arbitration**

#### **A. No Right to Appellate Review**

In support of his or her preference for litigation over arbitration, one attorney wrote that the right to appellate review serves as a “cross-check” for “wacky decisions.” That may be true, but it is unlikely that 7,482 wacky decisions are being issued each year in California<sup>121</sup> because the reversal rate from those appeals is only between 10 and 20 percent.<sup>122</sup> Alternatively, if that many wacky decisions are being issued each year, then the appellate process is only redressing a small percentage of those decisions since the affirmance rate is between 80 and 90 percent each year.<sup>123</sup> Moreover, the survey results show that most attorneys are aware of the slim likelihood of achieving a reversal through an appeal,<sup>124</sup> which suggests that the real value of the right to appeal is strategic: *i.e.*, that it leaves the proceedings open and the ultimate outcome uncertain

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<sup>119</sup> Of the 113 attorneys who responded to the survey, 85 attorneys (or 75%) responded to the question regarding their reasons, in addition to appeal, for preferring litigation over arbitration.

<sup>120</sup> *See*, Table 9, *supra*.

<sup>121</sup> This number represents the average number of appeals filed in California over the past 10 years, based on the California Judicial Council’s data as summarized in Table 8, *supra*.

<sup>122</sup> *See*, Tables 7 and 8, *supra*.

<sup>123</sup> *See*, Tables 7 and 8, *supra*.

<sup>124</sup> *See*, Table 9, *supra*.

and perhaps creates an opportunity for the appellant to negotiate an out-of-court solution of the dispute with the appellee.

As mentioned in Section 2(B), in an effort to address the risk of unpredictable or biased decision-making, without sacrificing the benefits of arbitration, parties have tried contracting for expanded judicial review as part of their agreement to arbitrate.<sup>125</sup> Some courts, including the Ninth Circuit up until 2003,<sup>126</sup> have recognized those provisions based on a literal reading of the Supreme Court's decision in *Volt Information Sciences v. Board of Trustees*,<sup>127</sup> which held that parties may specify by contract the rules under which their arbitration will be conducted.<sup>128</sup> The Third, Fourth and Fifth Circuits have indicated that they are willing to honor contract provisions which expand judicial review beyond that provided by Section 10(a) of the FAA.<sup>129</sup> These circuits generally emphasize that the purpose of the FAA is to enforce the terms of private arbitration agreements, including terms specifying the scope of review of arbitral decisions. In

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<sup>125</sup> See, footnote 95, *supra*.

<sup>126</sup> In 1984, Kyocera Corporation ("Kyocera") entered into an agreement with Lapine Technology Corporation ("LaPine") to manufacture and supply computer disk drives. In May 1987, LaPine instituted proceedings in federal court seeking damages and an injunction compelling Kyocera to continue supplying disk drives under the alleged terms of the agreement. Kyocera moved to compel arbitration pursuant to the arbitration clause contained in the agreement. That motion was granted and in September 1987 an arbitration was convened. The arbitration panel determined that Kyocera had breached the agreement and that the breach was the proximate cause of damage to LaPine. Damages of \$243,133,881 were awarded, plus attorney's fees of \$14,500,000. Kyocera filed a motion in the district court seeking to vacate the award under the FAA and the additional review standards created under the agreement for vacatur "where the arbitrators' findings of fact are not supported by substantial evidence" or "where the arbitrators' conclusions of law are erroneous." The district court determined that it was bound to apply only the statutory grounds for review established under the FAA and refused to enforce the expanded judicial review provisions of the parties' agreement. A divided panel of the Ninth Circuit reversed the district court, holding that federal court review of an arbitration award is not necessarily limited to the standards set forth in the FAA, and remanded to allow the district court to apply the parties' contractually expanded standard of review of unsupported factual findings and errors of law. *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888, 891 (9th Cir. 1997) ("LaPine I"). On remand, the district court reviewed the arbitration decision according to the non-statutory standards specified in the parties' agreement and confirmed the award. Again, Kyocera timely appealed the district court decision to the Ninth Circuit. In 2002, a three-judge panel unanimously affirmed the district court's confirmation of the arbitration award. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 299 F.3d 769 (9th Cir. 2002) (LaPine II). Kyocera timely filed a request for rehearing en banc and, on December 17, 2002, the Ninth Circuit granted that request. The court of appeal then ordered and received supplemental briefing devoted entirely to the LaPine I issue of private parties' power to dictate the grounds for judicial review of an arbitration award and the ramifications thereof. On August 29, 2003, the Ninth Circuit affirmed the district court's confirmation of the arbitration award, but in so doing corrected the law of the circuit regarding the proper standard for review of arbitral decisions under the FAA. *Kyocera, supra*, 341 F.3d at 994.

<sup>127</sup> 489 U.S. 468.

<sup>128</sup> *Id.* at 478-479.

<sup>129</sup> See, footnote 95, *supra*.

the aforementioned circuits, the right to expanded judicial review of an arbitral award is currently available by contract.

As might be expected, the federal courts are split on the issue of whether private parties can expand or create judicial review of arbitral awards to allow some level of review for errors of fact and/or law. In contrast to the Circuits discussed above, the Seventh, Eighth, Tenth and, most recently, Ninth Circuits have severed and refused to enforce such clauses (or have hinted that they will do so) on constitutional grounds: namely, that the public cannot contract to expand appellate jurisdiction.<sup>130</sup> Additionally, the few state courts that have weighed in on this issue, California included,<sup>131</sup> have expressed the same concerns about allowing private parties to create or expand appellate jurisdiction.<sup>132</sup> In these jurisdictions and states, contracts seeking to create or expand judicial review of arbitral decisions will not be enforced.

Because the Supreme Court has yet to resolve the split among the circuits, relying on an arbitration clause in which the parties agree to expanded judicial review of the arbitral award is “chancy and unpredictable.”<sup>133</sup> However, contracting for appellate review within the arbitration process and without the involvement of the judiciary is a suggestion that was made by Judge Richard Posner in *Chicago Typographical Union v. Chicago Sun-Times* in 1991,<sup>134</sup> and has since been embraced by arbitrators and provider organizations alike.<sup>135</sup>

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<sup>130</sup> See footnote 95, *supra*.

<sup>131</sup> See, Crowell, *supra*, 95 Cal. App.4th 730 (interpreting the California Arbitration Act); CC Partners, *supra*, 101 Cal. App. 4th 635 (same); Little., *supra*, 29 Cal. 4th 1064 (same).

<sup>132</sup> See, *In re* County of Chemung, 277 A.D.2d 792 (N.Y. App. Div. 3d Dept. 2000) (interpreting New York’s arbitration statute); Dick v. Dick, 534 N.W.2d 185 (Mich. Ct. App. 1994) (interpreting Michigan’s Arbitration Act); Chicago, Southshore & South Bend R.. v. Northern Ind. Commuter Transp. Dept., 682 N.E.2d 156 (Ill. App. 1997), rev’d other grounds, 184 Ill. 151 (1998) (interpreting the Illinois Arbitration Act).

<sup>133</sup> Paul Bennett Morrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60-OCT Disp. Resol. J. 10 (2005) (“Morrow Article”); see also Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171, 173 (2003) (the legal status of such clauses remains uncertain).

<sup>134</sup> 935 F.2d 1501, 1505 (7<sup>th</sup> Cir. 1991).

<sup>135</sup> See, e.g., *Morrow Article*, *supra*, 60-OCT Disp. Resol. J. 10; JAMS Optional Arbitration Appeal Procedure (2003) (“JAMS Appeal Rules”), available at <http://www.jamsadr.com/rules/comprehensive.asp>; International Institute for Conflict Prevention and Resolution (“CPR”) Arbitration Appeal Procedure (“CPR Appeal Rules”), available at [http://www.cpradr.org/arb\\_appeal\\_intro.asp?M=9.7](http://www.cpradr.org/arb_appeal_intro.asp?M=9.7). The rationale behind the CPR Appeal Rules is that while that organization does not wish to encourage widespread appeals from arbitration awards, it nevertheless wants to “allay the concerns of attorneys and clients regarding the rare arbitration award that blatantly fails to apply the law or for which there is scant support in the record.” *Id.*

Most provider organization rules allow the parties to modify or supplement the rules that will govern their arbitration,<sup>136</sup> and should be flexible enough to allow the parties to agree to an appeal within the arbitration process. However, two ADR organizations have adopted formal rules that provide a formal structure for “internal” appellate review.<sup>137</sup> Those rules permit an appeal based on perceived errors of law and / or fact and, like the judicial appellate process, prescribe strict time frames and briefing requirements to prosecute such an appeal.<sup>138</sup> Like judicial appeals, the rules governing arbitral appeals authorize the appellate arbitrator to affirm, reverse or modify the original award based on an error of fact or law or because grounds for vacatur are found to exist. The arbitral appeal process requires the appellate arbitrator to prepare a written statement explaining the appellate decision. While there is very little literature and no case law on these “internal” arbitration appeals, it would appear that the decision reached by the appellate arbitrator should expedite the award confirmation process because, presumably, any vacatur issues would have been decided and that decision would have collateral estoppel effect in the court confirmation proceedings.<sup>139</sup>

Regardless of whether the challenge to an arbitration award is made in the courts on vacatur grounds or within the arbitration tribunal on error and vacatur grounds, the real problem for the party seeking such review is not so much the standard of review that is available to them, but the lack of a record concerning both the proceedings and the arbitrator’s reasoning process.<sup>140</sup> In a court of law, all proceedings are recorded in some fashion without the request or

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<sup>136</sup> Rule 2 of the JAMS Rules provides that parties “may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies . . . .” <http://www.jamsadr.com/rules/comprehensive.asp>. Rule R-1 of the AAA Commercial Rules provides that the parties “by written agreement, may vary the procedures set forth in these rules. . . .” <http://www.adr.org/sp.asp?id=22440>.

<sup>137</sup> JAMS Appeal Rules, available at <http://www.jamsadr.com/rules/comprehensive.asp>; CPR Appeal Rules, available at [http://www.cpradr.org/arb\\_appeal\\_intro.asp?M=9.7](http://www.cpradr.org/arb_appeal_intro.asp?M=9.7).

<sup>138</sup> *Id.*

<sup>139</sup> See, footnote 76, *supra*.

<sup>140</sup> See, e.g., *Atlas Floor Covering v Crescent House & Garden, Inc.*, 166 Cal. App. 2d 211, 215, 333 P.2d 194 (1958) (record of the arbitration proceedings presented to the trial court and then to the court of appeal was incomplete because there was a reporter’s transcript of only one of the two days of hearing and the transcript was not certified by the arbitrators as the official record of the proceedings). only In an arbitration proceeding, unless the parties make arrangements for a stenographic record, “the record” consists of the paperwork submitted by the parties, the interim award and the final order. The arbitrator’s notes, workpapers and mental deliberations are

special arrangements of any party. That is not true in arbitrations. In an arbitration, any party desiring a stenographic record must make arrangements and pay for the court reporter.<sup>141</sup> In order to constitute the “official record” of the arbitration proceeding, it must be provided to the arbitrator and made available to the other parties for inspection.<sup>142</sup> Moreover, in court proceedings, the parties can request findings of fact and conclusions of law or submit special interrogatories to the jury at the time of the evidentiary proceedings. That is not necessarily the case in an arbitration proceeding unless requested by both parties and agreed to by the arbitrator.<sup>143</sup> In cases involving high-stakes outcomes, complex factual issues, highly specialized areas of law or developing areas of law, the need for a record should be anticipated at the outset of the proceedings in order to assure that the level of review which is available in either forum is meaningful.

### **B. Arbitrators “Split the Baby”**

In response to the survey, several attorneys wrote that they do not like arbitration because arbitrators will “split the baby” rather than decide the merits of the case.<sup>144</sup> Many of these attorneys also wrote that they suspected that the reason why arbitrators “split the baby” is to curry favor with both sides by not deciding against them on all points in the hopes of being considered by both parties for future arbitration appointments.<sup>145</sup> As discussed in this section, there may be some misperception or misunderstanding concerning the guidelines and constraints which govern an arbitrator’s decision-making process.

With regard to the expressed concern that arbitrators decide matters by simply “splitting the baby,” such decision-making is contrary to an arbitrator’s code of ethics. For example, the AAA Code of Ethics for Arbitrators in Commercial Disputes requires that an arbitrator make a

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immune from discovery or disclosure. *See, e.g.*, AAA Commercial Rules, R-26. Similarly, the arbitrator is not obligated to render a “reasoned award” or to provide findings of fact or conclusions of law unless requested by the parties prior to the arbitrator’s appointment. AAA Commercial Rules, R-42.

<sup>141</sup> AAA Commercial Rules, R-26.

<sup>142</sup> *Id.*

<sup>143</sup> *See, e.g.*, AAA Commercial Rules R-42.

<sup>144</sup> *See*, Appendix 2.

<sup>145</sup> *Id.*

decision only “after careful deliberation,” that he or she “decide all issues submitted for determination,” and that he or she do so “justly” and by exercising “independent judgment.”<sup>146</sup> The Arbitrators Ethics Guidelines adopted by JAMS echo the AAA Code of Ethics and specifically add that an arbitrator’s award should not be influenced “by any interest in potential future case referrals by any of the Parties or counsel, nor should an arbitrator issue an Award that reflects a compromise position in order to achieve such acceptability.”<sup>147</sup>

With regard to the concern that arbitrators decide matters in a way that they hope will be acceptable to both parties so as to curry favor for future appointments, to the extent such decision-making conduct has occurred in the past, it should have been curtailed in California by the Ethics Standards for Neutral Arbitrators in Contractual Arbitration (“New Ethics Rules”), which became effective on July 1, 2002.<sup>148</sup> Prior to the adoption of the New Ethics Rules, a “rule of reasonableness” governed conflict of interest disclosures, meaning that the arbitrator only had a duty to use reasonable efforts to conduct a reasonable inquiry regarding conflicts of interest and to make disclosures to the parties regarding same.<sup>149</sup> This was a subjective standard that varied on a case-by case and arbitrator-by arbitrator basis and served to undermine public confidence in the neutrality of the arbitrators appointed to hear their matters. In 2001, the California Arbitration Act was amended to require that all persons serving as neutral arbitrators

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<sup>146</sup> Code of Ethics for Arbitrators in Commercial Disputes, American Arbitration Association, Canon V (2004), <http://www.adr.org/sp.asp?id=21958>.

<sup>147</sup> Arbitrators Ethics Guidelines, JAMS, Guidelines VIII, [http://www.jamsadr.com/arbitration/ethics\\_print.asp](http://www.jamsadr.com/arbitration/ethics_print.asp).

<sup>148</sup> Cal. R. Ct., Appendix, Div. VI (Thomson West 2006). In 2001, Section 1281.85 was added to the California Code of Civil Procedure and requires that all persons serving as neutral arbitrators in private arbitration matters comply with the New Ethics Rules. Cal. Civ. Proc. Code § 1285.85(a). It was through Section 1281.85 that the California Judicial Council was instructed to adopt ethical standards for all neutral arbitrators to become effective July 1, 2002. The disclosure and disqualification provisions of Section 1281.9 of the California Code of Civil Procedure were then expanded to include any ground specific for disqualification of judges under Section 170.1 of the California Code of Civil Procedure, as well as any matters required to be disclosed by the New Ethics Rules. Cal. Civ. Proc. Code § 1281.9. Finally Stats 2001, c. 362 (S.B. 475), § 5.

Those ethics standards are set forth in Division VI of the Appendix to the California Rules of Court. The new law significantly revised the disclosure requirements and procedures for disqualifying arbitrators in private arbitration matters, and went far beyond anything theretofore on the books regulating the private arbitration process. The new law was believed to be necessary due to what the California Legislature perceived to be a lack of public confidence in private arbitration, which perception was at odds with the general purpose of arbitration law which is to “advance arbitration as an alternative to litigation.” Roger Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 2003 Pepp. Disp. Resol. L. J. 1, 3 (2004).

<sup>149</sup> Stephen B. Goldberg, Frank E. A. Sander, Nancy H. Rogers, Sarah Rudolph Cole, *Dispute Resolution / Negotiation, Mediation and Other Processes* (Aspen 4th ed 2003), p. 279.

in private arbitration matters comply with the New Ethics Rules.<sup>150</sup> The California Arbitration Act was further amended to add a provision which vests the parties with the power to disqualify an arbitrator without concurrence by a court or other supervising body.<sup>151</sup> If an arbitrator makes an award and either fails to make the required disclosures or fails to disqualify himself or herself upon receipt of a timely demand by one of the parties, the award must be vacated.<sup>152</sup> Under the New Ethics Rules and amended vacatur provisions, it is unlikely that an arbitrator will receive successive appointments unless he or she conducts arbitration proceedings fairly as to all parties and decides the matter on the merits.

### C. **Arbitrators do not Follow the Law**

In response to the survey, one attorney wrote that “arbitrators do not understand the law . . . or the ruling is simply wrong.” This sentiment was echoed by a number of other responding attorneys who felt that arbitrators lacked knowledge of, misunderstood or misapplied the law in reaching their decision. One of the things these comments reveal is that attorneys tend to generalize their concept of what law is into something that is perhaps static, easy to define and generally recognized and accepted. Black’s Law Dictionary defines law elusively as a “body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them.”<sup>153</sup> Another definition of law was offered by Justice Oliver Wendell Holmes, who stated that “the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>154</sup> Neither definition of what constitutes “the law” is enlightening. It is submitted that the definition of law is more of a guiding principal in which the concept of law may be widely accepted, but what underlies the law remains disputed

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<sup>150</sup> Cal. Civ. Proc. Code § 1285.85(a). It was through Section 1281.85 that the California Judicial Council was instructed to adopt ethical standards for all neutral arbitrators to become effective July 1, 2002. The disclosure and disqualification provisions of the California Arbitration Act were then expanded to include any ground specific for disqualification of judges under Section 170.1 of the California Code of Civil Procedure, as well as any matters required to be disclosed by the New Ethics Rules. Cal. Civ. Proc. Code § 1281.9.

<sup>151</sup> Cal. Civ. Proc. Code § 1281.91. In this regard, an arbitrator is required to disqualify himself or herself upon the demand of any party. *Id.*

<sup>152</sup> Cal. Civ. Proc. Code § 1286.2(a)(6); *see*, footnote 87, *supra*.

<sup>153</sup> Black’s Law Dictionary (8th ed. 2005).

<sup>154</sup> Oliver Wendell Holmes, *The Path of Law*, 10 Harv. L. Rev. 457, 461 (1897).

and difficult to define.<sup>155</sup> The above comments suggest that there is an easily defined, accepted and recognized “legal standard” and that simply is not true. While the tenet of the law may be accepted in principal, the application of the law will vary from case to case, whether in a court of law or an arbitral tribunal. That is a reality for disputants and their counsel because in any tribunal decisions are made by people, not machines.

The above comments and concerns correctly recognize that, in terms of legal precedent, arbitrators have greater latitude to grant relief from that which is available in a court of law,<sup>156</sup> and are not bound or restricted by legal precedent.<sup>157</sup> That being said, it is generally accepted that arbitrators are expected to temper their broad decision-making authority so as to not offend public policy, violate statutory or common law, or otherwise transcend the limits of the parties’ arbitration agreement or the matters submitted for decision.<sup>158</sup> The flexibility an arbitrator has in deciding a matter points up the need for counsel to take an active role in selecting an arbitrator to hear a given matter. In this regard, the comments suggest that responding attorneys may not appreciate the power they have to select their decision-maker<sup>159</sup> and thereby direct or influence the quality of the outcome in their client’s case. Under some provider rules, the parties may directly name the arbitrator or specify the criteria to be utilized in selecting arbitrator candidates for appointment.<sup>160</sup> Where the parties need help in identifying candidates, some provider organizations have administrative staff available to work with counsel to develop a list of criteria that can be used to develop a list of potential arbitrators satisfying the parties’ criteria for an ideal arbitrator.<sup>161</sup> Moreover, for large, complex disputes, the AAA offers an Enhanced Neutral

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<sup>155</sup> Rex R. Perschbacher and Debra Lyn Bassett, *The End of Law*, 84 B.U. L. Rev. 1 (2004), pp. 10-32.

<sup>156</sup> Donald L. Carper, *Remedies in Business Arbitration*, Arbitration Journal, Vol. 46, No. 3 (September 1991), as reprinted in AAA Manual, pp. 173-181 (“Carper Article”).

<sup>157</sup> Steven Alan Childress & Martha S. Davis, *Federal Standards of Review*, § 6.01 (3d ed. 1999), pp. 6-9 (“Childress Article”). As early as 1859, the California Supreme Court recognized that arbitrators are not bound by “principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].” Muldrow, *supra*, 2 Cal. at 77. More recently, two authorities noted that the traditional doctrine *stare decisis* does not apply to arbitrators; that they “are free to substitute their concepts of fairness for the law.” Childress Article, *supra*.

<sup>158</sup> Lawrence v. Flazarano, 402 N.E.2d 1017 (Mass. 1980).

<sup>159</sup> *Id.*

<sup>160</sup> *See, e.g.*, AAA Commercial Rules, R-12; JAMS Rules, Rule 15.

<sup>161</sup> *See, e.g.*, AAA Commercial Rules, R-11; Moxley Article, *supra*, 60-OCT Disp. Resol. J. at 25.

Selection Process which gives the parties an opportunity to interview potential arbitrator candidates as part of the selection process.<sup>162</sup> While an arbitrator's decision-making authority may be broadly defined under the law, the parties in an arbitration have an opportunity to counter that perceived deficiency through the arbitrator selection process. However, for the selection process to end with the appointment of a qualified arbitrator, the parties' attorneys must understand the strengths and weaknesses of their clients' case at the outset, which is a very different situation from that encountered in litigation where the decision-maker is not appointed until the matter has been investigated and prepared and is ready to proceed to trial.

One final insight provided by the above comments is that the responding attorneys may not appreciate the arbitrator's source of decision-making power. The first source of authority is the parties' arbitration agreement, which may be broadly or generically stated.<sup>163</sup> The second source of power comes from the parties' statement of the issues in their submission agreement, which statement can be refined and narrowed at the preliminary hearing.<sup>164</sup> Arbitration agreements are creatures of contract and must be analyzed and enforced as such. It follows, therefore, that an arbitrator's power derives from and is limited by the agreement to arbitrate, and that the parties are free to fashion agreements that restrict the arbitrator's authority to decide certain matters, as well as the arbitrator's discretion in fashioning an award.<sup>165</sup>

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<sup>162</sup> See, e.g., Fact Sheet / Enhanced Neutral Selection Process for Large Complex Cases (American Arbitration Association), <http://www.adr.org/si.asp?id=1639>.

<sup>163</sup> Carper Article, *supra*, AAA Manual, p. 173. "[T]he parties may narrowly limit arbitrability or they may comprehensively provide that all disputes, whether arising under the terms of the contract or growing out of their relationship – even through not cognizable in a court of law or equity – may be referable to arbitration." *Layne-Minnesota v. Regents of the University of Minnesota*, 123 N.W.2d 371, 288-289 (Minn. 1963).

<sup>164</sup> See, footnote 86, *supra*.

<sup>165</sup> See, Moncharsh, *supra*, 3 Cal. 4th at 8-9. Parties are free to fashion agreements that restrict the arbitrator's authority. *California Faculty*, *supra*, 63 Cal. App. 4th at 944; *O'Flaherty v. Belgum*, 115 Cal. App. 4th 1044, 1055-1056, 9 Cal. Rptr. 3d 286 (2004) (same). "[A]n arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law." *Jordan v. Dept. of Motor Vehicles*, 100 Cal. App. 4th 431, 444, 123 Cal. Rptr. 2d 122 (2002). See also, footnote 170, *infra*.

#### **D. Arbitrators do not Follow Evidentiary Rules**

In response to the survey, several attorneys responded that they do not like arbitration or are not comfortable with it as a process because the rules of evidence are not applied. These comments correctly recognize that state and federal rules of evidence do not govern the admissibility or exclusion of evidence in arbitration proceedings, unless the parties have expressly so agreed.<sup>166</sup> In this regard, the California Arbitration Act provides that the parties to an 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 procedure need not be observed.”<sup>167</sup> That being said, what constitutes evidence is not really a matter of rule. Evidence is testimony, documents and tangible objects that tend to prove or disprove the existence of an alleged fact,<sup>168</sup> and parties to an arbitration must present that which qualifies as evidence to support their claims and defenses.<sup>169</sup> To the extent that parties offer something other than evidence, the arbitrator does not have to go through the formality of excluding it. He or she can simply disregard it in rendering a decision.

Even though parties have wide latitude with respect to the evidence they can offer in an arbitration proceeding, the arbitrator can exclude evidence that is cumulative, repetitive, irrelevant or immaterial, provided that all parties are afforded a fair opportunity to present their case.<sup>170</sup> Moreover, in the context of a breach of contract dispute, the arbitrator may be required to exclude extrinsic evidence if the contract at issue contains an explicit integration and merger clause.<sup>171</sup> When called upon to exclude evidence, arbitrators are understandably conservative in

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<sup>166</sup> All questions as to the admission or rejection of evidence, as well as the credit due to evidence, and the inferences to be drawn from it, are matters for the arbitrator to decide in the exercise of his or her judgment. 4 Am. Jr. 2d Alternative Dispute Resolution § 190 (2005). Arbitrators need not adhere to the rules of evidence applicable in courts of law. *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096, 1106, fn. 12, 47 Cal. Rptr. 2d 650 (1995).

<sup>167</sup> Cal. Civ. Proc. Code § 1282.2(d). This manner of conducting an arbitration and receiving evidence is echoed in AAA Commercial Rules, R-31 and in JAMS Rules, Rule 22(d).

<sup>168</sup> *See*, Black’s Law Dictionary, *supra*.

<sup>169</sup> *See, e.g.*, AAA Commercial Rules, R-30(a).

<sup>170</sup> *Id.*; JAMS Rules, Rule 22(d).

<sup>171</sup> *See, e.g.*, *Bonshire v. Thompson*, 52 Cal. App. 4th 803, 60 Cal. Rptr. 2d 716 (1997). In *Bonshire*, the parties inserted a clause in their contract which stated that “no extrinsic evidence whatsoever may be introduced in any judicial or arbitration proceeding . . . involving this agreement.” *Id.* at 806. At the arbitration hearing and over the parties’ objection, the arbitrator considered evidence of a pre-contract understanding between the parties in order to

making such rulings because one statutory ground for vacatur of an award is “the refusal of the arbitrators to hear evidence materials to the controversy.”<sup>172</sup>

For the trial lawyer who finds himself or herself in the arbitral forum, the opportunity to shape the case by seeking to exclude evidence are minimized because arbitration “has a life of its own outside the judicial system”<sup>173</sup> and operates under different, perhaps more liberal, rules of procedure and evidence. At the end of the day, however, both systems seek to find the truth and to decide the dispute on its merits. Rather than looking to exclude evidence, counsel in an arbitration matter should instead focus the arbitrator’s attention on the ultimate issues to be decided and direct the arbitrator’s attention to the evidence that is relevant / material to that inquiry and that which is not. In litigation, the objective may be to have the opposing party’s evidence excluded per the rules of evidence. In arbitration, that evidence comes in and the objective is to then question the sufficiency of the opposing party’s evidence or the weight it should be given as compared to other, arguably more credible, evidence.

#### **E. There is no Discovery in Arbitration**

In response to the survey, several attorneys responded that one of the reasons they prefer litigation over arbitration is because there is no discovery in arbitration. While it is true that the general rule is that discovery in aid of arbitration is not allowed under California or federal law,<sup>174</sup> there are several exceptions which afford discovery for specific types of disputes. For example, parties who agree to arbitrate wrongful death or personal injury claims have the same discovery rights and obligations as in civil actions, except that depositions may not be taken

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define an ambiguous term in the contract and to supply a missing term. *Id.* at 808. The court emphasized that “the parties may contract to limit the powers of an arbitrator” and had specifically done so “by prohibiting the introduction of, and reliance on, extrinsic evidence.” *Id.* at 810-811. The court vacated the award, concluding that “when the arbitration clause of a contract specifically prohibits the arbitrator from considering extrinsic evidence, the arbitrator acts in excess of his or her powers in receiving such evidence, over objection, and using it as a basis for the ensuing award.” *Id.* at 805-806.

<sup>172</sup> Cal. Civ. Proc. Code § 1286.2(a)(5). Courts do not interfere with materiality determinations made by private arbitrators. Moncharsh, *supra*, 3 Cal. 4th at 9-10; Jones v. Humanscale Corp., 130 Cal. App. 4th 401, 409, 29 Cal. Rptr. 3d 881 (2005). Courts may only consider whether an arbitrator’s decision to exclude evidence resulted in “substantial prejudice” to a party; whether the arbitrator might well have made a different award had the evidence been allowed. Hall v. Superior Court, 18 Cal. App. 4th 427, 436, 22 Cal. Rptr. 2d 376 (1993).

<sup>173</sup> Byerly v. Sale, 204 Cal. App. 3d 1213, 1316, 251 Cal. Rptr. 749 (1988).

<sup>174</sup> E. I. Niles, *The California Arbitration Handbook*, § 12.02, pp. 12-1 to 12-2, § 17.07, p. 17-4 (1998).

without prior leave of the arbitrator.<sup>175</sup> Similarly, in arbitration matters involving uninsured and underinsured motorist coverage claims between insureds and their insurers, full discovery rights apply.<sup>176</sup> A certain level of discovery is available in employer-employee disputes involving an arbitration clause in a pre-employment agreement. In these cases, the employer is deemed to have impliedly consented to sufficient discovery so as to enable the employee to vindicate certain statutory and common law claims.<sup>177</sup> Finally, because arbitration is a creature of contract, the parties are free to define in their agreement the extent of discovery to be had in an arbitration proceeding. In these circumstances, the extent to which parties will be allowed to obtain discovery will be a function of the arbitration agreement, any applicable arbitration rules and the temperament of the arbitrator(s).<sup>178</sup>

Absent an agreement, there are cases which say that discovery is available only if extraordinary circumstances are found to exist,<sup>179</sup> and that a party's alleged need for discovery in order to develop evidence to prove its claims does not qualify as an extraordinary circumstance that will permit discovery.<sup>180</sup> However, the more reasoned view of practicing arbitrators is to allow discovery where it is needed so as to afford all parties a full and fair exploration of the

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<sup>175</sup> Section 1283.05 of the California Code of Civil Procedure provides that depositions may be taken and discovery may be had in arbitration proceedings in accordance with the Discovery Act, subject to a few limitations. Cal. Civ. Proc. Code § 1283.05. Section 1283.1(a) of the California Code of Civil Procedure then provides that all of the provisions of Section 1283.05 shall be “conclusively deemed to be incorporated into” every agreement to arbitrate wrongful death or personal injury claims. Cal. Civ. Proc. Code § 1283.1(a).

<sup>176</sup> Cal. Ins. Code § 11580.2(f).

<sup>177</sup> *Armendariz v. Foundation Health Psych-care Services, Inc.*, 24 Cal. 4th 83, 105, 99 Cal. Rptr. 2d 745 (2000) (“*Armendariz*”) (employment discrimination claim under FEHA); *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 180, 116 Cal. Rptr. 2d 671 (discrimination and other claims under the Labor Code); Little, *supra*, 29 Cal. 4th at 1081 (claim for wrongful termination in violation of public policy under arbitration agreement that expressly provided for discovery). The discovery required in these cases, however, may be “something less than the full panoply of discovery” allowed in the civil litigation context. *Armendariz, supra*.

<sup>178</sup> Sean T. Carnathan, *Discovery in Arbitration? Well, it depends . . .*, American Bar Association, Business Law Today Vol. 10, No. 4 (March / April 2001), <http://www.abanet.org/buslaw/blt/bltmar01carnathan.html> (“Carnathan Article”).

<sup>179</sup> *Prograph Int'l, Inc. v. Barhdt, Prograph Int'l, Inc. v. Barhdt*, 928 F.Supp. 983, 992 (N.D.Cal. 1996), citing William W. Schwarzer, A. Wallace Tashima and James M. Wagstaffe, *California Practice Guide: Civil Procedure Before Trial*, § 16:115.5 (1996).

<sup>180</sup> *Id.* While there is no clear definition of what will qualify as substantial need to warrant discovery in aid of arbitration, it would appear that, at a minimum, a party must demonstrate that the information it seeks is not otherwise available. *Comsat Corp. v. Nat'l Science Foundation*, 190 F.3d 269, 278 (4th Cir. 1999) (“*Comsat*”).

issues in dispute.<sup>181</sup> In this regard, a finding of substantial need involves two factors. The first is the nature, relevance and importance of the proposed discovery, and the second is the ability to obtain the facts or documents from other sources within a party's control.<sup>182</sup>

The real problem encountered with respect to discovery in aid of arbitration concerns that which is directed against third parties.<sup>183</sup> The FAA provides that an arbitrator may summon "any person to attend before them" and to bring with them "any book, record, document, or paper which may be deemed material."<sup>184</sup> Similarly, the California Arbitration Act grants an arbitrator the power to issue a subpoena requiring the attendance of witnesses and the production of documents at an arbitration proceeding.<sup>185</sup> With the exception of the special types of proceedings described at the beginning of this section, there is no statutory authority empowering an arbitrator to order nonparties to appear at depositions or to demand that nonparties provide the litigating parties with documents during prehearing discovery. In terms of the plain wording of the arbitration statutes, an arbitrator's power over nonparties is limited to requiring witnesses to appear and produce documents at the arbitration hearing; it does not encompass prehearing discovery.<sup>186</sup> That being said, a number of federal courts have held that an arbitrator has implicit power under the FAA to require a third party to testify at a deposition and to issue subpoenas for

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<sup>181</sup> Alfred G. Feliu, *Discovery in Arbitration / How Much is Enough?*, ADR Currents, Vol. 4, No. 1 (March 1999), reprinted in *References for Commercial Arbitrators*, Arbitrator II Advanced Case Management Issues, American Arbitration Association (2004) ("AAA References Manual"), pp. 111-113. There is a tension between a litigator's expectation of full discovery and arbitration's twin goals of providing for a speedy, cost-effective resolution and the arbitrator must balance the parties' need to discover information and documents against the aims of arbitration. *Id.*

<sup>182</sup> *See, e.g.*, *Suggs v. Whitaker*, 152 F.R.D. 501, 507 (M.D.N.C. 1993).

<sup>183</sup> At common law, an arbitrator was without power to compel attendance of witnesses. Arbitrators thus have no common law authority to compel nonparties to attend depositions or produce documents. Moreover, the power to issue subpoenas is a legal power, statutorily defined and enforceable by contempt, which is a court process. As such, parties cannot contract to give an arbitrator subpoena power over third parties. 2 *Commercial Arbitration*, § 91:5 (2006). *See also* Carnathan Article, *supra*; 1 *Alt. Disp. Resol.* § 8:22 (3d ed. 2006).

<sup>184</sup> 9 U.S.C. § 7.

<sup>185</sup> Cal. Civ. Proc. Code § 1282.6(a).

<sup>186</sup> In reference to this statutory wording, several courts have adopted the view that the FAA does not authorize arbitrators to issue subpoenas for discovery depositions against third parties. *See, e.g.*, *ATMEL Corp. v. LM Ericsson Telefon, AB*, 371 F.Supp. 2d 402 (S.D.N.Y. 2005); *Odfjell ASA v. Celanese AG*, 328 F.Supp. 2d 505 (S.D.N.Y. 2004); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 (D.Minn. Jan. 9, 2004); *Comsat, supra*; *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F.Supp. 69 (S.D.N.Y. 1995). The rationale for constraining an arbitrator's subpoena power is that parties to a private arbitration agreement bargained for a more efficient and cost-effective resolution of their disputes, which means limited discovery.

the production and review of documents before the hearing.<sup>187</sup> In keeping with this apparent move to construe the arbitration process as something more akin to traditional, litigation, extensive revisions have been proposed to the Uniform Arbitration Act,<sup>188</sup> which include express provisions for depositions, the subpoena of witnesses and the use of any other discovery process that may be appropriate to the resolution of the dispute.<sup>189</sup>

### **G. Conclusion**

Arbitration is a dispute resolution process that operates outside the court system and, for the most part, involves the courts only when arbitral orders or awards are sought to be enforced through the legal process. While it is an adjudicatory process, arbitration is not litigation. It is an alternative to litigation. However, as the comments in the preceding sections illustrate, many of the criticisms concerning the arbitration process stem from comparisons to the traditional litigation process and the perceived shortcomings that exist because arbitration is not governed by the same doctrines, rules or procedures. The object of the discussion in the preceding sections was not to validate or repudiate any particular criticism. Rather, the purpose was to offer a perspective for consideration: namely, that unlike the litigation process which is directed by a judge and governed by rules and procedures set by the legislature and courts, arbitration is a private process that is directed by the parties and governed by whatever procedures they want to govern the determination of their disputes.<sup>190</sup> In this regard, many of the perceived ills identified by the responding attorneys could be remedied by the parties' agreement to arbitrate, by their

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<sup>187</sup> *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F.Supp. 878 (N.D.Ill. 1995), remanded 95 F.3d 562 (7th Cir. 1996); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D.Fla. 1988); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D.Tenn. 1994).

<sup>188</sup> See Revised Uniform Arbitration Act ("RUAA"), <http://law.upenn.edu/bll/ulc/uarba/arbitrat1213.html>.

<sup>189</sup> RUAA, § 17(a) and Comment. The Uniform Law Commissions promulgated the original Uniform Arbitration Act ("UAA") in 1955. The UAA has been adopted in 49 jurisdictions. The primary purpose of the USS is to advance arbitration as a desirable alternative to litigation. The Uniform Law Commissioners feel that a revision to the original UAA is necessary "in light of the ever-increasing use of arbitration and the developments of the law in this area." [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-aa.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-aa.asp).

<sup>190</sup> As noted by one court:

"[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."

*Baravati v. Josephthal, Lyon & Ross, Inc.*, 38 F.3d 704, 709 (7th Cir. 1994).

statement of the submission to arbitration, by the selection of the arbitrator(s) and by reorienting the preparation and presentation of their cases to vacatur grounds which, unfortunately, serve as a backdrop to how many aspects of an arbitration are administered.

## **5. Concluding Remarks**

The survey which served as the foundation for this paper provided information and insight into attorney perceptions about the arbitration process beyond anything anticipated at the outset of this effort. That the responding attorneys favored litigation over arbitration was no surprise, but it was a surprise that they placed a high value on the right to appeal as part of the reason for that preference even though hard statistics and their own beliefs showed that the likelihood of obtaining a reversal of a challenged decision is only about 10 percent. This suggests that the perceived value of appellate review is more strategic than substantive. To that end, the same strategic advantage exists in arbitration by challenging confirmation of an arbitration award on vacatur grounds and taking an appeal of the decision on that matter.

With regard to the responding attorneys' other reasons for preferring litigation over arbitration, it was a surprise to learn that an overwhelming majority of the participants held such a broad assortment of negative perceptions about the arbitral process. To be sure, the arbitration process is very different from litigation, but its objective is the same: to provide parties with a full and fair hearing and to then make a decision that resolves the dispute based on the evidence presented. To the extent that the arbitration process has perceived weaknesses, it is submitted that many of them are party-controlled and can be remedied through the wording of the parties' agreement to arbitrate, through the statement of their submission to the arbitrator(s) and through their selection of the arbitrator(s).