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Hon. Linda B. Quinn (Ret.)

Dust off the toolbox to move your case along

Judicial referees can help you better cope with courtroom delays

During the 10 years I was a civil litigator, a metal box holding 3" x 5" cards had a prominent place on the desk of the senior partner's secretary. Attorneys were instructed by that formidable authority that a 3" x 5" card must be created for every case, calendaring a date five years hence. That far-away date triggered a drop-dead day when trial must begin or the case was automatically dismissed by statute. Bumping up against the five-year deadline was reality in every case. I spent many Friday mornings at master calendar call knowing a courtroom would not be available, but being ready for trial "just in case." Coded entries on billing records included one for trial prep and a different code for "trial re-prep." The billing records for cases were blighted with charges for "trial re-prep" because of courts' inability to provide courtrooms for trial.

Shortly after I joined the bench, the age of fast-track litigation dawned and cases were tried within 12 to 24 months of filing. Several generations of attorneys today have never known that critical step of calendaring the five-year date in the tickler system.

The bad, old days are upon us again in the world of litigation. Budget cuts in the hundreds of millions of dollars have resulted in courtrooms being shuttered and moth-balled, court staffing slashed by firings and attrition, and elimination of critical resources. These conditions are not only yesterday's news, they are the new normal. Chaos management is the rule of the day. Reports of draconian changes in courts are floated, then re-retooled, then implemented, then modified, then a new round of budget slashes cause courts to go back to revise the plan.

No bad news – please!

Clients don't want to hear bad news about their case. They really don't want to hear that the logistics of presenting

See Quinn, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2013 Issue

their case are subject to fickle budget plans. Clients don't want to hear the negative impact on their civil case is exponentially higher because of the statutorily and socially mandated priority of criminal, juvenile and family-law cases. This bleak environment leads the average client to send screeching e-mails and voice messages with the following themes: "What do you mean the motion you convinced me to pay for can't be heard for five months?" "What do you mean the opposition hasn't followed the rules on responding to discovery just because they don't have to without me paying for a motion to compel that won't be heard for six months??" "What do you mean my trial date was vacated???" "What do you mean my case was transferred downtown????"

These times have inspired our Chief Justice to say we may be facing a "civil rights' crisis" in the function of delivering justice to all. Such a statement of impending doom doesn't engender trust and confidence for clients entering this vortex of chaos.

Looking for a sharper tool?

The time has arrived to dust off our toolbox and pull out tools for the timely and effective presentation of cases to a trier of fact while preserving opportunities to appeal. An underused tool that may help regain some control over your case is a judicial reference to a referee. The tool of any private-judging protocol must initially address three public policies. The first is a judge's limited ability to delegate court functions. The second is the public's right of access to court proceedings, and the third is preserving appellate rights from a trial court's ruling.

There are two avenues that lead to the appointment of a referee under the judicial reference framework. The non-consensual route is found at Code of Civil Procedure section 639 and the consensual path starts at Code of Civil Procedure section 638. While the consensual path is where this article strives to point the reader, a review of the non-consensual opportunities is first presented.

No thanks – not interested

When parties do not consent to the appointment of a judicial referee, a judge's authority to appoint a referee, either by motion of a party or on the court's own motion, is limited to:

- When the case requires examination of a long account, a referee may be appointed to report on a specific fact or decide the entire issue;
- When an account is necessary before judgment, or for implementing a judgment or order;
- When a question of fact, other than upon the pleadings, arises at any stage of litigation;
- When necessary for information of the court in a special proceeding;
- When necessary to resolve disputes regarding discovery.

The written order must include the basis for the necessity of the appointment, the scope of the appointment, the name of the referee, and a finding that no party has established an economic inability to pay for the referee or that a party has established an inability to pay its pro rata share of the fees and another party has voluntarily offered to pay the additional share of the referee's fees. California Rules of Court, rules 3.920, et. seq. provide more specifics in the serpentine route toward the non-consensual appointment of a referee.

Once you have brought a successful motion for appointment of referee for one of the limited purposes described above, the product of the referee is only advisory. The court may adopt the referee's recommendations only after independently considering the referee's recommendations and objections to the recommendations. Even when no objections to the recommendation are filed, the court must independently review the recommendation. The use of a non-consensual referee remains a limited tool to be used primarily for discovery hurdles or accounting cases rivaling the task of state budget officers looking for funds to run a judiciary.

Hmmm – maybe this can be mutually beneficial

Judicial referees appointed by the consent of the parties have broad powers that can allow your case to escape the increasing challenges of being within the confines of resource-starved courts. A judge may appoint a referee on the stipulation of parties to hear and determine any and all issues in an action, whether of fact or law, and issue a statement of decision or ruling. (Code Civ. Proc, § 638.) A referee may also be appointed upon the motion of a party to a written contract that provides any controversy arising from it will be heard by a referee. (*Ibid.*) The decision of a referee appointed under section 638, that is, by consent of the parties, may be reviewed on appeal as if made by the trial court. (Code Civ. Proc., § 645.)

A review of literature on judicial references reflects some confusion as to which rulings of a referee are advisory and which are binding. As shown below, this writer concludes that a consensual reference of either all or a portion of a case results in the referee's decision being binding and available for appellate review. A non-consensual reference is limited to the topics specifically described in section 639 and the referee's decisions under section 639 are advisory only to the trial court with the trial court being required to independently review the referee's recommendations.

Section 644, subd. (a) states:

> In the case of a consensual general reference pursuant to section 638, the decision of the referee ... upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.

The word "general" is not found in any other section of the Code of Civil Procedure relating to judicial references. The term has been described by some writers as synonymous with "for all purposes." It has prompted the erroneous

See Quinn, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2013 Issue

use of the term "special" reference to refer to a consensual reference for less than all purposes of a case, such as for a single motion, in spite of the fact that the term "special reference" is not used in the Code, either in the context of consensual or non-consensual references.

Section 644, subd. (b) states:

> In the case of all references, decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations, in whole or in part, after independently considering the referee's findings and any objections and responses thereto filed with the court.

A review of the code sections and cases support a conclusion that consensual reference of a portion of a case for less than all purposes can avoid the limitation of a referee's ruling being only advisory and subject to the time consuming independent review of the judge. A consensual reference may segregate specific motions from the case and allow a referee to make binding determinations on segregated elements of the case.

Two cases are instructive in the interpretation of the term "general" as used in section 644, subd. (a). In *Aetna Life Insurance v. Superior Court of San Diego* (1986) 182 Cal.App.3d 431, the trial court assigned all law-and-motion to a referee without written consent of the parties. The appellate court swiftly reached the conclusion that such a practice was decidedly outside the scope of section 639, describing permissible non-consensual references. The opinion leaves no doubt the court did not interpret a "general" reference to be one synonymous with "for all purposes." It held, "A court has no power to make an uncontested-to general reference, which conclusively decides all or part of a matter; …such a general reference is not authorized pursuant to Code Civ. Proc., § 638, except by explicit agreement of the parties." (*Ibid.*)

In *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, the court addressed the topic of appointing referees without consent of the parties for law-and-motion matters. Again, the practice was quashed and the court discussed the scope of appointments of referees with the consent of the parties. "A 'general' reference is conducted pursuant to section 638 … which authorizes the trial court to refer any or all issues to a referee for trial and determination, provided that the parties have agreed thereto in an agreement filed with the clerk or judge or entered in the minutes or docket…The finding and determination of the referee upon the whole issue must stand as the finding of the court and judgment may be entered thereon in the same manner as though the matter had been tried by the court." (*Id.* at 1522, citations omitted)

Although there have been articles written which argue only consensual references of the entire case avoid the onerous and time consuming requirement of an independent review by the judge, the above discussion supports the practice of consenting to a referee for select portions of a case without the referee's ruling being only advisory and subject to an independent review by the judge.

Come on – give it a try

This discussion has likely done nothing but set your thoughts in the direction of "What good is this to me? – I'll never get that foot-dragging opposing counsel to take any part of this case outside to a private referee." Opposing counsel may react suspiciously. Starting with the premise that his or her case has the slow oar in the water and no impetus to speed up the case, the creative opposing counsel's resistance will appear to be boundless.

Polish up your power of persuasion with a comprehensive proposed Stipulation for Appointment of Referee. The proposal should first cover issues that must be protected in any reference. Specify the ethical obligations of the referee under California Judicial Canons of Ethics, subdivisions (D)(2)(f) and (g) and California Rules of Court 3.924(b)(2) requiring disclosure of personal and professional relationships and potential conflicts. This may also be an area to offer an expansion of the disclosure requirements, for the comfort of opposing counsel.

A referenced matter is subject to the public policy of making proceedings open to the public. Your proposed stipulation should describe that mechanism. Include in your proposal the provision that all pleadings will be filed concurrently with the court, showing place, date and time of any hearings in the referenced matter. A public policy that must be protected is the public's access to legal proceedings. Confirm with your potential referee his or her ability to conduct hearings at locations with access by the public. Confirm with courts how referenced matters will be noticed to the public and include these terms in the proposed stipulation, not only for the comfort of opposing counsel, but for the judge who will be considering your Stipulation for Appointment of Referee. Check what your jurisdiction is doing with empty courtrooms. Although most potential referees will have accommodations for any members of the public to attend hearings, those empty courtrooms may be available for hearings on referenced matters.

Do the reconnaissance and preparation to support a comprehensive proposed stipulation to opposing counsel. Include the enticements of less formal communication with a referee, e-mail letter briefs, greater use of telephone conferences, quicker access to a referee than a judge and a more streamlined presentation of evidence. These are points that may be persuasive to the attorney with even the slowest oar in the water.

The ability to choose a referee can either be a selling point or one where opposing counsel may prefer to not take responsibility. Consider either an agreement to a specific selected referee or a suggestion the judge choose and appoint a referee upon each counsel's nomination of up to three potential referees to the court.

Parties retain appellate rights following decisions by referees appointed by consent or stipulation. Propose the manner of reporting referenced proceedings. You have options of being innovative and cost-effective. While an appeal from a

See Quinn, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2013 Issue

trial of a referenced matter will be heard on a Statement of Decision or Settled Statement without a transcript of the proceedings, consider a court reporter or digital recording for the purpose of providing the referee a full transcript from which a complete and thorough Statement of Decision or ruling can be prepared. Set aside fears of presenting a less than adequate record to a Court of Appeal by identifying attorneys' expectations of the referee regarding the content of the Statement of Decision. Check with your Court of Appeal regarding what type of record it prefers in all reference matters.

Include the specific scope of the referee's appointment. If it is for a single law-and-motion matter, retain referee powers through any potential motion for reconsideration. If the scope of the appointment is for a trial, preserve referee powers to address post-trial matters, such as motions for new trial. Always address the cost of the reference. In the absence of an agreement, the court may order referee fees paid in any manner deemed "fair and reasonable." (Code Civ. Proc., § 645.1.)

Dig deep in the toolbox

Innovative uses of the consensual judicial reference will depend on the particular crises in your jurisdiction. Your court may not be able to adequately provide trial courtrooms. It may be able to get a case to trial, but not schedule a motion for five to six months, derailing your litigation plan. Your case may be dependent on specific facts that benefit the case by an early determination. Keep in mind there is nothing in the Code of Civil Procedure or the California Rules of Court that limit references to only non-jury trials. There are many resources available today in which to conduct private jury trials whose verdicts can be reviewed on appeal.

Innovation starts with preparation. A proposal for Stipulation for Appointment for Judicial Reference may be just the tool to pull out of your toolbox and present to cooperative or persuadable opposing counsel with his or her own litigation challenges in the face of the ever changing war zone of financially weary courts.

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