

THE RECORDER

Judicial Reference, A Forgotten Tool

To avoid common delays in traditional litigation, parties can rely on referees to resolve some, or all, of the claims

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Let's say you're a rising star in your firm, and you're looking for a way to break out of the pack. Your clients are frustrated by the glacial speed with which their case is slogging through the courts. They want your firm to do something. Let us introduce you to one of the most powerful tools available to litigators trying to get a case through an increasingly cash strapped — read that, “slow” — court system. It's flexible, fast, less expensive than court resolution, and it fits any type of case you can throw at it. It is sanctioned by the California Constitution and the Code of Civil Procedure, and it can be put in place at the last minute. It can cover the entire case, or just part of it. And it can be used with equal effectiveness by experienced litigators or relative novices. It is the Judicial Reference.

The tool has been around for years, but it has seen very limited use. Why?

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One reason may simply be inertia. You file a case with the court and it just stays there. You've always done it that way; why change? There are lots of reasons. Most importantly, perhaps, may be the increasing unavailability of the court system due to funding restrictions. Fewer open courts, less staff, more harried and overworked judges all contribute to a slower and less efficient justice system.

But there are other, better reasons to give Judicial Reference a try. Paramount is your ability to tailor it to fit the needs of your case. Are you trying to get the whole case resolved quickly? The California Constitution, Article VI §21, provides for the appointment of temporary judges, and the Legislature has enacted statutes providing for the appointment of referees. The procedures could not be more flexible. Code of Civil Procedure §638(a) allows the court to appoint a referee to determine “any or all issues” in the action. You choose. Want to keep the court as the ultimate decision maker, but get a key factual issue resolved early so the case can move more expeditiously? Use CCP §638(b). That section lets you select a referee to “ascertain a fact necessary to enable the court” to decide the case.

What if you want a reference and the other side doesn't? Apply to the court



under CCP §639. Want two bites of the apple? Empower the referee to make recommendations only, but leave the final order to the court. The available resolution structures are almost boundless.

The benefits of Judicial Reference are not limited to structure. Consider timing and efficiency. How many times have you prepared for a court hearing — or trial — only to have the matter continued for months at the last minute because of the court's schedule? You've put in hours or weeks of preparation, maybe brought in witnesses from around the country, tuned your whole schedule to accommodate this all-important hearing. And then, with no warning, it's gone. That's not going to happen with a reference.

When you choose your referee, usually a retired judge or an attorney-neutral, you will have that person's undivided attention. Does he have other cases? Sure, but when a hearing gets

set for your matter, those other cases are taken into consideration and the calendar will get blocked out for your case, and your case alone. The court system can't do this, but the referee can. Many lawyers consider this degree of certainty one of the most important aspects of a Judicial Reference. We know that clients love it. It's hard enough explaining to a client why he's just paid \$50,000 to prepare for a trial that now won't happen for six months or a year, and he'll have to spend that \$50,000 all over again.

Many cases today involve hyper-technical or complex issues, where a decision-maker's experience in the field might be a real benefit. If you're in court, you can look up the credentials of the judges and armed with a one-shot CCP §170.6, hope for the best when your case is called for trial. Maybe you get lucky. But why take the chance? With a Judicial Reference, you get to choose the person who will decide your case. Sure, there'll be some negotiating with the other parties about who that person will be, but in the end you're much more likely to get somebody with the desired experience or expertise than you would be in court. And think about it: the other side is likely looking for someone with the same type of expertise as you are. The selection process really isn't that difficult.

Once your referee is appointed, you will begin immediately to reap the benefits of the reference. Typically, the referee will start the ball rolling with an in-person or telephonic meeting with all counsel to discuss the contours of the case. The parties frequently meet and confer in advance so that they can present the referee with a proposed agenda of either agreed upon or disputed issues for resolution. Looking at all calendars, the referee often maps out a schedule for resolution of the entire case, or at least the parts of it the parties agree upon at this juncture. The dates only get changed

by stipulation or in consequence of a litigated request. In either case, you'll never face the prospect of arriving for hearing only to be told that your matter has been continued. Nor will you be in the equally unenviable position of trying to set other cases for trial, and trying to guess whether your present case will "go" or be continued.

Discovery is one of the most fertile fields from which to reap the benefits of a reference. There's not an attorney around who doesn't know that discovery disputes are the swamp of litigation. More time and money is wasted needlessly on discovery battles than on any other aspect of case preparation. Your referee can shorten these battles or eliminate them altogether. Often a referee will devise a discovery schedule specific to your case, and will set out a protocol for resolving discovery disputes. It is this latter area where the referee's services will prove most valuable. In our experience, discovery battles in a reference can be resolved in days, compared with the months often involved in traditional litigation. Your client will greatly appreciate the savings in time and money.

A Judicial Reference offers a further benefit of which many practitioners are unaware. Unlike binding arbitration, where the arbitrator's award will only be reviewed by a court under limited circumstances, the referee's decisions are subject to a full right of appeal, just as if the decision had been made by a sitting judge. CCP §645 guarantees that right, and it often provides the final level of comfort a client or attorney otherwise unfamiliar with Judicial References, needs to take this step.

Even with all of the benefits a Judicial Reference offers, clients are often reluctant to try it because of its perceived high cost. While this argument may have an initial appeal — the hourly rates of referees can be substantial — it doesn't hold up under analysis. Of course, counsels' rates will be the same

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whether the case proceeds through court or through reference. Then factor in the speed and efficiency offered by the reference, which results in a reduced number of hours spent by the lawyers, and the total cost is usually meaningfully lower. This doesn't take into account the value of having your case resolved sooner than if the case proceeded in court.

Keep in mind that, just like an arbitration clause, a Judicial Reference clause may be written into your clients' contracts and will be enforced by the court. So for potential complex contract issues, your clients will have the peace of mind of knowing they have a built in expeditious method of dispute resolution.