



## General reference as an expedient alternative to arbitration or trial

THE USE OF A JUDICIAL REFEREE IS AN UNDERUTILIZED ADR TOOL THAT MAY RESOLVE A PARTY'S DISPUTE MORE EFFICIENTLY THAN ARBITRATION, WHILE PRESERVING APPEAL RIGHTS

The COVID-19 pandemic brought courts to a halt. Jury trials were suspended for several months. Earlier this year, Governor Newsom's budget proposal anticipated spending cuts to courts by millions of dollars. In turn, clients can expect to see delayed trials. This article challenges the practitioner to consider an underutilized alternative dispute resolution device – the general reference. The rules governing judicial reference can be found at Code of Civil Procedure sections 638-645.2 and California Rules of Court, rules 3.900-3.907, 3.920-3.926, and 3.930-3.932. The general reference is an advantageous method for efficiently resolving a dispute, and an alternative to trial or arbitration.

### What is a general reference?

"Judicial reference involves sending a pending trial court action to a referee for hearing, determination and a report back to the court." (*Trend Homes, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 955.) A general judicial reference requires the consent of all parties. The parties may agree to the reference in a contract before a dispute arises, or by stipulation after the dispute ensues. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 960-961.)

A general reference typically directs the referee to try all the issues in the action. Rather than having a judge or jury decide the case, the referee holds the trial and issues a statement of decision. The statement of decision explains the "factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.)

### Why select general reference over trial?

A general reference offers an efficient and expeditious alternative to traditional litigation. The Code of Civil Procedure and Evidence Code will be followed, and the decision can be appealed. A referee will typically have the time to resolve disputes faster than the court. A trial won't be continued or trailed because the court doesn't have a courtroom. Instead, a referee will set aside time to have the proceedings and will be able to give his/her undivided attention without interruptions or concerns about other matters on an otherwise busy court docket. Additionally, the parties choose who decides their case. The parties can select a referee with the right experience or background to hear the matter. No juries are empaneled to decide a case under a general reference.

### Why select general reference over arbitration?

The biggest advantage of choosing general reference over arbitration is that the parties preserve their appeal rights. Judicial review of arbitration awards is limited. Arbitrators are not bound to decide cases in accordance with law and may base a decision on principles of justice and equity. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11-12.) A referee must explain the "factual and legal basis for its decision." (Code Civ. Proc., § 632.) In arbitration there is no automatic right of discovery. (Code Civ. Proc., § 1282.2(d).) The rules of evidence need not be followed. (*Ibid.*)

### Authority for general reference

The court can order a general reference upon "the agreement of the

parties" or "upon the motion of a party to a written contract or lease which provides that any controversy arising therefrom shall be heard by a reference if the court finds a reference agreement exists between the parties." (Code Civ. Proc., § 638.) The California Constitution also authorizes the appointment of temporary judges. (Cal. Const., Art. VI, § 21.)

A judicial-reference clause in an agreement is tested under principles of unconscionability. (*Woodside Homes v. Sup. Ct.* (2003) 107 Cal.App.4th 723, 729-730.) A provision will likely be found enforceable when it gives actual notice of judicial reference, is easily understood, placed in a conspicuous location, and provides an opportunity for meaningful reflection by parties. (*Ibid.*; *Treo @ Kettner Homeowners Assn. v. Sup. Ct.* (2008) 166 Cal.App.4th 1055, 1066-1067.) A provision may be unconscionable if it fails to state how the referee's fees will be paid. (*Pardee Construction Co. v. Sup. Ct.* (2002) 100 Cal.App.4th 1081, 1090-1092.) A judicial reference clause may not be enforced if the payment of the referee's fees unfairly burdens the party in the weaker bargaining position. (*Ibid.*) Courts have upheld a provision that calls for the parties to share the cost of the referee's fees evenly. (*Woodside, supra*, 107 Cal.App.4th 723 at p. 730.)

### General reference and jury waiver

The right to a civil jury trial is "inviolable," but it may be waived by statute. (Code Civ. Proc., § 631(a), (f); *Grafton Partners L.P. v. Sup. Ct.* (2005) 36 Cal.4th 944, 951-953.) Pre-dispute jury waivers are unenforceable when they are not authorized by statute. (*Id.* at 964.) A pre-dispute agreement calling for judicial

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reference is permitted because it is authorized by statute. (Code Civ. Proc., § 638.) The statute “unambiguously results in a waiver of ‘jury trial’ without the need to use those words.” (*Woodside Homes of California Inc. v. Sup. Ct.* (2006) 142 Cal.App.4th 99, 104; see also *O’Donoghue v. Sup. Ct.* (2013) 219 Cal.App.4th 245, 257.)

Similarly, parties can waive a jury trial through an agreement to arbitrate. (Code Civ. Proc., § 1281.) In medical malpractice, an agreement to arbitrate must include a jury waiver disclosure in the language provided in Code of Civil Procedure section 1295, subdivision (a). Outside the medical malpractice context, an otherwise enforceable arbitration agreement does not require an express jury waiver. (*O’Donoghue v. Sup. Ct., supra*, 219 Cal.App.4th at p. 257 (citing *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699).)

### Court’s appointment of referee

For the court to issue an order appointing a referee, the parties should file a stipulation or motion that addresses: (1) The scope of the requested reference (whether the referee will decide all issues or specified issues and identify what issues trial court is to decide); (2) How the referee will be compensated; (3) If authorization to use court facilities

or court personnel is requested, the use requested must further the interests of justice;

(4) The proposed referee’s certification as required by Cal. Rules of Court 3.904(a); and

(5) Be accompanied by a proposed order that includes the matters specified in rule 3.902.

(Cal. Rules of Court, rule 3.901.) Judicial council form ADR-109 addresses these elements.

A decision to deny a motion to appoint a referee is not an appealable order. (*J.H. Boyd Enterprises, Inc. v. Boyd* (2019) 39 Cal.App.5th 802, 804.) Instead it is reviewed by writ. (*Id.* at 811.)

### Scope of referee’s appointment

The statutory basis for appointing a referee determines the scope of the reference and the referee’s powers are limited by the court order of appointment. (Code Civ. Proc., § 638; Cal. Rules of Court, rules 3.900-3.907.)

#### General reference

A general reference authorized by Code of Civil Procedure section 638 permits the referee to handle the entire proceeding: case management, discovery, law and motion, summary judgment motions, settlement, and trial. (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1208.) The referee can be appointed to:

“hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision,” or to “ascertain a fact necessary to enable the court to determine an action or proceeding. (Code Civ. Proc., § 638, subs. (a)-(b).) The court can issue its order; alternatively, the parties may submit Judicial Council Form ADR-110 for this purpose. (Cal. Rules of Court, rule 3.902.)

The parties have control in specifying at the onset the procedures the referee will follow. “A referee appointed pursuant to section 638 shall report *as agreed by the parties* and approved by the court.” (Code Civ. Proc., § 644, subd. (b), emphasis added.) It is important that the parties clearly identify what issues the referee will be deciding. This ensures the referee’s statement of decision addresses those issues. For example, the parties could stipulate to having a referee decide issues of liability but retain the trial court judge for determining damages. (See *Salka v. Dean Homes of Beverly Hills, Inc.* (1993) 23 Cal.App.4th 952.)

A discovery referee can be appointed by a general reference with the consent of all parties. (*Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296, 1303.) If the trial court authorizes the discovery referee to do so, the referee can impose monetary and

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### ADR comparison

	General Reference	Court Trial	Arbitration
Selection of Trier of Fact	Parties	Court	Parties
Control Over Scheduling Hearings and Trial	Parties and referee control	Depends on court availability	Parties and arbitrator decide
Right to discovery	Yes	Yes	Not automatic
Observance of CCP and Cal. Evid. Code	Yes	Yes	Need not be followed
Bound by Law	Yes	Yes	No
Right to Appeal	Yes, but must first object	Yes	Limited
Cost and Fees	Parties pay hourly rates and administrative fees of referee	Parties pay court fees	Parties pay hourly rates and administrative fees of arbitrator
Accessible to Public	Yes	Yes	No
Jury	No	Maybe	No

terminating sanctions. (*Ibid.*) An appeal of an order to pay monetary sanctions issued in a general reference is an appealable order. (*Id.* at 1302-1304.)

#### **Special reference**

In addition to a general reference, the statute also authorizes the appointment of a special referee in very specific instances. A special reference can be appointed by the court for one of the limited purposes outlined in the statute. (Code Civ. Proc., § 639, subd. (a)(1)-(5).) A special reference can be by stipulation or court order, but unlike the general reference, it does not require consent of all the parties. A common special reference is appointment of a discovery referee. Unlike a general reference, a finding by a special referee is advisory only. (Code Civ. Proc., § 644; *Weinfeld v. Weinfeld* (1958) 159 Cal.App.2d 608, 613-14.) A referee under a special reference writes a report with recommendations for the trial court to adopt. The court can choose to ignore the recommendations of a special referee and issue its own ruling.

#### **Who gets appointed**

Generally, a retired judge or active attorney agreed upon by the parties will be appointed as the referee. (Code Civ. Proc., § 640, subd. (a).) However, the statute does not require that they be licensed attorneys. If the parties cannot agree to the selection of the referee, the court will choose among the three nominees from each party. (Code Civ. Proc., § 640, subd. (b).) The court can appoint up to three referees. The court could appoint a court commissioner. (Code Civ. Proc., § 640, subd. (b).) However, this is unlikely due to the courts' heavy dockets. Where the court appoints a referee, a party may object to the appointment if there is a legal ground to do so. (Code Civ. Proc., § 641.)

#### **The proceedings before the referee**

##### **Case management**

Once a general reference is made to a neutral third party, that referee can hear all matters for the case. The referee must issue certifications and disclosures to the

parties. (Cal. Rules of Court, rule 3.904.) Typically, the referee will confer with the parties to issue a case management order outlining deadlines for discovery, motions, and trial. The parties are permitted to conduct discovery as if the case were proceeding in court, unless the parties' agreement to judicial reference provides otherwise. Original documents are still filed with the court clerk as if the case were heard by the judge. Below the nature of the paper or the character of the action or proceeding, the word "Referee:" followed by the name of the referee must be on any paper filed in a case pending before a referee. (Cal. Rules of Court, rule 2.111(8).) A filed-stamped copy goes to the referee. (Cal. Rules of Court, rules 3.930; 2.400(b).) Frequently, referees will hold a telephone conference to informally resolve an issue.

##### **Location for proceedings**

Court facilities and personnel may only be used in a judicial reference if the use would further the interest of justice. (Cal. Rules of Court, rule 3.907.) In practice, the hearings are held in an office or conference room, rather than the courtroom. However, the proceedings are still public. The court clerk must post notice with contact information, so that interested third parties can arrange to be present for proceedings. (Cal. Rules of Court, rule 3.931.)

##### **Hearings**

Hearings are "conducted in the same manner as it would be before a court under the rules of evidence applicable to judicial proceedings." (*Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341.) The rules of civil procedure, including discovery rules, apply to a general reference. (*Trend Homes, Inc. v. Sup. Ct. (Azperren)* (2005) 131 Cal.App.4th 950, 955.) Practitioners representing clients in a general reference should treat the proceedings before the referee as if they are in open court. Counsel should cross-examine witnesses and make objections. Therefore, it is suggested that the parties agree to have a court reporter and share in the costs.

##### **Effect of referee's decision**

The referee must submit a statement of decision to the court within 20 days after the hearing has been concluded and the matter has been submitted. (Code Civ. Proc., § 644.) A statement of decision reported by a referee in a general reference is treated as if rendered by a superior court under Code of Civil Procedure section 632. (*In re Marriage of Demblewski* (1994) 26 Cal.App.4th 232, 235-236.) In cases where the referee is deciding all issues, the referee is authorized to issue a report awarding damages, including fees and costs.

##### **Objections to referee's statement of decision**

A party objecting to the referee's statement of decision must promptly file a written objection to the referee. (*Salka, supra*, 23 Cal.App.4th 952 at p. 960.) Alternatively, the objecting party may promptly file a motion in the trial court to set aside the referee's statement of decision. (*Ibid.*) "The objective is to afford the referee and the trial court an opportunity to correct unsupported findings and errors of law, which may avoid an appeal." (*Ibid.*) Either procedure complies with Code of Civil Procedure section 645, which states: "The decision of the referee appointed pursuant to Section 638 or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict."

Also see *Lindsey v. Contech* (2017) 9 Cal.App.5th 1296 finding that, pursuant to the agreement of the parties authorized by Code of Civil Procedure section 638, subdivision (a), the statement of decision does not necessarily require the court's review, and an appeal can be taken directly from the referee's decision. (The general referee is authorized "[t]o hear and determine any and all issues in an action or proceeding, whether fact or of law, and to report a statement of decision." (Code Civ. Proc., section 638, subd. (a).))

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A motion to vacate the award can be made on any one of the enumerated bases outlined in Code of Civil Procedure section 657, the statute authorizing a motion for new trial. An order vacating the statement of decision and directing a rehearing is properly appealable as an order granting a new trial. (*Ellsworth v. Ellsworth* (1954) 42 Cal.2d 719, 722.) If the court does not vacate the referee's findings, the court can enter a judgment based on the referee's statement of decision.

### **Trial court's entry of judgment**

Judgment is entered based on the statement of decision as if the case had been tried by the court. (Code Civ. Proc., §§ 644(a), 645; *Sy First Family Ltd. Partnership v. Cheung, supra*, 70 Cal.App.4th at p. 1341.) In Los Angeles Superior Court, the prevailing party must file a noticed motion requesting the court issue judgment consistent with the report of the referee. (Los Angeles Sup. Ct. Local Rule 3.9(c).)

### **Motion to vacate judgment**

A party who objects to the judgment may seek to have the judgment set aside by the trial court pursuant to Code of Civil Procedure section 663. (*SFP v. Burlington Northern & Santa Fe Ry. Co.*

(2004) 121 Cal.App.4th 452, 466.) A motion to vacate the judgment must be filed the earlier of (1) "[a]fter the decision is rendered and before the entry of judgment" or (2) within 15 days of the mailing of notice of entry of judgment by the clerk under Code Civ. Proc., § 664.5 or service by any party of notice of entry of judgment, or (3) within 180 days after entry of judgment. (Code Civ. Proc., § 663a.)

The court can rule on the motion to vacate judgment for seventy-five days from the earlier of (1) the mailing of notice of entry of judgment by the clerk under Code Civ. Proc., § 664.5, (2) service by any party of notice of entry of judgment, or (3) the first notice of intention to move to set aside and vacate the judgment. (Code Civ. Proc., § 663a, subd. (b).) If the court does not rule on the motion and the time period is not extended, then the motion is deemed denied by operation of law. (*Ibid.*) A valid notice of intention or motion to vacate the judgment extends the appeal period. (Cal. Rules of Court, rule 8.108(c).)

### **Appeal of judgment**

Alternatively, the objecting party can appeal the judgment. A notice of appeal of a judgment in an unlimited action is filed at the court of appeal within 60 days

after notice of entry of judgment or 180 days after entry of judgment, whichever is earlier. (Cal. Rules of Court, rules 8.100, 8.104(a).) A notice of appeal of a judgment made in a limited action is filed at the appellate division of the trial court within 30 days after service of the notice of entry of judgment. Litigants can use Judicial Council-approved appeal forms. (Cal. Rules of Court, rule 8.822.)

### **Conclusion**

The COVID-19 pandemic exacerbated limited court resources. Access to courthouses remains limited. Clients should expect delays in an overburdened judicial system. For clients looking for expediency, the use of arbitration or general reference may be more attractive than waiting for trial.

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