



## Discovery referee appointments

### A GUIDE FOR THE TRIAL ATTORNEY HIGHLIGHTING THREE DIFFERENT TYPES OF REFEREE APPOINTMENT

The use of a court-appointed discovery referee is an alternative dispute resolution tool. The appointment is based on an agreement of the parties, a party's motion, or a court's motion under Code of Civil Procedure sections 638(a), 638(b) or 639(a)(5). A court-appointed discovery referee puts discovery disputes into the hands of a privately paid referee.

Multiple codes and court rules have an application to the appointment and use of a discovery referee. To that end, familiarization of the dizzy array, and sometimes contradictory, Code of Civil Procedure sections 638 through 645.1 and California Rules of Court, rule 3.900 through rule 3.932 are essential. Other relevant code sections and court rules are set forth within this article.

**Relevant information keys to explain this article:** Throughout this article:

- "Section" refers to the California Code of Civil Procedure and "subdivision" is not spelled out;

- "Rule" refers to the California Rules of Court.

**Three code sections:** Keep in mind that *discovery referees* are appointed under *three* specific code sections. They are:

- Section 638(a), a *general* discovery reference appointment based on an agreement of the parties;
- Section 638(b), a *special* discovery reference appointment based on a preexisting agreement, but usually only one party is seeking enforcement; and
- Section 639(a)(5), a *special* discovery reference appointment requested by one or more parties or upon the court's own motion.

**Note:** Section 638 has *two* subdivisions; i.e., (a) and (b). Both subdivisions allow for the court to appoint a referee, but there is a considerable difference with the application of the referee's decision. As to be explained below, a section 638 subdivision (a) discovery referee

appointment is a *general reference*, and the referee's "statement of decision" becomes the court's order. (Code Civ. Proc., § 644, subd. (a).) A section 638 subdivision (b) discovery referee appointment is a *special reference*, and the court either accepts, rejects, or modifies the referee's advisory findings. (Code Civ. Proc., § 644, subd. (b).)

#### Distinguishing general and special discovery references

**The basics:** The distinction between a *general* and *special* discovery reference is important, because the referee's report has different results. For a *general* discovery reference, section 638(a), the referee's report becomes a decision of the court, and upon the clerk's entry of judgment, it becomes a final judgment. (Code Civ. Proc., § 644, subd. (a).) For a *special* discovery reference under sections 638(b) and 639(a)(5), the referee's report is *advisory*. It can be accepted, rejected, or modified by the trial court. (Code Civ. Proc., § 644, subd. (b).)

The recent court decision of *Yu v. Superior Court (Bank of the West)* (2020) 56 Cal.App.5th 636 defines general and special references of section 638, as follows:

Proceedings under subdivision (a) of section 638 are called general references because they authorize the referee to consider any or all of the issues raised, whereas those under subdivision (b) of section 638 are considered special references, as they limit the referee to specific factual findings to aid the trial court in its determination of the action.

**General reference:** A general reference provision in a contract can include all issues or a single issue, like a discovery dispute. If *all parties* to the contract want the discovery dispute to be determined by a referee, the *parties* move under section 638(a). Also, parties in litigation can at any time stipulate in writing that a discovery dispute is to be decided by a section 638(a) general reference referee.

Not all predispute general-reference contracts are enforceable. See *Tarrant Bell Property, LLC v. Sup. Ct. (Abaya)* (2011) 51 Cal.4th 538, where the court was concerned that a general reference decision may conflict with issues of law or fact to be decided at trial.

A general reference referee appointment under section 638(a) is very similar to an appointment of a privately compensated “temporary judge.” The comparison is striking in that both appointees’ findings become an order of court. For that reason, the recent case of *Jolie v. Sup.Ct. (Pitt)* (2021) B308958 holding ongoing disclosure requirements for a temporary judge should be reviewed by any section 638(a) referee.

**Special reference:** A special reference appointment of a discovery referee gives the referee *limited* authority. The referee is charged with duties to hear the discovery dispute and make a *report and recommendation* to the appointing court. The court independently reviews the referee’s report and recommendation. It can adopt, reject, or modify the recommendation.

A relatively recent definition of a *special* reference can be found in *Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296, 1303: “A special reference is an appointment to a referee made pursuant to section 638, subdivision (b), or section 639, giving the referee authority to perform certain specified tasks and report a recommendation back to the trial court for independent consideration.”

The special reference *discovery* referee appointment can be made under section 638(b) or section 639(a)(5), in the following manner:

- (1) By stipulation of the parties or motion of a party based upon a provision within a *preexisting agreement* between the parties. (Code Civ. Proc., § 638, subd. (b).); or
- (2) By motion of “any” party or upon the court’s own motion.

(Code Civ. Proc., § 639, subd. (a)(5).)

#### A section 638(a) motion

A section 638(a) motion by the *parties* for the appointment of a general reference discovery referee is made pursuant to stipulation, pre-dispute contract term, or motion by *all* parties. The intent of the parties requires a referee, and not the court or arbitrator, to hear and decide the dispute. The dispute can be on any subject matter, including discovery issues.

**Appointment by stipulation, contract, or motion:** To obtain a section 638(a) discovery reference order, *all* parties present a stipulation, contract provision or jointly move the court for the appointment. The required information to be presented to the court is set forth in rule 3.901(b).

**Judicial Council form:** Instead of a formally prepared motion, the use of Judicial Council form ADR-109, entitled “Stipulation or Motion for Order Appointing Referee” should be considered. However, it is suggested the form specify a section 638(a) *general* reference to avoid confusion with a section 638(b) special reference appointment. The distinction is important, because a general reference

referee’s statement of decision becomes an order of the court; whereas a special reference report and recommendation is advisory, and it can be accepted, rejected, or modified by the court. (Code Civ. Proc., § 644.)

**The order of appointment:** A *proposed* order appointing a general reference discovery referee under section 638(a) is to be filed with the clerk, or entered in the minutes, at the same time the appointment is requested. Rule 3.902 sets forth the requirements for the appointment order. Instead of a formally prepared order, the use of Judicial Council form ADR-110, entitled “Order Appointing Referee,” should be considered.

#### A section 638(b) motion

When not all parties to a preexisting agreement are willing to seek the appointment of a discovery referee according to the agreement’s terms, one or more other parties can move the court for an appointment under section 638(b). Required information to be presented to the court is set forth in rule 3.901(b).

**Judicial Council form:** Instead of a formally prepared motion, the use of Judicial Council form ADR-109, entitled “Stipulation or Motion for Order Appointing Referee” should be considered. However, it is suggested the form be narrowed to a section 638(b) special reference to avoid confusion with a section 638(a) general reference appointment. The distinction is important because a general reference referee’s statement of decision becomes an order of court; whereas a special reference report and recommendation is advisory, and it can be accepted, rejected, or modified by the court. (Code Civ. Proc., § 644.)

**The order of appointment:** An order appointing a discovery referee under section 638(b) is to be filed with the clerk, or entered in the minutes, and must specify the items in rule 3.902. Instead of a formally prepared order, the use of optional Judicial Council form ADR-110, entitled “Order Appointing Referee,” should be considered.

### A section 639(a)(5) motion

Subdivision (a) of section 639 provides for the appointment of a *special* referee in five distinct categories. This article discusses only subdivision (a)(5), which concerns the appointment of a referee “to hear and determine any and all *discovery motions and disputes relevant to discovery* in the action and to report findings and make a recommendation thereon.” (Italics added.) A motion for appointment of the section 639(a)(5) discovery referee can be made by the court or on motion of a party or parties.

**The court’s motion:** Case law has established parameters for a court to order a section 639(a)(5) discovery referee. (See *Taggares v. Sup. Ct.* (1998) 62 Cal.App.4th 94.)

**A party’s motion:** Under section 639(a)(5), any party can move for the appointment of a discovery referee. A preexisting agreement is not required. The motion is to specify the matters to be included in the reference. If a proposed referee is called out in the motion, the proposed referee is to prepare a certification required by rule 3.924(a). (See section below.) The certification must accompany the party’s motion. The motion is to be served and filed. (Cal. Rules of Court, rule 3.921(a).)

The motion is to be heard by the assigned judge. If the case is not assigned to a particular judge, the motion is then heard by the presiding judge or law and motion judge. (Cal. Rules of Court, rule 3.921(b).) Instead of a party preparing a formal motion, the use of Judicial Council form, ADR-109, entitled “Stipulation or Motion for Order Appointing Referee” should be considered.

**The order for a section 639(a)(5) discovery referee appointment:** The court is to appoint a referee agreed upon by the parties. If the parties do not agree upon a referee, each party is to submit up to three nominees to the court. The court will then appoint a referee from the lists provided or appoint a court commissioner. (Code Civ. Proc., § 640, subd. (b).) Note the court retains the power to modify a section 639(a)(5)

discovery referee order at any time upon motion of a party or upon the court’s own motion. (Code Civ. Proc., § 643, subd. (c).)

A written order for the appointment of a section 639(a)(5) discovery referee is to comply with rule 3.922 and section 639(c)(d). Both have several requirements that must be included in the order. Also, Local Rules, rule 3.9(a), entitled “Judicial Reference,” provides: “Prior to entry of an order of reference, counsel must discuss the availability of a proposed referee and his or her charges and required terms of payment.” To this end, a proposed referee should provide the parties with a preprepared agreement, fee schedule, and other necessary terms.

**Exceptional circumstances required:** “A discovery referee must not be appointed under Code of Civil Procedure section 639(a)(5) unless the exceptional circumstances of the particular case require the appointment.” (Cal. Rules of Court, rule 3.920(c).) Also: “If the referee is appointed under section 639(a)(5) to hear and determine discovery motions and disputes relevant to discovery, the order must state the exceptional circumstances of the particular case that requires the reference.” (Cal. Rules of Court, rule 3.922(c)(2).) The same rule is also set forth in section 639, subdivision (d)(2).

**Referee’s fee for a section 639(a)(5) appointment:** The order is required to state the maximum hourly rate the referee is to charge, and, at a party’s request, the maximum number of hours the referee may charge. (Code Civ. Proc., § 639, subd. (d)(5).)

A pro-rata share of the referee’s fees is to be borne by each party unless an objecting party establishes an inability to pay. (See below.) The order to pay the referee’s fees is made at the time of appointment in any manner determined to be fair and reasonable. (Code Civ. Proc., § 645.1, subd. (b).) The fee order must comport with section 1023, which states:

The fees of referees are such reasonable sum as the court may fix for the time spent in the business of the

reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rates shall be allowed.

A trial court violates section 1023 when it *orders* the entire cost of the reference to be paid by an affluent party. (*Taggares v. Sup. Ct.* (1998) 62 Cal.App.4th 94,106.) However, the parties can agree on an unequal division of fee responsibility.

**A party’s economic inability to pay a section 639(a)(5) discovery referee’s fee:** A party can oppose the appointment of a discovery referee by alleging an economic inability to pay the referee’s proposed fee.

The court’s determination of a party’s inability to pay can be based on the party’s prior establishment of an *in forma pauperis* or other factors. (Code Civ. Proc., § 639, subd. (d)(6)(A)(B).) If a party establishes an inability to pay a pro-rata share of the referee’s fee, the opposing party can volunteer to pay the additional share or an agreed-upon portion. (Code Civ. Proc., § 639, subd. (d)(6)(A)(B).) California Rules of Court, rule 3.922(f)(3) states:

When the issue of economic hardship is raised before the referee begins performing services, the court must determine a fair and reasonable apportionment of reference costs. The court may modify its apportionment order and may consider a recommendation by the referee as a factor in determining any modifications.

If there is no available cost-free alternative, the trial court must handle the discovery motion rather than referring it to a referee. (*Taggares v. Sup. Ct. (Mitchell)* (1998) 62 Cal.App.4th 94.)

For a comprehensive dissertation on referee fee orders, see Sharon Arkin, *Protecting Your Client from Discovery Referee Fees*, March 30, 2017, The Marin Lawyer.

**An attorney is not to be ordered to pay fees:** The code is specific that the ability of a party’s attorney to pay the referee’s fee is *not* to be considered or ordered. (Code Civ. Proc., § 639, subd. (d)(6)(B) and Code Civ. Proc., § 645.1, subd. (b).) Also see *Taggares v. Sup. Ct.* (1998) 62 Cal.App.4th 94,103.)

**Costs:** Note that a section 639 order allows for the allocation of costs, and those costs, arguably, may not be recoverable under sections 1032 and 1033.5 by a prevailing party. However, see *DeBlase v. Sup. Ct. (Hoffman Brothers)* (1996) 41 Cal.App.4th 229, 233, stating “. . . ultimately, the entire referee’s fee will, like other recoverable costs, be borne by the losing party.”

**Judicial Council Form:** An optional “Order Appointing Referee,” Judicial Council Form, ADR-110, is available for a section 638(a) or (b) and a section 639(a)(5) discovery referee *appointment*. The form has a certification provision (discussed below) that can be used by a proposed referee, but the form does not have a “verification under penalty of perjury” provision for the proposed referee to execute.

### Proposed referee’s certification and disclosure requirement

A proposed referee is mandated to file with the court a certificate of consent to an appointment and *separately* serve on the parties a conflict disclosure declaration. For a section 638(b) motion, rule 3.904 applies; for a section 639(a)(5) motion, rule 3.924 applies.

**Certification:** A proposed referee’s certification must include a consent to serve, assent to comply with certain judicial ethic rules, and verification under penalty of perjury. It is to be filed with the court before service begins. An executed certification is submitted with a party’s motion or at any other time a referee is proposed. (See Code Civ. Proc., § 2015.5 for verification requirements.)

**Disclosure:** A proposed referee is to disclose to the *parties* potential judicial ethic violations and any personal relationships with a party or a party’s attorney. There is no rule for submitting the *disclosure* to the court. Nor is there a known requirement for the disclosure to be verified. It appears that the disclosure requirement is to be provided only to the parties.

### Grounds for objection to the appointment of a specific referee

The listing of seven grounds for

objection to the appointment of a specific referee can be found in section 641. The code appears to apply to the appointment of a referee under either section 638(b) or 639(a)(5). Also, see rule 3.925. An objection to a reference or an appointed referee is to be made in writing and filed with the court. The court, not the referee, hears the objection and rules on it. (Code Civ. Proc., § 642.)

### The discovery reference hearing

**Open proceeding requirements:** If a discovery dispute hearing would be held by a judge in open court, the proceedings before the referee must be open for public viewing. To that end, the discovery referee is required to file with the court written information explaining where and when the discovery dispute hearing will take place.

Court rules require public notice of the reference and hearing date to be posted by the court clerk. (See rule 3.931 entitled “Open proceedings, notice of proceedings, and order for hearing site.” Also see rule 2.400, subd. (d), and Local Rules, rule 2.24(b), entitled “Proceedings Open to the Public.”) Details about virtual hearings should be provided to the court for posting. Public access to the discovery documents and hearing is to be permitted by the referee.

**Hearing site:** For a referee appointment under section 639(a)(5), rule 3.922(e) requires a court order to authorize the referee to set the hearing location. A private facility or use of court facilities and court personnel are allowed under rule 3.926. However, for section 638 general reference appointments, rule 3.907 provides that, *with some exceptions*, a party who stipulates to a referee under section 638 is deemed to have elected to proceed *outside of* court facilities. Under COVID-19 restraints, it is wise to arrange a virtual hearing with court permission.

**Court order:** Hearing parameters of time and location are generally stated in the court’s order. For a section 639(a)(5) hearing, rule 3.922(e) requires the court to grant the following authority to a discovery referee:

If the referee is appointed under section 639(a)(5) to hear and determine discovery motions and disputes relevant to discovery, the order must state that the referee is authorized to set the date, time, and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings; take evidence; and rule on objections, motions, and other requests made during the course of the hearing.

### Documents filed with the court to be used during the reference

Documents filed with the court by the parties or by the discovery referee must strictly comply with rule 2.400. All documents to be used during the reference proceedings *must* first be filed with the court. The word “Referee,” followed by the referee’s name, is to be stated on the first page of each filed document, below the nature of the document or character of the action. (Cal. Rules of Court, rule 2.111(8).) A copy of each filed document is to be furnished to the referee. (Local Rules, rule 2.24(e).)

### The disputed discovery documents

It is suggested that the referee require the moving party to “bundle” or “package” the discovery motion, opposition, reply, and other related documents. The bundle or package is then provided to the discovery referee and opposing party as a single unit. Such practice allows for an expeditious review by the discovery referee of each disputed issue. Also, the disputed discovery documents must comport with the section above requiring court filing before submission to the discovery referee.

### Discovery referee’s report to the court

**Judicial Council form:** Referees may find the optional Judicial Council form ADR-111, entitled “Report of Referee,” an alternative to preparing a formal report. This optional form is usable by a discovery referee appointed under section 638(a), section 638(b), or section 639(a)

(5). If the referee was appointed under either section 638(a) or section 638(b), the correct subdivision should be set out on the form to avoid a statement of decision. (Subd. (a) confused with an advisory recommendation (subd. (b).)

Note, the form does not have a place for the judge to execute acceptance of an advisory report, as required by Local Rules, rule 3.9(b). The local rule states: “Form of Approval. . . . [T]he referee must include in the report a place for the judge to enter an order if the judge accepts the report. If the referee’s report is rejected, the judge will prepare a new order or direct a party to prepare it.”

**The time limit for the referee to submit the written report:** Unless the court otherwise directs, a referee’s written report is to be submitted to the court within 20 days after the conclusion of the hearing. At the time of the appointment, the referee can request additional time. (Code Civ. Proc., § 643, subd. (a).)

**A general reference discovery referee’s report is a court decision under section 638(a):** “A referee appointed pursuant to section 638 shall report as agreed by the parties and approved by the court.” (Code Civ. Proc., § 643, subd. (b).) For a general discovery reference, section 638(a), the referee’s report becomes a decision of the court, and upon the clerk’s entry of judgment, it becomes a final judgment. (Code Civ. Proc., § 644, subd. (a).) The only trial court evaluation of a general reference report is by post-judgment motions. (*Yu v. Sup. Ct. (Bank of the West)* (2020) 56 Cal.App.5th 636.)

A section 638(a) referee appointment is a consensual general reference: “A general reference is an appointment to a referee made pursuant to section 638, subdivision (a), giving the referee authority [t]o hear and determine *any or all* of the issues in an action or proceeding, whether fact or of law, and to report a statement of decision.” (Italics and quotes in the original.) Also, see *Lindsey v. Conteh* (2017) 9 Cal.App.5th 1296, 1303, upholding a substantial monetary sanction ordered by a section 638(a) referee.

As a general reference, the referee’s reported decision is to follow the requirements of section 644(a), which states:

In the case of a consensual general reference pursuant to section 638, the decision of the referee or commissioner 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 *Lindsey* court also evaluated section 645. (*Id.* at p.1304.) Under section 645, a referee’s section 638(a) statement of decision is not reviewable by the trial court, and, with some exceptions, they are enforceable. Section 645 provides:

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. [I.e., post-judgment motions for a § 638(a) statement of decision.] When the reference is to report the facts, the decision reported has the effect of a special verdict.

(Code Civ. Proc., § 638, subd. (b) [Brackets added].)

**A special reference discovery referee’s advisory report under section 638(b):**

Under a section 638(b) special reference, the referee is “[t]o ascertain a fact necessary to enable the court to determine an action or proceeding.” The report is to be presented “as agreed by the parties and approved by the court.” (Code Civ. Proc., § 643, subd. (b).)

Under section 644(b), a special referee’s reported recommendation is “only advisory.” The court reviews the recommendation and “independently” either accept it in whole, in part or not at all. The court also considers a party’s objections and responses to the report, before it issues an order.

**A special reference discovery referee’s advisory report under section 639(a)(5):**

As a special reference under section 638(b), a report by a discovery referee under section 639(a)(5) is “only advisory.” Thus, the court reviews the

recommendation and “independently” either accepts it in whole, in part, or not at all. (Code Civ. Proc., § 644, subd. (b).) Before an order is issued, the court considers the opposing party’s objections and responses.

**Advisory report requirements:**

A section 639(a)(5) discovery referee’s report is to take into account the requirements of section 643(c).

**Objection to the advisory report:** An opposing party can object to a section 639(a)(5) discovery referee’s advisory report. Section 643(c), sets forth the elements for an objection.

**Response to the objection to the advisory report:** Responses are to be filed with the court, served on the referee and all other parties.

**Court review of the advisory report:**

The court reviews the objections and responses. The court thereafter enters an appropriate order that either adopts, modifies, or rejects the advisory report. The court has the power, at any time, to modify its original order, change the terms of the order or disregard the referee’s recommendation upon the motion of a party for good cause or upon the court’s own motion.

For an example of a court’s review of a discovery referee’s section 638(b) or section (639(a)(5) advisory report and recommendations under section 644(b), see *Lopez v. Watchtower Bible & Tract Society of New York* (2016) 246 Cal.App.4th 566. The reviewing court in *Lopez* held a trial court has broad discretion to consider objections to a discovery referee’s report, and the trial court is not required to hold a hearing or conduct a de novo analysis of the issues. “In its [trial court’s] review, the court should give the referee’s findings ‘great weight’ and focus on the parties’ objections to those findings.” [Brackets added.] (*Id.* at p.589)

Also see *Holt v. Kelly* (1978) 20 Cal.3d 560, 563, where, in a nondiscovery reference, our supreme court held a referee is in a unique position to evaluate the credibility of a testifying witness, and, therefore, the referee’s opinion can be given great weight.

### **Conclusion**

For the appropriate matter, the use of a discovery referee is an informal and expeditious way to resolve discovery disputes. Additionally, the court reduces its time outlay for matters that may be more expertly handled by a competent referee.

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