BY JUDGE TERRY FRIEDMAN (RET.)

The Appointment of Discovery Referees in Complex Litigation

CALIFORNIA'S BUDGET CRISIS poses severe challenges to trial courts. One response may be the appropriate use of discovery references in highly complex cases, which can help relieve trial courts of growing burdens and provide litigants with a timely and effective alternative.

In 2009 and 2010, the Judicial Council, with great reluctance, was forced to close courts one day a month. Strong judicial branch leadership has preserved court funding for 2011, but the prospects for maintaining current judicial services to the public in 2012 are grim.

Compounding the impact of budget cuts is the shortage of judicial officers in California. According to the Administrative Office of the Courts, California needs 2,352 judicial officers to manage the caseload demands of our growing population, yet currently only 2,022 judges have been authorized and funded by the legislature.

The Los Angeles Superior Court anticipates sharply reducing civil courtrooms if it must shift limited resources to criminal cases to meet constitutional obligations. Fewer civil judges will be assigned to civil cases and will encounter much higher caseloads. As a consequence, civil practitioners likely will face delays in trials and hearings.

Of great concern will be the inevitable impact on the resolution of discovery disputes, particularly in complex cases involving intellectual property issues or high-level financial disputes. One recourse available to overburdened courts and to parties who wish to avoid delays in the resolution of discovery disputes is the authority of a trial judge to appoint a discovery referee.[1]

References may be general or special. In a general reference, the referee may hear and make binding determinations on any or all issues in an action.[2] The court may make a general reference only with the explicit consent of the parties by stipulation in court or based on specific authorization in a written contract.[3] Absent consent, a general reference would be an "unconstitutional abdication of judicial authority."[4]

More common is a special reference, which allows the referee to make only nonbinding recommendations to the court.[5] In contrast to a general reference, a special reference does not require the consent of the parties. Instead, either party may make a written motion for a special reference, or the court may do so sua sponte.[6] Among the circumstances in which a court may make a special reference is "when it is necessary for the information of the court in a special proceeding."[7] Nevertheless, even this basis for a special reference without the parties' express consent is impermissible when a referee who does not have the consent of the parties conclusively decides all or part of a matter.[8]

In *Aetna Life Insurance Company v. Superior Court*, the trial court assigned all law and motion summary judgment proceedings to a referee and deemed the referee's findings and conclusions of law to be binding and determinative. Indeed, the court denied a party's request to treat the findings as advisory.[9] However, Code of Civil Procedure Section 644 expressly authorizes the trial court to make a nonconsensual reference of law and motion issues only if the special referee's findings are submitted to the court as advisory recommendations.

Moreover, according to Code of Civil Procedure Section 639(a)(5), the court's express authority to appoint a discovery referee is available only when the court determines that the appointment is "necessary." Further, the appointment is limited to the "exceptional circumstances" of the particular case.[10] Courts are discouraged from making "blanket orders directing all discovery motions to a discovery referee" except in the unusual case in which a majority of specified factors exist, including:

1) The necessity of resolving multiple issues.
2) The need to hear multiple motions simultaneously.
3) The current motion will be followed by a series of many motions.
4) The quantity of documents that must be reviewed make the inquiry "inordinately time-consuming."[11]

Other factors "always militate against reference," including when the legal issues underlying the discovery requests are complex, unsettled, or of first impression. The same is true when other parties to the litigation who are not involved in the discovery proceedings nevertheless would be affected by the rulings.[12]

A party who objects to a reference must make a written objection to the court with reasonable diligence.[13] If the court overrules or denies the objection, the party may petition for writ of mandate to challenge a nonconsensual special reference. For example, in *Taggares v. Superior Court*, the trial court, without consulting the parties, referred an initial discovery motion and all future discovery disputes in an uncomplicated breach of contract and fraud case to a referee. One party filed a writ of mandate challenging the trial court's authority to make the referral.[14] The court of appeal issued a writ directing the trial court to vacate its reference order and comply with Code of Civil Procedure Section 639, which prohibits nonconsensual references absent a finding that certain enumerated exceptional circumstances exist.[15]

Procedures and Grounds for Objections

The delegation of judicial decision-making to a referee is tempered by various limitations and protections for the parties. Among these are the court's inability to select the referee without the parties' participation. The parties may agree to the referee,[16] but if they do not, each party must submit up to three nominees to the court. The court must appoint the referee from among the nominees so long as no party makes an objection pursuant to Code of Civil Procedure Sections 641 or 641.2.[17] Those sections list each of the various grounds on which a party may object to a proposed referee, including whether the referee:

- Lacks the qualifications to be competent as a juror in the case other than residence in the county.
- Has an affinity within the third degree to a party (for example, the relationship of an uncle or an aunt with a niece or a nephew, or closer), an officer of a corporate party, or any judge of the court in which the appointment is to be made.
- Stands in a legal relationship, such as conservator and conserva-

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tee or principal and agent; is a member of any party's family; is a business partner with any party; or has posted security on a bond for any party.

- Served as a juror or witness in any trial between the parties.
- Has an interest in the action.
- Has formed an unqualified opinion on the merits of the action.
- Has a state of mind evincing bias toward or against any party.

Generally, a party raises these grounds after the court makes the reference, because parties typically lack the capacity to investigate the grounds at the time the reference is made.[18] Nevertheless, if any party either expressly consents to a reference or afterward appears before the referee without raising any objection to his or her appointment, authority, or jurisdiction, the party's objections to the reference or any irregularities involving the appointment will be deemed waived.[19] Thus, a party who wishes to object to a proposed referee on the grounds enumerated in the Code of Civil Procedure must file a written objection to the court with reasonable diligence.[20] If no party submits a nominee, the court may then select the referee, again so long as no party raises an appropriate legal objection.[21]

Referees also must disclose matters that may be grounds for disqualification, including facts that may constitute any of the grounds for objection to appointment of a referee and any ground for disqualification of a judge.[22] A referee must disclose "information that is reasonably relevant to the question of disqualification" even if the referee believes there is no basis for disqualification.[23] Specifically, the referee must disclose "any significant personal or professional relationship…with a party, attorney or law firm in the current case, including the number and nature of any other proceedings in the past 24 months in which the referee has been privately compensated by a party, attorney, law firm, or insurance company in the current case for any services."[24]

Explicit in a special referee's authority only to make a report or recommendation to the court is the right of the parties to file an objection to the report or recommendation. There is no express limitation on the grounds for objection, which presumably include errors of law, flawed factual findings, and abuse of authority or acting beyond the scope of reference. Such objections must be made within 10 days after the referee serves and files the report, unless the court directs another period of time. Other parties may file a response to the objection.

After independently considering the referee's findings and reviewing the objections and responses, the court enters its orders, as appropriate.[25] The referee's recommendations are entitled to great weight.[26] Once entered, the court orders are subject to the same appellate review as any court order.

While the referring trial court may order the parties to pay the referee's fees, it must do so in a fair and reasonable manner.[27] A party who objects to paying the referee fees or to the amount ordered may seek relief by petitioning for a writ of mandate.[28] For example, in *Solorzano v. Superior Court*, indigent plaintiffs proceeding in forma pauperis objected to the trial court splitting the discovery referee's $300 hourly fee. The court of appeal found that the trial court had failed to consider the impact on the indigent plaintiffs of its order that the parties equally share the fees.[29] Moreover, courts have found that a party need not be declared indigent before the trial court is obligated to consider whether its order for all parties to equally share the costs of a referee is reasonable.[30]

Trial courts must bear in mind, however, that it may not be fair and reasonable to order one party to finance the entire reference.[31] Whatever remedies a trial court may fashion, such as imposing discovery sanctions or permitting the referee to assert an equitable lien on a plaintiff's recovery, are dependent on the particular circumstances of a case. Also, they are subject to appellate review, most likely by writ.[32]

More Time and Less Formal

As discovery references are likely to become more common in our budget-strapped courts, litigators should understand the differences between the discovery referee process and court proceedings. For one, while the impact of discovery decisions on the trial may be a factor, even subconsciously, in the judge's mind, it is less of a consideration, if it is one at all, for the referee. For example, arguments based on whether the discovery at issue may cause a trial continuance or could lead to an expansion of issues to be tried will be less cogent because the referee is likely unfamiliar with these matters.

An important distinction is the amount of time the referee will devote to the issues and the hearing in particular. Trial judges' daunting calendars are often filled with multiple motions that must be heard before the day's trial can begin. By contrast, discovery referees generally do not face strict time constraints. However, counsel should still be aware that succinct arguments tend to be more successful.

Similarly, in large cases, such as intellectual property disputes involving hundreds of thousands or even millions of pages of electronic documents, the parties may file dozens of discovery motions. Scheduling many motions for timely hearings may not be possible in a busy trial court. The discovery referee may have more flexibility to meet the scheduling needs of the parties.

Referee hearings also are less formal than hearings conducted in court. Hearings before a discovery referee are held in private offices or even telephonically. More often than not, counsel and the referee engage in casual conversation off the record before and after the hearing. These discussions give counsel an opportunity to get to know the referee. However, attorneys should be cautious not to misread this informality as an invitation to engage in improper ex parte communications.

Sometimes the discovery referee conducts hearings that resemble supervised meet-and-confer sessions. Guided by the referee's thorough tentative ruling distributed to counsel days before, counsel may approach the hearing with creative ideas for resolving the discovery dispute entirely or discrete issues within it. For example, counsel for the party facing an adverse tentative ruling may suggest a middle ground between the tentative ruling and the party's position that takes into account the other party's needs. This type of mediated hearing takes the kind of time that may not be available in a formal and busy courtroom—and indeed a trial judge may decline to assume such a role. ■

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[1] Code Civ. Proc. §§638 *et seq*.
[2] Code Civ. Proc. §§644(a), 638.
[3] Code Civ. Proc. §638.
[4] Aetna Life Ins. Co. v. Superior Court, 182 Cal. App. 3d 431, 435 (1986); Cal. Const. art. VI, §22.
[5] Code Civ. Proc. §§638, 644(b).
[6] Code Civ. Proc. §639(a).
[7] Code Civ. Proc. §639(a)(4).
[8] Aetna, 182 Cal. App. 3d at 435.
[9] *Id*. at 434-36.
[10] Code Civ. Proc. §639(d)(2).
[11] Taggares v. Superior Court, 62 Cal. App. 4th 94, 105 (1998).
[12] *Id*. at 106.
[13] Code Civ. Proc. §642; Cal. R. Ct. 3.905.
[14] Taggares, 62 Cal. App. 4th at 100.
[15] *Id*. at 107.
[16] Code Civ. Proc. §640(a).
[17] Code Civ. Proc. §640(b).
[18] *See* J. G. Boswell Co. v. Industrial Accident Comm'n, 67 Cal. App. 2d 347 (1944).
[19] Shain v. Petersen, 99 Cal. 486 (1893).
[20] Code Civ. Proc. §642; Cal. R. Ct. 3.905.
[21] Code Civ. Proc. §640(b).
[22] Code Civ. Proc. §§641, 170.1.
[23] Cal. R. Ct. 3.904(b)(1); Cal. Code of Judicial Ethics Canon 6D(5)(a).
[24] Cal. R. Ct. 3.904(b)(2).
[25] Code Civ. Proc. §§643(c), 644.
[26] In re Estate of Beard, 71 Cal. App. 4th 753, 777 (1999).
[27] Code Civ. Proc. §645.1.
[28] Solorzano v. Superior Court, 18 Cal. App. 4th 603, 607 (1993).
[29] *Id*. at 615.
[30] McDonald v. Superior Court, 22 Cal. App. 4th 364, 370 (1994).
[31] Taggares v. Superior Court, 62 Cal. App. 4th 94, 104 (1998).
[32] Solorzano, 18 Cal. App. 4th at 616; *see also* McMillan v. Superior Court, 50 Cal. App. 4th 246 (1996) (depublished).