

Judicial References

IN THESE DAYS OF DWINDLING JUDICIAL RESOURCES, IS there any way to ensure that a client's case receives the prompt and thorough attention it deserves?

The answer is yes, if one considers a judicial reference—a term of art for a little-known procedure whereby the parties appoint a

retired judge, attorney-neutral, or a qualified layperson to carry out functions usually performed by a sitting judge. (One example of a nonlawyer referee is an accountant who may be appointed to examine complex financial dealings.)

The authority for judicial references stems from two sources. The first is the California Constitution, which provides for appointment of temporary judges. (See Cal. Const., Art. VI, § 21). The Code of Civil Procedure also authorizes judicial references. Specifically, the code provides for the appointment of a referee to hear all or part of a given case. (See Cal. Code Civ. Proc. §§ 638, 639.) Under § 638, the parties may agree to the appointment of a referee to determine “any or all of the issues” in the action [§ 638(a)], or to “ascertain a fact necessary to enable the court” to decide the case [§ 638(b)].

The parties may agree to a judicial reference before or after the dispute arises. Under § 638, a reference may be for as much, or as little, of the case as the parties desire; the scope of the reference can be expanded by stipulation at any point in the litigation.

If the parties agree to a determination of all issues, the referee will issue a statement of decision, which the trial court must accept and turn into a judgment.

The advantages of a judicial reference are many: (1) the parties choose

their own decision maker, (2) there are reliable and convenient trial and motion dates, (3) the case receives specialized attention, and (4) the parties retain full procedural rights—including the right to appeal—just as if they had tried the case in court. (See Cal. Code Civ. Proc. § 645.)

These advantages become even more apparent in particular matters, such as intellectual property disputes. In those instances, counsel may select a retired judge who has presided over numerous intellectual property matters while on the bench, or perhaps a veteran attorney-neutral with considerable experience in a given practice area. The parties can then proceed to schedule motions and hearings at their convenience, confident that the temporary judge/referee will have the experience to deftly deal with the issues, the time to read the briefs, and the ability to hear the case when called, as opposed to continuing it due to the crush of an overflowing calendar.

Of course, parties may simply agree to arbitrate the case, regardless of whether or not there is a pre-dispute arbitration clause. But a judicial reference comes with a procedural advantage that arbitration cannot match: the right to appeal. With a reference under §§ 638 and 639, the parties retain the appellate rights that they surrender when they opt for arbitration.

A judicial reference can also save

money at each step of the litigation process. Although the initial cost exceeds court filing fees, the parties save money on the back end because neutrals can tailor case management to minimize the expense of discovery, assist counsel in identifying threshold issues that may resolve or significantly streamline the matter, and devote full days to an eventual trial, should one be required.

Most temporary judges/referees take a hands-on approach to case management. For example, they will frequently order that no discovery motions be filed until the temporary judge/referee holds a telephone conference to discuss an informal resolution of the issue. Those telephone conferences can be scheduled as soon as an issue arises. Similarly, the neutral will frequently ask counsel if there are legal or factual issues that can be teed up for resolution, which may allow the parties to settle the matter, or at least greatly diminish the length of a merits hearing.

Should a full-blown hearing become necessary, there can be full days devoted to taking evidence and hearing argument, and litigants may also utilize such cost-saving techniques as videoconferencing or telephone testimony for witnesses not readily available in person. Thus, a matter that might take three weeks or more in court could take a week or less when properly administered by a temporary judge/referee.

As access to our civil courts becomes drastically curtailed, counsel should consider the use of judicial references for cases that require more than minimal judicial involvement. ☛

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