

Advantages of Using a Judge Pro Tem

By Hon. Patrick J. Mahoney (Ret.)

Time. There never is enough. In my days as a trial court judge, not finding enough time was a daily burden, a constant constraint on the process of deciding a challenging issue.

By returning to the private sector, I gained time that I never had as a jurist to consider the facts and law that impact the final decision. From my perspective that is a significant benefit parties secure when they take advantage of the unique law of California authorizing the appointment of a temporary judge, a judge pro tem. (Cal. Constitution art. VI, § 21)

Parties use a judge pro tem to ensure a decision maker is knowledgeable in the law applicable to the dispute as well as having time to manage the case in a cost-effective manner. When retained, California Rules of Court 2.830-.834 enable me to engage with the parties in fashioning a decision-making process that is most effective for their case. It may be narrow – ruling on a specific issue – or as broad as the full complement of judicial authority from case management, discovery, law and motion, settlement, trial and post-trial issues. Hearings are held in private settings with the caveat that a public filing notices the time and place of the event or virtual hearing. The process enables parties to set a schedule that ensures the matter will be heard and that time is available to address the merits of the dispute or facilitate a resolution. An additional benefit is the clarity of the record should an appeal be taken. When a party appeals, the party has the full panoply of appellate rights and remedies as contrasted with the stringent limitations of overturning an adverse arbitration award.

The COVID-19 pandemic has impacted



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court calendars across the state, particularly civil calendars. Each county is tackling the challenge differently but delay is common to all. As a consequence, this is a further reason to utilize a judge pro tem so that issues are decided without continued delay.

The judge pro tem is bound by the Code of Judicial Ethics, a further protection for the parties by ensuring the independence of the decision-maker.

Conflict is reduced as a consequence of the informal setting and prompt attention to issues as they arise. For example, I resolve discovery by short letter briefs and collaborative telephone calls. I also am able to provide the parties with guidance as to the issues I believe warrant being addressed. Often, this facilitates settlement.

Private judging is not a private process as is an arbitration. Pleadings are filed with the Court and notice is provided for hearings. One

limitation on the judge pro tem is the inability to seal a public record; that remains the responsibility of a sitting jurist.

A jury trial is rare before a judge pro tem but possible if the parties are able to stipulate to a jury selection process that addresses both composition and appellate rights.

The appointment of a neutral to serve as referee differs. It may be by agreement of the parties or solely on the trial judge's authority. A trial court's appointment authority is limited by statute (CCP § 639) and is most commonly employed to discovery disputes, an accounting or a discrete scientific or technical issue. The court determines an apportionment of the costs and the scope of the reference. The referee issues a report which either party may object to requiring the court to rule on the objection. Where the parties stipulate to the referee, the stipulation may prescribe both the scope and finality of the referee's report on a designated issue. Where a referee is appointed based on the court's authority, public facilities are available to the parties, which is not the case when the appointment is by stipulation.

The referee is bound by the Code of Judicial Ethics and the parties retain their full appellate rights.

The use of a judge pro tem or a referee provides the parties with time and expertise as well as the full panoply of rights and remedies afforded by our judicial system. In this unique period where the COVID-19 crisis is constraining the resources of the court system, the retention of a judge pro tem or appointment of a referee warrants consideration.

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