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GUEST COLUMN

Biglaw's toolkit: apply with pressure

By Edwin Reeser

Once upon a time it was thought the Tower of London had the best "tools" for the task at hand. It is beginning to look like the Tower keeper could take a few lessons from law firms.

Here are the "Dungeon Master's Dozen" from the Tower of Biglaw that you can expect to be applied with increasing frequency — and force — to reallocate money and governance power within law firms as the unrelenting pressure of the Great Recession continues. Not all law firms employ them, and some tools do have a proper place. It is when good tools are put to a bad use that problems abound. Without getting into the evaluation of motives behind them, let's take a look at the tools laid bare upon the table before the partners:

Part One in a Two-Part Series

1. Partner "de-equitization." Initially driven by a desire to remove the *occasional* unproductive partner, most partnership agreements were not able to be manipulated to permit direct discharge of equity partners other than for cause, or pursuant to a noticed meeting and vote of a supermajority of the partners. De-equitization provided a means of placing such a partner at a compensation level commensurate with their performance, while still retaining the title of "partner." During the Great Recession the technique has evolved to change the status of greater numbers of partners to that of salaried employees, and to report higher profits per partner, while also placing control of the partnership into the hands of fewer people. Increasing numbers of partners have been converted to "non-equity" status, expecting to continue as lawyers in the firm only to discover a two-step process of termination that they have agreed to — and then they are ushered out prior to their expected retirement date.

See Page 6 — BIGLAW

EDWIN REESER
Pasadena

Juliane Backmann / Special to the Daily Journal

Michael N. Berke says that while the process can be frustrating, representing veterans in U.S. Department of Veterans Affairs claims offers a high success rate, a sense of accomplishment and — sometimes — a big payday.

Despite slim payouts, lawyers see success with VA benefits appeals

By Chase Scheinbaum
Daily Journal Staff Writer

Until he was called upon by a friend to take over a World War II veteran's appeal for disability benefits, Michael N. Berke was an unsuspecting personal injury lawyer. A sole practitioner based in Santa Clarita, Berke had never set foot into the jungle that veterans and their lawyers are often cast. He didn't anticipate the three-year struggle he would encounter. Nor did he realize, before setting down this road, what veterans are up against when seeking disability benefits from the U.S. Department of Veterans Affairs.

The result of Berke's lawyering — a six-figure payment for decades of unrecognized injuries — is far from common. But the other details of his experience can be expected by any lawyer or firm taking on the nation's second largest bureaucracy after the Department of Justice — a labyrinth of paperwork, delays lasting years and the sense that something is amiss with the process. By 2020, the U.S. is expected to be home to 20 million veterans, many of whom receive benefits from the VA. Despite a tremendous need for attorneys, incentives to practice veterans law are few.

Atop the list of vexing problems is poor economics — low payouts from the government and a clientele that struggles economically. The huge number of veterans of wars in Iraq and Afghanistan has attracted a handful of sole practitioners and for-profit firms that specialize in the area, such as Bergmann & Moore LLC, a Bethesda, Md.-based shop. Yet the sector is far from booming.

"If you want to say it's opened up a new niche, yeah, but it's a small one," said Ronald B. Abrams of National Veterans Legal Services Program, a nonprofit that helps veterans obtain disability benefits. "You're only talking about 300 or 400 people who are practicing, on a steady basis, veterans law."

There are some reasons why forming a business model around benefits claims might make sense. If a veteran wins benefits on appeal, the attorney can be paid a flat 20 percent of the accrued benefits or another reasonable payment to which the veteran agrees. When unpaid benefits have piled up for years, as in Berke's case, the amount can be substantial.

Also, few lawyers know that, at least in the case of appealing benefits claims, it's usually a winning pursuit. "We win on the average over 90 percent of the time," Abrams said. "The average person will win about 70 percent of the time."

But all that is tempered by the glacial pace of the VA. Veterans wait an average of three-and-a-half years for a response to an appeal of denied benefits, according to a report earlier this year by the Center for Investigative Reporting. On average, veterans wait 20 months in Los Angeles and 18 months and 11 months in Oakland and San Diego, respectively, according to data cited in the report.

See Page 3 — VA

Same-sex marriage only for 4?

Opponents of same-sex marriage may challenge broad application of ruling

By John Roemer
Daily Journal Staff Writer

Don't order the wedding cake just yet, lawyers warned following the U.S. Supreme Court's refusal Wednesday to decide the Proposition 8 case on its merits.

The high court also struck down a significant part of the federal Defense of Marriage Act, extending federal benefits to same-sex couples.

Though many of California's estimated 200,000 same-sex couples may be eager to marry, legal speed bumps appear likely to remain.

"These are not nearly the victories many assume," said constitutional scholar Adam Winkler of UCLA School of Law. "The court has advanced the ball on LGBT rights, but only a little bit," he added, referring to lesbian, gay, bisexual and transgender people.

Winkler said that the DOMA ruling is not likely to lead courts to question other forms of anti-gay bias like adoption and the right to marry in the first place. And the Prop. 8 non-decision, while an apparent victory because it lets stand a district court holding that Prop. 8 is unconstitutional, raises questions about where and how soon gays and lesbians can get married, Winkler said.

See more coverage of the rulings, page 5

Even as many gay marriage supporters celebrated, Winkler predicted the underlying district court ruling is likely to be successfully challenged on whether its reach extends beyond the four individual plaintiffs.

"Trial judges do not have the authority to shape the legal rights of people who do not appear before them," Winkler said. "The injunction will likely apply only to the four named plaintiffs."

The high court ruled that proponents of California's same-sex marriage ban lacked standing to defend the measure because they had not suffered a concrete and particularized injury. *Hollingsworth v. Perry*, 12-144. That leaves the case where it was in 2010 when former Chief U.S. District Judge Vaughn R. Walker of San Francisco concluded that Prop. 8 is unconstitutional under the due process and equal protection clauses.

Wrote Chief Justice John G. Roberts for the 5-4 majority, "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."

A conservative attorney who foresaw the standing problem four years ago and sought to solve it, Robert H. Tyler, said the opportunity remains for further litigation to advance Prop. 8's intent. Tyler, the general counsel of Advocates for Faith & Freedom LLC in Murrietta, represented Imperial County and its clerk in their efforts to intervene as defendants in the Prop. 8 litigation. They claimed that because 70 percent of voters in the county had backed Prop. 8, they had a clear interest in its defense. Walker and the 9th Circuit rejected that argument.

"We tried to plug that hole," Tyler said Wednesday of the standing question. "Now, we're deciding whether to get back involved." He said he'd con-

See Page 5 — DON'T

Judicial Council rule change balances power among courts

By Paul Jones
Daily Journal Staff Writer

A proposed change to judicial branch rules that's slated to pass without discussion at Friday's Judicial Council meeting represents a small but noteworthy victory for the state's trial courts in the balance of power within the branch.

Rather than relying on a select few courts' presiding judges to pick nominees for a prized seat on the Judicial Council, presiding judges for all 58 superior courts would be able to pick a single nominee for approval by the chief justice.

All 58 court-elected presiding judges in the state are members of the Judicial Council's Trial Court Presiding Judges Advisory Committee, which allows them to collaborate to affect judicial branch policy. Traditionally, the advisory committee's executive committee, made up of presiding judges from several large courts and a rotating selection of presiding judges from smaller courts, picks three of its own to proffer to the chief justice, who picks the finalist for a term beginning in September. He or she then chairs the presiding judges committee and takes an advisory, non-voting seat on the Judicial Council.

The council is the most powerful body within the judicial branch and is responsible for making policy for the courts. It has 21 voting members and 11 nonvoting members and has recently overseen the adoption of a historic new funding formula for the state's courts and approved a shake-up of the branch's various advisory committees and working groups to increase the council's oversight of branch governance.

Working with current Chief Justice Tani G. Cantil-Sakauye, the state's presiding judges are set to soon pick their committee leader and council representative from any of all 58 presiding judges on the advisory committee.

Current chair, Judge Laurie Earl of the Sacramento County Superior Court, and Judge David Rosenberg of Yolo County Superior Court, last year's chair, both advocated for changes to the process.

"It's gratifying that the chief justice has recognized — and frankly, she's always recognized this — the importance of the presiding judges," Rosenberg said. He said many judges had felt that prior Chief Justice Ron George "operated in a very authoritarian way, and that presiding judges, who are elected by their courts, were the enemy. … This is a step towards democratization."

Rosenberg said he'd pushed the idea for judges to pick one candidate, instead of three, to effectively put the power of picking the advisory committee's leadership fully in the committee's hands. Earl said she'd pushed for all judges to be eligible for the chair, not just members of the executive

See Page 3 — COUNCIL

DAILY APPELLATE REPORT

CIVIL LAW

Constitutional Law: Federal law denying benefits to legally married same-sex couple is found unconstitutional as it deprives equal liberty of persons protected by Fifth Amendment. United States v. Windsor, U.S. Supreme Court, DAR p. 8343

Constitutional Law: Opponents of same-sex marriage lack standing to appeal lower court's ruling overturning California's ban on gay marriage. Hollingsworth v. Perry, U.S. Supreme Court, DAR p. 8314

Marriage equality does not mean divorce equality

By Robert Stanley

Several years ago, I asked a prominent Los Angeles family law attorney whether he supported same-sex marriage, and he said, "of course — we need more inventory." With marriage rates among opposite-sex couples at all-time lows, his concern was not unfounded. Now that DOMA and Proposition 8 are going the way of Jim Crow, at least for same-sex couples in California, the logical increase in marriage numbers that will follow should eventually provide the additional customer base my colleague had in mind. But a word of caution to him and all others handling legal matters for same-sex couples: "marriage equality" in California will not immediately translate into "divorce equality."

It is true that following the Supreme Court's rulings, same-sex married couples will finally be able to take advantage of many of the important federal laws and benefits for divorcing couples that had eluded them under DOMA. For example, they will now be able to make tax-free transfers of property between them as part of the divorce, without fear that such transfers would be treated as taxable gifts or taxable income. Likewise, a same-sex ex who is required to pay spousal support as part of a divorce will now be able to deduct the support payments on his or her federal income tax return.

However, the uniform application of federal law to same-sex and opposite-sex divorces will not change the fact that many same-sex couples will have taken a very different route in getting to divorce court. This is not to say that same-sex relationships end for different reasons. Although every couple's story is unique, I have found there is very little difference in the basic reasons couples split up, whatever the genders involved. Love, sex and money are a powerful combination, fraught with potential pitfalls, for any relationship. But same-sex couples, at least those who are most likely to have already married or to enter into marriage in the very near future, have by and large been together for many years, in relationships that have already weathered a constantly evolving legal and cultural landscape. This is important because divorce results are often impacted as much by the history of the subject relationship as they are by the laws applicable at the time of the divorce.

For example, a California same-sex couple who met and fell in love in 2000 and moved in together a year later. Then perhaps they had a public religious commitment ceremony with families and friends present a few years later, which everyone considered the couple's "wedding." At some point, this hypothetical couple decided to register as domestic partners with the secretary of state. And last but not least, they legally married during the 4-month window that marriage was available to same-sex couples in 2008.

What this means from a family law perspective is that this couple would likely have a relatively complicated set of facts upon which to base any legal split. Under California law, each of their anniversaries would have potential legal significance with respect to support obligations and community property rights. Living together created the possibility of "palimony" style contract claims pursuant to *Marvin v. Marvin*, 18 Cal. 3d 660 (1976), and similar cases (palimony was one of the only practical means of enforcing same-sex relationship obligations just 15 years ago, when almost no formal legal relationship status was available California or in any U.S. jurisdiction). The religious marriage increased the chances that such a *Marvin* claim would succeed. The domestic partnership meant that the couple was subject to all of the same rights and responsibilities as opposite-sex married folks. And now, under *U.S. v. Windsor* and *Hollingsworth v. Perry*, the legal marriage should mean that they are just as married as their straight married friends, even to the IRS and the rest of the federal government.

This is just one example of the endless variety of ways in which long-term same-sex relationships have evolved across a patchwork of often conflicting state and federal laws. Depending on where they have lived and when, and what resources and motivations they have had, many same-sex couples have taken advantage of one or more of the wide assortment of legal options available to them over the past 15 years, from "civil unions" to "registered partnerships" to "domestic partnerships" to marriage. Unlike the nearly universally understood legal implications of a legal "marriage," these other legal relationship monikers have each potentially carried with them a different set of rights and responsibilities. Even within these specific relationship categories, there can be significant variation in the associated rights and responsibilities. To have entered into a "civil union" in Vermont in 2001 legally is not the same as having entered into a "civil union" in Hawaii in 2013. In fact, the meaning of a particular type of relationship may have evolved tremendously over time within a single jurisdiction. For example, the first version of registered domestic partnership in California (established in 1999 as the first of its kind in the country) offered little more than hospital visitation rights. A few years and legislative amendments down the road, and the rights and responsibilities of a California-registered domestic partnership have been statutorily deemed to be on full-fledged equal standing with marriage under state law.

Further complicating things for many existing same-sex couples has been the lack of an expected or typical relationship path, leading to an endless variety of individual choices in the expression of love and commitment, with many intended and unintended legal consequences. Many couples with desired legal relationship options unavailable to them at home chose to go to other jurisdictions to be married or partnered under the laws of the those jurisdictions. Other couples living in jurisdictions with no legal recognition available for their relationships chose to enter into contractual relationships with one another. Some same-sex couples who considered themselves "married" in all respects but that "piece of paper" chose not to enter into civil unions or domestic partnerships available to them because those relationships did not represent the full extent of their commitments. The legal effects of choices like these are highly variable and to a large extent untested and unknown. There is much room for legal argument to be made, and legal precedent to be set.

California courts have already handed down decisions which could serve as cause for much debate within any same-sex relationship dissolution. For example, in *Estate of Wilson*, 211 Cal. App. 4th 1284 (2012), the appellate court decided that a prenuptial agreement which was entered into by a same-sex couple in connection with their registered domestic partnership was also effective to define the couple's rights when they subsequently entered into a legal marriage during California's window of marriage opportunity in 2008, notwithstanding that the couple never amended, updated or affirmed the agreement in connection with their legal marriage. In a more recent example, the state Supreme Court determined that whether one can be considered a "putative spouse," which could afford one marital rights including as to community property and spousal support, is a subjective question (reversing long-standing precedent holding that such a belief must be objectively accurate). *Ceja v. Rudolph & Sletten, Inc.*, S193493 (2013). Although *Ceja* involves an opposite-sex couple and is an estate case, its holding presumably would allow for a member of the same-sex couple in our hypothetical relationship to claim that he was a putative spouse, potentially entitled to all of the corresponding rights and obligations of a legal marriage, at the time of the couple had a formal "wedding" in front of family and friends, notwithstanding that these were not actually legal marriages. It takes little effort to imagine the countless other factual and legal scenarios which would invite argument as to the meaning and import of the various relationship steps that other same-sex couples may have taken, particularly those who have traveled to other jurisdictions to avail themselves of another available formal relationship status. This is all the more so with the dismissal of *Hollingsworth*, which effectively leaves in place significant variation in the availability of marriage rights for same-sex couples from state to state.

Following the decisions in *Windsor* and *Hollingsworth*, same-sex marital relationships in California should eventually become part of the basic divorce "inventory" that my colleague once envisioned. But, for same-sex couples who have already faced the myriad of relationship options available to them, and made varying choices in the ways of addressing their rights and obligations to one another, getting a divorce will likely still be much more complicated than for the their straight counterparts.

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Biglaw's toolkit: place over wound, apply pressure

Continued from page 1

2. Compensation reset. Available at both the equity and nonequity level, this is simply a substantial reduction in income below that expected by the partner. There are two basic ways this tool operates. One is as a tool to lever the partner out of the firm, with a bold reduction to a compensation level that is below that available elsewhere for the partner's contribution level. The longer he or she stays, the more the firm receives a premium return on their work. The second is a means of lowering compensation for all partners through a variety of discretionary objectives, some of them inherently contradictory, calculated to make it impossible for any person to do it all. The classic example is to emphasize teamwork and track referrals and delegations of work, and to simultaneously track originations retained. If one retains "too much" work, they are punished or not rewarded as a message that they are expected to do more for the team. If one delegates "too much" work, they are punished or not rewarded as a message that they need to increase their originations. The bottom line is that a component of income which is expected by the partner based on what they thought were standards applied consistently across all performances by partners is stripped away for distribution elsewhere.

3. Retired partner distribution interrupt. Many firms have retirement programs, adopted years ago, that provide an "unfunded" retirement stream. Putting aside arguments as to why these were good ideas or bad ideas (and there are excellent supporting theories and equities on both sides of the issue), they typically allocated a sum to a retired partner, often based on factors of years in service for the firm and compensation earned, pursuant to a formula. There were also caps on the maximum amounts that could be paid to any individual, and to the aggregate of individual distributees there often applied another limit, say to 10 percent of the total distributable profit pool in any year. Sometimes these payouts were for life, other times for a set period of years. Once the net income of the firm stopped being large enough to fully pay out the benefits, the firm has the ability to suspend any further payments for the balance of the year. What some firms have done is to reduce the percentage at which the distributions are suspended, say to 6 or 7 percent. With the advent of increased retirements through their acceleration (see #1), firms have seen their actual payout experience increase significantly, particularly with stagnancy of gross revenue and decreasing operating margins. Partners encouraged to retire, with the expectation of receiving these payouts, are now facing suspensions or significant reductions of the payments without any reasonable expectation that there will be a catch up.

4. Return of capital deferral. The withdrawing or retiring partner, expecting to receive the full amount of their capital return, is advised that pursuant to broad "best interest of the firm" powers in the partnership agreement, the decision has been made to return capital over a term of years, anywhere from three to 10, without interest, with the first payment not being for one year or more.

5. Forced capital contribution. The firm announces that it needs to reserve monies for unspecified purposes to "be prepared" for the unknown. It is treated as distributed, and recontributed, but the monies never hit the partners' pockets. Partners do pay tax on the monies, of course. This helps a firm with cash flow challenges to fund them with what is really a broad pay discount. In "black box" compensation systems these contributions may not be proportionally applied. For example, a firm may have a program of expecting a 35 percent of compensation capital account policy, but then put a cap on required capital at $600,000. So all partners at the upper tier of compensation, indeed those over the reported profits per partner for the firm, are effectively exempted from the increased capital call.

6. Recharacterization of distribution to loan. Distributions are made to certain partners who are in excess of actual allocable income share. This may be an accommodation to a partner that is special, say pursuant to a "guaranteed" contract where there is no percentage holdback as for most partners. All such excess amounts are treated as being recharacterized as a loan rather than income to the partner until they have been in the firm for another three years. If the partner leaves the firm then such amounts are subject to recapture by the firm, and the firm may offset the amounts against any capital account balances of that partner which would otherwise be returnable to them. If a partner, especially a lateral, determines that the expected performance of the firm is not and likely will not reach the levels necessary to earn out the shortfall, they may be in a position of having to give up most, if not all, or even more than, the expected "guaranteed" distributions should they decide to leave the firm.

7. Accrued income forfeiture. The withdrawing partner from a firm typically receives a "draw" against forecast income for the year, often in the range of 50 to 60 percent of that forecast. Departure prior to the end of the fiscal year usually results in forfeiture of all accrued but undistributed income for the year through the date of departure. When combined with a lengthy mandatory notice period, it virtually assures a significant forfeiture by the departing partner, in any conceivable scenario of departure at any time of year, especially with a "bonus" or "discretionary" clawback as described below.

8. Discretionary performance pool. A portion of the net revenue is set aside into a pool for distributions to recognize outstanding performances that might otherwise go unrewarded in the firm's compensation formula. These often go to insiders/senior compensated partners disproportionately. They also reduce the spread of compensation reported because they are not base comp. But there is also a component that can be pretty evenly distributed so that many folks get a distribution of some kind. It can be a "feel good" for recognition. But arguably, if it is just going back roughly proportionately to the partners, why do it at all? Because there is a policy that if you are awarded and take a discretionary bonus, and then leave the firm within a year, you have to give it all back.

9. Perk allowance. Not reported as income, but expensed by the firm, these are robust entertainment and "business development" allowances, travel upgrades for hotels, limos and flights, firm condos or suites in other cities, and a long list of other goodies not enjoyed by the partnership at large, but paid for by them.

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Tomorrow we will continue exploring the nine remaining tools from the "Dungeon Master's Dozen."

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Litigators look to creative solutions to save time and money

By Michele Seltzer and Rosemarie Chiusano

If you have called the department handling your state court lawsuit only to learn that the next available hearing date is six months away, or if you have trailed for months on a trial date, then you personally have experienced the impact of budget cuts on our judicial system. Time is money, and these delays can drastically increase the expense of litigation to clients. Worse, delayed resolution of matters can shift the balance of power in a case when an unresolved discovery dispute, dispositive motion or trial looms over the parties.

While attorneys are familiar with the more traditional forms of ADR, such as mediation and arbitration, ADR focuses on resolving disputes of *any kind*. Creative attorneys now use ADR to resolve even interim disputes and, in doing so, save their clients time, money and the anguish that can accompany uncertainty.

ADR is hot; companies are responding to the changing court environment by developing new programs and reviving older, pre-"fast track" dispute resolution methods. The only limits to ADR are the parties' willingness to participate in the process and their imaginations to create a framework to resolve disputes. In the long run, even though ADR may have up-front expenses, it can save clients plenty of money.

The following scenarios present age-old legal problems, and offer innovative ADR solutions.

Problem: You have a genuine dispute over the discoverability of bank records, and it is grinding the case to a halt. The hearing date on a motion to compel is months away and both sides need resolution to evaluate settlement. The court denies the ex parte application for a new hearing date, noting the stack of motions on its calendar that day. What can you do?

Possible solution: discovery mediation

Parties can stipulate to have a private judge mediate a discovery dispute through a process appropriately called "discovery mediation." As long as the parties cooperate and act in good faith, there is a discovery mediation method for every dispute. Counsel may opt to have a private judge adjudicate the dispute after a more typical law and motion practice with a hearing or, alternatively, they can sit down with the private judge to jointly create a solution that balances the potential prejudice to the producing party against the requesting party's need for the discovery.

Despite the cost of a private judge, discovery mediation saves litigants' money. The parties may be able to dispense with law and motion and use the ADR neutral to avoid protracted meet and confers depending on the discovery mediation method and the nature of the dispute. Further, resolving a dispute that holds the parties hostage has real value and may even facilitate settling the entire case.

Discovery mediation may not be right for every case. If one side is being purposefully obstructive, then the parties are unlikely to agree to discovery mediation. Further, if a party cannot produce discovery without a court order due to the privileged nature of the information, then the parties may consider requesting the court to order a special reference for the discovery dispute.

Problem: You represent a plaintiff with significant injuries. The defendant vehemently contests liability and thinks that he can successfully defend this case. Bifurcation of the trial on liability and damages is inevitable. You know that taking the liability issue to trial will involve highly technical (excruciatingly boring and laborious) issues. Mediation seems impossible since the plaintiff's demand is in the millions and the defendant has offered nuisance value.

Possible solution: jury mediation

Jury mediation allows for a trial dress rehearsal when settlement discussions have stalled and the parties want to know how particular issues will play out before a jury. Through a jury consulting company, the parties obtain vetted jurors representing the demographics of the trial venue. The parties and mediator determine the scope of the issues and what evidence to present to the jury (the point is to get candid feedback, not to jump on your opposing counsel). Each party presents their evidence and then watches through a one-way mirror in another room while the consultant polls the jury to gauge the jury's reactions to evidence. With the jury's feedback, the parties immediately begin mediation.

Jury mediation has resulted in settlements in virtually every case, especially when the parties are polarized on a discrete issue(s) preventing meaningful mediation. The cost of the private jury and mediator pales in comparison to trial and, even when the parties can't settle, they can prepare for trial armed with the jury's invaluable feedback.

Problem: A distributor claims it relied on alleged supplier misrepresentations when selling a faulty product. The resulting litigation has damaged their relationship with each other and customers. The distributor and supplier need this matter resolved quickly before the dispute permanently destroys their symbiotic economic relationship and years of goodwill.

Possible solution: private trials

The current crisis in the courts has led to a private trials renaissance since they offer the benefits of arbitration, including speedy resolutions, without sacrificing rights to appeal. The parties can even utilize a paid jury for the trial. The application and utility of private trials will evolve with changes in the court.

Private trials can provide a win-win in cases where delay hurts both sides. A private judge can try a matter in *one-third* the time of a public court since the judge need not abide by the court's start and stop times, long lunch break requirements, and interruptions from the court's regular calendar. Plus, the parties can plan for trial with certainty (no trailing), which eases the burdens of scheduling witnesses, especially experts who often charge per day of testimony. This saves money for clients without forsaking the legitimacy of the trial process or right to a court trial.

Problem: You represent a financial institution that has arbitration provisions in their contracts. Your client needs a speedy resolution to disputes, but thinks that arbitrations result in "split the baby" outcomes with no right to appeal. They ask you for other options for their contracts.

Possible solution: general judicial reference

To a transactional attorney, a general judicial reference is the theoretical perfect marriage between a court trial and arbitration. Like arbitration, the parties must agree to a general judicial reference, which generally provides faster case resolution outside of the civil court system.

Unlike arbitration, a general judicial reference functions like a court trial since California statute governs them; the parties try the case before a neutral applying procedural and substantive law. The court retains jurisdiction over the lawsuit and enters judgment based on the neutral's decision. The parties may then appeal that judgment no differently than if the court heard the entire matter.

General judicial reference does have its drawbacks. Parties seeking to keep their disputes out of the public record need to know that judicial reference requires a pending lawsuit, whereas arbitration can be completely private. Also, the parties may desire to keep the process informal, like an arbitration, which may become a problem on appeal. Further, to prepare for appeal, the parties need to mark exhibits, make objections, and preserve their records, which may necessitate a costly court reporter (although parties now must hire court reporters for court trials to make a record). However, a judicial reference can still save money because the case will not trail, and the referee can often try the case three times faster than the court since there are no time limits or calendar interruptions.

ADR, never easier to sell, is a voluntary process that requires cooperation among all involved parties, including counsel. Either the parties can remain locked behind door #1 — a congested court system with binary results in an adversarial process, or open door #2 — speedy, cost-effective alternative dispute resolution that can lead to win-win solutions for everyone.

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