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Is it Time To Appoint a Discovery Referee?

By Katherine Gallo



Last November I received the following e-mail:

Since courts are so overwhelmed and setting dates for hearing is now running 6 months or longer, how does one do motions to compel further responses to interrogatories in a meaningful way? I booked the first available date with the court, but it is not until next June and I need the responses in order to know what documents to request. Any ideas?

It is unfortunate that the California budget crisis has so imploded civil litigation in our courts. Despite the fact that discovery is the heart and soul of your case and you are entitled to compliance with your discovery requests; law and motion departments typically give discovery motions the lowest priority on their calendar. So, what do you do?

One answer is to have a Discovery Referee appointed. Parties can either stipulate to a Discovery Referee pursuant to C.C.P. §638 or make a motion pursuant to C.C.P. §639. The reference to a Discovery Referee can also be limited in scope to individual issues (i.e., the motion pending, sitting in all depositions, etc.) or for all discovery purposes in the action. The Judicial Council form for the Appointment of a Discovery Referee and the Order appointing the Discovery Referee are easy to use and cost effective.

Below are the legal authorities and the limitations of a court appointed discovery Referee pursuant to C.C.P. §639:



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I. AUTHORITY

The court has the power to appoint a Discovery Referee pursuant to C.C.P. §639(a)(5) which reads as follows:

(a) When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a Referee in the following cases pursuant to the provisions of subdivision (b) of Section 640 :

(5) When the court in any pending action determines that it is necessary for the court to appoint 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.

II. QUALIFICATIONS AND REQUIREMENTS OF REFEREE

A. Residency in the county is no longer required. [C.C.P. § 640, CRC 3.923]

B. The Referee's certification that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and with the California Rules of Court. The certification must be filed with the court. [CRC 3.921 , CRC 3.924(a)(1), (2)]

C. In addition to any other disclosure required by law, no later than five days prior to the deadline for parties to file a motion for disqualification of the Referee under C.C.P. §170.6 or, if the Referee is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter, a Referee must disclose to the parties:

(1) Any matter subject to disclosure under subdivisions (D)(2)(f) and (D)(2)(g) of Canon 6 of the Code of Judicial Ethics; and

(2) Any significant personal or professional relationship the Referee has or has had with a party, attorney, or law firm in the instant 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 instant case for any services, including, but not limited to, service as an attorney, expert witness, or consultant or as a judge, Referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral. CRC 3.924



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III. DESIGNATION OF REFEREE

Code of Civil Procedure §640 lists the procedure that the court is to use in selecting a Discovery Referee if the parties do not stipulate:

- A. The court shall appoint as Referee or Referees the person or persons, not exceeding three, agreed upon by the parties.
- B. If the parties do not agree on the selection of the Referee or Referees, each party shall submit to the court up to three nominees for appointment as Referee and the court shall appoint one or more Referees, not exceeding three, from among the nominees against whom there is no legal objection. If no nominations are received from any of the parties, the court shall appoint one or more Referees, not exceeding three, against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a Referee.

IV. ORDER APPOINTING REFEREE

The order appointing a discovery Referee must be in writing [C.C.P. §639(d)] and shall include the following:

- A. The order must specify that the Referee be appointed pursuant to C.C.P. §639(a)(5). [CRC 3.922(c)]
- B. The name, business address, and telephone number of the Referee [C.C.P. §639(d)(4), CRC 3.922(b)]
- C. If the Referee is a member of the State Bar, the order must include the Referee's State Bar number. [CRC 3.922(b)]
- D. A statement as to the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case. [C.C.P. §639(d)(2), CRC 3.922(c)(2)]
- E. The subject matter or matters included in the reference. [C.C.P. §639(d)(3), CRC 3.922(d)(1)]
- F. Whether the Referee is being appointed for all discovery purposes or only for limited purposes. [CRC 3.922(d)(2)]



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G. The Referee is authorized to hear and determine discovery motions and disputes relevant to discovery and is further 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. [CRC 3.922(e)(1)]

H. The maximum hourly rate the Referee may charge and, at the request of any party, the maximum number of hours for which the Referee may charge. [CRC 3.922(f)(1)]

I. Include a finding that

(1) No party has established an economic inability to pay a pro rate share of the referee's fees; or

(2) One or more parties has established an economic inability to pay a pro rata share of the referee's and another party has agreed voluntarily to pay that additional share of the referee's fees; and

(3) 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 modification.

V. POWERS OF THE REFEREE

The powers of a discovery Referee are limited to those granted by statutory authority and cannot be extended by a court order.

A. Discovery Matters California Rule of Court Rule 3.922(e) grants the discovery Referee authority to set the date, time, and place for all hearings determined by the Referee to be necessary, to direct the issuance of subpoenas, to preside over hearings, to take evidence and to rule on objections, motions, and other requests made during the course of the hearing.

B. Case Management Conferences In *Lu v. Superior Court* (1997) 55 CA4th 1264, 1269 the court of appeal stated that the Referee doesn't just assist the trial judge in resolving discovery disputes but the Referee can "*work with the attorneys in developing a discovery plan, scheduling discovery in the most efficient, rational and least oppressive manner.*"



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C. Law and Motion Matters other than Discovery *The superior court has no power to assign matters to a Referee for decision without explicit statutory authorization.* Aetna Life Insurance Co. v. Superior Court (1986) 182 CA3d 431, 435-436 "Hearing, considering and deciding dispositive motions is not one of the special references authorized by C.C.P. Section 639 which the court may make without consent." *Jovine v. FHP, Inc.* (1998) 64 CA4th 1506, 1523 . An assignment of a Referee for a purpose other than one listed in Section 639 is an excess of the court's jurisdiction and, therefore, voidable. *Jovine*, supra at 1531-1532.

D. Mediation California Rules of Court, Rule 3.920 states, "A court must not use the reference procedure under Code of Civil Procedure Section 639 to appoint a person to conduct a mediation." The Fourth District Court of Appeals in *Jeld-Wen v. Superior Court* (2007) 146 Cal. App. 4th 536 ruled that the trial court lacked authority to order parties in a complex civil action to attend and pay for private mediation because such an order conflicted with the statutory scheme pertaining to mediation as set forth in the Civil Action Mediation Program, C.C.P. Section 1775 et seq., which emphasized the voluntary nature of mediation.

E. Mandatory Settlement Conferences According to the comment section in CRC 3.920 a court can appoint a settlement Referee pursuant to conduct a mandatory settlement conference in a complex case, but the MSC must be held at the courthouse, supervised by the court and at the expense of the county. See *Raygoza v. Betteravia Farms* (1987) 193 Cal. App. 3d 1592,1595. Also, there is no statutory provision allowing the court to order payment of fees for a settlement Referee. Code of Civil Procedure §645.1 titled "Payment of Referees' Fees" limits the court's authority to order payment to those Referees appointed pursuant to C.C.P. §639.

VI. DISCOVERY REFEREE'S REPORT

A. Recommendations Due Code of Civil Procedure Section 643(a) and (c) require the Referee's to file with the court and serve on the parties a written report within 20 days after completion of the hearing. The report shall include a recommendation on the following:

1. The merits of the any disputed issue;
2. A statement of the total hours spent and the total fees charged by the Referee; and
3. Allocation of payment of the Referee fees.



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Remember, the referee's report is advisory and not determinative. [C.C.P. §644]

B. Objections Any party may file an objection to the Referee's report, or within another time as the court may direct. The objection shall be served on the Referee and all other parties. Responses to the objections shall be filed with the court and served on the Referee within 10 days after the objection is served. [C.C.P. §643(c)]

C. Review by Court Code of Civil Procedure Section §643(c) states that

"[t]he court shall review any objections to the report and any responses submitted to those objections and shall thereafter enter appropriate orders. Nothing in this section is intended to deprive the court of its power to change the terms of the Referee's recommendations, and this overriding power may be exercised at any time, either on the motion of any party for good cause shown or on the court's own motion."

"The trial court must independently consider the Referee's findings before action upon the recommendations." Rockwell International Corp. v. Superior Court (1994) 26 CA4th 1255, 1269-1270 A hearing is not required as a matter of law. The review may be done "in whatever manner the trial court deems appropriate." Marathon National Bank v. Superior Court (1993) 19 CA4th 1256, 1258. "Even though the trial court must independently consider the Referee's findings before acting, the Referee's recommendations are entitled to great weight." Estate of Beard (1999) 71 Cal. App. 4th 753, 777.

I don't make the recommendation to have a Discovery Referee appointed lightly. Having a Discovery Referee can cost the parties thousands if not tens of thousands of dollars. However, if you do not get the discovery you are entitled that would enable you to evaluate and prepare your case for mediation, a motion for summary judgment or for trial, you are doing your client a disservice. Also, resolving discovery disputes tends to resolve the animosity in the case. With the animosity gone, the parties can have effective settlement negotiations. Finally, Discovery Referee fees can be recovered in your Memorandum of Costs if you are the prevailing party.