

## California Judicial Reference Can Benefit Litigants Right Now

By **Charles Correll** and **George Morris** (October 15, 2020, 4:16 PM EDT)

Before the pandemic, California courts were already clogged to the point of bursting.

Unlike certain personal injury cases, there is no right to a preferential setting for commercial cases. Those of us who try commercial cases in California state courts know that getting a commercial case to trial promptly was a challenge before COVID-19, despite the efforts of our overworked judges and court staff.

Then the pandemic hit, making the situation exponentially worse — courts closed, trials were continued, and critical dispositive and other important hearings were significantly delayed. And once courts do reopen completely, they undoubtedly will face their largest backlogs ever.

Tellingly, the emergency rules the Judicial Council of California adopted in response to COVID-19 extended the five years in which to bring a civil action to trial by an additional six months.[1]

Fortunately, California has a lesser known and underutilized procedure that provides the expediency and efficiency sought from arbitration but that operates within the California court system — the judicial reference.

In the broadest judicial reference, the parties employ a private person — typically a retired judge — to oversee all facets of the case. There is full discovery, and ultimately the referee conducts a bench trial, which becomes a superior court judgment and is appealable.

All California rules of court, procedure and evidence govern judicial reference proceedings. While there are trade-offs to using this procedure, as discussed below, California's judicial reference procedure is overall a desirable alternative to litigating commercial cases in state court, especially during these unprecedented times.

### Overview of a Judicial Reference



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Section 638 of the California Code of Civil Procedure sets forth the framework for a judicial reference. It states:

A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

As set forth above, parties to an existing litigation, or to a contemplated litigation, can either stipulate to moving the case into a judicial reference, or one party can make a motion to the court for the appointment of a referee if there is a written contract between the parties that allows for a controversy to be heard by a referee under Section 638.

The parties also decide whether the referee will hear any single issue in the case or the entire matter. There certainly may be times where it is advantageous to have a referee decide a single issue in the case, or for a referee to preside over discovery disputes, but this article focuses on having the entire case before a referee.

If a contract contains a judicial reference provision, a party should move for an order to a judicial reference as soon as possible. A party can waive its right to a reference by continuing to litigate in state court, but such waiver is less likely than for an arbitration agreement.

In *O'Donoghue v. Superior Court of the County of San Francisco*, a state appeals court found that the plaintiff did not waive its right to a reference despite seeking a reference three years after the case was filed and after it had conducted discovery and requested a jury trial in multiple case management statements.<sup>[2]</sup> The court found no prejudice because the parties have the same discovery rights whether in state court or in a reference, so the moving party gained no advantage by staying in state court.<sup>[3]</sup>

We had a similar experience in *EFG-Campus Bay LLC v. Cherokee Simeon Venture I LLC* in Contra Costa County Superior Court. In this case, we substituted into an ongoing case in which the contract between the parties contained an agreement to proceed with a judicial reference. Although demurrers had been litigated and much discovery conducted, we were able to move the case to a judicial reference three years after it was filed.

That said, the waiver analysis is a multifactor test, and a trial court can find waiver weighing these factors in its sound discretion.

Once the parties proceed to a judicial reference, they have the option to agree upon the referee. This allows the parties to ensure that their selection has both the needed expertise for the case and the time necessary to oversee it.

If the parties cannot agree on a referee, the court obtains up to three nominees from each party, and then the court selects a referee, or up to three referees, from these nominations.<sup>[4]</sup> The parties have the right to object to the court's selection on various grounds set forth in Sections 641 and 641.2 of the Code of Civil Procedure.

In addition, before presiding over the reference, referees must make all disclosures required by the California Code of Judicial Ethics and determine whether there are any conflicts or any personal or professional relations with any of the parties or attorneys. Parties may have additional objections based on these disclosures. The court rules on all objections that the parties cannot resolve informally.

The parties to a Section 638 reference typically agree on the payment for the referee. If the parties cannot agree on payment terms, the court can order the parties to pay the fees in any reasonable and fair manner.[5]

Once a Section 638 reference begins, it proceeds just as a state court proceeding with pleading motions, discovery, dispositive motions and ultimately a bench trial. A referee has 20 days after a final hearing or trial, if any, to provide a binding statement of decision.[6] The court then enters judgment on the case in the same manner as if the action had been tried by the court.[7] A party to the reference may move for a new trial before the referee or appeal the decision using the state courts of appeal.[8]

### **How a Judicial Reference Works in Practice**

Our experience with a judicial reference in EFG v. CSV, which was a highly complex, multiparty case, highlights the benefits of this procedure. We were told by the superior court at one hearing that our matter had the thickest file at the courthouse. It certainly had a Jarndyce v. Jarndyce feel to it. We noticed, however, that the contract contained a judicial reference provision. Using the procedure described above, we moved to compel the case to a judicial reference over the plaintiff's objections.

Once the retired judge was appointed, the parties tailored the proceedings to maximize efficiency and reduce costs, while still maintaining the protections of state court rules and procedures. This ultimately made the reference far more advantageous than arbitration.

Although both a reference and arbitration utilize private decision makers, arbitrators are not bound by the rules of evidence and can exercise discretion on what to consider in deciding the case. In a reference, the referee is bound by all rules of court, evidence and procedure in the same way as a state court judge.

In addition, and perhaps most importantly, parties to a reference maintain the right to appeal. A decision of an arbitrator cannot be appealed or overturned except under limited circumstances, whereas a Section 638 referee's decision is subject to review by an appellate court just as if the case was tried in state court.

At the outset of the reference, the parties worked with the referee to come up with an efficient case schedule. We also agreed on specific procedures for handling discovery motions that required a decision in two weeks. The motion and opposition briefs were limited to five pages each, and no reply briefs were permitted.

The referee issued a tentative ruling and held a hearing within two weeks of the date the motion was filed. Although this was a very fast turnaround, it was clear that the referee spent a lot of time reviewing the papers, preparing for the hearing and ultimately deciding the issues.

The process for demurrers and summary adjudication was equally efficient and cost-effective. The parties agreed on page limits, response time and a hearing date. The referee in turn provided a detailed

tentative ruling and held a hearing in which the parties essentially had unlimited time to present their arguments.

By the time our case concluded, we were convinced that the reference was an ideal combination of arbitration and state court proceedings. To accentuate this point, our case had languished in state court for over three years until we finally moved to a reference. The case was then completely resolved in less than a year.

In that short time frame, numerous discovery issues were resolved, the plaintiff amended its complaint three times as a result of rulings on demurrers, and the remaining parties filed cross-motions for summary adjudication. The process also lent itself to a partial settlement during the proceedings.

While our case was before the pandemic, the new reality of conducting hearings and trials via platforms like Zoom, Microsoft Teams, Skype, and Cisco Webex would work well for a judicial reference. Because the parties have a private referee, scheduling is easier, and the parties have great flexibility to tailor the reference to adapt to the reality of litigating from a distance.

In addition, court reporting services have also pivoted and are now providing a host of options to conduct remote depositions, hearings and trials with technology that is easy to use for both counsel and the referee. All the advantages of a judicial reference are still available even if conducted remotely, and of course the biggest advantage is getting one's case moving again.

### **So, What's the Catch?**

While we believe that a judicial reference is a good alternative to state court, we realize that there are some aspects of the process that may not appeal to everyone. The most notable is that the parties lose the option of having their case heard by a jury. For some parties, that is a significant downside if not a nonstarter.

Another is that participating in a reference may result in higher costs. The parties are responsible for paying for the private referee. Good ones are not cheap. In addition, in our experience, whether the reference is for all issues or just for discovery issues, referees commonly request that the parties also pay for a clerk to assist the referee.

While these costs may be offset by efficiencies of the judicial reference, a party should consider them before agreeing to it. And if the choice is between a judicial reference or arbitration, a party may prefer the latter because it may entail more limited discovery and there is finality once an award is issued.

### **Conclusion**

Typically, parties agree to a judicial reference in their contract, like parties agree to arbitration. Given the courts' backlog, however, parties to pending commercial disputes should consider agreeing to a judicial reference even if their contract does not contain such a provision.

While one side may benefit more from delays in state court, that party may also want to avoid a jury trial; similarly, the party that wants a jury trial may also be the one wanting a speedy trial. A judicial reference, therefore, can be an agreeable compromise even after a dispute has arisen.

Whether to pursue a judicial reference is a unique decision in each case, but litigants and counsel alike

should know that this option exists. It is especially attractive now, given that the parties' alternative is remaining in the logjam of civil cases currently pending throughout California's state court system. Godot might just come along before one's case is tried.

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***Disclosure: The authors represented Cherokee Simeon Venture in the case discussed here.***

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[1] <https://www.courts.ca.gov/documents/appendix-i.pdf> at p. 14.

[2] 219 Cal. App. 4th 245, 255 (2013).

[3] *Id.* at 265.

[4] CCP § 640(b).

[5] CCP § 645.1.

[6] CCP § 643(a).

[7] CCP § 644(a).

[8] CCP § 645.