



THE RESOLUTION EXPERTS

# JAMS - The Resolution Experts

## Using Special Masters And Referees Effectively



## Benefits of Using A Special Master or Referee

- Expertise
- Continuity and Consistency
- Expediency
- Cost effectiveness



## Overview

- Selection considerations
- How to get the most of your Special Master or Referee
- Rules governing appointment
  - Federal Court - Special Master
  - State Court – Referees
- Authority of Special Master/Referee
- Case Studies



## Considerations for Selecting and Appointing a Special Master or Referee

- Select an experienced Referee or Special Master who likes doing it!
- Give the Referee or Master broad authority not only to decide disputes, but also to manage organize and schedule discovery
  - Case Management
- Take time to carefully draft the Order of Reference or Order of Appointment



## Considerations for Selecting and Appointing a Special Master or Referee

- Describe the procedure for issuing, correcting and reviewing the Referee's orders
- Authorize the Referee or Master to act flexibly and informally
  - Letter briefs
  - Telephonic hearings
- Consider someone who is technologically savvy!
  - E-mail



## Effective Use of A Special Master or Referee

- Work collaboratively with the Referee or Special Master from the beginning
- Set up a monthly or bi-weekly status conference call with the Referee
- Stipulating to the appointment of a Referee gives you more control over the process
- Focus on solving the problem you are presenting
- Be willing to proceed informally
- Consult your Referee as soon as a dispute emerges



## Special Masters – Federal Appointment

- Voluntary or Involuntary Appointments
  - Rule 53(a)(1)(A) and (C)
- Appointment is at the discretion of the Federal Judge – even if requested by the parties
- Special Masters can
  - address *pre-trial* and *post-trial* matters that cannot be addressed effectively and timely by a district court judge or magistrate, or
  - perform any duties *consented to* by the parties
- Court must consider parties' ability to pay prior to appointment
- Parties must be given notice and opportunity to be heard before appointment



## Special Masters – Federal Appointment (Con't)

- No Special Masters allowed in jury trials without party consent
- Rule 53(a)(1)(B)
  - *Exceptional circumstances (e.g. complex accounting or computational matters)*
- Special Statutory provisions authorizing Appointment of Special Masters
  - *See, e.g., 42 U.S.C.A. § 300aa-12 (the National Childhood Vaccine Injury Act )*





## Special Masters – Order of Appointment

- ***Order Appointing Special Master should:***
  - Spell out duties – with specificity – and any limitations on authority (Rule 53(b))
  - State circumstances, if any, in which the Master may communicate ex parte with the court or parties
  - Identify the nature of material to be preserved and filed
  - Set forth time limits for performing certain duties and the method of filing the record or report.
  - The procedures and standards for reviewing the Masters' orders, findings and recommendations
  - Set forth terms and basis of Special Master's compensation



## Special Masters – Order of Appointment Other Considerations

- Before order is entered, Special Master must file affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 445.
- Parties, with court's approval, may waive disqualification
- Order of Appointment may be amended after notice to parties and opportunity to be heard



## Special Master's Authority

- Generally broad – unless order appointing Master limits authority (Rule 53(c))
- Has power to “regulate all proceedings and take all appropriate measures” to perform assigned duties
- May **impose** a *non-contempt* sanction against a party
- May **recommend** a *contempt* sanction against a party and sanctions against a non-party
- In evidentiary hearings, Special Master may exercise the power of the appointing court to compel, take and record evidence



## Special Masters – Orders & Reports

- Orders must be filed and promptly served on each party (Rule 53(e))
- Reports must be made as required by the Order of Appointment
- Report must be filed and promptly served on the parties (Rule 53(f))



## Special Masters – Actions on Orders and Reports

- Court may adopt, affirm modify, wholly or partly reject or reverse or resubmit the matter to the Special Master with instructions (Rule 53(g))
- Court must give parties an opportunity to object and be heard before acting – Objections must be filed within 20 days unless court sets a different time
- Findings of fact are reviewed by the court de novo, unless the parties stipulate otherwise



## Special Masters – Actions on Orders and Reports (Continued)

- Legal conclusions are reviewed de novo
- Procedural matters are reviewed for abuse of discretion unless the Order of Appointment establishes a different standard of review
- In some cases, Referee's findings subject to deferential standard of review. (See *Whitcotton v. Secretary of HHS* (1996) 81 F.3d 1099 (Vaccine Injury Act case))



## Special Master's Compensation

- Special Master's Compensation fixed by Order of Appointment (Rule 53(h))
- Terms can be changed by court, but only after notice and an opportunity to be heard
- Payment is made by the parties or from a fund or subject matter in court's control
- Court may allocate payment among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a Master



## State Court Referees

*CCP § 638: Voluntary Appointments*

### Referee may be appointed:

- upon the agreement of the parties filed with the court or entered into the minutes or pursuant to written motion, 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





## State Court Referees

### *CCP § 638: Voluntary Appointments (Continued)*

- The Referee may be appointed to hear and determine any or all of the issues in an action or proceeding – whether of fact or law – and to report a statement of decision, (called a “general consensual reference”), or
- The appointment may be limited – authorizing the Referee to make factual findings to enable the court to determine an action or proceeding
- An agreement for appointment of a Referee may be entered into before or after a dispute has arisen, but no Referee may be appointed unless there is a pending suit
- Withdrawal of stipulation for the appointment must be made by motion and supported by a declaration of facts establishing good cause (CRC 244.1(g))



## State Court Referees

### *CCP § 639: Non-Voluntary Appointments*

- Referee may be appointed upon written motion by one party or on the court's own motion
- Court's power to refer a matter to a Referee is constrained by the constitutional principle that judicial power may not be delegated (Cal.Const. Art. VI, § 22; *DeGuere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 496)
  - Court has no power to make an uncontested-to “general” reference, which conclusively decides all or part of a matter



## State Court Referees

### *CCP § 639: Non-Voluntary Appointments (Continued)*

- Involuntary references must be authorized by statute and include:
  - Examination of accounts (CCP 639(a)(1); see *DeGuere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 499.)
  - Taking an account (CCP 639(a)(2))
  - Factual dispute arising upon motion in any stage of action (CCP 639(a)(3); see *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1210-11.)
- Special Proceedings, i.e., statutory actions creating remedies unavailable at common law or inequity including eminent domain, unlawful detainer, lien foreclosure, enforcement or arbitration and writs or review (CCP 639(a)(4))
- Discovery disputes – when the court determines it is necessary – but only in “exceptional circumstances” (CCP(a)(5))



## State Court Referees

### *“Subordinate Judicial Duties”*

- Other statutes authorize court employees (Court commissioner, probate referees, juvenile referees, etc.) to perform various “subordinate judicial duties” as authorized by Cal.Const. Art. VI, § 22. (See, e.g., CCP § 259 (Commissioner’s powers generally; CCP § 873.010 *et seq.* (partition of real property).)
- **NOTE:** Appointment not appropriate where complex or unsettled legal issues. (See *Taggares v. Superior Court (Mitchell)* ( 1998) 62 Cal.App.4th 94, 106.)



## State Court Referees

### *Order Appointing Referee*

#### Orders of Reference must be in writing and include:

- Referee's name and business address and telephone number
- State Bar number where applicable
- Referee's signature indicating consent to serve (CRC 244.1)
- Scope of the reference clearly stated – any or all issues or limited?
- Subject matter of the reference
- Referee's power to set the date, time and place for all hearings and 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 hearing (CRC 244.2(h)(2))
- The Referee's signature indicating consent to serve and certifying that he or she is "aware of and will comply" with Canon 6 of Code of Judicial Ethics



## State Court Referees

### *Order Appointing Referee (Continued)*

Consensual Orders of Reference under CCP 638 should also include:

- Referee's fees to be paid as agreed by the parties
- Whether reference is "general" or "special"
- **NOTE:** when parties consent to Reference, they get to define the scope and subject matter



## State Court Referees

### *Order Appointing Referee (Continued)*

Non-consensual Orders of Reference under CCP 639 must also state:

- Maximum hourly rate and at any party's request, the maximum number of hours for which the Referee may charge. Upon good cause, the court may later modify the maximum number of hours.
- A finding as to the parties' ability to pay – the Court may *not* consider the counsel's ability to pay, just the party's
  - Required even if party not proceeding *in form pauperis*
  - Inability to pay a pro rata share of fees may prevent the reference



## State Court Referees

### *Order Appointing Referee (Continued)*

- **Discovery Referees:** When the Referee is appointed to hear and determine discovery motions and disputes, Order of Reference must so state and must include the “exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case.” (CCP 639(a)(5) and (d)(2))
  - Exceptional circumstances” include the following:
    - Multiple issues to be resolved
    - Multiple motions to be heard simultaneously
    - Present motion is only one in a “continuum” of many
    - Number of documents to be reviewed (especially in connection with issues based on assertion of a privilege) make the inquiry “inordinately time consuming”. (*Taggares v. Superior Court (Mitchell)* (1998) 62 Cal.App.4th 94, 105.)
- Efficiency is not an “exceptional circumstance” (See *Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 437.)





## State Court Referees

### *Selecting a Referee*

- Same procedure for voluntary and involuntary references
- The court shall appoint the person(s) agreed upon by the parties
- If no agreement, each party submits up to 3 nominees, and court appoints Referee(s) against whom there is no legal objection



## State Court Referees

### *Selecting a Referee (Continued)*

- If no nominees - court appoints Referee(s) against whom there is no objection
- If Referee is *former* California judicial officer, must be either an active or inactive member of the State Bar. (CRC 244.1(a))
- **NOTE:** Participation in the selection process does not constitute waiver of grounds for objections to the appointment



## State Court Referees

### *Objections to the Appointment*

#### *Peremptory*

A party may move to disqualify a Referee under CCP 170.6 within 10 days of the notice of appointment or the parties' first appearance in the case or at least 5 days before the date set for hearing – if the Referee assigned is known 10 days before the hearing and has been assigned only for limited discovery purpose. (CCP 639(b))



## State Court Referees

### *Objections to the Appointment (Con't)*

#### **For Cause**

- A party may object to the appointment of any person as Referee on grounds including (CCP § 641):
  - Not competent to serve as a juror under statute
  - Consanguinity or affinity within the third degree to either party or officer of corporation that is a party, or any judge of court in which appointment made
  - In business with or employee of party
  - Served as a juror or been a witness on any trial between same parties
  - Interest in outcome of action
  - Formed or expressed prior opinion on action
  - Evidence of enmity against or bias toward either party
- Referee not technically competent



## State Court Referees

### *Termination of Reference*

- Order of Reference may be terminated before hearing
- A voluntary reference may also be terminated if a third party intervenes and does not stipulate to the reference



## State Court Referees

### *Disclosures by Referee*

No later than 5 days before the deadline to file a motion for disqualification, a referee must disclose to the parties:

- Any matter subject to disclosure under subdivisions (d)(2)(f) and (g) of canon 6 of the Code of Judicial Ethics; and
- Any significant personal or professional relationship the Referee has or has had with any party or counsel or insurance company involved in the case



## State Court Referees

### *Statements of Decision, Reports and Orders*

#### **CCP § 638**

- Decisions are reported as agreed to by the parties
- For Referees appointed to decide the whole case – a “consensual general references” – the decision of Referee stands as the decision of the court -- it is a final appealable order. (CCP § 644; *Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 436.)
- When the reference under § 638 is simply to report the facts – a “special reference” – the decision reported has the effect of a special verdict. (CCP § 645)



## State Court Referees

### *Statements of Decision, Reports and Orders*

#### **CCP § 639**

- Decision must include recommendation on any disputed issue and include a statement of the total hours spent and the total fees charged and the Referee's recommended allocation of payment. (CCP § 643)
- Decisions of Referees appointed under CCP § 639 are advisory only. The court may adopt the Referee's recommendations in whole or in part after independently considering the Referee's findings and any objections and responses thereto. (CCP § 644)





## State Court Referees

### *Actions on Statements of Decision, Reports and Orders*

- Objections should be filed within 10 days after the Referee serves and files the report, or within time the court directs (CCP § 643)
- Objections should be served on all parties and the Referee
- Responses to Objections must be filed within 10 days after objections are served
- Court then independently reviews objections and makes orders accordingly.



## State Court Referees

### *Actions on Statements of Decision, Reports and Orders*

#### *(Continued)*

- Although not binding, Referee's recommendations on factual findings entitled to "great weight" (*Estate of Beard* (1999) 71 Cal.App.4th 753, 777; *In re Rosoto* (1974) 10 Cal.3d 939, 946.)
- No hearing required before accepting or rejecting Referee's recommendations
- Court retains the power to make the decisions and may change the terms of the Referee's appointment upon a party's motion or for good cause upon its own motion
- **NOTE:** Referee's recommended order has no binding effect until it is adopted by the Court, (*Holt v. Kelly* (1978) 20 Cal.3d 560, 562; *Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1884, n.1), unless a consensual general reference.



## State Court Referees *Compensation*

- CCP § 638 - Referee's fees paid as agreed by the parties
- CCP § 639 - after the court's mandatory determination of ability to pay, may order the parties to pay the fees of Referees in any manner determined to be "fair and reasonable", including an apportionment of the fees among the parties.



## Case Studies

- ***Agreements to Use Referee***
  - Pre-Dispute Agreements
    - Enforceable only if part of “written contract or lease” (CCP 638)
    - General rules of contract interpretation apply
      - *Badie v. Bank of American* (1998) 67 Cal.App.4th 779, 800-04
      - *Greenbriar Homes Communities, Inc. v. Sup. Ct. (Couris)* (2004) 117 Cal.app.4th 337, 343.)
    - *Pardee Const. Co. V. Sup. Ct. (Rodriguez)* (2002) 100 CalApp.4th 1081, 1087-93
    - *Woodside Homes of Calif., Inc. v. Superior Court (Folger)* (2003) 107 Cal.App.4th 723, 725-36



## Case Studies (Continued)

### ***Post-lawsuit Agreements***

- Post-dispute agreements for appointment of a Referee may be either written or oral.
  - CCP 638 (agreement may be entered into the minutes)
  - *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1527
  - *Garland v. Smith* (1938) 131 Cal.App. 517, 524-25.)
- *See Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 435.) – Written agreement required
- *In re Hart's Estate* (1938) 11 Cal.2d 89, 91-92 - Implied agreement may be sufficient
- *National Union fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709, 715-16 – parties stipulated to reference after purported binding arbitration



## Case Studies (Continued)

### ***Finding “ability to pay” (CCP 639(d)(6))***

- *Andrews v. Superior Court (Thomas)* (2000) 82 Cal.App.4th 779, 781-83
  - Court has no authority to Order party’s attorney to pay Referee
- *Taggares v. Superior Court (Mitchell)* (1998) 62 Cal.App.4th 94, 103
  - Court may not consider counsel’s advancing of fees in determining ability to pay
- *DeBlase v. Superior Court (Hoffman Bros., Inc.)* (1996) 41 Cal.App.4th 1279, 1285
  - No compelled fee waiver – Referee cannot be ordered to serve without compensation; Court cannot authorize waiver of fees
- *Solorzano v. Superior Court* (1993) 18 Cal.App.4th 603, 615
  - Court cannot require *in forma pauperis* Plaintiff to pay private fees