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ESCAPING THE COVID-19 BACKLOG: JUDICIAL REFERENCES

Robin Meadow

As we wait for in-court trials to recommence in the wake of the COVID-19 pandemic, speedier alternatives begin to look more and more attractive, especially for civil litigants in cases that have no calendar preference or other urgency.

Those who are prepared to waive a jury—but are not prepared to risk the uncertainties of arbitration (see *Escaping the COVID-19 Backlog: Arbitration* in this issue (*Arbitration*))—should consider a judicial reference. In essence, this is a bench trial governed by the Code of Civil Procedure and Rules of Court, with full rights of appeal—but conducted by a privately-retained referee whom the parties can choose. While this procedure contains several traps for the unwary, at least some of its uncertainties have recently been resolved in *Michael S. Yu, A Law Corp. v. Superior Court of Los Angeles County* (2020) 56 Cal.App.5th 636 (*Yu*), discussed below. As with agreements to send a pending lawsuit to arbitration (see *Arbitration*), alert counsel can avoid problems that can arise when parties must rely on form clauses in pre-dispute transactional documents.

This article recommends ways to frame the reference proceeding that will help ensure smooth transitions back to the superior court and, if necessary, to the Court of Appeal. The time to address these points is at the outset, when neither side knows who will prevail or who may end up appealing. This uncertainty promotes cooperation, for which there may be much less incentive after the referee's decision.

Basics

The key statute is Code of Civil Procedure section 638:

> 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.
>
> (b) To ascertain a fact necessary to enable the court to determine an action or proceeding.

This article concerns subdivision (a), under which the referee functions as an all-purpose judge until rendition of a decision. There are some exceptions: Motions to seal records or to file a complaint in intervention must be filed with the court in the first instance. (See Cal. Rules of Court, rule 3.932; further undesignated rule citations are to the California Rules of Court.) Otherwise, the referee's decision "must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." (Code Civ. Proc., § 644, subd. (a); further undesignated code citations are to the Code of Civil Procedure.)

Some general points to be aware of:

• References are governed by rules 2.400 and 3.900 et seq. and, in Los Angeles, by Superior Court of Los Angeles County (LASC), Local Rules, rules 2.24 and 3.9.

• Although referees are almost always retired judges, the statute doesn't require judicial experience. (See §§ 641, 642 [grounds of objection]; rule 3.903 ["If the proposed referee is a former judicial officer, he or she must be an active or an inactive member of the State Bar"].)

• Unlike the confidentiality of an arbitration or a mediation, a judicial reference must be open to the public, and a person must be designated for public contact. (Rule 3.931(b)(1) ["In each case in which he or she is appointed, a referee must file a statement that provides the name, telephone number, e-mail address, and mailing address of a person who may be contacted to obtain

information about the date, time, location, and general nature of all hearings scheduled in matters pending before the referee that would be open to the public if held before a judge"]; LASC, Local Rules, rule 2.24(b) ["The stipulation for appointment of temporary judge or agreement for a reference must set forth the name and telephone number of a person for any member of the public to contact in order to attend a proceeding that would be open to the public if held in a courthouse. A notice containing such name and address shall be posted by the clerk as required by California Rules of Court, rules 2.831 and 3.900 et seq."].)

• Agreeing to use the judicial reference procedure, even in a pre-dispute agreement, waives the right to a jury trial. (*O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 256; see *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944 [pre-dispute jury waivers with respect to ordinary trials are unenforceable].)

• The trial court has discretion to refuse to appoint a referee despite the parties' agreement. (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 545.)

Pre-Trial and Trial

Because the referee effectively serves as a trial judge, pre-trial and trial proceedings closely resemble what would happen in court, except that—like arbitrations and mediations—the parties have far more control over scheduling and communications, and the proceedings can be less formal.

But parties must be alert to the risks of informality. In particular, they must ensure that the informality doesn't come at the price of an inadequate record on appeal. Since neither side knows who will win or who will appeal, this is a joint responsibility that both sides should be motivated to implement.

The easiest starting point is rules 3.930-3.932, "Rules Applicable to References Under Code of Civil Procedure Section 638 or 639."

Filings. The Rules of Court require that "[a]ll original documents in a case pending before a temporary judge or referee must be filed with the clerk in the same manner as would be required if the case were being heard by a judge, including filing within any time limits specified by law and paying any required fees." (Rule 2.400(b)(1); see rule 3.930 [requiring compliance with rule 2.400 in judicial reference proceedings]; LASC, Local Rules, rule 2.24(l).) And the referee "must keep all exhibits and deliver them, properly marked, to the clerk at the conclusion of the proceedings, unless the parties file, and the court approves, a written stipulation providing for a different disposition of the exhibits." (Rule 2.400(c)(2).) Rule 2.400 has multiple other requirements for filings, including provisions for public access.

The referee's orders present a special situation. No Rule of Court expressly requires the referee to file orders with the court. And while one would think that "original documents" includes "orders," LASC, Local Rules, rule 2.24(l) arguably draws a distinction. Titled "Filing of Original Papers and Orders," it states: "*All original papers* must be filed with the court, and all applicable fees paid, within the same time and in the same manner as would be required if the court were trying the case. *Signed orders of the temporary judge* must be presented for filing to the clerk in Department 1, or Department 2 for Family Law cases, of the Stanley Mosk Courthouse." (*Ibid*., italics added.) Arguably, the second sentence is merely a separate direction to temporary judges (not referees) about where to file their orders, but the language could certainly be clearer.

In any case, the reality is that parties and referees do not always file documents as the rules require, and may not even be aware of the requirements. The result is that when the case moves back to court, even cooperative counsel must resort to cumbersome and time-consuming workarounds—such as lengthy compendia of unfiled documents, and correspondence with the referee in the hope that he has maintained and can belatedly file his orders—to put everything before the court for purposes of getting judgment entered and pursuing an appeal. With uncooperative counsel, there can be extensive motion practice to accomplish that result, which may require resolving disputes about the contents of the actual record.

Counsel should not expect help from the referee's neutral-provider organization, if any. They often have little infrastructure for maintaining filings, and little motive to expend staff time doing so.

The easiest solution is to follow the Rules of Court from the outset; to insist that the referee and/or neutral provider do so, too; to specifically require the referee to file all orders with the court; and to follow up to ensure compliance. The parties' reference agreement and the court order should explicitly cite and require compliance with the relevant rules of court and local rules, or even quote them.

Court reporter. Just as in court, there should be a court reporter at every hearing, regardless of topic or length. With so much happening remotely by video, it's easy to forget this simple rule. The parties' agreement should reflect that all proceedings will be reported, and counsel should agree on a mechanism to make this happen.

A distinct problem exists when the court reporter must prepare the record on appeal, because there is no statute or rule of court that creates any interface between the reference's private court reporter and the superior court clerk. In court, private reporters must agree to adhere to the protocols that govern court-employed reporters, and while record preparation can be bumpy, at least the court clerk is nominally in charge of it. One solution to this problem is to include language in the original reference order to the effect that each private reporter must sign a similar document and

that the court clerk must accept transcripts prepared by the private reporters. Another workaround in the Second District Court of Appeal is to take advantage of that court's local rule permitting counsel to file a certified copy of the reporter's transcript directly with the Court of Appeal. To do this, one should use the Second District's form for designating the record on appeal (available at https://www.courts.ca.gov/documents/app-003-2DCA.pdf) checking box A.4. on the third page:

4. ☐ A certified transcript under rule 8.130(b)(3).
(To be lodged directly with the Court of Appeal, Second Appellate District.)

Regardless of how the reporter's transcript gets filed, it must comply with the format requirements of rule 8.144 (indexes, pagination, etc.). The private reporting firm should receive instructions on these requirements at the outset of the reference proceeding so the reporters can comply with them as soon as they start generating transcripts.

Exhibits. As noted earlier, absent a court-approved stipulation, exhibits must be transmitted to the court. But particularly with remote trials, paper exhibits will be rare. And in any case, it's been many years since trial courts routinely retained exhibits.

A complete set of exhibits is just as important to an appeal as the reporter's transcript. Parties should agree in advance how to handle exhibit identification, admission/exclusion of exhibits, and exhibit preservation. Ideally, at the conclusion of evidence, the parties, with the referee's assistance and an appropriate order, will compile a set of exhibits and file them with the court, where they will be readily accessible for post-reference proceedings in the trial court and on appeal.

Emails. The relative informality of a reference proceeding—which, especially when administered by a neutral provider, operates much like an arbitration or mediation in terms of communication among counsel, the neutral and the neutral provider—means that email communications are likely to be far more common than in regular court proceedings. But that doesn't make it any less important to ensure that they become part of the record of the proceeding. Certainly any email to or from the referee should be treated as an official record of the court, no less than any other kind of communication between the court and parties. The importance of a particular statement by counsel or the referee may not become evident until well into the case. And unlike courts, which have a central email system that is presumably part of the court's permanent records, a neutral provider—much less an individual neutral—generally undertakes no record-keeping obligation at all.

The parties should therefore agree to use some mechanism to compile all emails involving the referee or provider at the end of the case. The compilation can then be filed with the court.

The Statement of Decision

The trial before a referee culminates in a statement of decision that the referee "report[s]" to the court. (Code Civ. Proc., § 638, subd. (a).) The statute doesn't make clear whether the referee must follow the normal statement of decision process, but *Yu*, citing a treatise, suggests this possibility. (*Yu*, *supra*, 56 Cal.App.5th at p. 647, fn. 5.) Counsel should treat the process as one would in court, since there are serious waiver risks. And counsel should act immediately: Once the referee files the statement of decision with the court, the game is over. (*Ibid*. ["Objections are made to the referee before the decision is filed because once a general referee files a decision with the trial court, the decision 'must stand as the decision of *the court*' (§ 644, subd. (a), italics added) and is 'conclusive' (*Lewis v. Grunberg* (1928) 205 Cal. 158, 162)"].) For more information about the statement of decision process, see Segal & Meadow, *Statements of Decision: Your Chance to Tell and Preserve the Story*, ABTL Report: Los Angeles (Winter 2019) and Segal & Meadow, *Statements of Decision Part Deux*, ABTL Report: Los Angeles (Winter 2020).

Back in the Trial Court

Regardless of how the statement of decision gets finalized before the referee, the next stop is the trial court. Theoretically, the trial court could enter judgment on its own as soon as the referee files the statement of decision, but typically the prevailing party makes a motion for entry of judgment. (See LASC, Local Rules, rule 3.9(c) [requiring the prevailing party to make such a motion].)

Yu, *supra*, 56 Cal.App.5th 636 resolved some uncertainties in this process. In *Yu*, after the referee submitted his decision to the trial court but before the trial court entered judgment, the losing party moved the trial court to set aside the decision, arguing that the referee had made erroneous conclusions of law based on the facts he found. (*Yu*, *supra*, 56 Cal.App.5th at p. 643.) In response, the prevailing party argued that the trial court must first enter judgment and that any new trial or retrial must take place before the same referee. (*Ibid*.) The trial court found errors in the referee's conclusions of law, but was uncertain about the proper sequence of events—judgment first, followed by new trial motion, or new trial motion first? Concluding that either approach would yield the same result, the trial court ruled that "'based upon the record at this time, it is the clear intent of this Court to not adopt the Referee's findings and awards in all respects, and to simply order a new trial on all issues.'" (*Ibid*., italics omitted.) The court then ordered that the new trial would be conducted before it, not the referee. (*Ibid.*)

The prevailing party filed a writ petition challenging this procedure. After a detailed examination of the history of the reference procedure, the Court of Appeal made three important holdings. *First*, because under section 643 the referee's decision "'must stand as the decision of the court,'" the trial court was

required to enter judgment immediately and had no discretion to do otherwise. (*Yu*, *supra*, 56 Cal.App.5th at p. 646, italics omitted.) *Second*, the trial court had the power by way of a motion for new trial to set aside the judgment entered on the referee's report for legal error—though it must defer to the referee's factual findings. (*Id*. at p. 654.) *Third*, the trial court—not the referee—was the proper forum for the new trial. (*Id*. at pp. 654-655.)

This last point is particularly important because the Court of Appeal based its holding on the parties' reference agreement: "Under the parties' agreement here, the referee's powers were exhausted when he filed his decisions with the trial court. Real parties sought a new trial by the court, effectively objecting to the reference. In the absence of mutual consent for a new reference, therefore, the trial court properly ruled that the new trial be conducted before the court." (*Yu*, *supra*, 56 Cal.App.5th at p. 655.) Presumably, the parties could agree in advance, with the court's approval, to refer post-judgment matters—even including a new trial after an appellate reversal—to the same referee, or at least to some unnamed referee rather than the court. But since only the winning party would typically want the same referee, advance agreement to do this could prove unwise.

Other post-trial matters raise similar issues. For example, how are costs and attorney's fees to be decided? Motions to award fees and to tax costs are typically filed after entry of judgment—long after "the referee's powers were exhausted" if the statement of decision has already been reported to the trial court. Yet the referee is in the best position to rule on fees and costs motions, and even the losing party might prefer a knowledgeable decisionmaker over a stranger to the case. (See *Long Beach City Employers Ass'n v. City of Long Beach* (1981) 120 Cal.App.3d 950, 961 [suggesting a greater evidentiary burden when these motions are presented to a judge who didn't try the case].) Here, too, the reference agreement can dictate in advance that the referee will decide these issues, either by way of rulings made before submission of a statement of decision to the court or by an agreed reference to the same referee after entry of judgment.

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The availability of a prompt trial before an agreed judge with a full right of appeal can be an attractive alternative to waiting in the growing backlog of COVID-delayed superior court cases. But counsel should look before they leap by paying close attention to the proposed agreement's details.

Robin Meadow *is a partner at Greines, Martin, Stein & Richland LLP.*