

REAL ESTATE LITIGATION UPDATE

What You Need To Know About Judicial Reference

California's state courts have been hit hard by recent budget cuts that have significantly slowed down litigation, making alternatives to the court system more attractive. One option that allows parties to resolve disputes more efficiently is for parties to write into contracts that they will use judicial reference, which operates within the court system and relies on private referees.

How Judicial Reference Works

Judicial reference is codified in California Code of Civil Procedure (CCP) section 638, which provides for the appointment of a referee 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." Section 638 expressly provides that a contract or agreement made before a dispute arises can require that any lawsuit arising out of that contract or agreement shall be heard by a referee. The parties may also agree to judicial reference after a dispute arises, such as by stipulation during litigation.

A case is filed in Superior Court and then referred to a private referee, often a retired judge. If the parties cannot agree on a referee, then the court must obtain up to three nominees from each party and choose from them. Code Civ. Proc. § 640(b). If the parties do not provide any nominees, the court must make its own appointment, unless there is a legal objection. *Id.* Referees must disclose any matter subject to disclosure under the Code of Judicial Ethics as well as potential conflicts and any personal or professional relations with any of the parties or attorneys. Parties may object to the referee based on specific grounds, such as that the referee has an interest or bias, or has expressed an opinion as to the merits. Code Civ. Proc. § 641.

All the rules of evidence, civil procedure and other court rules apply to judicial reference. Among other things, this means that discovery occurs as if the case is proceeding in court. The referee has 20 days after the hearing to provide a binding statement of decision, and the Court enters judgment on it in the same manner as if the action had been tried by the court. Code Civ. Proc. § 643(a), 644(a). Parties may move for a new trial from the referee or appeal the decision using the state courts of appeal. The parties must agree on payment for the referee's fees, or the court may order the parties to pay the fees in any reasonable manner. Code Civ. Proc. § 645.1.

Advantages of Judicial Reference

Judicial reference offers several advantages, including speed, convenience, and avoidance of a jury trial. The California Supreme Court has held that pre-dispute jury waivers are not enforceable. *See Grafton Partners v. Superior Court*, 36 Cal. 4th 944 (2005). Judicial reference and arbitration, however, are permitted, because the California Legislature has enacted a comprehensive scheme authorizing these forms of alternative dispute resolution and they conserve public judicial resources. *Id.*, at 964-965.

Judicial reference shares several of the advantages of arbitration. The parties select a referee of their choice, and he or she essentially serves as their private judge. This makes scheduling hearings easier and allows for a quicker resolution without the need for a jury trial. The parties' ability to select their referee provides them an opportunity to select a neutral with expertise in the subject matter of the dispute. Moreover, a privately-selected referee will oftentimes have more time to review the parties' submissions and to prepare for hearings and trial. Insofar as the parties desire to place limitations on discovery, as arbitral rules often do, California Code of Civil Procedure § 2016.030 permits the parties to devise such restrictions in a judicial reference. Of course, on the downside, the parties will need to pay hourly rates and administrative fees of a reference as they would in arbitration.

Compared with arbitration, however, judicial reference has several additional advantages and few disadvantages. One advantage, for transactions of consequence, is that parties maintain full appellate rights, whereas arbitration decisions can only be overturned for limited reasons. Another benefit is that referees must comply with the rules of evidence, while arbitrators often choose to consider almost any piece of evidence, regardless of its admissibility. Judicial reference also provides parties more flexibility with respect to discovery. Third-party discovery can be difficult to enforce in an arbitration, even if the parties retain the right to conduct such discovery in an arbitration agreement.

One potential disadvantage of judicial reference is that hearings must be publicly accessible, whereas arbitration hearings are usually private. While judicial reference hearings take place at private facilities chosen by the parties, the clerk must post a notice of the case name and a telephone number to contact to arrange for attendance at any proceeding that would be open to the public. See Cal. Rule of Court 244.1(e).

On balance, for transactions of consequence, judicial reference is often a superior form of alternative dispute resolution as compared to arbitration for contracts that may be enforced in California, and will often produce a more efficient and predictable result than a jury trial.

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