

SO YOU WANT TO BE A NEUTRAL

ADR Services, Inc.

April 27, 2021

Moderator: Bette Epstein, Esq.

Panelists: Hon. Maria-Elena James,

Claudia Hagadus Long, Esq., Irene Takahashi, Esq.



Meet Your Speakers



Bette Epstein, Esq.



Hon. Maria-Elena James

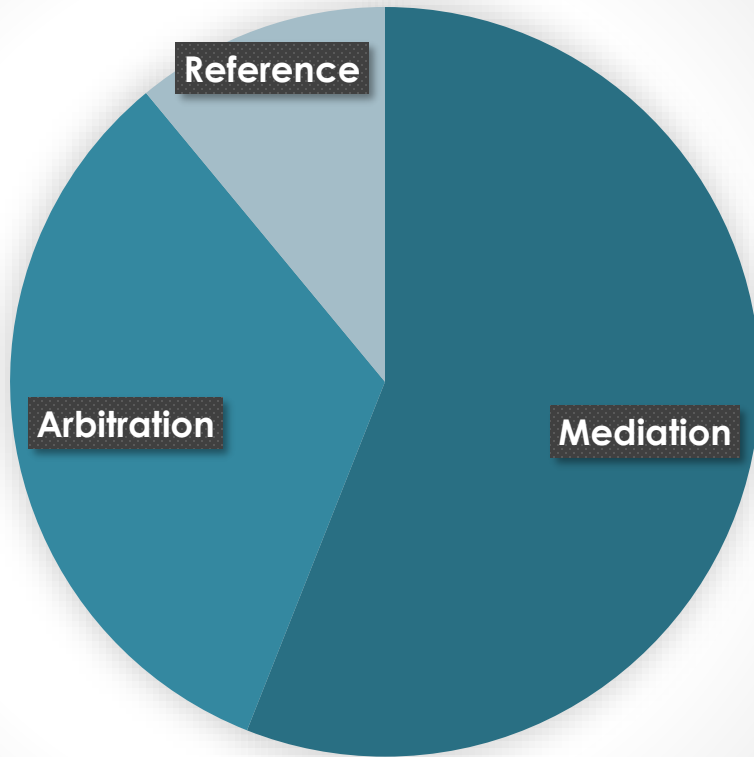


Claudia Hagadus
Long, Esq.



Irene Takahashi, Esq.

Types of Case Referral in ADR





MEDIATION & EARLY NEUTRAL EVALUATION

Claudia Hagadus Long

EDUCATION AND TRAINING OF MEDIATORS

- Civil Mediations are covered by CCP§177.5 et seq. Local rules detail the requirements for Court-Appointed Mediators. Contra Costa County, for example, has a very robust mediation program that requires 40 hours of training, significant continuing education, including a continuing-ed requirement regarding mediating with unrepresented litigants, and a minimum level of experience.
- Voluntary non-appointed mediators are subject only to the limitations of confidentiality.

- The basic traits of a good mediator:
 - PATIENCE
 - EMPATHY
 - TENACITY

- What about neutrality?

- How important is subject matter legal experience?
 - who's asking?
 - does the answer change for retired judges?

ONE SIZE DOES NOT FIT ALL

- Different cases need different mediators
- Needs are often deeply stereotyped
 - Business dissolutions, construction defect claims, patent & trademark, banking & finance
 - Estates & Trusts, employment discrimination, non-disclosure
- COMBATTING THE STEREOTYPE

EARLY NEUTRAL EVALUATIONS

- Subject to local court rules
- Qualities of a good ENE provider:
 - Patience
 - Neutrality
 - Quick grasp of facts
- How useful is this service in marketing?
 - Takes advantage of litigation experience and subject matter knowledge
 - Broadens the base of possible clients
 - But beware the morphing into mediation: making sure the parameters of the service are clear



ARBITRATION

Irene Takahashi

Arbitration

Civil courts have been severely impacted by COVID-19. We can expect the backlog of civil cases to continue, given the Covid variants, threat of another surge of cases, prospective jurors' hesitancy to report in person for jury duty, and how civil cases will continue to create a huge backlog.

Given the priority for criminal cases and limited courtrooms to accommodate jury trials, you may want to consider arbitration as a means of resolving your case, particularly if you are on the plaintiff's side. Arbitration is an adversarial process, similar to a bench trial, whereby a neutral third party(ies) is/are empowered to decide the outcome.



Disputes Are Submitted to Arbitration In One of Three Ways

1. **Contractual Arbitration** - A process to resolve a dispute that has arisen from or relating to a contract. It is based on a pre-dispute agreement in the parties' contract that, in the event if a dispute, the issue will be resolved through arbitration. In most cases, the result is legally binding.
2. **Arbitration by Stipulation** - This is based on a post-dispute agreement between the parties when they have agreed to arbitrate their dispute. It is typically binding and the arbitrator's award is usually final.
3. **Judicial Arbitration** - (CCP Sections 1141.10 et seq.) Certain types of cases are directed to non-binding arbitration prior to trial. The arbitrator's award may be rejected by a dissatisfied party and a trial may be requested.

Arbitration Process

- Disclosures
- Arbitration Management Conference
- Discovery
 - Arbitrator takes whatever interim measures deemed necessary
 - MSJ/MSA
- At any stage of the proceedings, the parties may agree to conduct a mediation conference to facilitate settlement
- Arbitration Hearing
- Award

Role of the Arbitrator & Initial AMC

An arbitrator, in essence, assumes the role of a judge presiding over a Court Trial. My experience as a judge well serves the interests of the parties. I begin with an Arbitration Management Conference, during which time the future conduct of the case, including clarification of the issues, document exchange, discovery, the form of the Award, the length of the arbitration, procedural matters, identification of pending discovery issues, dispositive motions (demurrers, motions to strike, motions for judgment on the pleadings and summary judgment), pre-trial motions, witness and expert availability and any other procedural matters are discussed.

Interim Measures

As an arbitrator, I am empowered to take whatever interim measures deemed necessary. This might include injunctive relief or emergency provisional relief. e.g. temporary restraining order.

Mediation During Arbitration

At any stage of the proceedings, the parties may agree to conduct a mediation conference to facilitate settlement. Generally, the mediator should NOT be the arbitrator appointed to the case unless the parties agree and execute a stipulation to that effect. It has been my experience that a number of cases settle during the course of the proceedings headed towards arbitration. For example, in one case, after briefs were submitted and the evidentiary hearing completed, counsel for the parties must have gotten a sense of how I might be inclined to rule based on some of the questions I posed following their arguments. I had just finalized my decision 5 days after the hearing when I received an e mail from one of the attorneys, advising that the case had settled. On several occasions, I have been retained to mediate a case after an arbitration had been scheduled and the parties reached a settlement at mediation. Obviously, a mediation is much less costly in terms of attorney, witness and experts' time and fees.

Conducting the Arbitration Hearing

As the Arbitrator, I determine the order of proof at the arbitration hearing. I make an effort to accommodate scheduling of witness. Unlike a jury or a bench trial, my time is flexible and I have no problem taking a break for a day or two in the middle of an arbitration, if circumstances dictate. For example, I may interrupt the hearing for an expert's deposition to be taken and allow time for the deposition transcript or videotaped deposition to be received in evidence in lieu of live testimony.

We begin with the claimant's presentation of evidence in support of the claims and the defense follows. As the arbitrator, I preside over the arbitration hearing and will rule on objections and evidentiary matters as they arise. I might request a brief in support of a party's position if I feel it is necessary to arrive at the proper ruling. I may conduct my own legal research. During this entire process, as contrasted with the typical experience in Court, counsel for the parties play an active role in scheduling the submission of briefs, order of witnesses, and other procedural matters. In my effort to accommodate the parties, a more relaxed forum overall results. Certainly, many of you have experienced the stress of scheduling witnesses for a particular day, only to have to reschedule them so as not to incur the Court's wrath.

I permit evidence to be introduced by declaration or affidavit. Witnesses may appear by phone or videotaped deposition, depending on the agreement of the parties. If deemed helpful to the understanding of the testimony, I've welcomed a site inspection to better understand what happened.

Arbitration Award

After the evidence is submitted, I may receive or request post-hearing briefs before I render my award. I make a concerted effort to explain the disposition of each claim and the relief, if any, granted. Before I start writing, I review all my notes, written submissions, portions of deposition transcripts, and will articulate the basis for my decision.

As opposed to presenting evidence in a public courtroom, arbitrations are kept CONFIDENTIAL unless otherwise required by law or judicial decision.

Advantages To Resolving Cases Through Arbitration

1. The parties select their arbitrator or panel of arbitrators, allowing for the selection of an arbitrator with the appropriate subject matter expertise.
2. It is faster and more cost-efficient than the courts that, more times than not, involve a trial date and preparing for trial only to have your case continued by the judge for lack of a courtroom and having to reschedule witnesses, thereby wasting time, effort and costs.
3. It is less formal and more flexible with respect to scheduling around the
4. Needs and availability of the parties, witnesses and counsel.
5. There are more simplified rules of evidence and procedure.
6. The process is private and confidential.



§ 638/§ 639 REFERENCES & PRIVATE TRIALS

Hon. Maria-Elena James

References (CCP § 638, § 639 (a), § 639 (b)) and Private Trials General Information

- May be selected either through agreement of parties, by the court directly, or after parties submit a list of names to the court for selection
- The Referee/Judge Pro Tem must sign a disclosure statement All references require disclosures – must keep a database.
- These assignments may include:
 - Motion work (on all discovery or a specific sub-set of motions)
 - Presiding over depositions
 - Trial by Reference or Private Trial
- Referee will either submit Report & Recommendations to the Court for adoption/rejection, or issue final decisions, based on the type of assignment
- All documentation must be filed with the court, either by counsel or by the Neutral's office (consideration of expense in undertaking these assignments)
- See handout materials with additional details on each assignment

CALIFORNIA CODE OF CIVIL PROCEDURE § 638.

§ 638.

A referee may be appointed upon the agreement of the parties ...to hear any or all the issues and to report a statement of decision.

- The referee must sign a disclosure statement All references require disclosures – must keep a database.
- The referee is usually chosen by agreement of parties.
- Court may adopt or reject referee's statement.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 639(a)

§ 639. (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.

- When the trial of an issue of fact requires the examination of a long account on either side, a question of fact.
- Often done when there is a complicated and lengthy discovery dispute.
- How do the assignments get to you?
 - Judge picks someone (from a county program, or select someone they know)
 - Parties submit names for the Judge to pick from
 - Parties stipulate to someone
- The referee must sign a disclosure statement.
- Referee reports findings and makes a recommendation.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 639(b)

§ 639(b) In a discovery matter, a motion to disqualify an appointed referee pursuant to Section 170.6 shall be made to the court by a party either:

When a referee is appointed(a) the order shall indicate whether the referee is being appointed for all discovery purposes in the action.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 639(b)

§ 639(b) (d) All appointments of referees pursuant to this section shall be by written order and shall include the following:"

This section requires that the order state the reason for the appointment, the circumstances that require the appointment, the subject matter included, the name and contact information for the referee, the hourly rate for the referee, a finding of no financial inability for either party to pay,

California Constitution, Article VI: §21.

On stipulation of the parties....the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

Many courts have formal programs that allow attorneys to volunteer to serve as a temporary judge.

2021 California Rules of Court

Rule 2.830. – 2.834 Temporary judges requested by the parties

Rule 2.832. Compensation

- A temporary judge selected by the parties may not be compensated by the parties unless the parties agree in writing on a rate of compensation that they will pay.

(f) Motion to withdraw stipulation

A motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation, and must be heard by the presiding judge or a judge designated by the presiding judge.

Beware: Make sure to include that your stipulation & appointment order should include a clause allowing Pro Tem to recuse themselves, otherwise the judicial canons do not allow recusal unless there are very specific circumstances (non-payment is *not* one of these circumstances!).

Converting from a mediator to a referee

- The Parties understand that this mediation-private trial process in front of the same neutral may compromise temporary judge's neutrality, because the neutral may have received confidential information relevant to the merits of the dispute in the course of the mediation before hearing the evidence and deciding issues in the trial.
- Parties waive the right to seek disqualification of the Temporary Judge by reason of participation in the previous mediation and waive the right to seek to object to the temporary judge's orders on this basis.



FOUR VIEWS OF MOVING ON

Preparing & Marketing for Success

- Forty hours of minimum training
- Shadowing and mentorship
- Getting the first few cases
- Niche/ Broad-based
 - Speaking engagements, writing articles
 - Virtual and in-person events
 - Email marketing
- Preparing your “book of business” and building relationships
- Matching the process to the mediator
 - Staying in the comfort-zone/ expanding the comfort-zone



DISCUSSION & QUESTIONS

Stay in Touch



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