



# WHO YOU GONNA CALL? CASE BUSTERS!

How and When to Utilize Neutrals in Family Law Disputes

**ADR Services, Inc.**

**May 17, 2022**

**Webinar**

# Today's Speakers



**Hon. Susan  
Lopez-Giss**



**Comm. Glenn  
Oleon**



**Richard  
Roggia, Esq.**



**Hon. Charlotte  
Woolard**



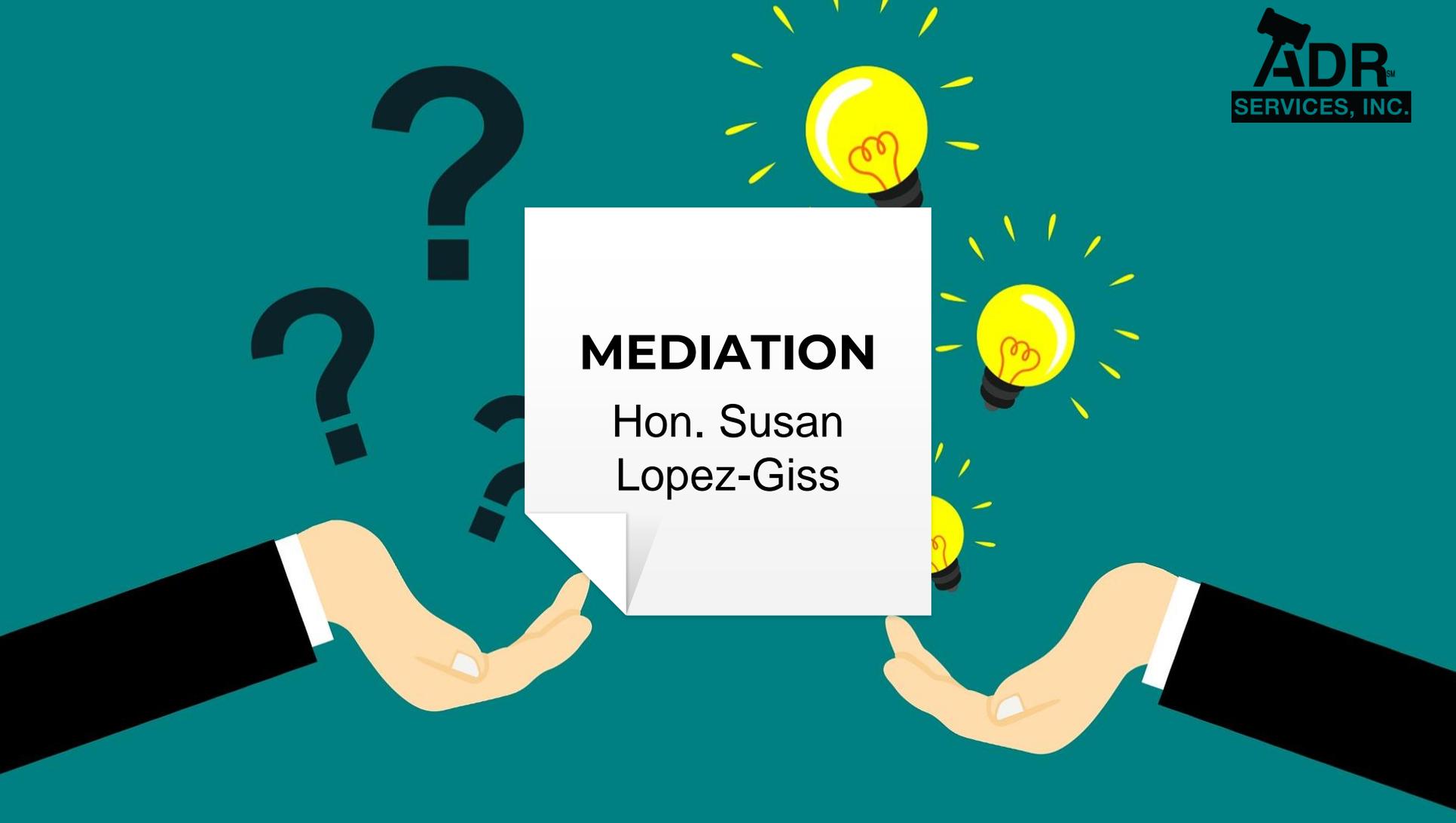
**MEDIATION**  
Hon. Susan Lopez-Giss

**Family Law Arbitration**  
Hon. Charlotte Woolard

**Private Judging**  
Commissioner Glenn Oleon

**References**  
Richard P. Roggia, Esq.



The background is a teal color. In the center, a white rectangular box with a folded bottom edge contains the text. Two hands in black suit sleeves are shown holding the box from the bottom. To the left, several large black question marks are scattered. To the right, three glowing yellow lightbulbs with radiating lines are scattered. The overall theme is mediation and problem-solving.

# **MEDIATION**

Hon. Susan  
Lopez-Giss

## Why Mediation?

Angry Clients:  
Expectation that  
attorney will  
produce results.



# Stories v. Admissible Evidence



Vs.





**Cost = Risk Management**

# Help Me Help You!

1. Frame the Issues — Rules of Court require meet and confer to identify disputed issues - Confidentiality affords ability to know opposition's arguments.
2. Clients Vent
3. Opportunity to clarify your client's **"DEMAND"**



# Results



1. Clients get impartial assessment from Mediator - which assists with attorney's credibility.
2. If mediation succeeds - Attorney is hero.
3. If mediation fails - Confidential opportunity to look at answer book (mediator's assessment).
4. Post-Mediation Options



**Private  
Judging**  
Commissioner  
Glenn Oleon

# ADVANTAGES OF PRIVATE JUDGING

## Flexibility

- Easy access to judicial officer
- Choose convenient times and locations for meeting
- Operate by consensus to make your own rules (within reason)
- Private Judge can hear all or limited issues in case

## Ability to choose your judicial officer

- Experience, expertise, known commodity
- Less need to educate the judge

## Scheduling efficiency and convenience

- Pick dates that work for all participants
- Case Management as often as necessary
- Minimize scheduling delays and continuances
- Shift between trial and settlement modalities
  - Avoid breaking up trials
  - Potential cost savings

Privacy (but not unlimited)  
(CRC 2.834)

# PROCEDURES FOR APPOINTING/USING PRIVATE JUDGE

**Stipulation and Order signed by parties and counsel, then approved by Supervising or Presiding Judge**

- Different procedures/forms in different counties

**Disclosures by Private Judge**

**Creation of “Shadow File”**

**Waiver of conflicts if Private Judge conducts “mediated Settlement Conference”**

1

2

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**Consent and Oath of Office signed by Private Judge**

- Temporary Judge bound by Canons and Rules of Court
  - Prohibition on ex parte communications

**Payment of retainer**

**Filing and service of papers, payment of Court fees**

# DISCLOSURES

## **CRC 2.831**

No later than 5 days after designation must disclose any matter subject to disclosure under Code of Judicial Ethics.

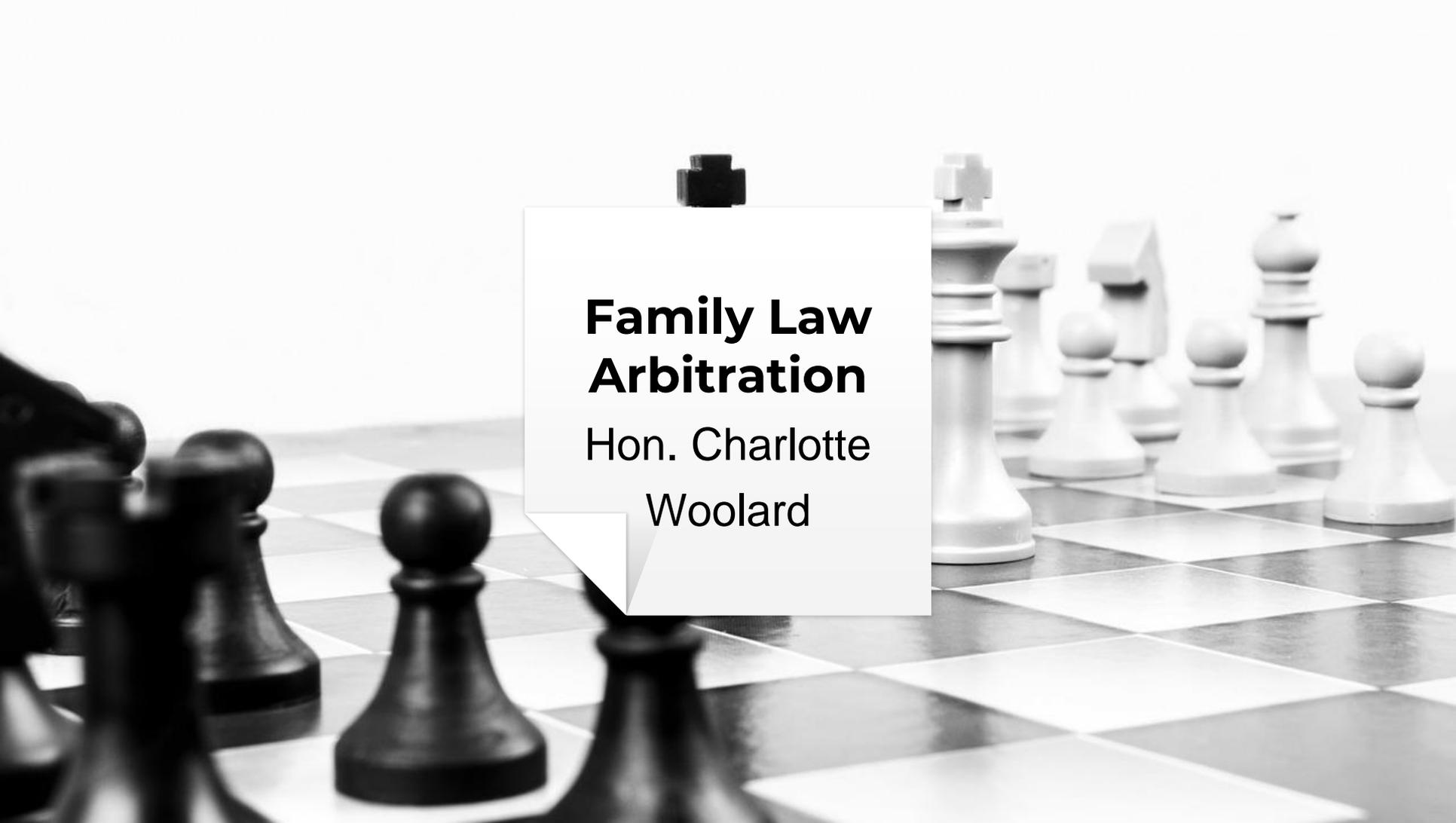
## **Canon 6 of Code of Judicial Ethics**

Any information parties or attorneys might consider relevant to issue of disqualification.

Includes known personal or professional relationships with party, attorney, or law firm in the proceeding.

## ***Jolie v. Superior Court (2021) 66 Cal.App.5th 1025***

Continuing duty to update disclosures upon accepting new cases involving same attorneys or parties.



## **Family Law Arbitration**

Hon. Charlotte  
Woolard

# BENEFITS OF FAMILY LAW ARBITRATION

Parties select their own judge

Arbitration is faster than going to court

Arbitration is less formal than Court Proceedings

Privacy  
(disclosures still issued)





# Options Available

## FAMILY CODE §2554 JUDICIAL ARBITRATION

- Division of the Community Estate
- \$50,000 limitation
- Court's decision as to value not appealable
- Court submission of matter to arbitration
- Arbitration award final unless request for trial de novo or request for dismissal

# CONTRACTUAL ARBITRATION

- Marital property division *Marriage of Cream* (1993) 13 Cal.App.4th 81
- Child Custody and Child Support – binding arbitration may be unenforceable
  - » Custody: *Marriage of Goodarzirad* (1986) 185 Cal. App.3d 1020
  - » Support: *Armstrong v. Armstrong* (1976) 15 Cal 3d 942  
*Marriage of Berezna & Heminger* (2003) 110 Cal.App.4th 1062

# WORK-AROUND OPTIONS FOR CHILD CUSTODY/SUPPORT

- Arbitrator is bound to apply governing law (mandatory guidelines).
- Arbitration agreement preserves normal rights of appellate review.
- Agreement does not foreclose judicial intervention for modification proceedings.
- Courts not prevented from exercising their role as *parens patriae* to protect the rights of minor children.

## CALIFORNIA SUPREME COURT'S ...

Implicit approval of allowing parties by stipulation to submit disputed domestic relation matters to binding arbitration with certain procedures and protections.

»» *Marriage of Assemi* (1994) 7 Cal.4th 896.

Appellate Review of Arbitration Awards on merits allowed by agreement.

»» *Cable Connection, Inc. v. DIRECTV, INC.* (2008) 44 Cal.4th 1334.

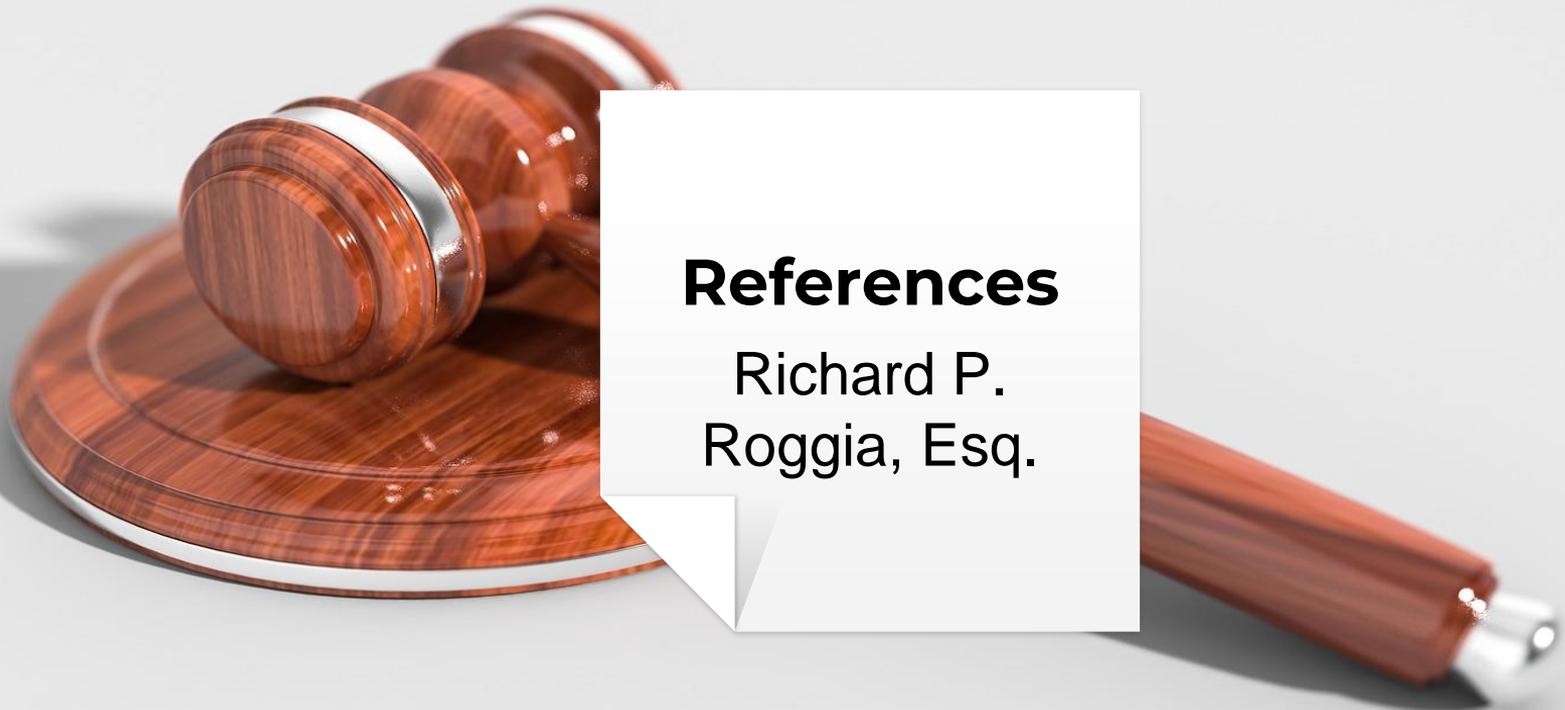


# **CAN THE FEDERAL ARBITRATION ACT (FAA) EVER APPLY TO FAMILY LAW ARBITRATIONS?**

( -Rarely )

# UNIFORM FAMILY LAW ARBITRATION ACT (UFLAA)

- <https://www.uniformlaws.org/committees/community-home?CommunityKey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed>
- Approved by the American Bar Association and recommended in all states.
- Not enacted in California.
- Covers most contested domestic relations issues in states where adopted.

A wooden gavel with a silver ferrule is resting on a wooden sound block. The gavel is positioned diagonally across the frame, with the head on the left and the handle extending towards the right. The wood has a rich, reddish-brown hue and a visible grain. The background is a plain, light gray surface.

## **References**

Richard P.  
Roggia, Esq.

# How And When May Referee Appointed Pursuant To CCP §638 or CCP §639 Be Of Benefit To Your Client?

## **CONSENSUAL APPOINTMENT PER CCP §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 there from shall be heard by a referee if the court finds a reference agreement exists between the parties:...

## **CCP §638 a & b:**

(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...

DATE OF SEPARATION

VALIDITY OF MARRIAGE

ALTERNATE VALUATION DATE

PERSONAL PROPERTY DIVISION

VALIDITY OF PREMARITAL  
AGREEMENT OR MSA

# Referee's Authority

## **CCP §644.a**

“(a) In the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue 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...”

## **CCP §644.b**

(b) In the case of all other references, the decision of the referee or commissioner is only advisory. 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 filed with the court. (Am Stats 2007, C263).

## **CCP §645**

“The decision of the referee appointed pursuant to Section 638 or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict..”

# Discovery Disputes Requiring Speedy Resolution

Compare: Motions  
to Quash/Compel  
litigated before  
trial/motions  
Judge and  
submittal to  
Referee

Medical Records

Psychological or  
Therapist Records

Employment  
Records

Third Party  
Financial Records

Complex case  
involving a multitude  
of unrelated  
discovery issues that  
counsel can  
anticipate will arise  
over the course of  
the litigation

**\*Consider all purpose discovery assignment vs. filing multiple motions as issues arise.**

## CCP §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 in the following cases pursuant to the provisions of subdivision (b) of Section 640:

... (5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.

## CCP §640.a

- (a) The court shall appoint as referee or referees the person or persons, not exceeding three, agreed upon by the parties.
- (b) If the parties do not agree on the selection of the referee or referees, each party shall submit to the court up to three nominees for appointment as referee and the court shall appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection. If no nominations are received from any of the parties, the court shall appoint one or more referees, not exceeding three, against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a referee...

## CCP §643.a&b

- (a) Unless otherwise directed by the court, the referees or commissioner must report their statement of decision in writing to the court within 20 days after the hearing, if any, has been concluded and the matter has been submitted.
- b) A referee appointed pursuant to Section 638 shall report as agreed by the parties and approved by the court.

## CCP §643(c)

A referee appointed pursuant to Section 639 shall file with the court a report that includes a recommendation on the merits of any disputed issue, a statement of the total hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment. The referee shall serve the report on all parties. Any party may file an objection to the referee's report or recommendations within 10 days after the referee serves and files the report, or within another time as the court may direct. The objection shall be served on the referee and all other parties. Responses to the objections shall be filed with the court and served on the referee and all other parties within 10 days after the objection is served. The court shall review any objections to the report and any responses submitted to those objections and shall thereafter enter appropriate orders. Nothing in this section is intended to deprive the court of its power to change the terms of the referee's appointment or to modify or disregard the referee's recommendations, and this overriding power may be exercised at any time, either on the motion of any party for good cause shown or on the court's own motion. (Am Stats 2000, C644)

# Nonconsensual Reference to Referee Need be Specific and Limited to factual issues.



Nonconsensual reference to special master of "any and all issues" re custody was overbroad and unauthorized by statute. Scope of nonconsensual reference per Code Civ. Proc. §639 (c) must be limited to factual questions on existing controversies.

»» *Ruisi v. Thieriot*, 53 Cal.App. 4th at pp. 1207-1208.

# Keep in Touch!



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