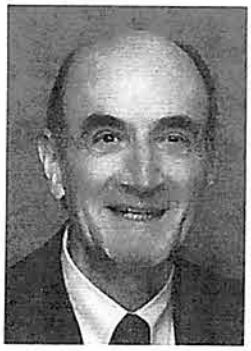
Remedies for the Courthouse Flu:

How to Get Your Civil Case Tried During the COVID-19 Crisis



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By Honorable Allan Goodman (Ret.)

Civil litigators are seeking ways to expeditiously resolve their clients' pending lawsuits while judges throughout California redouble their efforts to provide safe spaces in which those cases can be tried.

Even as trials resume in court facilities, the COVID-19 induced backlog of criminal cases, Code of Civil Procedure section 36 preference cases, and unlawful detainer cases, among others, are likely to substantially delay civil trial starting dates in most civil cases well into late 2021 and 2022.

For those litigators willing to try their cases to a person they select — and who may be selected for his or her expertise in the subject matter of the dispute — while preserving the same right to appeal the judgment obtained as they would have had the case been tried to a judge, Code of Civil Procedure section 638 and article VI, section 21 of the state Constitution provide ready remedies.

The fundamental question for many litigators who otherwise would be trying their cases to juries is whether the desirability of trying the case now, without the delays inherent in the daily courtroom schedule — and to a person knowledgeable in the field and/or issues presented — outweighs the eventual trial of the case to a jury the members of which, however sincere and diligent, have no understanding of the nuances of the issues and/or facts to be presented to them.

There are two remedies to the COVID-19 courthouse flu readily available to provide the antidote to this legal malaise.

Constitutional Provision

Article VI, section 21 of our state Constitution provides: "On stipulation of the parties litigant 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."

The California Rules of Court implementing this provision for appointment of such a "temporary judge" are set out in chapter 2 of division 6 of the rules. (Rules 2.830–2.835.) Once nominated by the parties, the temporary judge must make certain disclosures and must disqualify himself or herself as determined by

application of provisions of the Code of Judicial Ethics. (Rule 2.831(d), (e).)

When these requirements are met and the oath of office is filed (rule 2.831(b), (c)), the temporary judge proceeds with the matter. The parties and the temporary judge set the schedule for all proceedings, unencumbered by the caseload or daily schedule of the trial court.

During the course of the proceedings, documents are filed with the clerk of the court; copies are filed with the temporary judge. (Rules 2.833, 2.400.) Public notice requirements are set out in Rule 2.834. Motions to seal records and to intervene are heard in the superior court rather than by the temporary judge. (Rule 2.835.)

The hearing before the temporary judge proceeds just as a trial would; all the same statutes and rules apply as would apply if the case were tried in a courtroom. The key difference is that the timetable on which the case is tried is set by counsel and the temporary judge — unaffected by the COVID-19 slowdown.

Following the close of the evidence, the temporary judge renders a statement of decision that becomes a judgment. Some courts have local rules that address certain aspects of the proceeding (e.g., the Los Angeles Superior Court has adopted local rules to apply to trials before temporary judges and before referees (discussed below)); see LASC Rules 2.24 and 3.9; Orange County Superior Court has a single rule, Rule 162, which sets a 90-day time limit for the filing of the decision after trial by either the temporary judge or referee).

The temporary judge handles the entire proceeding, including any postjudgment motions. (*Anderson v. Bledsoe* (1934) 139 Cal. App. 650, 651.) The opinion in *McCartney v. Superior Court* (1990) 223 Cal.App.3d 1334, 1338, illustrates the comprehensive nature of the stipulation and order entered in that case that was relied on by the appellate court to affirm that the temporary judge has the power to hear posttrial motions.

The final judgment is subject to appeal in the same manner as a judgment entered after trial in the courthouse.

Statutory Provision

Code of Civil Procedure section 638 provides, in part: "A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, ... 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 exits 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."

(Subdivision (b) of the same statute provides that a person may be appointed and authorized "[t]o ascertain a fact necessary to enable the court to determine an action or proceeding." This more limited appointment is treated in a manner similar to the discovery and other limited references available under Code of Civil Procedure section 639.)

Section 638, subdivision (a) is substantively similar to the constitutional provision discussed above, and with similar benefits: the opportunity to select an experienced former bench officer or attorney to resolve the matter on the schedule the parties and the referee selected.

This "general judicial reference" is initiated in one of three ways: by contract entered into before litigation; by stipulation entered into at any time; or by motion filed in the court in which the case is pending. Of course, it cannot

proceed without an order of the court in which the action is pending. So long as the result is an order based on the consent of the parties, the rules discussed below apply.

One, two, or three referees may be appointed. The appointment process is set out in Code of Civil Procedure sections 640, 641, and 642 and in Rules 3.900 through 3.907. (Section 641.2 adds a technical competence requirement for a referee appointed in environmental matters.)

Although the court may decline to grant the motion for a reference, given the severe backlog of cases our trial courts face, denial of a motion for a reference is unlikely absent the presence of complicating factors such as the likelihood that the ruling would result in conflicting rulings on common issues of law or fact. (See *Tarrant Bell Property v. Superior Court* (2011) 51 Cal.4th 538; cf. Code Civ. Proc., § 639 which requires that there be "exceptional circumstances" to support that reference.)

Once the order of appointment is made, the person nominated must make ethics disclosures as provided in rule 3.904. Following appointment and qualification, the referee and counsel for the parties set the schedule for the hearing and resolution of the matter, unencumbered by the press of other cases pending in the courtroom.

Pretrial and trial proceedings are the same as if the matter were heard in the courthouse. This includes the power of the parties to stipulate to modify the types and extent of discovery in which they will engage. (Code Civ. Proc., § 2016.030.)

After the reference trial concludes, the referee files a statement of decision. The term as used in the general reference statutes has the same meaning as in Code of Civil Procedure section 632. (*Central Valley Gen. Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513; see Rule 3.1590.) Section 643, subdivision (b) states that the timing of the filing of the decision of the referee is as "approved by the court." Thus, the 20-day limit for filing reports on references made under section 639 does not automatically apply; rather the time for filing the statement of decision under the general reference statute is to be specified in the order appointing the referee. The extended time for preparation of the statement of decision may be important; the referee may need more than 20 days to properly consider and rule on the issues raised in the hearing of what could be a complex matter.

The statement of decision filed following a hearing under section 638, subdivision (a) is not preliminary or conditional; the consensual general reference yields a statement of decision that "stand[s] 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." (*Yu v. Superior Court* (2020) 56 Cal.App.5th 636, 649.) The term "may" used in this statute is not permissive; instead, it has been determined to mandate entry of judgment in accordance with the statement of decision filed. (*Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182, 1193 [entry of judgment is a ministerial act performed by the clerk].) The trial court does not have the power to modify this ruling.

The decision made in the general reference "may be excepted to and reviewed in like manner as if made by the court." (Code Civ. Proc., § 645.) While there is authority suggesting these posttrial motions are properly handled by the referee given he or she heard the matter (e.g., *Clark v. Rancho* (1989) 216 Cal.App.3d 606, 623), to avoid controversy, counsel may

wish to specify in their application for the reference and in the order they propose that the referee appointed hear these motions. (See *Yu v. Superior Court* (2020) 56 Cal.App.5th 636, 655 [jurisdiction to hear posttrial motions determined to be in the trial court based on lack of express statement that referee would have authority to hear posttrial motions].)

Any appeal from the judgment entered proceeds just as does a judgment after trial in a courtroom. Note that, if the judgment is vacated and a rehearing is directed, that order is appealable as an order granting a new trial. (*Ellsworth v. Ellsworth* (1954) 42 Cal.2d 719, 722.)

There are Judicial Council forms to help with each of these COVID-19 antidotes: Judicial Council forms ADR-109 (Stipulation or Motion for Order Appointing Referee) and 110 (Order Appointing Referee); each is optional. Whether the Judicial Council forms or a self-generated form is used, it is a good idea to carefully review the applicable rules of court to help assure that all necessary information has been included.

A Note About Fees

Trying a case to a referee or to a temporary judge incurs fees not required if the case remains in the courthouse, of course. Code of Civil Procedure section 645.1, subdivision (a) expresses the preference for the parties to agree on the manner in which the referee's fees will be paid. In absence of such an agreement, the court is authorized to make that determination.

In considering whether the result of electing to try the case by a consensual general reference would be significantly more costly than awaiting the eventual trial in the courthouse, the litigator may wish to consider, in addition to the cost of the delay, that trial before the referee would likely be conducted in full trial days and without the daily interruptions in trial time that are inevitable in busy trial courts and which increase those costs as well.

Brief Comparison to Arbitration: The Scope of Appellate Review

There is an additional consideration when counsel are weighing whether to move to compel arbitration, if it is available, on the one hand, or to seek a consensual reference under Code of Civil Procedure section 638, subdivision (a) or appointment of a temporary judge under article VI, section 21, on the other: the scope of review on appeal following the judgment entered at the conclusion of each of these two alternative proceedings is the same as if the judgment had been entered following a trial in the courthouse.

By contrast, the scope of review of an arbitration award is far more limited. And, while proceedings in arbitration can be confidential (without the agreement of the parties only the arbitrator is bound by secrecy), both the temporary judge and referee proceedings have public notice requirements; these rarely result in attendance by other than the participants.

Summary

In our current environment of delay by reason of the COVID-19 courthouse flu, both Code of Civil Procedure section 638 and article VI, section 21 enable litigators to litigate — to try their cases to judgment — before the referee or temporary judge of their choice, and on their timetable — and to try the cases now rather than await the eventual break in the logjam of civil cases.