

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Elihu M. Berle, Chair
Heather Anderson, Senior Attorney, 415-865-7691
Alan Wiener, Attorney, 818-558-3051

DATE: September 27, 2005

SUBJECT: Alternative Dispute Resolution: Appointment and Reports of Referees
(approve forms ADR-109, ADR-110, and ADR-111) (Action Required)

Issue Statement

Orders appointing referees under Code of Civil Procedure sections 638 and 639 and the reports of such referees frequently do not contain all of the information or findings currently required by the statutes and the California Rules of Court.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2006:

1. Approve form ADR-109, *Stipulation or Motion for Order Appointing Referee*, for optional use in applying for the appointment of a referee under Code of Civil Procedure section 638 or 639;
2. Approve form ADR-110, *Order Appointing Referee*, for optional use in ordering the appointment of a referee under Code of Civil Procedure section 638 or 639; and
3. Approve form ADR-111, *Report of Referee*, for optional use in submitting the report of a referee appointed under Code of Civil Procedure section 638 or 639.

The proposed forms are attached at pages 5–11.

Rationale for Recommendation

Reference is a process in which the court appoints a neutral third person to review information submitted by the parties or to conduct independent research into the facts and then to submit findings, recommendations, or a decision to the parties or the court. Code

of Civil Procedure section 638 authorizes courts to appoint referees upon the agreement of the parties, and section 639 authorizes courts to appoint referees without the parties' agreement in specified circumstances.

Detailed requirements concerning the content of applications and orders appointing referees, the compensation of referees, and referees' reports are set forth in sections 638 through 645.2 of the Code of Civil Procedure and in rules 244.1 and 244.2 of the California Rules of Court.¹ A review of reference orders and reports collected as part of a recent legislatively mandated study of references revealed that many reference orders and reports do not contain the information or findings that are required by these statutes and rules.

The proposed forms are designed to help litigants, courts, and referees satisfy the statutory and rule requirements concerning references ordered under sections 638 and 639. The forms would serve as checklists and address the matters that are required to be addressed, or that might commonly be important to address, in applications for the appointment of referees, orders appointing referees, and reports of referees. Form ADR-109, *Stipulation or Motion for Order Appointing Referee*, would allow litigants to more easily apply for the appointment of a referee and would provide the court with the information necessary to prepare an order that satisfies the statutory and rule requirements. Form ADR-110, *Order Appointing Referee*, would enable courts to more easily state the findings and elements of a reference order required by the pertinent statutes and rules. Form ADR-111, *Report of Referee*, would enable referees to readily provide the information that their reports are required to include.

Alternative Actions Considered

The Civil and Small Claims Advisory Committee has also recommended amendments to rules 244.1 and 244.2, to clarify, simplify, and consolidate the requirements concerning the contents of applications and orders for the appointment of referees. These amendments will be proposed as part of the overall reorganization and modernization of the California Rules of Court. It is not expected that these rule amendments will require revisions to the currently proposed forms.

Comments From Interested Parties

The proposed forms were circulated as part of the spring 2005 comment cycle. Seven individuals or organizations submitted comments. Of these, six agreed with the proposal and one agreed with the proposal only if it is modified; none disagreed with the proposal. A chart summarizing the comments received and the advisory committee responses is attached at pages 12–14.

¹ All subsequent statutory references are to the Code of Civil Procedure and all subsequent rule references are to the California Rules of Court.

Form ADR-109, Stipulation or Motion for Order Appointing Referee

Several revisions were made to improve the organization, clarity, and utility of proposed form ADR-109 after it was circulated for public comment. At the suggestion of Mr. Stephen V. Love (formerly the Executive Officer of the Superior Court of San Diego County) the parenthetical instruction in item 1 was clarified to request the name of each applicant. In item 2, requests for discovery and other references were separated, because discovery references, the most common type of nonconsensual reference, must be supported by a finding of exceptional circumstances while other nonconsensual references do not need to meet this requirement. In item 5b, the order of paragraphs (1) and (2) was reversed to encourage the parties' agreement concerning how the reference fees will be paid. In item 6b, the parenthetical instruction was revised to more clearly address rule 244.1(e), which provides that court facilities and personnel may be used in proceedings before privately compensated referees appointed under section 638 only upon a finding of the presiding judge that the use would further the interests of justice. Item 7 was revised to clarify that the designated contact person is only for arranging attendance at reference proceedings conducted in a private facility.

Form ADR-110, Order Appointing Referee

Revisions were also made to improve the organization, clarity, and utility of proposed form ADR-110 after it was circulated for public comment. In item 2, the findings supporting discovery references and other references were separated to parallel the revisions to item 2 of form ADR-109. In response to Mr. Love's suggestion, items 2c and 5c(3) (items 2f and 6c(4) of the form circulated for comment) were revised to include identification of parties who have established an economic inability to pay a pro rata share of the referee's fees and of those who have agreed to pay that additional share.² In item 3, a parenthetical instruction was added to address requirements, under rules 244.1(a) and 244.2(c), concerning the referee's consent to serve and certification. Item 4b(2) was revised to more clearly set forth whether a discovery reference is for all discovery purposes or is limited to specified discovery matters. Item 4b(2) also now incorporates the authority of a discovery referee to schedule and conduct hearings (as provided in rule 244.2(h)), which was stated in item 5 of the form circulated for comment.

Item 7 of form ADR-110 (item 8 as circulated for comment) previously provided that the clerk would post notice identifying the person who could be contacted to arrange attendance at any proceeding that is open to the public. This provision was intended to address rule of court requirements concerning reference proceedings conducted in private

² Section 639(d)(6)(A) provides that a court shall not appoint a referee at a cost to the parties unless the court finds either that no party has established an economic inability to pay a pro rata share of the referee's fee or that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and another party has agreed voluntarily to pay that additional share. As circulated for comment, item 2f of form ADR-110 provided space to state the finding that a party had established an economic inability to pay a pro rata share of the referee's fees and that another party had voluntarily agreed to pay that additional share of the referee's fees, but did not provide space for identifying those parties.

facilities; however, the provision was not limited to such references.³ To partially address a comment from Mr. Love, item 7 was retitled and made an optional provision for use only when the reference will be conducted in a private facility.

Implementation Requirements and Costs

The proposed new forms do not impose any requirements or costs on the litigants, courts, or referees, but may make it easier for them to identify and comply with existing statutory and rule requirements. This, in turn, may save the courts, litigants, and referees time and expenses in proceedings involving the appointment of a referee under Code of Civil Procedure section 638 or 639.

³ Rule 244.1(e) provides that court facilities generally must not be used in proceedings pending before privately compensated section 638 referees and that the clerk must post a notice indicating the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse. Rule 244.2(g) provides that, if proceedings in section 639 references are held in a private facility, the facility must be open to the public upon the request of any person.

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|---|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____ | FOR COURT USE ONLY DRAFT 12 (Revised 8-15-05) |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME: | |
| PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: | |
| <input type="checkbox"/> STIPULATION <input type="checkbox"/> MOTION FOR ORDER APPOINTING REFEREE | CASE NUMBER: _____ |

1. **Applicant.** The following parties apply for appointment of a referee (*name each applicant*):

2. **Statutory ground for appointment.**

a. **Section 638.** Appointment of the referee is requested under Code of Civil Procedure section 638 because (*check one*):

- (1) all parties to the action have agreed to the appointment of a referee under section 638.
 (2) the parties entered into a written contract or lease that provides that any controversy arising from it shall be heard by a referee, as follows (*identify agreement and state provision for appointment of referee below or in Attachment 2a*):

b. **Section 639.** Appointment of the referee is requested under Code of Civil Procedure section 639 because (*check and complete (1) or (2)*):

- (1) **Discovery reference.** 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. (*Code Civ. Proc., § 639(a)(5). State the exceptional circumstances specific to the particular case that require the discovery reference, below or in Attachment 2b(1).*)
- (2) **Other reference.** (*Check one or more of the following statutory grounds and state the reason the appointment is requested, below or in Attachment 2b(2).*)
- (a) The trial of an issue of fact requires the examination of a long account. (*Code Civ. Proc., § 639(a)(1).*)
 (b) The taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect. (*Code Civ. Proc., § 639(a)(2).*)
 (c) A question of fact, other than upon the pleadings, has arisen by motion or otherwise. (*Code Civ. Proc., § 639(a)(3).*)
 (d) It is necessary for the information of the court in a special proceeding. (*Code Civ. Proc., § 639(a)(4).*)

3. **Referee.** Applicant requests appointment of the following person as referee:

- a. Name:
 b. Business address:
 c. Telephone number:
 d. The proposed referee is an active or inactive member of the State Bar. (*A proposed referee who is a former California judicial officer must also be an active or inactive member of the State Bar.*) The proposed referee's State Bar number is:

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| PETITIONER/PLAINTIFF: | CASE NUMBER: |
| RESPONDENT/DEFENDANT: | |

4. Subject matter of reference.

- a. **Section 638.** Applicant requests that the reference include (check and complete one):
 - (1) all issues in dispute.
 - (2) the following issues (describe issues to be covered by reference below or in Attachment 4a):

- b. **Section 639.** Applicant requests that the reference include the following issues (describe issues below or in Attachment 4b):

5. Referee's compensation. (Check and complete one.)

- a. The referee will not be privately compensated by the parties.
- b. The referee will be privately compensated by the parties as follows:
 - (1) The parties have agreed that the referee's fees shall be paid as follows (state agreement below or in Attachment 5b):

 - (2) The parties have not agreed on payment of the referee's fees and request the matter to be resolved by the court under Code of Civil Procedure section 645.1.

6. Use of court facilities and personnel. (Check and complete one.)

- a. Applicant does not request the use of court facilities or court personnel.
- b. Applicant requests the use of court facilities or court personnel. (Describe the requested use below or in attachment 6b. If the reference is to be conducted by a privately compensated referee appointed under Code Civ. Proc., § 638, also state why the use of court facilities or court personnel will further the interest of justice. Court facilities and personnel may be used in proceedings before a privately compensated section 638 referee only upon a finding of the presiding judge that the use would further the interest of justice.)

7. Hearing location information. The following person may be contacted to arrange attendance at any proceeding that is open to the public and that is conducted in a private facility (complete all of the following):

- a. Name:
- b. Address:
- c. Telephone:

Date:

| | | |
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| (TYPE OR PRINT NAME) | ▶ | (SIGNATURE OF APPLICANT OR ATTORNEY) |
| (TYPE OR PRINT NAME) | ▶ | (SIGNATURE OF APPLICANT OR ATTORNEY) |
| (TYPE OR PRINT NAME) | ▶ | (SIGNATURE OF APPLICANT OR ATTORNEY) |
| (TYPE OR PRINT NAME) | ▶ | (SIGNATURE OF APPLICANT OR ATTORNEY) |
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| PETITIONER/PLAINTIFF: | CASE NUMBER: |
| RESPONDENT/DEFENDANT: | |

THE COURT ORDERS:

3. **Referee.** The following person is appointed as referee. *(The referee's signature indicating consent to serve and certification that he or she is aware of and will comply with the applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court must be included in the proposed order appointing a referee under Code of Civil Procedure section 638 or attached to the order appointing a referee under section 639. See item 9.)*
- Name:
 - Business address:
 - Telephone number:
 - The referee is an active or inactive member of the State Bar. *(A proposed referee who is a former California judicial officer must also be an active or inactive member of the State Bar.)* The referee's State Bar number is:
4. **Scope and subject matter of reference.** The referee is appointed as follows *(check and complete a or b)*:
- Section 638 appointment.** The referee is appointed under Code of Civil Procedure section 638 *(check and complete one)*:
 - to hear and determine any or all of the issues in the action or proceeding, whether of fact or of law, and to report a statement of decision.
 - to ascertain the following facts necessary to enable the court to determine the action or proceeding *(state facts to be ascertained by referee below or in Attachment 4a)*:
 - Section 639 appointment.**
 - The following subject matter or matters are included in the reference *(describe the matter or matters the referee is ordered to consider below or in Attachment 4b)*:
 - Section 639 discovery reference.**
 - The discovery referee is appointed for *(check one)*:
 - The discovery matters identified in (1) above.
 - All discovery purposes in the action.
 - The referee is authorized to set the date, time, and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings; take evidence; and rule on objections, motions, and other requests made during the course of the hearing.
5. **Referee's compensation.** *(Check and complete one of the following.)*
- Uncompensated referee.** The referee will not be privately compensated by the parties.
 - Compensation of section 638 referee.**
 - The referee's fees will be paid as agreed by the parties.
 - The parties have not agreed on the payment of the referee's fees and have requested that the matter be resolved by the court. The court orders that the referee's fees be paid as follows *(state the manner of payment determined by the court to be fair and reasonable below or in Attachment 5b)*:

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5. c. **Compensation of section 639 referee.**
- (1) The maximum hourly rate that the referee may charge is *(specify)*:
- (2) The maximum number of hours for which the referee may charge is *(at the request of any party, state the maximum number of hours for which referee may charge)*:
- (3) The court orders that the referee's fees be paid or apportioned as follows and reserves jurisdiction to modify this order *(state fair and reasonable apportionment of reference costs below or in Attachment 5c)*:
- (a) All parties shall pay equal shares of the referee's fees.
- (b) The parties shall pay equal shares of the referee's fees except that, based on the finding of economic inability set forth in item 2c(2):
- (i) The following party is not required to pay any portion of the referee's fees *(name of each party excused from paying referee's fees)*:
- (ii) The following party shall pay the pro rata share of the referee's of the party identified in (i), in addition to his or her own share of the referee's fees *(name of each party who has agreed to pay an additional share of the referee's fees)*:
- (c) The referee's fees shall be paid as set forth in Attachment 5c.
- (4) The court will subsequently determine how the referee's fees will be paid, under Code of Civil Procedure section 645.1(b). *(If the issue of economic hardship is raised before the services of a referee appointed under section 639 begin, the court must make a fair and reasonable apportionment of reference costs.)*
6. **Use of court facilities and court personnel.** Court facilities and court personnel *(check and complete one)*:
- a. may not be used without an order of the presiding judge. *(Court facilities and personnel may be used in proceedings before a privately compensated section 638 referee only upon a finding of the presiding judge that the use would further the interest of justice.)*
- b. may be used as follows *(describe any authorized use of court facilities or court personnel if referee will not be privately compensated or is appointed under section 639)*:
7. **The reference will be conducted in a private facility.** The clerk must post notice that the following person may be contacted to arrange attendance at any proceeding that is open to the public *(complete all of the following)*:
- a. Name:
- b. Address:
- c. Telephone:
8. **Referee's report.**
- a. **Time of report.** The referee must report *(check and complete one)*:
- (1) in writing to the court within 20 days after the hearing, if any, has been concluded and the matter submitted.
- (2) as follows *(specify other time and manner of reporting directed by the court)*:
- b. **Manner and contents of report.**
- (1) **Section 638 referees.** The referee must report in the following manner agreed to by the parties and approved by the court *(describe)*:
- (2) **Section 639 referees.** The referee must file with the court a report that includes a recommendation on the merits of any disputed issue, a statement of the hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment. The referee must serve the report on all parties.
9. **Certification of referee.** The undersigned consents to serve as referee as provided above and certifies that he or she is aware of and will comply with the applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court.

(TYPE OR PRINT NAME OF PROPOSED REFEREE)

(SIGNATURE OF PROPOSED REFEREE)

Date:

JUDICIAL OFFICER

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|--|---|
| <p>REFEREE (Name, State Bar number, if applicable, and address):</p> <hr/> <p>TELEPHONE NO.: _____ FAX NO. (Optional): _____</p> <p>E-MAIL ADDRESS (Optional): _____</p> | <p>FOR COURT USE ONLY</p> <p style="text-align: center;">DRAFT 10 (Revised 8-15-05)</p> |
| <p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</p> <p>STREET ADDRESS: _____</p> <p>MAILING ADDRESS: _____</p> <p>CITY AND ZIP CODE: _____</p> <p>BRANCH NAME: _____</p> | |
| <p>PETITIONER/PLAINTIFF: _____</p> <p>RESPONDENT/DEFENDANT: _____</p> | |
| <p>REPORT OF REFEREE</p> | <p>CASE NUMBER: _____</p> |

1. **Appointment.** The undersigned referee was appointed as follows:
 - a. **Date.** By order dated: _____
 - b. **Statutory authority.** Referee was appointed under (check one):
 - (1) Code of Civil Procedure section 638.
 - (2) Code of Civil Procedure section 639.
2. **Submission.** The hearing, if any, was concluded and the matter was submitted on (date): _____
3. **Referee's time and fees.** (All items must be completed if referee was appointed under section 639.)
 - a. Total hours spent by referee: _____
 - b. Total fees charged by referee: _____
 - c. Referee recommends the following allocation of payment of referee's fees (state the recommended allocation below or in Attachment 3c): _____

4. **Recommendation on the merits.** (State the recommendation on the merits of any disputed issues below or in Attachment 4.)

5. **Pages and attachments.** Number of pages attached: _____

Date: _____

(NAME OF REFEREE)

(SIGNATURE OF REFEREE)

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| PETITIONER/PLAINTIFF: | CASE NUMBER: |
| RESPONDENT/DEFENDANT: | |

DECLARATION OF SERVICE OF REPORT OF REFEREE

1. I am at least 18 years of age, not a party to this action, and I am a resident of or employed in the county where the mailing took place.
2. My residence or business address is:

3. I served a copy of the *Report of Referee (Alternative Dispute Resolution)* (form ADR-111) by enclosing it in a sealed envelope with postage fully prepaid, as follows:
 - a. I deposited the sealed envelope with the United States Postal Service with the postage fully prepaid.
 - b. I placed the envelope for collection and processing for mailing following this business's ordinary practice with which I am readily familiar. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.
 - c. Date of deposit:
 - d. Place of deposit (*city and state*):
 - e. Addressed as follows (*name and address of each party*):

4. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

 _____

(SIGNATURE OF DECLARANT)

SPR05-09

Alternative Dispute Resolution: Appointment and Reports of Referees
(approve forms ADR-109, ADR-110, and ADR-111)

| | Commentator | Position | Comment on behalf of group? | Comment | Advisory Committee Response |
|----|---|-----------------|------------------------------------|--|---|
| 1. | Mr. Mike Belote CA Advocates, Inc. Sacramento | A | Y | Agree. | No response required. |
| 2. | Superior Court of Los Angeles County Los Angeles | A | Y | Agree with proposed changes. | No response required. |
| 3. | Mr. Stephen V. Love Executive Officer Superior Court of San Diego County San Diego | AM | Y | (1) Form ADR-109, Item 1: It is unclear whether the instruction “(name each)” refers to each party or the referee each party is proposing (2) Form ADR-110, Item 2f (item 2c of the revised form): If one party is not able to pay and another party has agreed to pay, shouldn’t the Order Appointing Referee state which party is agreeing to pay? (3) Form ADR-110, Item 6a (item 5a of the revised form): If the referee will not be privately compensated by the parties, will the referee not be compensated at all? | (1) The committee revised the parenthetical instruction to read: “name each applicant.” (2) The committee added items 2c(2)(a) and (b) and revised item 5c(3)(b) so that the findings and order can conveniently identify the party who is excused from paying referee’s fees based on a finding of economic inability and the party who has agreed and is ordered to pay an additional share of the referee’s fee. (3) A referee who is not privately compensated by the parties might be serving pro bono or might be compensated by his or her employer for serving in this capacity (e.g. a court commissioner might be appointed as a referee). The committee therefore did not revise |

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Alternative Dispute Resolution: Appointment and Reports of Referees
(approve forms ADR-109, ADR-110, and ADR-111)

| | Commentator | Position | Comment on behalf of group? | Comment | Advisory Committee Response |
|----|--|----------|-----------------------------|--|--|
| | | | | (4) Form ADR-110, Item 8 (item 7 of the revised form): There is currently no procedure in our court to allow for the posting of the notice referred to, so this would require us to develop new procedures. | this provision. (4) CRC, rule 244.1(e) requires that, for all matters pending before privately compensated section 638 referees, the court clerk must post the specified notice and rule 244.2(g) requires that if §639 references will be conducted in a private facility, that facility must be open to the public on the request of any person. However, because these provisions only concern references conducted in private facilities the committee retitled item 7 of proposed form ADR-110 accordingly and made it optional. |
| 4. | Mr. Ira Spiro Chair, 2004–2005 The State Bar of California Committee on Alternative Dispute Resolution San Francisco | A | Y | The ADR Committee supports this proposal, and commends the development of the new forms to help litigants, courts and referees fulfill the requirements of statute and rules of court concerning the appointment of referees. This was a much-needed improvement and appears to be very helpful. Moreover, the forms are optional in any event, so those who wish to proceed in some other manner could still do so. | No response required. |
| 5. | Hon. Henry J. Walsh Judge Superior Court of Ventura County Ventura | A | N | Agree with the proposed changes. | No response required. |

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Alternative Dispute Resolution: Appointment and Reports of Referees
 (approve forms ADR-109, ADR-110, and ADR-111)

| | Commentator | Position | Comment on behalf of group? | Comment | Advisory Committee Response |
|----|---|-----------------|------------------------------------|----------------------------------|------------------------------------|
| 6. | Ms. Jan Weaver Supervisor Superior Court of Placer County Auburn | A | N | Agree with the proposed changes. | No response required. |
| 7. | Mr. Dean Zipser President Orange County Bar Association Irvine | A | Y | Agree with the proposed changes. | No response required. |