



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 29, 2010

Title	Agenda Item Type
Alternative Dispute Resolution (ADR): Order Appointing Referee	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Revise form ADR-110	July 1, 2011
Recommended by	Date of Report
Civil and Small Claims Advisory Committee Hon. Dennis M. Perluss, Chair	September 15, 2010
	Contact
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Executive Summary

The Civil and Small Claims Advisory Committee recommends revising the optional form *Order Appointing Referee* (form ADR-110). The revised form would assist courts and inform litigants by more clearly indicating the State Bar of California membership status of the referee.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective July 1, 2011, revise *Order Appointing Referee* (form ADR-110) to indicate whether the status of a referee who is a member of the State Bar of California is active, inactive, or other.

The revised form is attached at pages 4–6. The revision substantively affects only item 3d on page 2 of the form.

Previous Council Action

On April 17, 2001, the Judicial Council amended rules 244.1 and 244.2 of the California Rules of Court, concerning referees appointed under Code of Civil Procedure sections 638 and 639, in

part to require that referees who are former judicial officers be active or inactive members of the State Bar and that orders appointing referees who are members of the State Bar include the referee's State Bar number.¹

On November 3, 2005, the Judicial Council approved *Order Appointing Referee* (form ADR-110) to help courts satisfy the statutory and rule of court requirements concerning the appointment of referees under Code of Civil Procedure sections 638 and 639.

On June 30, 2006, the Judicial Council repealed rules 244.1 and 244.2 of the California Rules of Court and adopted rules 3.900–3.932 in their place. Rules 3.902(1) and 3.922(b) provide that orders appointing referees under Code of Civil Procedure sections 638 and 639, respectively, must include the referee's State Bar number, if the referee is a member of the State Bar. Rules 3.903 and 3.923 provide that a referee who is a former judicial officer must be an active or an inactive member of the State Bar.

Rationale for Recommendation

Order Appointing Referee (form ADR-110) currently includes a check box to indicate that the referee is “an active or inactive member of the State Bar” and a space for the referee's State Bar number. However, it cannot be determined from the completed form whether the referee's State Bar membership status is active or inactive, and the form does not include a space to indicate that the referee has another membership status, such as ineligible, resigned, or disbarred.

The proposed revision to form ADR-110, which substantively affects only item 3d,² will:

- Help to ensure that persons who are appointed as referees under Code of Civil Procedure sections 638 and 639 satisfy the State Bar membership requirements of rules 3.902 and 3.922;
- Help courts to administer lists and panels of neutrals who may be eligible for appointment as referees; and
- More clearly inform a litigant of the State Bar membership status of a person who has been appointed as a referee in the case.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated for comment as part of the spring 2010 invitation to comment cycle. Five courts, other organizations, and individuals submitted comments. Two commentators agreed with the proposal, one agreed with the proposal if modified, and two reviewed the proposal and did not have comments.³

¹ Referees who are not former judicial officers are not required to be members of the State Bar.

² A minor formatting change would also be made, to correct the indentation of items 7a, 7b, and 7c.

³ A chart providing the full text of the comments and the committee's responses is attached at pages 7–8.

The Superior Court of San Diego County commented that it agrees with the proposal if modified and suggested two nonsubstantive revisions to item 3d of form ADR-110. The Civil and Small Claims Advisory Committee revised the parenthetical statement in this item, as the commentator suggested, to incorporate references to rules 3.903 and 3.923 of the California Rules of Court.

Implementation Requirements, Costs, and Operational Impacts

The proposed change is not expected to impose any significant implementation requirements or costs on the courts or the Administrative Office of the Courts. Form ADR-110 is an optional form, which courts may elect to use or not use. And, the ability to generate orders that include the additional information about referees' State Bar membership status is already part of the design of the new California Court Case Management System (CCMS).

Attachments

1. Form ADR-110, at pages 4–6
2. Chart of comments, at pages 7–8

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 Not approved by the Judicial Council Draft Rev. 08-09-10
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT:	
ORDER APPOINTING REFEREE	CASE NUMBER: _____

THE COURT FINDS:

1. **Section 638 appointment.** A referee is properly appointed under Code of Civil Procedure section 638 because *(check one)*:
 - a. all parties to the action have agreed to the appointment of a referee under section 638.
 - b. the parties entered into a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee.
2. **Section 639 appointment.** A referee is properly appointed under Code of Civil Procedure section 639 because *(check and complete a or b)*:
 - a. **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. *(Code Civ. Proc., § 639(a)(5). State the exceptional circumstances specific to the particular case that require the discovery reference, below or in Attachment 2a.)*
 - (1) The trial of an issue of fact requires the examination of a long account. *(Code Civ. Proc., § 639(a)(1).)*
 - (2) 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).)*
 - (3) A question of fact, other than on the pleadings, has arisen by motion or otherwise. *(Code Civ. Proc., § 639(a)(3).)*
 - (4) It is necessary for the information of the court in a special proceeding. *(Code Civ. Proc., § 639(a)(4).)*
 - b. **Other reference.** *(Check one or more of the following statutory grounds and state the reason for the appointment below or in Attachment 2b.)*
 - (1) The trial of an issue of fact requires the examination of a long account. *(Code Civ. Proc., § 639(a)(1).)*
 - (2) 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).)*
 - (3) A question of fact, other than on the pleadings, has arisen by motion or otherwise. *(Code Civ. Proc., § 639(a)(3).)*
 - (4) It is necessary for the information of the court in a special proceeding. *(Code Civ. Proc., § 639(a)(4).)*
 - c. **Economic inability to pay.** *(Check one.)*
 - (1) No party has established an economic inability to pay a pro rata share of the referee's fees.
 - (2) 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 of the referee's fees. *(Complete item 5c(3)(b).)*
 - (a) The following party has established an economic inability to pay a pro rata share of the referee's fee *(name each)*:
 - (b) The following party has agreed voluntarily to pay an additional share of the referee's fee *(name each)*:
 - (3) The referee is being appointed at no cost to the parties.

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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 a member of the State Bar of California. *(Rules 3.903 and 3.923 of the California Rules of Court provide that a referee who is a former judicial officer must be an active or inactive member of the State Bar.)*
 - The referee's State Bar number is:
 - The referee's State Bar membership status is *(check one)*:
 - Active
 - Inactive
 - Other *(specify)*:
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

SPR10-03

Alternative Dispute Resolution (ADR): Order Appointing Referee (revise form ADR-110)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Steven H. Gurnee Senior Advisor California Defense Counsel Roseville	A	No comment.	No response required.
2.	Orange County Bar Association Lei Lei Wang Ekvall President	A	No comment.	No response required.
3.	Superior Court of Sacramento County Robert Turner	NI	*The court has reviewed the proposed change but does not have any comments to submit.	No response required.
4.	Superior Court of San Bernardino County Legal Research Staff	NI	No comment.	No response required.
5.	Superior Court of San Diego County Michael M. Roddy Court Executive Officer	AM	<p>The additional language in form [ADR -100]* should be modified as follows:</p> <p>d. <input type="checkbox"/> The referee is a member of the California State Bar. (A proposed referee who is a former California judicial officer must be an active or inactive member of the State Bar.)</p> <p>(1) <input type="checkbox"/> The referee's State Bar number is: (2) <input type="checkbox"/> The referee's State Bar membership status is (check one): (a) <input type="checkbox"/> Active (b) <input type="checkbox"/> Inactive (c) <input type="checkbox"/> Other (specify):</p> <p><u>(Rules 3.903 and 3.923 of the California Rules of Court provide that a referee who is a former California judicial officer must be an active or inactive member of</u></p>	<p>The committee agrees that it would be beneficial to revise the text of the paranthetical statement as suggested by the commentator.</p> <p>The committee does not recommend moving the paranthetical statement because this information is potentially relevant to all of item 3.d. and moving the statement would make the information less apparent. Additionally, the statement has been in the proposed location since the form was adopted in 2005, and this has not been reported to have been problematic.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			<p><i>the State Bar.</i>)</p> <p>Reasoning:</p> <ol style="list-style-type: none">1. The form is replete with statutory citations – why not also expressly reference the applicable Rules of Court?2. Since the additional language relates to relates to State Bar membership status and is only at issue if the status is “other,” it should appear after the d.(2)(c) checkbox. If the additional language is added immediately after the first checkbox as proposed (indicating generally that the referee is a member of the State Bar), it may result in the erroneous, albeit strained, interpretation that State Bar membership only applies to former judicial officers.	