

Recent legislation makes the use of court-appointed discovery referees more user friendly

DISCOVERY

CHANNEL

BY CHRISTINE BYRD

Until recently, California courts had the authority under Code of Civil Procedure Section 639 to require parties to use discovery referees whenever “necessary.” The decision as to when a discovery referee was necessary was left to the discretion of the trial court. However, critics charged that discovery referees were often unnecessary and imposed undue financial burdens on the parties.

Responding to such criticisms, two years ago the California Legislature enacted a new law, AB 2912,¹ that, beginning in 2001, eliminated the trial court’s discretion under Section 639 and imposed specific conditions on the appointment of discovery referees in order to protect parties against unnecessary or inappropriate appointments.² The legisla-

tion dramatically amended Section 639 and other provisions applicable to discovery referees. The legislature also directed the Judicial Council to collect and report information regarding the use of discovery referees under Section 639. The next year, the legislature extended the reporting deadline but underscored its mandate: “It is the intent of the Legislature that the practice and cost of referring discovery disputes to outside referees be thoroughly reviewed.”³

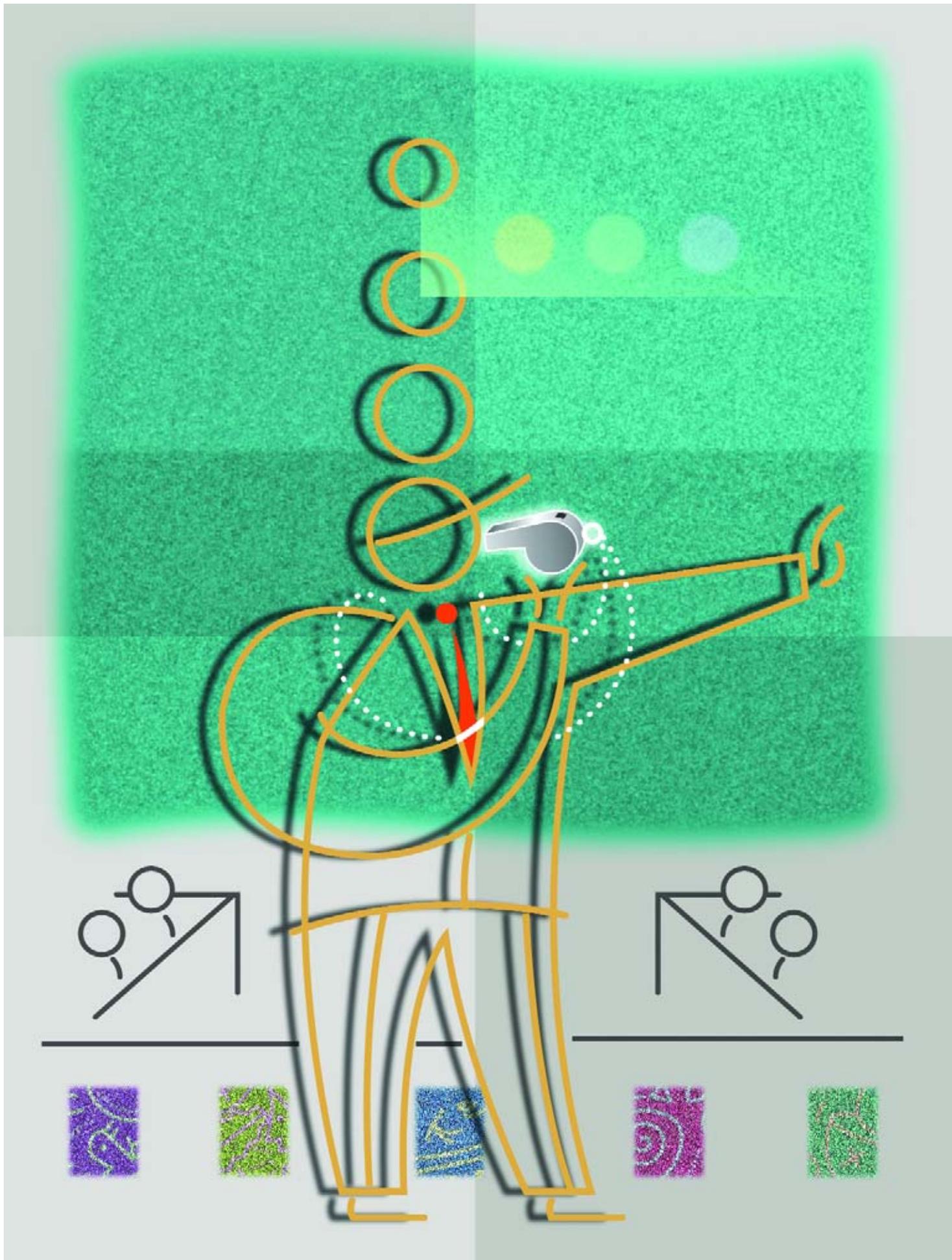
The new requirements for the appointment of a discovery referee without the consent of all parties are clear regarding what a court cannot do and what an appointment order must contain:

- The court cannot appoint a discovery referee absent “exceptional circumstances.”
- The court cannot appoint a discovery ref-

eree without express findings regarding the ability of the parties to pay for the referee’s fees.

- The court order appointing a discovery referee must be in writing.
- The court must specify in the order the scope of the reference.
- The court order must include the name, business address, and telephone number of the referee.
- The court order must specify the maximum hourly rate the referee may charge and, if a party requests, the maximum number of

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hours that the referee may charge.

One of the most significant requirements is the change in the standard under which a discovery referee can be appointed absent the consent of the parties. Under the new law, a discovery referee can be appointed only under “exceptional circumstances... , which must be specific to the circumstances of the particular case.”⁴ This amendment should go far in preventing any unnecessary appointments, although what constitutes “exceptional circumstances” justifying a court’s decision to appoint a discovery referee remains to be seen. It is worth noting that the language is substantially similar to the language in Rule 53 of the Federal Rules of Civil Procedure, governing the appointment of special masters, which provides that a reference to a master “shall be the exception and not the rule.”⁵

Ability to Pay

A requirement in the new law that is as important as the changed standard for appointment of a referee involves the referee’s fees. Even if exceptional circumstances warrant the appointment of a discovery referee, the court cannot appoint one without first determining whether the parties have the ability to pay the referee’s fees.⁶ In fact, the bulk of the amendments enacted in 2000 address this issue. To appoint a discovery referee, the court must find that “no party has established an economic inability to pay a pro rata share of the referee’s fees.”⁷ As for the obvious question of whether a lawyer’s ability to pay may be considered, the answer is no. The court is allowed to consider “only the ability of the party, *not the party’s counsel*, to pay these fees.”⁸

The economic analysis of a party’s ability or inability to pay for a discovery referee must not take place in a vacuum. The court is expressly directed to consider “the estimated cost of the referral and the impact of the proposed fees on the party’s ability to proceed with the litigation.”⁹ The purpose of this amendment is to ensure that no party is forced to sacrifice necessary case preparation in order to pay the costs of a discovery referee. Indeed, at the request of a party, the order for the appointment of a discovery ref-

eree must set forth clearly the maximum number of hours for which the referee may charge.¹⁰ The maximum may be modified but only upon written application (by a party or by the referee) and only for good cause.

The provision for a cap on a discovery referee’s fees is an obvious response to past criticisms, and its benefit to the parties is clear. It may also help the court by making it

fees and the smaller parties are unable to do so. The legislature did not address the implications of having a discovery referee paid by only one side in a lawsuit. In that situation, to avoid an appearance of bias, the court may wish to withhold from the discovery referee the identity of the party or parties paying the referee’s fees.

The new law also requires that the court specify the scope of the reference at the time the discovery referee is appointed. This requirement appears twice in the amendments. First, Section 639(c) requires that the order “indicate whether the referee is being appointed for all discovery purposes in the action.”¹² Second, Section 639(d)(3) requires that the order specify “the subject matter or matters included in the reference.”¹³ These changes are a significant improvement, because the written order will give clear direction to the referee and to the parties as to the scope of the appointment. However, the use of different language in subsections (c) and (d) is puzzling.

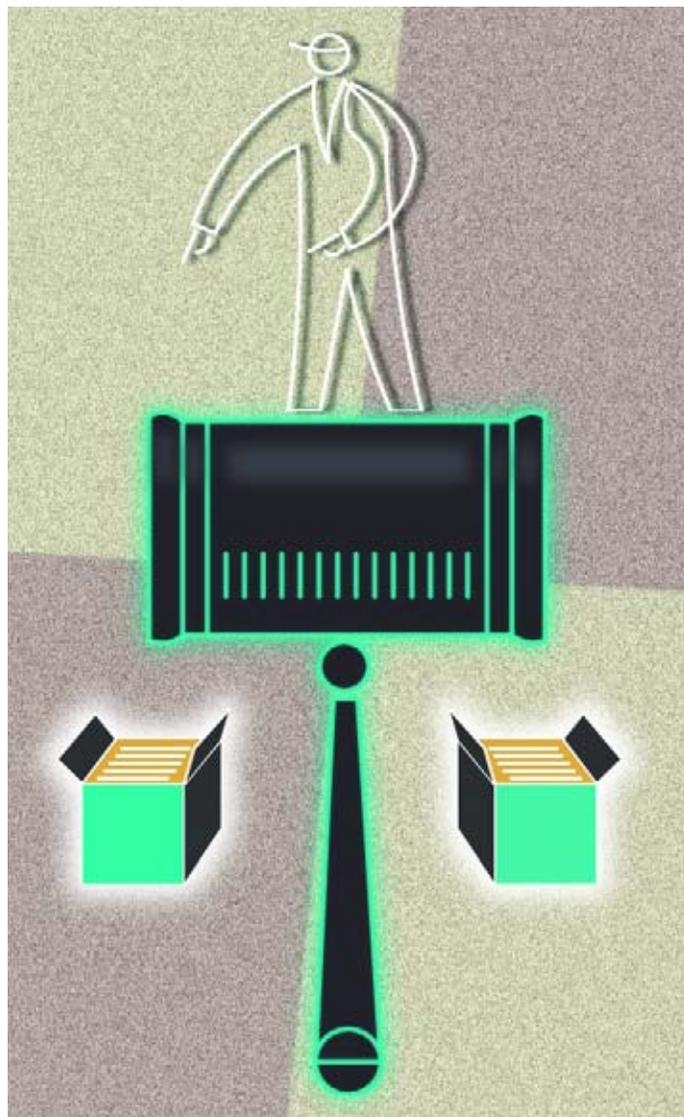
The remaining requirements are informational in nature. The court order now must be in writing, and it must include the name, business address, telephone number, and maximum hourly rate of the referee.¹⁴ Also, a copy of the order must be forwarded to the presiding judge of the court.¹⁵

In the event that a party disagrees with a discovery referee’s report, a full review by the court is available: “[T]he decision of the referee... is only advisory.”¹⁶ The court may adopt the referee’s decision in whole or in part, change the decision, or disregard it entirely, but only

“after independently considering the referee’s findings and any objections and responses thereto filed with the court.”¹⁷ It should be noted that, regarding the review, the statute does not provide the parties with any right to a hearing.

Benefits of Using a Referee

These new requirements should eliminate unnecessary appointments, but discovery referees should continue to be appointed in appropriate cases. The types of cases in which discovery referees have traditionally been appointed are those requiring the full-time



easier to assess the economic impact of an appointment, particularly on parties with limited financial resources who might benefit from the appointment of a discovery referee.

If one party is unable to pay, then a discovery referee cannot be appointed unless any other party, even an opposing party, “has agreed voluntarily to pay that additional share of the referee’s fee.”¹¹ In this circumstance, the court may proceed to appoint the discovery referee. While such cases may not be common, this provision will be a benefit in large multiparty cases in which the larger parties are willing and able to pay a referee’s

attention of a judge, those requiring technical expertise, or both.

For example, environmental cleanup cases can easily involve dozens of parties if all current and prior landowners are named in an action or in the cross-actions. They can also include technical issues. Likewise, construction defect cases, in which numerous contractors and subcontractors are sued, can also contain multiple parties and technical issues.

A discovery referee who understands the technical problems in a multiparty case can handle discovery matters quickly and efficiently. Such a referee can be a tremendous benefit to the parties. However, for parties who are individuals without insurance coverage, the cost of a discovery referee can be burdensome. The changes to Section 639 allow the courts to continue to appoint discovery referees in those cases in which they will be a benefit to the parties, but the changes protect small parties against prohibitive fees.

Of course the appointment of a discovery referee does not guarantee that discovery will proceed more efficiently than it would before a judge. Some judges are excellent at actively supervising discovery matters and rarely appoint discovery referees. For example, Judge J. Stephen Czuleger is reluctant to appoint referees even when lawyers request one. "It is not enough for lawyers to tell me there is a need for a referee in their case," Judge Czuleger said. "They need to tell me specifically what they want the referee to do, rather than leaving it open-ended."¹⁸

Lawyers frequently see the appointment of a referee as leading to a delay of the trial. However, the appointment of a discovery referee should not prolong the resolution of a case. Indeed, one of the benefits of having a discovery referee should be the faster handling of discovery matters. A good discovery referee can allow the parties to obtain legitimate discovery and enforce legitimate objections while minimizing the time and expense normally associated with discovery disputes.

For example, a discovery referee can 1) require that disputes be raised immediately, 2) eliminate "meet and confer" sessions, and 3) streamline the documentation that must accompany a motion to compel. With a discovery referee, counsel can sit down and discuss precisely what information is being sought; what information is relevant; what persons or locations are likely to have that information; what logistics, software requirements, or organizational issues are involved; and what type of search is likely to result in useful information. A discovery referee also can work with counsel to develop a discovery program that serves the interests of all par-

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ties. The appointment of a discovery referee should shorten, rather than lengthen, the life of a case.

The Delay Issue

Although the amendments to Section 639 are a definite improvement, they do not address the critical issue of delay. Not one of the changes to Section 639 requires that a referee hear discovery matters promptly. Code of Civil Procedure Section 643 does provide that the referee must report to the court "within 20 days after the hearing, if any, has been concluded and the matter has been submitted."¹⁹ However, before Section 643 applies,

the referee continues to have discretion and control over the speed with which a matter is heard and submitted.

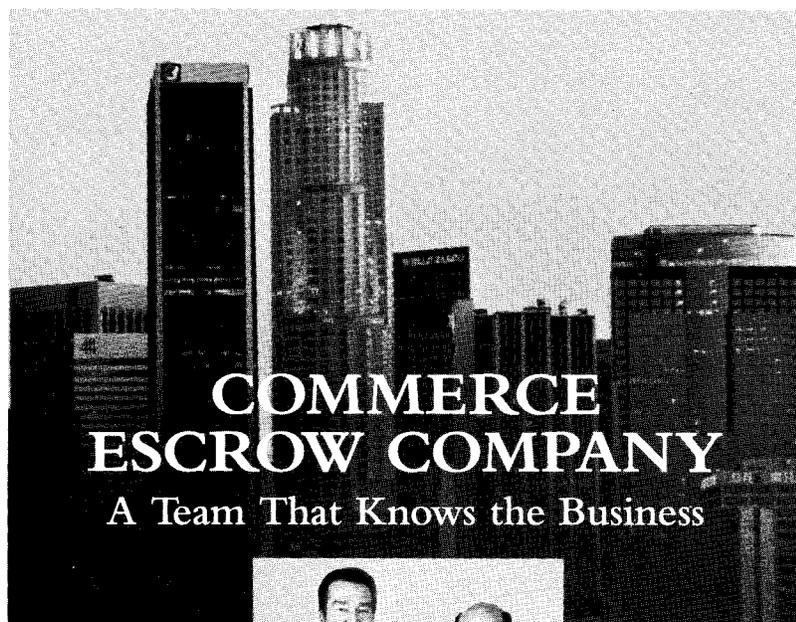
Although legislative changes to address the issue of delay will no doubt be suggested in years to come, the courts can also address this problem in the meantime. One simple way to eliminate delay is for the court to ensure that the discovery referee is both active and knowledgeable. Another way is by including a sunset provision in the appointment order, so that the appointment automatically concludes at a certain date with the issuance of a final report. Judge Czuleger has also developed a simple way to eliminate

delay. His policy is to maintain the original trial date, regardless of the appointment of a referee. He believes that this policy is effective in encouraging efficiency in the discovery process.

The changes to Section 639 do not apply to the appointment of discovery referees with the consent of all parties, which is addressed by Section 638. Even so, parties should contemplate using the new amendments as guidelines when consenting to Section 638 appointments. The new Section 639 requirements are thoughtful and worthwhile. Parties also should consider requesting a sunset provision in any appointment of a discovery referee, whether under Section 638 or 639.

The overall impact of the new changes governing the appointment of discovery referees under Section 639 remains open to debate, but data on the implementation of the new amendments will be available soon. The Judicial Council is required to collect all orders appointing discovery referees, both under Section 638 and Section 639. The Judicial Council is then required to report to the legislature on the number of appointments, the cost to the parties, and the time spent by the discovery referees.²⁰ The deadline for that report is July 1, 2003.²¹

It will be interesting to review the information collected by the Judicial Council and to see what effect, if any, the legislative changes have had on discovery referee appointments. ■



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¹ 2000 Cal. Stat. ch. 644, §2.

² When all parties consent to the appointment of a discovery referee, Code of Civil Procedure §638 applies, not §639. When the parties do not consent, §639 is applicable. The focus of this article is on §639.

³ CODE CIV. PROC. §640.5. The legislature also expanded its mandate by requiring the Judicial Council to report on the use of referees in discovery matters pursuant to either Code of Civil Procedure §638 or §639.

⁴ CODE CIV. PROC. §639(d)(2).

⁵ FED. R. CIV. P. 53(b).

⁶ CODE CIV. PROC. §639(d)(6). No such finding is required if the referee is serving gratis. The requirement of findings regarding the parties' ability to pay for the referee applies only when the referee is being appointed "at a cost to the parties." CODE CIV. PROC. §639(d)(6)(A).

⁷ CODE CIV. PROC. §639(d)(6)(A).

⁸ CODE CIV. PROC. §639(d)(6)(B) (emphasis added).

⁹ *Id.*

¹⁰ CODE CIV. PROC. §639(d)(5).

¹¹ CODE CIV. PROC. §639(d)(6)(A).

¹² CODE CIV. PROC. §639(c).

¹³ CODE CIV. PROC. §639(d)(3).

¹⁴ CODE CIV. PROC. §639(d)(4) and (5).

¹⁵ CODE CIV. PROC. §639(e).

¹⁶ CODE CIV. PROC. §644(b). No such review is available for a consensual general reference pursuant to §638. CODE CIV. PROC. §644(a).

¹⁷ CODE CIV. PROC. §644(b); CODE CIV. PROC. §643.

¹⁸ Telephone interview with author, Mar. 13, 2002.

¹⁹ CODE CIV. PROC. §643(a).

²⁰ CODE CIV. PROC. §§638(c), 639(e), 640.5.

²¹ *Id.*