

Guide to Using a Special Master in Dispute Resolution

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- This is not legal advice nor should it be considered legal advice.
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Agenda

1

Introduction to Special
Masters

2

Special Masters in State
Courts

3

Questions?



Introduction to Special Masters



What is a Special Master?

- A special master (also known as a master or referee) is:
 - a person appointed by a court, arbitrator, or other decision-making body to make factual determinations in complicated cases.
 - “Quasi-judges” with specifically defined duties which relieve the court of its functions beyond its core responsibilities.



Types of Special Masters

- Mediative Special Master
 - facilitates the dialogue regarding preservation accords, production agreements, search and retrieval protocols, and other arrangements regarding the discovery of ESI
- Investigative Special Master
 - may be called for in situations where one party has had repeated failures to produce ESI or/and comply with court orders
- Adjudicative Special Master
 - may be appointed to assist the court the by making findings and recommendations regarding disputes related to ESI

Reasons for Appointing a Special Master

- Familiarization with:
 - Discovery tools
 - Technology Assisted Review
 - Keywords/Search Terms
 - Technology
 - Knowledge of ESI repositories and their physical environments
 - Includes mobile, social and cloud
 - Rapid evolution of “what’s next?”
 - Most litigators should be able to handle Facebook, LinkedIn and Twitter, but what about Ello, Quora, Pheed, and the upcoming data deluge from the Internet of Things (IOT)?
- Ability to expedite case which may otherwise be delayed
 - Especially important currently as COVID-19 has caused immense delays and backlogs

Special Master Selection and Appointment Considerations



- Consider whether the need is mediative, investigative or adjudicative?
- What is more critical: knowledge of the law, knowledge of the technology, or both?
- Does the Master's experience match the criteria necessary to assist with the case at bar?
- Will the Special Master require additional support?
- Availability of the Special Master
 - Will the Master be available for the entire time they will be needed?



Special Master Selection and Appointment Considerations (cont.)

- Check for conflicts and consider how your jurisdiction and court will address the issue of Special Master selection
- Take time to carefully draft the Order of Reference or Order of Appointment
- Describe the procedure for issuing, correcting, and reviewing the Referee's orders
- Authorize the Referee or Master to act flexibly and informally
 - Letter briefs
 - Telephonic hearings



Effective Use of Special Masters

- Work collaboratively with the Referee or Special Master from the beginning
- Set up a monthly or bi-weekly status conference call with the Referee
- Stipulating to the appointment of a Referee gives you more control over the process
- Focus on solving the problem you are presenting
- Be willing to proceed informally
- Consult your Referee as soon as a dispute emerges



Special Masters in State Courts

California Code of Civil Procedure § 638: Voluntary Appointments



- Parties may agree to the appointment of a referee
 - **§ 638(a):** to determine “any or all of the issues” in the action, or
 - **§ 638(b):** to “ascertain a fact necessary to enable the court” to decide the case
- An agreement for appointment of a Referee may be entered into before or after a dispute has arisen, but no Referee may be appointed unless there is a pending suit
- Referee’s fees paid as agreed by the parties
- Withdrawal of stipulation for the appointment must be made by motion and supported by a declaration of facts establishing good cause (CRC 244.1(g))

California Code of Civil Procedure § 638: Voluntary Appointments (cont.)

- Referee may be appointed for as much, or as little, of the case as the parties' desire
 - Limited appointment– authorizes the Referee to make factual findings to enable the court to determine an action or proceeding
 - Full appointment – authorizes the Referee to hear and determine all the issues in an action or proceeding – whether of fact or law – and to report a statement of decision, which the trial court must accept and turn into a judgment.
- Scope of the reference can be expanded by stipulation at any point in the litigation



State Court Referees – CCP § 639: Non-Voluntary Appointments

- Referee may be appointed upon written motion by one party or on the court's own motion
- After the court's mandatory determination of ability to pay, it may order the parties to pay the fees of Referees in any manner determined to be "fair and reasonable", including an apportionment of the fees among the parties
- Court power to refer a matter to a Referee is constrained by the constitutional principle that judicial power may not be delegated (Cal.Const. Art. VI, § 22; *DeGuere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 496)
 - Court has no power to make an uncontested-to "general" reference, which conclusively decides all or part of a matter

State Court Referees – CCP § 639: Non-Voluntary Appointments (cont'd)

- Involuntary references must be authorized by statute and include:
 - Examination of accounts (CCP 639(a)(1); see *DeGuere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 499.)
 - Taking an account (CCP 639(a)(2))
 - Factual dispute arising upon motion in any stage of action (CCP 639(a)(3); see *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1210-11.)
- Special Proceedings, i.e., statutory actions creating remedies unavailable at common law or inequity including eminent domain, unlawful detainer, lien foreclosure, enforcement or arbitration and writs or review (CCP 639(a)(4))
- Discovery disputes when the court determines it is necessary – but only in “exceptional circumstances” (CCP(a)(5))



State Court Referees: “Subordinate Judicial Duties”

- Other statutes authorize court employees (*Court commissioner, probate referees, juvenile referees, etc.*) to perform various “subordinate judicial duties” as authorized by Cal. Const. Art. VI, § 22. (*See, e.g., CCP § 259 (Commissioner’s powers generally); CCP § 873.010 et seq. (partition of real property).*)
- *Note:* Appointment not appropriate where complex or unsettled legal issues. (*See Taggares v. Superior Court (Mitchell)* (1998) 62 Cal.App.4th 94, 106.)



State Court Referees: Order Appointing Referee

- Orders of Reference must be in writing and include:
 - Referee's name and business address and telephone number
 - State Bar number where applicable
 - Referee's signature indicating consent to serve (CRC 244.1)
 - Scope of the reference clearly stated – any or all issues or limited?
 - Subject matter of the reference
 - Referee's power to set the date, time, and place for all hearings and to direct the issuance of subpoenas, to preside over hearings, to take evidence and to rule on objections, motions, and other requests made during the hearing (CRC 244.2(h)(2))
 - The Referee's signature indicating consent to serve and certifying that he or she is "aware of and will comply" with Canon 6 of Code of Judicial Ethics



State Court Referees: Order Appointing Referee (cont.)

- Consensual Orders of Reference Under CCP 638 should also include:
 - Referee's fees to be paid as agreed by the parties
 - Whether reference is "general" or "special"
 - Note: when parties consent to Reference, they get to define the scope and subject matter
- Non-consensual Orders of Reference under CCP 639 must also state:
 - Maximum hourly rate and at any party's request, the maximum number of hours for which the Referee may charge. Upon good cause, the court may later modify the maximum number of hours.
 - A finding as to the parties' ability to pay – the Court may *not* consider the counsel's ability to pay, just the party's
 - Required even if party not proceeding *in form pauperis*
 - Inability to pay a pro rata share of fees may prevent the reference
- *The Order of Reference may be terminated before hearing*

State Court Referees: Discovery Referees

- **Discovery Referees:** Referee appointed to hear and determine discovery motions and disputes.
 - Order of Reference must so state and must include the “exceptional circumstances requiring the reference, which must be specific to the circumstance of the particular case.” (CCP 639(a)(5) and (d)(2))
 - “Exceptional circumstances” include the following:
 - Multiple issues to be resolved
 - Multiple motions to be heard simultaneously
 - Present motion is only one in a “continuum” of many
 - Number of documents to be reviews (especially in connection with issues based on assertion of a privilege) make the inquiry “inordinately time consuming.” (*Taggares v. Superior Court (Mitchell)* (1998) 62 Cal.App.4th 94, 105.)
- Efficiency is not an “exceptional circumstance” (*See Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 437.)

State Court Referees: Selecting a Referee

- Essentially the same procedure as with Federal Courts for Voluntary and Involuntary references
- The court shall appoint the Referee(s) agreed upon by the parties
- If parties are unable to come to an agreement, each party may submit up to 3 nominees
 - The court appoints the Referee(s) against whom there is no legal objection
 - If Referee is *former* California judicial officer, they must either be an active or inactive member of the State Bar. (CRC 244.1(a))
- *Note:* Participation in the selection process does not constitute waiver of grounds for objections to the appointment

State Court Referees: Objections to the Appointment

- Peremptory
 - A party may move to disqualify a Referee under CCP 170.6 within 10 days of the notice of appointment or the parties' first appearance in the case or at least 5 days before the date set for hearing – if the Referee assigned is known 10 days before the hearing and has been assigned only for limited discovery purpose (CCP 639(b))
- For Cause
 - A party may object to the appointment of any person as Referee on grounds including (CCP § 641):
 - Not competent to serve as a juror under statute
 - Consanguinity or affinity within the third degree to either party or officer of corporation that is a party, or any judge of court in which appointment made
 - In business with or employee of party
 - Served as a juror or been a witness on any trial between same parties
 - Interest in outcome of action
 - Formed or expressed prior opinion on action
 - Evidence of enmity against or bias toward either party
 - Referee not technically competent

State Court Referees – Disclosures by Referee

- No later than 5 days before the deadline to file a motion for disqualification, a referee must disclose to the parties:
 - Any matter subject to disclosure under subdivisions (d)(2)(f) and (g) of Canon 6 of the Code of Judicial Ethics; and
 - Any significant personal or professional relationship the Referee has or has had with any party or counsel or insurance company involved in the case



State Court Referees – Statements of Decision, Reports, and Orders: CCP § 638

- Decisions are reported as agreed to by the parties
- For Referees appointed to decide the whole case – a “consensual general references” – the decision of the Referee stands as the decision of the court – it is a final appealable order. (CCP § 644; *Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 436.)
- When the reference under § 638 is simply to report the facts – a “special reference” – the decision reported has the effect of a special verdict. (CCP § 645)



State Court Referees – Statements of Decision, Reports, and Orders: CCP § 639

- Decision must include a recommendation on any disputed issue and include a statement of the total hours spent and the total fees charges and the Referee's recommended allocation of payment. (CCP § 643)
- Decisions of Referees appointed under CCP § 639 are advisory only. 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. (CCP § 644)

State Court Referees: Actions on Statements of Decision, Reports, and Orders

- Objections should be filed within 10 days after the Referee serves and files the report, or within time the court directs (CCP § 643)
 - Objections should be served on all parties and the Referee
 - Responses to Objections must be filed within 10 days after objections are served
 - Court then independently reviews objections and makes orders accordingly
- Although not binding, Referee's recommendations on factual findings entitled to "great weight" (*Estate of Beard* (1999) 71 Cal.App.4th 753, 777; *In re Rosoto* (1974) 10 Cal.3d 939, 946.)

State Court Referees: Actions on Statements of Decision, Reports, and Orders

- No hearing required before accepting or rejecting Referee's recommendations
- Court retains the power to make the decisions and may change the terms of the Referee's appointment upon a party's motion or for good cause upon its own motion
- *Note:* Referee's recommended order has no binding effect until it is adopted by the Court, (*Holt v. Kelly* (1978) 20 Cal.3d 560, 562; *Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1884, n. 1), unless a consensual general reference.



Agreements to Use Referee

- Pre-Dispute Agreements
 - Enforceable only if part of “written contract or lease” (CCP 638)
 - General rules of contract interpretation apply
 - *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 800-04
 - *Greenbriar Homes Communities, Inc. v. Sup. Ct. (Couris)* (2004) 117 Cal.App.4th 337, 343
 - *Pardee Const. Co. v. Sup. Ct. (Rodriguez)* (2002) 100 Cal.App.4th 1081, 1087-93
 - *Woodside Homes of Calif., Inc. v. Superior Court (Folger)* (2003) 107 Cal.App.4th 723, 725-36



Post-lawsuit Agreements

- Post-lawsuit agreements for appointment of a Referee may be either written or oral.
 - CCP 638 (agreement may be entered into the minutes)
 - *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1527
 - *Garland v. Smith* (1938) 131 Cal.App. 517, 524-25
- *See Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal.App.3d 431, 435 – Written agreement required
- *In re Hart's Estate* (1938) 11 Cal.2d 89, 91-92 – Implied agreement may be sufficient
- *National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709, 715-16 – Parties stipulated to reference after purported binding arbitration

Finding “Ability to Pay” – CCP 639(d)(6)

- *Andrews v. Superior Court (Thomas)* (2000) 82 Cal.App.4th 779, 781-83
 - Court has no authority to Order party’s attorney to pay Referee
- *Taggares v. Superior Court (Mitchell)* (1998) 62 Cal.App.4th 94, 103
 - Court may not consider counsel’s advancing of fees in determining ability to pay
- *DeBlase v. Superior Court (Hoffman Bros., Inc.)* (1996) 41 Cal.App.4th 1279, 1285
 - No compelled fee waiver – Referee cannot be ordered to serve without compensation; Court cannot authorize waiver of fees
- *Solorzano v. Superior Court* (1993) 18 Cal.App.4th 603, 615
 - Court cannot require *in forma pauperis* Plaintiff to pay private fees



Questions?

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Daniel Garrie is the Co-Founder of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups and has been a dominant voice in the computer forensic and cybersecurity space for over 20 years. Prior to Daniel’s legal career, he successfully built and sold several technology start-up companies. Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. Daniel has both a Bachelor’s and a Master’s Degree in computer science from Brandeis University, as well as a J.D. degree from Rutgers Law School. Daniel has led forensic teams in some of the most visible and sensitive cyber incidents in the United States. In particular, Daniel recently located and recovered deleted files in both private and public cloud computing environments using his patented software, Forensic Scan. This investigation took less than forty-eight hours to clean and recover the data from the servers of a cloud-hosting provider that was compromised by a malicious cyber-attack. Thanks to the Forensic Scan technology, that Daniel co-invented and patented (US9990498B2 and US9990497B2), and his own expertise, Daniel and his team was able to identify the source of the breach and remediate the problem in record time.

Daniel regularly testifies as an e-discovery, cybersecurity and computer forensic expert witness, authoring forensic expert reports on multi-million-dollar disputes. His ability to perform complex investigations and effectively communicate the results to a jury has made him one of the most sought-after experts in the country. His testimony has been pivotal in a number of cases, including one involving the embezzlement of millions of dollars from a large non-profit. Daniel was able to perform a thorough analysis of the alleged embezzlers’ phone and computer, despite the embezzlers’ attempts to wipe them, and identify concrete evidence of the embezzlement to a jury. Since 2008, Daniel has served as a Neutral and Special Master and in 2016, he joined JAMS as one of the organization’s youngest Neutrals. At JAMS, Daniel serves as an Arbitrator, Forensic Neutral, and technical Special Master with a focus on cybersecurity, cryptocurrency, and complex software and technology related disputes. Some of the major cases for which he has served as an e-discovery special master, or forensic neutral include: *Hougan vs. City of Newport Beach*, No. 30-2012-00582855 (Super. Ct. Cal. 2014); *Small v. University Medical Center of Southern Nevada*, 2014 WL 4079507(D. Nev. 2014); *C.D.S. Inc. v. Zelter and Amazon Web Services, Inc.*, (S.D.N.Y. 2016); *Jawbone, Inc. v. Fitbit Inc. et al* (Super. Cal., S.F. County 2018). In addition to his vast litigious experience, Daniel is well-published in the cybersecurity space, Editor-in-Chief of the Journal of Law & Cyberwarfare, author of more than 200 articles and books including, “Understanding Software, the Internet, Mobile Computing, and the Cloud. A guide for Judges”, published by the Federal Judicial Center. He has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and a thought leader for cybersecurity articles and opinions, being cited over 500 times to date.



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The wide range of clients, roles and substantive matters provides Mr. Miller with unique, invaluable insight into case evaluation and high-stakes litigation. His intense focus in settlement is to calmly seek resolution by empathizing with the needs, understanding and goals of those involved. His command of substantive law is extensive. He was for many years a professor at the USC Gould School of Law, where he taught classes on civil procedure, contracts, real property, antitrust, securities and international law. He also is well-known for having taught for over 20 years in a leading California bar review course. He lectures and speaks frequently on intellectual property and international legal issues, most recently in Beijing; Shanghai; Seoul; Hyderabad; Bangalore; New Delhi; Ulaanbaatar; Washington, D.C.; Toronto; London; and Berlin.

Mr. Miller is a past President of the State Bar of California. He has been at the center of the California legal profession since he began his career as law clerk to Justice Roger J. Traynor of the Supreme Court of California.



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Jeffrey Huron is an attorney in the Business Litigation Group and serves as the Managing Member of Dykema’s Los Angeles office. With 30 years of experience litigating and arbitrating business, real estate and entertainment disputes, Mr. Huron has tried and won multi-million dollar high-stakes cases for a wide range of clients. Mr. Huron also has substantial experience in appellate matters, having handled more than fifty appeals and writs. Mr. Huron has been recognized in Southern California SuperLawyers for Business Litigation every year since 2010.

Mr. Huron’s clients include a wide range of businesses, partnerships, financial institutions, lenders, real estate investors and developers, receivers, and business owners and shareholders.

His diverse experience includes litigation involving partnership disputes, breach of fiduciary duties, breach of contracts, interference with contracts and business relationships, copyrights, trade secrets, class actions, adversary proceedings in bankruptcy, lender liability, easements, escrow, broker, title and construction disputes, malicious prosecution, defamation, wrongful termination, sexual harassment, unfair business practices, and professional malpractice.

Throughout his career, Mr. Huron has authored several articles regarding litigation and appellate practice. His article, Exclusion Preclusion, discusses how to preserve an appellate record when a court excludes evidence during trial and was featured on the cover of Los Angeles Lawyer magazine. And the United States Supreme Court cited Mr. Huron’s article regarding antitrust remedies in a 9-0 published opinion by former Supreme Court Justice Sandra Day O’Connor.



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Michael Geibelson is the Managing Partner of Robins Kaplan LLP's California offices. Michael solves complex business disputes for retailers and technology companies through litigation, mediation, and trial. He has represented companies in the retail, real estate, food and beverage, entertainment, technology, and cannabis industries in key industry issues involving lease disputes, false advertising and unfair competition, class actions, misappropriation of trade secrets, supply agreements, copyright and trademark. He frequently publishes and speaks on topics concerning litigation skills and strategies to make litigation, electronic discovery, and trial more efficient and less costly.

Selected Results:

- Secured summary judgment and award of fees and costs enforcing right to exercise option period under commercial lease.
- Secured denial of class certification in action alleging false advertisement of product characteristics in over 900 models of consumer product under California Unfair Competition Law (UCL) and False Advertising Law (FAL), Business & Professions Code Section 17200 and 17500.
- Obtained denial of class certification in an action alleging false advertising of battery life representations concerning hundreds of models of laptop computers under California Unfair Competition Law (UCL) and California Consumers Legal Remedies Act (CLRA).
- At trial, secured decertification of class action claim for statutory privacy violations under California law.
- Obtained finding of copyright misuse and denial of preliminary injunction against major studio in representing national retailer of movies.
- Obtained summary judgment for national retailer in "loss leader" claims under the Unfair Practices Act (California Business & Professions Code §§ 17030, 17043, 17044); affirmed on appeal (9th Cir. 2010)
- Obtained denial of class certification for online retailer in case of first impression under Song Beverly Credit Card Act, California Civil Code Section 1747.08, involving requests for consumers' personal identifying information in online credit card transactions.