

Creative Case Management Techniques in the Face of Looming Budget Cuts

What do civil litigators tell their clients about the significant cuts by the Governor's "spending plan"? What can they really say other than "this is no spending plan at all." Are we back to the 1980's with the only civil cases



News & Updates



Induction of the Hon. Terri A. Mockler

Judge Mockler's induction took place on June 22, 2012. After the court convened en banc, Master of Ceremonies, Charles James, former Contra Costa Public Defender, introduced the speakers: Karen

Spotlight

Civil Fast Track Settlement Mentor Conferences

Most attorneys who practice in Contra Costa County are generally familiar with [the Court's several Alternative Dispute Resolution \(ADR\) programs](#). There are specific requirements which all ADR panel members must meet to serve ...

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Alternative Dispute Resolution Resources

Contra Costa Lawyer Online

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<http://cclawyer.cccba.org/>

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Inside: Guest Editor's Column

Wednesday, August 1, 2012



Nicole Mills

In our June issue, our Presiding Judge, Diana Becton, wrote a sobering article entitled “Access to Justice in the Wake of Budget Cutbacks.”¹ We all know that the budget crisis is not going away any time soon- and in fact has the very real potential to become a lot worse. Judge Becton’s article gave us a peek of where we stand- permanent budget cuts of \$8.4 Million over the last 3 fiscal years with an additional 4.1 million in permanent cuts due to hit next year and, as Judge Becton tells us, “[i]f the temporary taxes proposed by the Governor are rejected by the voters, then there will be another \$125 million cut to the Judicial Branch” which translates into at least an additional \$2.1 million in cuts to the Contra Costa Courts.

What could that mean for people trying to litigate in our courts? It could mean a lot- including massive delays in hearing anything other than crimi-

¹<http://cclawyer.cccba.org/2012/06/access-to-justice-in-the-wake-of-budget-cutbacks/>

nal and juvenile law cases, suspending adjudication of all small claims and limited jurisdiction cases.

Given the situation we are about to find ourselves in, we here at the *Contra Costa Lawyer*² want you to think about ADR. Now, when you hear those letters, you usually think “Alternative Dispute Resolution.” This month, we would like you to think of “**Alternative Dispute Resources.**” This month, we want to encourage you to think outside of the litigation box, to the myriad other ways you can advance your client’s interests if the traditional route of litigation is not readily available. To that end, we have several articles designed to help you do just that.

For business attorneys, Ben Borson³ has suggested a potentially different approach to negotiation- instead of negotiating with litigation in mind, approach negotiations as an opportunity for a win-win solution. Contracts that are fair and negotiated cooperatively are less likely to require intervention by the Courts in the first place- saving your client both time and money in the end.

Do you have employment claims that need to be handled? Click on the article by James Wu and Michelle Regalia McGrath⁴ who have focused on the resources available for resolving employment claims- both on the state and federal level.

In house counsel and trial attorneys alike should read Linda DeBene’s article⁵ on the use of Special Masters to advance your case when the Court delays are not in your best interest. She offers practical advice on the use of Temporary Judges and Referees and tips on how to use them most efficiently and effectively. If you would like to hear more after reading her article, make sure to sign up for the MCLE Spectacular⁶ presentation entitled “Using Special Master” which is being co-sponsored by the Business Law and ADR Sections. While both the article and the MCLE Spectacular presentation are designed to provide you with alternatives to the delay in process that may become inevitable, the MCLE Spectacular presentation will provide far more detail from an exceptional panel that will include not

²<http://www.contracostalawyer.org>

³<http://cclawyer.cccba.org/?p=4354>

⁴<http://cclawyer.cccba.org/?p=4325>

⁵<http://cclawyer.cccba.org/?p=4362>

⁶<http://www.cccba.org/attorney/mcle/special-events-mcle.php>

only our own Linda DeBene and Roger Brothers, but also Judge Goode, Jonathan Redgrave of the Academy of Court Appointed Masters, and Lisa Turbis in-house counsel at Autodesk. Given the looming budget cuts, it is a program that everyone working with the Courts should really consider attending.

David Miller⁷ has taken a look at all of the options that our Courts- even in a time of budget crisis- offer us to aid in the resolution of our claims and the development of a creative litigation plan designed to achieve that resolution. From the traditional option of mediation to settlement conferences, neutral evaluation and arbitration, the Contra Costa Superior Courts have made ADR a priority. One of these programs is the Settlement Mentor Program. Judge Craddick talks about this program, its benefits to both the Court and the participants and gives a glimpse into how the program works. This is yet another program offered in partnership between our Court and volunteers.

Particularly in a time of budget crises, the Court could not make these offerings without countless hours of volunteer time offered by our Bar Association members and all of the other attorneys who practice in our Court- and for that we thank you all. The partnership between our Court and our volunteers is special and benefits everyone- the Court, the litigants and the volunteers.

Should you find yourself taking part in mediation or arbitration, whether via the Court panel or private mediation/arbitration, we have suggestions on how to make the most of your opportunity. Malcolm Sher⁸ offers suggestions and perspectives on the importance of preparing properly for mediation, while Joshua Genser⁹ offers his perspectives on Appraisals and Arbitration.

The current budget crisis is wreaking havoc on our judicial system and it is poised to do even more damage depending on the outcome of this fall's elections. Judge Becton has given us a glance at what may come. It is our hope that with this issue, we have given you ideas and strategies on how to

⁷<http://cclawyer.cccba.org/?p=4341>

⁸<http://cclawyer.cccba.org/?p=4348>

⁹<http://cclawyer.cccba.org/?p=4336>

be the best counselor for your client and how to achieve their goals without having to resort to full blown litigation.

One final note. Under normal circumstances, we would have even more information for you in our annual Bench/Bar issue which usually comes out in September. We know that this is one of the most popular issues that we do all year and that you are all looking forward to it. However, due to the uncertainty in the budget, we have decided to delay that issue until November so that we can give you the most up to date, concrete information available.

Nicole Mills is a mediator specializing in business disputes and elder mediation. She is the current Chair of the ADR Section and is also the Co-Editor of the Contra Costa Lawyer. She can be reached at nicolemillsesq@yahoo.com¹⁰.

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Creative Case Management Techniques in the Face of Looming Budget Cuts

Wednesday, August 1, 2012



Linda DeBene

In spite of strong protest from the legal community, Governor Brown signed a 2012-13 spending plan in June 2012 that slashes \$544 million from the judicial branch budget¹¹. A few small reports of the fallout:

June 11, 2012: Fresno Superior Court must absorb \$26m in cuts in the upcoming fiscal year closing seven branch courts¹².

June 15, 2012: Los Angeles Superior Court must absorb \$100m in cuts¹³.

¹¹<http://www.calbarjournal.com/July2012/TopHeadlines/TH4.aspx>

¹²<http://abclocal.go.com/kfsn/story?section=news/local&id=8677451>

¹³<http://www.nbclosangeles.com/news/local/los-angeles-superior-court-announces-budget-cuts-affecting-431-employees-159187565.html>

Its employee union, soon to lose 431 more members, warned “an end to timely justice” with civil cases being delayed for years

June 2012:San Francisco Superior Court seeks volunteers for a new mandatory settlement conference program as judicial officers will no longer be available due to other duties¹⁴, and it is dropping mediation referrals altogether from their programs.

Initial budget cuts that began in 2009-2010 resulted in courts being closed one day per month. Then there were furloughs. Subsequent cuts have resulted in reductions in not only court staffing/services, but in closing of branches, reduction in civil courtrooms, district attorney staffs, probation staffs, and public defender staffs being cut and criminal case loads are backing up.[1]¹⁵

What do civil litigators tell their clients about the significant cuts by the Governor’s “spending plan”? What can they really say other than “this is no *spending* plan at all.” Are we back to the 1980’s with the only civil cases getting to trial being those butting up to the 5-year statute (and looking for ways around that), or having a statutory preference? Maybe it is not that bad yet, but who knows when it will turn around.

This article will attempt to address alternatives for managing and trying cases while still preserving the right to appeal, with some practice points on these alternatives. Yes, there are some: Temporary Judges under California Constitution, Article VI, §21, and Judicial References under California Code of Civil Procedure §§638 and 639.[2]¹⁶

Temporary Judges

Temporary Judges have the same powers as trial judges, but must be appointed by the presiding judge. The parties must agree on appointment *after* the lawsuit is filed, the appointee must be a member of the State Bar, and must take an oath. All hearings are open to the public. Temporary Judge judgments are appealable.

¹⁴http://www.sfsuperiorcourt.org/sites/default/files/pdfs/MSCV.5_0.pdf

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Assuming the parties can agree on using a Temporary Judge, and are able to select one to recommend to a presiding judge, there are several positive aspects to using one. A Temporary Judge may have subject matter expertise, there is continuity and consistency in rulings, trial can be held on an expedited schedule the parties can set, and appeal is preserved. Even if the pro-tem[3]¹⁷ does not have a courtroom, the case can be tried in an office so long as all court formalities are followed and it is open to the public.

Cost effectiveness as compared to the typical judicial process is a matter to weigh. In light of the possibility that civil cases may not likely get an available courtroom for extended periods of time and motions may only be set quarters (not just months) away, the matter can be expeditiously moved along because the pro-tem does not have the same time constraints of sitting judges or commissioners. Cost expenditures have to be weighed against delay[4]¹⁸. A pro-tem can manage the case, keeping in touch as needed with the presiding judge if a courtroom/jury is essential, set motions in a reasonable fashion, and can review and sign orders in days not months.

If counsel and their clients select to use, and agree upon a Temporary Judge, a positive aspect is having someone who will have time to listen and understand the case, and who will not have the constraints of an over crowded docket. The pro-tem is likely to be more accessible and can see the whole picture of the case, not just discovery in a vacuum or in trial at some distant point in time. In complex/technical issue cases, the pro-tem may also have practice area expertise a judicial officer may not have (or have time to figure out) due to other assignments/responsibilities. And, the pro-tem can typically get the case to trial faster.

There are interactions with the court and the courthouse that may be “cons” to a Temporary Judge assignment. In a trial which needs a jury, court personnel are involved such as bailiffs, clerks (to handle evidence and the jury) and jury commissioners. Typically jury trials by Temporary Judges end up at the courthouse, but with cutbacks in court personnel, while there may be an empty courtroom to use, there likely will not be a bailiff, no clerk to handle evidence, and no one to handle the jury. A Temporary Judge is useful when formality of a trial is desired, but without court personnel, one might

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conclude that a Presiding Judge could deny the appointment recommendation of counsel and let the case wait. Yes, the parties and their clients can waive jury, but Presiding Judges may wish *voir dire* on this issue before permitting the waiver so as to avoid appellate complaint of incompetence of counsel or waiver without full knowledge of the effect on the party's case.

Other “cons” are that some lawyers are terrified of the unknown. Temporary Judges rarely have a public track record. While their decisions are appealable, it is difficult to ascertain the “word on the street” about their eccentricities in a “judicial” role, as opposed to sitting judges. However, this con must be weighed against the delay being caused in the courts, the agreement of the parties in making a recommendation to the Court for appointment and the needs and desires of the clients to obtain a trial instead of more months and years of unknown delay.

Judicial References (Voluntary and Consensual)

Judicial References have a fuller range of flexibility and less ties to the courthouse arena. Judicial References can be for the whole case or for portions of the case. An agreement to appoint a Judicial Referee can be in a pre-dispute contract, or the parties in a filed lawsuit (or anticipating one) can stipulate to a Referee either for all purposes or for limited purposes under CCP §638[5]¹⁹, but there must be a lawsuit pending at some point as the Referee acts as an arm of the Court.

Trials and hearings for Judicial Referees must still be “noticed” to the Court appointing the Referee, with documents that the parties will send to the Referee *first* filed in the relevant clerk's office. Cal. Rule of Court 2.400. Under a reference all pleadings are still public and hearings are open to the public. 2010 Public Access Provisions, California Rules of Court 10.500 *et seq.* See also Cal. Rule of Court 3.931. While there is no requirement that the trial or hearing of the matters be at the courthouse, arrangements must be in place for the public to attend. Cal. Rule of Court 3.907. In fact, under Rule 3.907, a party who has elected to use a §638 reference is “deemed to have elected to proceed outside court facilities.”

CCP §638(a) Referees can be for all purposes (“general consensual reference”) or CCP §638(b) Referees for specific purposes (“special consen-

¹⁹#_ftn5

sual reference”), such as discovery, settlement (not mediation[6]²⁰), and accountings, as some few examples. They do not need to be attorneys, and they can be chosen by the parties without court approval (although a court order appointing is needed), or on motion. §638 references must be consensual[7]²¹, and no California court has the power to make an uncontested-to “general reference”. No oath is required, although any Referee who serves as an “arm” of the Court is required to comply with all of the ethical requirements of a judicial officer under the California Canons of Judicial Ethics, Canon 6.

General references under §638(a) provide the Referee with the power to make binding decisions after hearing as if the case were being tried to a court. *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal. App.4th 1334, 1341, 83 Cal. Rptr.2d 340, 344. Upon conclusion of the trial, the Referee is required to make a statement of decision, which may be reviewed upon a motion for new trial. The statement of decision has the same meaning as in CCP §632, except that §638 does not mandate that a party make a request for statement of decision before one is required. The Referee’s final decision is deemed the “decision of the court” and is appealable. CCP §§ 644, 645. *Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal. App.3d 431, 436, 227 Cal. Rptr. 460, 464.

While a §638(a) Referee for all purposes makes binding decisions, a §638(b) Special Referee makes recommended decisions. But when parties consent to either reference, they are able to define the scope and subject matter. It is at this early stage in the process that the parties and the Referee need to take time and work collaboratively to carefully draft the Order of Reference or Order of Appointment. Major complaints of counsel are that the procedures for issuing, correcting and reviewing the Referee’s order is not clear, was not set or that there are too many steps, making the process inefficient and expensive. Streamlining the process plus efficiency of time and expense are the most positive aspects of a reference if used under a clear and concise order that the parties negotiate and agree upon.

Judicial References (Court-Ordered)

Involuntary references (*i.e.*, non-consensual) must be authorized by statute

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and be limited in scope. One statutory scheme is CCP §639 which provides for: examination of accounts [§639(a)(1)], taking an account [§639(a)(2)], determining factual dispute(s) arising on motion at any stage of an action [§639(a)(3)], conducting “special proceedings” (*i.e.*, statutory actions creating remedies unavailable at common law or in equity including eminent domain, unlawful detainer, lien foreclosure, enforcement or arbitration and writs of review [§639(a)(4)], or discovery disputes[8]²²) when the court determines it is necessary but only in “exceptional circumstances” [§639(a)(5)]. Unfortunately counsel cannot rely on “efficiency” as an exceptional circumstance. See *Aetna Life Ins. Co. v. Superior Court (Hammer)*, *supra*, *Id.* at 437.

Another statutory scheme which permits courts to appoint Referees is California Constitution, Article VI, §22, which authorizes court employees (court commissioners, probate referees, juvenile referees, hearing officers, etc.) to perform various “subordinate judicial duties” as authorized. See also CCP §259 and CCP §873.010 *et seq.* These provisions may provide for subordinate judicial duty officers, but the fact that some commissioner or referee positions are, or may be, the target of severe budget cuts, will force courts to turn to the §639 involuntary references in situations warranted. Otherwise counsel and their clients will be left with voluntary/consensual references under CCP §638.

What can civil attorneys and their litigating clients do in the face of the current budget crisis to get their cases tried and preserve their rights to appeal?

Case Management & Other Practice Pointers

If you have a written pre-dispute agreement (enforceable under §638 only if part of a “written contract or lease”), or even if you do not, meet and confer with other counsel (or, if pre-litigation, with opposing parties), and work out an agreement for a §638 general or special reference. If the goal is for a reference for all purposes, start immediately to select a mutually agreeable Referee[9]²³.

²² #_ftn8

²³ #_ftn9

If you have no pre-dispute agreement, make a post-dispute agreement for reference. This can be oral or written. Under §638, an agreement may be entered in the record or minutes of the court proceedings.

When possible, agree amongst counsel to the Referee or Temporary Judge and recommend to the Court

You cannot choose your judge, but you can select your Referee or Temporary Judge

When deciding, recall that a §638 Referee cannot conduct a jury trial[10]²⁴.

If counsel trust the Referee it will be productive. Often, if the parties cannot agree and/or the Court appoints over objection, it can be counterproductive and inefficient from a proceedings or cost perspective.

Focus on solving the problem you are presenting when recommending a SM/Referee to the Court. If you are already in a case that presents a specific issue, the Court can be asked to appoint a Referee for a particular purpose, not the whole case[11]²⁵.

Select an experienced SM/Referee[12]²⁶ who likes doing the work. Not every ADR neutral is willing to handle the detailed work that comes with a SM/Referee assignment involving complicated E-discovery or contentious discovery in general.

Select an experienced SM/Referee

who is not afraid to make tough calls and who will move the ball forward expeditiously;

who has time to get to the rulings;

who has subject matter knowledge in the practice area of your case;

²⁴#_ftn10

²⁵#_ftn11

²⁶#_ftn12

To maximize knowledge and not pay for a learning curve in cases involving E-discovery consider someone who is technologically savvy, trained in E-discovery and ESI, and aware of ever-changing trends in methods for document production, storage and search methods.

Because meeting and conferring between counsel is less expensive than formally briefing pre-trial motions on protocols, discovery, privilege and privacy claims, select a SM/Referee that will keep the parties involved in the process by:

requiring meet and confer sessions on issues prior to making motions;

encouraging an early discovery plan, stipulations on dates and protocols for e-discovery;

holding informal conference calls rather than face to face hearings on arising issues so they can be dealt with in real time and not fester

When possible do not limit the SM/Referee to deciding disputes, but give specific authority to manage, organize and schedule as a complex department would do.

A SM/Referee handling the whole matter will be better able to know the whole case and see when discovery issues may impact the structure of the decisions in the case later on.

Authorize the SM/Referee to act flexibly and informally to save time and money by such means as letter briefs instead of full briefing, standby time for discovery so rulings can be made on the spot during a deposition on the record rather than doing expensive and time-consuming motion work.

Ask SM/Referee if s/he will standby for depositions at no cost unless called for needed ruling.

If the SM/Referee's decision is a nonbinding one, determine in advance if SM/Referee will do tentative rulings on motions. Set up a process for a short window to object to tentatives before being sent to the Court for approval. Many tentatives will draw no objection, and this will save time with judicial approvals when the appointing judge has a back log of orders

to consider/approve. A cover e-mail/letter from the SM/Referee direct to the Court stating the proposed order is attached and time for objection has expired without any objection will be expeditious, and the parties will be motivated to move forward on the motion/discovery ruling without having to wait for the Court to act.

If there are tentatives and objections, there can be a hearing on short notice rather than waiting for a court opening many months out, or for an order that may be delayed or lost in a busy or understaffed clerk's office, thus avoiding delay.

Conduct regularly scheduled status conferences to move/track action items. Do not let disputes fester. •Set up a process in advance for bringing disputes/issues to the attention of the SM/Referee informally so shortened time briefing schedules may be set or tentative decisions announced informally. Time and expense to the client can be saved by informal resolutions documented by short e-mail orders.

Do not be afraid to educate the SM/Referee and let him or her know of impending problems so that what might look like small issues do not bubble up and become big problems down the road.

Remember that civility is not inconsistent with self-interest and it is consistent with cost savings. It is more frequently than not possible to simultaneously advance your client's interest while fostering productive discovery agreements with opposing counsel.

Consider informal discovery exchanges instead of expensive motion practice

Exchange discovery electronically and via email, setting up in advance such time saving measures as service times by email that may be shorter or longer as the case calls for instead of statutory deadlines, using "read receipts" or acknowledgments of receipt instead of expensive overnight carriers or deliver persons.

Refrain from immediately defaulting to a sanction request in every instance of discovery crisis, instead opting for compliance rather than raising the level of adversarial angst. Requests for sanctions are repeatedly denied for

one reason or another and are quite expensive in light of the high risk of denial. Invest in your credibility level by selecting your battles carefully. When the appropriate time comes for a truly winnable sanctions request, your client will not have a track record of expensive losses to overcome.

Once you have made the decision to avail yourself of one of these alternative options

use referrals or suggestions from neutrals that do this work to aid in the selection process;

ask someone you are vetting if they have form orders that they use that you can review;

call your colleagues or other attorneys you trust for recommendations or procedural formats that have worked.

call your favorite ADR Provider and ask to speak with a Case Manager or Case Assistant that is familiar with SM/Referee appointments.

There are many procedural, drafting and detail issues concerning the use of SM/Referees and Temporary Judges that are important to consider, but space is limited here. Those experienced in using SM/Referees or Temporary Judges know the process is complex, so reach out and tap the source.

The alternatives presented may not be right for every case. The benefits may not outweigh the costs. That remains a decision between litigation counsel and their client on a case by case basis. The overriding practice point, however, is a reminder that yes, there are alternatives to the current situation of budget crisis and courtroom delays that can be used to answer the question of your clients “What can we do to get this done?”

Linda DeBene is a mediator, arbitrator, referee and special master with JAMS – The Resolution Experts, specializing in business & commercial disputes, lending, professional liability, real estate, construction, and insurance related matters. She has been an ADR professional and court-appointed neutral since 1986, and a California legal professional since 1978. Linda is based in the Walnut Creek JAMS Resolution Center, and focuses her work throughout Northern California. Linda is available to serve your

clients at any of JAMS Resolution Centers in the U. S. and can be reached at ldebene@jamsadr.com²⁷

[1] Since 2010 Contra Costa County has reported “devastating” budget cuts, calling it a “crisis”. In 2009, 20% of district attorney staff was laid off with an announcement of cessation of prosecuting misdemeanors. The DA predicted an influx of criminals into the county, the likely result being increased criminal cases for Contra Costa. <http://www.co.contra-costa.ca.us/DocumentView.aspx?DID=4422>²⁸

In 2011 Contra Costa County was in its fifth year of budget cuts. Public defenders and prosecutors were being forced to cut programs. Probation officers were laid off leaving “the specter of hundreds of youth and adult probationers living unsupervised in the county.” <http://www.co.contra-costa.ca.us/DocumentView.aspx?DID=5736> The result can only be an increase in criminal cases which will control available trial departments.

[2] Arbitration is also an option. Most arbitrations are binding, but counsel can draft around the binding nature of arbitration, or stipulate around it, providing for a right to appeal. Some ADR providers, including JAMS, have optional appeal procedure should parties desire to arbitrate and still maintain an appeal right. <http://www.jamsadr.com/rules-option-al-appeal-procedure/>

[3] The terms “pro-tem” may be used in this article as another term for Temporary Judge.

[4] In light of the budget crisis, most counties now require parties to provide as well as pay for the court reporter themselves in any event. Courts no longer have the funds to provide court reporters in civil matters irrespective of who pays for the transcripts.

[5] Or under Rule 53(a)(1)(A) and (C) of the Federal Rules. Federal Appointments of Special Masters will not be discussed in detail here mainly because federal courts have not begun to experience the extreme budgetary cuts as are happening in California’s state courts (although the approximate 100 unfilled federal judicial positions nationwide that may begin to affect

²⁷<mailto:ldebene@jamsadr.com>

²⁸<http://www.co.contra-costa.ca.us/DocumentView.aspx?DID=4422>

the federal trial courts if they remain in that state for long). Magistrate Judges do handle much of the load for discovery and pretrial matters that commissioners on the state level are assigned to handle.

[6] Cal. Rule of Court 3.900 and 3.920 specifically prohibit a court from appointing a referee to conduct a mediation.

[7] A court's power to refer a case to a referee is constrained by the constitutional principle that judicial power may not be delegated. California Constitution Article VI, §22; *De Guere v. Universal Studios, Inc.* (1997) 56 Cal. App.4th 482, 496, 65 Cal. Rptr.2d 438, 447. Also see *Aetna Life Ins. Co. v. Superior Court (Hammer)* (1986) 182 Cal. App.3d 431, 437, 227 Cal. Rptr. 460, 464.

[8] Discovery disputes under §639 are non-binding decisions and have been ordered by the court under the provisions of §639(a)(5)] without the consent of all of the parties. While some parties may consent, some may not, so counsel are forced to seek a reference on motion, or the court can order the reference *sua sponte*. The referee's decisions must go to the court for final order. Since the final order on discovery is of the court, the decisions are appealable and subject to writ proceedings. Discovery disputes under §638 are voluntary and decisions of the referee are binding, appealable and subject to writ proceedings.

[9] Prior to the budget crisis, courts would generally (but not always) honor the parties' agreement for appointment of a §638 referee, either general or special. In light of staffing levels, closed civil courtrooms and other budgetary impositions, judges may welcome counsel cooperatively moving a case to a referee or judge pro-tem. Considerations may not be the same for a §639 motion for reference as the decisions of the court-ordered referee are not binding. A judge may not see the wisdom of having to re-consider the referee's decisions, particularly because at least one party has objected and the referee has been appointed over that objection, deciding instead to keep the case in the judicial system.

[10] California Rule of Court 3.907

[11] Many different limited but specific assignments to SM/Referees have documented case authority for their use both in state and federal courts. The list is really quite exhaustive and case specific, a benefit to counsel and the

court to have in a relevant case where detailed and time consuming help for the Court may be needed.

[12] There is no designation of “Special Master” under California state law. The term, however, is present in the federal system and has been used interchangeably for some time when speaking of Referees under state reference provisions. Special Master or SM may be used in this article and such designations are intended to refer to state referees.

Avoiding Disputes: Keep the Litigants Out of it

Wednesday, August 1, 2012



D. Benjamin Borson, M. A., J. D., Ph. D.

The current under-funding of our courts can produce substantial disadvantages for parties wishing to assert their legal rights against those that violate them- and it looks like it is only going to get worse, with increasing delays in obtaining court dates, more issues that are resolved on the pleadings, and increased reliance upon Alternative Dispute Resolutions (ADR) methods, such as mediation and arbitration. Even though ADR methods have helped parties resolve disputes without long and costly litigation, costs associated with conventional ADR approaches can still inhibit parties from asserting their rights.

In reality, the roles that courts, arbitrators and mediators fulfill are to help principals better define their respective roles and responsibilities. Instead of relying upon outsiders to decide the important issues in relationships, I believe that clients' interests are better served by having the principals

decide between themselves what the key issues are and what provisions are needed for the collaboration to be successful for both parties. It is the role of a counselor to provide insight into the legal issues, to educate the principals and to help craft a valid, enforceable agreement that minimizes the likelihood for later litigation, arbitration or mediation. Of course, there is no way of preventing all disputes from arising, but to the degree that attorneys can work with the parties to produce good working relationships, with open lines of communication, we can help avoid unneeded, costly and time-consuming formal proceedings.

The purpose of this article is to provide an alternative to “after the fact” resolution of disputes and to provide “front end” approaches that may reduce the need for litigation or even ADR. In its most general terms, the concept is for principals of each party to reach an agreement about a subject in clear, well-defined terms, so that “after-the-fact” disputes may not arise at all. To this end, I suggest that counsel work in cooperative fashions with not only the principals of their client, but also with the “opponent’s” counsel, and, with permission, with the opponent’s principals.

The rationale underlying this approach is that at the beginning of a relationship, both parties are interested in creating a “win-win” situation. However, as “zealous advocates,” counsel may be tempted to promote their own client’s interests to produce an agreement that intentionally favors their client’s apparent interests over the common interests of the parties. This article is intended to provide a framework for attorneys to consider how to reach a “win-win” situation. By creating a win-win situation, neither party is as likely to feel disadvantaged, and will therefore be less likely to put the issues “in dispute.” By decreasing the tendency to dispute, the parties can avoid the costs, time and lost opportunities that characterized traditional litigation or, to a lesser degree, ADR. Although the discussion that follows will be more specific for a business context, the principles are applicable to many other disciplines.

We will use a hypothetical contract situation, in which parties A-CO and B-CO desire to enter into a business relationship. Under basic legal principles, a contract requires: (1) offer, (2) acceptance, (3) consideration. A cause of action for breach of contract requires all three of these elements as well as: (4) identification of breach and (5) remedies. Although discussion of

basic contract law is beyond the scope of this article, many disputes arise under provisions relating to breach and remedies.

Hypothetical

A-CO is in the business of developing and manufacturing new products to serve a known market, and identifies B-CO, that may be a prospective client or competitor. B-CO is a well-known distributor of products in the same field as A-CO. Both A-CO and B-CO could benefit from a productive relationship. A-CO's counsel is asked to prepare an agreement defining the terms under which the parties will do business. A-CO's counsel, being a "zealous advocate" retrieves a "standard agreement" (used before) that is heavily weighted in A-CO's favor. A-CO sends to proposed agreement to B-CO, whose counsel sees that the proposal is heavily weighted in A-CO's favor, and advises B-CO's principals to reject the proposal. Thus, counsel for A-CO and B-CO are already in an adversarial relationship.

Under this hypothetical, counsel for A-CO and B-CO are likely to trade revisions of the agreement and spend precious resources pressing for their individual positions. Although this approach is characteristic of an adversarial system, it is unlikely to produce the "win-win" solution that the principals of A-CO and B-CO would desire.

Dispute Avoidance

We will address some of the common areas that give rise to "after the fact" disputes, and some ways of avoiding them.

Principal's Conversation and Initial Term Sheet

To produce a "win-win" solution, we suggest that the first step not be to provide a "standard agreement," but rather to identify the true common interests of A-CO and B-CO. This can be best done through a conversation between the principals (e.g., CEOs or VPs for Business Development) of A-CO and B-CO. The goal of the conversation is to determine the overall scope of a possible relationship. During the conversation, each principal ideally would state their respective company's genuine interests, including both their desired terms, as well as those things that would be detrimental to the win-win solution. These discussions would result in the first document, or "Term Sheet" that spells out in general terms, the aims of the relationship. Once agreed upon, the Term Sheet would be the guide for

further discussions and preparation of documents memorializing the relationship.

Confidentiality

Under the hypothetical above, A-CO's proprietary interest (e.g., trade secret, design, patent, copyright, trademark, source of goods, or other valuable asset) in the technology underlies their proposed product. Therefore A-CO may wish B-CO to avoid unauthorized disclosure of the proprietary interest. B-CO's proprietary interest may be in channels of trade, customer information and the like. Both parties desire protection of their own proprietary information. The parties then would craft a Non-Disclosure Agreement (NDA) that spells out the terms under which further conversations would be carried out.

Negotiating a Non-Disclosure Agreement may include "non-use" provisions, and generally follows the Uniform Trade Secret Act (UTSA), a standard that many States have implemented. Although beyond the scope of this article, the UTSA provides that a party asserting trade secret misappropriation prove that the alleged mis-appropriator: (1) had access to the secret, and (2) used it without permission of the owner. Trade secret cases are often difficult to litigate, due in part to the possible loss of the trade secret in discovery. There are many arguments over protective orders, "Attorneys Eyes Only" or other matters that can jeopardize the trade secret holder's rights to maintain secrecy.

One way to avoid such disputes is for each party to avoid disclosing highly sensitive information early in discussions. Here, the principals of A-CO and B-CO should be clear about their positions, and should use restraint, and disclose sensitive information until and only if disclosure of such information is required to provide the win-win solution.

Obligations of the Parties and Breach

Once the principals have agreed on principle to the Term Sheet, details of the provisions should be addressed. Generally, principals try to envision the agreement in positive terms, and may be reluctant to clearly define what obligations they will incur and what acts by themselves or others would constitute a breach of the agreement. It is important for each principal to understand their obligations undertaken (consideration) in exchange for the

benefit of the bargain. Each principal should represent that they can fulfill the obligations taken on, and warrant that they can execute on them.

A-CO and B-CO should agree upon the key terms of delivery and payment. For example, if A-CO agrees to provide a certain number of products per period of time, A-CO should ensure that there are suppliers sufficient to meet their manufacturing needs. A-CO may benefit from having alternative sources of components or raw materials needed to ensure sufficient product delivery. Similarly, B-CO should ensure that they have the channels of trade needed to successfully market the products. The principals should clearly define how payment is to be accomplished. For example, B-CO may wish delivery at B-CO's warehouse before incurring the obligation to pay. Thus, A-CO would be responsible for loss of products in transit. If there is a delay in shipping, A-CO could be responsible for B-CO's anticipated loss of revenue. In such a situation, A-CO could benefit from provisions requiring either some "down payment" from B-CO to partially cover manufacturing and shipping costs. Regardless of where the principals' negotiations lead, both parties should be clear at the outset, instead of leaving this matter to the drafting attorneys.

In the situation where A-CO agrees to payment only after B-CO receives payment for product sold, A-CO may require "audit rights" of B-CO's books to be able to validate B-CO's claim that B-CO has paid the proper amount. Disputes arise here if A-CO simply trusts B-CO to keep accurate sales records including the number of products sold, the selling price, and the times of sales. Alternatively, A-CO may have other agreements with other distributors outside the US. Such audit provisions may be difficult to implement, especially if the languages of A-CO and B-CO are different.

Real-Life Example

The dangers of relying on "standard agreements" instead of negotiating terms relevant and important to each company are not just hypothetical. In one real-life example, A-CO (a foreign company) manufactured product for sale world-wide, and B-CO was a US distributor of the product with exclusive rights to sell product in the US. The agreement provided a compulsory arbitration provision, whereby any dispute "arising under the agreement" would be arbitrated in the US under certain arbitration rules.

B-CO became concerned that A-CO might be using a different US distributor in violation of the agreement, and sued A-CO in State court in the US. B-CO's attorney alleged that the arbitration provision was voidable (at B-CO's option) because there were no provisions governing discovery and audit rights. A-CO's attorney filed an arbitration request, asserting that the dispute should go directly to arbitration. During the court proceeding, many hundreds of thousands of dollars were expended litigating the validity of the arbitration provision, and finally, B-CO's attorney justified B-CO's position arguing that without discovery under State law, B-CO would not be able to determine if there was any breach. A-CO's attorney agreed that B-CO had audit rights, but only in A-CO's country in A-CO's language, a position rejected by B-CO. Ultimately, the court held that the arbitration provision was valid, and sent the dispute to the arbitrator, who held for B-CO in an amount of less than 2 % of the litigation costs then expended by A-CO and B-CO together.

This example points out deficiencies of relying upon "standard agreements," and the need for principals to understand each other and reach genuine agreement about key provisions. Here, all of this could have been avoided if the parties had talked to each other ahead of time and identified (and agreed upon) their true interests: A-Co's interest in manufacturing products and B-Co's interest in selling such products in a geographically defined jurisdiction.

Indemnification

To control risk, both A-CO and B-CO benefit from indemnification provisions. Such provisions are often asserted in litigation to obtain the benefit of the bargain if there has been a failure in performance by one of the parties. One party (e.g., B-CO) may wish indemnification for breach of a provision to supply a certain number of products, and A-CO may wish indemnification for failure of B-CO to promptly pay for A-COs products or lack of diligent marketing. If one party (e.g., B-CO) has greater bargaining power, it may urge indemnification for simple negligence, gross-negligence, or willful breach. Indemnification for simple negligence may expose A-CO to potentially complete loss, in part because proving simple negligence is a lower standard, and a small company may not have the resources to avoid all potential simple negligent acts, or accidental omissions.

To address potential differences in indemnification provisions, the principals should be clear about the standard to be met. A “balanced” or “reciprocal” approach may be good in many situations in which both parties want reassurances that their risk is appropriately managed. In particular, indemnification against each party’s own gross-negligence or willful misconduct can save losses compared to indemnification for simple negligence. If the principals are clear about the implications of the different standards, then such disputes can be avoided.

Avoid “Agreements to Agree”

There are often situations in which principals don’t have the confidence to tackle potential future disputes, even if they can be reasonably anticipated. For example, should A-CO develop a new product based in part on one covered by an agreement with B-CO, A-CO may wish to keep it out of B-CO’s agreement. B-CO may wish the new product to be covered, and therefore take advantage of potential new sales. Because the new product may not exist (yet), the parties may be tempted to provide an “agreement to agree” to cover future innovations. Such provisions are common in technology development agreements and even in relatively simple manufacture and distribution agreements like the hypothetical.

The major problem with agreements to agree is that the terms are not likely to be clear at the time the agreement is entered into. Without the terms being clear, their enforcement is problematic. Thus, at a later date, A-CO may assert one position and B-CO could assert an opposing position, and the court, mediator, or arbitrator may have insufficient support for rendering a particular decision. Under general contract law, the meaning of the agreement is defined at the time the agreement is entered into. If the principals are unclear at the time the agreement is entered into, there will be little but resort to “he (she) said, he (she) said” and the dispute is not likely to be properly resolved in the best interests of both parties.

Additionally, if there is such a provision, the agreement should specify the consideration given for such a provision. Agreement to agree provisions may be stricken from the agreement as being unenforceably vague or for failure of consideration. Without a “savings” or “severability” provision in the agreement, the entire agreement may be vulnerable to challenge.

We recommend avoiding such agreements to agree, and instead, working through the key issues in advance of execution of the agreement. Under the hypothetical, although A-CO is a design and manufacturing company, B-CO may identify a need in the market that could justify producing a derivative (or follow-on) product based on both the original innovation by A-CO, but with input from B-CO. In such a situation, B-CO could assert ownership over the improved product. If B-CO has an ownership in the improved product, B-CO could demand a “set off” of the agreed revenue to A-CO, or could even strike out on its own, to develop and market such an improved product without A-CO at all. In cases in which such decisions cannot be made in advance, it may be more desirable to leave those issues for another agreement or amendment to be made in the future, and to rely upon provisions of statutory or case law to guide the next agreement.

Summary: Roles of Counsel in Negotiating Win-Win Agreements

Attorneys can provide guidance to their clients by understanding that the attorney’s role may not simply to be zealous advocates of a narrow, short-term interest of their client (i., e., to win on one provision), but to promote their long-term interests and act as counselors in the best sense. The counselor’s roles are to become educated about their clients’ short and long term interests, in which both their client and another party have valid common interests. By supporting the common interests of the putative collaboration, counsel can educate the principals in ways by which they can reach agreements in which the key terms are clear and generate confidence by both parties. When guided by the best interests of their clients and their collaborators, counsel can help avoid the parties becoming adversaries, and thereby help avoid long, costly litigation, arbitration, and mediation.

Although contract issues are common, they may have many twists and turns. Similarly, other areas of the law have their own features. However, by becoming a true counselor, an attorney can serve the best long-term interests of their clients without compromising our ethical obligation to be zealous advocates of our clients.

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The High Cost of Failing to Prepare For Mediation

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Malcolm Sher

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In joint session, the plaintiff listens to his lawyer's blistering opening presentation. One might expect him to be elated and emboldened, yet he looks down sheepishly avoiding the incredulous gaze of others in the room and hurriedly scribbles notes. He shakes his head, almost imperceptibly, looking at the mediator as if to say, "save me from what my lawyer is doing."

Again in joint session, defense counsel in a sexual harassment/wrongful termination case, insinuates that he has some evidence that will devastate plaintiff's case. It is a subtle suggestion that there is a "smoking gun."

Whilst not responding, the client's hunched shoulders and folded arms, and the stunned look of his lawyer say it all.

It's decision time in the mediation of a dispute between siblings involving inherited property. A tenant occupies the property but is behind on the rent. Mortgage payments on a loan reluctantly taken out by the siblings to renovate the property before renting it are delinquent. In private, the youngest sister, a college student, tells the mediator that she is fed up with the dispute and the stalemate and has decided to buy out her other two siblings' interests. The mediator inquires whether this is really her goal. He asks if she knows what the loan balance is, how much is owed on property taxes, whether she, alone can qualify to take over the mortgage. Instead of a look of confidence, the mediator gets an open-mouthed blank stare as the attorney sits, quietly, saying nothing.

Each of the above scenarios illustrates a classic lack of preparation prior to the mediation session. In the first, the lawyer has not prepared the client. In the second, the client has not prepared the lawyer. In the third, neither the client nor the lawyer has prepared. Each is a recipe for disaster and each can be avoided.

Seasoned advocates know that the real negotiations begin the moment they enter the mediator's conference room. Attorney and the client each have a role to play, but both have a common goal, to persuade the other parties and their representatives of the merits and settlement value of the case. Their behavior, tone of voice, even whether and how they exchange pleasantries will impact the rest of the day.

The attorney who exhibits no command of the facts, little understanding of the law, is offensive arrogant or argumentative in an opening statement, is sure to embarrass himself, his client and probably also those who are listening. The opening statement may be the only opportunity before trial to show the other side, their lawyers and insurance representatives how the advocate will "show up" to the judge or jury. But mediation is not trial. Blustering and "grandstanding" destroys credibility, especially if the alleged facts or applicable law are not clearly thought through and agreed with by the client. Astute observers will quickly pick up from the client's body language that he and his lawyer are not on the same page.

As part of preparing the client for the mediation and outlining the structure of the day, counsel should consider allowing the client to review the proposed opening statement, so that both are satisfied that facts are accurately stated and the law supports the argument. If he is speaking in a joint session, rehearse what the client is going to say so that it compliments and supports, but does not contradict his attorney's presentation. After all, it's the client's case; he "owns" the problem that needs to be resolved and is part of the team.

In the second scenario, the mediator, recognizing the obvious danger, suggests a short break. In private caucus, it becomes clear that the client has not been truthful with his counsel. Having denied in deposition that he ever sent salacious e-mails to co-workers, he now concedes that he "may have" sent some e-mails that "could be" characterized as inappropriate, but deleted them from his office computer. So what could the other side have on him? Prodded by the mediator, he admits failing to tell his attorney that he might still have them on his home laptop.

Even the best mediator "doesn't know what he doesn't know" and the same may be said for counsel. They know only what they are told, read or can extrapolate. Lawyers tell their clients that they need to know everything about the case and not to make value judgments about what is and is not important. Yet clients inadvertently or otherwise hide the ball from their own lawyers, often in contingency cases, where they have no financial risk.

Although the client is often Exhibit A, in my experience as a mediator, this scenario arises when the attorney fails to fully learn "who" the client is. Rather, he concentrates almost exclusively on the facts and the law, never probing the client's psyche, motivations, or exploring whether he or she has a social conscience or a hidden agenda. In the scenario, ascertaining whether the client owned a laptop and insisting on inspecting it might have uncovered the truth. A cagey response might have provided grounds to decline representation initially, or justified withdrawing before everyone's time and energy, and in a contingency fee situation, the lawyer's money was wasted. Now, the best the mediator may be able to do is attempt to coax "nuisance" money in a "save face" resolution.

In the last scenario, the eldest sibling client and her attorney have obviously not prepared for the mediation. Counsel appears hopelessly out of his depth handling what is really a family partition action. Neither he nor his client

has considered the client's goals, her own emotional situation, economic realities or social needs. As the youngest, and most vulnerable of the siblings, all she wants to do is get on with her studies. In volunteering to buy the others' interests, it is clear to the mediator that she has simply reacted in frustration to this out-of-control situation and her attorney's inability to guide her towards a sensible solution. The mediator suddenly recall that counsel's website shows that his practice focuses on personal injury and property damage cases, so why is the mediator not surprised?

Each of these scenarios illustrates the need for careful pre-mediation preparation. Mediation is not an event. It is a process. Like litigation or arbitration, it takes on a life of its own, yet must be choreographed, prepared for and even sometimes rehearsed. Learning what the client hopes to accomplish and what the client fears if there is no settlement is critical. How else can she be properly counseled about selecting from potential settlement proposals? Attorneys run the risk of embarrassing results, both in mediation and at trial, and especially in contingency cases where they fail to fully investigate the background of and stories told by clients who have no "skin in the game." And, remember, the opening presentation can work wonders; messing it up can spoil everything.

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With Trial Court Funding in Trouble, You Better Have an ADR Plan for Every Case

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Regardless of your news source, it would be difficult not to know that the California economy is down. Whatever your indicator – the Dow, S&P 500, your own portfolio, or your business – reduced public services are an inescapable truth.

Like every other sector that relies on public funding, the trial courts have not been able to escape the results of the economic downturn. Alameda County no longer provides court reporters for civil hearings³⁰ – if you want one, it's BYOCR. San Francisco Superior Court has simply done away with its alternative dispute resolution program altogether. I learned last year that the ideal staff-to-bench-officer ratio is 10:1, including file clerks, clerks, research attorneys, deputies, court reporters, etc. In the last year, Contra County Superior Court has been operating at a ratio of 7:1. In the coming year, with continuing budget cuts, the court may have to reduce that ratio to 6:1.

So what, you ask? How does this affect my litigation practice? Good question. I think the answer is that trial attorneys had better start preparing for less trials, and look even more to alternative ways to settle their cases. The ADR plan needs to start from the first meeting that a litigator has with the client. What alternatives should you consider for the case, and offer to your client? Good question. The answer is: look to the programs which the court offers.³¹

Mediation³²

³⁰<http://www.alameda.courts.ca.gov/Resources/Documents/Notice%20regarding%20Availability%20of%20Court%20Reporting%20Services%20in%20Civil%20Cases.pdf>

³¹<http://www.cc-courts.org/index.cfm?fuseaction=page.viewPage&PageID=1604&varuniqueuserid=08633693427&stopRedirect=1>

³²<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageID=1633>

Mediation³³ has become sufficiently popular that this option may "go without saying." Therefore, I'll mention it first.

The court encourages counsel and parties to mediate their cases. In addition to private mediation, the Court's ADR Program offer the parties a panel of experienced mediators who have agreed to provide the parties one-half hour of preparation time, and the first two hours of mediation time, at no charge. The Court's website offers information for each of the neutrals³⁴, allowing counsel to perform plenty of due diligence regarding the prospective mediators, including areas of expertise, rates, and information which would allow you to search further if you're inclined, such as viewing individuals' websites.

Arbitration³⁵

Many years ago, judges encouraged the parties to utilize non-binding judicial arbitration (not mediation, can you believe it?). Although this method has less of a following now, it is still a useful tool to consider. Judicial arbitration³⁶ (which probably should be more accurately called judicially-supervised arbitration) allows the parties to obtain a neutral evaluation of their case without giving up the right to trial, and often forms a basis upon which to consider settlement ranges and negotiations. If you use the court's Judicial Arbitration Panel, the cost of the arbitrator is only \$150 per day or per case.

For those of you drafting contracts for your clients, consider including binding arbitration clauses for prospective disputes. Contracting parties might want to insure some certainty in their future knowing that if a dispute arises regarding their contract, they have agreed in advance to submit disputes to a binding arbitrator for resolution. Parties who have agreed to binding arbitration obtain the benefit of a faster opportunity to resolve their dispute.

³³<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageID=1633>

³⁴<http://neutrals.cc-courts.org/>

³⁵<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageID=1634>

³⁶<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageID=1634>

Neutral Case Evaluation³⁷

Neutral case evaluation is a bit of a hybrid between arbitration and mediation, and benefits from utilizing a neutral who has experience in the particular subject matter of a case. This process can be as formal or informal as the parties like. They present their case to the neutral in a fashion of their design, but similar to arbitration—possibly including briefs, live witnesses, witness declarations, documents, etc. and at the end of the presentation of evidence, the neutral gives the parties feedback regarding the strengths and weaknesses of the case. The neutral can provide this feedback orally or in writing, at which time parties can decide whether to continue working with the neutral to negotiate a settlement, converting the process into more of a meditative effort.

The court's NCE program's panel members give one-half hour of preparation time and two hours of hearing time at no charge. Statistically, this method is less used than mediation or arbitration; however, I think it is under-utilized as a tool for obtaining neutral feedback regarding a case, and providing an opportunity to immediately use that feedback for settlement negotiations.

Settlement Mentor³⁸

So, for those of you who weren't able to resolve your case prior to trial, the Court has yet another settlement opportunity (it is almost as if the court wants you to resolve your own case). At either the issue conference or on the day of trial, the Judges select cases which they believe are good opportunities for settlement, and call in a Settlement Mentor³⁹ to conduct settlement negotiations. The Mentor, an experienced trial attorney, provides 2-3 hours of time at no charge to the parties. The Mentor's approach is usually much more evaluative and directive compared to mediation. Approximately one-half of the cases set for trial resolve by this method.

Trial

³⁷<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageID=1635>

³⁸<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageID=1636>

³⁹<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageID=1636>

If all else fails, there is still this tried and true method of resolving disputes. However, as can be seen above, the Contra Costa courts will urge and encourage parties to resolve their disputes as much as possible without utilizing the court's diminishing resources. (Please review <http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageId=6956> for more information on the options described above.)

I'm no economist, but there does not appear to be an end in sight to these difficult economic times. Clients seek lawyers in order to resolve problems. Given the continuing reduction in services available through the courts, lawyers must consider what their client's goals are and form a plan to achieve them. While every case will have its own factual and procedural twists and turns, the lawyer must have an ultimate plan for resolution- and that plan should include an analysis of HOW to get to the end result.

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⁴⁰<http://us.mc1601.mail.yahoo.com/mc/compose?to=dmiller@millermediation.com>

Appraisals and Arbitrations: A Warning Note

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Your client is leasing her building and giving the tenant an option to buy it. The purchase price upon exercise of the option is the then-fair market value of the property.

Your client is leasing his building and the tenant is given the right to extend the term of the lease at the then-fair market rent for the space.

The option agreement or lease provides that, if the parties, upon the tenant's exercise of the right to buy or extend, cannot agree on the fair market value or rent, then the fair market value or rent will be determined by an appraisal.

The time comes and the tenant gives notice of the exercise of the option. Your client and the tenant cannot, however, agree on the purchase price or rent, so the parties engage an appraiser and the appraiser renders an opinion of the fair market value. The tenant, however, doesn't like the appraiser's opinion, and insists that the fair market value or rent is lower, so litigation ensues.

Surprise! Under California law, the appraisal process for resolving the parties' dispute over the fair market value of the property is an arbitration. The California Arbitration Act, in Code of Civil Procedure §1280(a), defines an "Agreement" to include "agreements providing for valuations, appraisals and similar proceedings..." In *Klubnikin v. California Fair Plan Assn.* ⁴¹(1978) 84 Cal. App.3d 393, 395, the Court determined that, "'appraisers" empowered by the terms of a policy of fire insurance to determine the "cash value" and "loss" utilized to ascertain the amount payable on the policy are arbitrators within the meaning of Code of Civil Procedure section 1280...⁴²"

In *Lambert v. Carneghi* ⁴³(2008) 158 Cal. App.4th 1120, 1130-1131, the appellants argued that the fact that the California Arbitration Act defines

⁴¹<http://law.justia.com/cases/california/calapp3d/84/393.html>

⁴²<http://law.onecle.com/california/civil-procedure/1280.html>

⁴³<http://caselaw.findlaw.com/ca-court-of-appeal/1452237.html>

“Agreement” to include appraisals and valuations does not mean that agreements to resolve disputes through such appraisals and arbitrations are necessarily “agreements to submit to arbitration”. The court of Appeal rejected that argument, stating:

“What this argument fails to acknowledge is that the term “arbitration” is not itself defined in the arbitration act. In determining whether an internal employee review committee procedure was an agreement to arbitrate, our colleagues in Division Two concluded that “although arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless there is a third party decision maker, a final and binding decision, and a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision.” In reaching its conclusion, the court pointed to section 2071⁴⁴ and acknowledged that “California case law recognizes that this appraisal provision is an arbitration agreement.” **

“Appellants argue that an insurance appraisal is “vastly different” from an arbitration. They point to the fact that the appraisal clause mandated by section 2071⁴⁵ does not specify how an umpire and two appointed appraisers will decide issues where the appraisers fail to reach an agreement, and does not provide for the discovery, testimony, briefing, “or any of the other accouterments that we associate with litigation or with arbitration.” Although it is true that “arbitration can take many procedural forms” it does not follow that “a fire insurance appraisal is *not* an arbitration” simply because it does not have the “accouterments” that appellants claim are required in order for a procedure to be considered an arbitration. This is especially true in light of the fact that California law does not automatically guarantee

⁴⁴https://www.lexis.com/research/buttonTFLink?_m=e61b316f4fe5b67eb9ce07c4e29010b2&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b158%20Cal.%20App.%204th%201120%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=125&_butInline=1&_butinfo=CAL.%20INS.%20CODE%202071&_fmtstr=FULL&docnum=1&_stardoc=1&wchp=dGLzVzz-zSkAW&_md5=b789ec0a2b81c0de48324be40e307bb5

⁴⁵https://www.lexis.com/research/buttonTFLink?_m=e61b316f4fe5b67eb9ce07c4e29010b2&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b158%20Cal.%20App.%204th%201120%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=128&_butInline=1&_butinfo=CAL.%20INS.%20CODE%202071&_fmtstr=FULL&docnum=1&_stardoc=1&wchp=dGLzVzz-zSkAW&_md5=edac1e0754315e930a18ce2aba01a4db

the right to discovery in arbitration proceedings, except in certain types of cases or unless the parties agree.”

This fact, that a determination of valuation or price by submission of the issue to an appraiser is an arbitration, means there are traps for both parties:

The first trap is that Code of Civil Procedure §1298⁴⁶ requires that arbitration provisions in contracts for the sale of real property be clearly labeled as such, include large-type warnings of loss of jury trial rights, and be initialed by the parties. Unless the drafter of the option agreement was aware that the appraisal procedure was an arbitration, the drafter might not have complied with §1298. There is authority that §1298 is preempted by the Federal Arbitration Act and is, therefore, unenforceable (*Westra v. Marcus & Millichap*⁴⁷ (2005) 129 Cal. App.4th 759, 764), but it’s certainly wiser to comply with the statute than rely on its unenforceability.

The second trap is that contests of arbitration results are severely circumscribed. Code of Civil Procedure §1288⁴⁸ provides that a Petition to Vacate or Correct an arbitration award must be brought within 100 days after the date of service of the signed award. This 100-day time limit is applied strictly, so that even arguments against the validity of the award made in defense against a Petition to Confirm that arbitration award are barred unless the Petition to confirm was filed within that 100-day period. (Code of Civil Procedure §1288.2.⁴⁹)

Klubnikin, supra at 398, held that the failure of a party to seek to vacate or correct an arbitration award within the 100-day period made the Award final and *res judicata* on the issues determined in the arbitration. *Eternity Investments, inc. v. Brown*⁵⁰ (2007) 151 Cal. App.4th 739, 745, held that the failure to seek to vacate or correct an Award within the 100-day period

⁴⁶<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1298-1298.8>

⁴⁷<http://law.justia.com/cases/california/court-of-appeal/2005/a107322.html>

⁴⁸<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1288-1288.8>

⁴⁹<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1288-1288.8>

⁵⁰<http://law.justia.com/cases/california/court-of-appeal/2007/b190711m.html>

bars seeking such vacation or correction even in response to a petition to confirm.

The “winner” in the valuation arbitration proceeding, therefore, can prevail in the face of meritorious objections to the arbitration award if the “loser” fails to seek to vacate or correct the award within 100 days after it’s issued, and then brings a Petition to Confirm it, to which all defenses have been waived by the loser’s failure to contest it within 100 days.

Even if the loser were to seek to vacate or correct the award within 100 days after it was issued, there are very few reasons for which an arbitration award can be vacated or corrected, and that the award is incorrect is not one of those reasons. (Code of Civil Procedure §1286.2 & §1286.6.⁵¹) It appears, then, that the warnings about arbitration required by §1298 are highly relevant to the parties to an agreement that calls for valuation by appraisal.

The practice tips here are three: (1) Comply with the requirements of Code of Civil Procedure §1298 when drafting a lease or option agreement that calls for an appraisal to establish the fair market rent or purchase price; (2) If your client doesn’t like the result of the valuation, file a Petition to Vacate or Correct the Award within 100 days of its issuance; and (3) If you client does like the result of the valuation, wait until after 100 days have passed from its issuance to file a Petition to Confirm the award.

Joshua Genser was born and raised in West Contra Costa County, California, and is the second generation of his family to provide legal services to West County businesses. Mr. Genser is also the Chief Executive Officer of the Richmond Development Company, LLC, developing office, warehouse, industrial and commercial properties in and around Richmond. He has a Master’s Degree in Economics from Stanford University and his law degree from the University of California at Berkeley. Mr. Genser has practiced law since 1983, handling litigation and transactions in business and real estate matters. In addition, Mr. Genser serves the community as a Director and past Chair of the Richmond Chamber of Commerce, Director of the Pinole and Hercules Chambers of Commerce, Director of the Richmond Community Foundation, and Director, Treasurer and Past President

⁵¹<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=01001-02000&file=1285-1287.6>

of Temple Beth Hillel. In 2007, Genser & Watkins was given the Chief Justice Ronald M. George Pro Bono Law Firm of the Year Award by the Contra Costa County Bar Association, and Joshua Genser was named Pro Bono Attorney of the Year by The Law Center. Joshua Genser has also been honored as a Northern California Super Lawyer.

Have an Employment Claim that Would Benefit from Early Resolution? Here are some Resources

Wednesday, August 1, 2012

California courts face an extremely challenging budget situation that may significantly slow the resolution of employment law related (and other civil) claims. For attorneys handling, or litigants dealing with, employment law claims, there are some alternatives to resorting to court to get claims resolved. These include the California Labor Commissioner's Office (for wage and hour claims), and for harassment/discrimination claims: the California Department of Fair Employment and Housing (DFEH) and the U. S. Equal Employment Opportunity Commission (EEOC). As access to the Courts becomes increasingly limited, attorneys handling employment claims will need to become well versed in the array of alternatives that exist.

Resolving Wage and Hour Claims

An employee or former employee can take wage and hour claims (for example, unpaid overtime, missed meal breaks, mishandled vacation pay, etc.) to the California Labor Commissioner's Office, specifically the Division of Labor Standards Enforcement (DLSE). After a claim is made, the Deputy Labor Commissioner assigned to the case will determine how to proceed. Within 30 days of the filing of the complaint, the Deputy will notify the parties if the claim will be dismissed, if a conference is scheduled, or if the claim will proceed to a hearing without a conference. Throughout the DLSE process, the parties have the ability to discuss settlement options with the Deputy Labor Commissioner.

In most cases, a conference will be scheduled. The purpose of the conference is to attempt to resolve the claim without a hearing. The parties must appear, though they are not required to prove their case at the conference, nor will they be under oath. The parties should be prepared, however, to discuss the claim with the Deputy Labor Commissioner, and should bring any and all supporting documents with them to the conference. If the parties do not resolve the matter, a hearing will be scheduled for each party to prove their cases, under oath, much like a bench trial in Superior Court.

Resolving Harassment and Discrimination Claims

Even before an employee or former employee may bring a claim in Court for employment discrimination, harassment, or certain types of retaliation, the potential litigant must first exhaust his or her “administrative remedies.” To do so, the claimant must file a complaint with the California Department of Fair Employment and Housing (DFEH) or the U. S. Equal Employment Opportunity Commission (EEOC). Both the DFEH and the EEOC have developed comprehensive ADR programs to facilitate resolution of these claims and therefore assist in the reduction of the backlog of these claims. If the matters are not resolved at mediation, both the DFEH and EEOC may continue to help claimants pursue their claims. The following is an overview of the in-house mediation programs offered through the EEOC and DFEH.

Mediation at the DFEH

The DFEH is the California agency charged with enforcing, among other things, the California Fair Employment and Housing Act (FEHA). Generally, the FEHA prohibits harassment and discrimination in employment. Every year, the California DFEH handles approximately 20,000 claims of discrimination, harassment and/or retaliation in some way. In many of those cases, complainants file a complaint and request an immediate “Right To Sue” notice in order to proceed directly to Court. In those cases, the DFEH does not do much more than take in the Complaint, and process the Right To Sue notice. However, because of the Court situation, Complainants (and their attorneys) may begin to choose to spend more time in the DFEH process rather than bypassing the DFEH to get to Court, particularly in light of the DFEH’s in-house mediation program.

According to her article in the May 2012 CA Labor & Employment Bulletin, Phyllis W. Cheng, DFEH Director, reflected that in 2009 to 2011, due to California’s staggering budget deficits, the DFEH staff was subject to furloughs, budget cuts of approximately 16 percent, and freezes on hiring and spending. However, during that same time period, the DFEH focused on, and excelled in, service, outreach, advocacy and being a resource. With respect to alternative dispute resolution/resources, Director Cheng noted that the DFEH established its in-house Mediation Division, and that Division has greatly expanded settlement services. Indeed, the Mediation Division settled \$2.6 million worth of cases in its first full year of operation. According to Director Cheng, “[t]hese free mediation services save

both victims and businesses significant expenses by helping them settle cases out of court, while improving employment and housing practices.” (Cheng, 2012).

At the DFEH, mediation is typically available at three stages: (1) pre-investigation mediation, (2) post-investigation/pre-accusation, and (3) post-accusation.

(1) Pre-investigation mediation: The first time mediation is offered (or can be requested) is when the Respondent is notified that an employment complaint has been filed against it. If all parties agree to participate in this free pre-investigation mediation, the Respondent need not file a position statement and response to the Complaint until after mediation concludes unsuccessfully. A representative of the DFEH’s Enforcement or Legal Divisions does not attend pre-investigation mediation conferences. Parties may have counsel if they choose, but attorney representation is not required. This pre-investigation mediation can take place quickly and, if successful, it can result in complaints being closed sooner rather than later. This process is certainly much quicker than going to Court, particularly in light of the further cutbacks California Courts are facing in these difficult economic times.

(2) Post-investigation/pre-accusation mediation: If the parties choose not to participate in pre-investigation mediation, or if no resolution is reached, the DFEH also offers post-investigation/pre-accusation mediation. A representative of the DFEH’s Enforcement Division attends post-investigation/pre-accusation mediation sessions. That representative may be the investigating office’s assigned legal staff counsel. If a resolution is not reached, the Legal Division will not assign the same staff counsel to issue and prosecute the accusation.

(3) Post-accusation mediation: Mediation conferences conducted after an accusation is issued are attended by the member of the DFEH’s Legal Division who issued the accusation or who was subsequently assigned the case. If settlement is not reached, the same staff counsel who issued the accusation and participated in the post-accusation mediation may prosecute the case.

The main benefits for parties who mediate their claims via the DFEH’s Mediation Division are: potentially quicker resolution, more cost-effective

process than private mediation and/or winding through the Superior Court process, and the potential for more creative or individually tailored resolutions. Many employers, however, may be concerned that easy, quick, and cost-free mediation programs may encourage disgruntled employees to file seemingly frivolous complaints, and/or if the company agrees to mediation too early, it is showing weakness. Thus, while there may be some benefits to early mediation, each case and situation is different and must be considered individually. Nonetheless, the DFEH Mediation Division has created an exceptional process and opportunity for parties to resolve their differences long-before diving into the Court quagmire.

EEOC Purview and Initiation of a Charge

The DFEH's federal counterpart is the U. S. Equal Employment Opportunity Commission (EEOC), which enforces Federal laws prohibiting employment discrimination [1]⁵². These laws protect against employment discrimination when it involves:

Unfair treatment because of the employee's race, color, religion, sex (including pregnancy), national origin, age (40 and older), disability or genetic information.

Harassment by managers, co-workers or others in the workplace because of the employee's race, color, religion, sex (including pregnancy), national origin, age (40 and older), disability or genetic information.

Denial of a reasonable workplace accommodation that the employee needs because of his or her religious beliefs or disability.

Retaliation because the employee complained about job discrimination, or assisted with a job discrimination investigation or lawsuit.

All of the laws enforced by the EEOC, except for the Equal Pay Act, require the employee to file a Charge of Discrimination with the EEOC before they can file a job discrimination lawsuit against their employer. In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

No Need to File with Both DFEH and EEOC

⁵²#_ftn1

As stated above, California has its own anti-discrimination laws and an agency (DFEH) responsible for enforcing those laws. If an employee files a charge with the DFEH, it will automatically be “dual-filed” with the EEOC if federal laws apply; the employee need not file with both agencies.

Mediation Offered Soon After Charge is Filed

Once the charge is filed, the parties may be asked to try to settle the dispute through mediation. The EEOC evaluates each charge to determine whether it is appropriate for mediation considering such factors as the nature of the case, the relationship of the parties, the size and complexity of the case, and the relief sought by the charging party. Charges that the EEOC has determined to be without merit are not eligible for mediation.

The decision to mediate is completely voluntary. While it is not necessary to have an attorney or other representation in order to participate in EEOC’s Mediation Program, either party may choose to do so. If both parties agree to mediate, the EEOC will schedule a mediation that will be conducted by a trained and experienced mediator. The EEOC utilizes a combination of contractors, pro bono mediators and internal mediators. The mediation is available at no cost to the parties and is confidential- all parties sign an agreement of confidentiality. Information disclosed during the mediation is not revealed to anyone, including other EEOC investigative or legal staff. As further precaution, a firewall exists between the EEOC ADR program and the EEOC Investigation and Legal units.

If either party turns down the mediation, or if the mediation does not resolve the charge, the charge will be given to an investigator. If an investigation finds no violation of the law, the employee is given a Notice of Right to Sue. This notice gives the employee permission to file suit in a court of law. If a violation is found, the EEOC will attempt to reach a voluntary settlement with the employer. If they cannot reach a settlement, the case will be referred to the EEOC legal staff (or the Department of Justice in certain cases), who will decide whether or not the agency should file a lawsuit. If the EEOC decides not to file a lawsuit, the EEOC will give the employee a Notice of Right to Sue.

Process for Federal Agencies is Different

Federal employees and job applicants have similar protections but a different complaint process through the EEOC. In addition, many federal agencies have developed their own internal dispute resolution process.

Resources to Utilize Before An Issue Is Brought to the Labor Commissioner, DFEH or EEOC

Ideally, employees and employers have opportunities to investigate and resolve their disputes or complaints long before resorting to the Labor Commissioner, EEOC, DFEH or Court.

Employees should take advantage of employer-provided avenues to bring complaints, including company toll-free numbers, open door policies, internal complaint procedures, communication with human resources department and/or supervisors or ombudsmen (if available). Employers should of course ensure that these avenues exist and that the workforce is informed with regard to these internal processes and procedures. Employers should also educate all levels of management, including human resources personnel, on the handling of such complaints and the importance of conducting thorough and unbiased investigations. Of course, training for all levels of the work force regarding equal employment and wage/hour practices is critical so that such complaints can be avoided in the first place.

Employment cases can be highly emotional and the stress of having them drag on for years can cause a lot of problems for the participants- be it emotional, physical or financial stress. What is important for participants in employment related cases to remember is that there are a host of options for alternative dispute resolution- available through the DFEH, EEOC or private mediators.

For over 15 years, **James Y. Wu** has focused his practice on employment law and HR issues. James continues to provide day-to-day counseling to employers and employees and he provides strategic litigation services. James is a member of the CCCBA Board of Directors, and in 2008, James was the president of the Employment Law Section of the CC-CBA and served on that Board from 2007 to 2012. Please contact James at james@jameswulaw.com⁵³ and www.jameswulaw.com.

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[1] The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin; the Age Discrimination in Employment Act, which prohibits discrimination against individuals 40 years of age or older, sections of the Civil Rights Act of 1991; the Equal Pay Act; Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments; and Section 501 of the Rehabilitation Act of 1973, prohibiting disability discrimination in federal government and employment.

⁵⁴<mailto:michelle@mcgrathinvestigations.com>

Civil Fast Track Settlement Mentor Conferences

Wednesday, August 1, 2012

Most attorneys who practice in Contra Costa County are generally familiar with the Court's several Alternative Dispute Resolution (ADR) programs⁵⁵. There are specific requirements which all ADR panel members must meet to serve on the panel (described in CCC Local Rules of Court⁵⁶, Rule 109) and thus be eligible to conduct mediations, arbitrations, neutral case evaluations and settlement mentor conferences.

The focus of this article is the civil fast track[1]⁵⁷ settlement mentor program⁵⁸, (described in CCC Local Rules of Court⁵⁹, Rules 401-407), and is quite different from the other forms of ADR.

Settlement Mentors have remarkably excellent success in bringing them together and settling cases, with an overall success rate approaching 40%. Individual Settlement Mentors who volunteer to serve on a regular basis have a success rate of about 90%.

Although cases may be referred to a Settlement Mentor at any time during pendency of the case, most cases are scheduled for settlement mentor conferences to take place on the morning of trial. The Civil Judges attempt to "match" cases with specific Settlement Mentors who have experience with similar cases. In addition to having the qualifications to be on the ADR panel, Settlement Mentors must have significant litigation experience and the expertise to analyze the issues, understand the case, be knowledgeable about recent jury and bench trial verdicts to give credibility to their evaluation of the case at hand, and make settlement recommendations, when appropriate. Effective Settlement Mentors prepare by reviewing the Court's

⁵⁵<http://basic.cc-courthelp.org/index.cfm?fuseaction=Page.viewPage&pageId=4299&parentID=2945>

⁵⁶<http://documents.clubexpress.com/documents.ashx?key=0jY0LPTEXW4H6Q1BM5bRnys9hhKIF0dY6g7ASMxIPtWjvNU5pDGj5w%3D%3D>

⁵⁷#_ftn1

⁵⁸<http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageId=1636&parentID=1604>

⁵⁹<http://documents.clubexpress.com/documents.ashx?key=0jY0LPTEXW4H6Q1BM5bRnys9hhKIF0dY6g7ASMxIPtWjvNU5pDGj5w%3D%3D>

file, trial briefs, motions in limine, speaking with the judge and requesting additional information from each side's attorney in advance of trial, if necessary.

An effective Settlement Mentor must have the skill, knowledge, personality and finesse to assist the parties in taking a hard, realistic look at their case, despite their avowed impasse, frequently with "lines drawn in the sand" on the day of trial, and to facilitate creative negotiations so that the case can be settled.

The process is very different from mediation and is not confidential. In fact, the Settlement Mentor may share information learned from the parties (including settlement positions) with the judge handling the case and receive input from the judge. However, information obtained from the parties and attorneys is otherwise confidential.

It is also unlike arbitration since no evidence is presented, witnesses are not called and, of course, no award or decision is made.

Considering the fact that on the day of trial, parties are usually quite entrenched in their positions, Settlement Mentors have remarkably excellent success in bringing them together and settling cases, with an overall success rate approaching 40%. Individual Settlement Mentors who volunteer to serve on a regular basis have a success rate of about 90%.

This is a win-win program. Whether the cases settle or not, attorneys and parties are appreciative and very complimentary of the Settlement Mentor's efforts (with 2 hours of the Settlement Mentor's time *gratis*), the judges are grateful when the case settles as their time is freed up for another case and they aren't required to bring in 50+ citizens for jury selection, citizens are grateful they don't need to spend time in trial, and attorneys and parties in other cases, then can go forward with their trial without trailing or a continuance. And, the Settlement Mentors report that they find the experience educational, gratifying and rewarding, knowing they have performed a valuable service to the Court, their colleagues, their profession and the community.

Anyone interested in participating in the settlement mentor program may contact the ADR office for more information, or complete the application on the Court's website. (www.cc-courts.org/adr)

[1] The program was recently expanded to include probate cases set for trial

ADR in Family Law

Wednesday, August 1, 2012

Family Law Litigants in Contra Costa County get Meaningful Alternative Dispute Resolution Opportunity Through the Double Pro Per Settlement Conference Calendar

Approximately two hundred thousand divorce petitions are filed annually in California. Seventy percent of those cases involve at least one self-represented litigant at the beginning of the case. That figure increases to 80 percent by the time of judgment. [1]⁶⁰

With so many unrepresented litigants, and in the face of ever-shrinking court budgets, judges and attorneys are challenged to find ways to offer dispute resolution services that aid the public, as well as free up much needed time on crowded court trial dockets.

For several years the Family Law Section of the Contra Costa County Bar Association has provided volunteer attorneys to staff the Double Pro Per Settlement Conference Calendar. Each of the five family law departments has a monthly settlement conference date, at which a volunteer attorney works with self represented litigants to settle cases, assist in the preparation of paperwork, and generally to provide an overview of the court process should either party decide they would prefer to go to trial.

It has been this writer's experience that the litigants on this calendar do not want to go to trial. They would love to be done, but for that one issue that keeps the parties from concluding the process. Sometimes it's a pension and how to divide it. Other times it's a car, or a debt, or a student loan issue. The resolution can lie in a simple explanation of a pertinent statute, the discussion of when an asset or debt was acquired, or a reasonable discussion about what one party is willing to trade the other, in exchange for a resolution. The over-riding theme of all of the settlement conferences I've attended is that people are generally willing to give something to get something, want to be heard and treated with respect, and just need a little help to get them through the system.

⁶⁰#_ftn1

My hat goes off to all of the volunteer attorneys who staff this program. During these tough economic times it is hard for attorneys (generally solo practitioners in family law) to be away from the offices, and the volunteer attorneys on this program devote an entire afternoon to this worthy ADR process. And for those attorneys (of which there are several) who go the extra mile and continue on a pro bono basis to assist parties after they leave the settlement conference, you truly are the pro bono background of our community.

Dana L. Santos is a Certified Family Law Specialist, practicing in Contra Costa County for 12 years. She coordinates the Double Pro Per Settlement Conference Calendar, and can be reached at danasantos@comcast.net.

[1] California Law Review, Bonnie Hough, citing Judicial Council of California, Statewide Action Plan for Serving Self-Represented Litigants 2 (2004), *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report_comment_chart.pdf.

Induction of the Hon. Terri A. Mockler

Wednesday, August 1, 2012

Judge Mockler's induction took place on June 22, 2012. After the court convened en banc, Master of Ceremonies, Charles James, former Contra Costa Public Defender, introduced the speakers: Karen Moghtader, Deputy Public Defender; Julie Hast, Deputy District Attorney, Hon. Richard Flier (ret.), and Robert Rich of Beltzer, Hulchiy & Murray.

Audrey Gee, the 2012 CCCBA President, presented the gavel to Judge Mockler, before Judge Trevor White administered the Oath of Office. Evangeline Brown then presented Judge Mockler with her judicial robe. Below are a few photos from the induction ceremony.

























Judge Mockler was appointed to the Contra Costa County Superior Court Bench by Governor Brown on February 1, 2012. As a public defender for over 28 years, Mockler was exposed to many different people with many different problems. She encountered both rural and urban poverty, and took pains to understand the myriad socio-economic problems associated with poverty. In addition to the impacts of alcoholism, addiction and lack of education on her clients and their families, she witnessed the lack of access to information and resources that is rampant throughout much of American society. Working in the criminal justice system for so many years, Mockler learned much about the human spirit, both from the viewpoint of the victim, and the accused. While she struggled regularly with the misery in her cases, these difficult situations were tempered by her encounters with resilience and positive change. These experiences have taught her much about people and life, and they inform her approach to justice.

As a public defender, Mockler staunchly upheld the constitutional rights of her clients, but did not see them as saints or victims. She learned to appreciate and accept different viewpoints, and has come to understand that things are rarely as simple as they seem at first blush. These two skills – appreciating different viewpoints and evaluating situations through different prisms – allowed her to understand the plight of crime victims as well as the plight of criminal defendants. Judge Mockler believes that after nearly thirty years of experience as an advocate in the justice system, she has developed the right balance of thoughtfulness, purpose, and compassion, and looks forward to this next iteration of her professional career.

Waikiki: Why Bother?

Wednesday, August 1, 2012



Dana Santos

I will admit to a shameful, dirty secret. I like Waikiki. Yes, I know there are innumerable places the world over to which I should travel while I am able and before I die. There are countless temples, pristine nature preserves, delicious foods, parks, national treasures, amazing architecture and fine works of art that need to be experienced if one can truly be said to have lived a full life.

And yet, every five or so years, I have the need to visit Waikiki. I can't explain it, it just calls to me. The scenery, while beautiful, is marred by high rise hotels, mass produced chachkes for sale, and tourists jamming sidewalks wearing socks and sandals (simultaneously). The once quaint fishing village and vacation spot for Hawaiian Royalty is so long gone, the pictures showing how Waikiki "used to be" are alien and depressing.

And yet, I go. The walk along the Ala Wai Canal in the bright light of day can sometimes show a depressingly dirty, garbage filled waterway that was originally constructed to drain the surrounding wetlands (sigh). However, if you overlook these blemishes, a walk along this fish filled canal is a wonderful way to start your morning exercise routine. In the evening, it

is a pleasure to sit on a bench and watch the canoe paddling teams practice their technique.

The beach in Waikiki is eroding, crowded and difficult to navigate for all the sprawled bodies. And yet, it is a wonderful spot to learn how to surf, minutes from your hotel room, and offers a warm, safe, sparkling turquoise environment for people of all ages and abilities to enjoy the Pacific.

The shopping in Waikiki is dreadful. Your options range from high priced designer offerings that represent your monthly take home pay to mass produced t-shirts with questionable words of wisdom printed upon them. And yet, I never fail to go to the International Market to mill about and buy something I don't really need but oddly will enjoy.

When it comes to food, Waikiki can feel overwhelming and tricky. First, you have to navigate everyone who wants to hand you a brochure for a "nightly dinner special." You can find a fabulous hole in the wall one night, the next night pay way too much money for nothing special. Let me provide an example of this dichotomy. One night my husband and I wanted to go to a "nice meal" (ok, I wanted a nice meal, and my husband loves me so he said "yes dear" like the good sport he is). We went to the Moana Surfrider⁶¹, a grand dame of a hotel if there ever was one. If you don't know about the Moana, you need to go at least once. With rocking chairs on the veranda, a gorgeous view of the beach, and a peek into a long ago, more elegant past, it is worth going for happy hour. Dinner? Not so much. My scampi shrimp were tough, the sauce something I could have made at home in five minutes while watching Dr. Phil. And while I won't write off a restaurant with one bad meal (putting aside the pretty penny that meal cost) I will be inclined to consider other options for a "nice meal" in Waikiki the next go round.

The opposite end of the spectrum? Uncle Bo's Pupu Bar and Grill⁶² on Kapahulu Avenue. If you take your food seriously, you need to find this place. Don't be discouraged by the slightly longer walk you will have to take from your Waikiki hotel. Don't be sidetracked by the fact that it sits on a fairly busy thoroughfare. What is important about this place is the excellent food, rocking cocktails, and great staff. For \$75 otd (out the door) my husband and I had great cocktails with local flair in the eclectic bar, and

⁶¹<http://www.moana-surfrider.com/>

⁶²<http://www.unclebosrestaurant.com/>

then moved to the dining room to share two or three appetizers that were huge and yummy. (Everything on the changing menu sounds good, so I recommend you order a little of everything and share.) And err on the side of under ordering, because the portions are generous. We had a hard time understanding how this place could put on such a solid product and charge such reasonable prices.

One final note for those foodies out there. Like shrimp? Like garlic? Then you need, need, need to rent a car or take the bus out to Giovanni's Shrimp Truck⁶³ on the North Shore. (Yes, I know it is not Waikiki, but I have to include it.) It's a schlep out to Giovanni's, no doubt, but as you sit there gorging yourself on a mountain of cooked to order, fresh, hot, garlicky shrimp and enjoying an icy cold beverage, you will have a moment of purest nirvana. Which, as we all know, is why we go on vacation in the first place.

Aloha!

Uncle Bo's Pupū Bar & Grill⁶⁴ – 559 Kapahulu Ave, Honolulu, Oahu, HI 96815-3855

Giovanni's Shrimp Truck⁶⁵ – 56-505 Kamehameha Highway Kahuku – Check out the menu and pictures!⁶⁶

Waikiki facts⁶⁷

⁶³<http://giovannisshrimptruck.com/>

⁶⁴<http://www.unclebosrestaurant.com/index.html>

⁶⁵<http://www.giovannisshrimptruck.com/>

⁶⁶<http://giovannisshrimptruck.com/menu.php>

⁶⁷http://waikiki.com/insiders_guide/history_of_waikiki.html

Court funding and the Impact of Budget Cuts on Access to Justice

Wednesday, August 1, 2012

Adequate court funding is essential because courts exist to serve the public and support democracy. Year after year, however, budget cuts force our courts to do more with less, threaten to close courthouse doors and put our most fundamental rights at risk.

Our August 2012 Contra Costa Lawyer deals with alternative dispute resolution resources. Nearly every article mentions how court budget cuts compel more and more attorneys and their clients to seek alternative routes to justice, including mediation and arbitration. Along with our selection of articles on how to make the most of alternative dispute resolution opportunities, we want to provide you a list of recent articles that show the extent of the court funding crisis.

The current budget crisis is wreaking havoc on our judicial system and it is poised to do even more damage depending on the outcome of this fall's elections. What could that mean for people trying to litigate in our courts? It could mean a lot- including massive delays in hearing anything other than criminal and juvenile law cases, suspending adjudication of all small claims and limited jurisdiction cases. Below is a selection of articles that show the impact of budget cuts thus far:

July 16, 2012 –San Francisco court worker's strike shuts down the court.⁶⁸

June 20, 2012 – Court closures expected to hurt rural communities⁶⁹ (Valley Public Radio)

June 4, 2012 – Court Reporters are no longer available for civil cases in Alameda County⁷⁰

⁶⁸<http://www.sfgate.com/bayarea/article/SF-court-workers-strike-closes-offices-3711676.php>

⁶⁹<http://www.kvpr.org/shows.php?id=1072>

⁷⁰<http://www.alameda.courts.ca.gov/Resources/Documents/Notice%20of%20Nonavailability%20of%20Court%20Reporters%20v3.pdf>

May 26, 2012 – All seven Fresno County branch courts are closing for good⁷¹

May 24, 2012 – Judges in California Join to Stop Courts Cuts⁷² (Wall street Journal)

May 22, 2012 – San Francisco Superior Court is forced to end settlement program, transitions to volunteer-driven program⁷³

May 18, 2012 – CA Superior Courts Facing Massive Budget Cuts and Lay-offs⁷⁴ (Humboldt Sentinel)

May 17, 2012 – Dark Days for California's Courts⁷⁵ (Mercury News)

March 5, 2012 – LA Superior Court forced to close 50 courtrooms and lay off 300 court employees⁷⁶

More articles and resources on the CCCBA website⁷⁷

Even more coverage on the Bar Association of San Francisco's website⁷⁸

⁷¹<http://abclocal.go.com/kfsn/story?section=news/local&id=8677451>

⁷²<http://online.wsj.com/article/SB10001424052702304791704577420811231610648.html>

⁷³<http://www.sfcourts.org/modules/showdocument.aspx?documentid=3092>

⁷⁴<http://humboldtsentinel.com/2012/05/18/california-superior-courts-facing-massive-budget-cuts-and-layoffs/>

⁷⁵http://www.mercurynews.com/breaking-news/ci_20645731/dark-days-californias-courts

⁷⁶<http://www.courthousenews.com/2012/03/05/44425.htm>

⁷⁷<http://www.cccba.org/attorney/news/press-20120315.php>

⁷⁸<http://www.sfbar.org/court-funding/index.aspx>

