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The dollars and sense of a discovery referee

By Joyce Fahey

Several years ago, I was appointed as the discovery referee in a 4-year-old case in which the parties had already each spent nearly \$1 million in attorney fees, but were no closer to resolution than the day the complaint was filed. By that point, the “litigation” consisted of nothing more than a war of words in the discovery arena. That was then. What was shocking then is now often the norm.

What surprises me the most about cases that have been lingering for years is the sensible and cost-saving solution that is often overlooked. A discovery reference not only resolves cases more quickly, but it also saves clients unnecessary expense and, most importantly, it calls a cease-fire to the war of words between counsel.

The lifespan of a request for production, admissions, inspection and interrogatories is mind-boggling. All too often, such requests are met with objections, non-responsive answers and unproductive meet-and-confers. By now, several months have passed and other than racking up billable hours, nothing has been accomplished. The inevitable motion to compel creates further delays due to overcrowded court dockets. After approximately one year “in litigation,” your client has paid tens of thousands of dollars and you know no more about the



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other side’s case than was known before the discovery phase of the litigation began.

There are tremendous benefits to seeking the appointment of a referee early on in the process. The referee will manage your case efficiently and help you avoid the frustrations of the back-and-forth sparring contests with opposing counsel. Orders appointing discovery referees are made pursuant to Code of Civil Procedure Sections 638 or 639. If you and opposing counsel agree that the discovery process will be contentious, you can stipulate to the appointment of a referee pursuant to CCP 638. If counsel cannot agree on a particular referee, you can submit a list of names to the court, per CCP 640.

The court also has the option of appointing a referee on its own or at the request of one of the parties, “because of the multiple issues to be resolved, multiple motions to be heard, motions

are numerous and voluminous documents need to be reviewed, especially in connection with issues based on privilege.” CCP 639

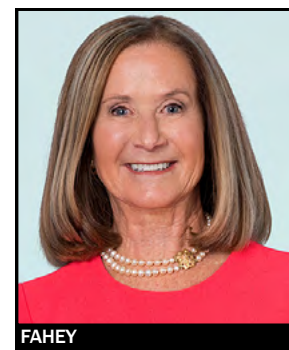
The court order will include a finding as to how the parties will share the cost of the referee, as well as the scope and subject matter of the reference. The scope can be as limited as resolving privilege issues or as broad as resolving all discovery in the action. A 639 appointment is likely to occur in matters involving attorney-client or doctor-patient files, as well as extensive e-discovery disputes. A reference appointment is invaluable in these instances because the matter will be resolved in a matter of weeks, rather than the months it takes to get on the trial court’s calendar. The reference will also result in a savings for the client because referees often prefer letter briefs, which take far less time to prepare than formal motions.

Discovery referees will typically keep a close watch on your case to ensure a speedy resolution of outstanding issues. The purpose of the initial meeting is to prioritize issues and lay out the rules of the road for future sessions. A court reporter for subsequent hearings is wise so there can be no confusion about the referee’s findings and orders. Further, counsel always retain the right to challenge a referee’s findings and a transcript of the reference hearing will assist the trial court.

Next time you start drafting your objections or set of special interrogatories and cringe at the prospect of spending the foreseeable future arguing about them, take a deep breath and make the call. “You will never reach your destination if you stop to throw rocks at every dog that barks.

— Winston Churchill

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