

February 11, 2025 | ADR Services, Inc. In-House CLE Program

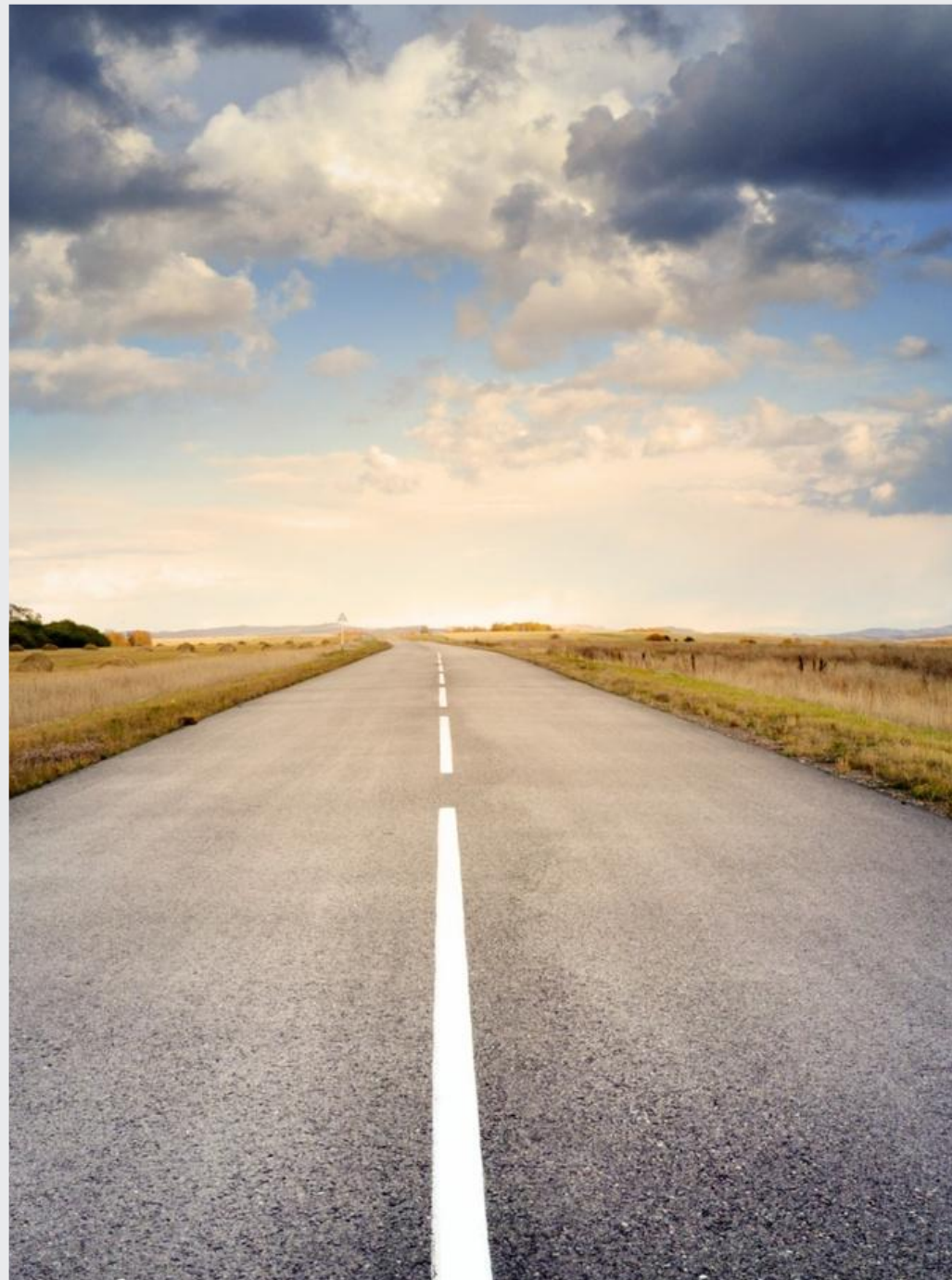


BREAKING THROUGH PRETRIAL LOGJAMS THE POWER OF REFEREES

Hon. James Lambden (Ret.)

Hon. Victoria Wood (Ret.)

TODAY'S PROGRAM



- **Part 1**
What are referees and how are they appointed?
- **Part 2**
When, why, and how to use a referee
- **Part 3**
Forms, practice pointers, resources

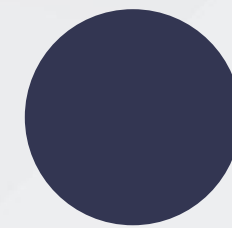
PART 1

WHAT ARE REFEREES AND HOW ARE THEY APPOINTED?

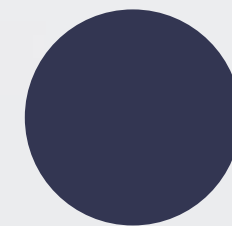


REFERENCE BASICS

California Code of Civil
Procedure (“CCP”) sections
638–639 (see in general CCP
638–645.1)



GENERAL: CCP 638(a): “To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision”



SPECIAL: CCP 638 (b) and 639(a)

638

- More like a court judge
- Consent of Parties – **required**
- **Decision:** “must stand as the decision of the court” (CCP 644(a))
- Parties lose their right to a jury trial
- Referee loses jurisdiction once Statement of Decision is filed
- The decision of the Referee must be attacked in the same manner as one made by the court, and an order vacating the decision and directing a rehearing is properly appealable as an order granting a new trial (*Estate of Bassi*)

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- More focused on discovery issues
- Consent of Parties – **not required**
- **Decision:** advisory (CCP 644(b))
- •Can be for a single issue/motion or for all discovery in a matter



THE MAIN DIFFERENCE GENERAL V. SPECIAL REFERENCES REVIEW

A GENERAL REFEREE'S ORDER
UNDER CCP 638(A)



Is *directly appealable* after filing (*Lindsey*)

A SPECIAL REFEREE'S REPORT
UNDER CCP 638(B) OR CCP
639(A)(1)-(5)

Is not *directly appealable*

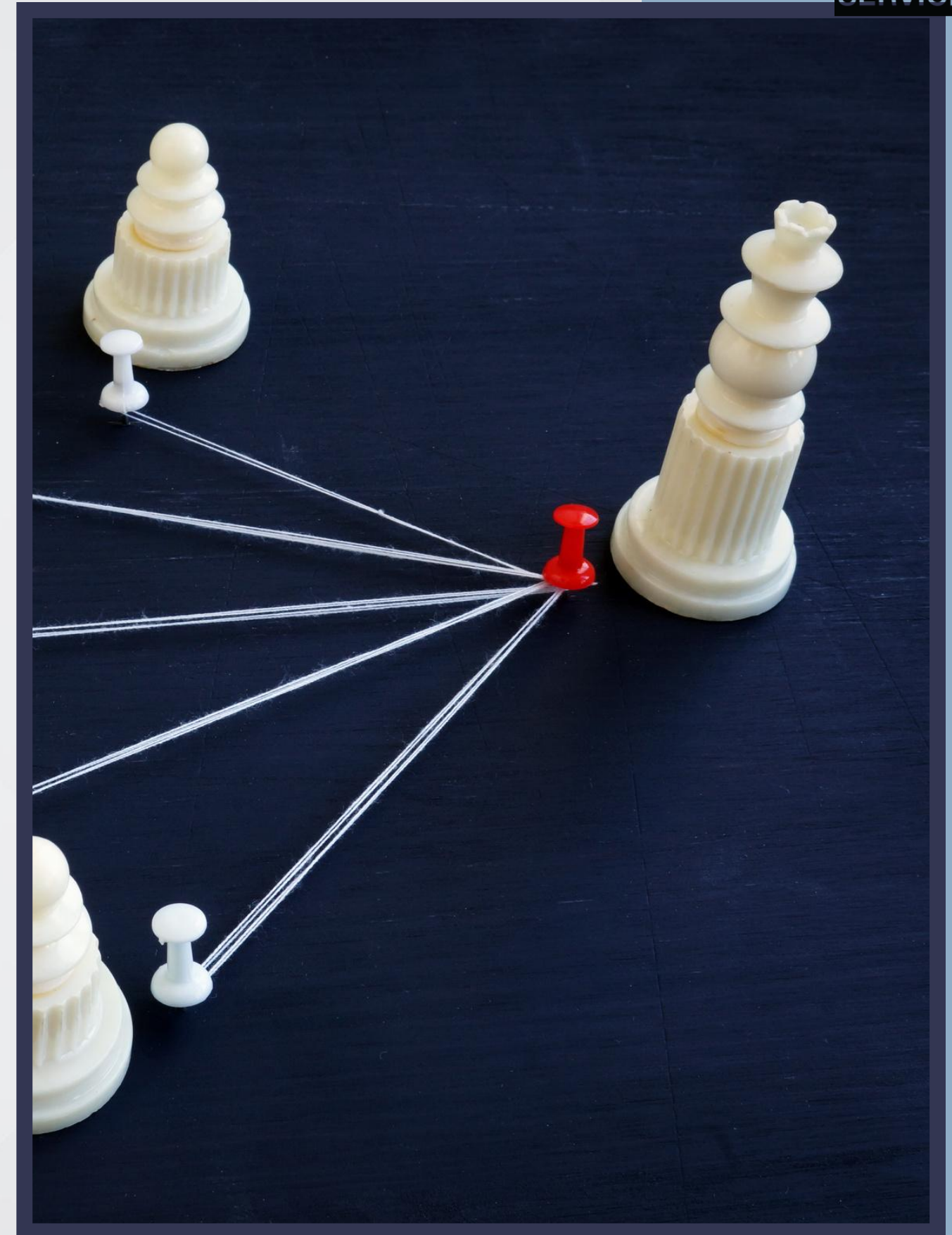
- Court must independently consider the Referee's findings and objections submitted by the parties before accepting or rejecting the referee's recommendations (*Rockwell International Corp.*)
- Referee's recommendations "are entitled to great weight" (*Marathon*)

APPOINTING A DISCOVERY REFEREE

CCP 638—only by agreement of parties (agreement either in the case or in a prelitigation contract raised in a party's motion)



CCP 639—by party motion or court's own motion. When court "determines that it is necessary."



APPOINTMENT PROCEDURE

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Parties agree to referee & prepare stipulation & appointment order

Referee consents to serve & signs appointment order


Appointment order submitted to court; Judge Approves the appointment

Referee opens file, issues disclosures, and conducts CMC to determine next steps

Court selects & appoints referee

Referee consents to serve

Referee opens file, issues disclosures, and conducts initial DMC to determine next steps



**FOR PURPOSES OF THIS
PROGRAM, WILL FOCUS ON
DISCOVERY REFEREES (639)**

DISCOVERY REFEREE POWERS & LIMITATIONS

CAN

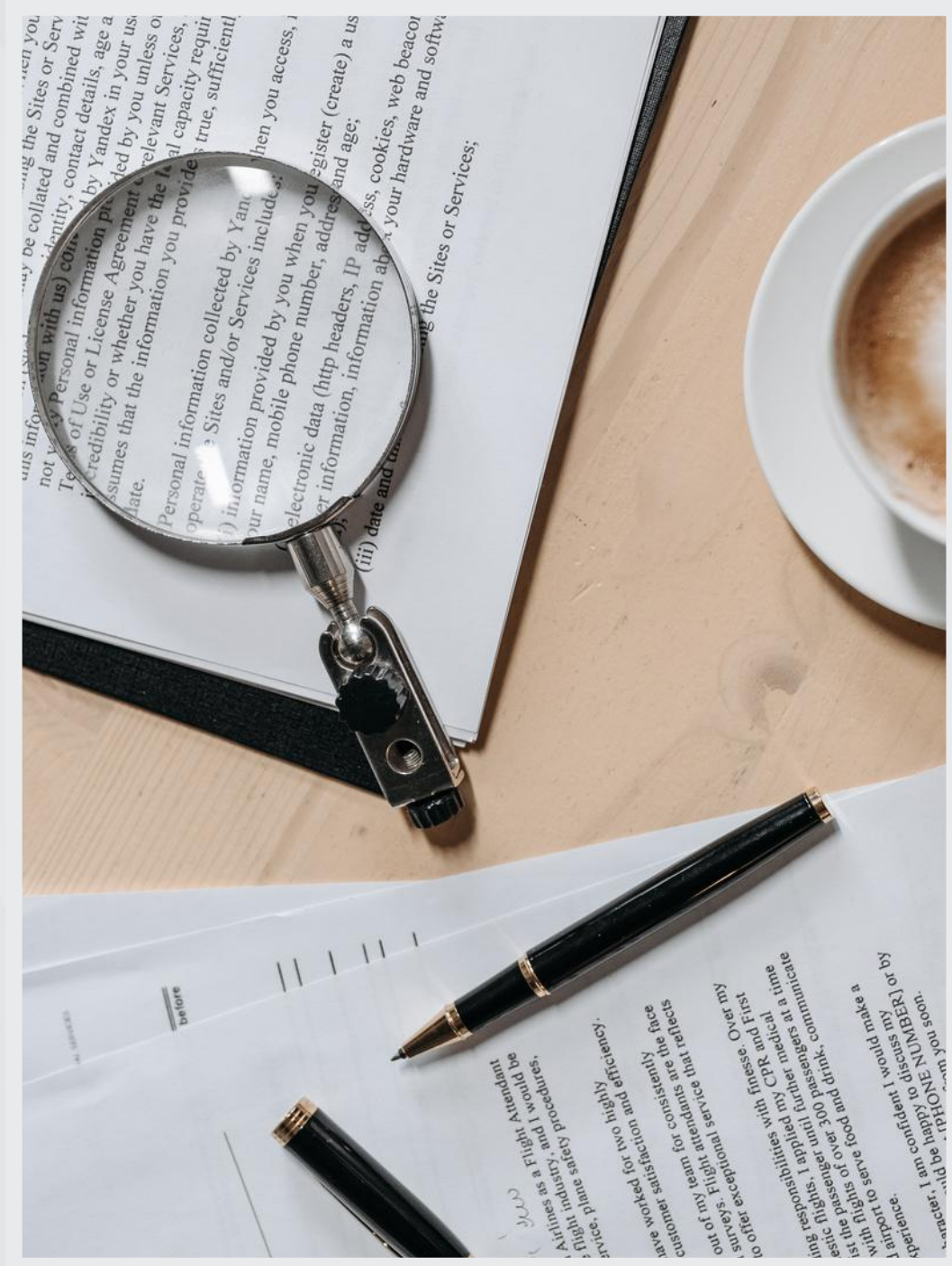
- **Can** set the date, time, and place for all Referee hearings. (CRC, Rule 3.922)
- **Can** issue subpoenas, take evidence, and rule on objections, motions, and other requests made during the course of the hearing. (CRC, Rule 3.922)
- **Can** set Case Management Conferences with the attorneys to develop an efficient, rational, and least-oppressive discovery plan. (*Lu*)



CANNOT

- **Cannot** conduct contempt proceedings (*Marcus*)
- **Cannot** order sealing of records (CRC, Rule 2.551)

DISCOVERY REFEREE'S REPORT (CCP 643(C))



- Must file with court and serve on parties within 20 days of the hearing
- Must include a recommendation on
 - The merits of any disputed issue,
 - Statement of the total hours spent, and the fees charged, and
 - Allocation of payment of the fees.
- Is only advisory

DISCOVERY REFEREE'S REPORT Review & Adoption CCP 639(a)

- No hearing required, but the court may take additional evidence. CCP 639(a)
- Review may be “in whatever manner the trial court deems appropriate.” (Marathon)
- Court must independently consider the Referee’s findings, but the Referee’s recommendations are entitled to great weight. (Marathon)
- Court may adopt in whole or in part, after independently considering findings and any objections and responses filed with the court. (CCP 644(b))
- Court cannot sign proposed order until the objection period has passed.



PART 2

WHEN, WHY, AND HOW TO USE A REFEREE



JUSTIFICATION FOR & BENEFITS OF A DISCOVERY REFEREE



- Multiple issues or motions to be resolved
- Hear motions timely so the cases don't stall
- Lessen the delay in cases going to trial

CASE MANAGEMENT AND DISCOVERY SCHEDULING IN COMPLEX MATTERS (TAGGARES)

Plaintiff names 18 defendants in a business case alleging fraud and conspiracy. The principal defendants are two national corporations and 16 minor players are named in peripheral roles including delivery/storage company, suppliers and subcontractors etc. Motions including protective orders, waivers of attorney client privilege and massive ESI productions.



15 As to the general discovery management expenses (distinguished from anticipated individual
 16 motions by parties) the Discovery Referee recommends the division of invoices and payment as
 17 follows:

- 18 • Plaintiff: 20% as recommended by the Court in its appointing order;
- 19 • The "[REDACTED]" related parties, including individual family members and related
 20 "[REDACTED]" corporations: 30% jointly and severally among the "[REDACTED]" parties;
- 21 • The "Successor Entities": 30% jointly and severally among the six named entities; and
- 22 • The "Others": 20% jointly and severally among the presently appearing parties and any
 23 added "Other" parties.

24 The discovery referee recommends apportionment and invoicing of the parties according to the
 25 above percentage ratios, subject to any further adjustment approved by the Court. RECOMMENDED

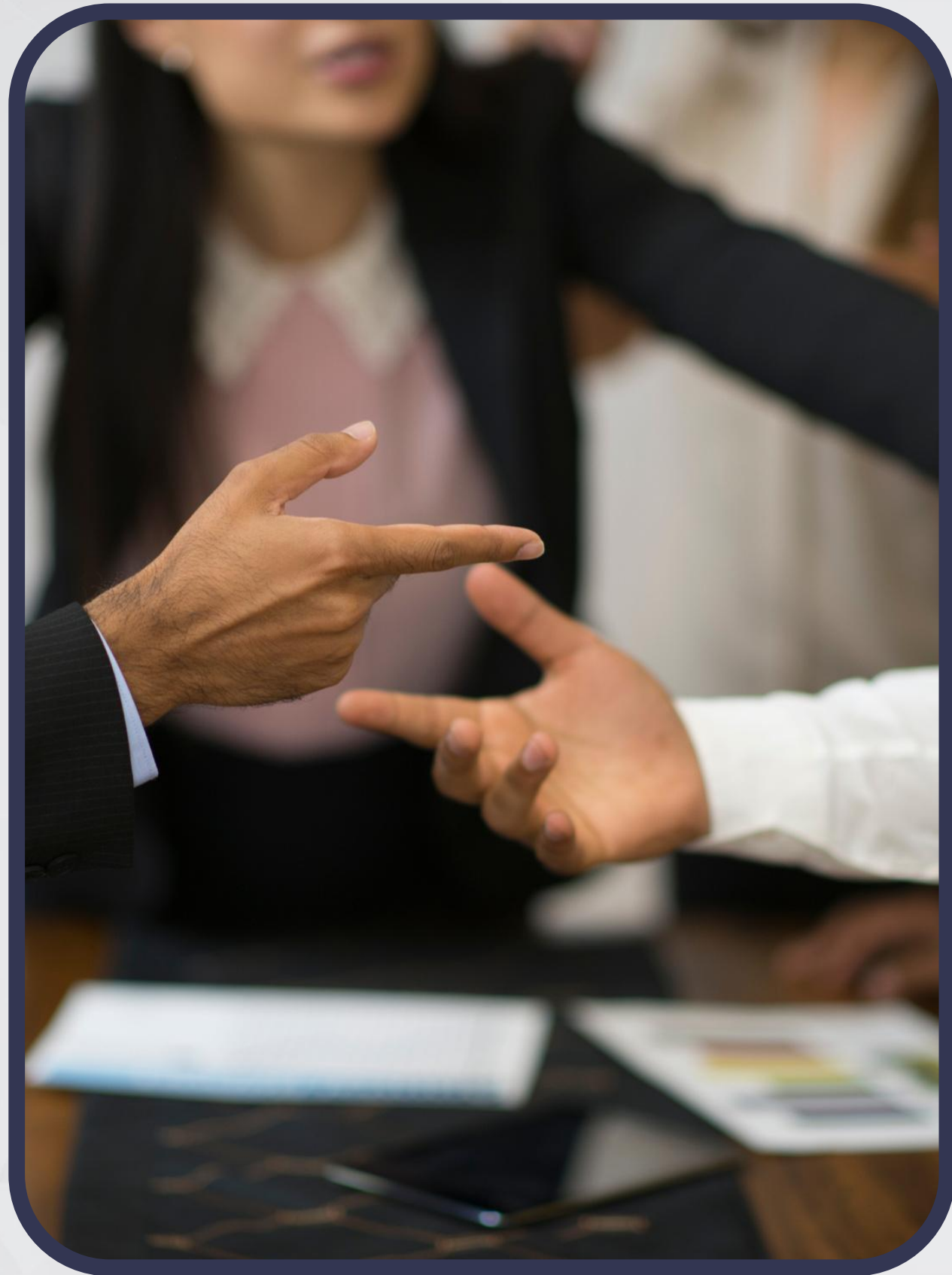
USING DISCOVERY REFEREE TO PREPARE FOR EFFECTIVE MEDIATION AND RESOLVE SPECIFIC ISSUES

- Mediation planning conference – what is the minimum amount of discovery we need to have an effective mediation?
- Resolve discrete issues so parties can have a productive mediation
- Decide issues in specialized areas like coverage, construction defect, family, probate, technology using subject-matter-expert Referees (639(a))



**VOLUMINOUS DOCUMENTS
TO BE REVIEWED/DISCOVERY
REFEREES CAN HANDLE CASE
MANAGEMENT (LU)**

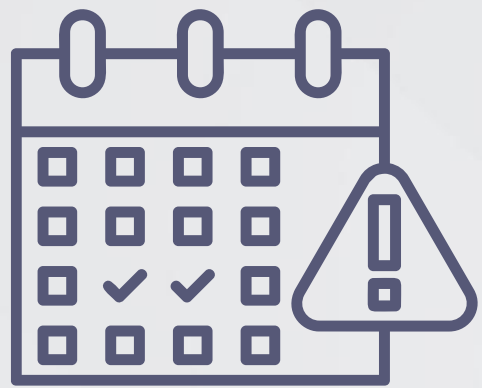




**ANTAGONISTIC DEPOSITIONS
WHERE PARTIES NEED RULINGS
ON OBJECTIONS SO THE
DEPOSITION CAN PROCEED**



FLEXIBILITY & SCHEDULING BENEFITS



Flexible briefing
schedules per
counsel's agreement
and Referee's
schedule



More in-depth and
productive Informal
Discovery
Conferences with
goal to avoid formal
hearing, and cutting
down on fees of
back-and-forth



Can set hearings at
more convenient
times and timelines
depending on
counsel's needs and
Referee's schedule



Remote appearances
or use of private
facilities

PART 3

FORMS, PRACTICE POINTERS, RESOURCES



MATERIALS ATTACHED

Contact ADR Services, Inc. before appointing a referee, and we will be happy to assist with forms and guidance on the process.

- CRC Rule 3.922
- ADR 110 Stipulation & Appointment Order
- Sample Stipulation & Appointment Orders (§§ 638, 639)
- Sample motion procedure
- Sample hybrid deposition protocol
- Sample DMC order with fee allocation
- Example Report Limits Delay in Decision

AUTHORITIES

STATUTES

CCP §638
CCP §639(a)(1) – (5)
CCP §640
CCP §643
CCP §644
CCP §645.1
CCP §1775
Evid.C. §1118
Evid.C. §1121

RULES OF COURT

Rule 2.551
Rule 3.921
Rule 3.922
Rule 3.923
Rule 3.924
Rule 2.400

CODE OF JUDICIAL ETHICS

Canon 3B(7)
Canon 6D

CASES

Estate of Bassi (1965) 234 Cal. App. 2d 529
Estate of Beard (1999) 71 Cal. App. 4th 753, 777
Hood v. Superior Court (1999) 72 CA 4th 446, 449
Jeld-Wen v. Superior Court (2007) 146 Cal. App. 4th 536
Jovine v. FHP, Inc. (1998) 64 CA4th 1506
Lewis v. Superior Court (1999) 19 C4th 1232
Lindsey v. Conteh (2017) 9 CA5th 1296
Lu v. Superior Court (1997) 55 CA4th 1264
Marathon National Bank v. Superior Court (1993) 19 CA4th 1256
Marcus v. Workmen’s Comp. Appeals Board (1973) 35 CA3d 598
McDonald v. Superior Court (1994) 22 CA4th 364
Rockwell International Corp. v. Superior Court (1994) 26 CA4th 1255
Taggares v. Superior Court (1998) 62 CA4th 94
Tarrant Bell Prop. LLC v. Superior Court (2011) 51 C4th 538

THANK YOU
QUESTIONS?



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