# Court cutbacks highlight utility of discovery referees

By James C. Powers

The recent cutbacks in funding for courts and the resulting increased demands on judges' time make it appropriate to consider greater use of discovery referees. Discovery referees have not only been useful, but stand as essential players in major litigation with extensive discovery and discovery disputes. Now that it can take months to get hearings on motions, quick access to a discovery referee can greatly simplify and expedite litigation. Cost factors have largely limited use of a discovery referee to cases with high economic stakes. But one recent court cutback in court spending may lower the cost of using a discovery referee. Termination of the Los Angeles County Superior Court Alternative Dispute Resolution Program has left many mediators without a source of cases to mediate. Most mediators are probably not suitable as discovery referees. But mediators who have extensive backgrounds and expertise in discovery, and interest in discovery issues, can prove to be able discovery referees.

Most mediators in the superior court program did 25 pro bono mediations to develop a mediation practice, and some may be willing to act as discovery referees at reduced rates to build a practice as a discovery referees. A referee is usually appointed for all discovery disputes in an action, but a referee can be given a more limited reference. A referee may be quite hesitant to take on all discovery in an action pro bono, but he or she is much more likely to agree to handle a single motion or deposition without charge. Such a limited reference also gives the parties the opportunity to form their own opinions of the referee before stipulating to his or her handling of all discovery in an action.

A discovery referee's power is derived entirely from the order of reference appointing the referee and such orders can vary widely in their provisions. They typically provide for the referee to prepare a report recommending rulings on each discovery motion or group of related motions, and for the report to be submitted for approval to the judge to whom the case is assigned. The reports are usually, though not always, approved without change by the judge. Alternatively, the order appointing the referee can provide that his or her rulings shall be final subject only to review by writ or appeal in the same manner as a judge's orders on discovery matters. Most judges are delighted to have discovery motions handled by a referee.

Such orders almost always provide that the referee shall rule or recommend rulings on all discovery motions and preside at depositions and rule on objections as they are made. Getting immediate rulings can greatly expedite difficult depositions. At a later stage, counsel may decide to save expense by proceeding with depositions without the referee. However, the order of appointment should provide that in such event either party could adjourn a deposition and insist on the presence of the referee if that party feels it is necessary to do so.

The order may also empower the referee to grant extensions of time to respond to discovery requests, make discovery motions, and set hearing dates and briefing schedules for discovery motions, subject to countermand by the judge.

A discovery referee can be particularly helpful with regard to demands for production of documents. All too often, efforts to obtain documents begin with overbroad demands for everything a beginning associate can imagine, followed by boilerplate objections with limited actual production, and then extensive motions at high costs. Motions to compel further response to demands for production, or to compel production, usually result in orders that simply grant or deny further response or the production sought. A court no doubt has power to make orders other than simply "yes" or "no," but there is no specific authorization to do so in the applicable sections (Code of Civil Procedure Sections 2031.310 and 2031.320). By contrast, the section on protective orders for inspection demands (Code of Civil Procedure Section 2031.060) expressly provides multiple alternatives to simply granting or denying further response or production. These include limiting the scope of demands, changing time and place of production, and requiring that inspection, copying, testing, or sampling be made only on specified terms and conditions (Code of Civil Procedure Section 2031.060(b)(4)). A motion for protective order must be accompanied by a meet and confer declaration (Code of Civil Procedure Section 2031.060(a)) and frequently requires an ex parte application in order to be heard before response to the inspection demand is due, particularly with these days of crowded court calendars. The process of obtaining a timely hearing, or a timely extension of time to respond, is generally much simpler and more expeditious if a discovery referee has been appointed.

Parties who try to delay discovery and complicate lawsuits frequently oppose appointment of a discovery referee. When that occurs, it is usually necessary to move for appointment of a discovery referee based on a showing of obstruction of discovery or excessive discovery requests. However, the savings of time and expense are so clear in substantial cases that parties frequently stipulate to a discovery referee. One tactic that is particularly valuable in convincing an opponent to stipulate is to offer to pay the costs of the referee, subject to those costs being apportioned between the parties by the referee, either as rulings or recommendations are made or at the end of the action.

A careful practitioner will draft the stipulation and proposed order for appointment to include provisions that are perceived as advantageous and fair under the circumstances of the particular case and to avoid others.

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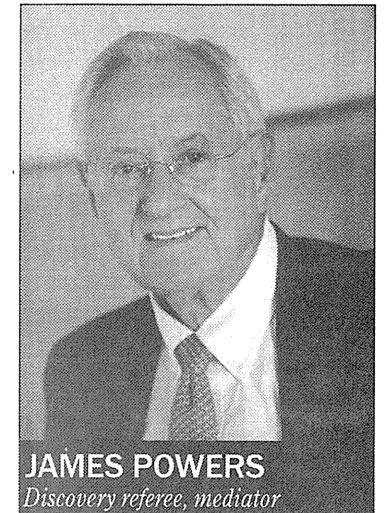
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