

Settle Up!

Settlement Newsletter



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Getting to Trial

I remember going to trial as a young lawyer. Everything rose in a crescendo to a fevered pitch just before trial. The logistics, coordination and workup were monumental. After endless preparation, I'd show up at the courthouse ready to do battle. And then the court would order a continuance.

I didn't know (at first) that the courts set trial dates months down the road without any idea of how many courtrooms will be available on any given day. We'd all show up with our witnesses ready to go only to find out that no courtrooms were available. We'd sit around all day and wait for something to break loose (and it often didn't). We'd then go back to our office and wait on "trial standby" for a week to see if a courtroom opened up. Our witnesses would cool their heels; our clients would get frustrated; we'd all stay on high alert for a week. And then we'd

get a call that no courtrooms were available and a new trial date would be set several months down the road.

Sound familiar? Everybody's been through it. It's not an efficient system. It's like having your carrier overbook an airline flight – except nobody offers you a free ticket when your flight's been oversold. Older attorneys would sometimes lament that all they wanted was "a date certain" for trial. But a master calendar system just doesn't provide for certain trial dates.

Some counties have switched to using a single judge for all purposes. In these counties, yours is the only case (or one of a very few cases) set for trial in that department on a given date. That way, you know you'll go out to trial on the date that's set (double scheduling still sometimes occurs. But these courts usually scramble to find an available courtroom so that the trial date can be

honored). This system avoids some of the master calendar problems. But it may be a long, long time (i.e. over a year) before your assigned date comes up.

*“There's another option:
judicial reference.”*

How can parties get to trial in a reasonable time without the re-setting problems of a master calendar system? Binding arbitration is always a possibility. But there's no right of appeal with arbitration, and some clients (or their counsel) don't want that. Arbitrators have broad powers, and their decisions aren't supposed to be reviewable for errors of law or judgment. The prospect of an adverse decision can be just too daunting for some parties to bear.

There's another option: judicial reference. With a judicial reference, the parties

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stipulate to having their matter heard by a private judge. It's just like a bench trial, except it takes place outside the courthouse. The parties get to select their judge (how often does that happen?). All the rules of evidence apply. See Evidence Code §300. The right to appeal is preserved. The parties present their case just like they would in a traditional courtroom. (See In re McNamee (1933) 131 Cal. App. 30, 31). Even the public has a right to observe the proceedings (should anybody care to). See California Rule of Court 3.931(a).

The upside? The parties get to choose "a date certain," they choose their judge, and they know exactly when their case will go to trial.

The downside? The parties pay the referee's fees. But the parties are free to agree how those fees will be paid. See Code of Civil Procedure §645.1(a).

The upshot? If the cost of gearing up for a trial several times is higher than the cost of paying a referee for three or four days of hearing time, the parties might prefer a judicial reference.

The foregoing article is provided for general informational purposes and should not be used in connection with any specific legal matter. Persons with legal issues or matters should consult competent legal counsel.