

UNBUNDLED JUDGES: MAKING THE COURT WORK FOR YOUR CLIENT

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PRIVATE JUDGE

Much has been made of unbundling attorneys' services; but I suggest that the court's services can and should be unbundled more frequently than they are. In actuality, the family law attorney already uses the unbundled services of the court, but probably doesn't think of it in those terms: 1) Need a quick temporary support order? File a motion and have a hearing, then go back to the negotiations table to settle the issues. 2) Stuck on one minor issue regarding the parenting plan? File a motion, attend mediation, get a third person's point of view to settle or get a decision. 3) Need a bifurcated issue like Date of Separation determined so you can resolve the rest of the issues? File a motion to bifurcate and request a trial. Rarely does the family law attorney rely on the court to resolve each and every issue from the soup to the nuts.

But we aren't using *all* the possible services the court offers. I'll suggest some ways you can unbundle the court *in* the court, *outside* of the court, and *through* the court.

In the Court

The first thing to do is to figure out if there is a knowledgeable and generous (with time and attention) family law judge available to you. Obviously, if you have direct calendaring you may be limited; however, when I was on the bench, I welcomed requests from attorneys with cases calendared in other departments who requested special assistance on their cases (with the blessing of their assigned judge), often as a settlement judge or early neutral evaluator of a case. And, believe me, every judge welcomes the request to do something a little different in the daily routine of hearings and trials and signing orders!

Since Family Code section 2450 was amended, most courts have been focusing on the Family Centered Case Resolution process for data collection for the Judicial Council regarding the completion of cases by requiring periodic case management appearances to report on the case status. But the real meat of the amendment that is actually *helpful* to you and your client is the rest of the statute that now says that a stipulation for case management is no longer required. You can get case management over the objections of opposing counsel or party. And this can be done through a party's request or on the court's own motion. The stated purpose of case management is not to provide data to the Judicial Council, but to provide judicial assistance to the parties, to expedite the process, to reduce the expense of litigation, and to focus on early resolution by settlement.

Much can be done in case management to process the case without numerous motions: In informal discussions (including telephone conferences with the judge) you can set the matter for trial on a bifurcated issue, limit discovery, obtain early neutral case evaluation, enter an alternative dispute resolution process, and have joint experts appointed, among other even more creative ideas. Pick and choose what you want from your case management judge.

The opportunity for greater confidentiality exists in a case management process, although if a judge is making orders over someone's objection, those proceedings must be on the record. Yes, DUE PROCESS still exists. But might a discussion in chambers or over the telephone not be better than in an open courtroom?



Hon. Marjorie A. Slabach, Ret., presided over a Family Court in San Francisco Superior Court from 1997 to 2011. Prior to serving on the bench she was a named and founding partner in a private family law firm in Santa Rosa, California. She has been a Certified Family Law Specialist since 1992. Currently she serves as a private judge handling family law matters. She is the recipient of numerous awards and recognitions, including: 2014 Member, Judicial Responder Panel; 2013 Honoree from ACFLS for Outstanding Service to Family Law; Board member, AFCC-CA; 2010 Judicial Officer of the Year from the Family Law Section of the California State Bar; 2010 Champion for the Children Award from Rally Family Visitation Services of Saint Francis Memorial Hospital; 2008 Judicial Officer of the Year from the Northern California Chapter AAML. She is a native of Indiana, where she attended public elementary and middle schools and a private Mennonite High School, Jr. College and Liberal Arts College. She taught Jr. High and High School English for fourteen years before relocating to California and attending Boalt Hall School of Law from which she graduated in 1982. She was also an instructor of Family Law at Golden Gate School of Law and Empire School of Law for a total of 10 years.

Outside of the Court

And if your Family Court Judges are too busy, overworked and under-appreciated (thus a little grumpy), find a private judge outside of the court. It costs money! But it may be worth it in saving the parties' frustrations with the current budget crisis court.¹

You may have greater opportunity for confidentiality with a private judge, though all the rules of court and evidence apply. All pleadings must be filed with the court, and open hearings are required. However, a private judge is often able to make decisions with a modicum of pleadings, thus greater confidentiality. And rarely do we have an audience. The greater informality allows for more time for case management, doing business via email and telephone calls, greater availability on shorter notice, and greater flexibility with calendars and process.

If you use a private judge you do not have to hire that person to be the judge for your entire case. *Unbundle the Private Judge's Services*. Pick and choose which pieces of the case you want a Private Judge to deal with.

The following procedures can be done with a private judge who has not actually been appointed as "the Judge" by the court; but you will still want to define/limit the role by way of a stipulation: Case Management, Settlement Conferences, Discovery Issues, Early Neutral Evaluations, or Advisory Opinions, etc. Get Creative! You may want someone who will provide a recommendation to the court. Or you may not. You can choose.

Or pick and choose which pieces of the case with which you want a private judge to deal as an appointed Temporary Judge. This could be the entire case, only one hearing or trial, only one bifurcated issue, only a review and approval of the judgment package.

Your stipulation for appointment of judge pro tem should include the specific procedures you want your judge to use. As an example, this comes from a form stipulation that has been used by many private judges: "... the Temporary Judge also may perform case management with the goal of achieving the earliest possible resolution with the

least expense to the parties. The case management primarily shall be carried out through conference calls and email communication between the Temporary Judge and counsel to be scheduled as appropriate in this matter. ... This matter will be conducted with the goal of providing Petitioner and Respondent with adequate information as quickly as possible so that settlement can be explored at the earliest possible time. When settlement exploration seems appropriate, a status conference will occur between the Temporary Judge, Petitioner, Respondent and their counsel from time to time. ... The Temporary Judge is authorized to talk with each counsel separately and, upon notice to opposing counsel, to meet each separately with a party and his or her counsel. Each counsel is authorized to contact the Temporary Judge by email without notice to opposing counsel if a dispute arises which cannot be resolved by counsel conferring in good faith with each other and if email communication is copied to opposing counsel. ... Petitioner, Respondent, and their counsel agree to act in good faith in conducting discovery informally. Neither counsel shall file any papers, documents, or requests for orders without having previously conferred with the Temporary Judge. One method of reducing the cost of this action will be to limit paperwork and court hearings and to assure that, if any court hearings are required, they will proceed when scheduled."

Rarely will a private judge require certain procedures be used. If you and your client are uncomfortable using such informality, find another judge or change the language of the stipulation. But the point is, that you can unbundle the services of a private judge and define your own procedures with a private judge (so long as you and opposing party/counsel can agree upon those things), in order to make the process work for your client.

Through the Court – CCP 638 & 639 Referee

Yes, the Code of Civil Procedure applies to Family Law.

One of the ways to unbundle the Court *within* the court as mentioned above is to ask for an alternative means

of dispute resolution. Through the court you can pick and choose the process, the issue, and the person who will serve as referee under CCP section 638 and 639.

Under these sections there are two different kinds of referees: the 638 referee and the 639 referee.

CCP 638 says "A referee may be appointed *upon the agreement* of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract (requiring such an appointment)."

The purposes of CCP 638 appointment of a referee are: 1) "To hear and determine any or all of the issues in an action or proceeding, whether of fact or law, and to report a statement of decision, and 2) To ascertain a fact necessary to enable the court to determine an action or proceeding. The language itself can be read to unbundle the case for the purpose of determining one or more issues or the whole case."

In order to access a CCP 638 referee, the parties must agree to have a referee and agree upon who that referee will be (CCP 640(a)). OR, the parties agree to have a referee, but can't agree on who it will be; therefore, the court may choose a person to act as the referee (CCP 640(b)) [See CCP 641 for the limited basis upon which a party may object to an appointed referee.] AND the parties must agree upon the issues to be determined by the referee.

The appointed 638 referee must issue a Statement of Decision within 20 days of the hearing (CCP 643(a)).² The decision of the 638 Referee "must stand as the decision of the Court," and judgment can be entered forthwith. It is subject to appellate review as though made by the court (CCP 645).

The other kind of referee is the 639 referee. "When the parties do not consent, the court may, upon written motion of any party, or of its own motion, appoint a referee in the following cases. ..."

1) When the trial of an issue of fact requires the examination of a long account on either side; in which case the referee(s) may be directed to hear and decide the whole issue, or report on any specific question of fact involved therein.

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- 2) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.
- 3) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.
- 4) When it is necessary for the information of the court in a special proceeding.
- 5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and dis-

putes relevant to discovery in the action and to report findings and make a recommendation thereon.

Obviously we all recognize the discovery referee as the most frequent appointment in our cases; however, notice the other four possibilities that lend themselves to do an accounting of the add-on expenses for which a parent is asking for reimbursement; or the *Moore/Marsden* calculation that you don't trust to the ex-D.A. who just came on the bench; or the stock option characterization analysis; or determining which Mix method of tracing is required in a commingled account and then doing the tracing; or ... But you see where I am going with this list. The sky is the limit in all the creative ways

one can use a 639 referee even over the objections of opposing parties.

Once a request for a referee is granted, the writing of the job description and payment requirements are very specific. See CCP 639(d). The choosing of the referee is the next step: Agree or have one appointed for you. CCP 641 and 641.2 provides the limited basis for objecting to an appointed referee.

Because the appointment of a 639 referee was made over the objections of a party, the report the referee provides is not a statement of decision subject only to appellate review: it is a report and recommendation that is merely advisory which the court may adopt in whole or in part. The report and recommendations must follow a specific