

Letter from
the President

Does your client Need Fast, FAST, Relief? Then give this issue of the ABTL REPORT a try, but take only as directed. Side effects may occur.

To obtain speedy resolution of a dispute, the alternatives to court trial described at length in this issue must be considered. With the average time from filing to trial now 58 months in Los Angeles Superior Court, Central District, various substitutes have proliferated. Most are described in this issue.



A word of warning. The procedures set forth resemble one another to such a degree that one might assume some are identical. They are not. In fact, the differences, though subtle, may have a strong impact on procedure or result.

Here is a summary of this issue: Judge (Ret.) Philip H. Richards describes the use of the **Thomas J. McDermott, Jr.** judge *pro tem* and the general reference judge and the differences between them. Howard I. Friedman comments from the practitioner's point of view on the realities of actually trying a case under these procedures.

Eddy S. Feldman describes the vast panorama of arbitration available in California, while Robert Zakon focuses on Judicial Arbitration, the new procedure whereby Superior Court cases determined to be of a value of \$15,000 or less are sent to mandatory arbitration. (A bill is now pending in Sacramento which will raise this limit to \$25,000.) We have also included a chart to introduce you to the use of these procedures.

If that is not enough, here are some more variations:

The United States District Court, Central District, now provides for a stipulated reference to a magistrate for all purposes. The magistrate acts as a judge and enters a judgment which is appealable to the Ninth Circuit (see General Order 194-C). Judge Thomas Lambros of the United States District Court for the Northern District of Ohio has devised a process of "summary jury trials" for the purpose of effecting settlement. Between pretrial and trial, the parties convene in Judge Lambros' Courtroom and a six-person jury is impaneled. In a short pro-

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Private Judging:
Judge Pro Tem and General Reference

A colloquy you may hear most any day in many local law offices runs something like this:

Client: If we file suit, how soon can we get to trial?

Counsel: Unfortunately, anywhere from four to five years.

Client (dejectedly): Four or five years! Even if we win, we'll lose half of it by inflation.

Yes, Mr. Client, that is the sad fact in litigious Los Angeles County. Currently, the median time from filing a complaint to trial of a civil non-jury case in the Central District of the Los Angeles Superior Court is about four years and increasing. The reason is clear enough: there are approximately 20,000 civil non-jury cases at issue and awaiting trial and only five or six departments trying civil non-jury cases.



Is there any relief from this delay? Yes, in a word. Under a program initiated in 1978 by then Presiding Judge William P. Hogboom and endorsed by his successor, Judge Richard Schauer, and by the present Presiding Judge David N. Eagleson, thirty-four retired judges and six retired commissioners comprise the present Los Angeles County

Hon. Philip H. Richards Trial Panel of Retired Judges and Retired Commissioners. Members of this group are available by stipulation of counsel to try civil non-jury cases, accept all-purpose assignments and hear arbitrations and voluntary settlement conferences either as a judge pro tem or under a general reference.

Every kind of civil non-jury case may be so tried: business, personal injury, malpractice, property damage, family law, equity, probate, eminent domain, etc. Some of the advantages of a private trial are:

- Elimination of two, three or four years' delay;
- Choice of the judge;
- Scheduling of trials at counsels' convenience;
- Location of trials at either counsel's office, at the courthouse, when available, or other locations;
- Trial recesses granted as necessary or desired;
- Elimination of re-preparation due to master calendar continuances;

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Using Retired Judges: A Practitioner's View

The trial of complex business litigation is increasingly characterized by handicaps generated by the all-too-familiar congestion prevailing in our trial courts. But the availability of certain mechanisms which, in my judgment, materially alleviate these problems is less well-known and certainly inadequately utilized by many practitioners. These essentially involve the use, by stipulation, of a judge pro tem or a general reference under CCP § 638 (1). Perhaps it would be useful to hear the views of at least one practitioner who has utilized such mechanisms on a number of occasions.

Let us start with the premise that all parties to a complex commercial or business litigation are desirous of securing an expeditious, economical and orderly determination of their dispute by a judge capable of comprehending the intricacies of the issues involved and determined to effectuate a full and comprehending resolution thereof. Clearly, if any of the parties do not share these objectives, the available procedure cannot be invoked. The advantage of these mechanisms, under the foregoing circumstances, are manifest.



Howard I. Friedman *First:* By the use of a reference or pro tem judge, the scheduling of proceedings can be accommodated to the convenience and needs of all parties concerned, without reference to the ordinary processing of other pending actions in the court system. This normally means that ample time can be provided for necessary pretrial activity, and trial itself can be scheduled to match the needs of the particular case. In ordinary circumstances, this means a much earlier trial than would otherwise be available.

Second: The panel of available retired judges and commissioners in Los Angeles County is comprised of some of the most outstanding and experienced judges in our judicial system. Many of these retired judges have enormous experience in the handling of complex litigation, and are capable of rapid and insightful comprehension of the most arcane commercial and business matters. Many have special expertise and experience in particular areas of law involving complex business matters. Accordingly, the panel provides an almost unique opportunity for securing a capable judge most suited to the particular matter. Since the selection of a judge from the panel is by agreement of the parties, the use of a pro tem or reference judge means the parties participate in a direct fashion in the actual selection of the judge who will hear their case. Comparable opportunity simply does not

exist in the ordinary processing of civil actions, except within quite narrow limits.

Third: In cases involving a need on the part of businessmen for an early decision as to their rights, particularly in connection with ongoing business relationships, the use of a pro tem judge or reference judge provides a unique opportunity to secure speedy determination of such issues without the normal rupture of ongoing business relationships. Moreover, that the procedure is invoked by mutual agreement is itself a factor that tends to de-escalate the atmospherics of bitterness often characteristic of more lengthy court processing.

Fourth: While there is additional expense involved in the use of a reference or pro tem judge, the expense is essentially minimal when compared to the normal litigation process. The parties can provide that such expenses may be recoverable by the prevailing party, but even in the absence of such an agreement, the additional cost will typically be more than offset by the savings in attorneys' fees and other costs normally associated with the stop-and-go features of lengthy proceedings in the trial courts. In my experience, the savings in attorneys' fees alone exceed whatever costs are involved in the use of the pro tem or reference judge.

Fifth: The procedure is preferable to arbitration in most situations, because it is fully parallel with trials in court in terms of procedural and substantive rights. Indeed, in every material respect, a trial before a referee or pro tem judge is precisely the same as a trial before a sitting judge. All the devices for procurement of evidence, the rules of evidence themselves, the requirement of formal findings of fact and conclusions of law and judgment, as well as the availability of appeal, are exactly the same as in the typical trial setting. The chief difference is the ability to select the judge and the processing of the case directly with that judge. Normally, the case can even be tried in the formal setting of a courthouse trial department.

Sixth: While the mechanism may have only limited impact upon the general congestion of our civil courts (since only a relatively few cases are likely to find the mutuality of interest among all parties to invoke these procedures) there is still a significant public value served. Typically, the cases most eligible for the use of a pro tem or reference judge are those that would tie up a civil trial judge for lengthy periods of time. Hence, the real impact upon the overall system is the total amount of trial time saved for sitting judges, which, of course, affects the processing time for other cases in the pipeline.

Another type of case not discussed above is materially assisted, in my experience, by the use of a pro tem or reference judge. In some complex business cases, one of the parties may insist upon a jury in order to secure a decision reflecting the views of more than one person. This is often the case where public bodies are involved and sensitive issues are raised. Manifestly, the use of a jury in complex business litigation enormously prolongs the adjudicative process. Sometimes the legitimate concerns for securing multiple fact-finders can be accommodated without the necessity of going through a jury trial.

In a recent case involving complex electronic technology, counsel estimated that over a year of trial time would be required to try the case before a jury. Because of the nature of some of the issues raised, one party felt compelled to insist upon more than one fact-finder. By

agreement of the parties, the matter was submitted to a three-judge panel consisting of two retired judges sitting by reference and one sitting judge. The effect was to accommodate the felt concern for having more than one fact-finder and at the same time achieve a much more rapid and orderly trial of the matter. The case was tried for approximately three weeks and then settled, but it was obvious that the full trial would have been concluded in less than two months' trial time. Thus, the total savings represented approximately ten months of trial time and enormous additional attorneys' fees.

In conclusion, I must confess to an inability to see clearly what disadvantages inhere in the use of a pro tem or reference judge. The usually cited disadvantage of additional cost has, in my experience, simply not existed; on the contrary, I am persuaded that one of the principal advantages of the system is the reduction of litigation costs. On substantially every score, complex litigation can be more fully, effectively and efficiently processed and decided by the use of these mechanisms than by normal processing through the civil trial system.

—Howard I. Friedman

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Private Judging

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Lawyers no longer held hostage to a beeper while trailing;

Interruptions of judges by other court business halted;
Avoidance of the loss of interest in non-prejudgment interest cases;

Erosion of the recovery, if any, by inflation stopped;
Reduction in ultimate cost of trial for both sides, even with judge's compensation, because of a more expeditious trial;

Fees for all trial counsel promptly earned; and Civil non-jury logjam lessened, saving taxpayers approximately \$1,000 a day.

Seth M. Hufstedler, past president of the State Bar and acknowledged resurrectionist of the general reference procedure for prompt trials, writes:

"I have had the happy experience of using the General Reference program and it has tremendous advantages for the lawyers who participate in it. The parties can work out their schedule and can obtain a prompt trial.

"The plan permits the parties to select a judge in whom they both have great confidence, which reduces the haggling between the parties and frequently shortens the trial a great deal.

"Two lawyers and a judge attempt more frequently to work together as a unit for the convenience of the parties and for the simplification of the issues and the acceleration of the proceedings so that they can be terminated far more quickly.

"I think the Reference procedure is most helpful and that lawyers sensitive to the cost to their clients will find that they can save a great deal of cost and expense to them under that procedure."

Judge Pro Tem — Temporary Judge

The terms 'judge pro tem' and 'temporary judge' are used interchangeably.

Cal. Const., Art VI, § 21, provides: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause."

Cal. Rules of Court, Rule 244(a), specifies the simple procedure for the appointment of a judge pro tem as follows:

1. A written stipulation that the proposed appointee, with his name and address, be appointed as temporary judge (judge pro tem) is submitted to the Presiding Judge.

2. If the proposed appointee consents and the judge approves, the approval and order designating the temporary judge are endorsed on the stipulation which is then filed.

3. The appointee takes the oath of office which is attached to the stipulation.

4. The case is then assigned to him and he proceeds with its determination.

A trial by a judge pro tem is not a second class trial as some surmise. It has exactly the same effect as a trial before a sitting judge. As the Supreme Court held in *Est. of Kent* (1936) 6 C.2d 154, 163, a judge pro tem "when acting, . . . is acting for the Superior Court."

The same rules of procedure and evidence apply to a trial by a judge pro tem, in the case in which he is ap-

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pointed, as apply in a public trial by a sitting judge.

In the case in which he is appointed the judge pro tem has identically the same powers as a sitting judge, and the acts and decisions of the judge pro tem are subject to the same review.

As to the duration of his authority, the Supreme Court, in *Sarracino v. Superior Court* (1974) 13 C.3d 1, 10 states: "The appointment of a temporary judge to hear a particular 'cause' carries with it the power to act until the final determination of that proceeding."

Private judging by judges pro tem is growing in use. A recent "Newsletter" from the Administrative Office of the Courts states that in the last fiscal year the Superior Courts received nearly 2,000 days of service by judges pro tem.

General Reference

The Code of Civil Procedure provides for two types of reference as follows:

1. A voluntary or general reference upon the agreement of the parties to try any and all the issues in the action. (Code Civ. Proc., § 638 (1)).

2. A compulsory or special reference for a limited purpose without the consent of the parties. (Code of Civ. Proc., § 639).

We are concerned only with the voluntary or general reference. The simple procedure for a general reference is as follows:

1. The parties, in writing, designate the person or persons (not more than three) as referees to try all the issues of fact and law, set forth any post-judgment authority desired and fix the referee's compensation.

2. The court orders a general reference, appointing the designated referee who is granted the powers to hear and determine the matter in accordance with the stipulation.

3. The appointed referee then proceeds with the determination of the case.

The referee is a judicial officer appointed by the court. His authority is derived from and limited by the order of the court.

A trial before a referee is conducted in the same manner as though it were before a court.

The referee applies the same rules of procedure and evidence as a judge.

Upon completion of the testimony, the referee reports his written findings and conclusions of law to the court and by custom submits a form of judgment to be rendered by the court. The findings of the referee must stand as the findings of the court, and the judgment must be in accordance with such findings.

It would appear from the statutory framework of a general reference that although the court is bound by the referee's findings of fact, it is not bound by the referee's conclusions of law. As a matter of custom, however, the presiding judge will render the judgment recommended by the referee.

Unless otherwise specifically provided, the powers of the referee terminate upon the filing of his report.

The findings of the referee may be excepted to and reviewed the same as if made by the court, and this is by a motion for new trial.

Appeal is the same as a judgment in a trial by the court.

For the big case with complex issues, where counsel are between the Scylla of an individual judge and the Charybdis of a jury of twelve lay persons of unknown

ability to comprehend the issues, a selected trial court of three experienced retired judges would appear to offer the best solution.

Differences Between Judge Pro Tem and General Reference

The end result of a trial before a judge pro tem or under a general reference is basically the same. Nonetheless:

A judge pro tem must be a member of the State Bar; the referee in a voluntary reference may be any qualified person agreed upon by the parties.

A judge pro tem must take an oath of office not required of a referee.

A judge pro tem is said to be acting for the court and derives his powers from the Constitution; a referee is a judicial officer appointed by the court and derives his authority solely from the order of appointment.

A judge pro tem is empowered to act until the final termination of the cause in which he is appointed; the powers of a referee cease upon the filing of his report.

A judge pro tem has complete judicial power to act on the cause in which he is appointed; a referee's authority is restricted by the order of reference that may enlarge or limit his functions, powers and duties.

A judge pro tem is empowered to make findings and conclusions, and render judgment; a referee is empowered to make findings on the whole issue that must stand as the findings of the court and upon which the court renders the judgment.

Within the cause in which he is appointed, a judge pro tem may punish for contempt; a referee may not exercise the power of contempt.

Probably the greatest difference between a judge pro tem and a referee is only cosmetic: 'referee' may have an invidious connotation to the layman of the fighting ring or the football field, whereas 'judge pro tem' conjures up a courtroom.

The Constitution and Code of Civil Procedure provide means whereby litigation can be quickly disposed of by private judging, but to work effectively there must be a willingness of all parties to participate. The traditional "one side wants to get to trial and the other doesn't" attitude must yield to the realization that today's defense counsel is tomorrow's plaintiff counsel, and that obstructionist tactics are wholly inconsistent with the clamor for more expeditious termination of litigation.

—Philip H. Richards
Judge of the Superior Court (Retired)

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Living With Judicial Arbitration: The Wave of the Future

The importance of the Judicial Arbitration Act, which observes its second anniversary on July 1, 1981, is greater today than it was two years ago because the Superior Court will institute a new procedure this summer for reducing the civil active list by diverting cases to arbitration.

Under the new procedure a special department of the Superior Court will conduct hearings on a full-time basis to determine if the judgment in any case would probably be less than \$15,000 and therefore should be ordered to arbitration. This new procedure will start with the cases closest to the mandatory settlement date, with a goal of eventually conducting hearings no later than nine months after the filing of the at-issue memorandum.

If this new procedure is successful, eventually cases will be diverted to arbitration in approximately one year after filing rather than the four to five years under present conditions. Assuming a quick arbitration hearing thereafter, the great majority of Superior Court cases in the future will in all likelihood be tried (arbitrated) within two years of the filing date, a substantial improvement over the present situation where cases are tried only under the shadow of the five-year rule.

Previously, upon recommendation of the mandatory settlement judge, a case would be ordered to arbitration on the day of trial in Department 1. Under this old procedure the "hearing" to determine if a case would be diverted to arbitration was in fact the mandatory settlement conference which was held approximately three weeks before trial. Thus, a case could wait at least four years, and in many instances nearly five years, before it would be removed from the civil active list and sent to arbitration.



Most attorneys are familiar with rules and procedures for arbitrating a case under the American Arbitration Association rules. Unfortunately, this has led to a great many errors on the part of attorneys who assume that the rules under the Judicial Arbitration Act, CCP 1141.10 et seq., are similar. Also, the Act contains significant differences from its predecessor which many attorneys still do not understand. It is extremely important that all attorneys be aware of at least the following:

1. Unlike other arbitration hearings in which the rules of evidence are "waived" or "relaxed" or are only given lenient lip service, the rules of evidence *do apply* under the Judicial Arbitration Act.

2. Even if a case is ordered to arbitration over the outraged cries of the plaintiff that the case is worth more than \$15,000, the arbitrator has the power to make an award *in excess* of \$15,000. Thus an order diverting a case to arbitration does not prejudice a plaintiff by fixing

a \$15,000 ceiling on the award as a matter of law. This is a significant change from the prior arbitration procedure but remains unrecognized by many attorneys in our community.

3. All attorneys are aware that arbitration under the American Arbitration Association, or other private, independent arbitration, produces an "award" which cannot be executed upon until that "award" is reduced to a judgment of the Superior Court. This requires the filing of a petition to, in essence, convert the "award" into a judgment. Normally this is done by special motion in the Law and Discovery Department and is thus a relatively quick procedure. However, it still requires a great deal of attorney time for preparing the necessary papers, serving the opposing side, appearing in court to argue the motion, preparing the judgment, and thereafter obtaining a writ of execution on the judgment.

Under the Judicial Arbitration Act the award itself is placed in the Superior Court Judgment Book. A writ of

Trials de novo Demanded By Plaintiff

Arbitration Award	Superior Court Judgment	Comment
1. \$0	\$0 (Court)	
2. \$0	\$0 (Jury)	Tried in 5 court days 1 year later.
3. #1 \$2,000 #2 \$ 250	#1 \$100 #2 \$0	Tried in 5 court days 1 year later.
4. \$0	\$5,000 (Court)	Tried in 2 court days 19 mo. later.
5. \$0	\$4,000 (Court)	Tried in 1 court day.
6. \$0	\$3,750 (Jury)	Tried in 3 court days 1 year later.
7. \$0	\$2,500 (Jury)	Tried in 7 court days.

Note that none of the cases resulted in a decision approaching the \$15,000 standard set by the Judicial Arbitration Act. Apparently even those matters wherein plaintiff prevailed realistically could have been tried in the Municipal Court.

Trials de novo Demanded By Defendant

Arbitration Award	Superior Court Judgment	Comment
1. \$9,000	\$13,460 (Jury)	Tried in 4 court days 11 mo. later. Defendant obtained worse result.
2. \$10,500	\$22,715 + \$5,000 punitive (Court)	Disaster for defendant.
3. \$5,000	\$8,000 (Jury)	Tried in 3 court days 20 mo. later.
4. \$6,690	\$6,690 (Court)	Apparently the arbitrator was right.
5. \$5,000	\$4,000 (Jury)	Tried in 2 court days 1 year later.
6. \$4,006	\$4,131.60 (Court)	Tried in 2 court days.
7. \$8,759.85	\$8,309.40 (Court)	Tried in 4½ hours - but hardly worth the effort.
8. \$9,627.94	\$7,824.30 (Court)	Tried in 2 court days—again, probably not worth the effort in view of additional counsel fees and costs.
9. \$5,255	Non-suit (Court)	Finally, defendant called it right.

execution may be issued without the necessity of filing another lawsuit and obtaining a judgment from the Law and Discovery Department.

Two years ago there was apprehension in the legal community that the arbitration awards would probably substantially favor either the plaintiff or the defendant (depending on which side of the fence you normally practice), thereby producing a disproportionate number of trials de novo by either plaintiff or defendant. If true, this would have clearly damaged the credibility of the program.

But the latest figures issued by the Judicial Council for the last twenty-one month period in the Los Angeles Superior Court reveal that the requests for trials de novo filed during that period were 52% by plaintiff and 48%

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The Uses of Arbitration in California

"ARBITRATION, n. A patent medicine for allaying international heat, designed to supersede the old-school treatment of bloodletting. It makes the unsuccessful party to the dispute hate two or more nations instead of one — to the unspeakable advantage of the peace."

Ambrose Bierce, *The Devil's Dictionary*

Arbitration as an alternative choice to judicial resolution of disputes is no new thing in California. In *Gunter v. Sanchez* (1850) 1 Cal. 45, the differences between the "reference" of a cause of action and the submission of a dispute to arbitration were discussed sophisticatedly and at some length by the Supreme Court.

The first arbitration statute of California was adopted as §§380 et seq., Chapter V of Statutes of 1851, entitled, "An Act to Regulate Proceedings in Civil Cases in the Courts of Justice in this State."

In the intervening 130 years, two comprehensive revisions (1927 and 1961) of that statute have been made by the Legislature, and the California courts have given strong judicial support to arbitration by upholding the constitutionality of the legislation and the finality of awards. The climate has been so favorable in California that even the United States Supreme Court took note of California's "historical friendliness" to arbitration in the case of *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware* (1973) 414 U.S. 117, 132, 94 S. Ct. 383, 392.

Traditionally, arbitration is defined as the "submission for determination of a disputed matter to private unofficial persons selected in the manner provided by law or agreement of the parties." *Stockwell v. Equitable Fire and Marine Insurance Company* (1933) 134 Cal. App. 534, 540, 25 P. 2d 873, 875-6. Pure arbitration, although sometimes described as "quasi-judicial" (*Accito v. Matmor Canning Co.* (1954) 128 Cal. App. 2d 631, 633, 276 P. 2d 34, 35), has several characteristics that set it apart from judicial decision-making: it is entered into voluntarily; the decision-makers are private, unofficial persons selected by the parties to the dispute; all relevant evidence may be fully admitted; awards are based upon broad principles of equity and justice; and the merits of the dispute are not subject to judicial review.

The present general arbitration statute (now Part 3, Title 9 of the Code of Civil Procedure, §§1280 et seq.) is designed to cover those controversies where the parties themselves have chosen arbitration.

In addition, "arbitration" to resolve disputes over certain kinds of subject matter has been designated by the Legislature a surprising number of times. What the Legislature declares to be arbitration, however, frequently is not pure arbitration at all: the so-called arbitration may have been mandatory, or it may have been required that the award must be supported by "law and substantial evidence" and not by "equity and justice;" or perhaps the award is not final and the dispute may be retried in a court of law.



Eddy S. Feldman

when the parties are either private or public.

A somewhat comprehensive list of instances of "arbitration" of disputes in the California Codes is set out below. No attempt is made to describe in detail the arbitration machinery.

1. *Insurance*: workers' compensation insurance as to self-employed persons (Labor Code, § 5308); county mutual fire reinsurers (Insurance Code, § 8073); uninsured motor vehicles (entitlement to and amount of damages) (Insurance Code, § 11580.2(f)).

2. *Taxes*: determination of domicile (alternative method) (Revenue and Taxation Code, § 14199.4); apportionment and allocation of tax bases as to multistate taxpayers (Revenue and Taxation Code, § 38001 et seq.); interstate arbitration of death taxes (Revenue and Taxation Code, § 14197).

3. *Labor Management Disputes*: the Department of Industrial Relations may arbitrate or arrange for arbitrators in promoting "sound union-employer relationships" (Labor Code, § 65); everything from fact-finding to arbitration (binding) is provided for in the several statutes found in the Public Utilities Code concerning labor-management relationships in local rapid transit districts; grievance machinery, including arbitration between aggrieved academic employees and governing boards, for California State University and Colleges (Education Code, § 89542.5); similarly for faculty personnel of the community colleges (Education Code, §§87672 et seq.) (hearings are governed by Government Code, § 11500, which establishes procedures not for arbitration, but for "adjudicatory hearings"); impasse procedures for public educational employment (Government Code, §§ 3548.5 et seq.); for securities to be transferred from San Francisco City and County Employees Retirement System to the State Teachers Retirement Board (Education Code, § 14119.1); grievance procedure ending in "binding" arbitration may be negotiated by Santa Clara County Fire Protection District (Health and Safety Code, § 13852.5).

4. *Realty*: disputes over damage done by municipal corporations of other water suppliers which enter watersheds in order to supply water (Water Code, § 1246); disputes over proposed plan of any governmental agency or public utility to construct projects that will affect flow of streams, rivers or lakes (Fish and Game Code, § 1601); disputes over apportionment of cost of maintaining and repairing easements among several owners (Civil Code, § 845); disputes over what are fixtures when boundaries change between school districts (Education Code, § 39421), and community college districts (Education Code, § 81501); controversies between school districts and adjacent property owners over boundaries (Educa-

tion Code, § 39491); controversies between community college districts and adjacent property owners over boundaries (Education Code, § 81481); eminent domain compensation (Code of Civil Procedure, §§ 1273.010 et seq.); establishment by State Lands Commission of high water and low water marks (Public Resources Code, § 63587); disputes over price at which non-consenting owner of an interest in an oil or gas tract, which is the subject of a unit agreement, will sell to other parties (Public Resources Code, § 3647; judicial determination can then be had by suit for declaratory judgment); controversies relating to condition of leased premises claimed to have been made untenable (Civil Code, § 1942.1).

5. *Construction*: "any" dispute between a licensee of the Contractors' State License Board and a complainant (Business and Professions Code, § 7085, designated "administrative arbitration"); setting of a fair and equitable price for work changes on streets and highways (Street and Highways Code, § 5237); disputes between a construction contractor and a public agency if the contract already provides that one of the parties may decide any disputes (Civil Code, § 1670).

6. *Other*: controversies between talent agencies and their clients (Labor Code, § 1700.45); disputes between new car dealers and their customers may be arbitrated "amicably" (Vehicle Code, § 3050 (c) (2)); disputes over maintenance or operation of licensed dairy produce exchanges (Food and Agricultural Code, § 57161); disputes over attorney's fees (Business and Professions Code, § 6201 et seq.); certain at-issue civil actions where the amount in controversy does not exceed \$15,000 ("judicial arbitration") (Code of Civil Procedure, § 1141.10 et seq.); disputes arising under health care service plans (Health and Safety Code, §§ 1363 (10) and 1373 (i)); disputes over alleged medical malpractice (Code of Civil Procedure, § 1295); disputes over pricing and product quality in the garment industry (Labor Code, §§ 2685 et seq.); disputes between franchisors and franchisees of franchises other than petroleum franchises and new motor vehicle dealership franchises (Business and Professions Code, § 20040); disputes over penalties that cable TV franchisors impose upon franchisees (Government Code, § 53066.1 (k)).

We can probably expect more such enactments in future sessions of the Legislature. If so, the Legislature should be more consistent and careful in its draftsmanship and, wherever possible, integrate the general arbitration statute into disputes resolution machinery. It is no service to call the disputes resolution machinery "arbitration," which it is not.

Arbitration has no magical attributes. It is not a panacea for judicial glut. It does transfer the decision-making process to another forum and to another group of persons who are more available. Taxpayers do not directly bear the burden of more courtrooms and the supporting administrative structure. But, as has been observed by one justice of our State Supreme Court, the transfer does not necessarily make for better decision-making; nor does it reduce the number of decisions to be made.

While arbitration has been praised because it seems neaper than judicial litigation, it cannot be overlooked that successful arbitration *in volume* probably requires an administrative bureaucracy not dissimilar to the bureaucratic structure surrounding the judges: there must be personnel to receive cases, route them to the arbitrators,

maintain a roster of arbitrators, collect fees, send out notices, keep records, provide hearing places, and supervise and pay employees.

Arbitration hearings are now conducted in the United States by the highly respected American Arbitration Association (AAA). In the field of labor-management relations there are also the Federal Mediation and Conciliation Service and the California Department of Industrial Relations. In California the AAA is deemed so important in some instances that it has been written by the Legislature into the disputes resolving machinery (for example, Labor Code, § 2686 (c); Business and Professions Code, § 20040; and Government Code, § 53066.1 (k)). The result is that there are several decision-making systems running parallel with each other. This is not necessarily bad, but it is a fact.

If arbitration is going to continue to work and not collect the inflexibilities of the judicial system, certain things should be done.

Arbitrators should receive some training in decision-making. Arbitration is not a talent inherent in everyone chosen to resolve an argument. Separate corps of arbitrators who specialize in deciding labor-management disputes, personal injury disputes, and construction disputes already exist. Knowledgeable arbitrators probably discern the issue more speedily than others.

Judges everywhere in the country have substantial opportunities for continuing education in judging, but there are few such programs for arbitrators.

This last observation suggests the usefulness of a center for arbitration activities and studies here in the West. Such a center would collect pertinent arbitration materials, including judicial decisions concerning arbitration, awards, legislation and other relevant literature. The center could also provide assistance to legislative bodies so they could benefit from the best draftsmanship in this field. Such a center would assist in preparing and maintaining the cadres or rosters of arbitrators, and might even be responsible for providing additional arbitral talent.

—Eddy S. Feldman

The President's Report

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ceeding (one to four hours), each party puts on his case through a presentation by the lawyer and, perhaps, one or two live witnesses followed by final argument. The jury deliberates, then renders a non-binding verdict, hopefully giving some reasonable guide to the probable outcome of the case if it is fully tried. Thereafter, settlement discussions are held. If the case does not settle, a regular trial is scheduled.

Before calculating your calendar down to nothing, a *caveat*. As reported by Don Morain in the May 4, 1981 *Herald Examiner*, Judge (Ret.) Eugene E. Sax tried a case as a judge *pro tem*. After presiding over the matter for twenty months, including a nineteen-day trial, the judge wrote a 141-page decision in favor of the plaintiffs. The defendant became so irate that it hauled Sax before the State Judicial Council, apparently contending bias, and has refused to pay certain fees due Sax. Who would do such a thing after stipulating to the judge and then losing? Why, the State of California, through its Attorney General. The moral, if there is one, may be that it isn't how you play the game, it's whether you win or lose.

—Thomas J. McDermott, Jr.

GUIDE TO FASTER TRIALS

METHOD	STATUTORY OR OTHER BASIS	REVIEW NORMALLY AVAILABLE	WHO TO CONTACT
Retired Judicial Officers (Pro Tem)	Const., Art VI, § 21; Rules 244, 532, Cal. Rules of Court	Yes	Arnold R. Pena Civil Courts Coordinator LASC – Room 209 111 No. Hill Street Los Angeles, CA 90012 (Tel. (213) 974-5408)
Retired Judicial Officers (General Reference)	CCP § 638 et. seq.	Yes (CCP §§ 644, 645)	
Judicial Arbitration (Superior Court)	CCP § 1141.10 et. seq. Rule 1600 et. seq. California Rules of Court	Yes (Rule 1616, California Rules of Court)	John B. Austin Arbitration Administrator LASC – Room 218 111 No. Hill Street Los Angeles, CA 90012 (Tel. (213) 974-5462)
Arbitration	CCP § 1280 et. seq.	No (except under limited circumstances – CCP § 1286.2, 1286.6)	Jerry Murase Regional Director American Arbitration Association 443 Shatto Place Los Angeles, CA 90020 (Tel. (213) 383-6516)

Living With Judicial Arbitration

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by defendant. This should put to rest the prior fears that the program would substantially favor one or the other side.

However, the requests for trials de novo have created a different problem. Unfortunately, there are no real sanctions imposed as a condition of filing for a trial de novo. Thus requests for trials de novo are filed in 38-40% of all cases in which an award is rendered. It is the feeling of a substantial number of lawyers that the Judicial Arbitration Statute should be amended to provide that the party filing for a trial de novo must pay for all attorneys' fees incurred thereafter unless a better result is obtained at trial. (This viewpoint is reflected in a recent plebiscite of ABTL, whose members voted more than three to one for the recommendation of sanctions in such instances. See next column.)

Recently the Superior Court has attempted to "prove" what we all intuitively knew about the success of the trial de novo by having the court clerk furnish a copy of the final minute order of every trial de novo to the Court Coordinator for the Superior Court. The results of sixteen trials de novo are known (see charts on page 5). If the first sixteen trials de novo are indicative of a trend – and I submit that they generally are – then the results speak for themselves: they show the general futility of insisting on a trial de novo and also the need for sanctions.

However, the greatest problem the Superior Court faces is the absolute necessity for hundreds of more qualified attorneys to participate as arbitrators. At the present time, 788 cases are being ordered to arbitration each month.

Arbitrators may set matters for hearing either at 6:00 P.M. at the courthouse or anytime in their own offices. A limited number of courtrooms are available, if the arbitrator chooses to hold the hearing at 1:30 P.M. in Superior Court. The arbitrations appear to average one-half day. Arbitrators are paid \$150.00 for each hearing date. If

another day is needed to review documents, review evidence, and write a decision (this is not mandatory but many arbitrators prefer to do so), then request may be made for an additional payment of \$150.00.

Obviously, however, the motivating factor in becoming an arbitrator is to serve the community. Such a contribution is meaningful in terms of reducing the present case backlog and providing expert and quick justice in pending civil actions. Attorneys with business law backgrounds should request appointment to the business law panel when applying to be an arbitrator.

—Robert W. Zakon

(Special thanks is hereby acknowledged to Arnold Pena, Court Coordinator, Superior Court, and John Austin, Arbitration Administrator, for the statistical information in this article. All attorneys are urged to familiarize themselves with the Judicial Arbitration Act, CCP 1141.10 et. seq. and the Rules of Court (Rules 1600-1617) implementing the Act.)

Results of ABTL Plebiscite

A total of 313 postcard ballots were received in response to the ABTL Report plebiscite in Vol. IV, No. 1 on the three principal proposals to relieve court congestion. The results:

- Should the Los Angeles Superior Court institute, on a pilot program basis, a direct calendaring system?

Yes	254 (81%)
No	53 (17%)
Abstain	6 (2%)
- Should the \$15,000 limitation on mandatory arbitration be raised to \$25,000, to \$50,000, or not at all?

To \$25,000	135 (43%)
To \$50,000	91 (29%)
No change	81 (26%)
Abstain	6 (2%)
- Should the party setting aside an arbitration award be liable for attorneys' fees if the trial de novo does not result in a more favorable award?

Yes	262 (84%)
No	44 (14%)
Abstain	7 (2%)