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**WITHOUT CONSENT OF
THE PARTIES . . .**

By Katherine Gallo



If you perform a Lexis search using the words “*Special Master*” in the Code of Civil Procedure you will find “*no results.*” This is because there is no statutory authority for such an appointment. Yet, in the area of Construction Litigation the parties regularly stipulate and the courts appoint a Special Master to handle the case management, discovery rulings and settlement conferences under a Case Management Order.

These Case Management Orders often give the Special Master powers that the **court is not empowered to order**. This includes

1. Deeming all answers with affirmative defenses and cross-complaints filed. **C.C.P. § 431.30**
2. Requiring disclosure of information not permitted by the **Discovery Act**.
3. Allowing non-code compliant discovery. **C.C.P. §§ 2030.060, 2031.060 and 2031.220-240**
4. Staying discovery. See discovery blog “*You Have a Right to Conduct Discovery.*”
5. Conducting settlement conferences while controlling case management and discovery. California Rules of Court, Rule 3.900, Rule 3.920 and Rule 3.1380

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6. Applying the mediation privilege to settlement conferences. **Ev.C. §1117**
7. Requiring payment for conducting settlement conferences. **C.C.P. §645.1**
8. Cloaking all communications in the mediation privilege. **Ev.C. §1125**
9. Violating the mediation privilege by communicating with the court. **Ev.C. §1119, 1121**
10. The ability to rule on good faith settlements. *Aetna Life Insurance v. Superior Court (1986) 182 CA3d 431*
11. The ability to issue sanctions for non-compliance of the CMO/PTO. *Barrientos v. City of Los Angeles (1994) 30 Cal App 4th 63*
12. Not requiring a report to the court within 20 days after a hearing. **C.C.P. §643**

Stipulated references are governed by **C.C.P. §638**, which states:

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 or lease that provides that any controversy arising there- from shall be heard by a referee if the court finds a reference agreement exists between the parties:

(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.

(b) To ascertain a fact necessary to enable the court to determine an action or proceeding.

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However, all parties must give written consent to the reference before the court can grant such an order giving a special master such power.

*“The **written consent requirement is essential** to avoid later confusion about the scope of the reference and, more importantly, to authorize any delegation of adjudicative power to the subordinate court officer. A trial court's nonconsensual general reference constitutes an unconstitutional abdication of judicial authority (Cal. Const., art. VI, § 22).”* *Murphy v. Padilla* (1996) 42 Cal App 4th 707 at 711-12 and the order is **“voidable.”** *Jovine v. FHP, Inc.* (1998) 64 CA4th 1506, 1523.

As stated above, when new parties come into the case, they must affirmatively consent in writing to the assignment giving the Special Master extra powers or the assignment is strictly limited to those given to a Discovery Referee pursuant to **C.C.P. §639(a)(5)**. Those limitations are

“to hear and determine discovery motions and disputes relevant to discovery, the order must state that the referee is authorized to set the date, time, and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings; take evidence; and rule on objections, motions, and other requests made during the course of the hearing.” **CRC, Rule 3.922(e);**

“work with the attorneys in developing a discovery plan, scheduling discovery in the most efficient, rational and least oppressive manner” ***Lu v. Superior Court* (1997) 55 CA4th 1264 at 1269;** and

“report to the court their findings and make a recommendation.” **C.C.P. §639(a)(5)**

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If a party does want to object to that person also being the discovery referee in the case then they must comply with CRC, Rule 3.925 which states in pertinent part that:

*"...Any objection to the appointment of a particular person as a referee must be made with **reasonable diligence**, and in writing. The objection must be heard by the judge to whom the case is assigned, or by the presiding judge or the law and motion judge."*

You may find this blog and additional blogs on California Discovery by Katherine Gallo at www.resolvingdiscoverydisputes.com

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