

Assembly Bill No. 2912

Passed the Assembly August 24, 2000

Chief Clerk of the Assembly

Passed the Senate August 22, 2000

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2000, at _____ o'clock ____M.

Private Secretary of the Governor



CHAPTER _____

An act to amend Sections 638, 639, 640, 641, 641.2, 643, 644, 645, and 645.1 of, to add Section 645.2 to, and to repeal and add Section 642 of, the Code of Civil Procedure, relating to referees.

LEGISLATIVE COUNSEL'S DIGEST

AB 2912, Committee on Judiciary. Referees.

Existing law provides that a referee may be appointed upon the agreement of the parties, and that when the parties do not consent, the court may, upon application of any party or its own motion, direct a reference under certain circumstances.

This bill would require that all nonconsensual appointments of referees be made by a written order that includes specified information, including a specified finding about the parties' ability to pay the referee's fees, and would prohibit a court from making a nonconsensual reference at a cost to the parties if the finding is not made.

The bill would require, in any case when a referee is appointed to hear and determine discovery motions and disputes, a copy of the order appointing the referee to be forwarded to the office of the presiding judge of the court and would require the Judicial Council to collect information on the use of referees in discovery proceedings and the fees charged to litigants, and to report these findings to the Legislature by January 1, 2003.

The bill would incorporate additional changes to Section 639 of the Code of Civil Procedure made by SB 2153 to become operative only if both bills are enacted and this bill is enacted last.

Existing law provides, in the case of a consensual general reference, that the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, or with the judge where there is no clerk, judgment may be entered



thereon in the same manner as if the action had been tried by the court.

This bill would provide, in the case of all other references, the decision of the referee or commissioner is only advisory, and the court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court.

The bill would make other related changes.

The bill would direct the Judicial Council to adopt all rules of court necessary to implement these provisions. The bill would also direct the Judicial Council to collect information regarding the use of these referees and fees paid by the parties for the use of referees. The bill would require the Judicial Council to report to the Legislature regarding this information by January 1, 2003.

The people of the State of California do enact as follows:

SECTION 1. Section 638 of the Code of Civil Procedure is amended to read:

638. A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes or in the docket, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom 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 thereon.

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

(c) In any matter in which a referee is appointed pursuant to this section, a copy of the order shall be forwarded to the office of the presiding judge. The Judicial Council shall, by rule, collect information on the use of these referees. The Judicial Council shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those



fees is reported to the court. The Judicial Council shall report thereon to the Legislature by January 1, 2003. This subdivision shall become inoperative on January 1, 2004.

SEC. 2. Section 639 of the Code of Civil Procedure is amended to read:

639. (a) When the parties do not consent, the court may, upon the 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 referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

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

(b) All appointments of referees pursuant to this section shall be by written order and shall include the following:

(1) When the referee is appointed pursuant to paragraph (1), (2), (3), or (4) of subdivision (a), a statement of the reason the referee is being appointed.

(2) When the referee is appointed pursuant to paragraph (5) of subdivision (a), the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case.

(3) The subject matter or matters included in the reference.

(4) The name, business address, and telephone number of the referee.



(5) The maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. Upon the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours subject to any findings as set forth in paragraph (6).

(6) (A) Either a finding that no party has established an economic inability to pay a pro rata share of the referee's fee or a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee. A court shall not appoint a referee at a cost to the parties if neither of these findings is made.

(B) In determining whether a party has established an inability to pay the referee's fees under subparagraph (A), the court shall consider only the ability of the party, not the party's counsel, to pay these fees. If a party is proceeding in forma pauperis, the party shall be deemed by the court to have an economic inability to pay the referee's fees. However, a determination of economic inability to pay the fees shall not be limited to parties that proceed in forma pauperis. For those parties who are not proceeding in forma pauperis, the court, in determining whether a party has established an inability to pay the fees, shall consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation.

(c) In any matter in which a referee is appointed pursuant to paragraph (5) of subdivision (a), a copy of the order appointing the referee shall be forwarded to the office of the presiding judge of the court. The Judicial Council shall, by rule, collect information on the use of these references and the reference fees charged to litigants, and shall report thereon to the Legislature by January 1, 2003. This subdivision shall become inoperative on January 1, 2004.

SEC. 2.5. Section 639 of the Code of Civil Procedure is amended to read:



639. (a) When the parties do not consent, the court may, upon the 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 referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

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

(b) In a discovery matter, a motion to disqualify an appointed referee pursuant to Section 170.6 shall be made to the court by a party either:

(A) Within 10 days after notice of the appointment, or if the party has not yet appeared in the action, a motion shall be made within 10 days after the appearance, if a discovery referee has been appointed for all discovery purposes.

(B) At least five days before the date set for hearing, if the referee assigned is known at least 10 days before the date set for hearing and the discovery referee has been assigned only for limited discovery purposes.

(c) When a referee is appointed pursuant to paragraph (5) of subdivision (a), the order shall indicate whether the referee is being appointed for all discovery purposes in the action.

(d) All appointments of referees pursuant to this section shall be by written order and shall include the following:



(1) When the referee is appointed pursuant to paragraph (1), (2), (3), or (4) of subdivision (a), a statement of the reason the referee is being appointed.

(2) When the referee is appointed pursuant to paragraph (5) of subdivision (a), the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case.

(3) The subject matter or matters included in the reference.

(4) The name, business address, and telephone number of the referee.

(5) The maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. Upon the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours subject to any findings as set forth in paragraph (6).

(6) (A) Either a finding that no party has established an economic inability to pay a pro rata share of the referee's fee or a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee. A court shall not appoint a referee at a cost to the parties if neither of these findings is made.

(B) In determining whether a party has established an inability to pay the referee's fees under subparagraph (A), the court shall consider only the ability of the party, not the party's counsel, to pay these fees. If a party is proceeding in forma pauperis, the party shall be deemed by the court to have an economic inability to pay the referee's fees. However, a determination of economic inability to pay the fees shall not be limited to parties that proceed in forma pauperis. For those parties who are not proceeding in forma pauperis, the court, in determining whether a party has established an inability to pay the fees, shall consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation.



(e) In any matter in which a referee is appointed pursuant to paragraph (5) of subdivision (a), a copy of the order appointing the referee shall be forwarded to the office of the presiding judge of the court. The Judicial Council shall, by rule, collect information on the use of these references and the reference fees charged to litigants, and shall report thereon to the Legislature by January 1, 2003. This subdivision shall become inoperative on January 1, 2004.

SEC. 3. Section 640 of the Code of Civil Procedure is amended to read:

640. (a) The court shall appoint as referee or referees the person or persons, not exceeding three, agreed upon by the parties.

(b) If the parties do not agree on the selection of the referee or referees, each party shall submit to the court up to three nominees for appointment as referee and the court shall appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection. If no nominations are received from any of the parties, the court shall appoint one or more referees, not exceeding three, against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a referee.

(c) Participation in the referee selection procedure pursuant to this section does not constitute a waiver of grounds for objection to the appointment of a referee under Section 641 or 641.2.

SEC. 4. Section 641 of the Code of Civil Procedure is amended to read:

641. A party may object to the appointment of any person as referee, on one or more of the following grounds:

(a) A want of any of the qualifications prescribed by statute to render a person competent as a juror, except a requirement of residence within a particular county in the state.

(b) Consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation which is



a party, or to any judge of the court in which the appointment shall be made.

(c) Standing in the relation of guardian and ward, conservator and conservatee, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party; or a partner in business with either party; or security on any bond or obligation for either party.

(d) Having served as a juror or been a witness on any trial between the same parties.

(e) Interest on the part of the person in the event of the action, or in the main question involved in the action.

(f) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(g) The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

SEC. 5. Section 641.2 of the Code of Civil Procedure is amended to read:

641.2. In any action brought under Article 8 (commencing with Section 12600) of Chapter 6, Part 2, Division 3, Title 3 of the Government Code, a party may object to the appointment of any person as referee on the ground that the person is not technically qualified with respect to the particular subject matter of the proceeding.

SEC. 6. Section 642 of the Code of Civil Procedure is repealed.

SEC. 7. Section 642 is added to the Code of Civil Procedure, to read:

642. Objections, if any, to a reference or to the referee or referees appointed by the court shall be made in writing, and must be heard and disposed of by the court, not by the referee.

SEC. 8. Section 643 of the Code of Civil Procedure is amended to read:

643. (a) Unless otherwise directed by the court, the referees or commissioner must report their statement of decision in writing to the court within 20 days after the



hearing, if any, has been concluded and the matter has been submitted.

(b) A referee appointed pursuant to Section 638 shall report as agreed by the parties and approved by the court.

(c) A referee appointed pursuant to Section 639 shall file with the court a report that includes a recommendation on the merits of any disputed issue, a statement of the total hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment. The referee shall serve the report on all parties. Any party may file an objection to the referee's report or recommendations within 10 days after the referee serves and files the report, or within another time as the court may direct. The objection shall be served on the referee and all other parties. Responses to the objections shall be filed with the court and served on the referee and all other parties within 10 days after the objection is served. The court shall review any objections to the report and any responses submitted to those objections and shall thereafter enter appropriate orders. Nothing in this section is intended to deprive the court of its power to change the terms of the referee's appointment or to modify or disregard the referee's recommendations, and this overriding power may be exercised at any time, either on the motion of any party for good cause shown or on the court's own motion.

SEC. 9. Section 644 of the Code of Civil Procedure is amended to read:

644. (a) In the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon in the same manner as if the action had been tried by the court.

(b) In the case of all other references, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in



part after independently considering the referee's findings and any objections and responses thereto filed with the court.

SEC. 10. Section 645 of the Code of Civil Procedure is amended to read:

645. The decision of the referee appointed pursuant to Section 638 or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the decision reported has the effect of a special verdict.

SEC. 11. Section 645.1 of the Code of Civil Procedure is amended to read:

645.1. (a) When a referee is appointed pursuant to Section 638, the referee's fees shall be paid as agreed by the parties. If the parties do not agree on the payment of fees and request the matter to be resolved by the court, the court may order the parties to pay the referee's fees as set forth in subdivision (b).

(b) When a referee is appointed pursuant to Section 639, at any time after a determination of ability to pay is made as specified in paragraph (6) of subdivision (b) of Section 639, the court may order the parties to pay the fees of referees who are not employees or officers of the court at the time of appointment, as fixed pursuant to Section 1023, in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties. For purposes of this section, the term "parties" does not include parties' counsel.

SEC. 12. Section 645.2 is added to the Code of Civil Procedure, to read:

645.2. The Judicial Council shall adopt all rules of court necessary to implement this chapter.

SEC. 13. Section 2.5 of this bill incorporates amendments to Section 639 of the Code of Civil Procedure proposed by both this bill and SB 2153. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2001, (2) each bill amends Section 639 of the Code of Civil Procedure, and (3) this bill is enacted after SB 2153, in which case Section 2 of this bill shall not become operative.



Approved _____, 2000

Governor

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