



# Use and Cost of References in General Civil Cases

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A REPORT TO THE CALIFORNIA  
LEGISLATURE



ADMINISTRATIVE OFFICE  
OF THE COURTS

# USE AND COST OF REFERENCES IN GENERAL CIVIL CASES

A REPORT TO THE CALIFORNIA LEGISLATURE

August 2004

Judicial Council of California  
Administrative Office of the Courts  
Office of the General Counsel

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Administrative Office of the Courts  
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This report has been prepared and submitted to the California Legislature pursuant to Code of Civil Procedure sections 638(c) and 639(e) (Assem. Bill 2912; Stats. 2000, ch. 644), and Code of Civil Procedure section 640.5 (Sen. Bill 475; Stats. 2001, ch. 362).

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We thank the individual referees who facilitated this study by directly providing information concerning the cases in which they were appointed and their time and charges in those cases. We also thank the management and staff of Judicial Arbitration and Mediation Services (JAMS) for assisting in providing information about the time spent and fees charged by referees whose services JAMS administered.

We express our special appreciation to Ron Pi for collecting and analyzing the data that is summarized in this report. We also extend our sincere thanks to all others who have contributed their expertise to this project particularly Michael Bergeisen, Kenneth L. Kann, Dag MacLeod, Cliff Alumno, Benita Downs, Cynthia Agno, Wincy Wong, and Mary Nelson.



## I. Executive Summary

This report is submitted pursuant to California Code of Civil Procedure sections 638(c), 639(e), and 640.5. These sections required the Judicial Council to collect information from the courts and report to the Legislature concerning: (1) the use of references, particularly discovery references; (2) the time spent by referees in fulfilling their appointments; and (3) the fees charged to litigants for referees' services.

From July 2001 through December 2003, the superior courts provided the Administrative Office of the Courts with copies of (1) orders concerning the appointment and compensation of referees and (2) referees' reports. The Administrative Office of the Courts also directly collected information from approximately 35 referees about the time they spent and the fees they charged litigants for references.

The information obtained by the Administrative Office of the Courts shows that on a statewide basis:

- Referees were appointed in 486 general civil cases during the study period. This translates to roughly 1 reference ordered per 1,000 unlimited civil filings during this period.
- Approximately half (51 percent) of the references were ordered under Code of Civil Procedure section 639 (nonconsensual); one-quarter (25 percent) of the references were ordered under section 638 (consensual); and the statutory basis for approximately one-quarter (24 percent) of the references could not be determined.
- Approximately three-quarters (76 percent) of the reference orders assigned the referee some responsibility for addressing discovery disputes. Slightly less than half of the orders (48 percent) appointed the referee only for discovery purposes, and slightly less than one-third (29 percent) appointed the referee for both discovery and settlement purposes.
- Overall, "nonconsensual" reference orders under Code of Civil Procedure section 639 included discovery issues more often than "consensual" reference orders under section 638 (90 percent versus 67 percent). Similarly, more section 639 orders than section 638 orders appointed the referee only for discovery (55 percent versus 42 percent) and for both discovery and settlement (35 percent versus 25 percent).
- The number of hours spent by referees per case ranged from 1 hour to 300 hours; the median time spent was 16 hours. No statistically significant differences were found in the time spent by referees in references ordered under section 638 and under section 639 or in references ordered for different purposes.



- The total fees charged to the litigants for the referee's services ranged from \$150 to approximately \$92,000; the median fee charged was \$5,625. The fees charged did not appear to be related to the statutory basis for the appointment. However, there was a statistically significant difference between the median fee for references that were limited to discovery purposes (\$3,903) and the median fee for references ordered for both discovery and settlement purposes or for settlement purposes only (\$18,568).

## II. Introduction and Background

California Code of Civil Procedure sections 638(c), 639(e), and 640.5 required the Judicial Council to collect information from the courts and report to the Legislature concerning: (1) the use of references, particularly discovery references; (2) the time spent by referees in fulfilling their appointments; and (3) the fees charged to litigants for referees' services. This report summarizes information provided to the Administrative Office of the Courts concerning references in general civil cases<sup>1</sup> under Code of Civil Procedure sections 638 and 639.

Reference is a process in which the court appoints a neutral third party—the referee—to review information submitted by the parties or to conduct independent research into the facts and then to submit findings, recommendations, or a decision to the parties or the court.

A “consensual” reference may be ordered under Code of Civil Procedure section 638 upon an agreement of the parties filed with the court, or upon the motion of a party to a written contract or lease that provides that any dispute will be heard by a referee. A “nonconsensual” reference may be ordered under the circumstances specified in Code of Civil Procedure section 639(a). Most significant to this study, section 639(a)(5) authorizes the court to appoint a referee without the parties' consent when the court determines that it is necessary for a referee to hear and determine discovery motions and disputes relevant to discovery.

The use and cost of references has been a periodic subject of discussion. Legislation proposed in 1997 would have required the Judicial Council to collect information and report to the Legislature on the use of references in discovery proceedings;<sup>2</sup> however, this provision was subsequently removed from the bill.<sup>3</sup> In 1999, the Judicial Council's Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System, reported that truly consensual references are seen as a helpful tool litigants can use, particularly in complex cases or cases in which substantive expertise would assist in the resolution of the dispute.<sup>4</sup> In contrast, the subcommittee reported concerns about nonconsensual references, particularly discovery references.<sup>5</sup> The

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<sup>1</sup> “General civil case” means all civil cases except probate, guardianship, conservatorship, family law (including proceedings under the Family Law Act, Uniform Parentage Act, and Uniform Child Custody Jurisdiction Act; freedom from parental custody and control proceedings; and adoption proceedings), juvenile court proceedings, small claims proceedings, unlawful detainer proceedings, and “other civil petitions” as defined by the Judicial Branch Statistical Information Data Collection Standards. (Cal. Rules of Court, rule 200.1(1).)

<sup>2</sup> Sen. Bill 19 (1997-1998 Reg. Sess.) as amended July 14, 1997.

<sup>3</sup> Sen. Bill 19, *supra*, as amended August 24, 1998

<sup>4</sup> Judicial Council of California, *Alternative Dispute Resolution in Civil Cases: The Report of the Task Force on the Quality of Justice Subcommittee on Alternative Dispute Resolution and the Judicial System* (August 1999) pp. 57–58. Available online at [www.courtinfo.ca.gov/reference/documents/adrreport.pdf](http://www.courtinfo.ca.gov/reference/documents/adrreport.pdf).

<sup>5</sup> The subcommittee identified three major issues of concern with regard to nonconsensual references: (1) the perception that these references were being made in routine discovery matters; (2) the method used by the court to

subcommittee recommended various amendments to the statutes relating to references, including an amendment requiring the Judicial Council to collect information and report to the Legislature on the use of discovery references and the reference fees charged to litigants.<sup>6</sup>

To address these concerns and recommendations, the Judicial Council sponsored Assembly Bill 2912 (Stats. 2000, ch. 644), which amended section 638, section 639, and other sections of the Code of Civil Procedure relating to references. The amendments to sections 638 and 639, among other things, required the reporting, collection, and study of information concerning the use of referees, the time spent by referees, and the referees' fees, especially in connection with discovery disputes:

- **Section 638(c)** required that (1) copies of all orders appointing referees upon the agreement of the parties be forwarded to the office of the presiding judge and (2) the Judicial Council collect information on the use of these referees and information on the fees paid by the parties for the use of referees, to the extent that information regarding those fees was reported to the court.
- **Section 639(e)** required that (1) copies of orders appointing discovery referees pursuant to section 639(a)(5) be forwarded to the office of the presiding judge and (2) the council collect information on the use of these referees and the reference fees charged to the litigants.
- **Section 640.5**, which was separately enacted in 2001, expressed the Legislature's intent to have the practice and cost of referring discovery disputes to outside referees thoroughly reviewed. This section required the council to collect information from the trial courts and report on the use of referees in discovery matters pursuant to either section 638 or 639, including information on the number of referees, the cost to the parties, and the time spent by the discovery referees.<sup>7</sup>

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select the referee and the perception of favoritism in this selection process; and (3) the fees charged by the referees and the method used by the courts to allocate these fees among the parties. (*Id.* at p. 97.)

<sup>6</sup> This recommendation was, in part, modeled after the provision at one time included in Senate Bill 19. (*Id.* at pp. 97–98 (recommendation 16); and at Appendix 7, p. 8.)

<sup>7</sup> All three provisions ultimately directed the Judicial Council to report to the Legislature by July 1, 2003. (As initially enacted, sections 638(c) and 639(e) required the council to report by January 1, 2003; however, the legislation enacting section 640.5 extended these reporting dates to July 1, 2003.) This report has been delayed as a result of additional steps taken to collect data directly from referees concerning the time they spent and the fees they charged, which was not available from the courts and was necessary to provide information about the cost of references.

### III. Data Collection

This section briefly describes how the Judicial Council collected the data used in this study. The appendix contains more detailed information about the methods used to collect the data and the scope and reliability of the data.

To carry out the mandated study, the Judicial Council adopted rules 244.1(h) and 244.2(i) of the California Rules of Court, effective July 1, 2001. Rule 244.1(h) required that in references ordered under section 638 (consensual references), a copy of any order appointing a referee, the referee's report, and any order of the court concerning the compensation of the referee be forwarded to the office of the presiding judge. The rule further required that the presiding judge forward copies of these orders and reports to the Administrative Office of the Courts on a monthly basis. Rule 244.2(i) established the same requirement with respect to any reference ordered under section 639 (nonconsensual references).<sup>8</sup>

Under rules 244.1(h) and 244.2(i), data collection began on July 1, 2001 and continued through December 2003. However, this report generally examines references ordered or conducted from July 1, 2001 through September 30, 2003 ("the study period").<sup>9</sup>

Preliminary analyses while data collection was under way suggested that some superior courts might not have identified or forwarded all of the relevant reference orders and referees' reports to the Administrative Office of the Courts.<sup>10</sup> Additionally, most of the referees' reports that were forwarded to the Administrative Office of the Courts did not include information about the time spent or the fees charged by the referee.<sup>11</sup>

To address these data limitations, staff wrote to the presiding judges and executive officers of all the superior courts requesting verification that all relevant reference orders and reports had been forwarded by their courts. Permission to contact referees to directly obtain information about their time and charges was also requested from courts that had forwarded reference orders. With the courts' authorization and assistance, staff interviewed approximately 15 referees in 2003 and surveyed approximately 40 additional

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<sup>8</sup> The reporting requirement of rule 244.2(i) was not limited to discovery references, and was therefore broader than the mandate of Code of Civil Procedure section 639(e).

<sup>9</sup> Some references considered in this report may actually have been ordered before July 1, 2001. Since this report was expected to be filed by June 30, 2003, a small number of reference orders and referees' reports received after that date are not reflected in this report. Reference orders and reports that were filed after September 30, 2003 were not entered into the database so that analysis and presentation of the data could begin.

<sup>10</sup> The oversight of some reference orders and reports was foreseeable because most courts did not have systems in place for tracking cases in which references were ordered. While some courts were able to identify reference orders through their case management systems, others relied on the judges who made reference orders to submit those orders to the presiding judge.

<sup>11</sup> Referees appointed under section 639 (consensual references) are required to file a report with the court that includes a statement of the total hours spent and the total fees charged by the referee. (Code Civ. Proc. § 643(c).) There is no parallel statutory requirement for referees appointed under section 638 (consensual references), who instead are required to report as agreed by the parties and approved by the court. (Code Civ. Proc. § 643(b).)

referees in 2004 to determine the time they had spent and the fees they had charged in references for which they were appointed during the study period.

This report summarizes the information that the Administrative Office of the Courts obtained from superior courts and referees about the use and cost of references in general civil cases during the study period. While the data available for the study have limitations, this report provides the first broad view of the use and cost of references in California general civil cases. It provides information about the frequency, purposes, and costs of those references during the study period. It may also serve as a baseline for future measurements of trends in the use and cost of references.

## IV. Findings

### A. Use of References

#### Numbers of courts and cases in which references were ordered

Out of the 58 superior courts in California, 32 courts (55 percent) forwarded one or more orders appointing referees to the Administrative Office of the Courts.<sup>12</sup> Combined, these orders indicate that referees were appointed in a total of 486 general civil cases during the 27-month study period.<sup>13</sup>

Figure 1 shows the number of general civil cases in each superior court for which reference orders were received. Because there appear to be some significant geographical differences in the use and cost of references, the courts are grouped in the three regions used by the Administrative Office of the Courts.

**Figure 1. References in General Civil Cases—July 1, 2001 – September 30, 2003**

Northern/Central Region Superior Courts			Bay Area/Northern Coastal Region Superior Courts			Southern Region Superior Courts		
<i>County</i>	<i>Number of Cases in Which Reference Reported</i>	<i>References per 1,000 Unlimited Civil Filings</i>	<i>County</i>	<i>Number of Cases in Which Reference Reported</i>	<i>References per 1,000 Unlimited Civil Filings</i>	<i>County</i>	<i>Number of Cases in Which Reference Reported</i>	<i>References per 1,000 Unlimited Civil Filings</i>
Butte	1	0.47	Alameda	23	1.01	Los Angeles	83	0.66
El Dorado	2	1.16	Contra Costa	5	0.29	Orange	122	3.33
Fresno	14	1.58	Marin	10	2.58	Riverside	9	0.44
Kern	1	0.20	Monterey	8	1.03	San Bernardino	2	0.14
Merced	1	0.90	San Benito	1	1.03	San Diego	84	2.62
Mono	1	2.86	San Francisco	3	0.13	Santa Barbara	2	0.56
Nevada	2	1.78	San Mateo	19	3.00	Ventura	4	0.56
Placer	7	2.05	Santa Clara	16	0.90			
Sacramento	29	1.38	Santa Cruz	5	2.32			
San Joaquin	12	1.40	Solano	7	1.55			
Siskiyou	1	2.21	Sonoma	5	0.57			
Stanislaus	2	0.41						
Tulare	3	1.36						
Yolo	2	1.50						
<b>Subtotal for region</b>	<b>78</b>	<b>1.00</b>	<b>Subtotal for region</b>	<b>102</b>	<b>0.84</b>	<b>Subtotal for region</b>	<b>306</b>	<b>1.25</b>
No references were reported during the study period by the Superior Courts of Alpine, Amador, Calaveras, Colusa, Glenn, Kings, Lassen, Madera, Mariposa, Modoc, Plumas, Shasta, Sierra, Sutter, Tehama, Tuolumne, Trinity, and Yuba Counties.			No references were reported during the study period by the Superior Courts of Del Norte, Humboldt, Lake, Mendocino, and Napa Counties.			No references were reported during the study period by the Superior Courts of Imperial, Inyo, and San Luis Obispo Counties.		
<b>Statewide total:</b>								
<b>Number of Cases in Which References Reported: 486</b>								
<b>References per 1,000 Unlimited Civil Filings: 1.09</b>								

<sup>12</sup> The other 26 courts informed Administrative Office of the Courts staff that they had not appointed referees under Code of Civil Procedure section 638 or 639 during the study period.

<sup>13</sup> These include orders appointing referees under Code of Civil Procedure sections 638 and 639, as well as orders whose statutory bases could not be determined. The courts forwarded 711 reference orders; however, some of these were duplicates or represented multiple orders in a single case. Successive reference orders were made in some cases, apparently because the original referee was disqualified or declined to serve. In other cases, two referees were appointed for different purposes. Reference orders concerning family and probate cases that were forwarded by 10 superior courts were excluded from the study for the reasons explained in the appendix.

Overall, 26 courts (45 percent) informed the Administrative Office of the Courts staff that they had not appointed any referees under Code of Civil Procedure section 638 or 639 during the study period; 18 courts (32 percent) forwarded 1 to 5 reference orders to the Administrative Office of the Courts; 5 courts (9 percent) forwarded 6 to 10 orders; 6 courts (10 percent) forwarded 11 to 50 orders; and 3 courts (5 percent) forwarded more than 50 reference orders each.

To help assess the relative frequency with which the individual courts appointed referees, we divided the number of cases for which reference orders were received from each court by the number of unlimited civil cases filed in that court during the study period. Figure 1 shows the approximate number of references per 1,000 unlimited civil filings for each court.<sup>14</sup>

On a statewide basis, these data indicate that references were ordered in 1.09 cases per 1,000 unlimited civil cases filed, or in slightly more than one-tenth of 1 percent of the cases filed.<sup>15</sup> Courts in the Southern Region reported the highest rate of references (1.25 per 1,000 filings) and courts in the Bay Area/Northern Coastal Region reported the lowest rate (.84 per 1,000 filings). Courts in the Northern/Central Region reported an intermediate rate (1 per 1,000 filings). The highest rate reported by any individual court was 3.33 references per 1,000 unlimited civil filings, or slightly more than three-tenths of 1 percent of the cases filed.

### **Statutory bases for and purposes of reference orders**

This section of the report examines the proportions of the reference orders received by the Administrative Office of the Courts that were made under section 638 (consensual) and made under section 639 (nonconsensual). It also examines the purposes of these

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<sup>14</sup> Dividing the annualized number of references ordered by the annual number of unlimited civil filings gives some indication of the frequency of reference orders. However, this is not a precise measure for several reasons. First, the reference orders and the unlimited civil filings for a given court reflected in Figure 1 do not relate to identical groups of cases. (The numerator of the fraction from which each decimal figure was derived is based on the dates the references were *ordered*, and the denominator is based on the dates the cases were *filed*. Some reference orders made during the study period may have been made in cases that were filed before the study period, and in some cases filed during the study period, references may have been ordered after the study period ended.) Additionally, a small number of the references reported may have been for limited civil cases, which are not included in the number of unlimited civil filings. Finally, to the extent that references were ordered but not reported to the Administrative Office of the Courts, the rate would be understated.

<sup>15</sup> Referee reports, interviews, and survey responses identified another 333 proceedings that may have been references ordered in general civil cases during the study period but for which the Administrative Office of the Courts did not receive reference orders. These proceedings are not included in this section's discussion of the use of references or in Table 1 because it is not possible to determine the nature of the proceeding, the case classification, the date of the appointment, the statutory authority for the appointment, or the purpose of the reference or other proceeding from these information sources. (These proceedings are considered in section IV.B, however, which discusses the time spent by referees and the fees charged to the litigants.) If these proceedings were included in calculating the number of references per 1,000 filings, the statewide rate would be approximately 1.84 references per 1,000 unlimited civil cases filed, or slightly less than two-tenths of 1 percent of the cases filed.

references, as stated in the reference orders. In this discussion, particular attention is directed to discovery references.<sup>16</sup>

As already noted, section 638 generally authorizes the appointment of referees with the parties' agreement (consensual references) and section 639 generally authorizes the appointment without the parties' agreement (nonconsensual references).<sup>17</sup>

The statutory basis for appointing a referee determines the permissible purpose and scope of a reference. A referee may be appointed under Code of Civil Procedure section 638 either to hear and determine any or all of the issues, whether of fact or of law, or to ascertain a fact necessary to enable the court to determine an action or proceeding. In contrast, a referee may be appointed under section 639 only for the purposes specified in subdivision (a) of that section, including "[w]hen 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."<sup>18</sup> It has also been held that Code of Civil Procedure section 187 and California Standards of Judicial Administration section 19 authorize the appointment of a referee without the parties' consent to conduct settlement conferences in a case that has been determined to be complex. (See *Lu v. Superior Court* (1997) 55 Cal.App.4th 1264, 1271.)

The statutory basis for appointing a referee also determines the effect of the referee's decision. When the referee is appointed under section 638 to hear and determine any and all issues, the proceeding is referred to as a "general reference," and the referee's decision is binding. In all other references the decision of the referee is an advisory

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<sup>16</sup> As discussed on pages 3–4, a primary impetus for the legislation mandating this study was concern about the use and cost of discovery referees. Moreover, Code of Civil Procedure section 640.5 specifically directed the Judicial Council to collect and report information concerning the use of referees in discovery matters pursuant to sections 638 and 639.

<sup>17</sup> There are two noteworthy variations on the generalization that section 638 references are consensual and section 639 references are nonconsensual. Because section 638 permits appointment "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," a section 638 reference may sometimes be ordered over the objection of a party who, the court determines, agreed to use a referee before the dispute arose. Additionally, although section 639 authorizes the court to appoint a referee in specified circumstances when the parties do not consent, anecdotal evidence from referee interviews indicates that references are sometimes ordered under section 639 based on the parties' stipulation. This may be especially common in multiparty construction defect cases, because it facilitates the inclusion of parties who are brought into the action after a reference order is made.

<sup>18</sup> Code of Civil Procedure section 639(a) provides: "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 pursuant to the provisions of subdivision (b) of Section 640: (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."



recommendation to the court. (Code Civ. Proc., § 644.)

*Proportions of references ordered under section 638 and under section 639*

Statewide, 51 percent of the reference orders received by the Administrative Office of the Courts indicated that the referee was appointed under Code of Civil Procedure section 639, and 25 percent indicated that the referee was appointed under section 638. In the remaining 24 percent of the reference orders it was not possible to determine whether the referee was appointed under section 638 or 639; some of these orders did not specify a statutory basis, and others indicated that the referee was appointed under both sections.

Courts in Southern California appeared to more frequently appoint referees under section 639 than did courts in Northern California. Of the reference orders from the Southern Region, 62 percent indicated that the referee was appointed under section 639, compared with 44 percent of the orders from the Northern/Central Region and 26 percent of the orders from the Bay Area/Northern Coastal Region. However, it is important to note that the statutory basis for appointment of the referee was indiscernible in a significantly higher proportion of orders from the courts in the two northern regions (31 percent from Northern/Central and 36 percent from Bay Area/Northern Coastal) than in those from Southern Region courts (18 percent). It is therefore possible that more Northern California appointments were made under section 639 than our data show.

*Purpose of appointment*

Figure 2 shows the number and percentage of reference orders received by the Administrative Office of the Courts that were made for specified purposes. The top half of the figure compares the purposes of the orders that were identified as having been made under Code of Civil Procedure sections 638 with those made under section 639. The bottom half shows the purposes of all 486 reference orders received, without regard to the statutory basis for the appointment.

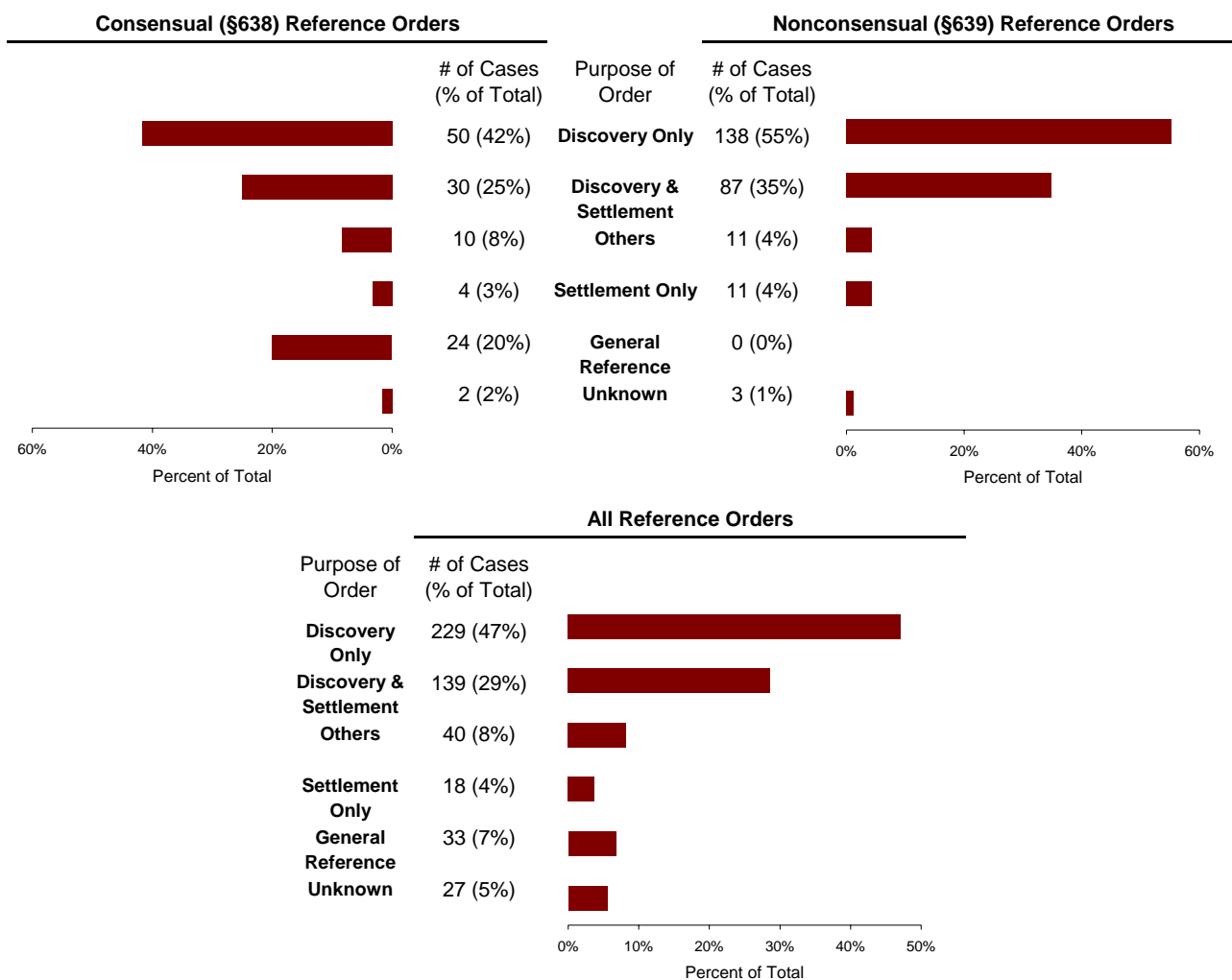
A total of 120 reference orders indicated that the referee was appointed under section 638. In 42 percent of these section 638 references, the referee was appointed only for discovery purposes; in 25 percent, the referee was appointed for settlement as well as discovery; in 20 percent, the referee was appointed to conduct a general reference;<sup>19</sup> and in 3 percent, the referee was appointed for settlement purposes only. In 2 percent of the section 638 references it was not possible to determine the purpose for which the referee was appointed.

A total of 250 reference orders indicated that the referee was appointed under section 639. In 55 percent of the section 639 references, the referee was appointed only for discovery purposes; in 35 percent, the referee was appointed for settlement as well as discovery; and in 4 percent, the referee was appointed for settlement purposes only. In

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<sup>19</sup> These general references, in which a referee was appointed to hear and determine any and all issues, may also have included some discovery disputes. However, this is not discernible from the reference orders or other information provided to the Administrative Office of the Courts.

**Figure 2. Purpose of appointment**



1 percent of the section 639 references it was not possible to determine the purpose for which the referee was appointed.

This breakdown indicates that referees were more frequently appointed for discovery purposes under section 639 than under section 638. In 90 percent of the section 639 reference orders, the order indicated discovery was among the purposes of the reference. In contrast, only 67 percent of the section 638 orders indicated that discovery was among the purposes for the reference.

Overall, among all the reference orders received (including references ordered under sections 638 and 639 and references in which the statutory basis for appointment is unknown), 47 percent indicated that the referee was appointed only for discovery purposes, and 29 percent indicated that the referee was appointed for both settlement and discovery purposes.<sup>20</sup> Referees were appointed only for settlement purposes in 4 percent

<sup>20</sup> References that included both discovery and settlement were particularly prevalent in case management orders in multiparty construction defect cases. (Some such orders appointed different referees to fulfill the discovery and

of the orders. In 5 percent of all the references, it was not possible to determine the purpose for which the referee was appointed.

### **Numbers and backgrounds of referees**

A total of 214 individuals were appointed as referees in the 486 general civil cases for which the Administrative Office of the Courts received reference orders during the study period. Most of these individuals (66 percent) were appointed as referees in only one case. However, there was a small number of individuals who were appointed to serve in relatively large proportion of the 486 cases. The 20 most frequently named individuals (approximately 10 percent of the referees) were appointed in about 40 percent of all the cases, and the 40 most frequently named individuals (approximately 20 percent of the referees) were appointed in about 60 percent of all the cases.

Statewide, the 214 referees consisted of approximately equal numbers of retired judicial officers (48 percent) and other individuals (52 percent).<sup>21</sup> The groups of most frequently appointed referees were comprised of similar proportions of retired judicial officers and other individuals. Thus, the study provides no evidence that retired judicial officers are more likely than other individuals who serve as referees to be appointed frequently.

Retired judicial officers and other individuals do, however, appear to be most frequently appointed for different purposes. Retired judicial officers were appointed in 60 percent of the references ordered for purposes of discovery only and in 62 percent of the general references. In contrast, individuals other than retired judicial officers were much more frequently appointed in references that included settlement: they were appointed in 85 percent of the references for purposes of both settlement and discovery and in 74 percent of the references for purposes of settlement only.

### **B. Time Spent by Referees and Fees Charged to Litigants**

This section of the report examines the available information about time spent and fees charged by referees. As noted, the referee reports sent to the Administrative Office of the Courts provided limited information about the time spent by referees and the fees charged to the litigants. Therefore, most of the information that follows was obtained from interviews and surveys of referees.

This section also examines the available information about the relationships between the referee's fee and (1) the statutory basis for the reference (i.e., whether the referee was appointed under section 638 or section 639) and (2) the purpose of the reference. However, information about these relationships was only available in a limited number of

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settlement responsibilities.) Anecdotal evidence from referee interviews indicates that discovery services constituted only a small percentage of these dual-purpose references.

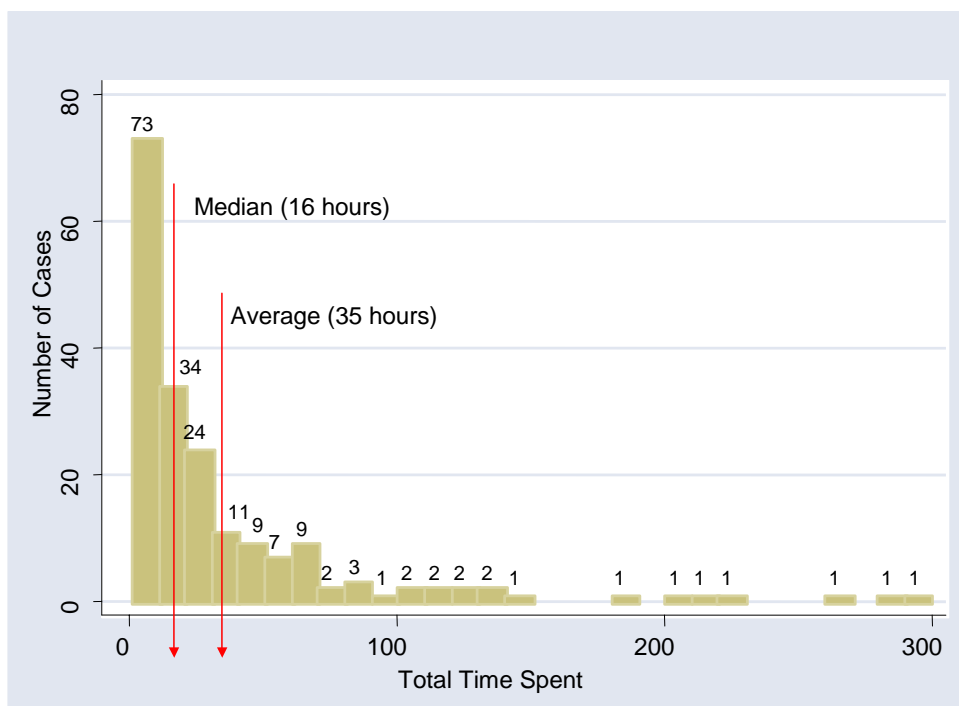
<sup>21</sup> The percentage of referees in the Southern Region who were retired judicial officers (50 percent) was significantly higher than the percentages in the Northern/Central (15 percent) and Bay Area/Northern Coastal (26 percent) Regions.

cases: information about both the referee’s fee and the statutory basis for the reference was available in only 63 cases (31 percent of the references for which fee information was obtained), and information about both the referee’s fee and the purpose of the reference was available in only 77 cases (38 percent of the references for which fee information was obtained). Therefore, caution should be exercised in drawing broader conclusions about the relationship between the referee’s fee and either the statutory basis or the purpose of the reference.<sup>22</sup>

### Time spent by referees

The Administrative Office of the Courts obtained information concerning the time spent by the referees on the references in 189 cases. Figure 3 shows the numbers of cases in which referees reported spending 0 to 10 hours, 10 to 20 hours, and so on, per case. Times reported ranged from a low of 1 hour to a high of 300 hours. The average (mean) was 35 hours and the median was 16 hours.

**Figure 3. Time spent by referee**



As can clearly be seen in Figure 3, the average time spent was pulled up by a relatively small number of cases in which the referees spent a great deal of time. The figure shows that in 73 of the 189 cases (38 percent) the referees reported spending 10 or fewer hours; in 107 cases (57 percent) the referees reported spending 20 or fewer hours; and in 131 cases (69 percent) the referees reported spending 30 or fewer hours. In only 38 cases (20 percent) did the referees report spending more than 50 hours. Given this distribution,

<sup>22</sup> The limitations of this data are discussed in more detail in the appendix.

the median time spent is a more reliable indicator of the typical reference than is the average time.

To determine whether there was any relationship between the amount of time spent by the referee and either the statutory basis or the purpose of the reference, we compared the amounts of time spent by referees appointed under section 638 and under section 639 and by referees appointed for discovery purposes and for settlement purposes. No statistically significant differences were found. In other words, the available data did not demonstrate a relationship between the amount of time spent by the referee and either the statutory basis or the purpose of the reference.

### **Referees' hourly rates**

Because referees generally charge by the hour, the cost of references is affected by the referees' hourly rates. The reference orders received by the Administrative Office of the Courts provided the hourly rates of 150 referees. These rates ranged from \$75 to \$750 per hour; the statewide average (mean) hourly rate for all of these referees was \$345 per hour.

The statewide average rate for retired judicial officers was \$389, which is approximately 30 percent higher than the \$303 average rate for referees other than retired judicial officers.

The average rate for all referees appointed by courts in the Southern Region was \$379, compared with \$325 for referees appointed by courts in the Bay Area/Northern Coastal Region and \$252 for referees appointed by courts in the Northern/Central Region.<sup>23</sup>

### **Total fees charged by referees**

The Administrative Office of the Courts obtained information on the total fees charged by referees in 201 cases. Figure 4 shows the numbers of cases in which referees reported charging the litigants \$0 to \$5,000, \$5,000 to \$10,000, and so on, per case. The total fees reported ranged from a minimum of \$150 to a maximum of \$92,003. The average (mean) fee charged was \$12,769 and the median fee was \$5,625.

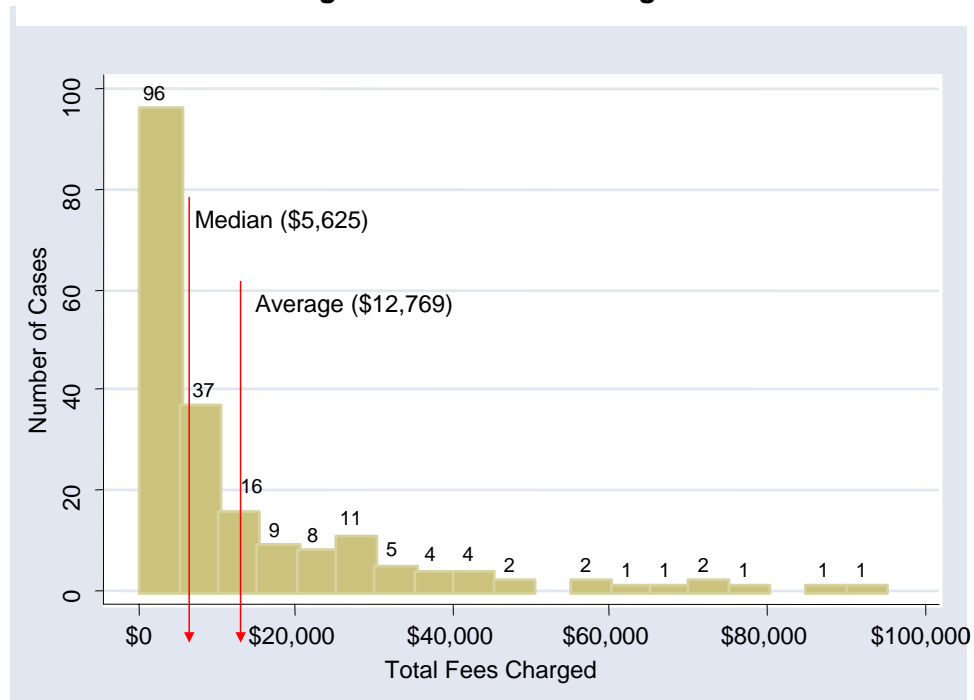
As can clearly be seen in Figure 4, the average fee, like the average time spent, was pulled up by a small number of cases in which the referees' fees were relatively high. The figure shows that in 96 of the 201 cases (47 percent), \$5,000 or less was charged; in 133 cases (66 percent), \$10,000 or less was charged; and in 149 cases (74 percent), \$15,000 or less was charged. In only 35 cases (17 percent) did the referee charge \$25,000 or more. Given this distribution, the median fee charged by the referees is a more reliable indicator

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<sup>23</sup> The average hourly rate in the Southern Region is higher partly because Southern Region courts appointed more retired judicial officers and partly because referees other than retired judicial officers charged a higher average hourly rate in Southern Region (\$357) than in the other regions (\$287 in Bay Area/Northern Coastal and \$241 in Northern/Central).

of typical referees' fees.

**Figure 4. Total fees charged**



To determine whether there was a relationship between the fees charged by the referee and either the statutory basis or the purpose of the reference, we compared the fees charged by referees appointed under section 638 and under section 639 and by referees appointed for discovery purposes and for settlement purposes. No statistically significant difference was found in the fees charged by referees appointed under section 638 or section 639. In other words, the data did not demonstrate a relationship between the fees charged by the referee and the statutory basis for the reference.

However, a statistically significant difference was found between the median fee charged in the references ordered for discovery purposes only and the median fee charged in the references ordered for both discovery and settlement purposes. In other words, in the cases for which information was available to make this comparison, the difference between the median fees appears to be attributable, at least in part, to the different purposes for which the referee was appointed.

Information about both the purpose for which the referee was appointed and the fee charged by the referee was available in 77 cases. The litigants in these cases were charged considerably less in references ordered solely for discovery purposes than in references ordered for both discovery and settlement purposes. In 41 cases, the reference was for discovery purposes only. The fees charged by the referees in these cases ranged from \$1,000 to \$72,000, and the median fee was \$3,903. In 22 cases, the reference was

for both discovery and settlement purposes. The fees charged by the referees in these cases ranged from \$413 to \$60,458, and the median fee was \$18,568.<sup>24</sup>

The higher fees charged in references that included both discovery and settlement (in comparison to references for discovery purposes only) appears to be related to the nature of the cases in which these references were ordered and the scope of the referees' duties. Of the 22 orders establishing these dual-purpose references, 21 were designated as "case management orders." Information obtained from reviewing these orders and from interviewing referees in these cases indicates that this type of reference is typically ordered in multiparty or otherwise complex cases. The orders typically appoint one or two referees to address any and all discovery issues that may arise in the action and to conduct settlement proceedings. However, in interviews referees indicated that discovery issues generally comprised a very small part of these references and that the bulk of the time spent and fees charged were for settlement proceedings and general case management activities. In interviews, these referees sometimes referred to themselves as "special masters." They also indicated that, although the reference order may have stated that the referee is being appointed under section 639 (i.e. "nonconsensual"), frequently these orders are issued with the agreement or consent of most or all parties to the action.

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<sup>24</sup> There were also two cases in which the referee was appointed only for settlement purposes. The fees reported in these two cases were also high compared to the fees for references involving only discovery: \$33,482 and \$92,003, yielding an average and median fee of \$62,743.

## APPENDIX

### Study Mandate, Methodology, and Data

This appendix first describes the statutory provisions requiring the Judicial Council to study the use and cost of references and the rules of court adopted by the council to carry out that statutory mandate. It then summarizes the actions and procedures used by the Administrative Office of the Courts to collect the data for the study. Finally, it describes the data that were collected and discusses relevant concerns about the data's completeness and the ability to generalize from certain findings reported.

#### **Statutes and rules relating to this study**

Code of Civil Procedure sections 638(c) and 639(e), which became effective January 1, 2001, directed that the Judicial Council, by rule, collect information concerning the use of references and the referees' fees. Specifically, section 638(c) required that copies of orders appointing referees upon the agreement of the parties (i.e., in "consensual" references) be forwarded to the office of the presiding judge and that the council collect information on the use of these referees and information on the fees paid by the parties, to the extent that information regarding those fees was reported to the court. Section 639(e) required that copies of orders appointing a discovery referee pursuant to section 639(a)(5) (i.e., in "nonconsensual" discovery references) be forwarded to the office of the presiding judge and that the council collect information on the use of these references and the reference fees charged to the litigants.<sup>25</sup> By their terms, sections 638(c) and 639(e) automatically became inoperative on January 1, 2004.

Code of Civil Procedure section 640.5, which became effective January 1, 2002, expressed the Legislature's intent that the practice and cost of referring discovery disputes to outside referees be thoroughly reviewed. This section directed the Judicial Council to collect information from the trial courts on the use of referees in discovery matters pursuant to either section 638 or 639, including information on the number of referees, the cost to the parties, and the time spent by the discovery referee.

To implement these statutory mandates, the Judicial Council adopted rules 244.1(h) and 244.2(i) of the California Rules of Court, effective July 1, 2001. Rule 244.1(h) required that a copy of any order appointing a referee under Code of Civil Procedure section 638 (consensual references), the referee's report, and any order of the court concerning compensation of the referee be forwarded to the office of the presiding judge, and that the

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<sup>25</sup> Unlike Code of Civil Procedure section 638(c), section 639(e) did not provide that the council's obligation to collect information concerning the fees charged to the litigants for nonconsensual discovery references was limited "to the extent that information concerning those fees is reported to the court." It may have been assumed that fees for discovery references would be reported to the court, since Code of Civil Procedure section 643(c) requires that all referees appointed pursuant to section 639 file a report that includes a statement of the total hours spent and the total fees charged by the referee.



presiding judge forward copies of these orders and reports to the Administrative Office of the Courts monthly. Rule 244.2(i) established the same requirement with respect to any reference under section 639 (nonconsensual references). The reporting requirement of rule 244.2(i) was not limited to discovery references and was therefore broader than the mandate of Code of Civil Procedure section 639(e). The council repealed rules 244.1(h) and 244.2(i) effective January 1, 2004, to coincide with the sunset of the corresponding statutory requirements.

### **Data collection procedures**

Data collection began on July 1, 2001, and continued through December 31, 2003. On July 7, 2001, Administrative Office of the Courts (AOC) staff wrote to all superior court presiding judges and executive officers, informing them of the reference reporting requirements. Courts were asked to forward their reference orders and reports to the AOC monthly. Some courts responded by forwarding copies of reference orders or reports, and others indicated that they had no orders or reports to forward. In early September, staff followed up with courts that had not yet forwarded any orders or reports.

Identifying reference orders and reports to forward to the AOC was a significant administrative challenge for many superior courts. The courts had varied systems and capabilities for identifying cases in which references were ordered. Some courts were able to identify reference orders through their case management systems. Other courts needed to rely on the individual judges who made reference orders to submit these to the presiding judge. Even the courts that could identify reference orders through their case management systems had no means of readily identifying the referees' reports subsequently filed in those cases. It was therefore foreseeable that some reference orders and reports might be missed.

Preliminary analyses of the data that had been received by early 2003 showed low numbers of reference orders and reports from most courts. This raised a concern on the part of the AOC researchers that some courts might not have identified and forwarded all of the reference orders and referees' reports made or filed since July 1, 2001. Additionally, most of the referees' reports that were forwarded did not include information about the time spent or the fees charged by the referee. In March 2003, AOC staff therefore sent each superior court a list of the reference orders and reports received from that court and asked the court to verify that the list was complete. A few courts identified and forwarded additional reference orders and reports in response to this request.<sup>26</sup>

The AOC researchers also made several additional efforts to supplement the information about referees' time and fees charged that was contained in the referees' reports. In March 2003, nine courts were asked to assist AOC staff in contacting a small number of

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<sup>26</sup> The only records that courts could readily crosscheck against the list of references they had already reported to the AOC were the orders and reports that had previously been submitted to the presiding judge.

frequently appointed referees so that staff could directly obtain information about the time spent and fees charged by these referees. With these courts' assistance, staff interviewed approximately 15 referees by telephone in April 2003. The great majority of these referees were cooperative and, through these interviews or through an alternative dispute resolution organization that administered many of their references, staff obtained information about the time spent or fees charged by these referees in 76 cases.<sup>27</sup> However, the interviews also revealed that a large percentage of the references that these particular referees handled were not the discovery references that the Legislature was most interested in, but were references principally focused on case management or settlement activities in construction defect cases or other complex cases. Additionally, some of the interviewed referees indicated that they had been appointed to perform services in other cases for which no reference order had been forwarded to the AOC.

In a further effort to obtain data concerning the time spent and fees charged by discovery referees, in February 2004 AOC staff surveyed 40 additional referees who—according to the reference orders received by the AOC—were appointed under Code of Civil Procedure section 639 (nonconsensual) to address discovery disputes in 58 cases. Each referee was sent a form listing all of the cases in which he or she had reportedly been appointed and was asked to provide the time spent and fees charged in each case listed and in any other cases in which he or she was appointed as a discovery referee, pursuant to either section 638 or 639, during the study period. Responses received from 20 referees provided the time spent in 97 cases and the total fees charged in 96 cases.

### **Description and analysis of data**

A total of 979 reference orders and reports were received from the superior courts and entered into an AOC database.<sup>28</sup> Of these 979 records, 711 were reference orders and 253 were referees' reports.<sup>29</sup> These records include some duplicate orders, multiple referee reports for some cases, and some orders issued prior to July 2001.

The 711 reference orders pertained to 486 general civil cases and 68 family law or probate proceedings. The family law and probate references were excluded from the analysis in this study for several reasons. First, it is not clear whether these references were ordered under Code of Civil Procedure section 638 or 639 or under some other authority.<sup>30</sup> Additionally, some courts apparently appoint referees who are court

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<sup>27</sup> A few referees refused to provide time or fee information because they considered the matter a consensual reference under section 638 rather than a nonconsensual reference under section 639. As previously noted, referees are required by statute to report their hours and fees only in references ordered under section 639.

<sup>28</sup> A small number of reference orders and referees' reports that were filed in the superior courts after September 30, 2003 were not entered into the database so that analysis and presentation of the data could begin.

<sup>29</sup> The natures of the remaining 15 documents could not be determined.

<sup>30</sup> The Probate Code sets forth the qualifications, authority, and responsibilities of probate referees. (See, e.g., Probate Code sections 400 et seq. and 8900 et seq.) Family Code section 2032 authorizes the appointment of a referee pursuant to Code of Civil Procedure section 639 to oversee a case management plan, upon a finding that a family law case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. It has also been held that Code of Civil Procedure section 187 and California Standards of Judicial

employees, rather than private individuals, to handle family and probate references. Perhaps for these reasons, the superior courts did not uniformly forward to the AOC their reference orders or reports in family law and probate actions.<sup>31</sup> Therefore, in order to make as accurate a comparison as possible of the uses of references in courts throughout the state, the researchers examined only references in general civil cases in this study.

The 253 referee reports forwarded by the courts pertained to 145 general civil cases. Overall, these reports included information concerning the time spent by the referee in 18 cases and information concerning the total fee charged by the referee in 31 cases.

In the AOC interviews and surveys, referees (or their administrators) provided information concerning 188 cases in which the referees may have been appointed under Code of Civil Procedure section 638 or 639 during the study period. Overall, these interviews and survey responses provided information about the time spent by referees in 173 cases and the total fees charged by referees in 172 cases.

For many of the cases for which reference reports were submitted by the courts, or for which referees directly provided time or fee information, the AOC received no reference orders. Of the 145 reference reports received from the courts, only 45 can be linked to reference orders forwarded by the courts; 100 referee reports cannot be specifically linked to a reference order received by the AOC. Of the 188 references for which referees provided time or fee information, 70 can be linked to reference orders submitted by the courts and 118 cannot.

There are several indications that the reference orders forwarded to the AOC may not represent all of the references ordered during the study period. First, as just indicated, referees' reports or time or fee information were received for 218 cases for which no reference order was received.<sup>32</sup> Second, as noted earlier, some referees who were interviewed indicated that they had been appointed to perform services in other cases for which no reference order was forwarded to the AOC.<sup>33</sup> Third, comparisons of two courts' electronic case management data with the records of reference orders received from those courts indicated that some reference orders identified in the case management systems had not been forwarded to the AOC. At one court, this same comparison also indicated a

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Administration section 19 authorize the appointment of a referee without the parties' consent to conduct settlement conferences in a case that has been determined to be complex. (See *Lu v. Superior Court* (1997) 55 Cal.App.4th 1264, 1271.)

<sup>31</sup> Only ten courts forwarded the 68 reference orders in family law and probate proceedings, and three courts (the Superior Courts of San Diego, San Mateo, and Santa Clara Counties) forwarded 50 of those orders.

<sup>32</sup> It is not possible to determine from the available information whether all of these "unlinked" cases actually represent references ordered during the study period under Code of Civil Procedure section 638 or 639. Some of these references were probably ordered before the study period and some may have been ordered under statutes other than section 638 or 639 or under common law authority.

<sup>33</sup> It is not possible to determine from the available information whether these other appointments referred to by referees were truly references under Code of Civil Procedure section 638 or 639 or were of some other type, or whether they were made during the study period.

converse discrepancy: some of the reference orders that *had been* sent to the AOC were not reflected in the court's case management system.<sup>34</sup>

Given this information and the difficulty that courts are known to have experienced in identifying reference orders, there is a strong likelihood that the 486 general civil cases for which reference orders were received by the AOC do not represent all of the general civil cases in which references were actually ordered under Code of Civil Procedure section 638 or 639 during the study period.

There are also concerns about the completeness and representativeness of the data collected on the time spent and fees charged by referees. The statutory bases and purposes of the references were determined from the reference orders. Thus, in the 218 cases for which time or fees were reported but no reference orders were received, and in the cases in which reference orders were received but were silent or ambiguous concerning the basis or purpose of the reference, the time spent and fees charged could not be compared based on whether the reference was ordered under 638 or 639 or based on the purpose of the reference. Similarly, the referees' time or fees were known for only 115 of the 486 general civil cases for which reference orders were received.<sup>35</sup> The large percentage of known references for which time or fee information is not available and the large percentage of references for which time or fee information is available but the statutory basis and purpose of the reference are not known create uncertainty about whether the patterns observed in the cases for which these characteristics are available for comparison would hold true for the entire body of cases.

Notwithstanding the concerns regarding the limited number of cases for which comparison data were available, the researchers examined the available data to identify any relationship between the referees' time and fees and either the statutory basis or the purpose of the reference. For each such comparison, a measure of the reliability of the results—called “statistical significance”—was also calculated. Statistical significance indicates the degree to which an observed difference between available comparison groups reflects a true difference as opposed to a chance occurrence (a “fluke”).

The statistical significance is expressed in terms of probability ( $p$ ). A  $p$  value of .10 associated with a finding means there is a 10 percent probability that the finding is due to pure chance. Adhering to conventions of statistical interpretation, comparisons with  $p$  values greater than .10 are considered insufficiently reliable and are reported as not statistically significant. Comparisons that have a  $p$  value of .10 or lower (i.e., a probability of 10 percent or less that the results are due to pure chance) are considered reliable indicators of true differences and are presented in this report. As noted, however, these results reflect only the references for which information about the statutory basis or

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<sup>34</sup> At this court, only about half of the reference orders recorded in the case management system were forwarded to the AOC, and only about half of the orders forwarded to the AOC were recorded in the case management system.

<sup>35</sup> In some instances this may be because no referee's report was filed with the court during the study period. In other instances it may be attributable to the difficulty courts encountered in tracking referee's reports, which may be filed long after a reference is ordered.

purpose of the reference and the referees' time or fees were available to compare; they do not measure the likelihood that the findings would hold true for references for which comparison data were not available.