

DEVELOPMENTS IN PRIVATE JUDGING—THE CALIFORNIA EXPERIENCE

M. Sue Talia

Private Family Law Judge, Danville, California

As state courts struggle to meet the challenges presented by limited resources and overcrowded dockets, many litigants are simply opting out of the system entirely and using private judges. This trend is having a profound effect on civil litigation and altering the mix of cases that remain in the state courts.

The Trend

In California litigants are increasingly turning to private judges as an alternative to the state courts for civil, non-jury actions. Private judging allows litigants to choose a judge with expertise in the subject matter of the litigation, schedule trials without regard to court dockets, and remove these matters from the state courts.¹

Private judging used to be limited to a small group of retired state trial judges and reserved for complex multiparty litigation. In those cases, the retired judge would be retained to manage and try the case. In recent years, as the state courts have struggled to meet vastly increased demand with shrinking budgets, a growing number of experienced private attorneys have “hung out their shingles” and announced their availability to serve as private judges, even though they were never appointed to the state court bench. As a result of this trend, private judging has quietly entered the mainstream in some areas, as litigants and their attorneys select from a pool of qualified potential judges and match an individual private judge to a specific type of case.

As done in California, private judging is not some lesser form of justice. The private judge has all of the authority of a state-appointed one, is bound by the rules of evidence, and takes the same oath of office as a state court judge.² This phenomenon is made possible by the California Constitution, Article VI, §21, and Rule 244 of the California Rules of Court. All parties must stipulate to the appointment, which, when approved by the presiding judge of the court in which the matter is pending, provides the private judge with all of the powers of a state court judge for that case.³ This stipulation is entirely voluntary, and the parties and their attorneys must agree not only that a private judge will be used, but also on the identity of

the specific private judge. Additionally, they must agree on the scope of the private judge’s authority. Failure to agree on any of these points leaves the case in the state court system for all purposes. The assignment can be limited to serving as a settlement judge, but usually involves assigning the case to the private judge. Private judges swear to follow the law and are bound by the Canons of Judicial Ethics and all state procedures and other rules. To ensure that private judges remain neutral fact finders and do not develop a special relationship with one attorney or firm, they are required to disclose, on a case-by-case basis, all matters which they have judged involving either an attorney or a law firm within 24 months prior to the appointment. They are also required to disclose any conflicts or potential conflicts that a state court judge would be required to disclose and to recuse themselves whenever required by the Canons of Judicial Ethics.

Procedures can be relaxed by agreement of the parties and the judge, or can remain as formal as necessary, especially if there is a concern to preserve appellate rights.

Once a case is assigned to a private judge, it is taken out of the state court system at the trial level. However, appellate rights can be preserved, and if the private judge’s decision is challenged on appeal, the state appellate courts will hear the appeal. There are numerous appellate decisions that review private-judge rulings and have become precedent in the state courts.

How It Works

Once limited to complex, multiparty business or construction litigation, private judging is now reaching middle-class litigants, who often find it less expensive to use a private judge, where time is set aside just for their case, rather than making multiple appearances at the public courthouse, only to run out of time before their matter is concluded or find that the judge does not have time to hear them and they must return another day.

Private judges tend to fall into two categories. Traditionally, a private service would recruit retired judges with expertise in specific areas, and the service would provide the facilities, billing, and promotion.⁴ Such services used to limit themselves exclusively to retired judges and did not offer individuals who had not been appointed to the bench. Increasingly, they are expanding to recruit private practitioners with desirable areas of expertise in a substantive field of law or with specific skills. Judges with good settlement skills are particularly in demand. The

service, rather than the individual judge, then markets the availability of the newly recruited private judges.

Private judging is an attractive “preretirement” option for many California state court judges. After serving 20 years, they are eligible for full retirement benefits. Upon retiring, they can then supplement that retirement with private-judging fees, creating a significant financial incentive. The only restriction is that judges who choose to do private judging are prevented, as of December 2002, from serving in the state courts on temporary assignment in the Assigned Judges Program. They must choose one or the other.⁵

In a parallel development, a growing number of private practitioners are simply announcing that their practices will henceforth be limited to private judging in their specialty area. One of the fastest growing areas for private judging is family law, where the huge numbers of litigants often overtax limited judicial resources. California certifies family-law specialists, and a number have made themselves available as private judges. When individual lawyers serve as private judges, they tend to focus on a narrow area of practice or a special type of litigation.

This phenomenon is having an impact on state courts across the board. Much of the complex, civil non-jury litigation is finding its way to private judges, who can give a case as much time as it needs and move a case at its own pace, rather than forcing it to fit into the court’s busy docket. In many areas, private judging is the norm for multiparty litigation that requires more-active management than the state courts can provide.

There are some practical considerations, of course. Since a private judge must meet the same ethical and professional standards as a publicly appointed state judge, neutrality must be strictly preserved. For that reason, it is rarely possible to combine private judging with a litigation practice. For obvious reasons, an attorney would not want to have the same individual be their judge in one case and opposing counsel in another. As a result, most private judges who are not affiliated with a group (and most family-law private judges are not) either limit their practices strictly to private judging or include other types of neutral legal functions, such as mediation and arbitration, and decline to represent individual clients.

Another practical consideration involves facilities. While most private judging still takes place in conference rooms, some cases and litigants require more of the traditional trappings of authority than can be supplied with judicial presence and a black robe. Private judges are prohibited from using the state court facilities in California. As a result, a few private judges have built their own courtrooms, complete with a judge’s bench, witness stand, court reporter’s stand, and counsel tables, such as the private courtroom maintained by the author.⁶

In family law, the practice has moved from complex litigation, where it is the norm in some counties, to the middle classes, who find it a more streamlined alternative to the state courts. Increasingly, when attorneys first consult with each other at the beginning of a new case, one of the first questions they ask is “who do you think our private judge should be?” As a result, much family-law litigation is proceeding outside the state courts on a parallel system. Because of the efficiencies built into private judging, where multiple court appearances and double- or triple-set time can be avoided, it is often less expensive for litigants to use and pay for a private judge’s time than to pay their attorneys to wait in the queue for a “free” judge in the state courts.

Effects

Private judges can ease the pressure on the state courts by removing some of the most time-consuming matters and allowing limited judicial resources to be conserved for the cases that remain. However, since most of the cases going to private judging involve attorneys, the balance in the state courts may shift from attorney cases to pro se matters, accelerating the current trend toward high volumes of self-represented litigants.

One of the factors driving the trend is the manner of appointment and assignment of state court judges in California. They are appointed by the governor and assigned to a specific calendar by the presiding judge in the county in which they are appointed. They may or may not have experience in the legal field to which they are assigned. This is particularly an issue in counties where the bulk of new appointees are former prosecutors who must learn not only civil procedure but also complex areas of civil law in a short time. Of course, new judges receive training from the Judicial Council, but many attorneys feel more comfortable with a judge who is a known quantity and who has significant experience in the subject matter of the

litigation. This is particularly apparent in family law, where many judges have little or no experience before taking over a family-law court.

Concerns

The expansion of private judging has occasioned a lively debate. Some question whether this practice creates a two-tiered justice system, where the wealthy can afford more “justice” than the poor. There is concern that this trend will turn the state civil courts into poverty courts and move everyone else into a private system.

It remains to be seen where the practice of private judging will lead. As the state courts struggle to find new sources of funding at a time when they are already seriously overburdened, short-term options are few. Private judging may be a short-lived phenomenon if the state courts find the systems and resources to allow them to address the needs of all litigants adequately. If not, it is likely that more and more litigants will find alternative means to resolve their legal issues.

This, in turn, raises a plethora of questions, which go to our very core assumptions about the purpose and function of the state courts and our justice system:

- Does this option threaten the assumptions of the current system in which courts should be free to all litigants?
- Does a parallel system create two-tiered justice system where those who can afford it obtain a higher level of service?
- Are those who can’t afford this service forced to forgo legitimate legal remedies for lack of financial resources?
- Is it possible to preserve a transparent, impartial, and reliable system of justice as a cornerstone of civilized society without sufficient funding?
- And most fundamentally, what is the meaning of access to justice, and how do we guarantee that it is protected and preserved?

These questions, and many more, will form the basis of a lively debate for years to come.

ENDNOTES

¹ As used in California, the term “private judge” means “privately compensated,” not closed to the public. The use of a private judge is not a way to shield a case of public interest from the press. Indeed, the private judge is required by the California Rules of Court to allow the press, as well as members of the public, to attend, unless the law would otherwise allow the proceedings to be sealed if held in a state court. As a practical matter, this issue only arises when the pending matter has some appeal to the press or a specific group.

² Private judging is distinguished from arbitration or administrative proceedings, where different rules and procedures may apply.

³ The practice varies widely, and in a few counties the presiding judge declines to approve private-judge stipulations, despite the constitutional authority, thereby making this practice unavailable to the litigants in that court.

⁴ A good example of a traditional service is JAMS at <http://www.jamsadr.com>, which has a national presence. Attorneys and litigants can access their Web site and search for qualified private judges by location and specialty.

⁵ It is unclear whether this rule applies only to retired state court judges or whether retired commissioners are similarly bound. It is likely that they will be, for the same reasons.

⁶ For a virtual tour of the courtroom, visit <http://www.privatefamilylayjudge.com/floorplan.html>.