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A Proposal for Private Judging in New York

New York should take a cue from California and other states and amend the CPLR to allow for litigants to select "private judges" to decide civil disputes through final judgment at the trial court level.

By **David B. Saxe and James M. Catterson** | March 12, 2021

The COVID-19 pandemic has thrust a dagger into the heart of our state court system. The Office of Court Administration is to be lauded, however, for its efforts to ensure that appropriate technology has been utilized to enable the state courts to fulfill vital functions, and the court system and the bar are working hard to implement digital technology into the regular practice of law.

But, as the pandemic continues, it is also clear that we must re-examine the way we approach adjudicating disputes. Our default mechanism of initiating a civil litigation in state court is cumbersome, time-consuming, and expensive. Recognizing these shortfalls, parties often choose some alternative form of dispute resolution. In New York, parties may take advantage of arbitration (which is authorized by statute), or they may choose one of the ways that the CPLR attempts to expedite existing disputes—namely through the involvement of a referee to hear and report or hear and determine, after a litigation has already been initiated.

But these methods suffer from the same significant shortfalls. Parties to an arbitration are provided with only very narrow grounds for seeking vacatur of an arbitration award (see CPLR §7511); indeed, when a party seeks appellate review of an arbitration award, the Appellate Division does not reach the substance of the reasoning behind the underlying award. An order appointing a referee to hear and determine is usually directed toward resolving a discrete issue only and is typically brought into a litigation after the parties have completed discovery.

We believe there is a better way. In our view, New York should take a cue from California and other states and amend the CPLR to allow for litigants to select "private judges" to decide civil disputes through final judgment at the trial court level. (While California has long embraced private judging, as discussed below, practitioners in New Jersey recently suggested private judging as "a potential solution to the backlog of court cases that require public access" and to enhance access to justice in light of the pandemic. See e.g., "With Courts Limited, History Helps Guide Use of ADR (https://www.law.com/njlawjournal/2020/07/17/with-courts-limited-history-helps-guide-use-of-adr/)," Law Journal Editorial Board, New Jersey Law Journal, July 17, 2020). Under our proposal, parties could choose any private judge they were comfortable with to decide their dispute. Every stage following the initiation of the lawsuit—from the motion to dismiss phase through the entry of judgment—would proceed under the uninterrupted supervision of a private judge. The private judge would enter a judgment that would serve as the legal equivalent of any other judgment rendered by the Supreme Court. And, under our proposal, a decision by a private judge would be reviewable on appeal by the Appellate Division or could be submitted to private appellate review, if available.

In our view, providing parties with the ability to seamlessly transition out of and back into the traditional state court system would provide for a robust guarantee of appellate review that stands in stark contrast to the narrow grounds for appellate review of an arbitration award. We also believe that embracing private judging as an alternative method to resolve disputes at the trial court level would allow parties to make informed decisions about which private judge would be best suited to evaluate a given dispute. Our proposal would also free up justices of the Supreme Court to dedicate more attention to their other pending civil and criminal matters and would also almost certainly take some pressure off of those justices.

In short, we believe that incorporating private judging as an alternative form of dispute resolution in New York would be a welcome advancement for litigators and parties alike. It would remove a host of civil disputes out of the traditional trial court system, lower the cost of presenting a dispute to a neutral body, and serve to increase access to justice in these trying times.

A Blueprint for New York? Private Judging in California. Proponents of private judging often point to California, which has embraced the practice. Private judging is codified in California Code of Civil Procedure section 638, which authorizes the trial court to appoint a referee 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" (California describes private judges as "referees"). Cal. Civ. Code §638(a). Private parties can agree to submit any future dispute to a private judge; the parties may also agree to the appointment of a private judge after a particular dispute arises. Id. §638.

Regardless of whether the parties have decided in advance of the dispute to select a private judge, the case is filed in that state's trial court (California Superior Court) and then subsequently referred to a private judge. If the parties cannot agree on a particular private judge, each party must submit up to three nominees to the court, and the court will then appoint a private judge to preside over the litigation, absent any legal objection to the selection. Id. §§640(b), 641. Section 641 allows each party to "object" to the appointment of a private judge on seven separate bases, including that the person has a conflict of interest or has previously formed or expressed an opinion as to the merits of the dispute; the trial court evaluates and rules on any objections to a private judge. Id. §642.

Once appointed, the private judge must provide a written statement of decision within twenty days of conducting a hearing. Id. §643(a). In most cases, the decision of the private judge stands "as the decision of the court" and judgment is entered "as if the action had been tried by the court." Id. §644(a). Likewise, for purposes of a potential appeal, the decision "may be excepted to and reviewed in like manner as if made by the court" by the California Court of Appeal, that state's intermediate appellate court. Id.

Many practitioners and academics have praised the efficacy of private judging in California. See e.g., Sheila Nagaraj, "The Marriage of Family Law and Private Judging in California," 116 Yale L.J. 1615, 1619 (2007); Hon. Patrick J. Mahoney (Ret.), "Advantages of Private Judges: Understanding the Benefits of Utilizing Private Judging in California (https://www.jamsadr.com/blog/2015/understanding-the-benefits-of-a-private-judge-in-california)," JAMS ADR Blog, Sept. 1, 2015.

Small Modifications to New York's Existing Regime Could Result in Meaningful Change. Our proposal to effect private judging would require only small modifications to the CPLR to become effective. The existing process in New York that most closely aligns with private judging is the CPLR's adoption of referees to hear and determine actions under Article 43 of the CPLR. Section 4301 allows a justice of the Supreme Court to appoint a "referee to determine an issue or to perform an act" who "shall have all the powers of a court in performing a like function; but he shall have no power to relieve himself of his duties, to appoint a successor or to adjudge any person except a witness before him guilty of contempt." CPLR §4301. Section 4317(a) allows parties to stipulate that "any issue shall be determined by a referee" and gives the court the power to designate a referee when the parties do not name one themselves. A decision by the referee then stands "as the decision of a court." CPLR §4319. 22 NYCRR §36.2(c) provides several grounds to disqualify a referee from appointment.

Our proposal includes additions and nuances to the current law that will benefit complex litigation and increase access to justice. One clear advantage of our proposal would be that private judges do not have to abide by the existing conflicts of interest rules set forth in 22 NYCRR §36.2(c). In our experience, sophisticated parties may find it advantageous to choose a private judge with some prior relationship to the parties or substantive knowledge of the dispute, who might otherwise be disqualified under 22 NYCRR §36.2(c). See also CPLR §4312 (imposing additional qualifications for a referee).

Additionally, under our proposal, court approval of a private judge would not be required to preside over matrimonial actions, over actions against a corporation to obtain a dissolution, over actions to appoint a receiver of its property or actions to distribute its property, or over actions where a defendant is an infant; under the CPLR, court approval is currently required for the appointment of a referee in each of these actions. CPLR §4317(a).

What Are the Advantages? Private Judging Reduces the Cost of Litigation While Expanding Choice and Access to Justice. We propose that these modest revisions will attract parties to take advantage of New York's private judging procedure. First and foremost, private judges will offer what arbitrators cannot: full, unfettered access to appellate review as if appealing from any other judgment rendered by the Supreme Court. We routinely hear parties complain about the limited appellate review provided for arbitration awards, and we are confident that private judging would be an attractive and effective alternative.

Likewise, the cost savings associated with filing a basic statement of claims instead of a more comprehensive complaint would be attractive to parties hesitant to commit to the initial costs and comprehensiveness required in a traditional litigation. The process would still maintain public access to proceedings and procedural certainty; although proceedings before a private judge may be conducted in a private setting, the public would have access to the initial filing details, the final judgment, and any documents associated with an appeal from the final judgment. Allowing parties to file the statement of issues with the clerk or virtually via NYSCEF would also provide certainty for purposes of the potential application of a statute of limitations. While our proposal would treat a private judge's judgment as any ordinary judgment subject to appeal to the

Appellate Division, we suggest that presenting appeals to a panel of private judges, as part of our proposal or a subsequent one, would likely result in additional cost savings and access to justice, and would certainly free up resources for our already beleaguered Appellate Division.

Notably, allowing parties to side-step the traditional trial court process would ultimately lead to the more prompt resolution of civil disputes. We anticipate that former state and federal judges would be quick to establish themselves in compliance with any new rules applicable to private judges. Private ADR providers such as NAM (National Arbitration and Mediation), JAMS, and AAA would be in a position to offer talented former judges or their staff to fulfill the expected demand for this new type of ADR service. In many cases, we anticipate that the mutually selected private judge, who will likely have some substantive background in the issues being litigated, can provide a sound resolution that leaves the defeated party reluctant to bring an appeal.

Under the CPLR's referee rules, an action must be filed with a detailed complaint in the normal course, and the reference to a judicial referee is made at a later time. As we propose, parties who seek to take advantage of private judging would only be required to submit to the Supreme Court a streamlined statement of claim, which would only include jurisdictional allegations. Promptly after filing that statement, the matter would be transferred to a private judge for resolution through final judgment. In other words, if the parties anticipate submitting the dispute to a private judge, they could save the resources that would otherwise go into preparing a more comprehensive complaint and come before a private judge in an expeditious and more cost-effective manner.

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Implementing private judges into New York's civil litigation framework will not immediately solve the caseload and overcrowding issues that affected the state court system before the pandemic. Nevertheless, with some fairly straightforward changes to the existing framework to incorporate private judging, we think that New York could lead by example in creating an effective mechanism for dispute resolution. This process would also remove some of the workload pressure from trial judges, but it would still result in maintaining the public's access to proceedings and litigants' ability to seek unfettered appellate review. Finally, our proposal would seamlessly incorporate technological advances in the private sector, which we believe would complement the Office of Court Administration's dedicated work to modernize the state courts in light of the pandemic.

David B. Saxe *and* **James M. Catterson** *both served as Associate Justices at the Appellate Division, First Department. Justice Catterson is now a partner at Arnold & Porter Kaye Scholer. Justice Saxe is now a partner at Morrison Cohen and a neutral at NAM (National Arbitration and Mediation).* *The authors acknowledge the outstanding assistance of* **Jesse Feitel***, an associate at Davis Wright Tremaine, in preparing this article.*