

# *Private Judges: How New York Can Unclog the Backlog*

New York Law Journal

December 12, 2022 Monday

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## ***New York Law Journal***

**Section:** LITIGATION; Pg. p.9, col.5; Vol. 268; No. 112

**Length:** 1872 words

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### **Body**

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The backlog in the New York judicial system following the COVID-19 pandemic that began in 2020 is undeniable. Much has happened since Chief Administrative Judge Lawrence K. Marks issued his Sept. 29, 2020 Memorandum wherein he noted that then Governor Andrew Cuomo had exercised emergency powers afforded to him by the legislature to cut the judiciary budget by 10%, or approximately \$300 million. The operation of the judicial system, how trials are conducted, how court appearances are conducted, etc., have all been impacted by the backlog and the COVID-19 pandemic. And yet, while the New York legislature continues to enact new laws that impact our judicial system, and practitioners continue to be required to adapt to new procedural rules and requirements, private judging akin to the model embraced by the state of California remains seemingly elusive. Specifically, the California Constitution, and California's Code of Civil Procedure, authorize parties to stipulate to the use of a private judge and to define the authority granted to the person selected as private judge. For a description of the particulars of the California model, see Saxe and Catterson, A Proposal for Private Judging in New York, New York Law Journal (March 12, 2021). On his website, Duncan Wardle the former Head of Innovation and Creativity for the Walt Disney Company explains the "power of yes."

Wardle explains the pervasiveness in our culture of reacting to new ideas with an almost instinctual "No, because" response. One can read the following on his website: "No, because ..." is the product of our expertise. Any time we hear an idea related to our own experience, our brain immediately pokes holes. And while we think of this as a positive trait that we're able to quickly and efficiently separate 'good' ideas from 'bad' ideas what it really causes us to do is miss out on some amazing opportunities. Because 'No, because ...' is the ultimate killer of great ideas. The solution? Train yourself and your teams to respond to all new ideas with 'Yes, and...' instead. (Emphasis in original). Without further ado, let us explore what these authors anticipate are the chief "No, because" reactions to codifying or at least considering California's model of private judging in New York as a means to alleviate the challenges being faced by New York's judicial system, the lawyers who practice within it, and the litigants who navigate that same system day in and day out. No, because New York already has a "hear and report" referee protocol. By way of example, in matrimonial cases, with some minor exceptions it is the ordinary course for financial trials to be referred to referees, i.e., litigants will not have the judge for whom they have appeared at this conference and that conference since day one try their case. Instead, a referee who they have yet to meet will try the case, issue recommendations, and send those recommendations back to the presiding judge. At that point, each party can file motions to confirm, reject, or modify the referee's report. Then, the litigants must wait for the judge to issue a decision on those motions. Unless parties agree that the referee can "hear and determine," i.e., that the referee will take the place of the judge and therefore bypass any need for motions to confirm/reject/modify, the "hear and report" method will rule the day. This is an enormously time consuming and costly exercise. Former Special Referee Marilyn T. Sugarman, who is currently in private practice and serves in arbitration, mediation and Special

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Master roles, notes: "Judges have crushing caseloads in the matrimonial parts. Cases have gotten more complex over the last number of years and there has not been a corresponding increase in the number of judges to handle them." She captures why the "hear and report" system is not a sufficient reason to impede private judging: Most financial trials are referred to referees, who do not have the support staff that judges have, and also cannot try these cases as efficiently as a private judge is able to do. It is infinitely harder to write a decision following a financial trial without assistance, and when you are still trying other cases. If both parties do not consent for a special referee to "hear and determine," there is another layer of delay because a motion must be brought before the assigned judge to confirm/ reject, which can add years between the time a case was ready to be tried and a judgment of divorce is issued. A private judge handling all aspects of a matter would become fully familiar with all aspects of the case as it proceeds. That is a direct benefit to the parties to a litigation. The existing judicial system in New York offers a "hear and determine" reference protocol that eliminates some of the infirmities and restrictions that exist under "hear and report" references. But, it too is restricted in part as to who can be selected as private judges and in its limitations on appellate review. We favor a robust proposal for private judging in New York that allows parties to select private judges from a broadly expanded list of individuals and permits parties to move seamlessly between the private judging world and the public court arena for appellate review, if desired. It is not uncommon to hear practitioners speak of delays of one to two years before getting to a trial before a referee; a common refrain among practitioners these days is that they simply want to "get in line," i.e., to get in line in the hopes that one day their lucky number will be called and their case ready for an actual trial before a referee. Referees often are not able to offer parties day-to-day trials until completion. More commonly, lawyers and their clients get to try their cases in bits and pieces creating incredible, additional expense. No, because parties to civil litigation in New York can pursue arbitration. While arbitration is available in New York, the right to appeal following an arbitration award is severely limited. A system that allows for private judging, coupled with the right to appeal pursuant to CPLR 5700 et seq. is therefore more appealing no pun intended. Private judging can ensure that fundamental errors that may not be subject to reversal in the arbitration scheme can, in fact, be corrected on an appeal. More specifically, incorporating the court system's appellate process as set forth in the CPLR ensures that the law applies in all respects to the decision of the private judge. No, because the judicial system would be rendered obsolete. To refute this anticipated objection to private judging, we will defer to California private judge Jill S. Robbins. Judge Robbins, author of the International Academy of Family Lawyers article titled *The Private Judge: California Anomaly or Wave of the Future?*, practiced family law in California for 14 years, was a family law judicial officer in Los Angeles County for 10 years, and is now in her 27th year of private judging. Simply stated: "There are not enough private judges to handle the thousands of cases filed." Basic arithmetic proves that private judging would not render our current judicial system obsolete. As to the cases that remain in the court system, IAS Judges would be able to devote more time and resources to those litigants. No, because private judging would be exclusively for the rich and famous. First, we are a capitalist society with free will and free choice. Second, to quote Judge Robbins: I handle cases where the net worth may range from \$500K to \$500 billion. While perhaps 50% of my cases are high net worth the other 50% may be between \$500K and \$5 million. For many people, even with limited means, the ability to have the attention of a private judge for a day, resulting in a settlement, will ultimately save them thousands of dollars. I have never heard a litigant state that 'it wasn't worth it' or similar words. Not every wealthy couple chooses the private judge route. Former referee Sugarman describes how private judging can eliminate the prohibitively costly exercise of re-preparing for trials that are not held on consecutive days in our current judicial system: Many litigants believe private judging is only for the high net worth individuals. But the reality is that even for people of less significant wealth, a streamlined private judging process is more efficient and can be less expensive. A case can be tried over days or weeks rather than months, and can be scheduled at the convenience of the parties and counsel. There is less 'waiting time' and no need for time to re-familiarize yourself with the case and continuously re-prepare witnesses, not to mention paying for expert witnesses to sit around in court. It is short-sighted to look only at the cost of the private judge, which should generally be shared by both sides, since it can be a savings in the long run. High-net worth conflicts tend to be some of the most hotly litigated matters and therefore, matters that can take up substantial portions of a court's time and resources. The potential for shifting those matters to private judges could therefore reduce backlog, and push litigants of lesser means closer to the front of the line in terms of access to the courts. As former referee Sugarman states: "The high net worth cases are often the lengthiest trials. Even eliminating a small fraction of these cases would help reduce the backlog." It is again worth noting the efficiency that private judging can add to this equation. Former Appellate Division, First Department Justice James M. Catterson explains: "At present, there are significant delays

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everywhere in the system, from resolving motions, to getting a decision on the merits. Private judging should be the solution to those inefficiencies because matters can be resolved in days or weeks rather than a year or three."No, because that is not how things are done in New York. We save the worst for last. This is not a worthwhile justification for impeding progress. Recall that New York did not institute its version of no-fault divorce until 2010. Ensuring that our judicial system is robust to the extent that it is prepared to efficiently handle the challenges of an ever-growing caseload should be the priority. As former Justice Catterson states, "Like all new things, there will be institutional resistance but given how extensive the current workload is, and the concomitant backlog throughout the trial courts and some of the Appellate Divisions, private judging would help lighten the load for the court system as a whole and allow it to gain some ground on the delays."We are not suggesting that adopting the California model can be accomplished with the flip of a switch. Legislative change including possible amendments to the CPLR would likely be required in New York. That, however, should not be a deterrent to having a conversation about private judging in New York. Change may not be easy at first, but progress often does not happen without some form of change.

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**Load-Date:** December 12, 2022

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