Ethical Considerations in Appointing our Colleagues as Private Judges

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The California Constitution, Article VI, Section 21, authorizes the appointment of a temporary judge to preside over a matter, who shall be a member of the Bar, sworn and empowered to act in an adjucative capacity. The temporary judge, ordered by the court to serve in a public capacity, is appointed pursuant to the provisions of Rule 2.810, requiring compliance with the qualifying conditions of Rule 2.812. The temporary judge, ordered pursuant to the selection and stipulation of private litigants, is appointed pursuant to Rule 2.831. While both appointments require compliance by the pro tem with Canons of Judicial Ethics and explicitly Canon 6 of the Code of Judicial Ethics, the terms and conditions for appointment diverge in most other respects. For example, appointment under Rule 2.831 allows for "private compensation" of the temporary judicial officer (Sections 830 and 832), does not impose the qualifications to serve as a pro tem as prescribed under Rule 2.813 (for appointment of a pro tem by the court to serve in a public capacity), and use of public court facilities is prohibited except upon a finding of good cause by the presiding judge (Section 2.833(b)). Rule 2.833(a) attempts to ameliorate the private and otherwise "unwatched" adjudication by privately compensated judges by mandating public disclosure of contact information and docket numbers for cases with privately presiding temporary judges.

The increasing use of private judges has broken down the usual barriers between the bench officers and the Bar. Traditionally, there was a divide between the judges and lawyers. Boundaries generally explicitly or implicitly limited social interactions and daily informal contact, insuring a modicum of separation was maintained. This breakdown in traditional boundaries is particularly true in the Family Law Bar, for which private judging is especially well-suited because of the nature of the cases and their inherent procedural limitations to court trials. Unlike other civil litigation, there is no option for a jury; so a private judge simply stands in for the bench officer and, with the addition of a court reporter, a court environment seems to be replicated. In fact, a court environment is not truly replicated because of the particular problems that inhere when we use our colleagues as judges.

The purpose of this article is to explore the ethical, strategic, and practical questions of imbuing our friends, colleagues, or prior opposing counsel with the power of a judge in our cases.[1] As Harry Hanson was quoted in 2005,[2] "So, those of us who specialize in family law have developed our own system for dispute resolution in the private sector. We basically hire each other to get appointed by the presiding judge of the Superior court as a judge pro tem for all purposes."

We need to examine the ethical obligations under Canon 6 of the Code of Judicial Ethics and the Rules of Professional Conduct that most directly bear on the familiar relationships intertwined with the judicial appointment of our colleagues and to look at the ethical problems and potential solutions to those problems. We need to acknowledge certain truths about our collegial and rather small family law bar and certain realities about the competition of litigators in order to have a frank, constructive, and ultimately solution-oriented conversation about this industry that has grown up amongst us.

I believe that the use of our friends, colleagues, and prior opposing counsel as private judges unwittingly exposes all of us, as a community and as individuals, to potential liability for violations of the various ethical canons, claims of cronyism, allegations of bias, complaints of self-dealing, and malpractice lawsuits. I believe that we are well-intentioned, but I also believe the problems related to the inter-relationship of our bar in this way have been "underdiscussed" and "underexamined."

Our use of colleagues as private judges occurs against a backdrop of various ethical obligations through the Canons of Judicial Conduct and the Rules of Professional Conduct.

Canon 6.D. of the Code of Judicial Ethics is applicable to Temporary Judges and requires compliance with enumerated other Canons incorporated by reference as well as principles set forth in Canon 6D and its numerous subparts. It is assumed that anyone appointed to serve as a Temporary Judge is cognizant of these ethical obligations. For our purposes, I am focusing on incorporated Canons 1 (integrity and independence), Canon 2B (1) (not allowing family or other relationships to influence judicial conduct), and 3B (5) (perform judicial duties without bias or prejudice) together with Canon 6A. (2)(b) and (c) which state:

"The temporary judge shall:

Not personally solicit memberships or donations for religious, fraternal, educational, civic, or charitable organizations from the parties and lawyers appearing before the temporary judge, referee, or court-appointed arbitrator (b) and

Under no circumstance accept a gift, bequest, or favor if the donor is a party, person, or entity whose interests are reasonably likely to come before the temporary judge, referee, or court-appointed arbitrator. A temporary judge, referee, or court-appointed arbitrator shall discourage members of the judge's family residing in the judge's household from accepting benefits from parties who are reasonably likely to come before the temporary judge, referee, or court-appointed arbitrator. (c)"

The above are followed by Canon 6.D.(3)(a)(vii)(A) through (C) setting forth reasons for disqualification to serve, as follows:[3]

(A) the temporary judge believes his or her recusal would further the interests of justice;

(B) the temporary judge believes there is a substantial doubt as to his or her capacity to be impartial; or

(C) a person aware of the facts might reasonably entertain a doubt that the temporary judge would be able to be impartial. Bias or prejudice toward an attorney in the proceeding may be grounds for disqualification

The appointment of a colleague as a private judge is the appointment of an active member of the Bar. Thus, the conduct of the judge, as well as counsel for the parties, is regulated by the Rules of Professional Conduct. These Rules seek to define a conflict of interest in order to prohibit or inhibit conduct violative of a conflict and thus promote fair and allied representation of a client's interests. There is no explicit rule regulating this idea of conflict in the context of our colleague's appointment as our judge, and particularly, with the appointment of a colleague who remains in active practice or is a member of a firm having partners and/or associates in the active practice of family law.

Rule 3-310 is titled, "Avoiding the Representation of Adverse Interests." Rule (B)(3) states: "The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter."

Rule 3-310 (C) says, "A member shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict..." or (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

The duty of absolute loyalty owed by counsel is the most fundamental principle underlying the rules of professional ethics.[4] The purpose of the conflict of interest rules is also to serve the purpose of ensuring the attorney's undivided loyalty and commitment to the client.[5] Therefore, the decisions that we make with our clients must always be in furtherance of our overriding duty of loyalty and the interpretation of the Rules of Professional Conduct must be in that context.

The decision we make to use a colleague as a private judge and the decision to recommend a particular colleague to be that judge only can be made in a manner consistent with (1) our duty of loyalty; and (2) the broadest interpretation of our obligations to avoid any actual or perceived conflict that could undermine our client's assurance of the alliance to which each is entitled.

We need to examine the above rules and duties in the context of certain facts and truths that have a direct bearing on the appointment of our colleagues as private judges, to wit:

1. Many of us refer cases to each other and, from time to time, send a bottle of wine or some equivalent gift as a token of our appreciation.

2. Many of us derive business, ergo income, from the referrals by our colleagues.

3. Private judges are retained for litigation, which is inherently competitive. Litigation, in some instances, can cause unpleasantness between counsel or shift, however subtly, the relationship of counsel over the course of years. Thus, using as a private judge a prior opposing counsel is matter for serious consideration.[6]

4. A judge, however appointed, possesses a tremendous amount of power in the lives of our clients and, through our representation of them, in the course of our practice. Each of us has learned to calibrate our behavior with the judge imbued with power in our client's case differently than we would calibrate our behavior with our opposing counsel. In other words, we behave differently with a judge in our case than we do with opposing counsel.

5. We have an understandable and commendable alliance with our partners and associates and surely are aware of their experiences in a particular case. Likewise, lawyers who privately adjudicate cases have an understandable and commendable alliance with their partners or associates who litigate family law cases against other colleagues who may consume private judging services.

6. Our Bar is small and collegial with the attorneys who litigate and the attorneys who adjudicate socializing together and participating in the same bar organizations, clubs, seminars, conferences, meetings, study groups, consultations, charitable organizations, boards, vacation meetings, and in some instances, country-home events, and sometimes in the same cases as opposing counsel.

7. Many of us have long professional histories with each other containing a variety of experiences, relationships, and emotions.

8. Litigating a case allows the presiding judge to gain knowledge, from an inside view, of each attorney's litigation strategies and thoughts in a different and more revealing way than is known to or seen by our opposing counsel.

I believe there is a significant difference between the issues to be considered depending upon the law practice of the colleague under consideration for appointment as a private judge.

Sole Practitioner No Longer Actively Practicing Law:

I believe that we can discharge our duty of loyalty and avoid the actual or appearance of any conflict of interests with a solo practitioner no longer litigating cases. There are fewer concerns and all can be addressed if the appointment as a private judge is an attorney who (1) makes a commitment not to litigate cases with anyone in either counsel's firms until all privately judged cases with either firm are completed; (2) practices law alone or has no partners or associates who practice family law at all; and (3) there is no contentious professional/personal history between the appointee and counsel.

In this instance, it is important to insure that, prior to our client's signing the Stipulation for Appointment, there has been a full disclosure in accordance with the applicable Canons and Rules of Professional Conduct. The disclosures should be open and accessible to the client. My recommendation is to send a letter to the individual under consideration for appointment. The text of the letter I have drafted for use in my office is set forth below:

> I am sure you are aware that Rule 2.831 requires compliance with Canon 6 of the Code of Judicial Ethics. By the same token, as a member of the Bar, I have certain professional and ethical duties to my client that are paramount to insure that she/he has been fully informed regarding the conduct of her/his case. Therefore, as part of the standard practice in this office when retaining colleagues to serve as private judges by appointment of the Presiding Judge of the applicable county, I am sending an inquiry to make sure that my client is aware of any potential conflict, actual conflict, or the appearance of any conflict. I believe this should be done prior to signing the Stipulation for appointment of any colleague as a private judge and I believe it benefits everyone associated with this process.
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> Therefore, in discharge of my professional and ethical duties, I am asking you to disclose the following, **in addition to any other disclosure** you believe would be appropriate pursuant to the applicable Canons:
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> 1. If you, or anyone closely associated with you, has had an extra-professional social relationship with [opposing counsel] or anyone closely associated with him/her professionally or personally. In other words, I am asking if you or anyone closely associated with you is friends

with or socializes with [opposing counsel] outside of activities organized around or related to professional functions, organizations, etc. Of course, "closely associated" would include, but not be limited to, [opposing counsel's] client, [client's name]. If so, would you please explain.

2. If you or anyone closely associated with you, has received any gift or favor from [opposing counsel] or anyone closely associated with him/her. This does not include referrals of clients or cases. This does include any "benefits" to you or anyone closely associated with you from [opposing counsel] or anyone closely associated with him/her. Again, "closely associated," would include, but not be limited to, [opposing counsel's] client. If so, would you please explain.

3. Are you actively engaged in any litigation in the area of family law at this time? If not, will you make the commitment that you will not actively engage in any litigation in the area of family law until all cases with my firm under private adjudication with you have been completed?

4. Have you or any associate or partner you have had who practiced family law and had anyone from my firm as opposing counsel ever communicated, formed, or enabled you to observe any experience resulting in a negative personal or professional opinion of anyone in my firm? If so, please explain.

I have bracketed the last paragraph above because I believe that, in most instances, we will know the answer to those questions and have our own opinions that will influence our decision to retain that particular colleague.

A full and open response to this letter should be received and discussed with our client prior to any signing of a Stipulation for Appointment.

Attorney Who Has An Associate or Partner Actively Engaged in the Practice of Family Law

There are significant and possibly prohibitive obstacles if the appointment as a private judge is an attorney who (1) no longer litigates case at all and has made a commitment not to litigate cases until all privately judged cases are completed; and (2) has an associate or partner who actively engages in the practice of family law.

I believe this set of circumstances violates the meaning or purpose of the Rules of Professional Conduct although this fact situation is not explicitly addressed by the Rules. I believe there is, in fact, an actual conflict of interest and the appearance of a conflict if I represent a client in litigation with the same firm in which I represent a client under private adjudication. I believe this conflict can impact or seem to impact my absolute duty of loyalty to the client in each of those cases.

Each client has the right to my complete loyalty and allegiance and yet, opposing counsel's firm and the private judge's firm have directly opposing functions in my practice. On the one side, my goal is to represent my client energetically and with the dedicated allegiance to that client's interests alone. This may include litigation, contentiousness, and an intense competition before the court. This will be taking place in the same environment in which, on the other hand, I will need the respect and assistance of a judge whose power, within legal limits, is unlimited and frequently in the subject realm of the "equitable."

These are irreconcilable scenarios and, under the best of circumstances, invite significant questions by the clients in each case. For example, the client in the litigation may be concerned that my decisions in her case are or were impacted by my need to curry favor from the judge in the other case. My client in the privately adjudicated case may be worried that my decisions in the litigation may or did impact my relationship, ergo her relationship with the private judge.

In addition, we are placing ourselves in a situation in which we will have to work very hard to segregate our otherwise integrated thought processes to keep the strategy in one case from being infected by strategic thinking in the other case.

Finally, appointments under these circumstances create a similarly impossible situation for the private judge. Just as one attorney is conflicted out of a case if an associate or partner is conflicted, so should the judge be conflicted out if an opposing and possibly contentious situation with a partner or associate is in play or could arise. It is a fiction to believe the partner's or associate's experiences will not be known to the private judge. It is against human nature that those experiences will not become part of the knowledge and experience informing the views of the private judge.

Attorney Who Occasionally Litigates or with Whom We Have Had a Contentious or Difficult Litigation in the Past

In addition, there are insurmountable obstacles if the appointment as a private judge is an attorney who continues to litigate cases, even on an occasional basis, or has

litigated against one of us in any case and that litigation possibly has a continuing impact on the professional or personal relationship with that colleague.

Here, we have many of the same problems set forth above and an

additional problem implicating our duties to our present and future clients. An individual sitting as a private judge has an unusual opportunity to see how we think and prepare our cases from the "inside." The private judge could learn a great deal about how we delegate work, strategize, prepare pleadings, formulate theories, argue issues, and other elements of our practice that generally would be out of the view of our opposing counsel. This may arm the private judge with information useful in planning his/her strategy at another time when opposing us in court. In addition, it patently is impossible simultaneously to reconcile our strategy as opposing counsel and our strategy as counsel for a party litigant with the same colleague both litigating against us and adjudicating for our clients in two different but contemporaneous cases.

In addition, past litigation sometimes leaves residual consequences in the relationships of the opposing counsel. Again, I believe we know when this has occurred and therefore, can factor that into our recommendations to our client about private judicial appointments.

Ex Parte Communication

Many private judges include in their stipulations a provision allowing for ex parte communications. It is my opinion that, other than during settlement negotiations, this never should be agreed to when appointing a colleague as a private judge. The opportunities for its abuse or the appearance of potential abuse are too prevalent because of the many professional/social functions and reasons for contact between us. However much we may respect our colleagues, our clients have the right to know there are clear and unassailable boundaries about which they need not worry.

Voluntary Withdrawal by the Private Judge

This provision in the Stipulation must be explained to our clients. My hope is that a full disclosure prior to appointment will reduce chances of one side alleging bias and thus causing the private judge to withdraw, not because of any bias, but because of fatigue with the client or his/her counsel's allegations. There also should be a frank and open discussion between counsel and the potential private judge about the circumstances under which the appointed colleague could anticipate withdrawing so that there is a foundation of understanding and commitment to avoid that scenario.

In summary, the use of private judges is a fact of our legal practice. We must do it in a manner consistent with our ethical obligations to our clients and think very carefully about the circumstances in which we place ourselves and our clients when we agree to use a private judge who is a colleague. I believe we can discharge our ethical duties if the private judge is a colleague who has ceased active litigation practice, has no partner or associate in active family law litigation, and will commit to remain out of litigation for the duration of our privately assigned cases. The Canons of Judicial Ethics, Rules of Professional Conduct, and duty of loyalty, construed together in this context, should make us think very critically about placing in an hierarchical and powerful position a colleague with whom we may have continuing litigation directly or with his/her partner or associate.

I would like to thank Justice Ignazio J. Ruvolo, First District of the California Court of Appeal, and Mark Tuft of Cooper, White & Cooper for the time they spent meeting with me to discuss the issues in this article. ■

Endnotes

1 The purpose of this article is not to explore the socio-economic/political implications of access to private judges or the emergence of a two-tiered system of justice. Although those issues are important, the proliferation of private judging is a fact of our legal life and, while important, the social implications have been discussed and written about elsewhere.

2 Lawyers Weekly USA, August 1, 2005, Dolan Media Newswires.

3 There are other enumerated bases for disqualification, but I have cited the ones I believe most applicable to the subject of this article.

4 *Flatt v. Sup.Ct.* (1994) 9 Cal. 4th 275.

5 *Flatt, supra.*; *The People Ex Rel. Dept. of Corporations v. Speedee Oil Change Systems Inc.* (1999) 20 Cal. 4th 1135.

6 I think that this is one of the more challenging intangibles to consider in accepting appointment as a judge or agreeing to the appointment of a particular colleague as a judge. Many of us believe that we can transcend any adverse personal feelings or residua from a prior professional experience and others may believe there are no adverse personal feelings or consequences when in fact relationships are altered. That is why it is particularly important to exercise scrutiny and caution in