

The Use of Private Judges: New World, New Wave?



By: [Kevin Schlosser](#)

Our system of justice has certainly faced various challenges over the years, but no one can deny that the COVID-19 crisis has forced us to confront unprecedented obstacles—2020 has been a year no one will forget. In March, the entire state court system virtually shut down, except for cases deemed “essential.” While our administrative judges and the office of court administration have worked tirelessly to restore some semblance of normalcy, the challenges are formidable.

On top of trying to balance life and death issues with providing timely and effective justice, our court administrators and the judiciary are facing debilitating budget cuts. As our chief administrative judge has recently acknowledged, “the economic fallout of the coronavirus pandemic has led to enormous pressures on the State budget, including the Judiciary budget,” noting a \$300 million hit to the court system. *NYLJ* Sept. 30, 2020, “As NY State Courts Report Budget Cut, Lawyers Fear Delays, Employee Unions Worry Over Jobs.”

The New York State Bar Association president has ominously predicted: “This budget cut is a matter of grave concern to the New York State Bar Association because it will inevitably create hardship for litigants and delay the administration of justice.” <https://nysba.org/new-york-state-bar-association-president-scott-karson-calls-cuts-to-judiciary-budget-a-grave-concern/>

Yet unanticipated silver linings have awakened in the crisis. The convenience and cost-savings of remote, virtual appearances, depositions and proceedings are beginning to overcome the initial resistance and reluctance. Both the Bar and the courts are adapting to a new, more flexible approach to dispensing and achieving justice.

Particular problems with jury trials have led many to consider and in fact advocate more use of bench trials. Additionally, more than ever before, “alternative dispute resolution” is seeing a supercharged interest.

Amidst all this, there should be renewed interest in the often overlooked yet extremely useful provisions of the CPLR authorizing parties to hire a “referee,” or as I call it, a “private judge,” to help resolve their differences, including significantly, to determine commercial and business disputes. The utility of a private judge to determine legal disputes has actually been available under the New York justice system for over a century. See *Woodruff v. Dickie*, 31 How. Pr. Rep. 164 (Sup. Ct. N.Y. Co., 1866). It has largely been hibernating.

Authority and Powers of Private Judges

The authority for such an appointment of a private judge is contained in CPLR 4001: “A court may appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law.” CPLR Article 43 provides the power and authority of a private judge to “determine an issue.”

As soon as a new case is filed in court, the parties can immediately stipulate to the appointment of a private judge. CPLR 4317(a) provides: “The parties may stipulate that any issue shall be determined by a referee.” Only in three limited circumstances must leave of court be sought first: “[1] for references in matrimonial actions; [2] actions against a corporation to obtain a dissolution, to appoint a receiver of its property, or to distribute its property, unless such action is brought by the attorney-general; or [3] actions where a defendant is an infant.” *Id.* All the parties need to do is stipulate and name their private judge, and the clerk must then issue an order effectuating the stipulation: “Upon the filing of the stipulation with the clerk, the clerk shall forthwith enter an order referring the issue for trial to the referee named therein.” *Id.*

CPLR 4301 affords the private judge broad powers, equivalent to a Supreme Court Justice, with limited restrictions: “A referee to determine an issue or to perform an act 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.”

The private judge has the power not only to issue a decision, but also a fully effective and enforceable judgment. See CPLR 5016(c) (“Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or referee shall, on motion, determine the form of the judgment.”)

Benefits and Advantages of a Private Judge

There are plenty of benefits to hiring a private judge who is dedicated exclusively to the case at hand:

1. Flexibility and Certainty. While the authority to appoint a private judge to determine issues in dispute derives from the CPLR, the private judge is free to conduct the affairs and proceedings at times, places and in a manner at his/her discretion, and entirely consistent with the preferences of the parties and their counsel. The parties deal with just one person, rather than the entire administration of the court system. (There is no “clerk’s law.”) The parties are able to secure real, reliable dates certain for written submissions, hearings and/or trials, which afford for advance planning. In short, the parties have a captive audience of one—their own private judge. Particularly now, given concerns about appearing in large, public courthouse for hearings or other appearances, meetings with private judges could be in a more controlled, private law office or other location, or of course conducted virtually.

2. Expertise. The parties can select who they jointly believe is the best person for the job. They can identify and choose someone with precisely the experience, knowledge and temperament that fits the case and the subject matter of the dispute. It is obviously enormously helpful to have someone particularly experienced in the issues presented by the case. Of course, counsel for both parties must feel comfortable with the integrity and objectivity of whom they choose.

3. Avoiding Cost and Bureaucracy of ADR Forums. While ADR companies are certainly adept at resolving disputes, they often saddle parties with unwieldy bureaucracy. To be sure, the parties will need to pay for the services of the private judge, but hiring a private judge can afford advantages over resolving a dispute in arbitration or administered through the large well-known dispute resolution organizations. The private judge can avoid the administrative bureaucracy and cost associated with the large ADR forums and venues. The private judge has the luxury of dealing directly with the parties as and when they need attention. The direct attention afforded by the private judge is ultimately likely to reduce the overall cost of resolving disputes, even with the cost of the private judge’s services. Additionally, the parties could enlist the private judge to help settle their case or formally decide particular issues, without a full blown adjudication of the entire merits.

4. An Enforceable Judgment. Unlike arbitration awards, as noted above, the private judge can reduce his or her decision to an enforceable judgment. CPLR 5016(c). There is no extra step to institute an entirely new proceeding under CPLR 7511 to confirm the private judge’s decision as there is after an arbitration award is issued. Thus, the additional time, expense and litigation attendant to confirming an award is eliminated.

5. Full Appeal Rights Preserved. Litigants are often reluctant to submit to arbitration because of the very limited opportunity to obtain a full and fair review of the arbitrator’s determination. It is well-recognized that courts will not vacate or nullify the decision of an arbitrator, except in exceptional and clear circumstances. It can be daunting to place all of that unchecked discretion in one person (or in a small panel). Unlike in arbitration, the decisions and judgment of the private judge are fully reviewable on appeal through the New York Court system based upon all the grounds available to challenge any decision of a court. See *Bedford v. Hol-Tan Co.*, 140 App.Div. 282, 285–286, 125 N.Y.S. 173, 175–176 (1st Dept. 1910) (“A referee appointed to hear and determine has the same power and authority as a justice of the court, and his decision stands as the decision of the court. [CPLR 4319.] His [or her] decision can be reviewed and set aside only for the same reason and in the same manner as can a decision of the court.”); *Hampton Bays Supply Co. v. Adler*, 3 Misc.2d 224, 226, 147 N.Y.S.2d 775, 778 (N.Y. Sup. 1955). Therefore, the reluctance that attorneys and their clients may have to the relatively unchecked power of an arbitrator to determine their dispute is ameliorated by the appellate review process. While the appellate courts are also facing overwhelming burdens, having a last resort in accordance with traditional appellate protections is a useful safety latch.

Our system of justice is facing unparalleled pressures. As we all try to find ways to resolve disputes in the most humane, fair, cost-efficient and expeditious manner, the use of private judges offers an additional, potentially-appropriate option.

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